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CONSTITUTIONAL LAW

PAUL H. SANDERS*

The Supreme Court of Tennessee has been faced with few major Constitutional Law problems during the period under consideration.[1] Statistically, the action of the Court in invalidating one law out of almost a score that were attacked before it on the basis of constitutional defect suggests an attitude of judicial restraint toward the product of a coordinate branch of government. The relatively small number of constitutional questions raised — and many of them were obviously make-weight rather than points of principal reliance — suggests a general awareness of the Court's stability and the unlikelihood of its departing from established precedent. Similarly, regard for the precedent established in *Plessy v. Ferguson*,[2] with its "separate but equal" doctrine, was a major factor in the decision of two federal district courts in Tennessee involving alleged deprivation of constitutional rights in the furnishing of educational and recreational facilities to Negroes. It was not a year for the expansion or contraction of doctrines of constitutionality previously established, although in one instance at least it appears that some "new law" was made.

I. Power to Tax

A. *Implied Governmental Immunity*

With activities by or on behalf of the Federal Government as widespread as they are and with state and local taxing authorities normally not lacking in diligence in searching out sources of revenue, collision between the two forces represented is inevitably frequent. How to resolve the conflict, when Congress has not been specific, continues to present a most difficult problem in Constitutional Law, though, paradoxically, no specific provision of the Constitution of the United States applies to the situation. During the Survey period, the Tennessee Supreme Court was called upon to determine whether the State had power to tax a company which had contracted during World War II with the Federal Government to store in privately owned tanks

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1. Constitutional Law questions principally concerned with an independent field of law are left for discussion in the pertinent articles of this Survey. Problems arising under the Tennessee Constitution which are largely peculiar to organization and powers of counties and municipalities are discussed in the Local Government Law article. Similarly, those relating to form and procedure in statutory enactment are discussed in the Statutory Interpretation article. Constitutional questions in Criminal Procedure and Evidence are discussed in the Criminal Law and Procedure article and the Procedure and Evidence article.

2. 163 U.S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896).

government-owned aviation gasoline destined for military use. The decision that the contractor in *Esso Standard Oil v. Evans*[3] was liable for the state tax upon the privilege of storing and delivering such gasoline was affirmed on May 4, 1953, by the Supreme Court of the United States.[4]

As recently as 1936, the Supreme Court of the United States invalidated an Alabama tax when applied to the "storing or withdrawing from storage" of gasoline withdrawn for sale to the United States for use by the Army and the Tennessee Valley Authority.[5] While finding that storing alone was not covered, the majority opinion in that case declared that, if it were assumed that Alabama meant to tax "mere storing," that purpose could not be given effect in respect of the company's sales and deliveries to the United States. It was reasoned that such a tax would, in practical effect, be one on a sale to the United States. Under the doctrine of reciprocal sovereign tax immunity then prevailing, it was presumably very clear that such a tax was invalid,[6] as would be a federal tax on a sale to a state or one of its subdivisions.[7]

Insofar as it prevented a state tax from affecting in this manner a federal instrumentality, the doctrine applied in the 1936 decision traces its lineage to Chief Justice Marshall's opinion in *McCulloch v. Maryland:*[8]

> ". . . the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

The great Chief Justice in another context stated that he had never heard an affirmative answer given to such questions as: "Can a contractor for supplying a military post with provisions, be restrained . . . from transporting the provisions to the place at which the troops were stationed. [O]r could he be . . . taxed for doing so?"[9]

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3. 250 S.W.2d 569 (Tenn. 1952).
4. Esso Standard Oil Co. v. Evans, 245 U.S. 495, 73 Sup. Ct. 800, 97 L. Ed. 741 (1953).
5. Graves v. Texas Co., 298 U.S. 393, 56 Sup. Ct. 818, 80 L. Ed. 1236 (1936).
6. Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 48 Sup. Ct. 451, 72 L. Ed. 857 (1928). Justice McReynolds observed in dissent: "I am unable to think that every man who sells a gallon of gasoline to be used by the United States thereby becomes a Federal instrumentality. . . ." 277 U.S. at 225.
7. Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 Sup. Ct. 601, 75 L. Ed. 1277 (1931).
8. 4 Wheat. 316, 436, 4 L. Ed. 579 (U.S. 1819). Marshall was of the opinion that the decision in the case did not preclude a nondiscriminatory state tax on the real property of the United States Bank or the application of a nondiscriminatory personal property tax to the interests held by Maryland citizens in the Bank.
9. Osborn v. Bank of the United States, 9 Wheat. 738, 867, 6 L. Ed. 204 (U.S. 1824).

The supremacy clause[10] not containing a specific prohibition, the immunity of the federal instrumentality from the state tax is thus based on implication — an implication that has been undergirded, however, by the logic deemed to emanate from the classic phrase: "[T]he power to tax involves the power to destroy. . . ."[11] Although a basis was laid for a contrary development in Chief Justice Marshall's opinion, the implied immunity doctrine was subsequently made applicable, in certain respects at least, to federal taxation of state instrumentalities.[12] The principle proved to be an expanding one, particularly during the 1920s, and was even applied in such a manner as to provide in numerous instances what were widely regarded as tax refuges for persons having dealings with the federal and state governments.[13] While there were continued expressions of judicial doubt prior to 1937 concerning some of the applications of the doctrine, these did not extend to the pronouncement in the leading case of *Van Brocklin v. Tennessee*[14] that a state lacked power to lay or collect a tax upon property owned by the federal government in the absence of Congressional consent, regardless of the manner or purpose of the acquisition of the property.

Beginning in 1937, the collapse of many aspects of the implied intergovernmental tax immunity doctrine seemed to take on the characteristics of an avalanche.[15] To the extent that this collapse resulted in an increased economic burden upon the Federal Government, it came about initially by deliberate invitation of counsel representing the United States. The United States in 1936 had filed a brief, *amicus curiae,* in *Graves v. Texas Company,*[16] urging the invalidity of the Alabama tax on the storage and withdrawal of gasoline when the

10. U.S. CONST. Art. VI, cl. 2.

11. McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L. Ed. 579 (U.S. 1819).

12. Collector v. Day, 11 Wall. 113, 20 L. Ed. 122 (U.S. 1871). *But cf.* South Carolina v. United States, 199 U.S. 437, 26 Sup. Ct. 110, 50 L. Ed. 361 (1905).

13. ROTTSCHAEFER, CONSTITUTIONAL LAW §§ 74-82 (1939); *cf.* ROTTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE 135 (1948); Powell, *The Waning of Intergovernmental Tax Immunities,* 58 HARV. L. REV. 633, 633-35 (1945).

14. 117 U.S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845 (1886). The opinion demonstrates that the granting of such immunity normally was made a condition of admission of a state to the Union and collects the statutory references to such immunity in all the states. This case reversed the decision of the Tennessee Supreme Court in Anderson v. Van Brocklin, 83 Tenn. 33 (1885), which had held that the exemptions then provided for property of the United States in the Tennessee statutes did not extend to property bought by the United States at its own tax sale and held merely to secure the tax. *Cf.* Shelby County v. McCanless, 163 S.W.2d 63 (Tenn. 1942).

TENN. CODE ANN. § 1085(1) (Williams 1934) exempts from taxation all property of the United States "used exclusively for public . . . purposes."

15. See ROTTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE 136-40 (1948); Powell, *The Waning of Intergovernmental Tax Immunities,* 58 HARV. L. REV. 633, 633-74 (1945); Powell, *The Remnant of Intergovernmental Tax Immunities,* 58 HARV. L. REV. 757 (1945); 4 VAND. L. REV. 195 (1950).

16. 298 U.S. 393, 56 Sup. Ct. 818, 80 L. Ed. 1236 (1936). Solicitor-General Stanley Reed and Assistant Attorney-General Robert H. Jackson were on the brief with other Government counsel.

amount of the tax would be passed on to the United States as a consumer. In 1937, in *James v. Dravo Contracting Company*,[17] Solicitor-General Reed, filing a brief and engaging in oral argument for the United States as *amicus curiae*, supported the position of the state that a West Virginia privilege tax was valid though laid upon the gross receipts of an independent contractor engaged in furnishing goods and services to the United States. According to the dissenting opinion of Mr. Justice Roberts, the Solicitor-General proposed that any state tax upon the operations of the United States or the means chosen for the execution of its powers should be valid unless the taxing statute discriminated against the Federal Government. A question as to the burden upon federal operations brought the response that " 'a tax upon the contractor, the sole result of which is to increase the cost to the sovereign by the amount of the normal tax burden, presents no interference with its operations.' "[18] The Court upheld the state tax in a five-to-four decision. Although the extent to which the majority adopted the broad policy approach attributed to the Solicitor-General is not clear, Chief Justice Hughes' opinion expressly stated that an assumption of increased costs to the Federal Government by reason of the state gross receipts tax would not thereby render it unconstitutional.[19]

The implications of this latter remark became clearer in the Court's 1941 decision in *Alabama v. King and Boozer*.[20] In the interim since the *Dravo* decision, the Court had overruled those precedents which had extended income tax immunity to a federal employee as against a state and to a state employee as against the United States.[21] While these contractions in the implied immunity doctrine had also been at the request of federal attorneys, Government counsel took the opposite side when Alabama sought to impose its regular sales tax upon the vendor of the materials bought by a contractor engaged in building an Army camp on a cost-plus basis. Under the Alabama law, the tax was collectible from the seller, but it was required to be collected by him from the buyer. Without dissent, the Court upheld the validity of the tax. The Court construed the facts to be that the sales of lumber were made to the contractor rather than to the United States, although apparently title passed to the Federal Government when the lumber

17. 302 U.S. 134, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937).
18. 302 U.S. at 171. It had already been held that a contractor was not immune from a state tax on gasoline used in the performance of his contract with the Federal Government. Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466, 54 Sup. Ct. 469, 78 L. Ed. 918 (1934).
19. 302 U.S. at 160.
20. 314 U.S. 1, 62 Sup. Ct. 43, 86 L. Ed. 3 (1941).
21. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 59 Sup. Ct. 595, 83 L. Ed. 927 (1939), *overruling* Collector v. Day, 11 Wall. 113, 20 L. Ed. 122 (U.S. 1871), and New York *ex rel.* Rogers v. Graves, 299 U.S. 401, 57 Sup. Ct. 269, 81 L. Ed. 306 (1937); see also Helvering v. Gerhardt, 304 U.S. 405, 58 Sup. Ct. 969, 82 L. Ed. 1427 (1938).

was delivered. The fact that the contractor was bound to furnish the material to the United States and was to be reimbursed by the Government for its cost, "including the tax," was considered no more to result in an infringement of the Federal Government's immunity than did the gross receipts tax in the *Dravo* case.

> "So far as such a non-discriminatory state tax upon the contractor, enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v.* [*Mississippi*] . . . *Graves v. Texas Co.* . . . we think it no longer tenable [citing cases]."[22]

In the companion case of *Curry v. United States*,[23] the application of the Alabama use tax to materials brought by the cost-plus contractor from without the state also was sustained as valid.

The direct incidence of the state tax in the *King and Boozer* case did not fall upon the Federal Government or upon property owned by it at the time. The specific repudiation of *Panhandle Oil Co. v. Mississippi*[24] indicated that the Court would sustain a state sales tax upon sales directly to the United States as purchaser, although the facts as construed by the Court called for no decision on the point. It may be important to note that the Court has not yet had occasion to decide this specific issue.[25] When Florida attempted to impose an inspection fee on fertilizer owned and held by the Federal Government in that state, the Court in 1943 affirmed unanimously an injunction prohibiting both the inspection and the fees.[26] Mr. Justice Reed wrote the opinion, noting that the fees were laid directly upon the United States and that, if the money exactions in question were enforceable, they would be required before executing a function of government. In 1944, a case arose in which Allegheny County, Pennsylvania, sought to assess a real property tax on a mill of the Mesta Machine Company, including, pursuant to regular state law, the value of machinery in the mill owned by the United States and leased to Mesta. Under its contract, the Federal Government was obliged to reimburse the company for such a state tax, and it was argued that, since the direct impact of the tax was on Mesta, *Dravo* and *King and Boozer* indicated that the assessment was constitutional. Mr. Justice Jackson wrote the majority

22. 314 U.S. at 8.
23. 314 U.S. 14, 62 Sup. Ct. 48, 86 L. Ed. 9 (1941).
24. 277 U.S. 218, 48 Sup. Ct. 451, 72 L. Ed. 857 (1928).
25. See Note, 96 L. Ed. 263, 272 (1952); 26 MINN. L. REV. 408, 411 (1942).
26. Mayo v. United States, 319 U.S. 441, 63 Sup. Ct. 1137, 87 L. Ed. 1504 (1943).

opinion declaring the tax invalid:[27] "We think, however, that the Government's property interests are not taxable either to it or to its bailee."[28] Separate dissenting opinions were written by Mr. Justice Roberts and Mr. Justice Frankfurter, who considered the situation indistinguishable from the Court's more recent decisions sustaining state taxes on a contractor.

When faced with the *Esso Standard Oil* case in 1952, the Tennessee Supreme Court had to decide whether the tax was of the type held valid in *Dravo* and *King and Boozer* or was essentially a tax on the United States or its property and therefore invalid under the *Allegheny County* decision. During World War II, the United States purchased all aviation gasoline before it left the refinery, title being vested in a corporation wholly owned by the Federal Government and specifically exempt from state storage and use taxes. Release from storage by the producing companies occurred only in accordance with official allocation of specific lots of fuel to the armed services and allies of the United States. From 1943 to 1946 certain lots of Air Force fuel came by barge from Louisiana for shipment through Memphis, Tennessee. Government storage facilities not being available, the United States contracted with the Esso Standard Oil Company to provide such facilities through the use of privately owned tanks, together with personnel to perform the necessary storage and handling functions. Esso was obliged to "render services . . . in receiving, storing, handling and loading Government-owned fuel" for service charges ranging from 18/100 of a cent to 6 and 3/10 cents per gallon. The United States agreed to assume liability for all state taxes. Pursuant to this contract, the gasoline arriving by barge was pumped by Esso employees into the storage tanks and later reshipped by truck to consuming airfields in Tennessee, Mississippi and Arkansas.

In August, 1949, the State of Tennessee demanded that Esso pay the regular six cents per gallon tax on the gasoline stored in connection with these operations. The Code sections[29] claimed to be applicable provide in part as follows:

> "Every distributor . . . shall pay . . . a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline . . . shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state. . . ."[30]
>
> ". . . The term 'distributor' . . . includes . . . every person who engages in the business in this state of . . . importing . . . gasoline . . . into this state,

27. United States v. County of Allegheny, 322 U.S. 174, 64 Sup. Ct. 908, 88 L. Ed. 1209 (1944).
28. 322 U.S. at 187.
29. TENN. CODE ANN. §§ 1126-1147 (Williams 1934, Supp. 1952).
30. *Id.* § 1127.

> and distributing, storing . . . the same in this state, for any purpose whatsoever."[31]

Esso paid under protest the taxes demanded for January, 1944, and filed its bill against the State Commissioner of Finance and Taxation in the Chancery Court of Davidson County to recover. The United States intervened, asserting immunity in Esso. The chancellor found that Esso was not liable for an inspection fee under Section 6821 of the Code,[32] or for interest and penalties, but that it was liable for the privilege tax under the Code sections quoted above.[33] The Tennessee Supreme Court affirmed the chancellor's decree in all respects.[34] In determining that the Tennessee statute applied to the situation, Judge Gailor's opinion first quoted from previous decisions to demonstrate that the tax was for the privilege of engaging in the business of storing gasoline. Further, "importing" was not deemed a necessary condition precedent to the tax, although it was considered to have occurred in any event when Esso removed the gasoline from the channels of interstate commerce. *Tennessee Oil Co. v. McCanless*,[35] where the Obion County Board of Education rented a storage tank from an oil company and paid it for distributing gasoline at the board's order, was distinguished as involving agency rather than the services of an independent contractor. Although some of the gasoline went to airfields in other states, Esso's failure to report and keep identifying records in this respect prevented it from being able to invoke statutory provisions applicable to "exports."[36] Finally, the tax liability was not eliminated by delay of state officials in demanding payment.

Having established that the Tennessee tax statute applied, Judge Gailor turned to the immunity claimed by the United States and found it nonexistent. It was noted that the incidence of the tax was on Esso, not the United States.[37] The *Allegheny County* case was not considered in point, since it was assumed to involve "an ad valorem tax on personal property of the United States." *Dravo* and *King and Boozer* were deemed to have settled Esso's liability for the privilege

31. *Id.* § 1126.
32. *Id.* § 6821.
33. This resulted in net tax liability in Esso of approximately $200,000 for the month of January, 1944. The case was treated, however, as a test case for other periods involving a total tax liability in the neighborhood of $4,000,000.
34. Esso Standard Oil Co. v. Evans, 250 S.W.2d 569 (Tenn. 1952).
35. 178 Tenn. 683, 157 S.W.2d 267, 162 S.W.2d 1081 (1941).
36. That the application of Tennessee's tax on "storage" to gasoline brought from without the State and later used, to some extent, without the State is not an unconstitutional burden on interstate commerce was established in Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 53 Sup. Ct. 345, 77 L. Ed. 730 (1933). On the "interstate commerce" phase of the tax, see also TENN. CODE ANN. §§ 1127, 1140, 1148.3 (Williams 1934).
37. The pronouncement, added in 1947, TENN. CODE ANN. § 1126.1 (Williams Supp. 1952), to the effect that "[t]he liability for, or the incidence of, the gasoline tax is hereby declared to be a levy on the consumer" is not mentioned. Technically, it had no application at the time.

tax for doing business in the State, "though that business was done entirely with property of the United States." Tennessee could not tax the gasoline stored in the tanks or the storage if the United States had acquired its own tanks, said the Court; but the privilege taxed here fell in neither category, and the fact that the burden of the tax was passed on to the Federal Government was immaterial.

The Supreme Court of the United States, in an opinion by Mr. Justice Reed, used substantially the same reasoning in affirming the implied immunity aspects of the foregoing decision.[38] In *Allegheny County*, the tax held invalid was based, in part, on the worth of federal property. The Tennessee privilege tax bore no such relationship to the stored gasoline, hence was not "on" such property. Again it was observed that there is nothing wrong with burdening the United States financially by a state tax. Mr. Justice Reed agreed with the distinction between the situation in the instant case and that in *Tennessee Oil Co. v. McCanless*. "Had the United States similarly rented the tanks from Esso, and thus stood firmly in its shoes as the organization exercising the privilege of storage, it would have fallen within the *McCanless* precedent."[39] The Chief Justice, Mr. Justice Black and Mr. Justice Douglas dissented without opinion. Mr. Justice Frankfurter did not participate.

It is submitted that the decisions in this case have made new law on implied immunity of the federal instrumentality from state taxation, rather than falling clearly within the scope of the *Dravo* and *King and Boozer* holdings. In neither of those cases did the state tax bear such a close relationship to property *at the time* owned by the Federal Government. The synthesis of all the decisions on the point considered seems to be that implied immunity on a constitutional basis still applies as against state taxes (1) which fall directly upon any branch or agency of the Federal Government or (2) which are "on" property owned by the Federal Government either in the hands of a federal agency or in the hands of an independent contractor if the tax is measured by the value of the federal property interest.[40] On the other hand, there is no implied immunity from normal, nondiscriminatory state taxation for those who have contracted with the Federal Government to perform services for it even in connection with federal property so long as the tax is not measured by the value of that property. While one may question how much difference there is, in sub-

38. Esso Standard Oil Co. v. Evans, 345 U.S. 495, 73 Sup. Ct. 800, 97 L. Ed. 741 (1953).
39. 345 U.S. at 500.
40. For instances in which state taxes upon third parties have been held valid even though laid upon property in which the Federal Government had an interest, see cases collected in 4 VAND. L. REV. 195 (1950). None of these involved wholly owned property in the hands of a contractor performing services for the United States.

stance, between a tax on the storage of property by a third party which must be borne by the owner (or a tax on the sale of property which must be borne by one who becomes the owner) and a tax on the property itself, this difference apparently amounts to a constitutional principle. As Mr. Justice Reed's discussion in the *Esso* opinion of the *Tennessee Oil Company* case shows, form rather than the essence of a transaction becomes of major importance.

Obviously, certain aspects of the implied immunity question are subject to control by draftmanship in the preparation of federal contracts. More importantly, the problem can be taken out of the implied immunity framework by congressional action. By statute, the implied constitutional immunity of the federal agency may be taken away and consent given to state and local taxation of the federal property; such is the practical effect in the case of the "in lieu of" payments of the Tennessee Valley Authority.[41] Or Congress may, by statute, provide immunity from state taxation for activities on behalf of the Federal Government where none would be implied.[42] Such a possibility arose in another case recently decided by the Supreme Court of Tennessee. The question of the liability of cost-type contractors with the Atomic Energy Commission for Tennessee sales and use taxes on materials used in the performance of the contracts came up in 1951. The majority decision of the Tennessee Supreme Court[43] which was affirmed by the Supreme Court of the United States,[44] was to the effect that Section 9 (b) of the Atomic Energy Act,[45] in providing immunity from state taxation to the Commission and its "property, activities and income," included such purchases and use by contractors under the term "activities."[46] It was thus considered unnecesary to reach the implied immunity question.

While it is true that uncertainties encountered in a situation such as the *Esso* case can be remedied by specific statutory wording by Congress, it is obvious that immunity provisions as vague as those in the

41. 48 STAT. 66 (1933), as amended, 54 STAT. 626 (1940), 16 U.S.C.A. § 831*l* (1941). See Tennessee Valley Authority v. Polk County, 68 F. Supp. 692 (E.D. Tenn. 1945). See also Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229 (U.S. 1865), and Roberts, J., dissenting in James v. Dravo Contracting Co., 302 U.S. 134, 161, 181, 58 Sup. Ct. 208, 82 L. Ed. 155 (1937). Among statutory consents to local taxation, see 38 STAT. 258 (1913), as amended, 40 STAT. 1314 (1919), 12 U.S.C.A. § 531 (1945) (federal reserve bank); 39 STAT. 380 (1916), 12 U.S.C.A. § 931 (1945) (federal land bank); 48 STAT. 1252 (1934), as amended, 52 STAT. 22 (1938), 12 U.S.C.A. § 1714 (1945) (federal financed housing).

42. See Esso Standard Oil Co. v. Evans, 345 U.S. 495, 73 Sup. Ct. 800, 97 L. Ed. 741 (1953); Carson v. Roane-Anderson Co., 342 U.S. 232, 72 Sup. Ct. 257, 96 L. Ed. 257 (1952); Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 60 Sup. Ct. 15, 84 L. Ed. 11 (1939).

43. Carbide & Carbon Chemicals Corp. v. Carson, 192 Tenn. 150, 239 S.W.2d 27 (1951), 5 VAND. L. REV. 105.

44. Carson v. Roane-Anderson Co., 342 U.S. 232, 72 Sup. Ct. 257, 96 L. Ed. 257 (1952), 22 TENN. L. REV. 437.

45. 60 STAT. 765 (1946), 42 U.S.C.A. § 1809(b) (1952).

46. See 32 B.U.L. REV. 241 (1952).

Atomic Energy Act are not much help in putting the problem at rest.[47]

In another decision related to the immunity question, *Penn-Dixie Cement Corporation v. Kizer*,[48] Tennessee's Corporation Excise Tax Law,[49] as amended in 1951 to prohibit deduction of federal taxes in computing net earnings subject to the excise, was attacked as void because, *inter alia*, it was "subversive of the powers and repugnant to the paramount authority of the United States." The Tennessee Supreme Court, in an opinion by Chief Justice Neil, rejected the argument that prohibiting the deduction of federal taxes was state tax action upon a federal tax and thus a "burden" upon or an interference with the Federal Government. No authority for or against the proposition was discussed in the opinion. Reference was made to the fact that thirteen states have similar prohibitions against deducting federal taxes. "If the Federal Government fails to intervene and protest against this alleged unconstitutional invasion of its sovereignty the appellant is not privileged to make the point to protect its own financial interest."[50] It may be observed that, if, in fact, the tax violated the principle of express or implied federal immunity, its invalidity could be asserted by anyone from whom it was attempted to collect the tax. Clearly, however, the tax here did not fall on any federal agency or instrumentality or bear any relationship to federal property, and there was no claim of specific congressional action to relieve from the tax.

B. *Retroactivity*

The *Penn-Dixie* case also presented Constitutional issues regarding the giving of retroactive effect to the 1951 amendment to the Corporation Excise Tax Law. Under the original statute, the tax was measured by the corporation's net earnings for the preceding year and was made "due and payable on July 1, 1923, and on July 1 of each succeeding year." The 1951 amendment, which became effective on January 31, 1951, provided that "all taxes due on or after July 1, 1951, shall be computed in accordance herewith." The Penn-Dixie Corporation operated on a fiscal year under which it had closed its books for 1950 prior to the enactment of the above amendment. It objected to applying the new method of computation to any 1950 earnings for purposes of the payment due on July 1, 1951, and urged that, if the law compelled this, it violated Article I, Section 20, of the Tennessee Constitution, forbidding laws retrospective or impairing contracts, and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

47. For questions as to the implications of the *Roane-Anderson* decision, see Freund, *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 136 (1952).
48. 250 S.W.2d 904 (Tenn. 1952).
49. TENN. CODE ANN. § 1316 (Williams Supp. 1952).
50. 250 S.W.2d at 910.

Chief Justice Neil's opinion first construed the statute (after observing some differences of opinion in the past) as exacting a payment "for the privilege of doing business during the twelve months' period ending June 30th next preceding the payment date of July 1st."[51] Thus, the tax to be collected should be measured by reference to the corporation's net earnings during the year preceding that date. The constitutional objections relating to retroactivity were found to be without merit:

> "Concluding that the Act is in a degree retroactive, or retrospective, this does not in and of itself render it invalid, since in our opinion it does not impair the obligation of a contract or operate to divest rights of any vested interest. Taxing statutes are generally held to be constitutional even though they have some retroactive effect [citing authorities]."[52]

In addition to finding the application of the 1951 amendment on a retroactive basis to be consistent with due process, the opinion concluded that the commissioner's construction of the tax in this instance was not so "oppressive and arbitrary" as to violate that clause. The Court's decision is in line with the weight of authority relating to retroactive taxation.[53] Even if it be regarded as a general rule that "due process" prohibits the levy of a tax (or a change in its rate) on a privilege that has been completely exercised, that would be consistent with the result in this case.

The problem of tax retroactivity arose in a more extreme form in *Cincinnati, N.O. & T.P. Ry. v. Rhea County.*[54] The 1949 tax levy of Rhea County had exceeded the special (and general) purposes levy permitted to the county by statute.[55] By a private act,[56] the legislature in 1951 purported to validate each purpose and amount contained in the 1949 levy. The Tennessee Supreme Court sustained the validity of the curative statute, reasoning that there was power beforehand to authorize levies for the purposes stated and that a taxpayer has no vested right under a particular taxing statute.[57] Again the result is consistent with the general weight of authority,[58] although it might

51. *Id.* at 908.
52. *Id.* at 909.
53. Welch v. Henry, 305 U.S. 134, 59 Sup. Ct. 121, 83 L. Ed. 87 (1938); Milliken v. United States, 283 U.S. 15, 51 Sup. Ct. 324, 75 L. Ed. 809 (1931); Garrett Freight Lines, Inc. v. State Tax Comm'n, 103 Utah 390, 135 P.2d 523, 146 A.L.R. 1003 (1943); see ROTTSCHAEFER, CONSTITUTIONAL LAW 210-14, 683-85 (1939); Note, 146 A.L.R. 1011 (1943).
54. 250 S.W.2d 60 (Tenn. 1952).
55. TENN. CODE ANN. § 1045.1 (Williams 1934).
56. Tenn. Private Acts 1951, c. 276.
57. See the Taxation subsection of the Counties section in the article on Local Government Law appearing in this Survey for further discussion of this decision.
58. Marion County v. L. & N.R.R., 91 Ky. 388, 15 S.W. 1061 (1891); see cases collected in Note, 140 A.L.R. 959, 967-72, 993-96 (1942). Many of the states, having a constitutional provision like that in Tennessee, have contrued the "retrospective" prohibition more rigidly. See Note, 140 A.L.R. 959, 972 (1942).

appear that the literal wording of Article I, Section 20, would necessarily condemn such a statute, since such levies, as this one originally was, were considered "void" by the Court.

C. *Miscellaneous*

In *Baumgartner v. South Pittsburg*,[59] the Tennessee Supreme Court upheld for the second time[60] the validity of a city ordinance providing for parking meters. Such an ordinance, the opinion by Judge Prewitt said, does not involve taxation without legislative authority. That the fees so imposed are proper for the installation, regulation and maintenance of these devices and do not amount to a tax is, of course, in line with the great weight of opinion of courts throughout the country on this subject.[61]

In two cases, during the period considered, the Tennessee Supreme Court upheld the power and propriety of courts to relieve taxpayers of statutory penalties when the equities of the case seem to demand it.[62] If based on well-known principles of statutory construction calling for a liberal construction in favor of a taxpayer and strict construction to avoid penalties, such cases raise no problems. If, apart from statutory interpretation and the application of specific constitutional provisions, the Court exercises power to relieve from statutory requirements otherwise applicable because it is "sitting as a court of equity," it would seem to raise serious questions relating to the basic separation of governmntal functions called for under the Constitution of the State.

II. EMINENT DOMAIN

In *Maury County v. Porter*,[63] the Tennessee Supreme Court held unconstitutional a statute[64] relating to condemnation by counties of certain properties for highway purposes. The act, in its entirety, was found invalid by reason of the provisions of section 7, "particularly" the part italicized:

> ". . . if the . . . defendants are not satisfied witb the amount assessed by the condemner, they shall, on or before the second day of the regular term of the court, next after the service of . . . notice, appear, except to the amount assessed . . . and thereupon a trial may be had . . . *but no*

59. 256 S.W.2d 705 (Tenn. 1953). See Note, *Some Legal Questions Arising out of the Use of Parking Meters*, 6 VAND. L. REV. 907 (1953).
60. See Porter v. City of Paris, 184 Tenn. 555, 201 S.W.2d 688 (1947).
61. See Opinion of the Justices 94 N.H. 501, 51 A.2d 836 (1947); Grimes, *The Legality of Parking Meter Ordinances and Permissible Use of Parking Meter Funds*, 35 CALIF. L. REV. 235 (1947); Note, 6 VAND. L. REV. 907 (1953).
62. Tennessee Products and Chemical Corp. v. Dickinson, 256 S.W.2d 709 (Tenn. 1953); Esso Standard Oil Co. v. Evans, 250 S.W.2d 569 (Tenn. 1952).
63. 257 S.W.2d 16 (Tenn. 1953).
64. Tenn. Pub. Acts 1951, c. 178, TENN. CODE ANN. §§ 3291.5-3291.18 (Williams Supp. 1952).

trial shall be had until twelve months have expired after the completion of said road, highway, freeway and/or parkway." (emphasis added)[65]

The opinion of the Court, by Judge Burnett, found that the above provision made "indefinite and indeterminable" the time when the condemnees might have their rights to compensation fixed in court. It was pointed out that the completion of the project might be years after the property is "taken" and conceivably might never occur. The Court did not invalidate the statute under Article I, Section 21, of the Tennessee Constitution, requiring just compensation when property is taken for a public use, but rather under the requirements of open courts and no delay in administering justice contained in Article I, Section 17. It was considered that the possible delay in being able to secure a trial in court under this section was the same as a failure to make adequate provisions for the certainty of payment of damages to the landowner and for such payment without unreasonable delay.[66]

Other sections of the act did provide for the condemner, acting for the particular county, to assess the amount of damages incident to the taking, to deposit the amount assessed with the clerk of the circuit court and to file a petition with the court asking that the property be condemned. Section 6 set forth the procedure leading up to and culminating in the necessary court action where the property owners are satisfied with the damages assessed by the condemner. Section 8 coverd instances where the owner fails to appear and except to the assessment as required in section 7. The fact statement in the principal case revealed nothing as to the adequacy of the damage assessment filed by the representative of Maury County in this case or as to the stage of completion of the project in question. The general doctrine announced by the Court in this case is the usual one that when property is taken, reasonable, certain and adequate provision must be made for payment of damages without risk or unreasonable delay to the owner.[67] Adequate provision for compensation by the state or local government within a reasonable time is an aspect of due process under the Fourteenth Amendment,[68] quite apart from state constitutional

65. TENN. CODE ANN. § 3291.11 (Williams Supp. 1952).

66. The Court cited with approval the case of McGibson v. Roane County Court, 95 W. Va. 338, 121 S.E., 99 (1924), as the only available authority on the point. The statute held unconstitutional in that case permitted entry on land and the building of a road with no requirement that the county court take any steps to ascertain compensation due the owners until 60 days after the road was completed. A later decision of the West Virginia Supreme Court upheld the validity of a statutory amendment under which final award or judgment in condemnation proceedings was entered "after a reasonable time has elapsed for completion of the work." Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331, 113 A.L.R. 787 (1937). The West Virginia constitutional provision on eminent domain (Article III, Section 9) is much more detailed in its requirements than is Article I, Section 21, of the Tennessee Constitution.

67. 3 NICHOLS, EMINENT DOMAIN, §§ 8.3-8.4 (3d ed. 1950); 18 AM. JUR., *Eminent Domain* § 304 (1938).

68. Bragg v. Weaver, 251 U.S. 57, 40 Sup. Ct. 62, 64 L. Ed. 135 (1919). 1 NICHOLS, EMINENT DOMAIN § 4.8 (3d ed. 1950); ROTTSCHAEFER, CONSTITUTIONAL

requirements. The right of the property owner to be heard, *in invitum*, within a reasonable time as to the adequacy of the compensation is similarly a requirement of due process.[69] It could well be concluded that this statute, on its face, failed to accord this right. Instead of these bases, the Court's opinion relied upon the provision about courts being open, which is more questionable in light of the widespread use of nonjudicial procedures in eminent domain proceedings.[70]

The Tennessee Supreme Court not only ruled section 7 to be unconstitutional, it held the entire act invalid. The absence of a separability clause permitted the Court to invoke a presumption that the legislature would not have enacted the statute except in its completed form.[71] This is consistent with a frequently cited decision of the Supreme Court of the United States on the subject,[72] although as to that Court an eminently qualified writer has concluded that "judicial decisions on separability often reflect the attitude of the judges towards the merits of the particular statute . . . rather than an objective effort to apply the principles which are always said to determine severability."[73] The basic principle is supposed to be that of determining legislative intent, and the Tennessee Supreme Court's heavy reliance on the absence of a separability clause in this instance was re-enforced by its independent judgment as to whether the rest of the statute would have been permitted to stand alone. As a matter of fact, it does not appear that the parts of the statute which were left intact were necessarily incomplete and incapable of being executed in accordance with a general legislative purpose to authorize counties to exercise the power of eminent domain for the purposes listed. This would seem to be particularly true in light of Code section 3133, which purports to incorporate, for the future as well as the past, the provisions of Code sections 3109-3132[74] in all legislative grants of condemnation power "unless expressly stated the contrary. . . ."[75] One might ques-

LAW 722 (1939). Due process does not require that the payment be in advance of taking. Sweet v. Rechel, 159 U.S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188 (1895). Some state constitutions so require. See 3 NICHOLS, EMINENT DOMAIN § 8.713 (3d ed. 1950); 18 AM. JUR., *Eminent Domain* § 305 (1938).

69. Bragg v. Weaver, 251 U.S. 57, 40 Sup. Ct. 62, 64 L. Ed. 135 (1919); Simms v. Dillon, 119 W. Va. 284, 193 S.E. 331, 113 A.L.R. 787 (1937). See 1 NICHOLS, EMINENT DOMAIN § 4.103(4) (3d ed. 1950); ROTTSCHAEFER, CONSTITUTIONAL LAW 723 (1939).

70. See 1 NICHOLS, EMINENT DOMAIN §§ 4.101-4.102 (3d ed. 1950). On the matter of using commissions rather than juries in the federal courts under Rule 71A, see 66 HARV. L. REV. 1314 (1953); 11 F.R.D. 212-44 (1952).

71. Citing Life & Cas. Ins. Co. v. McCormack, 174 Tenn. 327, 125 S.W.2d 151 (1939).

72. Williams v. Standard Oil Co., 278 U.S. 235, 49 Sup. Ct. 115, 73 L. Ed. 287 (1929).

73. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 114 (1937).

74. TENN. CODE ANN. §§ 3109-3132 (Williams 1934, Supp. 1952).

75. TENN. CODE ANN. § 3133 (Williams 1934). See Tennessee Mining and Mfg. Co. v. Anderson County, 173 Tenn. 497, 121 S.W.2d 543 (1938).

tion why the 1951 statute was enacted in light of the eminent domain powers already possessed by counties.[76] If the answer is thought to be the procedural advantages to the county of the unconstitutional section 7 in combination with section 11's offsetting of general as well as special benefits in calculating damages,[77] then the Court's refusal to let the sections other than section 7 be operative alone is consistent with basic principles of separability.

III. Equal Protection of the Laws

A. *Separate Facilities on Basis of Race and Color*

1. *Schools:* It has been said that the most important action taken by the Supreme Court of the United States during the last term was its failure to decide the five school segregation cases pending before it and its setting of them for reargument on October 12, 1953.[78] Counsel, including the Attorney-General of the United States, were requested to address themselves in briefs and oral argument to several rather detailed questions, of which the following will serve as examples:

> "1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
>
> "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> "(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> "(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"[79]

The ferment surrounding this general topic is reflected in the case law applicable to Tennessee during the period under consideration. Two decisions of federal district courts in the State were addressed to

76. Tenn. Code Ann. §§ 3159-3161 (Williams 1934).

77. The attack on this provision was not discussed by the Teunessee Supreme Court; the usual rule permits offset of special benefits in assessing damages but not of general benefits. See Knoxville v. Barton, 128 Tenn. 177, 159 S.W. 837 (1913); 3 Nichols, Eminent Domain § 8.6205 (3d ed. 1950). As to property not taken, this is codified in Tenn. Code Ann. § 3122 (Williams Supp. 1952). See Faulkner v. Nashville, 154 Tenn. 145, 285 S.W. 389 (1926).

78. 21 U.S.L. Week, 3321 (U.S. June 23, 1953). On the general subject, see Hyman, *Segregation and the Fourteenth Amendment,* 4 Vand. L. Rev. 555 (1951). On segregation in interstate transportation, see 4 Vand. L. Rev. 689 (1951). See Note, 94 L. Ed. 1121 (1950).

79. Brown v. Board of Education of Topeka, 345 U.S. 972, 73 Sup. Ct. 1114, 97 L. Ed. 956 (1953). For the facts of the cases, see Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952); Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952); Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951); Gebhart v. Belton, 91 A.2d 137, *affirming* 87 A.2d 862 (Del. Ch. 1952).

the question of segregation on the basis of race and color in the use of certain public facilities. In *McSwain v. County Board of Education of Anderson County,*[80] Judge Robert L. Taylor held that Negro high school students and their parents, residing in Clinton, Tennessee, were not deprived of their constitutional rights by the students being obliged to attend a Negro high school in Knoxville while white students "similarly situated" attended Clinton High School. An appeal in the case has been argued before the United States Court of Appeals for the Sixth Circuit, but decision apparently has been held up to await the United States Supreme Court's decision in the five cases mentioned above.

Although it was denied by the plaintiffs in the *McSwain* case that the suit attacked segregation, the Court considered it as necessarily having that effect. The relief prayed for, a declaratory judgment and an injunction, was denied, and the action was dismissed. The court found that the plaintiffs were not really aggrieved and that the arrangement for attending school in another county was a reasonable method by which responsible governmental agencies carried out the obligation of the State of Tennessee to provide equal educational facilities. The school in another county to which the plaintiff students were sent by bus, in fact, carried a slightly higher rating than the Clinton High School attended by white students.[81] The Court observed that transportation of students across county lines is common throughout the State and that many white high school students in Anderson County are so transported even if those in Clinton are not.

Judge Taylor pointed out that separation of white and colored races in schools is required by the Constitution[82] and statutes[83] of Tennessee. The segregation which results, he said, is not discriminatory, since it treats all races alike, and substantial equality, even though accorded on a separate basis, has been held to satisfy the requirements of the Fourteenth Amendment in *Plessy v. Ferguson*[84] and other precedents. The court distinguished the decision of the United States Supreme Court in *Missouri* ex rel. *Gaines v. Canada,*[85] which held that the equal

80. 104 F. Supp. 861 (E.D. Tenn. 1952).

81. The Negro students from Clinton had first been sent to a high school in Campbell County, rated "C." Subsequent to their request for admission to the "A" rated Clinton High School and the refusal, arrangements for attendance at the "A-1" Negro high school in Knoxville were made. See 104 F. Supp. at 863.

82. TENN. CONST. Art. XI, § 12.

83. TENN. CODE ANN. §§ 11395-11397 (Williams 1934).

84. 163 U.S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256 (1896).

85. 305 U.S. 337, 59 Sup. Ct. 232, 83 L. Ed. 208 (1938). In McCready v. Byrd, 195 Md. 131, 73 A.2d 8, *cert. denied,* 340 U.S. 827 (1950), the Supreme Court of Maryland considered this case controlling when it issued a mandamus to compel the admission of the plaintiff Negro as a first year student in the School of Nursing of the University of Maryland. Pursuant to the Southern Regional Education Compact (see Note, 1 VAND. L. REV. 403 (1948)), the plaintiff had been offered and had declined a course in the Meharry Medical College, School

protection clause of the Fourteenth Amendment was not satisfied by Missouri providing legal education for Negroes in other states while making it available within the geographic limits of the state to whites. It was considered that there is no similar obligation in terms of the geographic limits of Anderson County and that Tennessee, in the instant case, was according substantially equivalent facilities to the plaintiffs within the State. The riding of a bus back and forth to Knoxville by plaintiff students was a "small contribution" toward making the system of "separate but equal" facilities work. The alternative, as the Judge saw it, is a duplication of school facilities at every level of education involving "similarly situated" Negro and white students, which "would break the back of public education in Tennessee."

The forthcoming decisions of the United States Supreme Court will shed light on the present validity of the "separate but equal" doctrine as applied to public grade and high schools. It may be observed, however, that, even if this doctrine is reaffirmed, there will remain a question under a situation such as that in the *McSwain* case as to a lack of equality in fact in the facilities furnished.[86] Certain older decisions, usually speaking only of requiring "substantial equality," employed a standard which at times permitted actual inferiorities and disadvantages.[87] In the realm of graduate and professional education, however, the United States Supreme Court in recent years has insisted upon the reality of equal facilities, taking into consideration the intangibles affecting the particular line of study as well as the more concrete aspects of the facilities provided.[88] This has resulted in its being held, for example, that one of the oldest and best-equipped of the separate state law schools for Negroes did not provide equal facilities.[89] This same insistence upon equality in fact has been extended into lower educa-

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of Nursing, at Nashville. The Court found that "in educational facilities and living conditions the nursing school at Meharry College is not only equal but superior to the University of Maryland nursing school," but "[o]bviously no compact or contract can extend the territorial boundaries or the sovereignty of the State of Maryland to Nashville." 73 A.2d at 9.

86. Carter v. School Board of Arlington County, Virginia, 182 F.2d 531 (4th Cir. 1950); Corbin v. County School Board of Pulaski County, Virginia, 177 F.2d 924 (4th Cir. 1949); *cf.* United States v. Buntin, 10 Fed. 730 (C.C.S.D. Ohio 1882); Williams v. Board of Education of City of Parsons, 79 Kan. 202, 99 Pac. 216 (1908).

87. Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912); Wright v. Board of Education of City of Topeka, 129 Kan. 852, 284 Pac. 363 (1930); Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891); State *ex rel.* Gumm v. Albritton, 98 Okla. 158, 224 Pac. 511 (1923); Martin v. Board of Education, 42 W. Va. 514, 26 S.E. 348, (1896); *cf.* Cumming v. Richmond County Board of Education, 175 U.S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262 (1899); see Note, [1950] WASH. U.L.Q. 594, 598-601.

88. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 Sup. Ct. 851, 94 L. Ed. 1149 (1950); Sweatt v. Painter, 339 U.S. 629, 70 Sup. Ct. 848, 94 L. Ed. 1114 (1950).

89. McKissick v. Carmichael, 187 F.2d 949 (4th Cir.), *cert. denied,* 341 U.S. 951 (1951), 30 N.C.L. REV. 153 (1952); see Taylor, *The Demise of Race Distinctions in Graduate Education,* 1 DUKE B.J. 135, 142-44 (1951).

tional levels by some courts.[90] It is obvious that, if equality in fact, applied to the intangibles as well as the tangibles of education, is pushed far enough, it will make it impossible for separate facilities to meet the constitutional standard, quite apart from the financial difficulties which may be involved.[91] Thus, the collateral attack will have won a victory over enforced segregation, as it already has at the graduate and professional level. It has been suggested, however, by Circuit Chief Judge Parker in his opinion in one of the cases now pending before the United States Supreme Court that there are significant differences between the considerations applicable at the graduate and professional education level and those applicable at the common school level.[92]

2. *Public Recreational Facilities:* The other decision in Tennessee touching on the segregation question was that of Judge Robert N. Wilkin (retired), sitting by special assignment in the United States District Court for the Middle District of Tennessee, in *Hayes v. Crutcher*.[93] This was a class action by Negro citizens of Nashville against the Board of Park Commissioners for a declaration of rights and an injunction restraining (a) failure to furnish Negro citizens equal privileges on city golf courses and (b) the making of distinctions on the basis of color or race in providing public golf course facilities. An answer was filed denying (a) that plaintiffs were representatives of the class claimed and (b) that an actual controversy existed and alleging (a) that the golf courses were supported by green fees charged players and (b) that defendants were engaged in planning separate and equal golfing facilities for Negroes which would be constructed in the reasonable future. Plaintiffs then filed a motion for summary judgment on the pleadings, and Judge Wilkin's opinion was written to accompany his denial of this motion.

90. See cases cited in note 82 *supra* and Davis v. County School Board of Prince Edward County, Virginia, 103 F. Supp. 337 (E.D. Va. 1952); Pitts v. Board of Trustees, 84 F. Supp. 975 (E.D. Ark. 1949); State *ex rel.* Brewton v. Board of Education, 361 Mo. 86, 233 S.W.2d 697 (1950). *But cf.* Brown v. Ramsey, 185 F.2d 225 (8th Cir. 1950); Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).

91. Many writers have urged that equality in fact is impossible of accomplishment with segregated facilities — *i.e.*, that such facilities necessarily involve inequality. See dissenting opinion of Circuit Judge Edgerton in Carr v. Corning, 182 F.2d 14, 32 (D.C. Cir. 1950), particularly the quotation from 2 REPORT OF THE PRESIDENT'S COMMITTEE ON HIGHER EDUCATION 31, 35 (1947) appearing in his note 90, 182 F.2d at 32. See also *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 439 (1953) (excerpt from Appendix to Appellants Briefs filed in the School Segregation Cases, note 75 *supra*); *cf.* MYRDAL, AN AMERICAN DILEMMA 629 (1944); Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 561 (1951).

92. Briggs v. Elliott, 98 F. Supp. 529, 535. (E.D.S.C. 1951). For historical and political analyses of the problem, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950); Roche, *Education, Segregation and the Supreme Court — A Political Analysis*, 99 U. OF PA. L. REV. 949 (1951).

93. 108 F. Supp. 582 (M.D. Tenn. 1952).

The denial of the motion as to the prayer relating to equal privileges was based on a conclusion that there existed dispute as to material facts concerning such matters as the representative status of plaintiffs, the reality of a demand for such facilities and the status of defendants' plans for a separate Negro golf course. Judge Wilkin pointed out that, while a reasonable period for preparation will be permitted, the Constitution requires that equality in public golfing facilities be afforded Negro citizens. His dictum in this regard is supported by a number of recent decisions throughout the country.[94] In refusing summary judgment as to the prayer relating to "making distinctions" on a race or color basis in providing public golf facilities, Judge Wilkin's opinion adhered strongly to the idea that segregation is not forbidden by the Fourteenth Amendment: "*Plessy v. Ferguson* . . . is still the law of the land."[95]

The opinion discussed segregation and general problems of racial relationships at considerable length. There was no reference of any sort to any of the numerous studies, reports and treatises examining with differing viewpoints the ethical, sociological, political, economic, biological and psychological aspects of this question.[96] Judge Wilkin stated that segregation is not only recognized in constitutional law, it is supported by the natural law of like associating with like. The law, he said, must recognize and be adapted to such natural and instinctive principles, since it is futile for it to do otherwise. While the law protects the basic legal rights of all, regardless of color, and is therefore set against oppression and exploitation, it does not intrude into private and social affairs — "Racial differences do not in any way . . . justify arrogance, pride, intolerance, or abuse."[97] All races need to learn this, he stated, and through the agencies of education, philosophy and religion members of all races and colors should regard themselves as "partners, mutually responsible for one another under God."[98] The law, however, should attempt to do only what it can do effectively; certain recent developments burden democratic and legal processes with obligations which they are unable to meet, thus destroying the delicate balance of our society and playing into hands of revolutionaries.

Only time will tell whether the attitude of this opinion or its anti-

94. Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951); Law v. Mayor and City Council of Baltimore, 78 F. Supp. 346 (D. Md. 1948); *cf.* Rice v. Arnold, 45 So.2d 195 (Fla.), *rev'd per curiam*, 340 U.S. 848 (1950), *reconsidered*, 54 So.2d 114 (Fla. 1951), *cert. denied*, 342 U.S. 946 (1952). On public swimming pools, see Draper v. St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950); Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Calif. 1944); *cf.* Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948) (municipal pool leased to private persons). See Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 563 (1951).

95. 108 F. Supp. at 584.

96. The most comprehensive is MYRDAL, AN AMERICAN DILEMMA (1944).

97. 108 F. Supp. at 585.

98. *Ibid.*

thesis is more apt to bring on the adverse effects mentioned. It seems highly unlikely that any legal pronouncement in 1952 or 1953 will be more than a way station in the development of law in this field.[99]

99. As this is written, the Nashville newspapers carry stories of a projected new park for Negroes (including a golf course). Local Negro leaders are in disagreement as to the enthusiasm with which they should accept these segregated facilities.