

1961

# J. Bracken Lee v. State of Utah et al : Brief of Appellants

Utah Supreme Court

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Walter L. Budge; Ronald N. Boyce; Attorneys for Appellants;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

J. BRACKEN LEE,

*Plaintiff and Respondent,*

—vs.—

STATE OF UTAH, BOARD OF STATE  
CANVASSERS, SHERMAN J. PREECE,  
State Auditor, and WALTER L. BUDGE,  
Attorney General, SID LAMBOURNE,  
State Treasurer, members of the Board  
of State Canvassers,

*Defendants and Appellants.*

FILED

13 1961

Clerk, Supreme Court, Utah

Case No.

~~9439~~

9530

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## BRIEF OF APPELLANTS

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*Defendants and Appellants.*

Case No.  
9439

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## BRIEF OF APPELLANTS

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### NATURE OF CASE

The question presented is whether Article VII, Section 24 of the Constitution of the State of Utah was validly adopted by the electorate of the State on November 8, 1960, and whether it is in full force and effect, or whether it was not properly adopted or is otherwise void and of no effect.

## DISPOSITION BEFORE LOWER COURT

Upon joint motions for summary judgment (R. 25, 26), the trial court ruled, that Article VII, Section 24 of the Utah State Constitution, submitted to the electorate for adoption on November 8, 1960, being proposed Constitutional Amendment Number One on the ballot of November 8, 1960, was null and void and of no force and effect, and entered its decree on July 26, 1961, so declaring. (R. 27, 28).

## RELIEF SOUGHT ON APPEAL

The defendants and appellants seek reversal of the trial court's determination that Article VII, Section 24 of the Utah Constitution is null and void, and a declaration that it is valid and in full force and effect.

## STATEMENT OF FACTS

On December 28, 1960, the plaintiff filed an action in the Third Judicial District Court, Salt Lake County, State of Utah, seeking a judgment declaring that the proposed Constitutional Amendment Number One, submitted to the electorate at the general election held on November 8, 1960, and declared adopted by the defendants as members of the State Board of Election Canvassers, was null and void. (R. 1-10). Thereafter, a motion to dismiss was filed by the defendants on the grounds that the plaintiff had no standing to bring the action, and that the court was otherwise without jurisdiction over the subject matter. (R. 19). The motion was argued on February

15, 1961, and denied on March 1, 1961. (R. 20). Thereafter this Court denied on interlocutory appeal and the defendants filed an answer to plaintiff's complaint. (R. 17).

The facts upon which the decision of the lower court was based were stipulated to by the parties for the purposes of summary judgment. (R. 21).

It appears that during the 1959 session of the Utah Legislature a joint resolution was adopted purporting to amend Article VII of the Utah Constitution by adding a new Section 24 to provide for the "continuity of state and local government operations in periods of emergency resulting from disasters caused by enemy attack'." (R. 22). The resolution, in full, read (R. 22) :

"Notwithstanding any general or special provisions of the Constitution the legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such office, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations including, but not limited to the financing thereof. In the exercise of the powers hereby conferred the legislature shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the legislature so to



do would be impracticable or would admit of undue delay.

The Secretary of State is directed to submit this proposed amendment to the electors of the State of Utah at the next General Election in the manner provided by law."

In addition, House Bills 83, 82 and 81 were passed by the Legislature and signed into law contingent upon the adoption of the new proposed constitutional amendment relating to continuity of government. (R. 23). These acts provided for emergency executive, legislative and judicial officers, and for relocation of the seat of government in the event of the necessity, due to enemy attack or threatened attack. (R. 23-24).

Thereafter, the joint resolution was published in a newspaper in each county for a period of two months before the election held on November 8, 1960. (R. 22). A ballot bearing two constitutional amendments was submitted to the electorate on November 8, 1960. The amendments were set off in blocks and entitled "Constitutional Amendment Number One" and "Constitutional Amendment Number Two." Each block contained a space to be marked "For" or "Against" each proposed amendment. Amendment Number One dealt with the continuity of government provisions, and Amendment Number Two was concerned with tax exemptions. A sample of the ballot is attached to plaintiff's complaint. (R. 10-11). The language of Amendment Number One was as follows:

"Shall Section 24 of Article VII of the Constitution of the State of Utah, be amended to grant temporary emergency powers to the Legislature in the event of war or emergency caused by war."

At the election on November 8, 1960, a total of 374,981 persons cast ballots, 374,609 persons voting in the presidential race, 371,489 persons voted in the gubernatorial race, and 292,101 persons voted on Proposed Amendment Number One. Out of the votes cast on the Amendment, 171,762 persons favored adoption of the amendment and 120,339 opposed it. Approximately 58 percent of the voters voting on Amendment Number One favored it. Slightly less than 46 percent of the total persons casting votes on any issue at the general election favored the amendment since not all voters voting at the election cast a vote on the proposition contained in Proposed Amendment Number One. (R. 22). Based upon the votes cast, defendants declared the amendment adopted.

The plaintiff sought to have the amendment declared null and void on four bases. First, that the number of votes favoring adoption does not meet the constitutional requirements of Article XXIII relating to amendment of the State Constitution. Second, that the amendment was not a single amendment, but was in fact two or more amendments, and was void for failing to be submitted in such a manner as to allow the electors to vote on each amendment separately. Third, that it was not submitted to the electorate in proper form. Fourth, that the Proposed Amendment would contravene the provisions of the Federal Constitution guaranteeing a republican form of government and would also contravene Article I, Section 2 of the State Constitution by removing the political power from the people. It is submitted that an examination of each of these contentions will show them to be

without merit, and that the trial court erred in granting summary judgment declaring Article VII, Section 24 to be null and void.

## STATEMENT OF POINTS

### POINT I.

THE PROPOSED CONSTITUTIONAL AMENDMENT IS NOT INEFFECTIVE FOR WANT OF SUFFICIENT VOTES FOR APPROVAL.

### POINT II.

THE PROPOSED AMENDMENT TO THE STATE CONSTITUTION, ARTICLE VII, SECTION 24, DID NOT VIOLATE ARTICLE XXIII, SECTION 1 OF THE UTAH CONSTITUTION REQUIRING THAT PROPOSED AMENDMENTS BE SEPARATELY SUBMITTED TO THE ELECTORS.

### POINT III.

THE AMENDMENT WAS NOT DEFECTIVE FOR FAILURE TO SUBMIT THE AMENDMENT TO THE ELECTORATE IN PROPER FORM.

### POINT IV.

THE PROPOSED CONSTITUTIONAL AMENDMENT DOES NOT VIOLATE ARTICLE IV, SECTION 4 OF THE FEDERAL CONSTITUTION NOR AMEND OR CONTRADICT ARTICLE I, SECTION 2 OF THE UTAH CONSTITUTION.

## ARGUMENT

### POINT I.

THE PROPOSED CONSTITUTIONAL AMENDMENT IS NOT INEFFECTIVE FOR WANT OF SUFFICIENT VOTES FOR APPROVAL.

The plaintiff contends that the proposed amendment was not properly adopted because there was an insufficient number of votes cast in favor of the amendment. It should be remembered that in excess of 58 percent of those persons who voted on the proposed amendment registered their vote as favoring adoption, and that this was about 46 percent of the vote cast. The question for decision, then, is whether the Utah Constitution requires a majority of the persons voting thereon, or a majority of all votes cast, no matter what issues are joined with the amendment at the general election?

The proposed amendment was the result of legislative action by joint resolution. It was not a proposal emanating from a Constitutional Convention. Article XXIII of the Utah Constitution deals with amendment and revision. The three sections under that article provide two means for amending the Constitution. Article XXIII, Section 1, provides for amendment upon *action* of the Legislature. Article XXIII, Sections 2 and 3 relate to the other means of amending the Constitution, that being by way of a specially called Constitutional Convention. Since the proposed amendment was the result of a joint legislative action, the provision for amending the Constitution that must determine if the amendment was validly adopted is Article XXIII, Section 1, which provides:

“Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, and if two-thirds of all the members elected to each of the two houses, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective

journals with the yeas and nays taken thereon; and the Legislature shall cause the same to be published in at least one newspaper in every county of the State, where a newspaper is published, for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the State, for their approval or rejection, and *if a majority of the electors voting thereon shall* approve the same, such amendment or amendments shall become part of this Constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately.”

The pertinent part of this section is that referring to the electors necessary for adoption. On this point the section reads:

“\* \* \* if a majority of the electors *voting thereon* shall approve the same, such amendment or amendments shall become part of this Constitution.”

It is generally said that rules of statutory construction are applicable in assisting in construing a constitution, *Badger v. Hoidale*, 88 F.2d 208; 16 C.J.S., Constitutional Law, Sec. 15, and in this regard, words are to be given their natural, obvious or ordinary meaning. *South-Eastern Underwriters Ass’n. v. United States*, 323 U.S. 533; *General Electric Company v. Thrifty Sales*, 5 U.2d 326, 301 P.2d 741 (1956); 16 C.J.S., Constitutional Law, Sec. 19.

In applying this maxim to the language of the Utah Constitution, it appears clear that what was intended was

that only a majority of the persons who voted on the issue favor adoption to effect approval. In the case of *Breckhouse v. Hill*, 268 S.W. 865 (Ark. 1925), the Arkansas Supreme Court had before it a similar allegation to that now urged by the plaintiff. In that case 125,700 persons had voted on the gubernatorial issue, but only 52,000 to 56,000 votes were cast favoring the adopting of certain constitutional amendments. The Arkansas Constitution contained the words "voting thereon" similar to that of Utah. The court upheld the adoption of the amendments. Subsequently, in *Coombs v. Gray*, 281 S.W. 918 (Ark. 1926), the same court reaffirmed the interpretation. In *Battle Creek Brewing Co. v. Board of Sup'rs. of Calhoun County*, 131 N.W. 160 (Mich. 1911), the Michigan Supreme Court held the words "voting thereon" meant those who actually passed on the proposition and not just those who cast blank ballots. In *Keelams v. Compton*, 206 S.W. 2d 498 (Mo. 1947), the Missouri Supreme Court said with reference to the plain meaning of the words "voting thereon" as appeared in Article VI, Section 26 (6) of the Missouri Constitution:

"In any event it has been definitely determined that 'two-thirds of the qualified electors \* \* \* voting thereon, \* \* \*' means 'two-thirds of those who actually vote for or against the given proposition, whether such two-thirds be two-thirds or not of all the voters taking part in the election otherwise \* \* \*.' 'Votes cast on the proposition' and 'voting thereon' are to be construed in their ordinary and usual sense and they mean 'expressing the will, mind or preference; casting, or a vote.' They do not include votes or ballots that do not cast a vote on the proposition."



Thus it would appear clear that the plain meaning of Article XXIII, Section 1 would require only a majority of the votes actually expressing an opinion or preference on the amendment.

If some persons desire not to vote on an issue, it certainly is a fair inference that they leave the matter to those who, in their discretion, see fit to pass on the matter. In *Cass County v. Johnston*, 95 U.S. 360 (1877), it was said:

“This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares \* \* \*.”

This is certainly the recognized majority rule. See 131 ALR 1382, where it is said:

“It seems that by the weight of authority blank ballots are not to be counted in arriving at the total vote cast for the purpose of determining a majority.”

Applying these propositions to the question now before the Court, is there any reason to assume other than that those who did not vote on the proposed constitutional amendment left the proposition to those who saw fit to exercise their franchise? A person is no less absent because he fails to vote one way or the other on a ballot than if he never appeared. In a democracy the government is said to operate on the basis of the active participation of

its citizenry. Certainly the founding fathers would not have intended a meaning that would make the result go off on phlegmatic inactivity.

Other states having similar provisions have construed their constitutions contrary to the position now urged by the plaintiff. In *Green v. Board of Canvassers*, 5 Idaho 130, 47 Pac. 259 (1896), the Idaho Supreme Court concerned itself with Section 1, Article 20 of their State Constitution, which is less specific than that of Utah. The Idaho provision read:

“\* \* \* if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.”

The facts of the case disclose that a proposed constitutional amendment had not received approval from the majority of persons who cast ballots at the general election, but had received approval from those who saw fit to vote on the issue. The Idaho Court, in answer to the same contention as is made by plaintiff here, stated at page 260 of 47 Pacific Reporter:

“\* \* \* Experience has shown that it is almost, if not quite, an impossibility to secure an expression from every elector upon any question, and, above all, upon a question of an amendment of the constitution; and it is equally difficult to ascertain the actual number of electors at any given time. To rely upon the vote cast upon some other question at the same election would be entirely unsatisfactory, and such a construction is, we think, at least impliedly negatived by the provisions of section 3. While it is true that some 10,000 or more electors would seem to have been entirely



indifferent upon the question of the adoption of this and the other amendments, still all were—must have been—fully advised as to the importance of the questions submitted, and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent? We hold that the amendment under discussion is adopted, and has become a part of the constitution of the state of Idaho.”

In *Gillespie v. Palmer*, 20 Wisc. 572, in reference to the same argument urged here, the Wisconsin Court said:

“\* \* \* Under the provisions of our constitution, as well as of other constitutions, persons are elected to a particular office who have a majority of the votes cast—not for the candidates for some other office, but for the candidates for that office. Measures or laws are also declared adopted or rejected according as they receive or fail to receive each a majority of the votes cast for or against it. To declare a measure or law adopted or defeated — not by the number of votes cast directly for or against it, but by the number cast for and against some other measure, or for the candidates for some office or offices not connected with the measure itself, would not only be out of the ordinary course of legislation, but, so far as we know, a thing unknown in the history of constitutional law. \* \* \*”

It is submitted that as concerns the provisions of the Utah Constitution, the matter is clearly against the construction plaintiff proposes to give Article XXIII,

Section 1. *In Re Todd*, 208 Ind. 168, 193 N.E. 865; *DeSoto Parrish v. Williams*, 49 La. Ann. 422, 21 So 647.

Before laying this matter to rest it is well to note the argument raised by plaintiff at trial below that Section 3 of Article XXIII, relating to adoption of amendments or revision of the Constitution by requiring a “a majority of the electors of the State voting at the next general election” requires more than Section 1, and hence the framers couldn’t have intended two different standards. In *Green v. Board of Canvassers*, 5 Idaho 130 ,47 Pac. 259 (1896), the Idaho Court, when faced with the same argument, rejected the contention that two different standards could not have been intended, saying:

“\* \* \* We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. \* \* \*”

On the other hand, the Arkansas Supreme Court in *Coombs v. Gray*, 281 S.W. 918 (Ark. 1926), agreed with the general proposition that both sections should be harmoniously construed, saying:

“It would be doing violence to the design of the framers of the amendment to attribute to them an intention to require less number of votes to adopt an amendment proposed by the people un-

der the power of the initiative than one submitted by the legislature.”

However, instead of saying a majority of those voting at the general election must pass on the amendment, it said only a majority of those who expressly vote on the issue is needed to adopt an amendment.

The recorded proceedings of the Constitutional Convention provide a simple answer to the Utah situation. Sections 1, 2 and 3 were introduced at different times and by different sponsors. Section 1 was introduced by Delegate Eichnor. *Proceedings of Constitutional Convention*, p. 157. Delegate Chidester introduced the provision relative to Sections 2 and 3. *Op. cit.*, p. 113. The Committee on Amendments considered both sections and favorably reported them. *Op. cit.*, p. 243. On the floor of the Convention, Section 1 of Article XXIII was adopted with no change being made relative to the provision of “a majority of the electors voting thereon” being required for adoption. *Op. cit.*, 406. As to Section 1, it was always apparently contemplated that single amendments would be submitted at a general election. However, such was not the case as to amendments by Constitutional Convention. Thus Section 3, as introduced originally, read:

“Any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by a majority of the electors voting *at said election.*”

A reading of the debate at pages 675-677 of the Proceedings of the Constitutional Convention makes it clear

that what was intended was two ways of amending the Constitution. First, by the action of the Legislature and the electorate as to single amendments, and second, by a Constitutional Convention with adoption of the revised Constitution by a special election to be held for that purpose. Subsequently, Delegate Squires felt that a special election would be too costly, and also there was concern that possibly a Constitutional Convention would only recommend one or two changes which could be handled at a general election. Thus, Delegate Squires said with reference to the reason for changing the language of Section 3 from "said election" to "general election":

"That was my idea, to save the expense of a special election on the subject."

Thus, the reason for the apparent difference between Sections 1 and 3 of Article XXIII is apparently because of the failure to note the distinction when the money saving change was made. Thus the facts seem clearly to support a contention that the framers intended only that those persons who actually cast votes would be counted in determining the numerical majority, where the issue was voted on at a general election. As originally contemplated by the Section 3 form of amendment, the only persons casting ballots would be persons voting on the convention issues, and there was no need for the specific language used in Section 1 pertaining to general elections. Thereafter, when the amendment was made, the language relating to the required majority was overlooked and not changed. Thus, it seems clear that the intention of the framers was to require only a majority of the persons voting on the amendment cast votes in

favor of it for it to be adopted, where a general election is the means used to submit the matter to the voters.

It is submitted, therefore, that plaintiff's position as to the required majority is not well taken, and no objection to Article VII, Section 24, can be raised with reference to its failure to achieve the requisite number of affirmative votes.

## POINT II.

THE PROPOSED AMENDMENT TO THE STATE CONSTITUTION, ARTICLE VII, SECTION 24, DID NOT VIOLATE ARTICLE XXIII, SECTION 1 OF THE UTAH CONSTITUTION REQUIRING THAT PROPOSED AMENDMENTS BE SEPARATELY SUBMITTED TO THE ELECTORS.

Plaintiff contends that the proposed constitutional amendment violates Article XXIII, Section 1 of the Utah Constitution, which provides:

*“If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately.”*

In the instant case, two amendments were proposed, to-wit: Article VII, Section 24, adding the continuity of government provision, and a proposal to amend Section 2 of Article XIII, relating to tax exemptions; both of these proposed amendments were separately set out on the ballot in such a manner as to allow the voter to express himself separately on each issue. It would appear clear then, that unless Article VII, Section 24 was in fact two amendments, that there was no violation of the constitutional requirement.

The general rule of construction adopted with reference to constitutional provisions like that contained in Article XXIII, Section 1, is that if a constitutional amendment embracing several subjects, all of which are germane to the general subject of the amendment, is adopted, it will be upheld. 6 RCL 30. As is said in 16 C.J.S., Constitutional Law, Sec. 9:

“In order to constitute more than one proposed amendment, within such a constitutional provision, the propositions submitted must not only relate to more than one subject, but must also have at least *two separate and distinct purposes not dependent on, or connected with, each other*, and although a proposed amendment embraces more than one subject, *such subjects need not be separately submitted to the electors, if they are so concerned with, or dependent on, the general subject that it might be undesirable that one be adopted and not the other.*”

Many cases have recognized this rule. It is not necessary that every possible change or abolition of the Constitution be set out for yea and nay ballot, but only those that are in fact separate and distinct and not dependent or connected with one another. *People ex rel. Elder v. Sours*, 31 Colo. 369, 74 Pac. 167 (1903); *McBee v. Brady*, 15 Idaho 161, 100 Pac. 97 (1909); *Lobaugh v. Cook*, 127 Iowa 181, 102 N.W. 1121 (1905); *Winget v. Holm*, 187 Minn. 78, 244 N.W. 331 (1932).

In the case of *Kirby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934), the Supreme Court of Arizona spoke to the matter and stated the constitutional requirement thus:

“We think amendments to the Constitution, which the section above quoted requires shall be sub-



mitted separately, must be construed to mean *amendments which have different objects and purposes in view*. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other \* \* \*."

"If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if logically speaking, they should stand or fall as a whole, then there is but one amendment submitted."

A recent decision of the Supreme Court of Florida, *Gray v. Golden*, 89 So.2d 785 (Fla. 1956), concerned the interpretation of the similar provision of the Florida Constitution concerning home rule of a local county. The court said that the provisions for amendment of the Constitution are mandatory, and further stated:

"In the *City of Coral Gables v. Gary*, supra, we took pains to relate that even *though a proposed amendment may be separable into two or more propositions concerning the value of which diversity of opinion may arise, that alone is not sufficient to condemn it*; provided, the propositions may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant purpose. Unity of purpose as revealed in the object sought by the amendment is the test; the details leading to it are not material. If several propositions that are unrelated are submitted as one and cannot be reconciled as such on any reasonable thesis, then they meet the

condemnation of the constitutional mandate. We have no such situation here, local self-government for Dade County is the only concern of the proposed amendment.”

It has also been said:

“This requirement necessitates the separate submission of such amendments only as have different objects and purposes, *because several changes necessary to carry out a single purpose constitute one amendment.*”

16 C.J.S. 59. See *State v. Lockhart*, 76 Ariz. 3901, 265 P.2d 447 (1953).

Having, therefore, framed the legal rule relating to the constitutional requirement, is such rule violated when applied against our present amendment? Plaintiff argues that because the amendment provides:

“Notwithstanding any general or special provisions of the Constitution the legislature, *in order to insure continuity of state and local government operations in periods of emergency resulting from disasters caused by enemy attack* shall have the power \* \* \*.”,

that this empowers the Legislature to amend the Constitution and that every law passed (see H.B. 81, 82, 83, 1959 Legislature) works an amendment of the Constitution. Defendants disagree. It seems obvious that only subject is involved in the amendment, and that is the preservation of government in periods of emergency caused by enemy attack. A whole new provision has been added to the Constitution, all the provisions of the amendment relate to continuity of government, and all laws passed under this provision are thereby so limited.



The amendment embraces only one homogenous subject - continuity of government in periods of disaster or emergency due to enemy attack. It is clear then that the single object test laid down by the courts has been met. Any law passed contrary to such object would be invalid, and although laws may be passed touching other subjects, their object is the same - continuity of government, and no amendment of the Constitution takes place. As was said in *Continuity of Government*, Executive Office of the President, 1959, p. 9:

“So, the power granted by the amendment is broad. It could not be otherwise considering the contingency to which it is addressed.

For all the breadth of the grant, however, the amendment gives no blank check to the Legislature. On the contrary, the power is subject to limitations. For one thing, they are implicit in the structure of the amendment. Thus the amendment is phrased in terms of a grant of new power (*not removal of limits of existing powers*) for the attainment of a stated objective, namely: *Continuity of governmental operations.*”

From this it can be seen that no objection to the amendment exists from the standpoint of multiplicity. Any deviation from other constitutional provisions can only be made to preserve the continuity of government and apply the new powers of the new amendment. In the absence of their application, all other powers continue to exist. See *Continuity of Government*, supra, p. 10, and the Federal Constitution stands as a bulwark against improper action. Op. Cit., p. 10.

There is no need to consider whether any laws passed by the Legislature are presently unconstitutional since they are not before us; and to the degree they do not conform to the single object of the amendment would be void in any instance. The amendment is merely an enabling provision and its central object is that of adding to the Constitution powers of preservation by civil action, and avoiding the prospects of martial rule.

The instant amendment, therefore, is not void, since it is a consistent and workable provision relating to one single subject. Other provisions of the Constitution are till applicable except where disruption of the continuity of government due to enemy attack would prohibit their application, and in such an instance the provisions of Article VII, Section 24, come into effect. The new amendment does not vacate but supplements other provisions of the Constitution by providing for a continuation of civil government when no government might otherwise exist.

### POINT III.

THE AMENDMENT WAS NOT DEFECTIVE FOR FAILURE TO SUBMIT THE AMENDMENT TO THE ELECTORATE IN PROPER FORM.

The Secretary of State was directed to submit the proposed amendment, Article VII, Section 24, to the electorate at the next general election, and the amendment was to be submitted in the manner provided by law. J.R. 12 March 1959, Section 2. Acting in accord with the instructions appearing in the joint resolution, the Secretary of State caused the following proposition to be

placed upon the ballot and submitted to the electorate at the general election on November 8, 1960:

“Shall Section 24 of Article VII of the Constitution of the State of Utah be amended to grant temporary emergency powers to the Legislature in the event of war or emergency caused by war.”

Plaintiff urged in the trial court that for two reasons this statement of the issue on the ballot renders the constitutional amendment invalid. First, because it purported to amend Section 24 Article VII when no such section existed, and secondly because the word “war” rather than attack was used in describing the amendment. In considering the validity of the arguments raised by plaintiff, it should be pointed out that Section 1, Article XXIII of the State Constitution makes no specific provision as to how the particular amendment will be set out on the ballot. The only reference in that section as to what the Legislature should cause to be done after approving the amendment is the following:

“ \* \* \* and the legislature shall cause the same to be published in at least one newspaper in every county of the state for two months immediately preceding the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state \* \* \*.”

It appears from the wording of the amendment that the founding fathers intended the voters to be appraised of the contents of the constitutional amendment by newspaper notice; and that the ballot provide some means of identifying the amendment proposed and a means of approving or rejecting it. Section 20-11-19, U.C.A. 1953,

relating to the manner of voting on public measures, states :

“The manner of voting upon measures submitted to the people shall be as follows :

The number and ballot title herein provided for shall be printed upon the official ballot, with the words ‘For’ and ‘Against’ immediately to the right thereof, each followed by a square in which the elector may place a cross to indicate his vote. Electors desiring to vote ‘for’ shall place a cross within the square following the word ‘for,’ and those desiring to vote ‘against’ shall place a cross within the square following the word ‘against.’”

In the instant case the ballot title of the Continuity of Government Amendment was set out as Constitutional Amendment Number One, plus the above recited language, and a place to vote for and against set out on the ballot. Although the above statute may be limited to referendum or initiative, it appears that there can be no objection for failure to follow the standard form of submitting matters to the “people”.

The fact that the Constitution makes requisite the publication of the proposed amendment in the newspaper cannot be passed too lightly. In the case of *Snow v. Keddington*, 113 Utah 325, 195 P.2d 234 (1948), the Utah Supreme Court was faced with an argument claiming to invalidate a proposed adoption of a constitutional amendment, because of a failure to post cards as required by 20-7-4, U.C.A. 1953. The Supreme Court, in rejecting the argument, stated:

*“It should be remembered that the amendment is not printed in full on the ballot. It is merely*

*designated thereon by number and title, as is previously indicated in this opinion. Such being the case, the notice of importance to the voter is the publication in the newspapers prior to the general election. This is the publication that permits the voter time to consider the merits or demerits of the proposed change. At most, the card in the voting booth could only be a helpful reminder of the general sense of the proposed change. Failure of the county clerk to furnish cards complete in all details might be a violation of the statute, but it would not prevent passage of the proposed joint resolution.*

Under our constitutional requirements, notice must be carried in the newspapers, and if publication was of the complete proposed joint resolution including the provision for a delayed effective date, then the mere fact that this date was not also published on the cards does not require a holding that the proposition to postpone has not been submitted to the voters. All voters throughout the state are entitled to notice, and the fact that one county clerk may or may not have included all of the necessary information on the cards is not fatal to the passage of the complete resolution. If our constitution or statutes made no provision for general publication, and provided that it was necessary that the proposed amendment and its effective date be set out in full on the ballot, then the failure to include the proposition of a delayed date might constitute a failure to submit that portion of the proposed amendment to the people. However, the probabilities and possibilities of the voter being fully informed of the context of an amendment are reasonably assured of the publication is in the newspapers. *Accordingly, the method of notice prescribed by the constitution is one reasonably calculated to give notice to the voters, and this method was here complied with. This is*

*was submitted to the voters for approval or dis-sufficient to sustain a finding that the proposed amendment including its delayed effective date approval. \* \* \**

Thus, the Supreme Court has clearly recognized that the essential notice to the voters comes not from the ballot, but from the newspapers, and that the ballot merely provides a vehicle for expressing the voters' feelings on the issue. Adding to the argument that the ballot is to provide nothing more than a vehicle for expressing favor or disfavor on a proposed amendment is 20-3-41, U.C.A. 1953, which provides that Secretary of State shall, with reference to such proposed amendments:

*“ \* \* \* certify the same to the county clerk of each county, designating such amendment or question by number and also by a title which shall cover the subject matter of the amendment or question submitted \* \* \*.”*

It is clearly manifest that what appears on the ballot need be only a reference to the amendment sufficient to identify the subject matter so as not to confuse the voter as to *other similar* propositions that may be on the ballot. When considered in this light it becomes clear that the proposed amendment was not faulty for failure to be properly submitted to the electorate. It is clear that the amendment need not be set out in full, *Snow v. Kedding-ton*, *supra*; *Jones v. McDade*, 200 Ala. 230, 75 So. 988; see 16 C.J.S. Constitutional Law., p. 57, where it is said:

*“The ballot need not contain the amendment in full since it is presumed that every voter received the benefit of notice through publication in extenso of the proposed amendment.”*



The rule is well stated by the Supreme Court of Louisiana in *Hotard v. City of New Orleans*, 213 La. 843, 35 So.2d 752, where the court said:

“The second ground of attack upon the validity of the constitutional amendment is that the voters were not properly notified or informed of the contents or provisions of the amendment. All that the Constitution—Section 1 of Article 21—requires in that respect is that the Secretary of State shall cause the proposed amendment to be published in a newspaper in each parish in which a newspaper is published, twice within not less than 30 days nor more than 60 days preceding the election at which the amendment is to be submitted to the voters. It is admitted that the Secretary of State did cause this amendment to be published in full in one newspaper in every parish in the state, twice within not less than 30 nor more than 60 days preceding the election at which the amendment was voted upon. It appears in some of the briefs for the appellants— and was revealed in their oral arguments—that they have confused the manner of submitting constitutional amendments on the printed ballots with the manner in which notice shall be given by publication in the newspapers. The publication in the newspapers gives the voters full information as to the contents or provisions of a proposed constitutional amendment. *All that is required to be printed on the ballot is sufficient information to identify the proposed amendment which the voter is voting for or against.* \* \* \*”

In applying this rule to the facts of this case, and recognizing that the statutory limitations of 20-3-41, U.C.A. 1953, merely requires that the ballot refer to the subject matter to be considered, it appears clear that the

ballot was sufficient. The Constitution was being considered for amendment on two questions, one concerning the amendment to preserve the continuity of government in the event of enemy attack, and the other a tax exemption matter. It appears clear that as between the two propositions under consideration, no confusion could result. Plaintiff objects because the word “war” was used rather than “attack”. The words are not so dissimilar as to be confusing. Pearl Harbor was an attack; would anyone deny it was not also war? The similarity of meaning is pointed up by comparing Webster’s definition of attack:

“Act of falling on with force or violence,”

with that of war:

“The state or fact of exerting force or violence against another.”

The dissimilarity, if any exists, appears purely semantic. It seems clear that the wording of the amendment was sufficient to satisfy the subject matter requirements, since all express or implied powers created by a proposed amendment need not be set out. *State v. Hess*, 133 Ore. 91, 288 Pac. 505; *Swain v. Tuscaloosa County*, 103 So.2d 769 (Ala. 1958).

There is no question but what Article VII, Section 24 amends the Constitution by adding a new section and new subject matter, but the imperfections of title are not those confusing of subject matter. The test is clearly one of substantial compliances, and this having been done, plaintiff cannot complain. *Opinion of the Justices*, 104 So.2d 696 (Ala. 1958).



The language of the Utah Supreme Court is applicable to this situation in a case where the court was also faced with a technical claim of an erroneous title. In *Salt Lake City v. Tax Commission*, No. 9347 (10 February 1961), the Court said:

"We think that a reading of the whole title and the whole act \* \* \* may be an indictment of legislative articulation, but not legislative intent."

By the same standard, the ballot title relating to the continuity of government may be somewhat inarticulate, but there is no confusion as to the subject matter to be passed on by the people.

On this basis it is submitted that no basis for disapproving the adoption of the amendment exists.

The rule is that the form of the ballot should be in the form, if any, prescribed by the Constitution. 16 C.J.S., *Constitutional Law*, Sec. 9 However, the Utah Constitution makes no specific requirements as to the form of the ballot. Therefore, "on submission of a proposed constitutional amendment, all that is required to be printed on the ballot is sufficient information to identify the proposed amendment which the voter is voting for or against." 16 C.J.S., p. 57; *Hotard v. City of New Orleans*, supra. In the instant case the title does not confuse as to the subject of the amendment, and clearly distinguishes it from other propositions

Article VII, Section 24, therefore, was properly adopted, and the minor irregularities on the ballot that did not relate to another subject matter are of no importance.

#### POINT IV.

THE PROPOSED CONSTITUTIONAL AMENDMENT DOES NOT VIOLATE ARTICLE IV, SECTION 4 OF THE FEDERAL CONSTITUTION NOR AMEND OR CONTRADICT ARTICLE I, SECTION 2 OF THE UTAH CONSTITUTION.

On the trial level and in his complaint the plaintiff contends that the proposed constitutional amendment is void because of a substantive reasons; that it violates Article IV, Section 4 of the Federal Constitution, and that it amends Article I, Section 2, of the Utah Constitution, doing so without allowing a separate vote thereon. The last contention is a procedural objection previously answered.

Article IV, Section 4 provides in its relevant portions:

“The United States shall guarantee to every State in this Union, a republican form of government  
\* \* \* .”

In *Luther v. Borden*, 7 How. 1 (1849), the United States Supreme Court ruled that this section was not one with which the judiciary should be concerned since it was related to “political matters.” Thus the court held it was without jurisdiction to pass upon a question raising this issue. Professor Corwin, commenting on this provision, notes:

“‘The United States’ here means the governing agency created by the Constitution, but especially the President and Congress; for the Court has repeatedly declared that what is a ‘republican form of government’ is a ‘political question,’ and one finally for the President and the houses to determine within their respective spheres.”

Corwin, *The Constitution and What it Means Today*, 12th Ed., p. 174.

The fact that there may be a great deal of “direct government” does not make a government “unrepublican.” *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U.S. 118 (1912). Therefore, it is submitted that the argument is not one that this Court may hold to void the amendment.

Nor is the present amendment in any fashion unrepublican for it provides for a continuation of representation through persons able to carry on where otherwise martial rule or some other military government would be necessary. It should be noted that the amendment applies “in periods of emergency resulting from disasters caused by enemy attack.” In *Ex Parte Milligan*, 4 Wall 2 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1945), the United States Supreme Court held that as long as the civilian courts were open and civil government was able to function, there was no need for military government. A reading of the facts of these two cases reveals the unfortunate consequences that can result from military rule. During the course of martial law civilians may be administratively ruled by the complete executive authority of the military. Fairman, *The Law of Martial Rule*, 2nd Ed. (1943); *Civil Law*, Department of the Air Force, AFM 110-3, p. 289. They may be judicially tried by provost courts or military commissions, and are not directly entitled to be treated as military personnel subject to the Uniform Code of Military Justice, and hence are denied the safeguards contained

therein. See Richardson, *A State of War and the Uniform Code of Military Justice*, 47 ABAJ 792 (1961). In *Ex Parte Milligan*, *supra*, the United States Supreme Court said of martial law:

“That in a time of war the commander of an armed force (*if in his opinion the exigencies of the country demand it*, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within the limits, *on the plea of necessity*, with the approval of the Executive, substitute military force for and the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the ‘military independent of and superior to the civil power.’ ”

Although martial law was not wholly approved, and is not always carried so far, it is recognized as the law of necessity, and when the “necessity” is present it may be carried to such extremes, limited only by “necessity”. Corwin, *supra*, p. 122-123. Thus, if the discretion of the military commander is limited only by “necessity”, and

the necessity in wartime is as was noted in the *Minnesota Moratorium Case*, 290 U.S. 398, 426:

“[the] power to wage war, successfully, and thus permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation.”

If this discretion based on “necessity” is legal, as it is where real necessity decrees, Walker, *Military Law*, p. 474, et seq., then certainly the same powers are legal where necessity decrees when exercised by civil officers acting under approved constitutional authority.

The Executive Office of the President, Office of Civil and Defense Mobilization, in the volume *Continuity of Government* (1959) speaks of the purposes of the amendment in the following terms:

“The last decade has witnessed the evolution of the nuclear weapon. Meanwhile, the traditionally important military factors of time and distance have been all but removed by the development of ballistic missile capabilities.

The concept of modern war (which involves principally the doctrine of deterrence through the strategies of ‘massive retaliation’ and ‘counter-force superiority’) demands that measures be undertaken to increase the effective defense of our civilian society and this Nation’s traditional form of government. This is true primarily because of the destruction which would result to our industrial and population centers if an enemy attack is thrust upon us either through inadvertence or the failure of deterrence.

The capability of this Nation to survive an enemy attack will be determined by the state of readiness



of both our military and non-military defenses. Non-military defense is comprised of two principal elements, i.e. civil defense and defense mobilization. \* \* \* \*

The obvious need in many States for legislation to establish a sound legal basis upon which State and local governments can formulate their emergency government plans has prompted the Executive Office of the President, through the Office of Civil and Defense Mobilization (with the assistance of the Columbia Legislative Drafting Research Fund of Columbia University Council for Atomic Age Studies), to prepare the suggested legislation contained in this book. The legislation is designed to permit the States and their political subdivisions to accomplish the first and third of the foregoing objectives.

In addition, the development of the capability by State and local governments to continue functioning in the event of attack will assure, to the greatest degree possible, that the invocation of Martial Law will not be necessary. Military government is the antithesis of civil government. If the States, counties, and cities carry out a continuity of government program, they will make a substantial contribution toward guaranteeing that recovery of the Nation will be accomplished under the direction of civil authority. This will facilitate the maintenance of the Nation in accordance with our traditional concepts of constitutional government.”

Therefore, the amendment is directed towards preserving the republican form of government in the face of circumstances where anarchy would otherwise result. The plain-

tiff has strongly attacked the portion of the amendment which provides :

“ \* \* \* In the exercise of the powers hereby conferred the legislature shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the legislature so to do would be impracticable or would admit of undue delay.”

But these powers are no different than the same discretionary powers exercised in proclaiming martial law except less severe. In addition, a reasonable standard of “impracticability” and necessity govern their use. This is a sufficient legal standard. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Dennis v. United States*, 341 U.S. 494 (1951). As was noted in *Continuity of Government*, p. 9:

“For another thing, the amendment itself is explicit on the matter of limitations. It lays down the general standard that the Legislature must conform to the Constitution of the State in all that it does in exercise of the new powers. To be sure, the general standard is immediately followed by an exception under which the Legislature is permitted to deviate from those requirements when in its judgment conformity would be impracticable or would admit of undue delay. The fact that the determination of the question whether and how far to deviate is entrusted to the judgment of the Legislature without recourse to the courts (as would have been possible if the amendment spoke in terms of ‘findings’ by the Legislature) should not cause any great apprehension. There is nothing novel in the idea that Legislatures may take decisions, indeed final decisions, on constitutional questions. As a matter of fact,

the trend in the Supreme Court of the United States is toward a larger acceptance of the legislative judgment as to the permissible range of legislative power. The trend is almost pronounced in respect of legislation for the regulation of economic affairs, but it is also noticeable in respect of legislation affecting civil liberties. Sometimes the Court goes further and disavows jurisdiction altogether in cases where it deems the constitutional question more appropriate for disposition by political rather than judicial processes. For example, the Court will have nothing to do with the question whether the scheme of government set up by a State constitutes a 'republican form of government' as guaranteed to the States by the Constitution; rather it leaves the matter to the attention of the political branches, Congress or the President or both."

On this basis it must be noted that there is no substantive violation of Article IV, Section 4 of the United States Constitution.

The claim of violation of Article I, Section 2 of the Utah Constitution, which provides:

*"All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require."*

is equally invalid for the same reasons set out above. It should be noted that this provision give the people the right to "alter or reform their government as the public welfare may require."

This is what Article VII, Section 24 has made provision for in the event of necessity occasioned by enemy attack.



This, in addition, accords with Article I, Section 1 of the State Constitution, providing:

“All men have the inherent and inalienable right to enjoy and defend their lives and liberties.”

This is the functional purpose of Article VII, Section 24, and, therefore, no substantive objection to its provisions exists.

The contention that Article I, Section 2 is amended is, therefore, incorrect.

## CONCLUSION

The above points have attempted to analyze the objections made by plaintiff to the adoption of Article VII, Section 24 of the State Constitution, raised in his complaint and argument in the proceedings before the trial court. It is submitted that none of the matters complained of work to void the amendment, and therefore, the trial court erred in granting summary judgment declaring Article VII, Section 24 void and of no effect. This Court should reverse.

Respectfully submitted

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