

1969

Calvin L. Rampton, Governor of the State of Utah, and The State Of Utah v. Haven J. Barlow, President of the Senate of the State of Utah and Lorin N. Pace, Speaker of the House Of Representatives of the State of Utah, Et Al.: Brief of Defendants and Respondents

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

CALVIN L. RAMPTON, Governor
of the State of Utah, and the STATE
OF UTAH,

Plaintiffs and Appellants,

vs.

HAVEN J. BARLOW, President of
the Senate of the State of Utah, and
LORIN N. PACE, Speaker of the
House of Representatives of the State
of Utah, et. al.,

Defendants and Respondents.

Case No. 11725

BRIEF OF DEFENDANTS AND RESPONDENTS

An Appeal from the Judgment of the District
Court of Salt Lake County, State of Utah
Honorable Merrill C. Faux *Judge*

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BRIEF OF DEFENDANTS AND RESPONDENTS

NATURE OF CASE

The statement of case is adequately set forth in the appellants' brief.

DISPOSITION IN LOWER COURT

The appellants filed suit in the District Court of the Third Judicial District challenging the constitutionality of Section 5(1), Senate Bill 10, 38th Legislature of the State of Utah, 53-48-5 Utah Code Annotated, 1953, known as the Higher Education Act of 1969. Answer was duly filed and the matter submitted to the trial court on the pleadings. The matter was heard before the Honorable Merrill C. Faux, District Judge, and on the 25th day of June, 1969, judgment was entered declaring that the challenged statute was constitutional.

RELIEF SOUGHT ON APPEAL

Repondents submit this court should affirm the decision of the Utah District Court.

STATEMENT OF FACTS

The statement of facts is adequately set forth in appellant's brief.

ARGUMENT

I

ARTICLE VII, SECTION 10 OF THE CONSTITUTION OF UTAH PERMITS THE LEGISLATURE TO MAKE APPOINTMENTS TO STATE OFFICES WHICH IT CREATES.

The principal basis upon which the plaintiff rests his case is Article VII, Section 10 of the Constitution of Utah. It is the plaintiffs' claim that the provisions of Senate Bill 10, Section 5(1), passed by the 38th Legislature of the State of Utah, 53-48-5, U.C.A., 1953 (Higher Education Act of 1969) providing for the appointment of three resident citizens to the State Board of Higher Education by each the President of the Senate and the Speaker of the House of Representatives, impinges upon the Governor's executive right to appoint officers of the state.

Insofar as the Article VII, Section 10, is pertinent here, it provides as follows:

"The Governor shall nominate, and by and within the consent of the senate, appoint all state and district offices whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for . . ."

Defendants contend that this provision requires the

governor to nominate and appoint *state* and *district* officers in two situations: First, where the offices are created by the Constitution, and second, where new offices are created by law which does not provide for their appointment or election.

The plaintiff interprets this language to mean that:

“ . . . the foregoing provision was intended to place in the governor, as chief executive officer of the state, the power to appoint all executive officers whose election or appointment is not otherwise provided for in the constitution.”

However, the portion of the Constitutional section involved does not support this conclusion. The section in clear language clearly establishes two areas wherein the Governor is directed by the Constitution to make appointments. Article VII Section 10. First, he:

“ . . . shall nominate, and by and with the consent of the Senate, appoint all state and district officers whose offices are established by this Constitution, . . . ”

Second, he shall appoint officers to fill offices:

“ . . . which may be created by law, *and whose appointment or election is not otherwise provided for.*” (Emphasis ours.)

The petitioner interprets the language “otherwise provided for” to refer to the Constitution. Had this been the intent of the framers of the Constitution, the provision would simply have stated that:

“The governor shall nominate, and by and with the consent of the senate, appoint all state and district officers whose offices are established

by this constitution or created by law, except as otherwise provided herein."

A grammatical reading of the provision also demonstrates the folly of plaintiff's strained interpretation. The main clause of the sentence is:

"The governor shall nominate, and by and with the consent of the senate, appoint all state and district officers whose offices are established by this constitution, . . ."

This expresses a complete thought. More simplified, the main thought could be stated as follows:

"The governor shall appoint and nominate all state and district constitutional officers."

The second half of the sentence is a subordinate qualifying clause, which limits the main clause. The prepositional phrase "provided for" refers back to the closest noun in the same clause, so that the grammatical sense becomes, and whose appointment or election is not otherwise provided for "by law." If the prepositional phrase "provided for" is made to refer to the noun "constitution" which appears in the previous main clause, violence is done to a settled principal of English grammar which we should assume the authors of our Constitution understood. But as will appear, there are far more weighty considerations which compel an unstrained interpretation of this provision.

The plaintiff suggests that since various provisions of the Constitution, relating to the organization and duties of certain officers and agencies established by the

Constitution use the language "except as otherwise provided by law," or its equivalent, that the language of Article VII, Section 10 "whose appointment or election is not otherwise provided for" was intended to mean "provided for in the constitution." However, if an accurate grammatical reading of the constitutional section is made, the preposition phrase "provided for" refers to "by law." A proper grammatical reading of the sentence as it is written, makes this section entirely consistent in construction and form with the neighboring sections. An awkward and unnecessary repetition of terms would have resulted, i.e., ". . . or which may be created by law, and whose appointment or election is not otherwise provided for" *by law*.

The appointive power of the governor is conferred in the cases of future legislation to those instances where the legislature has not made other provision for appointment. The power to make appointments to public office does not inherently belong to the Governor, but must be derived from the Constitution or statutes implementing it. Nor does the appointive power necessarily belong to the executive branch of government. 38 *Am. Jur.* 2d, Governor, Section 5, p. 935, 42 *Am. Jur.*, Public Officers, Section 93. The Utah Constitution is not one of grant, but one of limitation, and consequently the Legislature is not restricted in its enactments unless the restriction is expressly or by necessary implication set forth by the Constitution itself. *University of Utah v. Board of Examiners*, 4 U.2d 408, 295 P.2d 348 (1956).

The people of the state are the main spring of

government, and it is to them that the power of selecting individuals for office inherently belongs. The power of appointment to public offices "belongs where the people have chosen to place it by their Constitution or laws." 42 *Am. Jur.*, Public Officers, Section 92. See Article I Section 2, Utah Constitution: "All political power is inherent in the people; . . ." The people through their Constitution may confer the power to make appointments upon the Governor or upon other selected or designated officers. See 67 C.J.S., Officers, Section 29, p. 157, 97 A.L.R. 2d 361. Each State Constitution is unique because the people of the various states, through their constitutions, have authorized public officers, quasi public officers or private organizations to make appointments to public offices

This principle is so well settled that it has not previously been drawn into question before the Supreme Court of our State, except in an indirect way in the case of *State ex rel Hammond v. Maxfield*, 103 Utah 1, 132 P.2d 660 (1942) where this Court had before it a case challenging the constitutionality of an act of the Legislature of 1933 which created a new body or commission known as the Engineering Commission. The act also amended some sections of the statutes of Utah relating to the State Road Commission, and provided for the termination of the tenure in office of persons then members of that commission. The act provided that members of the Engineering Commission " . . . shall serve as the members of the State Road Commission". The principal question on appeal was whether or not the Legis-

lature, as part of the plan of reorganization, could provide for the termination of the incumbency of the occupants of the offices of the State Road Commissioners on the appointment and qualification of members of the newly created Engineering Commission to serve ex officio as members of the State Road Commission. This court sustained the validity of the Act. The following is taken from the opinion:

“The courts are confronted with the principle that the power to create an office being in the Legislature, ordinarily the power to abolish it must also reside there. *At one and the same time the courts are confronted with another principle that the power to fill an office, at least if not otherwise provided for in the act creating the office, is executive and under a constitutional provision such as Art. VII, Sec. 10, of our Constitution, absent at least any contrary expression of the legislature, such power lies with the governor. . . .* (Emphasis ours).”

Of particular importance in the instance case is the language of the court to the effect that the power to fill an office, “*. . . if not otherwise provided for in the act creating the office . . .*” is executive in nature, and in the absence of contrary expression of the legislature, such becomes the governor’s prerogative. Thus the legislature clearly has the authority under the Constitution to appoint persons to the state offices.

As will be observed, Idaho, Montana and Colorado have constitutional provisions which are virtually identical to Article VII, Section 10 of the Utah Constitution.

As will appear, the Supreme Court of each of those states has interpreted this provision to mean that the legislature can appoint officers to fill offices which it creates.

The Supreme Court of Idaho in the case of *Ingard v. Barker*, 27 Idaho 124, 147 Pac. 293, 294, 295, discussed this provision in detail. There the Governor directed the Secretary of State to issue commissions as members of the State Board of Horticultural Inspection to the plaintiff and two other individuals. The secretary of state complied with the direction of the governor insofar as it pertained to one of the individuals but declined to comply with the same insofar as it pertained to the plaintiff and another, alleging that as to them the attempted appointment was void because it was in conflict with a state statute which provided:

“The State Board of Horticultural Inspectors shall consist of five (5) members, who shall be appointed by the Governor of the state, . . . ; and in making said appointments, the Governor shall consider any recommendations made by the State Horticultural Association as the proper person to be so appointed.”

The appointments of the governor were not individuals selected by the State Horticultural Association.

The plaintiff brought an original action in the Supreme Court for the purpose of securing a writ of mandate directing the defendant, as secretary of state, to issue to him a commission as a member of the State Board of Horticultural Inspection. One of the two questions submitted for decision was:

“It is competent for the legislature to provide that the State Horticultural Association shall have the right of authority to present or recommend to the governor a list of the names from which he must appoint the members of the State Board of Horticultural Inspection?”

“Section 1, art. 2, of the Constitution, provides that:

“The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and one person or collection of the persons charged with the exercise of powers properly belong to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted.”

Section 6 of article 4 provides that:

“The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for.”

“Section 1 of article 2, and section 6 of article 4 supra, have been construed by the Supreme Court of this state in the case of *In re Inman*, 8 Idaho, 398, 69 Pac. 120, and in the case of *Elliott v. McCrea*, 23 Idaho 524, 130 P. 785, to the effect that the Legislature may create an office or offices, which may be filled by appointment either by the chief executive or by any person, board, corporation, or association of individuals, and that such appointment would not be in conflict with the Constitution or an improper exercise of power

properly belonging to the executive department of the state government; and as stated by this court in the case of *Elliott v. McCrea*, supra, the Constitution itself provides the method of selection of legislative, executive, and judicial officers named in the Constitution.

“(2) The framers of the Constitution could not foresee what offices might be created by laws subsequently enacted, and so they provided that such offices should be filled by the Governor, unless the appointment or election should be otherwise provided for. The legislature, in enacting the statute in question, has exercised its constitutional right in naming and designating the officer or officers who shall make these particular appointments.

* * *

“(4) Primarily the rule is well settled by numerous authorities that, in the absence of a constitutional provision to the contrary, any one of the three departments of government may, under the authority of the statute, appoint for any class of office in any of the three governmental departments. (Citing cases.)

“(5) A state legislative body, existing by virtue of a constitutional provision, has power to enact any laws that are not expressly or by necessary implication prohibited either by the federal Constitution or by the Constitution of the state. (Citing cases including *Kimball v. Grantsville*, 19 Ut. 368, 57 P. 1, 45 L.R.A. 628.)

“(6) The power to create an office, unless otherwise provided by the Constitution, is vested in the legislative department of the government. The method of filling the office is to be determined by the Legislature, in the absence of constitutional provision. (Citing cases.)

“The power of the Legislature to pass laws regulating appointments to statutory offices is absolute, unless restrained by some constitutional provision. (Citing cases.)

“Section 6 of article 4 of the Constitution provides:

“ ‘The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for.’

“Under this constitutional provision, the Legislature has the power to create an office and provide for the filling of the same whenever such office is not established by the Constitution, and to provide for the appointment of such officer either by the chief executive or in any manner that in the wisdom of the legislature it may deem proper; there being no inhibition in the Constitution as to the creation of other offices than those named therein, but, on the contrary, there being an express recognition of such power in the following terms: ‘Or which may be created by law, and whose appointment or election is not otherwise provided for.’ Many officers in this state have been created by law that were not provided for in the Constitution, and in numerous instances the manner of their appointment has been clearly provided for by law. The chief executive in certain instances has been given the absolute power to nominate and appoint persons to fill certain offices created by the Legislature. This however, is not true in all cases. In some instances it requires the concurrence of certain state officials, whose offices are provided for by the Constitu-

tion, in order to make appointments by the Governor legal, in others the concurrence of the Senate, and in still others, the concurrence of a majority of certain boards.

“(7) That the Legislature may limit the power of the chief executive in the matter of making appointments cannot be successfully refuted.” (Citing case.)

* * *

“(8) We have therefore reached the conclusion that section 1310, Rev. Codes, as amended, supra, is constitutional and not in violation of section 1, art. 2, and section 6, art. 4 of the Constitution of this state, and that it was clearly within the power of the Legislature to enact said statutory provision.”

In the earlier case of *Elliott v. McCrea*, 23 Idaho 524, 130 P. 785, 786 (1913), the constitutionality of an Idaho House Bill was challenged because it provided for the appointment of drainage commissioners for the district by the judge of the district court of the judicial district in which the drainage district was located. The following is taken from the Court's opinion sustaining the constitutionality of the bill:

“Again, the Constitution (section 6, art. 4), provides that the Governor ‘shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for.’ The Constitution itself provides the method of selection of the legislative, executive, and judicial officers named in the Constitution. The framers of the Constitution, however, could not foresee what offices might ‘be created by

law' subsequently enacted, and so they provided that such offices should be filled by the Governor, unless the appointment or election should be 'otherwise provided for.' The Legislature in this case has 'otherwise provided.' They have clearly exercised their constitutional right in naming and designating the person or officer who shall make these particular appointments. This question has received frequent consideration by the courts, and they have almost invariably reached the conclusions we have indicated. (Citing cases.)"

The same result was reached in the case of *In re Inman*, 8 Idaho 398, 69 P. 120, where the Medical Bill of 1899 was challenged as being unconstitutional that it contravened Section 1, Article 2 of the Constitution:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Section 6, of Article 4 of the Idaho Constitution, states:

"The governor shall nominate and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for."

Petitioner claimed that since the Medical Act authorized the Governor to name and appoint the State Board of Medical Examiners, without the assent and concur-

rence of the senate, the same was in violation of the constitutional sections quoted.

The Court said:

“The act in question does not contravene either of said provisions of the constitution. Sec. 6, Art. 4, *supra*, points out the manner of filling offices whose appointment or election is not otherwise provided for by law. But in the act in question the legislature has provided, as it has power to do under the constitution, for the appointment by the governor.”

See also *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959).

It is to be noted that the language of section 6 of Article 4 of the Idaho Constitution which is given interpretation is identical to Section 10, Article VII of the Utah Constitution.

The Montana Constitution, Article VII, Section 7, is identical to Article VII, Section 10 of the Utah Constitution. The Montana provision states:

“The governor shall nominate, and by and with the consent of the Senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. . . .”

The Supreme Court of Montana in the case of *In re Terrett*, 34 Mont. 325, 333, 86 P. 266, 267, had before it an act of the 1903 Montana legislature which imposed upon the district judges the duty of appointing persons

to select bounty inspectors. Although the court held that the petitioner could not challenge this appointment in his case, it made this pertinent observation:

“However, under section 7, art. 7 of the constitution, the power to appoint or delegate the appointing power is reserved to the people, acting through the Legislature, in every instance, except in those enumerated in the Constitution. The appointment of these persons to select the bounty inspector could properly be delegated by the Legislature, as they are offices whose appointment is not otherwise provided for in the Constitution itself.”

The Colorado Constitution was adopted in 1876, twenty years before Utah became a state, and probably served as a model for our Constitution.

In the early case of *People v. Osborne*, 7 Colo. 605, 4 P. 1074 (1884), the Supreme Court of Colorado had before it an 1881 Act of the legislature which created a State Industrial School, the supervision of which was placed in the Board of Control who was to be appointed by the governor. Article 14, Section 6 of the Colorado Constitution states:

“The governor shall nominate, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, . . . If, during the recess of the senate, a vacancy occurs in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate. . . .”

The Court said:

“A comparison of the foregoing provisions of the constitution with those of section 2, *supra*, of the statute shows that, while an officer appointed to fill a vacancy by virtue of the provisions of the statute holds the office for the unexpired term of his predecessor, one appointed under the provisions of the constitution holds only until the next meeting of the senate.”

“It is evident, then, that if the offices in question had been created by the constitution, the statutory provisions for the filling of vacancies would be in conflict with the constitutional provisions on the same subject, and to the extent of the variance, the statute would be void. But these offices were not created by the constitution, but by the statute; nor can it be said that the constitution has provided either for original appointments to fill the offices or for appointments to fill vacancies in said offices, since both events are ‘*otherwise provided for*’ by the statute. This being so, the fundamental principle obtains that the legislature has unlimited power in regard to legislation, save only as to restrictions imposed by the constitution. (Citing authorities.)

The same provision of the Colorado Constitution was challenged in *People ex rel. Walker v. Capp*, 61 Colo. 396, 158 P. 143 (1916). The right of the legislature to prescribe the manner and person to be appointed warden of the state reformatory was upheld in this language:

“Neither is it true, as argued, that section 6 of article 4 of the constitution controls as to the appointment of the warden of the reformatory. This section reads:

“‘The governor shall nominate, and by

and with the consent of the senate, appoint all officers whose offices are established by this and whose appointment or election is not otherwise provided for. * * *

“The appointment of the warden of the state reformatory is otherwise provided for, and under the decision of the appellate courts of this state, — (Citing cases) — the statute which provides for the manner of appointment of such officers is controlling.

* * *

“Our constitution does not confer upon any officer the power to appoint a warden of the reformatory, hence it rested solely with the legislature to give that right and take it away. It had exclusive power to say who should appoint the warden of the state reformatory and to qualify or modify the appointing power by such limitations as it chose to impose. The legislature has the right to change its laws. It had the same power to prescribe the manner of appointing a warden of the reformatory, as in the civil service law provided, that it had when it provided for the manner of his appointment in the act creating the institution.”

Under similar circumstances the Arizona Supreme Court in *Lockwood, Post Auditor v. Jordan, State Auditor*, 72 Ariz. 77, 231 P.2d 428, upheld the constitutionality of a state statute placing the appointing power to certain state officers with the President of the Senate and Speaker of the House of Representatives, with the approval of the Senate and House. Article III of the Arizona Constitution reads as follows:

“The powers of the government of the State of Arizona shall be divided into three separate

departments, the legislative, executive, the judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

(This provision is substantially the same as Article V, Section 1 of the Utah Constitution.)

The Arizona court referred to and quoted from the earlier case of *Dunbar vs. Cronin*, 18 Ariz. 583, 164 P. 447, 454, relating to the establishment of a state library with a law and legislative reference bureau, and which provided for the appointment of a Board of Curators and a librarian. The statute designated the individual who was to fill the position. In that case the appointive power of the legislature was challenged as being in violation of the Arizona Constitution. The court said:

"The only instances under the Constitution in which the power of appointment is made exclusively executive are the specific ones above enumerated, and such others may occur when an office becomes vacant and the law or the Constitution has provided no mode for filling such vacancy. . . ."

The Arizona Supreme Court upheld the validity of the statute in the Lockwood case in this concluding language:

"We therefore hold that since there is no restriction in the Constitution against the exercise of such powers by the legislature that it was acting fully within the scope of its legislative authority in providing for appointment of post auditor to be made as in the Act provided."

See also *Riley v. State*, 43 Okl. 65, 141 P. 264, to the same effect.

There are two Utah cases, both decided before statehood and dealing with problems other than the construction of the constitutional provision involved in the present case, which may be helpful to briefly review.

In the case of *People v. Clayton*, 4 Utah 421, 11 P. 206 (1886). The territorial legislature enacted a statute pursuant to the organic act of Utah which contained restrictions upon the territorial legislature, and also pursuant to a federal statute which also imposed limitations upon the territorial legislature. The primary issue was whether or not the territorial statute providing for the election of an auditor was valid inasmuch as the organic act required the governor to appoint the state auditor. The court was concerned with the limitations of the territorial legislature imposed by the organic act and also by section 1857 of the Revised Statutes of the United States which contained a similar limitation. Section 7 of the organic act of the territory provided in part as follows:

“ . . . the governor shall nominate, and by and with the advice and consent of the legislative council, appoint, all officers not *herein* otherwise provided for; . . .” (Emphasis added.)

The court held that the words “not otherwise herein provided for” created in the governor a power of appointment which could not be delegated to nor usurped by the territorial legislature. Since neither the organic act nor the federal statute contained a provision permitting the legislature to provide for the election of the auditor, the

court held that the statute so providing was void.

A similar question was raised in *McCornick vs. Pratt*, 8 Ut. 294, 30 P. 1091, (1892) decided prior to statehood. The question before the court related to the validity of a territorial statute appropriating funds for the construction of buildings for the agricultural college and that certain officials would be ex officio trustees of a construction committee. Focus was centered on the question of whether or not the legislative means of selecting the trustees deprived the governor of his constitutional power under the organic act and the Federal Statute, to make the appointments. The same rationale was followed as in the *People vs. Clayton* case, *supra*, since the same provisions of the organic act and the federal statute were involved. The court held that a statute could not be passed in contravention of the organic act which authorized the governor to make all appointments “. . . not otherwise *herein* provided for.” (Emphasis added.)

The Utah cases of *People vs. Clayton*, 4 Utah 421, 11 P. 206, (1886) and *McCornick v. Pratt*, 8 Ut. 294, 30 P. 1061 (1892) support the interpretation of the present language in Article VII, Section 10, made by this court in *State ex rel Hammond v. Maxwell*, 103 Utah 1, 132 P.2d 660,663 (1942) referred to above. The comparable section of the organic act of Utah used the word “herein.” When the Utah Constitution was adopted the word “herein” was used in Article V, Section 1. That section provides that no department of government shall exercise any functions pertaining to either of the other departments, except in the cases “*herein expressly directed or permitted*” (em-

phasis ours). However, Article VII, Section 10 omits the word "herein" which was previously contained in the comparable section of the organic law of Utah. This clearly shows that the framers of the Constitution were aware of the importance of the word "herein." They plainly provided that each department of government would exercise its own powers except in those situations expressly otherwise provided within the Constitution itself. But as noted, Article VII, Section 10 of the Constitution omits the use of the word "herein." This omission was made even though that term had been used in the comparable provisions of the organic act of Utah and there had been two cases construing its meaning.

The following principle of statutory construction is applicable here:

"The omission of a word in the amendment of a statute will be assumed to have been intentional. Where the meaning of the prior law is intended to be continued, its terminology is also usually continued, so that an omission of words implies an intended change in the meaning of the statute. Under these rules, the courts may not add a restriction found in a prior statute, but omitted from a later one."

50 *Am. Jur., Statutes*, Sec. 276, p. 263. See also 82 U.S., *Statutes*, Sec. 384, p. 904. *Youngdale v. Burton*, 102 Ut. 169, 128 P.2d 1053 (1942). It is therefore reasonable to conclude that the framers intentionally omitted the word "herein" from Article VII, Section 10, and in so doing intended a different result to follow than in the cases of *McCornick vs. Pratt, supra*, and *People vs. Clayton, supra*.

A cardinal rule of constitutional construction is that the words must be construed in the light of what was intended by the framers of the instrument. In the case of *State ex rel. v. Eldredge*, 27 Utah 477, 76 P. 337, (1904) 339, this court said:

“... In construing the supreme law, the meaning of the framers must be ascertained from the whole purview of the instrument, and, in construing a particular section, the court may refer to any other section or provision to ascertain what was the object, purpose, and intention of the Constitution makers in adopting such section. . . .”

See also *University of Utah v. Board of Examiners of Utah*, 4 Utah 2d 408, 295 P.2d 348, 361 (1956).

The result reached in the early Utah cases cited by plaintiff in his brief, *McCornick v. Pratt*, 8 Ut. 294, 30 P. 1091 (1892) and *Duncan v. McAllister*, 1 Ut. 81 (1873), referring to the comparable provision of the Organic Act of the Utah Territory have been previously explained.

Plaintiff also cites a number of cases from North Carolina for the proposition that the legislature has no authority to fill offices created by it. However, the North Carolina provision expressly prohibited the general assembly from appointing any officer whose office was created by the constitution or “created by law.” When that language was later removed by constitutional Amendment the Supreme Court of North Carolina has held that the legislature of that state can make such appointments. These cases are entirely consistent with defendants’

position and argue persuasively against the strained interpretation sought by plaintiff.

As noted previously, the people are the final repository of the powers of government. They can delegate these rights to the Legislature through the Constitution. The people of North Carolina determined to do it one way, and the people of Utah determined to repose this power in the legislature rather than the governor.

If as the plaintiff contends, it was the intention of the framers of the Utah Constitution by adopting Article VII, Section 10, to place in the governor, "the power to appoint all executive officers whose election or appointment is not otherwise provided for in the Constitution" an interpretation must be adopted that is at variance with 70 years of legislative history in this state. For not only would such a strained construction give to the governor the right, but would require him to appoint not only all "state officers," but also the "district officers" as well. The rend which would result in the civil fabric of our state would virtually be complete. All district and state officers who have and presently are appointed or elected pursuant to laws enacted by the legislature since 1896 must be declared to have held, and to hold office illegally. A degree of clairvoyance must be ascribed to the Constitutional convention which has not heretofore been recognized. Plaintiff in effect contends that he is required by constitutional mandate to make every appointment to every district or state office not otherwise set forth in the Constitution. This position approaches the absurd. The framers of the Constitution could not

look into the future 70 years and determine what state or district agencies would be needed to carry on the business of government. In their wisdom they left these decisions to future legislatures. To demonstrate in a small way the violence which would be done to the structure of our government if the governor were to make all appointments to district and state offices, there is listed below some of the agencies of government which would be affected. The procedure of "appointment" or "ejection" provided for by law is also noted:

Section 8-1-1, et seq., U.C.A., 1953, establishes procedures for election of Cemetery Maintenance Board (L. of Ut., 1945, Ch. 17).

Section 8-4-4, U.C.A., 1953, establishes the cemetery board with five members as designated by the director of registration. (L. of Ut., 1955, Ch. 11).

Section 17-6-3.1, U.C.A., 1953, creates water and sewage districts which are governed by a board of trustees of each district created. Provision is made for election or appointment by someone other than the governor. (L. of Ut., 1953, Ch. 29.)

Section 11-11-15, U.C.A., 1953, creates auditorium and sports arena districts, each of which is governed by a board of directors which consist of nine members, each appointed by someone other than the governor. (L. of Ut., 1961, Ch. 26.)

Section 13-2-3, U.C.A., 1953, provides for the appointment of the executive secretary of the Trade Commission, who is appointed by the Trade Commission. (L. of Ut., 1937, Ch. 19.)

Section 17-27-17, U.C.A., 1953, provides for

the appointment of the district planning commissioner by the county commissioners. (L. of Ut. 1941, Ch. 23.)

Section 17-28-1, U.C.A., 1953, establishes the fireman's civil service commission, the members of which are appointed by the county commissioners. (L. of Ut., 1945, Ch. 36.)

Section 20-1-7.3, U.C.A., 1953, creates a judicial nominating commission consisting of seven members as follows: The chief justice of the Supreme Court, one commissioner chosen by the senate, one commissioner chosen by the house of representatives, two commissioners chosen by the governor, and two commissioners chosen by the Utah state bar association. (L. of Ut., 1967, Ch. 35.)

Section 20-1-7.6, U.C.A., 1953, provides in the event the governor fails to appoint one of the three persons submitted to him, within thirty days after he has received the list containing the names of three individuals, ". . . the chief justice of the Supreme Court shall forthwith appoint one of the persons named on the list to fill such office." (L. of Ut. 1957, Ch. 35.)

Section 23-2-9, U.C.A. 1953, provides for the appointment of the director of fish and game by the board of fish and game. (L. of Ut., 1953, Ch. 39.)

Section 23-4-2, U.C.A., 1953, establishes the board of big game control, comprised of five members, appointed by the governor, with the advice and consent of the Senate as follows: The director of the division of fish and game, a landowner nominated by the Utah State Cattlemen's Association, a member nominated to the governor by the

Utah State Woolgrower's Association, a member nominated to the governor by the Utah Wildlife Federation, and a regional officer in Utah of the U.S. Forest Service. (L. of Ut., 1953, Ch. 39.)

Section 24-2-2, U.C.A., 1953, creates the board of forestry and fire control which consists of the board of state lands. The board of state land consists of the state superintendent of public instruction, or such other person designated by him, and six others appointed by the governor. (L. of Ut. 1961, Ch. 53.)

Section 26-14-6, U.C.A., 1953, establishes a board of trustees to govern mosquito abatement districts. The board consists of persons appointed by district and county officials. (L. of Ut. 1923, Ch. 90.)

Section 26-15-3, creates the office of director of division of health, who is appointed by the Board of Health (L. of Ut., 1953, Ch. 174.)

Section 26-16-5, U.C.A., 1953, creates the health facilities council which is appointed by the governor, but must be the director of public health, the chairman of the Utah State Welfare Commission, and other designated individuals. (L. of Ut., 1955, Ch. 40.)

Section 37-4-3, U.C.A., 1953, establishes a state library commission composed of nine members appointed by the governor with the advice and consent of the senate. One is appointed on recommendation of each of the following agencies: State department of public instruction, the library board, the legislative council and the state historical society. The secretary of state is designated a member ex officio. (L. of Ut., 1957, Ch. 68.)

Section 49-1-2, U.C.A., 1953, establishes a

board of trustees of public employees retirement system composed of five members who are selected as follows: one is the state auditor, two are elected and two are appointed by the governor. (L. of Ut. 1951 (1st SS), Ch. 21.)

Section 51-1-2, U.C.A., 1953, creates the state depository board composed of the state bank commissioner, the attorney general and a citizen appointed by the governor. (L. of Ut., 1933, Ch. 47.)

Section 53-13-1, U.C.A., 1953, establishes the textbook commission which consists of the State course of study commission. (A form of this statute has been effective in Utah since 1898.)

Section 53-14-1, U.C.A., 1953, establishes the State course of study commission, which consists of the state superintendent, deans of each state schools of education of the University of Utah and Utah State Agricultural College, three school superintendents to be appointed by the state board of education and five lay citizens to be appointed by the governor. (L. of Ut. 1907, Ch. 57.)

Section 55-10-69, U.C.A., 1953, establishes a juvenile court commission, the membership of which consists of the chief justice of the Supreme Court or a justice of that court designated by the chief justice, the chairman of the public welfare commission, or a member of that commission designated by the chairman, the president of the Utah State Bar, or a member of the State Bar Commission designated by the President, the State Superintendent of public instruction, and the state director of public health. (L. of Ut., 1965, Ch. 165.)

Section 63-5-2, U.C.A., 1953, establishes the state council of defense, which is composed of the Governor, the Secretary of State, the Attorney

General, the President of the Senate, the Speaker of the House, and four members appointed by the Governor. (L. of Ut., 1941 (2nd S.S.), Ch. 33.)

Section 63-7-1, U.C.A., 1953, establishes the Senate Committee on Interstate Cooperation which consists of five senators designated in the same manner as is customary in the case of the members and chairman of other standing committees of the senate. (L. of Ut., 1939, Ch. 130.)

Section 63-7-4, U.C.A., 1953, establishing the Utah commission on Interstate Co-operation is composed of fifteen members as follows:

(1) The five members of the senate committee on interstate co-operation.

(2) The five members of the house committee on interstate co-operation.

(3) The five members of the governor's committee on interstate co-operation.

The governor, the president of the senate and the speaker of the house of representatives are ex officio honorary non-voting members of the commission. The chairman of the governor's committee on interstate cooperation is the ex officio chairman of this commission. The chairman of the senate committee on interstate cooperation is the ex officio first vice chairman of the commission and the chairman of the house committee is the ex officio second vice chairman of the commission. (L. of Ut., 1939, Ch. 30.)

Section 63-26-2, U.C.A., 1953, establishes the Utah council on aging consisting of eleven members as follows: One appointed by industrial commission, one appointed by department of health, one appointed by welfare commission, one ap-

pointed by Superintendent of public instruction, two appointed by the speaker of the House, two appointed by President of the Senate, three appointed by the governor. (L. of Ut., 1961, Ch. 129.)

Section 64-6-5, U.C.A., 1953, provides for the appointment of the superintendent of state industrial school by public welfare commission with approval of governor. (R.S., 1898 and C.L. 1907.)

Section 65-1-1.1, U.C.A., 1953, creates the state land board whose membership is as follows: The state superintendent of education, or such other person designated by the state board of education and six members appointed by the governor. (L. of Ut. 1967, Ch. 176.)

Section 78-3-18, U.C.A., 1953, designates the clerk of the Supreme Court to act as administrator for the district courts under the court administrator's act. No provision is contained in the Act for his appointment by the governor or other executive. (L. of Ut. 1967, Ch. 222.)

Section 73-7-11, U.C.A., 1953, authorizes irrigation districts. Each is governed by a board of directors to be elected. (L. of Ut. 1919, Ch. 68.)

Section 73-8-20, U.C.A., 1953, authorizes Metropolitan Water Districts, which are to be governed by a Board of directors consisting of representatives chosen by legislative bodies of each city. (L. of Ut., 1935, Ch. 110.)

Section 73-10-1, U.C.A., 1953, created the Utah Water and Power Board which consisted of thirteen members, two of whom were appointed by the Senate and two members by the speaker of the house. The Governor was also required to appoint seven from a list of recommendations submitted by the Utah Water User's Association.

(The name and make-up of this Board was changed by Chapter 176, Laws of Utah, 1967. See Section 73-10-1.5, U.C.A. 1953.)

Section 73-16-4, U.C.A., 1953, establishes the Bear River compact commission from Utah, which is made up of one member appointed by Interstate stream commission of Utah and two members appointed by Utah water and power board with consent of the governor. (L. of Ut., 1955, Ch. 161.)

Section 73-18-3, U.C.A., 1953, establishes the advisory council for administration of the state boating act with eight members selected by the board of parks and recreation with approval of the governor. (L. of Ut. 1959, Ch. 124.)

This list is not exhaustive but rather illustrative of the many state and district officers who are not appointed by the governor, but are in effect the appointments of the legislature, an official or quasi official of government or a private organization. As noted, provision is almost made for the election of some of these officers. It is perhaps needless to point out that the rights of citizens have been governed and fixed by these various officers acting on behalf of the state. A finding that these Boards were illegally constituted would be contrary to the stated and implied functions and powers of the legislature over the period of its entire history and would disrupt the procedures of government now existing and leave uncertain the rights of many citizens whose claims and rights have been fixed thereunder.

The majority of courts considering the question have held that the power to appoint or nominate individuals

to public office can be validly delegated to private persons or organizations. See 97 A.L.R. 2d 361.

With respect to the legislature exercising executive powers, it might be observed that all the legislature does by the provisions under study is to provide for appointments to an administrative agency with no control whatsoever in the function of the agency. Nothing suggests that the legislature will have any administrative control or direction over the actual operations of the board. There is a substantial distinction between merely making appointments to a board which will function independently as an administrative agency, and a situation where the legislature would have a week-to-week and month-to-month control over an administrative agency.

II

THE DEFENDANTS ARE NOT PRECLUDED BY ARTICLE V, SECTION 1 OF THE STATE CONSTITUTION, PROVIDING FOR THE SEPARATION OF POWERS, FROM MAKING APPOINTMENTS TO THE BOARD OF HIGHER EDUCATION AS REQUIRED BY 53-48-5 UTAH CODE ANNOTATED, 1953.

Article V must be construed in harmony with other provisions of the Constitution. It contains no express prohibition against the appointive authority being vested in persons other than the executive. On the other hand, Article VII, Section 10, by its plain wording contemplates that the Legislature shall have the power to "otherwise provide" for a means of appointing state officers. Thus, Article VII, Section 10, must be in the first instance construed as a limitation on the board general language of Article V since the former is express in its provision.

This factor is essential to a clear appreciation of the cases cited in plaintiff's brief and for the proposition he espouses that the appointment of officers is an executive function.

The plaintiff cites language from cases of the United States Supreme Court for his position, however, these cases are readily distinguishable from the case now before the court both on the facts and the applicable law. It is clear Congress cannot appoint officers of the United States, because such would constitute a violation of the separation of powers doctrine expressed in clear language in the Constitution of the United States. Article II, Section 2 provides:

“ . . . and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not *herein otherwise provided for*, and which shall be established by Law: . . .” (Emphasis added.)

Thus, the express language of the U.S. Constitution allows Congress to appoint officers only where the Constitution “*herein*” otherwise providd. That language is not found in Article VII, Section 10, of the Utah Constitution, although it was in the Organic Act, *People v. Clayton*, 4 Ut. 421, 11 P. 206 (1886), and was not carried over into the Constitution it must be concluded that the Utah Constitution was not intended to limit the appointment power to the Governor either expressly, or on the basis of the implications in the concept of separation of powers.

The plaintiff also relies upon a number of decisions

from other states to support his separation of powers contention. The Constitutions of Indiana and Massachusetts do not contain the same permissive language as the Utah Constitution, and therefore the cited cases do not pertain to the necessary question of Constitutional construction before the Court. Even so, in *In re Opinion of the Justices*, 302 Mass. 605, 19 N.E.2d 807 (1939), cited in plaintiff's brief at page 30, the Court refused to say the executive nature of the power to appoint and remove placed such power exclusively with the Governor. These cases obviously involved Constitutional provision not similar to Article VII, Section 10 of the Utah Constitution.

Equally inapplicable are the provisions of the Constitutions of Kansas, Arkansas, and Missouri. Appellants' reliance upon the cases cited from those jurisdictions is misplaced and are not applicable to the case now before the court. The Colorado Supreme Court has apparently rejected, in an analogous case, the position of the Nebraska and Missouri courts in the cases cited in Appellants' Brief. *People ex rel Walker v. Capp*, 61 Colo. 396, 158 P. 143 (1916).¹ As noted previously states with near identical provisions to Article VII, Section 10 have not construed their Constitutions in the same narrow fashion plaintiff urges this Court follow.²

The ultimate issue in this case must be viewed in the light of Utah's Constitution and decisions considering Article V. No decision of the Utah Court has passed on

¹This case is discussed at page 16 of this Brief.

²See pages through, *supra*.

the relationship between Article VII Section 10 and Article V.

At the outset, it is well to note what has been the traditional evaluation of the concept of separation of powers. Madison in *The Federalist*, No. XLVII, Vol. 1, at 331 (1916) stated with reference to Montesquieu's concept of separation of power, which was at the base of the framework of the American Constitution and of many State constitutions:

“* * * he [Montesquieu] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example of his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. * * *”

The Utah Supreme Court has in the past accepted the Montesquieu conceptualization of separation of powers when speaking of the provisions of Article V, Section 1 of the Constitution of the State of Utah. *Tite v. State Tax Comm.*, 89 Ut. 404, 57 P.2d 734 (1936). The action of the legislation in this case hardly constitutes a usurpation of the whole of the executive power, nor does it in any way constitute a major intrusion into the executive power when the constitutional provision of **Article VII, Section 10** is viewed in conjunction with the intent of Article V. Although in the case of *Springer v. Philippine Islands*, 277 U.S. 189 (1928) Madison's writings in *The Federalist*

were quoted with reference to the appointment power, it should be remembered that Madison was not discussing the concept of separation of powers in general but was justifying the divisions of labor set forth in the proposed Constitution of the United States in an effort to obtain its adoption by the colonies. Consequently, the question of whether the present legislation violates Article V, must be examined exclusively from the standpoint of the separation of powers doctrine of the Utah Constitution in conjunction with Article VII, Section 10. The last sentence of Section 1 of Article V provides :

“ . . . no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, *except in the cases herein expressly directed or permitted.*” (emphasis added.)

Thus, the Constitution in Article VII, Section 10 expressly permits the legislature to provide for other means of appointment and necessarily exempts that action from the application of Article V. The court is not concerned with the wisdom of the legislation, and has no power to arrest execution of the statutes, however unwise or unjust they may appear. *Kimball v. Grantsville City*, 19 Ut. 368, 57 P.1. 45 L.R.A. 628 (1899), *Breeden v. Lewis*, 26 Ut. 120, 72 P. 388 (1903). Nothing in the case of *Lee v. the State*, 13 U.2d 15, 367 P.2d 861 (1962) is inconsistent with the authority of the present statute authorizing the legislature to make an appointment to the single board. That case dealt exclusively with the question of whether a

constitutional amendment was properly adopted, and whether the ballot set out one or more possible constitutional amendments. A cursory reading of that case demonstrates that it, in no way, involves the question of the constitutionality of the exercise of the appointive authority by the legislature, nor does it discuss the concept of the separation of powers. In fact, nowhere in the case is Article 5 even mentioned. The very reference to the case of *Lee v. State*, supra, indicates the difficulty of the position of the plaintiff, since he is required to torture cases to find any authority to support his proposition. In *Tite v. State Tax Commission*, 89 Ut. 404, 57 P.2d (1936), Justice Wolf writing for the Utah Supreme Court made it clear that Article 5 of the Utah Constitution does not totally prohibit one department of government from exercising functions that may be comparable to functions exercised by another department of government. The court indicated that there was no prohibition against the State Tax Commission determining whether there had been a violation of law and imposing a penalty. It did indicate that where the exercise of the function was the exercise of judicial discretion, such as imposing an indeterminate fine, that Article 5 would be violated, but the court did not expressly note that the separation of powers concept does tolerate reasonable overlapping. The court observed:

“The absolute independence of the three branches of government which was advocated by Montesquieu has not been found entirely practicable, and, although the threefold division of powers is the basis of the American Constitution, there are many cases in which the duties of one depart-

ment are to a certain extent devolved upon and shared by the other."

A similar conclusion is noted in Vanderbilt, *The Doctrine of the Separation of Powers and Its Present-Day Significance*, Conant 1953, where Justice Vanderbilt acknowledged:

"The doctrine of the separation of governmental powers is not a mere theoretical, philosophical concept. It is a practical, workaday principle. The division of government into three branches does not imply, as its critics would have us think, three watertight compartments.. Montesquieu, as we have seen, knew better. the three departments, he said, must move 'in concert.'"

Clearly, therefore, with the Utah Supreme Court having acknowledged the general concept that there is permissible overlapping between the various departments of government, and Article V expressly excepting from its scope activities where the Constitution provides for the function of one department of government that may necessarily involve a portion of the activity of another, and with Article VII Section 10 expressly so authorizing, it must be concluded that the present legislation does not unreasonably infringe on the concept of separation of powers. The Colorado and Idaho cases, *supra*, discuss and uphold the constitutionality of statutes exercising the legislative appointive powers in the face of charges that the separation of powers doctrine was violated. Historically the founders of the various states were often suspicious of strong executive power and placed numerous limitations on the authority of the executive to act. These limitations were imposed in many instances in spite of a

belief in the concept of separation of power. The Constitutions of Georgia and Illinois are illustrative of some of the limitations imposed on the executive. Both Constitutions required that the legislature elect the governor. Georgia Constitution, 1789, Article II, Section 1 and 2. Illinois Constitution 1818, Article III, Section 2. This obviously illustrated the flexibility in the concept of separation of powers and is indicative of how Article V, Section 1 of the Utah Constitution should be construed in this instance in order to retain the intended flexibility. It is further noteworthy that the District Court in this instance expressly found that Article V, of the Utah Constitution was not violated finding that historical practice in this state has sanctioned legislation similar to that now before the court. (R. 147, 141)

III

THE PROVISIONS OF 53-48-5 UTAH CODE ANNOTATED, 1953 DO NOT VIOLATE ARTICLE I, SECTION 24 OF THE CONSTITUTION OF UTAH, NOR THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The plaintiff's final argument is that Section 5(1) of Senate Bill 10, 53-48-5 Utah Code Annotated, 1953, violates Article I, Section 24 of the Constitution of Utah, because it is not uniform in its operation. A further claim is asserted that the provision also violates the equal protection clause of the federal Constitution. Article I, Section 24 has been held by this court to embrace generally the same provisions as the equal protection clause of the United States Constitution prohibiting unequal classifications. *State v. Mason*, 94 Ut. 501, 78 P.2d 920 (1938). Es-

essentially both constitutional provisions contemplate that differences in application of legislation should not be arbitrarily based. However, it should be remembered that in making such a determination it is presumed that the legislation is constitutional, and a court will not declare an act unconstitutional if there is any conceivable basis for distinction. Further, broad latitudes will be allowed a legislature in establishing classifications.

At the outset it is submitted that the plaintiff is without cause to complain. He is not a member of the class against whom any discrimination, if there be any, is directed. He is an appointing authority, not an appointee. He is not affected personally by the application of the statute. Consequently it is submitted that he is without basis to challenge the constitutionality of the instant legislation.

Even assuming the status of the plaintiff to maintain a claim of denial of equal protection of uniform operation, it is submitted that the claim is specious at best. The obvious purpose of the legislation is to permit the legislature to have a modest degree of participation in the establishment of the agency charged with administering higher education in this state. This is a legitimate purpose, and not a discriminatory one. This being so, the Courts accord to the Legislature substantial latitude in determining how its policies should be implemented. *Equal Protection*, Harv. L. R. 1065, 1072-1078 (1969). Because there is a need for legislative input as respects the question of higher education in the State of Utah, the Legislature can reasonably determine the manner in

which that input is to be obtained. A control on the gubernatorial appointment is afforded in the traditional sense. Consent of the Senate must be obtained. Legislative input is obtained as respects the appointments of the Speaker of the House and the President of the Senate by according each of these officers the appointment prerogative. The only way the legislature could properly obtain a legislative check over the governor would be by making his appointments subject to legislative control. Legislative check on the other appointees is, of course, afforded by the very fact that officers of the legislature make the appointment.

It is significant that plaintiff cites the case of *Baker v. Carr*, 369 U.S. 186 (1962), for the position that there is a denial of equal protection and uniform operation in the instant case. Subsequent cases have clearly indicated that where the nature of the agency was essentially administrative, such as for the purposes of carrying out educational policy, reasonable disparities in the appointment process could be tolerated. In *Sailors v. The Board of Education*, 387 U.S. 105 (1967), a local school board was elected for each of several school districts which were unequal in population. The members of each local board selected one member to a biennial meeting at which the five member county board was elected. Suit was brought challenging the county board on the ground that it had violated the one man, one vote principle laid down in *Baker v. Carr*, supra. The United States Supreme Court rejected that contention holding that the functions of the county board were chiefly administrative

rather than legislative, and that therefore the members of such a unit could be appointed by delegates from districts not equal in population. By analogy, therefore, since the action in this case is equally appointive, the principle of *Baker v. Carr*, supra, is not applicable, and the mere fact that one may be treated slightly different than another so far as legislative confirmation is concerned would not render the statute unconstitutional.

POINT IV.

THE COURTS HAVE A DUTY TO UPHOLD THE CONSTITUTIONALITY OF A LEGISLATIVE ENACTMENT UNLESS IT CLEARLY VIOLATES A PROVISION OF THE CONSTITUTION.

A statute must be held constitutional unless it clearly violates a provision of the Constitution. Every doubt as to the constitutionality of a statute must be resolved in favor of its validity. A court has a duty to uphold legislative acts unless it is convinced beyond a reasonable doubt that they are unconstitutional. This principle has been enumerated by a long line of Utah decisions. *Great Salt Authority v. Island Ranch Co.*, 18 U.2d 45, 414 P.2d 963 (1966), *Wood v. Budge*, 13 U.2d 359, 374 P.2d 516 (1962); *State v. Geurts*, 11 U. 2d 345, 359 P.2d 12 (1961); *Parkinson v. Watson*, 4 U.2d 191, 291 P.2d 400 (1955); *State Board of Examiners v. Commission of Finance*, 122 Ut. 164, 247 P.2d 435 (1952); *Newcomb v. Ogden City, et al.*, 121 Ut. 503, 243 P.2d (1952) 941; *Snow v. Keddington*, 113 Ut. 325, 195 P.2d 234 (1948); *Broadbent v. Gibson*, 105 Ut. 53, 140 P.2d 939 (1943); *Keetch v. Cordner*, 90 Ut. 423, 62 P.2d 273 (1936); *State v. Mason*, 94 U. 501, 78 P.2d 920 (1938), 16 Am. Jur., *Constitutional Law*, sec. 137, p. 336.

In *University of Utah vs. Board of Examiners of State of Utah*, 4 U.2d 408, 295 P.2d 348, 362, (1956), the court relied upon the general principle of statutory construction as follows:

“In 16 C.J.S., Title Constitutional Law, 34, page 74, it is said:

“ ‘Long acquiescence by the people in legislative or judicial construction of constitutional provisions is entitled to great weight with the courts.’ ”

The crucial language contained in Article VII, section 10, was given interpretation by the courts prior to statehood and a discriminating use of that language was employed in our present Constitution. These factors are entitled to a great weight in favor of a constitutional interpretation of the legislation in this case.

In *Skeen v. Pain*, 32 Ut. 295, 90 P. 440, 442 (1907), the constitutionality of a statute was drawn into question because it authorized an ouster action to be maintained by an individual, whereas Article VIII, Section 18 of the Constitution indicates that all prosecutions are to be made in the name of the state. The court in upholding the statute observed:

“To say the least, the question is not free from doubt and, being so, all doubts must be resolved in favor of the constitutionality of the statute.”

We submit that a fair reading of the constitutional provision in the light of its background and decided cases leaves no doubt concerning the constitutionality of the Section 5 (1) of Senate Bill 10. And, even if the court should find that a shadow of doubt has been cast

across the face of this statute, "all doubts must be resolved in favor of the constitutionality . . . "

The prayer of the complaint seeks a restraining order enjoining defendants from appointing any members to the Board of Higher Education and requesting the court to declare that plaintiff has the exclusive power, subject to the consent of the senate, to appoint all members of the Board.

Certainly, if the provision in question is unconstitutional, the court may not rewrite the section to provide that the Governor shall make all 15 appointments, and thus preserve the constitutionality of the legislation. The law is clear that an unconstitutional act or provision will not be rewritten so as to make it constitutional.

It must then follow that since the composition of the board is such an integral part of the Act, the entire Act must fail and could not be saved by a severability clause. If the court could sever that provision permitting the Speaker and the President to make appointments, then the Act as severed and preserved would only provide for the nine appointments of the Governor, and the other provisions of the Act relating to membership would seem to permit the Governor to appoint eight Democrats and one Republican, and the other six appointments simply would not be made. This would be absurd and would frustrate the rather clear overall legislative intent. It thus seems that the act in its entirety must be constitutional or the entire act must fail, because the provisions relating to membership appear to be at the very heart of the subject legislation.

CONCLUSION

All political power is declared by Article I, Section 2, of the Utah Constitution, to be inherent in the people. It is they who have delegated the appointive power to the legislature of the state, except as stated in the constitution.

The people through Article VII, Section 10, chose to repose the appointive power with their elected representatives in the House of Representatives and the Senate, rather than with the Governor, apparently in the belief that the judgment of many is superior to the judgment of one.

As noted in the foregoing cases, decided by the Supreme Courts of Idaho and Colorado, the exercise of the appointive power of the people by the legislature does not violate the separation of powers doctrine. Even the famous proponents of our system of government realized that practical application would result in some overlapping of functions in the administration of government. This Court has recognized this.

The language of Article VII, Section 10, adopted by the Constitutional Convention of Utah was changed from that contained in the Organic Act which had been interpreted as preventing legislative appointments. The exact language of the Colorado provision was employed, which had been held by the Supreme Court of that state as permitting the legislature to designate officers to fill offices created by law. Further, this Court has stated by way of dicta that the provision “. . . if not otherwise provided for” referred to the legislative act creating the office. The Supreme Courts of Idaho, Montana and Colo-

rado have all so interpreted the same language contained in the comparable sections of the constitutions of those states, in the same way. Additionally, a grammatical reading of the section leads to the same result. But perhaps the most persuasive argument favoring a constitutional construction of this provision is the fact that state legislatures for 70 years have impliedly relied upon such an interpretation and have passed a great many statutes, beginning with the first legislature in 1898, in which the election or appointment of state and district officers must be as "otherwise provided for by law".

Plaintiff is without standing to claim that he is denied the equal protection of the law under Senate Bill 10, and even if such standing were present, the doctrine is not applicable in this case.

Every doubt, if any there be, should be resolved in favor of a constitutional construction of Senate Bill 10. The court has a duty to uphold the act unless it is convinced beyond a reasonable doubt that it is unconstitutional.

We submit that section 5(1) of Senate Bill 10 is valid in every respect, and should be declared constitutional by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the within and foregoing Brief was served upon the plaintiffs and appellants by mailing, postage prepaid, the said copies to their attorney, Sidney G. Baucom, Special Assistant Attorney General, 1407 West North Temple, Salt Lake City, Utah, 84116, this day of November, 1969.
