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No. 12310

IN THE SUPREME COURT OF THE STATE OF MONTANA

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

Relators,

-vs-

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

Respondent.

BRIEF OF AMICUS CURIAE

NORTH AMERICAN INDIAN ALLIANCE - BUTTE
and A.I.D. (AID FOR INCOME DEPRIVED)

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THE SUPREME COURT OF THE STATE OF MONTANA

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

-vs-

No. 12,309

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

Respondent.

BRIEF OF AMICUS CURIAE

COMES NOW the NORTH AMERICAN INDIAN ALLIANCE - BUTTE, and A.I.D. (AID FOR INCOME DEPRIVED) and submits herewith their amicus curiae brief in support of the position of the Respondent, Governor Forrest H. Anderson.

I.

STATEMENT OF THE ISSUE

Did the certification of votes on the adoption of the proposed revision of the Constitution by the Secretary of State, utilize the appropriate criteria to determine under Article XIX, Section 8 of the Montana Constitution whether the new proposed constitution has passed by a majority of those voting in the election?

II.

STATEMENT OF THE CASE

On June 20, 1972 Secretary of State Frank Murray certified the abstract of votes cast for and against the proposed constitution and the "total number of electors voting" in the election. It is the application of that certification to Section 8 of Article XIX of the Montana Constitution which is the basis of this action. Article XIX, Section 8 provides that the members of the constitutional convention shall submit revisions "to the electors for their ratification or rejection at an election appointed by the convention for

that purpose, ... and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." The outcome of the election on the new proposed constitution will depend upon how this court determines what constitutes "a majority of the electors voting at the election." It is presumed that the Secretary of State based his determination of electors voting in the election upon abstracts submitted to him pursuant to his instructions dated June 2, 1972 to all county clerk and recorders. Montana law requires that each precinct shall keep a list of persons voting to be known as the "poll book," R.C.M. 1947 § 23-3610(7), and apparently the poll books were used to determine the total number of votes cast. Apparently the Secretary of State has concluded that under Montana law total votes cast in an election are determined from the poll books and that this is the count to use in determining the majority required by Article XIX, Section 8 of the Montana Constitution.

III.

SUMMARY OF ARGUMENT

In the following discussion we have attempted to set out cogent reasons why the court should not accept the certification of the Secretary of State but instead hold that a majority should be determined by considering each issue independently. Our argument breaks down into two parts. First, that Montana statutes and Montana case law indicate that an independent consideration of each issue is the proper criteria. Under this argument we incidentally point out that Montana statutes have recognized an averaging method for multi-candidate elections but we do not urge that this method be adopted. Second, we argue that any criteria but an issue-by-issue determination raises constitution questions of due process and equal protection of the law in that their effect is to unfairly dilute the votes of those voting in favor of the constitution.

IV.

ARGUMENT

A. CONSTITUTIONAL INTERPRETATION.

In drafting the present Constitution the framers provided in Article XIX, Section 8, that a "majority of those voting on the question" shall determine whether or not a constitutional convention shall be held. The language providing that revisions be passed by a "majority of the electors voting at the election" on the proposed revision is also found in Section 8. From this it might be argued that by reading the whole of Section 8 one can conclude that the framers intended to draw a distinction between an election convening a convention and an election on a constitutional revision, the alleged distinction being based upon the relative importance of the two issues. This argument, however, collapses when Section 8 is read together with the entire Constitution.

First, there is no indication that the framers conceived that an election on a constitutional revision would be a multiple-issue election, and thereby raise the problems involved in this case. In fact there is evidence to the contrary. Ordinance II of the Montana Constitution sets out the procedure that was used in 1889 for the adoption of the present Constitution, and it was apparent that there was a single issue before the electors then--for or against the adoption of the constitution. Therefore, the framers' experience with writing and adopting constitutions was with a single-issue vote. Further, the procedure for adopting amendments provided that should there be more than one amendment on the ballot, those proposed amendments are to be considered single-issue questions (see Article XIX, Section 9). From this it must be inferred that the framers contemplated only one issue would be voted upon when they drafted the language providing for the passage of a constitutional revison by a "... majority of the electors voting at the election."

Secondly, there are three places in Article XIX where a majority vote is considered and three different types of language are used. The two quoted above are found in Article XIX, Section 8, and the third is found in Section 9 where constitutional amendments rise or fall "...by a majority of those voting thereon." A fourth expression of majority determination is found in Article XIII, Section 5 (discussed in the Tinkle case, infra), providing that no county shall incur any indebtedness over $10,000 without the approval of a "majority of the electors thereof, voting at an election to be provided by law."

From these four different expressions one could conceivably arrive at four different methods for determining a majority vote at an election. There is no indication that the framers were aware of four different situations which would require that different methods be used. Rather than indicate that the framers were conscious of the distinction appearing in the language of Article XIX, Section 8, a reading of the entire constitution indicates that they were conscious of majority rule and desired that a majority express their assent on an issue-by-issue basis before any measure became law. The logical conclusion of relators' position is that a different formula for voter approval is to be found whenever different language is used in the Constitution regarding "majority" determination of an issue. With regard to county bond issues our Montana precedents establish that a majority voting on the issue shall determine the result of the election, yet relators would juggle the formula and create a "majority plus" formula from the language of another of the four references to the will of the majority at elections. By such a strained conclusion they wish to obviate the obvious intention and awareness of the framers to rely upon a simple majority determination of those voting on the particular issue.

There is no justificaion or rationale upon which to conclude that the framers of the 1889 Constitution wished to alter the fundamental principle of majority determination by a casual and insignificant change from the language used in three other places in the

Constitution. It appears that the framers would have made a much more definitive explanation if they had intended to create a "majority plus" formula for revision of the Constitution. That they failed to do so is compelling evidence that the framers indeed wished to establish a majority determination of an issue by those voting on the particular issue.

B. STATUTORY INTERPRETATION.

The poll book tally of those voting in the election is not the appropriate figure to use in determining the passage of the proposed constitution. It is important to note that the predecessor of the statute requiring that the list of persons voting be kept, R.C.M. 1947, § 23-1219 (repealed 1969), was enacted in 1895 some six years after Montana became a state and after our Constitution was enacted. One can only conclude that drafters of the Montana constitution did not have this procedure in mind when they drafted Article XIX, and therefore the statute can have no more weight than any other legislative act or judicial decision.

Interpretation of a recently enacted statute provides evidence that the legislature did not intend to use the poll books for a determination of a majority. R.C.M. 1947 § 23-4113 sets out the standard to be used to determine total vote when an elector may vote for two or more candidates for the same office. "The total vote cast for all candidates for the office is the total vote cast for all candidates divided by the number of candidates officially declared nominated or elected as shown by the official returns." The election under attack here contained four separate issues to be voted upon by the electorate. If the court does not find that they are in fact four seperate issues which could have been voted upon on four separate days at four separate elections as is argued in Tinkle, infra, p. 431, then the analogy between this election and an election under Section 23-4113 is apparent. The elector was provided the opportunity to vote for the Constitution, along with three other issues on the ballot, and should a majority so have decided, all four could have passed.

The criteria set out in Section 23-4113 is persuasive indication that the legislature did not intend that the poll book count apply in multi-issue elections. Should this criteria be applied here there would be a significant reduction in the total votes from that certified by the Secretary of State. Adding the total vote on all the issues and dividing by four (the number of issues which could become law) the total vote appears to be 225,716, and 116,415 would be a majority of that figure. Again this statute is evidence that the legislature recognized the inherent unfairness of the poll book tally in multi-candidate (issue) elections.

The multi-candidate statute, Section 23-4113, has problems which we do not need to discuss here and we raise it as an issue only to make the point that the poll book tally is not the only criteria recognized by the election statutes. We urge the court to adopt the single issue or issue-by-issue criteria for determining a majority. Each issue should be determined independently of the others by simply adding the total number of votes on the issue (i.e. for or against the proposed constitution) and dividing by two. This criteria is supported by the rational of Tinkle, infra, in that the issue could have been voted on at a different election on a different day.

The proposed constitution could rise or fall without regard to the collateral issues of the death penalty, gambling, or the structure of the legislative body. It serves no purpose to argue that these issues rise and fall with the constitution and therefore are inextricably tied to it. It does not alter the fact that the question of the constitution is independent from them. A separate election on the constitution itself would have been appropriate and the convention should be lauded, not penalized, for saving the public this additional expense.

It might be argued that failure to vote on the adoption of the constitution constitutes a void ballot which should not counted. Further, the voters were on notice from the face of the ballot that if the proposed constitution failed to receive a majority of the

votes cast, alternate issues would also fail, and therefore failure to vote on the constitution results in a failure to express voter intent. Moreover, one can only assume that if the voter failed to vote on the constitutional issue he would have failed to vote had the election been held on a different day. But this is mere speculation and whether or not these voters might have voted there is no means of ascertaining how many would have done so or how they would have voted. Moreover, if these votes are to be counted at all they should be counted in favor of the constitution since a vote on a collateral issue assumes that the constitution will pass. Ultimately, the impracticality of ascertaining with accuracy the intentions of those "voters" who failed to vote dictates that the court adopt a policy of determining, issue by issue, what constitutes a majority intent.

It would be a complete denial of the democratic process to deny that the issue had received the proper affirmance by the requisite number of votes simply because those who chose not to vote on the central issue chose instead to vote on other issues and as a result increased the majority requirement. To increase the requisite majority because of a greater voter interest in collateral issues is inherently unfair.

As a factual matter those voters registered in the poll books do not represent the total vote actually cast. The new statutes regarding the conduct of elections do not require that the election judges mark in the poll book after the elector votes but do provide for marking precinct register books before the elector votes. See R.C.M. 1947 § 23-3610. That statute does require that each precinct keep a list of persons voting but there is no explicit requirement as there was under the repealed statute, R.C.M. 1947 § 23-1217 (repealed 1969), as to how that record is to be kept. Thus it cannot be assumed that the poll book tally takes into consideration those who did not in fact vote after signing it. Moreover, inasmuch as ballots are not opened under R.C.M. 1947 § 23-4003 until after the poll books have been balanced against the total votes, a <u>rejected</u> (i.e. void) ballot is included in the total poll book count. These ballots are deemed illegal and there is no reason why they should in any way influence the outcome of any election.

C. MONTANA CASE LAW.

From a review of the prior decisons of the Supreme Court of Montana we submit that to hold the poll book totals are appropriate in determining the fate of the proposed constitution would be inconsistent and directly contrary to well developed case law considering what constitutes a vote and what constitutes a majority in an election.[1] First we would refer the court to the brief of the Governor of the State of Montana, Forrest H. Anderson, respondent in this case. Governor Anderson has accurately stated the force and effect of Tinkle v. Griffin, 26 M. 426, 68 P. 859 (1902) which was in turn reaffirmed in Morse v. Granite County, 44 M. 78, 119 P. 286 (1911). Those cases establish that the expression "a majority of the electors thereof voting at an election" clearly means a majority of those who vote, and not a majority of all the electors of the county or of those who vote upon any other issue at the same or some other time. Governor Anderson correctly argues that the difference between the majority required in Article XIII, Section 5, and Article XIX, Section 8 is of no significance. We further submit that there is no rational basis why any difference should be significant. Elections under both are expressions of democratic intent and as such are subject to majority rule. To be sure, the constitutional issue is a more important one but this is no basis for prejudicing its passage simply because the ballot contained multiple issues.

Consistent with the rational of the Tinkle case, Montana law requires that where the intent of anyone casting a ballot is not clear, that ballot should be rejected. R.C.M. 1947 § 23-4002, Carwile v. Jones, 38 M. 590, 101 P. 153 (1909); Peterson v. Billings,

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[1]For other jurisdictions' interpretation of this problem see 131 ALR 1382, "Basis for computing majority essential to the adoption of a constitutional or other special proposition submitted to voters."

109 M. 390, 96 P2d 922 (1939). The casting of a ballot is an expression of intent and it is through this expression of intent at an election that our system of government operates. "Casting a ballot at such an election is an affirmative act not a negative one." Wolff v. Geurkink, 111 M. 417, 426, 109 P.2d 1094 (1940). As Tinkle, supra p. 431-432 so succinctly puts it, "Those who refrain from such expression are deemed to yield acquiescence." We submit that signing the poll book does not constitute the act of voting. It is the marking of the ballot which constitutes a vote. To count in any way those who chose to vote on other issues but failed to vote for or against the constitution is to give force and effect to votes which would otherwise have no effect upon the outcome. Clearly this is contrary to the principles of democratic government and is error.

D. CONSTITUTIONAL ISSUES.

Even if the Secretary's letter to county clerk and recorders is considered as evidence, there is no way, without a factual inquiry, to determine how the Secretary arrived at his certified total vote. Rules of Appellate Civil Procedure, Rule 17 (b) provides that original proceedings in the Supreme Court be commenced and conducted in the manner prescribed by the Code of Civil Procedure. Failure to make factual inquiry into the facts behind the certification by the Secretary of State constitutes a denial of due process of law to those who oppose this petition. Again, if the court is persuaded that neither the single issue criteria nor the poll book count is the proper formula for deriving the total votes, but instead some other criteria should be used, then the same argument applies. It is evident that there is not sufficient factual background to determine what constitutes a majority of those voting in the election and due process requires a factual inquiry.

Setting the above argument aside there is another and even more compelling reason why this court should not find for the relators herein. Article IX, Section 2, of the Montana Constitution, provides

that "every person...shall be entitled to vote...upon all questions which may be submitted to the vote of the people or electors..." In Reynolds v. Simms, 377 U.S. 533, 562 (1964) the United States Supreme Court characterized the right to vote as "a fundamental political right, ... preservative of all rights." In Dunn v. Blumstein, ____ U.S. ____, No. 70-13, Decided March 21, 1972 the Supreme Court said:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. ... This 'equal right to vote' ... is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. ... But, as a general matter, before that right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."

Any formula which determines a majority by other than an issue by issue basis has the effect of diluting the vote of some electors.

State statutes which dilute the effectiveness of some citizens' votes receive close scrutiny by the Supreme Court. Reynolds v. Simms, supra. The effect of determining a majority on the basis of the poll book tally would be to dilute the vote of those voting in favor of the constitution, thus denying them equal protection of the law. The poll book tally gives those who voted against the constitution a 2,385 vote advantage over those who voted in favor of the issue, because those voting on side issues but not the constitution are in effect being counted as voting against the constitution. The irony in this position is that a vote on the side issues assumes the existence of the constitution. The proponents of the constitution are required to get 2,385 more votes in favor of the issue when the poll book tally is used and thus the effect of their votes is diluted in direct proportion to the interest on the side issues. There is no compelling state interest in the dilution. To be sure, the framers of Montana's constitution had a great interest in insuring that any change of that constitution be pursuant to the

intentions of the majority. The election here considered is evidence enough that their concern was not unfounded. However, they chose a scheme which in the end provided for a simple majority to express that intention, and to increase that requirement because the ballot contained multiple issues dilutes the force and effect of every affirmative vote on the primary issue of adoption. To accept the relators' petition would effectively raise the standard over the simple majority without any compelling state interest in raising the standard and diluting the votes.

Furthermore the relators' position would result in invidious discrimination because it is impossible to turn the advantage around. Under no circumstances could the same advantage accrue to those voting in favor of a proposed constitution. Proponents must achieve a majority of the votes in order to ratify it. If they should fail to achieve a majority it would be ludicrous to think of giving them the extra votes needed. Under the poll book test (or the "majority plus" test) they are required to achieve a majority increased by blank ballots, void ballots, and ballots not voted. Invidious discrimination usually occurs in other ways but clearly this favoritism to those opposed to the Constitution nevertheless is discrimination which denies equal protection of the laws.

It might be argued that the drafters of our present constitution did determine that more than a majority of those voting in an election would be required to pass any constitutional revision or modification. Thus it is argued that the favoritism discussed above is no favoritism at all but simply a higher requirement for passage of the proposed constitutional revision. But the fact is that the framers chose a scheme based on a simple majority and once that scheme was chosen justice requires that each vote be counted as one vote--not some percentage of one vote in determining the outcome. An increase in the number of votes required, as a result of collateral issues, is no less a denial of equal protection, no matter whether a two thirds majority, or a simple majority, or somewhere in between, applies. Once a standard is set, it must be

adhered to and equal protection requires that the standard apply equally to those favoring as well as those opposing the issue.

V.

CONCLUSION

The passage of this new proposed constitution is an issue of great importance to the State of Montana. It is the fruit of a democratically elected constitutional convention which considered public opinion and labored to compromise the many interests involved. The document will provide the poor and the disadvantaged along with minority groups an increased opportunity to participate in government. If the petition of the relators herein is granted this opportunity will be lost and the prospect of another revision in the near future is slight at best. To create a "majority plus" rule of counting votes would establish a legal validity to the phantom and ghostly images of those electors who, for some reason or another, apparently accepted a ballot but then decided to refrain from voting their ballot:

> Has a person "voted" when he sends for and obtains an absentee ballot but then decides to throw his ballot in the garbage can rather than return it to the County Clerk and Recorder? Has a person "voted" when he signs the poll book, then remembers the cake burning in the oven at home and hurries from the precinct building without bothering to vote?

Voting must mean the act of marking a ballot and depositing it with the election officials so that the mark can be counted. The term "voting" as used in the constitution and Montana statutes does not mean, and cannot mean, simply obtaining a ballot without doing anything more. It must mean the exercise of marking a ballot to reflect the choice that the ballot invites him to make. If he declines to exercise that choice, then his participation in the election, or lack of it, cannot be construed to be a negative vote against the proposal under consideration, but instead is an acquiescence in the will of the majority of those who did exercise the same right of choice.

Acquiesence to the will of the majority is the cornerstone of the democratic process. We are protected from a tyranny by the majority through the constitutional guarantees of free speech and the continued reoccurrence of the political process. The position taken by the relators here is not based upon any recognizable state interest in protecting minority interests, yet if their position is upheld it would deny full force and effect to the most fundamental right of our political system--the right to an equal, effective vote. There is abundant evidence that the writers of our 1889 Constitution and subsequent legislative enactments did not intend that acts would have such an effect. There is a rational and logical basis for utilizing an issue-by-issue formula, as opposed to the poll book tally, particularly when the issue of the adoption of the new Constitution received more total votes than any of the other side issues. Montana case law supports this conclusion.

For the foregoing reasons we urge the court to deny the petition of the relators and affirm the democratic principle of majority decision in our state.

RESPECTFULLY SUBMITTED this 13th day of July, 197.

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CERTIFICATE OF SERVICE

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