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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.

FILED

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CLERK OF SUPREME COURT
STATE OF MONTANA

BRIEF OF CITY OF BILLINGS,
AMICUS CURIAE

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Filed _____

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IN THE SUPREME COURT OF THE STATE OF MONTANA

1972

STATE OF MONTANA, ex rel WILLIAM F. 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

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

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

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

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

20 The method of amendment of a state constitution is most
21 often determinable from the provisions of the constitution itself;
22 state constitutions typically, if not universally, contain detailed
23 provisions regarding the amendatory process, and these provisions
24 are mandatory, exclusive and strictly construed. 16 Am.Jur.2d,
25 Constitutional Law, Section 29. Montana has held that a sub-
26 stantial compliance with the constitution requirement is suffi-
27 cient. State ex rel Hay v. Alderson, 49 Mont. 287, 142 Pac. 210
28 (1914).

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

1 16 Am.Jur.2d, Constitutional Law, Section 38. In some jurisdic-
2 tions it is sufficient if a mere majority of the votes in reference
3 to the amendments are in favor of their adoption, where the con-
4 stitutions require ratification by "majority of the electors". In
5 other states a similar provision has been held to require a major-
6 ity of all voters voting at the election at which the proposed
7 amendment is submitted, and a mere majority of those voting on the
8 amendment itself has not been deemed sufficient. Ibid.

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

19 RATIONALE

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

- 24 1. " * * * The question presented is by no means
25 a novel one. In fact, so able and experienced
26 a jurist as Judge Thomas M. Cooley admits
27 (Const. Lim., 6th Ed., p. 747, note 1) that
28 'it must be confessed that it is impossible to
29 harmonize the cases.' An examination of the
30 large number of authorities cited by counsel
31 in the argument of this case accentuates the
32 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 hope-
less. * * * "

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

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

1 would accomplish nothing. We have carefully
2 examined them all, in the light of the able
3 arguments of counsel, and we find ourselves
4 unable to base our conclusions upon any
5 apparent weight of authority. We must decide
6 this case upon the provisions of our constitu-
7 tion as the same appear to us, . . ."
8 (47 Pac., p. 260.)

9 3. " * * * Experience has shown that it is almost,
10 if not quite, an impossibility to secure an
11 expression from every elector upon any question,
12 and, above all, upon a question of an amendment
13 of the constitution; and it is equally diffi-
14 cult to ascertain the actual number of electors at
15 any given time. To rely upon the vote cast upon
16 some other question at the same election would
17 be entirely unsatisfactory, and such a construc-
18 tion is, we think, at least impliedly negated
19 by the provisions of section 3. While it is
20 true that some 10,000 or more electors would
21 seem to have been entirely indifferent upon
22 the question of the adoption of this and the
23 other amendments, still all were--must have
24 been--fully advised as to the importance of the
25 questions submitted, and should their indiffer-
26 ence be taken as conclusive of their opposition
27 to the amendments? Upon what rule of honesty
28 or righteousness can this be claimed? Is it
29 not more reasonable, as well as more righteous,
30 to say that in a matter about which they mani-
31 fest such indifference their silence shall be
32 taken as assent? * * * " (47 Pac., p. 260.)

18 We realize that the Idaho court does by way of dictum
19 see a difference between the words "majority of the electors" and
20 the words "majority of all the electors voting at such election".
21 From that point of view, the language of the Idaho case would seem
22 to support the contention of the petitioners in this matter.
23 Fundamental Issue: Whether abstaining voters are to be counted
24 as voting against or regarded as having deliberately chosen to
25 abstain and thereby leave the question to the will of the majority
26 voting thereon.

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

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

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

13 The court may either say that those not voting for the
14 constitution or against it were satisfied with the old Constitu-
15 tion, or were satisfied to have those interested in the question
16 to determine for them whether the new constitution should be
17 adopted. We like the reasoning of the Idaho court in this situa-
18 tion and think that a strained construction applying to the wishes
19 of those not voting would not be "righteous" judgment.

20 SUMMARY

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

28 Respectfully submitted this 11th day of July, 1972.

29
30 

31 CALVIN A. CALTON
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1 CERTIFICATE OF MAILING

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

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18 on this 11th day of July, 1972.

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