

1961

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

Utah Supreme Court

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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, SHER-
MAN J. PREECE, State Treas-
urer; SID LAMBOURNE, State
Auditor, and WALTER L. BUDGE,
Attorney General, members of the
Board of State Canvassers,

Defendants and Appellants.

FILED

1 1961

C. Supreme Court, Utah

Case
No. 9530

BRIEF OF RESPONDENT

JACK L. CRELLIN,
JAMES L. BARKER, JR.,
NORMAN W. KETTNER,
A. M. MARSDEN,

Attorneys for Respondent.

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Defendants and Appellants.

Case
No. 9530

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The statement of facts as set forth in appellants' brief, together with the facts as stipulated by the parties in the lower court (R. 21-24) constitute all the facts material to this appeal.

STATEMENT OF POINTS

POINT I.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE DID NOT RECEIVE SUFFICIENT VOTES FOR RATIFICATION.

POINT II.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE AMENDS ARTICLE XXIII, SECTION 1, OF THE CONSTITUTION OF THE STATE OF UTAH AND IS VOID FOR THE REASON THAT SUCH AN AMENDMENT WAS NOT SUBMITTED SEPARATELY TO THE ELECTORS FOR RATIFICATION.

POINT III.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE WAS NOT SUBMITTED TO THE ELECTORATE IN A CONSTITUTIONAL AND LAWFUL MANNER.

POINT IV.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE IS VOID IN THAT IT AMENDS ARTICLE I, SECTION 2, OF THE CONSTITUTION OF THE STATE OF UTAH AND SUCH AMENDMENT HAS NEVER BEEN PUBLISHED NOR SEPARATELY SUBMITTED TO THE ELECTORS OF THIS STATE FOR THEIR RATIFICATION AS REQUIRED BY ARTICLE XXIII, SECTION 1, OF SAID CONSTITUTION.

ARGUMENT

POINT I.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE DID NOT RECEIVE SUFFICIENT VOTES FOR RATIFICATION.

Article XXIII, Sec. 1, of the Constitution of the State of Utah, relating to amendments thereto as proposed by the Legislature, provides in part as follows :

“* * * 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 the Constitution.” (Emphasis added.)

It has been generally held that language identical and similar to that employed in the above quoted portion of our constitution requires only the approval by a majority of those voting upon the amendment. *Green v. State Board of Canvassers*, 5 Ida. 130, 47 P. 259, 95 Am. S. R. 169; *In re Todd*, 208 Ind. 168, 193 N.E. 865; *State v. State Board of Canvassers*, 44 N. D. 126, 172 N.W. 80. There is authority to the contrary, however. *State v. Brooks*, 17 Wyo. 344, 99 P. 874, 22 L. R. A., N.S. 478.

We must look to the remainder of the existing constitutional provisions pertaining to its amendment in order to determine what was intended by the framers of our constitution in adopting the above quoted section. It will be noted that Section 3 of Article XXIII, relating

to the ratification by the electorate of amendments proposed by constitutional convention, provides that:

“No Constitution, or amendments adopted by such convention, shall have validity until submitted to, and adopted by, *a majority of the electors of the State voting at the next general election.*” (Emphasis added.)

Such terminology as that used in said Section 3 above has been uniformly held to require a major part of the highest vote cast for any purpose at the election wherein the proposed amendment is submitted for ratification by the people. *11 Am. Jur.*, Constitutional Law, Sec. 31; *16 C. J. S.*, Constitutional Law, Sec. 10; *People v. Stevenson*, 281 Ill. 17, 117 N. E. 747; *State v. Cato*, 131 Miss. 719, 95 So. 691; *State ex rel. Hayman v. State Election Board*, 181 Okla. 622, 75 P. 2d 861.

The question thus reduces itself to the following inquiry: Did the framers of the Constitution of this state intend to require a greater proportion of the electorate to ratify an amendment proposed by a constitutional convention than that required to ratify an amendment proposed by the Legislature? Logic would necessarily dictate a negative answer. By either procedure the fundamental law of the state is subject to changes which would have equal effect upon the rights of the people. To allow a minority of the electorate to change the organic law of this state in one instance and not the other would be clearly inconsistent and without merit or cause. It would be an injustice to impute such inconsistency to the considered judgment of those who framed

the constitution. Common sense would dictate that constitutional changes should not be ratified by a minority of voters. It is, therefore, entirely consistent with reason to conclude that the original authors of our Constitution intended that amendments thereto, whether proposed by the Legislature or a constitutional convention, should be ratified only by the affirmance of a majority of the total electors participating in the general election at which such amendment is voted upon.

In accordance with the above rules, it is clear that Proposed Amendment Number One did not receive the requisite number of votes for adoption. According to the records of the Secretary of State, there was a total number of 374,981 electors who voted in Utah in the 1960 General Election. (See Exhibit "B" attached to the complaint.) The highest vote cast for any purpose at the general election held on November 8, 1960, was for President of the United States which totaled 374,609, followed by that for Governor totalling 371,489. The total vote in favor of Proposed Constitutional Amendment Number One was 171,762. (See Exhibit "A" attached to the complaint.) Thus the total votes in favor of said amendment consisted of less than 46 per cent of the total number of voters participating in said election, less than 46 per cent of the vote cast for President and slightly more than 46 per cent of the total vote for Governor. Under these circumstances and the law applicable thereto, Proposed Constitutional Amendment Number One did not receive sufficient votes for ratification.

POINT II.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE AMENDS ARTICLE XXIII, SECTION 1, OF THE CONSTITUTION OF THE STATE OF UTAH AND IS VOID FOR THE REASON THAT SUCH AN AMENDMENT WAS NOT SUBMITTED SEPARATELY TO THE ELECTORS FOR RATIFICATION.

Article XXIII, Section 1, of the Utah Constitution, relating to amendments thereto, provides in part as follows:

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

Proposed Constitutional Amendment Number One purported to amend Article VII of the constitution, relating to the Executive Department of the state, by adding thereto a new section 24. However, the very last sentence of said proposed amendment provides as follows:

“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.*” (Emphasis added.)

The italicized portion of the above quote clearly abolishes all our constitutional guarantees and, in fact, makes it possible for the legislature to amend or render ineffective all, or any part of the present organic law of this state, including that portion relating to courts and judicial review, through the simple expedient of legislative

“judgment.” That such a result was intended and the gradual process of constitutional erosion thereunder has actually begun may be graphically illustrated by the legislation adopted in anticipation of the ratification of Proposed Constitutional Amendment Number One. House Bill No. 81, passed by the Legislature on March 12, 1959, to become effective upon the approval of Proposed Constitutional Amendment Number One by the electorate at the 1960 general election, permits the establishment of an emergency seat of government within or without the State of Utah in contravention to Article XIX, Section 3, of the constitution of this state which permanently locates the seat of government at Salt Lake City. House Bill No. 82, which was passed on the same date as House Bill No. 81 and was to become effective upon the same date as the latter, abolishes all qualifications of state executive officers other than that of taking an oath of office during periods of “attack” contrary to the requirements of Article VII, Section 3, of the present constitution. Section 9 of said House Bill No. 82 provides as follows:

“At the time of their designation, emergency interim successors and special emergency judges shall take such oath as may be required for them to exercise the powers and discharge the duties of the office to which they may succeed. *Notwithstanding any other provision of law, no person, as a prerequisite to the exercise of the powers or discharge of the duties of an office to which he succeeds shall be required to comply with any any other provision of law relative to taking office.*” (Emphasis added.)

House Bill No. 83 which was likewise passed on March 12, 1959, to become effective upon the adoption of Proposed Constitutional Amendment Number One, abolishes quorum and majority requirements for the transaction of business by the legislature in the event of an attack in absolute violation of the mandatory requirements of Article VI, Section 11, of the Utah Constitution by virtue of Section 14 of said House Bill No. 83, which reads as follows:

“In the event of attack, (1) quorum requirements for the legislature shall be suspended, and (2) where the affirmative vote of a specified proportion of members for approval of a bill, resolution or other action would otherwise be required, the same proportion of those voting thereon shall be sufficient.”

It is, then, too clear for argument that the legislature itself has already undertaken to amend existing constitutional provisions by virtue of the authority contained in said Proposed Constitutional Amendment Number One without conforming to the requirements of Article XXIII of the present constitution. The above quoted wording of the proposed amendment clearly permits such action by the legislature. It therefore constitutes an amendment to said Article XXIII, and indeed permits the absolute abolition of the entire organic law of this state, without the same having been approved by the people in the manner presently prescribed by that section of the constitution. The rule of law applicable to this situation is

succinctly stated in *11 Am. Jur.*, Constitutional Law. Sec. 32, as follows:

“The general rule is that an amendment to a Constitution does not become effective as such unless it has been duly adopted in accordance with the provisions of the existing Constitution. (Citing cases.) The procedure and requirements established for the amendment of the fundamental law are mandatory and must be strictly followed (citing cases), in order to effect a valid amendment. (Citing cases.) None of the requisite steps may be omitted. (Citing cases.)”

AN ATTEMPT BY A MAJORITY OF THE PEOPLE TO CHANGE THE FUNDAMENTAL LAW IN VIOLATION OF EXISTING CONSTITUTIONAL RESTRICTIONS PREVIOUSLY IMPOSED BY A MAJORITY OF THE PEOPLE IS UNCONSTITUTIONAL AND REVOLUTIONARY. *11 Am. Jur.*, Constitutional Law, Sec. 25, and cases therein cited. Thus it was stated in *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1, 18, Ann. Cas. 1915C, 200, writ of error dismissed in 231 U. S. 250, 58 L. Ed. 206, 34 S. Ct. 92, citing *McBee v. Brady*, 15 Ida. 761, 100 P. 99, that:

“The constitution is the fundamental law of the state. It received its force from the express will of the people, and in expressing that will the people have incorporated therein the method and manner by which the same can be amended and changed, and when the electors of the state have incorporated into the fundamental law the particular manner in which the same may be altered or changed; then any course which disregards that express will is a direct violation of that fundamental law.”

And in the case of *McBee v. Brady*, supra, it was further stated as follows:

“* * * where the validity of a constitutional amendment depends upon whether (existing) provisions have been complied with, such question presents for consideration and determination a judicial question, and the courts of the state are the only tribunals vested with power under the Constitution to determine such questions. * * * Whether the constitutional method has been pursued is purely a judicial question, and no authority is vested in any officer, department of state, body politic, or tribunal, other than the courts, to consider and determine that matter.”

In the case of *Bott v. Wurts*, 63 N. J. Law 289, 43 A. 744, 45 L. R. A. 251, the court stated:

“* * * If a legislative enactment, which may be repealed in a year, or an executive act, which affects only a single individual, cannot be allowed to stand, if it contravenes the Constitution, a fortiori a change in the fundamental law, which is much more permanent, and affects the whole community, should not be permitted to take place, in violation of constitutional mandates.”

And it was said in *Collier v. Frierson*, 24 Ala. 100:

“* * * The Constitution is the supreme and paramount law. * * * The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the Legislature or any other department of the government can dispense with them? To do so would be to violate the instrument which they are sworn

to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law.”

In view of the foregoing and the rule of our own Supreme Court that the Constitution can be amended only in the manner prescribed by Article XXIII thereof (*White v. Welling*, 89 U. 335, 345, 57 P. 2d 703), respondent urges this court to affirm that Proposed Amendment Number One is void on the ground that it amends said Article XXIII of the Constitution and that such amendment was never published nor submitted separately to the electors of this state for their approval or rejection as required by said Article XXIII.

It is no argument to state, as have the appellants in their brief, that the subject matter of the proposed amendment, i. e., the continuity of government in periods of disaster or emergency due to enemy attack, meets the single object test for constitutional amendments because its unlimited breadth can be succinctly stated. The stark fact remains that the “continuity of government” contemplated under the proposed amendment as evidenced by the legislative enactments adopted thereunder, is as foreign to our constitutional form of government as the most autocratic and dictatorial regime. If any portion, or all, of the constitutional guarantees to the people of this state can be altered or abolished by action of the legislature to “insure continuity of state and local government” under any circumstances, our constitution and the organic law of this state become meaningless.

It should be borne in mind that the same legislature which assumed to abolish qualifications of public officers, the location of the seat of our state government and the quorum requirements of the legislature under the proposed amendment could likewise abolish our courts and judicial system and, indeed, every aspect of constitutional government as we know it. To say that this alternative to historical martial law under conditions of necessity is preferable to the latter would seem unbelievable, if it were not for awareness of world-wide forces presently attempting to destroy our form of government, if possible, through insidious innovations in our own organic law. The grant to politicians of martial law power would be anarchy in its most loathsome form, and the single concept of "continuity of government" cannot give to the proposed amendment such celestial sanctity and organic omnipotence in law as to embrace every conceivable constitutional amendment or abolition within its infinite framework.

The fact remains that the proposed amendment alters, amends and, indeed, may abolish the amendment section of our state constitution and thereby permits every other part of the Utah Constitution to be subjected to the same treatment without the benefit of submission to the electorate. No such amendment to Article XXIII, Section 1, of the Utah Constitution has been separately submitted to the voters. To permit the amendment of the very section of the constitution relating to its alteration by the adoption of the proposed amendment renders the constitution a nullity. Our constitution con-

templates that it is subject to “*separate*” amendments. The appellants’ contention is that it is not and that the all inclusive nature of the proposed amendment justifies its mastery of our entire constitution. Not one single case cited by appellants so holds. Such a position is untenable and this court should affirm the decision of the lower court upon this point.

POINT III.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE WAS NOT SUBMITTED TO THE ELECTORATE IN A CONSTITUTIONAL AND LAWFUL MANNER.

Article XXIII, Section 1 of the Constitution of the State of Utah, relating to amendments thereto, provides in part as follows:

“* * * *said amendment or amendments* shall be submitted to the electors of the State for their approval or rejection, and if a majority of electors voting thereon shall approve the same, *such amendment or amendments* shall become part of this Constitution.” (Emphasis added.)

Section 2 of the joint resolution of the State Legislature passed March 12, 1959, proposing to amend Article 7 of the Constitution of the State of Utah by adding a new section thereto, designated Section 24, provides as follows:

“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.”

Constitutional amendments must be submitted to the electorate in such a manner that the clear intent of the people can be expressed thereon. As a bare minimum this requirement includes a clear statement on the ballot of the nature and scope of the proposed amendment. As was stated by the Supreme Court of Pennsylvania in the case of *Commonwealth v. Beamish*, 309 Pa. 510, 164 A. 614:

“The Constitution is the fundamental law of our commonwealth, and, in matters relating to alterations or changes in its provisions, the courts must exercise the most rigid care to preserve to the people the right assured to them by that instrument. No method of amendment can be tolerated which does not provide the electorate adequate opportunity to be fully advised of proposed changes.”

The statement on the Utah ballot rather than being a clear and concise statement of the nature and purpose of the proposed amendment was actually deceptive and misleading. The proposition as submitted to the voters was stated thusly:

“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.”

It seems doubtful that a ballot title could be drafted that is more misleading than the above. In the first place, prior to the amendment, there was no Article VII, Section 24 to amend. The question is phrased in such a way as to express a completely false hypothesis to the people. From the ballot title it appeared to the public that a pro-

vision then existed relating to the same subject and the people were being asked merely to modify it rather than being asked to enact something completely foreign to the Constitution and Constitutional government as it then existed. A completely new idea or enactment is always harder to win approval for than a modification of an existing principle. It appears, therefore, that reaction of the people to the misstatement of the nature of the amendment to the constitution was favorable to its alleged adoption.

In addition to completely misstating the procedural portion of the amendment, the ballot title also misstates the substance of the amendment. The amendment provides that the Legislature may suspend the Constitution in "periods of emergency resulting from disasters caused by enemy attack," whereas the ballot title provides for "temporary emergency powers to the Legislature in the event of war or emergency caused by war." The difference in the two statements is obvious. In the first place the ballot speaks of "temporary emergency powers to the Legislature." The amendment itself says nothing about "temporary" powers but confers upon the Legislature permanent powers to annul Constitutional guarantees when "in the judgment of the Legislature" to conform to the Constitution "would be impracticable or would admit of undue delay." The powers of the Legislature in this respect are not temporary at all, but are permanent.

The last part of the ballot title implies that temporary powers will be granted only in the event of war.

The amendment grants powers “in periods of emergency resulting from disasters caused by enemy attack.” This is certainly much broader than the limitations of the ballot title. Only Congress has the power to declare war but it appears under the amendment that anyone can declare an emergency exists resulting from disasters caused by enemy attack. The law concerning sufficiency of ballot title is clearly and concisely set out by the Arkansas Supreme Court in the case of *Bradley v. Hall*, 220 Ark. 925, 251 S.W. 2d 470 (1952) as follows:

“On the one hand, it is not required that the ballot title contain a synopsis of the amendment or the statute * * *. It is sufficient for the title to be complete enough to convey an intelligible idea of the scope and import of the proposed law. * * * We have recognized the impossibility of preparing a ballot title that would suit every one. * * * Yet, on the other hand, the ballot title must be free from ‘any misleading tendency, whether of amplification, of omission, or of fallacy,’ and it must not be tinged with partisan coloring. * * *

“It is evident that before determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment. For the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving.”

Applying these standards, it is abundantly clear that the ballot title in the instant case was so confusing in respect to the proposed amendment and so tinged in favor of adoption thereof that the electorate of this state was deprived of its constitutional guarantees in passing thereon.

POINT IV.

PROPOSED CONSTITUTIONAL AMENDMENT NUMBER ONE IS VOID IN THAT IT AMENDS ARTICLE I, SECTION 2, OF THE CONSTITUTION OF THE STATE OF UTAH AND SUCH AMENDMENT HAS NEVER BEEN PUBLISHED NOR SEPARATELY SUBMITTED TO THE ELECTORS OF THIS STATE FOR THEIR RATIFICATION AS REQUIRED BY ARTICLE XXIII, SECTION 1, OF SAID CONSTITUTION.

Article I, Section 2, of the Constitution of the State of Utah, provides as follows:

“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.”

It is clear that the proposed Constitutional Amendment Number One provides that the Legislature shall have power to “*adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations*” and shall thereby conform to Constitutional requirements “*except to the extent that in the judgment of the legislature so to do would be impractic-*

cable or would admit of undue delay.” The latter portion of the amendment makes a worthless document of our Constitution. Not only does it allow the Legislature to change the form of government contrary to the above quoted Article I, Section 2, of the Constitution, but it also permits the abolishment of executive and judicial functions under the present Constitution which has served historically as the cornerstone to our freedoms by providing a unique and much needed system of “checks and balances” between the various branches of government. It would permit the abolition or change of every aspect of our cherished fundamental law and inherent political power — all by virtue of an unlawful, minority grant of power to the Legislature to determine the existence of an emergency caused by an undefined “enemy attack” and to thereafter disregard any and all constitutional requirements which, in the judgment of the legislature, “would be impracticable or would admit of undue delay” in providing for continuity of “governmental operations.” The obvious objective of those who would deprive us of our freedom is apparent in the insidious and fraudulent provisions of Proposed Amendment Number One.

CONCLUSION

It has been aptly stated that “*history is a hard teacher because she gives the test first and the lesson afterwards.*” The lesson to be taught by the adoption of Proposed Constitutional Amendment Number One is fortunately before this court before its constitutional

blockbusting has reached fruition. That the concentration of our state government could be accomplished in any foreign power under its leadership seems absurd. That it could be done under and by virtue of our own constitution leads one to wonder as to the care exercised by our 20th century lawmakers in preserving our freedoms. The judgment of the lower court should, and must, be affirmed.

Respectfully submitted,

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