12309

Cause No. 12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

STATE OF MONTANA, ex rel WILLIAM V. CASHMORE, M.D., and STANLEY C. BURGER,

Relator,

vs.

FORREST H. ANDERSON, as Governor of the State of Montana,

Respondent.

BRIEF OF CITY OF BILLINGS, AMICUS CURIAE

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PROLOGUE

A proposed new constitution as adopted by the Constitutional Convention was voted on by the people of Montana on June 6, 1972. A majority of the people voting on the constitution voted for it, but the number voting for the new constitution was less than a majority of the electors voting at the election. Messrs. Cashmore and Burger have applied to this Court requesting that the Court determine that the new constitution has not been properly adopted.

STATEMENT OF CASE

The facts are not in dispute. A total of 237,600 of the people of Montana voted at the election. A total of 116,415 people voted for the new constitution, and 113,883 people voted against the constitution. A total of 116,415 votes are not a majority out of the electors voting at the election, namely 237,600.

Issue: Whether the new constitution has been "approved by a majority of the electors voting at the election" in accordance with Article XIX, Section 8?

STATEMENT OF LAW

Article XIX, Section 8, of Montana's 1889 Constitution

has not been construed by the Montana Supreme Court with respect to the language above noted. We expect that the other briefs to be filed herein will voluminously cover the history of decisions of this Court essentially upholding votes by a majority of the people of the State of Montana and disregarding technical objections thereto. As we understand, those decisions also uphold the proposition that it is a majority of the people voting on an issue which determines and not a majority of the people voting at the election. Since this is in fact a case of first impression in Montana, a look at what other states have done in similar situations, we believe, would be most helpful.

With practical uniformity, the courts have held that the question of the validity of the adoption of an amendment to the constitution is a judicial and not a political question. 16 Am. Jur.2d Constitutional Law, Section 43.

Since amendments to constitutions derive their force from the people, it is generally recognized that judicial tribunals have no right to question the wisdom or expediency of changes made in the fundamental law. 16 Am.Jur.2d, Constitutional Law, Section 44.

The method of amendment of a state constitution is most often determinable from the provisions of the constitution itself; state constitutions typically, if not universally, contain detailed provisions regarding the amendatory process, and these provisions are mandatory, exclusive and strictly construed. 16 Am.Jur.2d, Constitutional Law, Section 29. Montana has held that a substantial compliance with the constitution requirement is sufficient. State ex rel Hay v. Alderson, 49 Mont. 287, 142 Pac. 210 (1914).

With reference to the number of votes which must be cast to ratify proposed amendments, there is a wide diversity, not only of the constitutional provisions controlling the questions, but also the interpretations given to these provisions by the courts.

16 Am.Jur.2d, Constitutional Law, Section 38. In some jurisdictions it is sufficient if a mere majority of the votes in reference to the amendments are in favor of their adoption, where the constitutions require ratification by "majority of the electors". In other states a similar provision has been held to require a majority of all voters voting at the election at which the proposed amendment is submitted, and a mere majority of those voting on the amendment itself has not been deemed sufficient. Ibid.

We are cognizant of the fact that the issue here does not relate to merely an amendment of the constitution but the actual adoption of a new constitution, and that in Montana's 1889 Constitution there are separate sections of the Constitution dealing with each subject. Since the language involved in various state constitutions with respect to amendments and that with respect to adoption of a new constitution under Montana law are quite similar and the issues are nearly identical, we submit that reference to such decisions would be quite helpful to the Court in resolving the issue now before it.

RATIONALE

While the Idaho case of Green v. State Board of Canvassers, 5 Idaho 130, 47 Pac. 259 (1896) dealt with an amendment to the Idaho Constitution, it did involve construing the words "majority of the electors". The Idaho court stated as follows:

1. " * * * The question presented is by no means a novel one. In fact, so able and experienced a jurist as Judge Thomas M. Cooley admits (Const. Lim., 6th Ed., p. 747, note 1) that 'it must be confessed that it is impossible to harmonize the cases.' An examination of the large number of authorities cited by counsel in the argument of this case accentuates the statement of Judge Cooley, and perhaps we shall not be obnoxious to the charge of evading a duty should we decline to enter upon a task which so eminent a jurist declares to be hopeless. * * * "

(47 Pac., p. 259-260.)

2. "For us to go into an analysis of all the authorities cited and read upon the argument

would accomplish nothing. We have carefully examined them all, in the light of the able arguments of counsel, and we find ourselves unable to base our conclusions upon any apparent weight of authority. We must decide this case upon the provisions of our constitution as the same appear to us, . . ."
(47 Pac., p. 260.)

3. " * * * Experience has shown that it is almost, if not quite, an impossibility to secure an expression from every elector upon any question, and, above all, upon a question of an amendment of the constitution; and it is equally difficult to ascertain the actual number of electors at any given time. To rely upon the vote cast upon some other question at the same election would be entirely unsatisfactory, and such a construction is, we think, at least impliedly negatived by the provisions of section 3. While it is true that some 10,000 or more electors would seem to have been entirely indifferent upon the question of the adoption of this and the other amendments, still all were--must have been--fully advised as to the importance of the questions submitted, and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent? * * * " (47 Pac., p. 260.)

We realize that the Idaho court does by way of dictum see a difference between the words "majority of the electors" and the words "majority of all the electors voting at such election". From that point of view, the language of the Idaho case would seem to support the contention of the petitioners in this matter.

Fundamental Issue: Whether abstaining voters are to be counted as voting against or regarded as having deliberately chosen to abstain and thereby leave the question to the will of the majority voting thereon.

We can readily understand that in the literal language of Section 8, Article XIX, of Montana's Constitution the 1889 framers could have intended that in fact a majority of all those voting at the election would be required to adopt the new or revised constitution. However, construing the term "election"

strictly with reference only to the election as it applied to adoption or rejection of the new constitution, then only those votes either for or against the constitution would be considered to determine a majority. Either construction would probably be tenable and might sound reasonable.

The court is obviously free in this situation to do as it chooses. Cases are not in harmony and there is no general rule to guide in arriving at a result in this case. Looking at the language of Section 8, Article XIX, and the historical preference of the court to follow the will of the people, it is really a question of what the will of the people amounts to in this situation.

The court may either say that those not voting for the constitution or against it were satisfied with the old Constitution, or were satisfied to have those interested in the question to determine for them whether the new constitution should be adopted. We like the reasoning of the Idaho court in this situation and think that a strained construction applying to the wishes of those not voting would not be "righteous" judgment.

SUMMARY

In summary, we submit that it would be both within the fundamental intent of the 1889 Constitution and promotive of that genuine sense of fair play which has always characterized American politics that the majority vote by all of those willing to accept responsibility for voting on the issue ought to be entertained by this Court as the will of the people expressed and the adoption of the new constitution for the State of Montana sustained.

Respectfully submitted this 11th day of July, 1972.

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CERTIFICATE OF MAILING

I, Calvin A. Calton, City Attorney for the City of Billings, hereby certify that I mailed a full, true and complete copy of the foregoing Brief of City of Billings, Amicus Curiae to the following:

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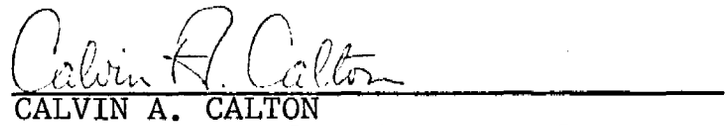

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