ORIGINAL

No. 12310

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

THE STATE OF MONTANA,
ex. rel. STANLEY C. BURGER,

Petitioner,

vs.

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

Respondent

FILED
JUN 20 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

* *

APPLICATION FOR DECLARATORY JUDGMENT,
ALTERNATE WRIT OF INJUNCTION,
ALTERNATE WRIT OF PROHIBITION,
and
ORDER TO SHOW CAUSE

* *

The Petitioner above-named hereby applies to this Court for a declaratory judgment, alternate writ of injunction, alternate writ of prohibition and order to show cause, and in support thereof, states and alleges as follows:

1. This is a proceeding for declaratory relief under Title 93, Chapter 89, R.C.M., 1947, the Uniform Declaratory Judgments Act of the State of Montana. The Petitioner also seeks an alternate writ of injunction or an alternate writ of prohibition or other appropriate writ or relief.

2. That the Petitioner is now and at all of the times hereinafter mentioned was a citizen and resident, elector and taxpayer of the State of Montana.

3. That the Petitioner is one elector among the electors of the State of Montana who voted upon the Constitution which has been proposed to the people of the State of Montana, at the election on the 6th day of June, 1972, and is beneficially interested in the proper determination of the outcome of this election.

(2)

4. That the Petitioner is informed and believes, and therefore alleges, that the facts which give rise to this controversy are not in dispute.

5. That the electors of the State of Montana at the general election held on the 3rd day of November, 1970, voted to call a Constitutional Convention for the State of Montana, and that thereafter the Legislative Assembly of the State of Montana enacted Chapter 296 of the laws of 1971 to set up a Constitutional Convention; that Constitutional Convention delegates were elected from throughout the State of Montana in the number of One Hundred (100) as provided by that chapter, and the Convention duly completed on the 24th day of March, 1972, and that the Convention fixed the date of the election on such proposed Constitution as the 6th day of June, 1972.

6. That the proposed Constitution so adopted by the Constitutional Convention, as aforesaid, was regularly submitted to the people on the 6th day of June, 1972, for a vote thereon on a ballot, a copy of which is hereto attached, marked Exhibit "A" and hereby made a part hereof, to which reference is hereby specifically made. That the said Constitution was submitted as one of four issues, and all electors were directed to vote upon said four issues by the official ballot as is more disclosed by said Exhibit "A".

7. That pursuant to law, the Secretary of State of the State of Montana has made out and filed in his office a statement of the canvass and has transmitted a copy to the Governor of the State of Montana, Forrest H. Anderson.

8. That a copy of the statement of the canvass, as filed in the office of the Secretary of State, of the State of Montana, and transmitted to the Governor of the State of Montana, Forrest H. Anderson, is attached hereto, as Exhibit "B", and by reference made a part hereof.

9. That Section 8 of Article XIX of the Montana Constitution adopted in 1889 and now in effect provides in part that "unless * * * approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." That the official figures of the Board of State Canvassers, as set forth in Exhibit "B", show that Two Hundred Thirty-Seven Thousand Six Hundred Eighty-Eight (237,600) electors voted at the election on June 6, 1972, and that only One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) electors voting at the election approved of the Constitution so submitted by the Constitutional Convention to the people and electors of the State of Montana, being less than a majority of the electors voting at the election.

10. That the Petitioner is informed and believes, and therefore alleges that unless the Governor of the State of Montana is restrained, enjoined and prohibited, he will issue a proclamation ministerial in nature declaring the Constitution adopted by a majority of the electors of the State of Montana.

11. That Petitioner herein is informed and believes, and therefore alleges that the said Constitution has not been properly adopted as required by Section 8, Article XIX of the Montana Constitution adopted in 1889, and therefore is of no force or effect and should not be adopted, and that the Respondent herein should now be restrained, enjoined or prohibited from taking any of the statutory and constitutional steps required to make the said Constitution effective.

12. That time is of the essence in this subject matter and the subject matter of this action is of great and widespread public and governmental concern and should be resolved at the earliest possible time. That filing an action in the District Court and final determination by an appeal to this Court is an

inadequate remedy because of the delay which would ensue before final decision could be had. That for all of the foregoing reasons, it is appropriate and proper for this Court to accept original jurisdiction for this proceeding to insure a just and speedy determination of the question involved at a time when such determination will be meaningful and effective.

13. That it is a matter of great public concern and of widespread interest to all of the qualified electors and citizens of the State of Montana that this Court determine whether the proposed Constitution submitted by the Constitutional Convention as aforesaid to the electors of the State of Montana for their approval on the 6th day of June, 1972, was adopted as required by Section 8, Article XIX of the Montana Constitution. That the Petitioner and all other persons similarly situated have no clear and adequate remedy at law except by way of declaratory judgment or in the alternative by writ of injunction or prohibition or other appropriate writ as herein prayed.

WHEREFORE, Petitioner prays for the following letter:

1. That the Supreme Court of the State of Montana take and accept original jurisdiction of the above entitled controversy and immediately proceed to herein determine the issues involved therein.

2. That this Court issue an order to show cause to the respondent herein named directing that he appear before this Court on a day certain to be heard as to why the said Constitution should not be declared as not having received the approval of a majority of the electors voting at the election on June 6, 1972.

3. That upon such hearing, this Court adjudge that the said Constitution submitted to the electors voting at the election on June 6, 1972, did not receive the approval of a majority of the electors voting at the election on June 6, 1972, and that the same was not adopted and approved by the voters as required

by Section 8, Article XIX of the Montana Constitution.

5. That this Court issue an alternate writ of injunction or an alternate writ of prohibition or other remedial writ enjoining, restraining and prohibiting the Governor of the State of Montana from issuing the proclamation that the said Constitution submitted to the electors voting at the election did receive the approval of a majority of the electors voting at the election, and commanding he proclaim that the same is not approved by the voters of the State of Montana as required by Section 8, Article XIX of the Montana Constitution.

6. That the Petitioner be granted such other and further relief as may to the Court appear to be meet and just in the premises.

MORROW, NASH & SEDIVY, P.C.

By: _____
Security Bank & Trust Co. Bldg.
208 East Main, Bozeman, Montana,
Attorneys for Petitioner

STATE OF MONTANA)
) ss:
County of Gallatin)

STANLEY C. BURGER, first duly sworn upon oath, for himself says:

That he is the Petitioner named in the foregoing application; that he has read the foregoing application and knows the contents thereof, and that the matters and things therein set forth are true to his own knowledge.

_____
Stanley C. Burger

Subscribed and sworn to before me this 20 day of June, A.D., 1972.

_____
EDMUND P. SEDIVY, JR.,
Notary Public for the State of Montana. Residing at Bozeman, Mont.
My commission expires: 5/9/75

JAMES H. MORROW, JR.
DONALD A. NASH,
EDMUND P. SEDIVY, JR.
208 East Main Street
Bozeman, Montana
Attorneys for the Petitioner

INSTRUCTIONS TO VOTERS: PLACE AN "X" IN THE BOXES WHICH EXPRESS YOUR PREFERENCES. THE FULL TEXT OF THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS IS AVAILABLE FOR INSPECTION AT YOUR POLLING PLACE. IF THE PROPOSED CONSTITUTION FAILS TO RECEIVE A MAJORITY OF THE VOTES CAST, ALTERNATE ISSUES ALSO FAIL.

OFFICIAL BALLOT

PROPOSED CONSTITUTION

PLEASE VOTE ON ALL FOUR ISSUES

1.
(Vote for One)

☐ **FOR** the proposed Constitution.

☐ **AGAINST** the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.
(Vote for One)

☐ 2A. **FOR** a unicameral (1 house) legislature.

☐ 2B. **FOR** a bicameral (2 houses) legislature.

3.
(Vote for One)

☐ 3A. **FOR** allowing the people or the legislature to authorize gambling.

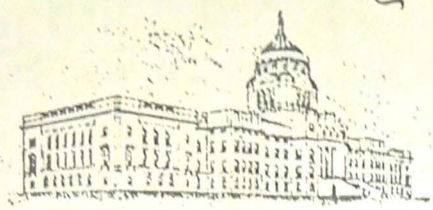
☐ 3B. **AGAINST** allowing the people or the legislature to authorize gambling.

4.
(Vote for One)

☐ 4A. **FOR** the death penalty.

☐ 4B. **AGAINST** the death penalty.

Office of the Secretary of State



OF THE

STATE OF MONTANA

CERTIFICATE OF THE ABSTRACT OF VOTES CAST FOR AND AGAINST THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS THEREON AT THE SEPARATE ELECTION APPOINTED BY THE CONSTITUTIONAL CONVENTION TO BE HELD SIMULTANEOUSLY WITH THE PRIMARY ELECTION IN THE STATE OF MONTANA ON

TUESDAY, JUNE 6, 1972

This is to certify that on Thursday, June 15, 1972 at 9:00 o'clock A.M., I, FRANK MURRAY, Secretary of State, in the presence of the Governor and State Treasurer proceeded in accordance with Chapter 296, Laws of Montana, 1971, as amended by Extraordinary Chapter 1, Laws of Montana, 1971, and Resolution No. 11 of the Constitutional Convention, adopted March 4, 1972, to canvas the votes cast at the Election held in the State of Montana on Tuesday, the Sixth day of June, A.D. 1972, for and against the proposed Constitution and the Separate Propositions thereon, as set forth within.

NOW, THEREFORE, I, FRANK MURRAY, Secretary of State, do hereby certify that the following is a true, correct and complete statement of the number of votes cast for and against the proposed Constitution and Separate Proposition thereon and of the number of electors voting at the election hereinabove referred to, and that I have computed and determined the votes from the abstracts transmitted to the Secretary of State by the County Clerks of all fifty-six counties in the State of Montana, and I declare the result to be as follows:

FOR the proposed Constitution.		116,415
AGAINST the proposed Constitution.		113,883
2A.	FOR a unicameral (1 house) legislature.	95,259
2B.	FOR a bicameral (2 houses) legislature.	122,425
3A.	FOR allowing the people or the legislature to authorize gambling.	139,382
3B.	AGAINST allowing the people or the legislature to authorize gambling.	88,743
4A.	FOR the death penalty.	147,023
4B.	AGAINST the death penalty.	77,733
Total number of electors voting.		237,600

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this twentieth day of June, A. D. 1972.

FRANK MURRAY
Secretary of State

Forrest H. Anderson-Governor

Alex B. Stephenson-State Treasurer

ORIGINAL

ORIGINAL

No. 12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M. D.,

Relator,

-vs-

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

Respondent.

* *

APPLICATION FOR DECLARATORY JUDGMENT,
ALTERNATE WRIT OF INJUCTION,
ALTERNATE WRIT OF PROHIBITION,
and
ORDER TO SHOW CAUSE

FILED
JUN 20 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

* *

The relator above-named hereby applies to this Court for a declaratory judgment, alternate writ of injunction, alternate writ of prohibition and order to show cause, and in support thereof, states and alleges as follows:

1. This is a proceeding for declaratory relief under Title 93, Chapter 89, R.C.M., 1947, the Uniform Declaratory Judgments Act of the State of Montana. The relator also seeks an alternate writ of injunction or an alternate writ of prohibition or other appropriate writ or relief.

2. That the relator is now and at all of the times hereinafter mentioned was a citizen, resident, voter and taxpayer of Lewis and Clark County and of the State of Montana and is beneficially interested in the proper outcome of this election. That the relator is one voter among the voters of the State

(1) THURBER'S HELENA

of Montana who voted upon the Constitution at the special election on the 6th day of June, 1972, and is beneficially interested in the proper outcome of this election. The relator is informed and believes, and therefore alleges, that the facts which give rise to this controversy are not in dispute.

3. That the voters of the State of Montana at the general election held on the 3rd day of November, 1970, voted to call a Constitutional Convention for the State of Montana, and that thereafter the Legislative Assembly of the State of Montana enacted Chapter 296 of the laws of 1971 to set up a Constitutional Convention; that Constitutional Convention delegates were elected over the state of Montana in the number of One Hundred (100) as provided by that chapter, and the Convention duly convened and adopted a proposed Constitution which was regularly completed on the 24th day of March, 1972, and that the Convention fixed the date and other procedures for the election on such proposed Constitution as the 6th day of June, 1972, all in a resolution, a copy of which is more fully set forth in a resolution marked Exhibit "A", hereto attached and hereby made a part hereof.

4. That the proposed Constitution so adopted by the Constitution Convention, as aforesaid, was regularly submitted to the people on the 6th day of June, 1972, for a vote thereon on a ballot, a copy of which is hereto attached, marked Exhibit "B" and hereby made a part hereof, to which reference is hereby specifically made. That the said proposed Constitution was submitted along with three other issues,

THURBER'S 4 HELENA

and all voters were directed to vote upon said four issues by the official ballot as is more fully disclosed by said Exhibit "B" hereto attached.

5. That the official canvass of the State of Montana indicated that Two Hundred Thirty-seven Thousand Six Hundred Eighty-eight (237,688) actually voted on the official ballot for the proposed Constitution. That One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) voted for the proposed Constitution submitted by the Constitutional Convention aforesaid, and One Hundred Thirteen Thousand Eight Hundred Eighty-three (113,883) electors voted against the proposed Constitution so submitted by the Constitutional Convention, all of which more fully appears from the official report of the State Board of Canvassers, hereto attached, marked Exhibit "C" and hereby made a part hereof.

6. That Section 8 of Article XIX of the Montana Constitution adopted in 1889 and now in effect provides in part that "unless * * * approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." That the official figures of the Board of State Canvassers show that Two Hundred Thirty-seven Thousand Six Hundred Eighty-eight (237,688) electors voted at the election on June 6, 1972, and that only One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) electors voting at the election approved of the Constitution so submitted by the Constitutional Convention to the people and electors of the State of Montana, being less than a majority of the electors voting at the election.

THURBER'S
HELENA

7. That the relator is informed and believes, and therefore alleges, that the Governor of the State of Montana unless restrained, enjoined and prohibited will issue a proclamation declaring the proposed Constitution adopted by a majority of the electors of the State of Montana.

8. That in support of the petition for alternate writ of prohibition, injunction and declaratory judgment, that relator herein is informed and believes, and therefore alleges, that the said Constitution has not been properly adopted as required by Section 8, Article XIX of the Montana Constitution adopted in 1889 and therefore is not of any force or effect and should not be adopted, and that the respondent herein should now be restrained, enjoined or prohibited from taking any of the statutory and constitutional steps required to make the said Constitution effective.

9. The subject matter of this action is of great and widespread public concern and should be resolved at the earliest possible time. That filing an action in the District Court and final determination by an appeal to this Court is an inadequate remedy in that the delay which would ensue before final decision could be had and would give effect to the proposed Constitution voted upon but not approved by the voters on June 6, 1972. That for all of the foregoing reasons, it is appropriate and proper for this Court to accept original jurisdiction for this proceding to insure a just and speedy determination of the question involved at a time when such determination will be meaningful and effective, and thereby prevent irreparable injury.

THURBER'S HELENA

10. That it is a matter of great public concern and of widespread interest to all of the qualified electors and citizens of the State of Montana that this Court determine whether the proposed Constitution submitted by the Constitutional Convention as aforesaid to the electors of the State of Montana for their approval on the 6th day of June, 1972, was adopted as required by Section 8, Article XIX of the Montana Constitution. That the relator and all other persons similarly situated have no clear and adequate remedy at law except by way of declaratory judgment or in the alternative by writ of injunction or prohibition as herein prayed.

WHEREFORE, relator prays for the following relief:

1. That the Supreme Court of the State of Montana take and accept original jurisdiction of the above entitled controversy and immediately proceed to herein determine the issues involved therein.

2. That this Court issue an order to show cause to the respondent herein named, directing that he appear before this Court on a day certain to be heard as to why the said Constitution should not be declared as not having received the approval of a majority of the electors voting at the election on June 6, 1972.

3. That upon such hearing, this Court adjudge that the said Constitution submitted to the electors voting at the election on June 6, 1972, did not receive the approval of a majority of the electors voting at the election on June 6, 1972, and that the same was not adopted and approved by the voters as

required by Section 8, Article XIX of the Montana Constitution.

4. That this Court issue an alternate writ of injunction or an alternate writ of prohibition or other remedial writ enjoining, restraining and prohibiting the Governor of the State of Montana from issuing the proclamation that the said Constitution submitted to the electors voting at the election and did not receive the approval of a majority of the electors voting at the election, and therefore the same is not approved by the voters of the State of Montana as required by Section 8, Article XIX of the Montana Constitution.

5. That the relator be granted such other and further relief as may to the Court appear to be meet and just in the premises.

PAUL T. KELLER, PAUL F. REYNOLDS
CHARLES E. PETAJA, P. KEITH KELLER

By: _____

South Annex Power Block
Helena, Montana 59601
Attorneys for Relator

A F F I D A V I T

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

WILLIAM F. CASHMORE, being first duly sworn, deposes and says:

That he is the relator named in the above-entitled action; that he has read the above and foregoing application for declaratory judgment, alternate writ of injunction, alternate writ of prohibition and

order to show cause, knows the contents thereof and the matters and things therein stated are true except as to those matters therein stated on information and belief, and as to those matters, he believes to be true.

M H Parkinson M D

SUBSCRIBED AND SWORN to before me, this 20th day of June, 1972.

Peggy D Taylor

NOTARY PUBLIC for the State of Montana
Residing at Helena, Montana
My commission expires June 30, 1972.

(S E A L)

THURBER'S
HELENA

MONTANA CONSTITUTIONAL CONVENTION

1971 - 1972

RESOLUTION NO. 11

DATE INTRODUCED: MAR 1 1972

A RESOLUTION TO APPOINT AN ELECTION FOR RATIFICATION OR REJECTION OF THE PROPOSED CONSTITUTION AND TO PROVIDE FOR PUBLICATION OF THE PROPOSED CONSTITUTION WITH COMMENTS

Section 1. In accordance with Section 17 of the Constitutional Convention Enabling Act (Chapter 296, Laws of 1971 as amended by Chapter 1, Extraordinary Session, Laws of 1971) the Convention hereby resolves that:

(1) An election separate from the state primary election shall be held simultaneously on June 6, 1972, for the purpose of ratifying or rejecting the proposed Constitution.

(2) The question of adopting the proposed Constitution and related questions shall be submitted to the people on a separate ballot which shall be certified by the Secretary of State in the form to be adopted by the Constitutional Convention.

(3) The County Commissioners in each County shall furnish separate pollbooks, precinct registers, tally sheets and any other supplies necessary for holding a separate election.

(4) The votes cast for the ratification or rejection and related questions shall be tabulated, returned and canvassed separately from the votes cast in the primary election but in the same places, in the same manner, and by the same election judges, clerks and canvassers.

(5) The Secretary of State shall prescribe the form of

EXHIBIT "A"

referred to, and that I have computed and determined the votes from the abstracts transmitted to the Secretary of State by the County Clerks of all fifty-six counties in the State of Montana, and I declare the result to be as follows:

Exhibit "C"

the election notice and direct each ~~election judge~~ Clerk & Recorder to post the notice in public places in their precincts at least 20 days prior to the election and direct each board of county commissioners to publish notice of the election in a newspaper of general circulation in the county once at least 10 days before the election.

(6) The election laws of Montana shall apply in all other respects to the Constitutional ratification or rejection election including notice of close of registration.

Section 2. (1) The Secretary of State is hereby requested to requisition the Purchasing Division of the Department of Administration to call for bids for the printing of the proposed Constitution with comments and report to the people as required by subsections (4) and (5) of Section 17 of the Constitutional Convention Enabling Act, which shall be printed in the form prescribed by the Convention.

(2) There is attached to this Resolution a Requisition approved by the Constitutional Convention for use by the Secretary of State in requesting the call for bids.

Introduced by Committee on Rules
Marshall Murray, Chairman

INTRODUCED BY: Committee on Rules

Marshall Murray
Chairman

EXHIBIT "A" cont.

referred to, and that I have computed and determined the votes from the abstracts transmitted to the Secretary of State by the County Clerks of all fifty-six counties in the State of Montana, and I declare the result to be as follows:

INSPECTION AT YOUR POLLING PLACE. IF THE PROPOSED CONSTITUTION FAILS TO RECEIVE A MAJORITY OF THE VOTES CAST, ALTERNATE ISSUES ALSO FAIL.

OFFICIAL BALLOT

PROPOSED CONSTITUTION

PLEASE VOTE ON ALL FOUR ISSUES

1.
(Vote for One)

☐ **FOR** the proposed Constitution.

☐ **AGAINST** the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.
(Vote for One)

☐ 2A. **FOR** a unicameral (1 house) legislature.

☐ 2B. **FOR** a bicameral (2 houses) legislature.

3.
(Vote for One)

☐ 3A. **FOR** allowing the people or the legislature to authorize gambling.

☐ 3B. **AGAINST** allowing the people or the legislature to authorize gambling.

4.
(Vote for One)

☐ 4A. **FOR** the death penalty.

☐ 4B. **AGAINST** the death penalty.

EXHIBIT "B"

CERTIFICATE
PROPOSED CON
AT THE SEPAR
CONVENTION T
IN THE STATE

This
9:00 o'clock A
presence of th
cordance with
by Extraordina
Resolution No.
March 4, 1972,
in the State o
1972, for and
Propositions t

NOW, THEREFORE, I, FRANK MURRAY, Secretary of State, do hereby certify that the following is a true, correct and complete statement of the number of votes cast for and against the proposed Constitution and Separate Proposition thereon and of the number of electors voting at the election hereinabove referred to, and that I have computed and determined the votes from the abstracts transmitted to the Secretary of State by the County Clerks of all fifty-six counties in the State of Montana, and I declare the result to be as follows:

Exhibit "C"

Office of the Secretary of State



OF THE

STATE OF MONTANA

CERTIFICATE OF THE ABSTRACT OF VOTES CAST FOR AND AGAINST THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS THEREON AT THE SEPARATE ELECTION APPOINTED BY THE CONSTITUTIONAL CONVENTION TO BE HELD SIMULTANEOUSLY WITH THE PRIMARY ELECTION IN THE STATE OF MONTANA ON

TUESDAY, JUNE 6, 1972

This is to certify that on Thursday, June 15, 1972 at 9:00 o'clock A.M., I, FRANK MURRAY, Secretary of State, in the presence of the Governor and State Treasurer proceeded in accordance with Chapter 296, Laws of Montana, 1971, as amended by Extraordinary Chapter 1, Laws of Montana, 1971, and Resolution No. 11 of the Constitutional Convention, adopted March 4, 1972, to canvas the votes cast at the Election held in the State of Montana on Tuesday, the Sixth day of June, A.D. 1972, for and against the proposed Constitution and the Separate Propositions thereon, as set forth within.

NOW, THEREFORE, I, FRANK MURRAY, Secretary of State, do hereby certify that the following is a true, correct and complete statement of the number of votes cast for and against the proposed Constitution and Separate Proposition thereon and of the number of electors voting at the election hereinabove referred to, and that I have computed and determined the votes from the abstracts transmitted to the Secretary of State by the County Clerks of all fifty-six counties in the State of Montana, and I declare the result to be as follows:

Exhibit "C"

FOR the proposed Constitution.	116,415
AGAINST the proposed Constitution.	113,883
2A. FOR a unicameral (1 house) legislature.	95,259
2B. FOR a bicameral (2 houses) legislature.	122,425
~~3A~~. FOR allowing the people or the legislature to authorize gambling.	139,382
3B. AGAINST allowing the people or the legislature to authorize gambling.	88,743
4A. FOR the death penalty.	147,023
4B. AGAINST the death penalty.	77,733
Total number of electors voting.	237,600

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this twentieth day of June, A. D. 1972.

FRANK MURRAY
Secretary of State

Forrest H. Anderson-Governor

Alex B. Stephenson-State Treasurer

Exhibit C

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

FILED
JUN 22 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

PER CURIAM: ORDER

William F. Cashmore, M.D., as relator filed in this Court a verified application for declaratory judgment, alternative writ of injunction or other remedial relief, in cause No. 12309, entitled "THE STATE OF MONTANA, ex rel. WILLIAM F. CASHMORE, M.D., Relator, vs. FORREST H. ANDERSON, as Governor of the State of Montana, Respondent; thereafter and on the same day Stanley C. Burger, as a Petitioner, filed in this Court his application for declaratory judgment, alternate writ of injunction, alternate writ of prohibition and order to show cause in cause No. 12310, entitled "THE STATE OF MONTANA, ex rel. STANLEY C. BURGER, Petitioner, vs. FORREST H. ANDERSON, as Governor of the State of Montana, Respondent.

Counsel in both causes were heard ex parte and it appears that the relief sought in both actions is a determination of whether or not the new constitution voted on at the election of June 6, 1972, received the approval of a majority of the electors voting at the said election, it being contended that it did not receive such approval as required by Section 8, Article XIX of the Montana Constitution.

While a restraining order was sought to prohibit the respondent Governor from issuing any proclamation upon the election the Court was advised by counsel during the course of their ex parte arguments that the proclamation had been issued by the Governor.

It further appearing that the relief sought in each of the actions, as hereinbefore related, is similar, a motion was made for the consolidation of the actions, which motion was granted and it was ordered that causes numbered 12309 and 12310, each entitled as hereinbefore set forth, be consolidated under cause No. 12309, to be entitled as this Order is entitled, and the Clerk is directed to make such amendments to his records as required to evidence these changes.

Upon consideration of the allegations contained in the pleadings,

(3)

the exhibits appended thereto, and the ex parte oral presentations before this Court, it would appear that the matters raised thereby are to secure interpretations of provisions of our present constitution in light of its wording and under precedents established in the case law of Montana and other states of the Union, and, further, that no fact questions arise which would require the taking of testimony, and in such a situation an adversary hearing before this court is all that would be required to present the legal issue for determination.

NOW THEREFORE, IT IS HEREBY ORDERED that this cause be set for an adversary hearing before this Court on the 17th day of July, 1972, at the hour of 9:00 a.m.

IT IS FURTHER ORDERED that service of a copy of this Order, of the two applications now on file, with their exhibits, and any memorandums of authorities to be furnished by the relators, be served upon the HONORABLE FORREST H. ANDERSON, as Governor of the State of Montana, forthwith; and identical service of such documents shall be made upon HONORABLE ROBERT L. WOODAHL, as Attorney General of the State of Montana, forthwith.

IT IS FURTHER ORDERED that the respondent shall file such motions or other pleadings as is desired, and, without waiver, shall file his answers to the petitions in this cause, all such pleadings to be served and filed on or before three days before the date fixed for hearing herein.

In view of the statewide interest in the question here presented, applications for leave to intervene or to appear herein amicus curiae should be addressed to the Chief Justice and filed within ten days from the date of this Order. Intervenors may appear in oral argument upon application to the Court for time therefor; amicus curiae must apply to the Court for permission to present oral argument and such application must fully set forth the reasons for the application. Amicus curiae shall appear by brief.

Briefs of all parties may be in typewritten form, and shall be filed with the Clerk of this Court at least three days before the day set for argument. All briefs shall be served upon counsel for all parties who have previously appeared, but any group appearing shall be entitled to but one copy thereof, and law firms appearing shall likewise be entitled to but one copy. The names of all parties who have previously appeared may be obtained from the office of the Clerk.

It appearing further that the members of the Constitutional Convention and/or the members of the primary election canvassing board may or may not be interested in appearing as parties in intervention or as amicus curiae, and for that reason copies of this order shall be served upon the president, first vice-president, eastern district vice-president, western district vice-president and secretary of the Constitutional Convention and upon the Governor, State Treasurer and Secretary of State, comprising the primary election canvassing board by mail.

Counsel will be notified of their time for argument at least 24 hours before the hearing.

DATED this 22nd day of June, 1972.

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

12309

No. 12309

ORIGINAL

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.

FILED
JUN 28 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

A N S W E R

COMES NOW the Respondent and for answer to the petitions on file in this cause, as required by the Court's Order of June 22, 1972, admits, denies and pleads as follows:

I.

For answer to the separate petition numbered 12309 entitled, "The State of Montana, ex rel. William F. Cashmore, M.D., Relator, vs. Forrest H. Anderson, as Governor of the State of Montana, Respondent", this Respondent:

1. Admits the allegations of paragraphs 1, 2, 3, 4, and 5.

2. As to the allegations of paragraph number 6, this petitioner admits the correctness of the quotation of the portion of Article XIX, Section 8 and of the official figures of the canvas of the election therein set out, but denies that the number of votes cast in favor of the proposed Constitution was less than a majority of the electors voting at the election.

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3. As to the allegations of paragraph 7, the Respondent neither admits nor denies them but alleges that all allegations and any argument or discussion based upon them are moot since the result of the election was proclaimed by this Respondent before the matter was presented to this Court.

4. Denies the allegations of paragraph 8.

5. As to the allegations of paragraphs 9 and 10, this answering Respondent neither admits nor denies the allegations of these paragraphs since these allegations were obviously intended only as a basis for invoking the jurisdiction of this Court, and, the Court having accepted jurisdiction, these allegations and any discussion or argument based upon them are moot.

II.

For answer to the separate petition numbered 12310 entitled, "The State of Montana, ex rel. Stanley C. Burger, Petitioner, vs. Forrest H. Anderson, as Governor of the State of Montana, Respondent", this Respondent:

1. Admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, and 8.

2. As to the allegations of paragraph 9, this petitioner admits the correctness of the quotation of the portion of Article XIX, Section 8 and of the official figures of the canvas of the election therein set out, but denies that the number of votes cast in favor of the proposed Constitution was less than a majority of the electors voting at the election.

3. As to the allegations of paragraph number 10, the Respondent neither admits nor denies but alleges that all allegations and any argument or discussion based upon them are moot since the result of the election

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was proclaimed by this Respondent before the matter was presented to this Court.

4. Denies the allegations of paragraph number 11.

5. As to paragraphs numbered 12 and 13, this answering Respondent neither admits nor denies the allegations of these paragraphs since these allegations were obviously intended only as a basis for invoking the jurisdiction of this Court, and, the Court having accepted jurisdiction, these allegations and any discussion or argument based upon them are moot.

III.

Having fully answered, this Respondent prays the Court to dismiss the action and declare the Montana Constitution of 1972 to be in full force and effect as previously proclaimed by this Respondent.

FORREST H. ANDERSON
GOVERNOR
Respondent
Attorney Pro Se

STATE PUBLISHING CO. HELENA, MONT.

12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

FILED
JUN 28 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

BRIEF OF RESPONDENT

FORREST H. ANDERSON
Attorney Pro Se

STATE
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HELENA, MONT.

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

B R I E F

The question presented by order of this Court for briefs and argument by all interested parties is a simple one; whether the number of votes cast in favor of adopting the new constitution proposed by the Montana Constitutional Convention of 1972 is sufficient to ratify that document and make it effective as the fundamental charter of the State of Montana.

The question raised by the Relators in these combined actions are predicated on the language of Article XIX, Section 8 of the Montana Constitution of 1889, which requires that new constitutional changes proposed by a Constitutional Convention must be ". . . submitted and approved by a majority of the electors voting at the election . . . ."

The Relators have questioned the meaning of the phrase, ". . . majority of the electors voting at the election . . . ."

As Governor, I proclaimed the proposed Constitution effective as having been approved by a majority

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of the electors voting at the election. A proper majority of the votes were cast in favor of the proposed Constitution. The traditional and accepted democratic electoral processes of the State and long-standing declarations of this Court were followed.

Language identical with the words questioned here is used in Article XIII, Section 5 of the 1889 Constitution. That section in part provides:

> No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law.

With the exception of the word "thereof", which does not and cannot in any way alter the meaning of the phrase, the wording is identical to that placed in question here.

Seventy years ago, in the case of Tinkle vs. Griffin, 26 M. 426, this Court was called upon to decide what those words meant. The fact situation was in all pertinent respects identical with that set out in the petitions now before the Court.

The Court noted that the same question had been litigated in other jurisdictions with differing results. Two separate lines of authority were even then well developed, one holding that a majority of those registered, or presenting themselves at the polls, or signing pollbooks or receiving ballots was required. The other line of cases accepted the view that a majority of those casting valid ballots upon the issue in question, separate and apart from any other issues or matters being voted upon at the same time was all that was necessary.

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Given this clear choice, the Montana Supreme Court speaking through Chief Justice Brantley decided that the Constitution required only a majority of those casting valid ballots upon the issue. In announcing the decision of the Court, the Chief Justice clearly explained the reason behind the decision and the soundness of that reasoning is as clear today as it was in the year 1902.

Chief Justice Brantley said:

> 2. It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of Section 5, Article XIII, of the Constitution, *supra*.
>
> It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at *an election to be provided by law*.
>
> As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression "majority of the electors thereof voting at an election," etc., 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. If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted. It was none the less a special election, within the meaning of the law, though in this particular instance it was held, for convenience, on the day fixed for a general election. It is the theory of

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our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.

In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (*Montgomery County Fiscal Court v. Trimble*, 47 S. W. 773, 42 L. R. A. 738.)

We are aware that the decided cases are somewhat in conflict; but, in the absence of an express direction requiring the application of a different rule, we think this fundamental principle should control in this case, as giving effect to the clear intention of the constitution. The following cases we cite as support of this view: *Smith v. Proctor*, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403; *Howland v. Board of Supervisors*, 109 Cal. 152, 41 Pac. 864; *Case County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Gillespie v. Palmer*, 20 Wis. 544.

The order of the district court was correct, and must be affirmed.

Affirmed.

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An additional fact about this decision is worthy of attention today. At the time that Tinkle v. Griffin was decided, the 1889 Constitution had been in effect only a little over twelve years. The convention and its debates and determinations were still quite recent history, and the reasons for those actions were reasonably fresh in the minds of those called upon to carry out the Constitution's provisions. Chief Justice Brantley and his colleagues were in a far better position to know intimately the intention of the framers of the Constitution than we are at a remove of over eighty years.

The same provision construed in the Tinkle case was challenged again nine years later in the case of Morse v. Granite County, 44 Mont. 78, 19 Pac. 286. The Court reaffirmed the rule of Tinkle v. Griffin and said:

> In the case of *Tinkle v. Griffin*, 26 Mont. 426, 68 Pac. 859, this court, construing the provision of the Constitution, *supra*, said: 'The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' *etc.*, 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.' This conclusion was reached because the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in them to give expression to their views at the ballot-box.

The Morse decision laid the question to rest for these past sixty years but we are now faced again with the contention rejected twice by this Court more than three generations ago.

Constitutions are intended to be the firm

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bedrock upon which our public institutions are built. Their language should be clear and understandable so questions do not arise, but if questions arise, there is clearly a need that the Court's determinations of those questions be as permanent and imperishable as the language of the document itself. If a decision adhered to for seventy years and followed and acquiesced in by public officers and financiers in funding governmental projects is now to be overturned, an element of uncertainty and disorder is introduced into our fundamental scheme that should, in my judgment, be avoided at all costs.

The reasoning of the Court so ably expressed by Chief Justice Brantley speaks to us down through the intervening years with all the force and vigor that it carried on the day of its original announcement, and its logic is uncontestable.

The conduct of public affairs must be placed in the hands of those who take an interest in government, make decisions based upon their studies of it and express their opinions in the proper form, electoral or otherwise. The power to make fundamental decisions of the gravest nature to our entire society must never be left in the hands of those who are so indifferent, so inert, or so negligent that they do not express themselves upon a public issue by even so simple a means as correctly marking a ballot and depositing it in a ballot box. The makers of our Constitition could never have intended so grotesque a result.

I have spent a lifetime in public service and have many times submitted my hopes and ambitions to the electoral process. I have deep faith in that

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process, and I have always honored it and abided by its mandate whether it was favorable to my desires or not. The procedure whereby we submit our most important determinations, individually and as a society, to the decision of the majority is the most fundamental principle in the political life of our State and Nation. I cannot believe that the framers of our Constitution or of any constitution ever intended that a declaration of a clear majority of the people making their declaration of their belief at the polls should be dishonored and held for naught. Such a result would, in my judgment, cause the gravest dangers to our entire government and shake and perhaps shatter the belief of the people, whatever their feelings on this particular issue, in the integrity of our entire electoral process. I cannot believe that the members of the Constitutional Convention of 1889 intended such a result. This Court did not so believe seventy years ago, and I do not so believe now.

The actions of the Montana electorate demand, and the integrity and continuity of our entire governmental structure demand, that the decision freely expressed by the majority of the voters to adopt a new constitution must be given effect. I proclaimed the new Constitution effective, and I stand on that decision.

Respectfully submitted,

Forrest H. Anderson
FORREST H. ANDERSON
Governor
Attorney Pro Se

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12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

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

Petitioner,

vs

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

Respondent.

FILED
JUN 28 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

12310

AMICUS CURIAE BRIEF OF
JOSEPH P. MONAGHAN

May it please the Court, from the press account in this morning's Montana Standard it appears that the Court anticipates an adversary proceeding involving the above case and a similar related case. Hence this brief. Under the front page story of the Governor's approval of the new Constitution by declaring the vote sufficient there appears a story slanted to influence a decision favorable to his determination. In that connection the writer of this brief has checked the law and finds it well stated in the case of IN RE DENNY, 59 NORTHEASTERN REPORTER at pages 360 and 361 as follows: "In our system of government a written constitution is the highest expression of law. None other emanates directly from the sovereign people themselves. It is the deliberate and affirmative utterance of the sovereign majority. It seems unnatural to say that the sovereign majority, the authors of the designedly permanent, the fundamental, the organic law, intended that any of its safeguards should be abrogated by a failure to demand the abrogation; that the indifference of the many should be a positive element in effecting an organic change desired by the few; that a judgment abolishing the writ of habeas corpus or the right of trial by jury should be taken by default. On the contrary, one would expect a provision that the charter of our liberties should stand unaltered until the sovereign majority by affirmative action expressed their desire for and effected a change. And such is the clear letter and spirit of article 16. If a majority of the electors of the state shall ratify a proposed amendment, it shall become a part of the constitution; otherwise, not. There is no room for construction. The language is too plain to admit of quibbling. "Majority" means "more than half." "Electors," with reference to an election, means, according to the lexicographers, and universally accepted usage, "persons who perform the act of voting," and "persons who have the qualifications entitling them to vote.? Constitutions are drafted with care. The

J. MIKE SODERSTROM
OFFICIAL COURT REPORTER

framers of our constitution deliberately selected and used the words in the meaning of which there could be no ambiguity. The sentence, "If more than half of the persons in the state who possess the legal qualifications entitling them to vote shall ratify the proposed amendment it shall become a part of the constitution," is a cumbersome equivalent. The idea is clearly and more succinctly expressed in the wording of the constitution. No other standard for the adoption of proposed constitutional amendments may be set up by this court, becomingly or lawfully, than the one fixed by the constitution, -- the affirmative ratification by "a majority of the electors of the state." So, in any case, the question becomes one not of constitutional construction, but of evidence. ...This court takes judicial notice of the returns made to the secretary of state, and if the trial court had stated a different number the finding would be ignored, because this court is charged with judicial knowledge of the fact that 240,031 is the correct number. From the same source and with the same authenticity this court knows judicially that at the same election 664,094 votes were cast for presidential electors, 655,965 votes for governor, and 493,670 votes on the other proposed amendment. Since we know absolutely that more than twice 240,031 electors of the state participated in the election, we hold that the proposed amendment in question was rejected."

In the case of Morse vs Granite County, 44 Montana 78 in which Judge Brantly affirmed apparently erroneous opinion in the case of Tinkel vs Griffin, 26 Mont,426, he made this preliminary premise at page 88: "By way of preliminary, it may be remarked that the validity of the proposed bond issue is questioned solely on the ground that the board was guilty of an omission to observe the requirement of the law in substantial particulars. There is no allegation or suggestion of fraud or willful wrongdoing, by which the plaintiff or any other elector was misled so that he lost his vote."

Was the voter misled? The Great Falls Tribune in an editorial appearing on June 9,1972 entitled CONVENTION WAS CLAIRVOYANT said; As it turned out, the Constitutional Convention was clairvoyant last winter when it separated the unicameral legislature, death penalty and gambling issues from the body of the new constitution. Any one of these, locked into the constitution instead of being presented as a separate question, would have been enough to drag the constitution itself down to defeat.

Was the voter confused? See the attached letter written by A.R. Graesser, Whitehall hereunto attached together with the other divergent articles on the subject of the proposed constitution appearing on the same page.

Was there any willful wrong doing?" See attached letter of Earl W. Kinney of Billings, Montana together with copies of the stories from the Billings Gazette alluded to therein and hereunto attached.

We call the Court's attention to the opinion of Cale Crowley supporting the position of the petition in the above entitled matter a copy of which is hereunto attached.

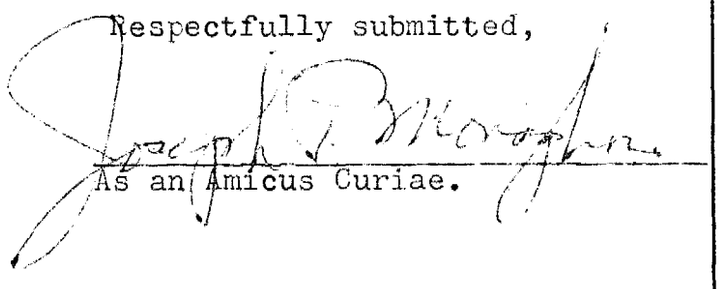
J. MIKE SODERSTROM
OFFICIAL COURT REPORTER

The irregularites which occurred in presenting the matters to the voters has been set forth in the case of PEOPLE'S ADVOCATES, Unicoporated, a/k/a "PUN", Relators vs. Frank Murray, SECRETARY OF STATE, et al. No. 12276; now pending on appeal to the United States Supreme Court contains numerous irregularites in connection with the election presentation.

Election fraud appearing to exist in several counties of the State where the proposed new constitution appeared to be prevailing caused the writer and his associates in the above action to have 30,000 cards printed for a post elections survey to be conducted in Deer Lodge County and in Cascade County but the hoods in Anaconda dispersed without a single signature the solicators who were attempting to perfect the survey there and Pat Murphy of Great Falls who first agreed to arrange for the canvass there reported that he would be shot if he attempted to pursue it in Great Falls in view of the feeling that existed there.

When we went to the FBI in Butte, Montana seeking cooperation we conferred with one Vincent G. McCarthy who advised us that the FBI was familiar with the existence of the proposed new constitution for the United States of America which had been drafted some short time ago in Santa Barbara, California which was to be presented for adoption after the 32nd state (which would have been Montana) would have approved the enabling provisos which would ultimately led our nation into the custody of the United Nations these facts we have not had sufficient to bring to the attention of the unwary voter. Norhas this writer had sufficient time to put into mailable form a letter which he proposed to send to his fellow attorneys. Dispite constant study and attention to this vast drastic and violent change which has been proposed in our form of state government which has been intensive for approximately two months the writer has been unable to anaylize scrutinize more than the judicial changes that have occurred by the reason of the DELETIONS, which were proposed at the eleventh hour as simply removing archaic and anacronistic provisions of the old constitution. It therefore appears not only was the electorate misled and confused and confounded but likewise "Con-Con" delegates themselves.

Respectfully submitted,



As an Amicus Curiae.

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 12309

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.

APPLICATION FOR LEAVE TO INTERVENE

TO: THE HONORABLE JAMES T. HARRISON, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF MONTANA:

COMES NOW, ROBERT L. WOODAHL, the duly elected, qualified and acting Attorney General for the state of Montana, and moves this Court for leave to intervene as an additional respondent in the above-entitled matter and for grounds thereof alleges:

I.

The above proceeding was commenced by the relators for a declaratory judgment to determine the validity of the Constitution which was submitted to the voters of Montana at an election held June 6, 1972.

II.

Respondent, Forrest H. Anderson acting in his official capacity as Governor of the state of Montana, pursuant to section 17 (9), Chapter 1, Extraordinary Session Laws of 1971, issued a proclamation on the twentieth day of June, 1972, declaring and proclaiming that a majority of all votes cast at said election for and against the proposed Constitution were in favor of said proposed Constitution.

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III.

Section 93-8911, Revised Codes of Montana, 1947, provides that the attorney general of the state is entitled to be heard in any proceeding for declaratory judgment in which a statute, ordinance or franchise is alleged to be unconstitutional.

IV.

This application is made on behalf of the executive branch of the government of the state of Montana to uphold the efficacy of an administrative act of the Governor as the head of that executive branch, said administrative act being required by law, and as designated counsel for the respondent, FORREST H. ANDERSON, as Governor of the state of Montana.

WHEREFORE, movant prays that this Court grant leave to him to intervene herein and, further, that this motion be deemed an application by this movant for time within which he may orally argue at the time herein fixed for hearing.

DATED this 30th day of June, 1972.

ROBERT L. WOODAHL
Attorney General

CHARLES C. LOVELL
Chief Counsel

WILLIAM N. JENSEN
Assistant Attorney General

By: Robert L. Woodahl
Robert L. Woodahl, Movant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Application for Leave to Intervene upon counsel of record by

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mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

Morrow, Nash & Sedivy
Attorneys at Law
208 East Main
Bozeman, Montana 59715

Keller, Reynolds & Drake
Attorneys at Law
South Annex Power Block
Helena, Montana 59601

Joseph P. Monaghan
Attorney at Law
2218 Elm
Butte, Montana 59701

Douglas Y. Freeman
Attorney at Law
Hardin, Montana 59034

Hibbs, Sweeney, Colberg & Koessler
Attorneys at Law
P. O. Box 1321
Billings, Montana 59101

DATED this 30th day of June, 1972.

ROBERT L. WOODAHL
Attorney General

CHARLES C. LOVELL
Chief Counsel

WILLIAM N. JENSEN
Assistant Attorney General

By: William N. Jensen

Office of the Attorney General
State Capitol
Helena, Montana 59601

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 12309

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.

O R D E R

Upon reading the application of Robert L. Woodahl, the duly elected, qualified and acting Attorney General of the state of Montana, praying for leave to intervene herein on behalf of the respondent, and good cause therefor appearing:

IT IS ORDERED that leave is hereby given the said movant to intervene in said proceeding by the filing appearance and by brief;

IT IS FURTHER ORDERED that said movant may argue the matter orally for such time as this Court may hereafter direct.

DONE this 30th day of June, 1972.

James T. Harrison

CHIEF JUSTICE

FILED

JUN 30 1972

Thomas J. Kearney

CLERK OF SUPREME COURT
STATE OF MONTANA

STATE PUBLISHING CO. HELENA, MONT.

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * *

No. 12309

* * * * * * * * *

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.

FILED
JUL - 5 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

* * * * * * * * *

BRIEF AMICUS CURIAE

* * * * * * * * *

ISSUE

Whether the electors voting in favor of the proposed new Constitution at the election June 6, 1972, constituted a majority such as required by the Constitution of Montana.

LAW

Section 8, Article XIX of the Montana Constitution provides that the Legislative Assembly may submit to the electors the question of whether to convene a convention to revise, alter or amend the Constitution and that if the Legislature approves such proposition the Legislative Assembly shall call a convention, said convention shall meet within three months after the election of delegates and shall prepare such revisions, alterations or amendments to the Constitution as may be deemed necessary and the said revisions, alterations or amendments shall be submitted to the electors and unless submitted and approved by a majority of the electors voting at the election, no

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such revision, alteration or amendment shall take effect.

Also Section 29, Article III: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

In further construing Section 8, Article XIX it is necessary to consider Section 9 of Article XIX which deals with amendments to the Constitution which may be proposed directly by the Legislative Assembly and which may be submitted directly to the electorate for approval or rejection and which provides that such amendments will become effective if approved by "a majority of those voting thereon * * * *."

ARGUMENT

It is noted that pursuant to Section 29, Article III of the Constitution a strict construction must be given to the provisions of the Constitution. Section 8, Article XIX, provides for the Constitutional Convention approach to revision, alteration or amendment of the Constitution whereas Section 9, Article XIX provides only for amendment to the Constitution. Amendment and revision have been distinguished in State ex rel. Corry vs. Cooney, et al, 70 Mont. 355, 225 P. 1007, wherein it was held that "revision of the Constitution authorized by Section 8, Article XIX, implies the probability of extensive and comprehensive action by a convention, while an 'amendment' under Section 9 does not only comprehend any change in the Constitution which adds something to or takes away from it, but is susceptible to a construction which will make it cover several propositions, all tending to effect or carry out one general object or purpose, and all connected with one subject."

The authors of the Montana Constitution under which we are now governed obviously recognized the fundamental differences in the approach to be employed by proceeding under either Section 8 or Section 9. Proceeding under Section 8 the Legislative Assembly would be moving toward a general

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revision and a generall overhaul of the document, submitting it to a close overall scrutiny whereas, under Section 9, only specific sections which may have proved troublesome, could be amended by a separate and distinct action upon each section, and thus the reason for the limitation on the number of amendments which could be submitted to the electorate at any one time.

The framers of the Montana Constitution under which we are now governed must have taken into consideration the import of the clear and lucid language used in these two conjunctive sections, to-wit: In Section 8 that the revisions, alterations or amendments had to be approved by "a majority of the electors voting at the election," whereas in 9 the differentiation was distinctly made that approval for a single and separate amendment had to be approved by "a majority of those voting thereon."

At the election on the proposed new Constitution June 6, 1972, a separate ballot was furnished on the Constitutional question. The presentation of the propositions on the Constitutional ballot and the import the various propositions relating thereto was obviously confusing and perhaps even intentionally confusing, but that is not the point. The point is that the number of electors who voted on the question received the Constitutional ballot and cast such ballot, though they may have elected to refrain from marking this ballot as to one or more of the four propositions contained thereon, one of which was a direct question concerning approval or disapproval of the proposed Constitution. The number of electors voting at the election has been thus established and it is respectfully submitted that unless a majority of those who cast this particular ballot approved the new Constitution, it must fail and that no other construction can be placed upon Section 8 of Article XIX of the Constitution of the State of Montana without violation to the meaning and intent of Section 29, Article III, requiring such strict and mandatory construction.

Respectfully submitted,

William F. Meisburger

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12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309
No. 12310

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 INTERVENOR ROBERT L. KELLEHER

FILED
JUL - 6 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

F A C T S

The Court is familiar with the number of votes cast for and against the proposed Constitution as well as the number of silent ballots.

L A W

Equity would seem to require that blank ballots cast at the election not be counted.

"Sec. 310. Basis of computing majority. In the absence of a statutory provision to the contrary, voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result. This is true whether the matter is submitted at a meeting under a statute requiring the assent of a majority, to be ascertained by taking and recording the ayes and nays of the inhabitants attending the meeting, or is submitted to a decision of a majority of the voters at the polls. Thus, a law requiring a question to be decided or an officer to be elected by the votes of the majority or other proportion of the voters does not require that the majority or other proportion of all the persons entitled to vote actually vote affirmatively, but only that the result be decided by a majority or other specified proportion of the votes cast. Similarly although there are cases that point to a contrary conclusion, generally the term "qualified voter" in a pro-

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vision as to the proportion of voters necessary for the adoption of a measure refers, not to those qualified and entitled to vote, but to those qualified and actually voting." 26 Am Jur 2d Elections Sec. 310.

The Court's attention has already been called to its own decisions[1] which support the position of the Governor.

MEANING OF SECTION 8, ART. XIX

The words "a majority of those voting on the question" in the first sentence of Sec. 8 of Art. XIX are in pari materia with the last sentence. The words "on the question" should be included in the last sentence of the section between the words "voting" and "at the election."

Federal Questions of DUE PROCESS and EQUAL PROTECTION

Query: Would a ruling that unmarked ballots constitute a negative vote violate the "one-man one-vote" rule of Baker vs. Carr (369 US 186, 7 L ed 2d 663, 82 S Ct 691) and Reynolds vs. Sims (377 US 533, 12 L ed 2d 506, 84 S Ct 1362)?

In a concurring opinion in Baker, Mr. Justice Douglas warned:

"There is a third barrier to a State's freedom

---

[1] Tinkel vs. Griffin, 26 Mont. 426 (Apr. 28, 1902-Majority of votes cast on the issue is sufficient to carry it); Peterson vs. Billings, 109 Mont. 390, 96 P.2d 922, (Dec. 4, 1939 - That intention of voters is to be considered and law interpreted liberally.); State ex rel. Wolff vs. Geurkink, 111 Mont. 417, 109P.2d 1094 (February 6, 1941-Ballot cast for a dead man is a mullity and cannot be given any effect).

A collection of cases from other jurisdictions up to 1940 on this question is found in 131 ALR beginning at page 1382. The Court's attention is specifically called to the cases beginning at the top of page 1399 under the heading "Requirement of Majority Votes Cast Generally".

in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.'"

"I agree with my Brother Clark that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County. The opportunity to prove that an 'invidious discrimination' exists should therefore be given the appellants."

". . .Fraudulent acts that dilute the votes of some have long been held to be within judicial cognizance. (Citing case) The 'right to have one's vote counted' whatever his race or nationality or creed was held (citing case) to be 'as open to protection by Congress as the right to put a ballot in a box.'" 7 L ed 2d 701-703

Mr. Chief Justice Warren in Reynolds pointed out that:

". . .The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 12 L ed 2d 523-524

CONCLUSION

The presence of the non-voting voter should no more be noted in the final tally than that of a little puppy dog who playfully runs through the polling place.

DATED this fourth day of July, 1972, the 196th of our Independence.

Respectfully submitted,

Robert L. Kelleher

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I, ROBERT L. KELLEHER, Attorney at Law, hereby certify that on the 4th day of July, 1972, I served the foregoing BRIEF OF ROBERT L. KELLEHER, INTERVENOR, upon the following named attorneys of record, by depositing a true copy thereof in the United States Mails, postpaid, addressed to them at their last known address, as follows:

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ORIGINAL

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JUL 10 1972

Thomas J. Kearney

CLERK OF SUPREME COURT
STATE OF MONTANA

The STATE OF MONTANA on the relation of WILLIAM F. CASHMORE, M. D. and STANLEY C. BURGER,

Relators,

v.

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

Respondent.

BRIEF OF AMICUS CURIAE

The proposed constitution is not a courageous document. It is not a creative document. It embodies no reform. It offers no challenge. It is unimaginative. It is uninspiring. It projects the illusion and evades the reality of change. It achieved a level of acceptance within the Convention, and that is the totality of its accomplishment and itself an indication of its meager merit. Those who support it do so more because of what it does not do than because of what it does.

It will not withstand a true comparison with the present constitution. This the Convention dared not provide and did not permit. In disregard of the election law (section 23-2802(2), Revised Codes of Montana of 1947 as amended) and in defiance of the spirit of its own enabling act (sections 17(4) and 17(10), chapter 296, Laws of 1971, amended chapter 1, Laws of 1971, Extraordinary Session),

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(37)

the Convention sought to have the electorate choose only the projected illusion of change as against the misdescribed or undescribed reality of the existing constitution.

Some were persuaded. Some were distrustful. Others were uncertain. All had been misinformed.

So the stratagem did not succeed.

The proposed constitution was not approved by a majority of the electors voting at the election (section 8, Article XIX, Montana Constitution; section 17(9), chapter 296, Laws of 1971, amended chapter 1, Laws of 1971, Extraordinary Session).

Under the Constitution it must not take effect.

Respectfully submitted,

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The undersigned certifies he served the foregoing brief on the 7th day of July 1972 by mailing a copy thereof to each of the following -

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No. 12310

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA,
ex. rel. STANLEY C. BURGER,

Petitioner,

vs.

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

Respondent.

BRIEF OF PETITIONER STANLEY C. BURGER

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STATE OF MONTANA

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No. 12310

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

THE STATE OF MONTANA,
ex. rel. STANLEY C. BURGER,

Petitioner,

-vs-

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

Respondent

* *

BRIEF OF PETITIONER STANLEY C. BURGER

STATEMENT OF THE CASE

On June 20, 1972, under cause number 12310 of this Court, Petitioner, Stanley C. Burger, brought this action on an original proceedings in this Court by his Application for Declaratory Judgment, Alternate Writ of Injunction, Alternate Writ of Prohibition or other appropriate writ, against Forrest H. Anderson, As Governor of the State of Montana, as Respondent, seeking relief of this Court to prohibit the Governor from proclaiming the adoption of the Proposed Constitution. On the same date and prior to the completion of the hearing on the Application, the Respondent proclaimed the adoption of the Proposed Constitution.

The Petitioner also sought a determination of whether or not the proposed constitution voted on at the election of June 6, 1972, received the approval of a majority of the electors voting at the said election, under the requirements of Section 8, Article XIX, of the Montana Constitution, so as to warrant any such proclamation.

On June 22, 1972, this Court accepted original jurisdiction of the action, and ordered an adversary hearing

before this Court on the 17th day of July, 1972, and ordered that briefs, in typewritten form, should be filed with the Clerk of this Court at least three days before the day set for argument.

The Court further ordered that this cause be consolidated with cause of action numbered 12309, being William F. Cashmore, M.D., relator, vs. Forrest H. Anderson, as Governor of the State of Montana.

STATEMENT OF FACTS

It is submitted that the facts necessary to a determination of this matter are not in dispute, and that all parties can agree:

1. That pursuant to the authority of Section 8, of Article XIX, of the Montana Constitution, the legislature of the State of Montana submitted to electors the question of whether a constitution convention should be called,under Chapter 65 of the Session Laws of 1969, and that at the general election which was held on November 3, 1970, a measure was approved by the voters that the legislative assembly at the 1971 session should call a convention to revise, alter, or amend the constitution of Montana, in accordance with Section 8, Article XIX, of the Montana Constitution.

2. That under Chapter 296, Laws of 1971, as amended by Chapter 1, Extraordinary Session Laws of 1971, the 1971 Legislature of Montana did call a Constitutional Convention to meet in 1971 and 1972, to submit proposals to the electorate not more than six months after adjournment of the convention.

3. That Section 17 of Chapter 296, Laws of 1971, as amended, reads:

"Section 17. (1) The revision or alteration of,

or the amendments to the constitution, adopted by the convention, shall be submitted to the electors of this state for ratification or rejection, at an election appointed by the convention for that purpose, not less than two (2) months nor more than six (6) months after the adjournment of the convention.

(2) The convention may submit proposals to the electorate for ratification in any of the following forms:

(a) submitted as a unit in the form of a new constitution;

(b) submitted as a unit with the exception of separate proposals to be voted upon individually, or

(c) submitted in the form of a series of separate amendments.

(3) The proposals adopted by the convention shall be certified by the president and secretary of the convention to the secretary of state.

(4) Each proposed revision, alteration, or amendment, together with appropriate information explaining each revision, alteration, or amendment, shall be published in full and disseminated to the electors upon adjournment of the convention but not later than thirty (30) days preceding the election and in such manner as the convention prescribes.

(5) The convention shall also publish a report to the people explaining its proposals.

(6) Notice of the election shall be given in the manner and form prescribed by the convention.

(7) The convention shall prescribe the manner and form of voting at such election.

(8) The votes cast at such election shall be tabulated, returned and canvassed in such manner as may be directed by the convention.

(9) If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana. The new constitutional provisions shall take effect as provided therein, or as provided in a schedule of transitional provisions attached thereto.

(10) The election laws of the state of Montana shall apply in all other respects to the election conducted under this section."

4. That the Montana Constitutional Convention under its Resolution No. 11, introduced on March 1, 1972, did under Section 1, resolve as follows:

"A RESOLUTION TO APPOINT AN ELECTION FOR RATIFICATION OR REJECTION OF THE PROPOSED CONSTITUTION AND TO PROVIDE FOR PUBLICATION OF THE PROPOSED CONSTITUTION WITH COMMENTS

Section 1. In accordance with Section 17 of the Constitutional Convention Enabling Act (Chapter 296, Laws of 1971 as amended by Chapter 1, Extraordinary Session, Laws of 1971) the Convention hereby

resolves that:

(1) An election separate from the state primary election shall be held simultaneously on June 6, 1972, for the purpose of ratifying or rejecting the proposed Constitution.

(2) The question of adopting the proposed Constitution and related questions shall be submitted to the people on a separate ballot which shall be certified by the Secretary of State in the form to be adopted by the Constitutional Convention.

(3) The County Commissioners in each County shall furnish separate pollbooks, precinct registers, tally sheets and any other supplies necessary for holding a separate election.

(4) The votes cast for the ratification or rejection and related questions shall be tabulated, returned and canvassed separately from the votes cast in the primary election but in the same manner, and by the same election judges, clerks and canvassers.

(5) The Secretary of State shall prescribe the form of the election notice and direct each Clerk and Recorder to post the notice in public places in their precincts at least 20 days prior to the election and direct each board of county commissioners to publish notice of the election in a newspaper of general circulation in the county once at least 10 days before the election.

(6) The election laws of Montana shall apply in all other respects to the Constitutional ratification or rejection election including notice of close of registration."

5. That on June 6, 1972, the election was held, and electors were directed to cast their votes on the approved ballot, a copy of which is attached to the addendum of this brief.

6. That pursuant to the election laws of Montana, canvass of the ballots was completed for each county of the State of Montana, by each board of county canvassers, which boards did file their certificates with the Secretary of State, on official forms provided therefor, a sample copy of which is attached to the addendum of this brief.

7. That pursuant to the election laws of Montana, and the direction of the Montana Constitutional Convention, the Secretary of State, State Treasurer, and the Governor of the State of Montana did, beginning on June 15, 1972, at 9:00 o'clock A.M., proceed to canvass the votes cast at the election held on June 6, 1972, and on June 20, 1972,

the Secretary of the State, Frank Murray, did execute and file a CERTIFICATE OF THE ABSTRACT OF VOTES CAST FOR AND AGAINST THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS THEREON AT THE SEPARATE ELECTION APPOINTED BY THE CONSTITUTIONAL CONVENTION TO BE HELD SIMULTANEOUSLY WITH THE PRIMARY ELECTION IN THE STATE OF MONTANA ON TUESDAY, JUNE 6, 1972. This certificate declared the results to be as follows:

"For the proposed Constitution.	116,415
Against the proposed Constitution.	113,883
2A. For a unicameral (1 house) legislature.	95,259
2B. For a bicameral (2 houses) legislature.	122,425
3A. For allowing the people or the legislature to authorize gambling.	139,382
3B. Against allowing the people or the legislature to authorize gambling.	88,743
4A. For the death penalty.	147,023
4B Against the death penalty.	77,733
Total number of electors voting.	237,600"

8. That on June 20, 1972, the Governor of the State of Montana, Forrest H. Anderson did issue a proclamation wherein he proclaimed and declared that the proposed Constitution had been adopted by the people of Montana.

9. That Section 8 of Article XIX of the Montana Constitution, reads as follows:

> "Sec. 8 The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of

the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; 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." (underlining supplied)

ARGUMENT

ISSUE: HAS THE PROPOSED CONSTITUTION BEEN ADOPTED PURSUANT TO THE LAWS OF THE STATE OF MONTANA?

1. Remedy of Declaratory Judgment.

There should be no question by respondent or any intervenors that this court has original jurisdiction to enter a declaratory judgment on the question of the interpretation of constitutional provisions on election laws. There is precedence in Montana for such action from the case of Maddox v. Board of State Canvassers, 149 P.2d 112, 116 Mont. 217. In that case, this court entertained original jurisdiction on an action for declaratory judgment determining rights and duties of the citizens of Montana under statutes which gave members of the military forces, the right to vote absentee ballots. The court interpreted that the language of Section 5 of Article III of the Montana Constitution, did not prohibit such voting.

2. Construction of Section 8, of Article XIX.

The basic issue before this court, will require the court to determine the intent of the framers of the Montana Constitution, when they adopted Section 8 at the Constitu-

tional Convention, August 17, 1889.

Section 8 of Article XIX of the Montana Constitution, reads in part:

> "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 Montana Court has previously set forth certain basic rules of construction to be followed in interpreting constitutional provisions. In State ex rel Gleason v. Stewart, 188 Pac. 904,906, 57 Mont. 397, the court stated:

> "The same rules apply to the construction of provisions of the constitution as apply to the construction of statutes. State v. Kenney, 11 Mont. 553, 29 Pac. 89; Dunn v. City of Great Falls, 13 Mont. 58, 31 Pac. 1017. As we have said, the section, as a whole, is not expressed in the clearest and most appropriate language; yet, when we have elicited from it the particular purposes and intentions of its several provisions, taking in their obvious sense the terms in which they are expressed, calling to our aid the ordinary rules of grammer, our task is ended. This is the elementary rule of construction. Other rules may be resorted to only when this fails. Jay v. School District No. 1, 24 Mont. 219, 61 Pac. 250, and authorities cited; Cooley's Const. Lim. (7th Ed) 89."

The Court has also held in Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P.2d 420,423, 109 Mont. 52 that:

> "When the terms of a statute are plain, unambiguous, direct, and certain, it speaks for itself, and there is nothing for the court to construe. State ex rel. Public Service Commission v. Brannon, 86 Mont. 200, 283 P. 202, 206, 67 A.L.R. 1020. See, also, State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P.2d 959, 101 A.L.R. 1329. This is a rule universally followed by all authorities on statutory construction, and the same rule applies in the construction of provisions of the Constitution. State ex rel. Gleason v. Stewart, 57 Mont. 397, 188 P. 904; State ex rel. Du Fresne v. Leslie, supra. 'If no ambiguity exists * * * the letter of the law will not be disregarded under the pretext of pursuing its spirit.' Cruse v. Fischl, 55 Mont. 258, 175 P. 878, 881."

Also, this Court has held in Rankin v. Love, 232 P.2d 998, 1000, 125 Mont. 184 that:

"It is the duty and responsibility of this court to ascertain the meaning of the Constitution as written, neither to add to nor to subtract from, neither to delete nor to distort."

The traditional rules of construction in cases of this kind, have been succinctly set forth in the classic decision in Knight vs. Shelton, 134 Fed. 423, E.D. Ark. 1905, wherein the court was confronted with the construction of the constitutional provision in the Arkansas Constitution concerning amendment to its constitution. There the court summarized:

"1. There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode that is prescribed. The construction of constitutional provisions is governed by the same rules which apply to the construction of statutes. The language used is to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or unambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers. If any of the provisions are unjust, so that their enforcement will work a hardship to any class of persons, the remedy must come from the people who have adopted them. Construction can furnish no remedy under our system of government."

Under Section 8, the natural significance of the phrase "majority of the electors voting at the election," is that to determine whether the revised constitution was adopted, you count the total number of electors voting at the election, and one-half (1/2) plus one (1) must have voted for the measure or it fails.

The Secretary of State has certified that 237,600 electors voted at the election held on June 6, 1972, with

regard to the ballots issued concerning the proposed constitution. Mathematically, a majority of these would require 118,801 votes for the proposed constitution. The certificate of the Secretary of State reveals that only 116,415 electors voted for the proposed constitution. Therefore, the issue failed and under the plain, definite meaning of the phrase in Section 8, the proposed constitution was not adopted by the people of Montana, under the very laws by which they have chosen to be governed.

It should be noted that our state legislature, meeting in 1971, found no difficulty in determining what was meant by the language in Section 8, when they recited in subsection (9) of Section 17 of Chapter 296, Laws of 1971, that:

> "If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana."

The constitutional convention was, or should have been aware of Section 8 of Article XIX of the Montana constitution, and the above mentioned legislative enactment, when the convention determined to submit to the electors at the special election the four proposals concerning the proposed constitution. It should be of no surprise to the members of the constitutional convention, that as a result of the official canvass of votes, the proposed constitution failed to receive the approval of a majority of the electors voting at the election, and, hence, was not adopted under Montana law.

The respondents may contend that the phrase "majority of the electors voting at the election" should be construed to allow adoption of the proposed constitution if one-half (1/2) plus one (1) of the electors who voted on the first issue voted "for" the proposed constitution. However, it must be pointed out the Section 8 phrase says "voting at the election" and not "voting on the question". Any such suggested construction would be an

unnatural conclusion from the language used in Section 8. There is a definite meaning to the words used by the framers and this Court should not hesitate to confirm this meaning by declaring that the proposed constitution was not adopted at the election.

If the framers of Section 8 had intended to allow adoption of a revised, altered or amended constitution, by a simple majority of the electors who voted on the question, the framers would most certainly have used language as contained in the first sentence of Section 8 of Article XIX of the Montana constitution, which reads:

> "The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter or amend this constitution; and <u>if a majority of those voting on the question</u> shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof." (underlining supplied)

Under this language it is clear that only a majority of the electors who vote on the question of calling a convention are necessary to require the legislature to call the convention. If only "a majority of those voting on the question" of the adoption of the constitution was all that was necessary, as urged by respondents, why didn't the framers of the constitution use that language, instead of the language "majority of the electors voting at the election"? It should be clear to all that the framers of the constitution meant what they said, and as a result, the proposed constitution was not adopted by the people of Montana, because a majority of those who voted at the election did not vote for the proposed constitution.

The Idaho Supreme Court, in the case of <u>Green v. State Board of Canvassers</u>, 47 P. 259 (Id. 1896) was faced with provisions in its constitution similar in character to our Section 8 of Article XIX. In that case, an amendment on women's suffrage had been presented at an election and 12,126 had voted for the amendment

and 6,282 had voted against it, and some 10,000 other electors did not cast a ballot on this amendment issue. The Canvass Board, however, declared that the amendment did not pass, under Section 1 of Article 20 of the Idaho constitution, which provided that "if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution". In determining what was meant by that phrase, the Idaho Court looked to the language of Section 3 of Article 20 concerning the calling of a convention to alter the constitution which used language like Montana's Section 8 of Article XIX, being "a majority of all of the electors voting at said election", (there specifically referring to a general election). The Idaho Court then concluded:

> "We confess ourselves unable to appreciate the argument which would make the language of Section 1 of Article 20 and Section 3 of said Article synonymous or expressive of the same intention. If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment."

Applying the same reasoning and analogy of the Idaho constitutional situation to our own constitution, it should be concluded that the framers did not intend that phrases in the first sentence of Section 8 and the latter portion of Section 8 of Article XIX were to be synonymous or expressive of the same intention concerning the number of electors necessary to adopt a measure thereunder, otherwise they would have used the same language. Further, there is good reason to believe that the framers intended to make a more stringent rule on "altering, revising or amending" the constitution as compared to the mere calling of the constitutional convention. Therefore, the two phrases of Section 8 cannot

receive a synonymous interpretation as contended by respondents. Section 8 must be construed in its plain language, to require a "majority of the electors voting at the election"in order to alter, revise or amend our constitution. As such, a majority did not approve of the proposed constitution and it should be declared as not adopted.

Along the same line, this Court should note that the framers of Section 9 of the same Article XIX, set forth the criteria for the number of electors who could adopt single amendments to the constitution as contrasted to alteration or revision, by stating:

> "Sec. 9. Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the Secretary of State shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election." (underlining supplied)

There should be little question that under Section 9, a single amendment to the Montana constitution would be adopted if it was "approved by a majority of those voting thereon", so that one-half (1/2) plus one (1) of those electors voting on the amendment issue would be sufficient. There would be no need to determine how many electors voted at the election, but only how many people voted for and against the amendment. Therefore, again, it must be asked if the framers intended the criteria of Section 8, being "majority of electors voting at the election", to be the same significance as Section 9, "a majority of those

voting thereon", why did they not use the same language? Obviously, the framers had no such intention, and under the reasoning of the Idaho Court, in the Green case, it must be assumed that the framers intended a more stringent rule on "altering, revising or amending" the constitution, as compared to the mere single amendment of the constitution. Again, as a majority of the electors who voted at the election did not approve of the proposed constitution, the proposed constitution was not adopted, and this Court should so determine.

3. Voting at the Election.

It is contemplated that respondents will urge that since the canvass found that 237,600 electors voted at the election, and since only 116,415 electors voted for the proposed constitution, that only 230,298 electors actually voted at the election and that 7,402 electors did not vote a ballot at the election and, hence, should not be counted under the meaning of Section 8, of Article XIX of the Montana constitution. We further contemplate that the respondents will rely on the cases of Tinkel v. Griffin, 26 Mont. 426, 68 P. 859; and Morse v. Granite County, et. al., 44 Mont. 78, 119 P. 286. This contention cannot stand the tests.

To begin with, there is no evidence that 7,402 electors did not vote "at the election" on June 6, 1972. The ballot submitted to the electors, and approved by the constitutional convention contains the heading:

"OFFICIAL BALLOT

PROPOSED CONSTITUTION

Please vote on all four issues"

The ballot then contained four (4) numbered issues, including being for or against the proposed constitution, being for a unicameral legislature or for a bicameral legislature, being for or against allowing the people or the legislature to authorize

gambling, and being for or against the death penalty. The constitutional convention characterized this ballot in subparagraph (2) of Section 1 of Resolution Number 11, as follows:

> "The question of adopting the proposed constitution and related questions shall be submitted to the people on a separate ballot which shall be certified by the Secretary of State in the form to be adopted by the constitutional convention."

Thus, it becomes clear that the constitutional convention intended to advise the people of Montana at the election that the whole ballot was concerned with the proposed constitution and all issues were related.

From the Certificate of Canvass by the Secretary of State, it is obvious that some electors did not vote for or against all of the issues, on the ballot. A total of 230,298 electors voted on the first issue, 217,684 electors voted on the second issue, 228,125 electors voted on the third issue, and 224,756 electors voted on the fourth issue. The total number of electors voting was certified as 237,600. Nowhere on the Certificate of the Secretary of State is there any total of the actual ballots issued. Therefore, this Court must conclude that the certification of "total number of electors voting" is a net total after deducting void ballots. Subsection (4) of Section 23-4002, of the Revised Codes of Montana, 1947, being part of what is known as Montana's Election Laws, provides:

> "A ballot which is not endorsed by the official stamp is void and shall not be counted. A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If a part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

This Court must presume by virtue of paragraph 15 of Section 93-1301-7, R.C.M., 1947, absent clear evidence to the contrary, that the election judges regularly performed their duty, and voided all ballots which had absolutely no markings on them for any of the four issues. Thus, the certified total of 237,600

"total number of electors voting" means that those electors marked and voted on one or more of the issues. Since Section 8 of Article XIX spoke of a "majority of electors voting at the election", and not a "majority of electors voting on issue one", the majority must be calculated on the total of 237,600 electors, and, hence, the 116,415 electors who voted for issue one were not a majority of the total number of electors voting at the election.

It should be noted that the language in the Oklahoma constitution concerning the adoption of an amendment being "majority of all the electors voting at such election" was so clear to both parties in the case of State ex. rel. Hayman v. State Election Board, 75 P. 2d 861, 864, 181 Okla. 622 (1938) that the parties conceded that:

> "...every voter appearing at the polls and casting a vote for or against any candidate or measure submitted is to be considered in determining the total number of 'electors voting at such election.'"

The same language found in the Illinois constitution was given the same judicial interpretation in People v. Stevenson, 281 Ill. 17, 117 N.E. 747 (1917).

4. Tinkel and Morse cases.

The case of Tinkel v. Griffin, 26 Mont. 426, 68 P. 859 decided by the Montana Supreme Court on April 28, 1902, is not controlling, as it discusses language different from that involved in the case at bar and is concerned with construing a different section and Article of the Montana constitution under a different set of facts with a different historical background.

In the Tinkel case, the Court was construing Section 5, Article XIII of the Montana constitution, concerning a limitation that "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000.00) without the approval of a majority of the electors thereof, voting at an election to be provided by law." The

question of a bond to secure a loan of $55,000.00 to build a new courthouse and jail in Flathead County was placed upon a county ballot at the general election held on November 6, 1900. 1000 votes were cast for the bond issue, and 462 were cast against it. The highest number of votes cast for any office voted upon at the election was 2,400. Under the language of Section 5, Article XIII, the Court found that the votes cast at the general election should not be used to compute whether a majority of the electors "thereof" voted at "an election to be provided by law". The Court stated:

> "The expression 'majority of the electors thereof voting at an election', etc. clearly means a majority of those who vote, and not a majority of those who vote upon any other issue at the same or some other time."

However, it must be conceded by all parties to this action that the latter portion of the statement of Justice Brantly, concerning more than one issue, was one of dicta by the Court and not controlling precedent because in the Tinkle case there was only the single issue of the courthouse bond on the election ballot.

The Court then stated:

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence."

Justice Brantly closed his opinion by acknowledging, however, that:

> "We are aware that the decided cases are somewhat in conflict; but in the absence of an express direction requiring the application of a different rule, we think this fundamental principle should control in this case, as giving effect to the clear intention of the constitution."

In summary, the Tinkel case was attempting to determine the intent of the framers of Section 5 of Article XIII of the Montana constitution, concerning the provision of "majority of the

electors thereof voting at an election". This is a different subject and a different phrase than what is involved in the case at bar. In the present case, considering the language of Section 9, as compared to the various phrases in Section 8, of Article XIX, the framers of Article XIX of the constitution made clear their intention that no alteration or revision of the constitution could be adopted without approval of "a majority of the electors voting at the election". With this expressed direction, the Tinkle case should not be held to alter the intent of the constitutional framers.

The case of Morse v. Granite County, et. al., 44 Mont. 78, 119 P. 286, was decided November 11, 1911. This case was again concerned with the subject of bond issues to be submitted to the people under Section 5 of Article XIII of the Montana constitution, and cited the Tinkel case in support of the interpretation of the election phrase. The bond issue in the Morse case was again for the construction of a courthouse. The only new issue raised concerned some legislative enactments, made pursuant to Section 5 of Article XIII, which according to the Plaintiffs required a larger number of votes for the bonds than did the original Section 5. The Court held that this was not the intention of the legislature, and allowed the bond issue to stand, although there were 1,302 electors legally qualified to vote in Granite County, and only 483 voted for the bond issue, and 378 voted against it.

For the same reasons stated above, the Morse case is not controlling of the issues in the case at bar, and adds nothing to the plain meaning of the language used by and the intent of the framers of Section 8 of Article XIX of the Montana constitution.

The Tinkel and Morse cases are further distinguishable in that the most recent constitutional convention submitted four related issues to the people on one ballot at the election on June 6, 1972. This created an entirely different question to be

determined than that contemplated by the Court in the Tinkel and Morse cases, where there was, in both cases, only one bond issue on the special county election. The prevailing view of Courts presented with evidence of more than one issue on a ballot, is exemplified in the California cases, including Law v. City and County of San Francisco, 144 Cal. 384, 77 P. 1019 (1904); City of Pasadena v. Chamberlain, 192 Cal. 275, 219 P. 965 (1923); People v. City of Woodlake, 106 P. 2d 71, 41 Cal. App. 199, (1940). In these cases, the Courts construed language such as "majority of the electors voting at such election" to mean that individual proposals failed if they did not receive the proper percentage of all electors voting at the election on one or more of the proposals. Under these authorities, and the evidence before this Court, the proposed constitution failed. The Tinkel and Morse cases are not contrary precedence.

A final and most compelling reason why the Tinkel and Morse cases are not applicable to a proper determination of this case, comes from the Supreme Court of the State of Michigan, in the recent decision Stoliker v. Waite, et. al., 101 N.W. 2d 299, 359 Mich. 65 (1960). In the Stoliker case, the issue before the Court was whether the Michigan constitution required a different vote for the call of a constitutional convention than it required for the adoption of an amendment to the constitution. The vote for the call of the convention required "a majority of such electors voting at such election". The vote for an amendment required only a "majority of the electors, voting thereon". The Court held that a different vote was required, and found that a call for a convention was not approved by the electors voting at the election. The Court discussed the issue, in this language:

> "The question before us is not the wisdom of providing for a different vote. That is a question for the draftsmen of the constitution. Our duty is not to draft a constitution but to uphold the one adopted by the people.

Nor is the question before us whether the constitution should be changed because it is allegedly an outmoded, horse-and-buggy, contraption better suited to the needs of 50 years ago, when it was adopted, than those of today. If it should be changed, it must be changed by the sovereign power that created it, the people. This Court does not have the jurisdiction to change the constitution."

The Court then went on to discuss the historical background of altering and revising constitutions:

"Before proceeding to re-examination of the words employed, and their meaning, it would be helpful to our understanding if we were to examine their origins, to ascertain, if possible, the reasons behind their inclusion. The words of a constitution normally carry the gloss of history. They come to us not as the apt alliterations of the moment of draftsmanship but as the verbal symbols of political turmoil. So it is with the constitutional clauses before us. They do, indeed, mean far different things. The reasons for their differences are plain to all who stop to read for they lie deep in the roots of our political life.

It was the conviction of our forbears that our people should be safeguarded by a written constitution, a device unknown to our English ancestors. It was intended by them to be a sacred and invulnerable document. It had been purchased at a staggering cost. It was not easily to be abandoned, in favor of new and more enticing structures of government, by mere temporary majorities. The allurements of the unknown and the untried are not unknown to government itself, as our founding fathers had good reason to know in this new world. The problem involved in the constitutional change, as clearly seen since our earliest days and as expressed in The Federalist, is the contest between 'that extreme facility, which would render the constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.' In short, it has been feared that easy change might degrade our constitutional principles to the level of statutes, some of which are hastily drawn and reflect excessive and partisan zeal. The threat of such action directed against our basic liberties has not been regarded as insubstantial. Daniel Webster denied the necessity for a revision of the whole constitution once a government had been framed and spoke against providing for such an event. James Madison suggested the concurrence of two of the three departments of state. Rohlfing points out that only a minority of the original 13 states made provisions for changes in the basic law and that Delaware and South Carolina, the first states to authorize specific amendment, as well as general revision, were not followed by other states until 1835. Whatever the particular safeguards employed in the various state constitutions, the procedures looking towards general constitutional revision were both dilatory and cumbersome as compared with the more expeditious procedures set up for less momentous changes. It has been the practice of the people of this country (and Michigan is no exception) to hedge about with

numerous safeguards, sometimes called obstructions, the power to call conventions empowered to revise the organic law of the state. The problem presented is one of the balancing of interests. (This, we stress, was the problem facing the framers of our constitution in 1908, not the courts of the State). At the one extreme of voter participation, the calling of a constitutional convention empowered to rewrite the basic charter of government by the same simple procedures or majorities as are required for usual voter approval has been rejected much more often than accepted. At the other extreme, there has been no adoption of a requirement that such vote be unanimous. What has emerged from the debates between constitutional draftsmen in state after state has been a compromise as to safeguards, the form of which is a matter for determination by the people of the state, and not by the courts. It has varied from state to state. In some states, a two-thirds (not a mere majority) vote of the members of each house of the legislature is required to submit the question of calling a convention. In Kentucky, action not at one session of the General Assembly but at two is necessary, and, moreover, the majority voting on the question must equal one-fourth of the number of electors voting in the last preceding general election. In still other states, the majority must be a majority of those voting at the election at which the question is submitted. Michigan is among the latter. There is nothing ambiguous, confused, or contradictory here. A call for a convention cannot be carried by the indifference of the electorate: the constitution itself demands participation.

The constitution also requires that a proposed constitution adopted by a constitutional convention be approved by a majority of the electors voting thereon. The measure of such approval, we observe, again, is a matter of weighing opposing considerations, some states specifically require a majority of the electors voting on the proposal. Others require a majority of those voting at the election. (citing among other state provisions, Montana constitution, Section 9, of Article XIX) Still others require different measures of approval. It is not unknown, in fact, that a constitution be not submitted to the people for approval, once having been drafted by a convention duly called."

Thus, while the decisions in the Tinkel and Morse cases, may be appropriate for the determination of the vote required on county bond issues, yet, in light of the historical concern with revising and altering the whole constitution of the state, this Court should hold that the vote required for the alteration or revision of the constitution was not the same as for the adoption of an amendment to the constitution. More than a simple majority of those voting "on the question" was required to adopt the constitution as proposed "at the election". As the Court, in the Stoliker case, at page 305 of 101 N.W. 2d, concluded:

> "The constitutional scheme is clear. The reasons for its adoption are manifest, whether wise or unwise. The words employed are 'plain and free from ambiguity.' The arguments and authorities once more urged upon us as aids to 'interpretation' have gained nothing in validity or applicability since our prior determination of this matter, and those newly devised are unimpressive. The simple, inescapable fact is that the constitution clearly distinguishes between the vote required to approve a constitutional amendment and that required to call a constitutional convention."

Likewise, in the case at bar, the Montana constitution clearly distinguishes between the vote required to approve a constitutional amendment under Section 9 of Article XIX and that required to alter or revise the constitution under Section 8 of Article XIX. Hence, by virtue of the official canvass which determined the number of electors voting at the election, as compared to those who voted "for" the proposal, the proposed constitution was not approved.

CONCLUSION

The constitutional convention submitted to the electors of Montana at an election on June 6, 1972, a new proposed constitution, altering and revising the current constitution. 237,600 electors voted at that election, on one or more of the four issues on the ballot offered, and of those electors who voted, only 116,415 voted for the proposed constitution. In order to alter or revise the current constitution, Section 8 of Article XIX of the constitution of Montana requires approval by a "majority of the electors voting at the election". This language means that you count the total number of electors voting at the election, and one-half (1/2) plus one (1) must have voted for the constitution or it fails. This would have required 118,801 electors voting for the constitution. If the framers of the constitution, whose language was approved by the people of Montana in 1889, would have wanted any other result, they would have said so. Therefore, this Court should declare that the

proposed constitution was not adopted by the people of Montana in 1972, and the proclamation of the Respondent, Governor of the State of Montana, is of no force and effect, and said Forrest H. Anderson, as Governor, should be ordered to proclaim that the proposed constitution was not adopted.

Respectfully submitted,

MORROW, NASH & SEDIVY, P.C.

BY: _____

208 East Main Street
Bozeman, Montana 59715
Attorneys for Petitioner

ORIGINAL

12309

ORIGINAL

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.

No. 12309

FILED
JUL 11 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

* * * * *

COMPLAINT IN INTERVENTION

* * * * *

COME NOW, the following named movants, as intervenors, by and through their counsel, and file herein the within complaint in intervention pursuant to the order authorizing such intervention herein duly made and entered June 28, 1972, as follows:

I.

The names of these intervenors are DAVE M. MANNING, CLYDE HAWKS, CARL M. SMITH, WALTER HOPE, JESS J. BLANKENSHIP and HERBERT J. KLINDT.

II.

These intervenors adopt as their own allegations, all of the allegations of fact contained in the Application for Declaratory Judgment, Alternate Writ of Injunction, Alternate Writ of Prohibition, and Order to Show Cause hereinbefore filed by relator William F. Cashmore, M.D.

III.

Further, these intervenors allege that, as more fully

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appears from the affidavit of R. W. Harris hereto annexed and from the official ballot offered to the electors on which to vote, when the electors in the State of Montana voted on the question of the adoption of the proposed Constitution June 6, 1972, said electors had been informed by delegates at the Constitutional Convention and by said official ballot that, upon their failure to vote on an issue therein contained, such failure would have the effect of a negative vote, so that the proponents of said Constitution are now estopped, and they may not now be heard to say in this case, or otherwise, that the majority of the electors required by Article XIX, Section 8 of the Constitution of Montana is other than a majority of all of the electors voting at the special election of June 6, 1972, at which the adoption of a new constitution was an issue.

WHEREFORE, these intervenors pray:

1. That on the hearing hereon, this Court adjudge that the Constitution submitted to the electors voting at the election on June 6, 1972, did not receive the approval of a majority of the electors voting at the election of June 6, 1972, and that the same was not adopted and approved by the voters as required by Section 8, Article XIX of the Montana Constitution.

2. That the alleged proclamation of the Governor of the State of Montana purporting to declare said Constitution to be the Constitution of the State of Montana be set aside and declared null and void.

3. That the Court grant such other and further relief as to the Court may seem proper in the premises.

DATED this 10th day of July, 1972.

DOUGLAS Y. FREEMAN
Hardin, Montana

HIBBS, SWEENEY, COLBERG & KOESSLER
P.O. Box 1321
Billings, Montana
Attorneys for Movants

By _____
R. F. HIBBS

C.C.: Counsel of Record

ORIGINAL

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

To Counsel in 12309, State ex rel. Cashmore vs. Forrest H. Anderson, Governor:

Following are assignments of position for argument and time alloted. Your adherence will be appreciated.

7/17/72 - 9:00 a.m.

Relators	Time	
Keller	30 minutes	Relator
Sedivy	20 minutes	Relator
Hibbs	20 minutes	Intervenor
Freeman	20 minutes	Intervenor
Longan	20 minutes	Amicus
Monaghan	10 minutes	Amicus
Keller	10 minutes	Rebuttal Intervenors & Amicus

Respondent	Time	
Gov. Anderson	30 minutes	Respondent
Robert L. Woodahl	30 minutes	Attorney General
Loendorf	30 minutes	Intervenor
Layne	10 minutes	Amicus
Kelleher	10 minutes	Intervenor
Gov. Anderson	10 minutes	Rebuttal as to Attorney General, Intervenors & Amicus

FILED
JUL 11 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

Relators	Time	
Keller	15 minutes	Rebuttal
Sedivy	15 minutes	Rebuttal

Should this schedule cause inconvenience to any of counsel please contact me.

James T. Harrison
Chief Justice

(39)

ORIGINAL

12309

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

FILED
JUL 12 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

ANSWER OF ATTORNEY GENERAL

NOW COMES ROBERT L. WOODAHL, duly elected, qualified and acting Attorney General of the State of Montana, and on behalf of Respondent, himself, and the executive branch of the government of the State of Montana, answers the petitions on file herein as follows:

I.

ANSWER TO PETITION NUMBERED 12309, ENTITLED "THE STATE OF MONTANA, EX REL. WILLIAM F. CASHMORE, M. D., RELATOR, VS. FORREST H. ANDERSON, AS GOVERNOR OF THE STATE OF MONTANA, RESPONDENT."

1. Admits the allegations of Paragraphs 1, 2, 3 and 4.

2. Answering Paragraph 5, denies that 237,600 electors actually voted on the official ballot; admits that 116,415 electors voted for, and 113,883 voted against the proposed constitution; alleges that the number of persons receiving ballots in the separate election and those receiving and returning absentee ballots in said separate election total 237,600 electors, and that the total number of individual electors voting at such election is some

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number less than, and perhaps markedly less than, 237,600; that this allegation is based upon the Affidavit of the Secretary of State of the State of Montana attached hereto, marked Exhibit "A", and by this reference hereby incorporated herein and made a part hereof.

3. Answering Paragraph 6, admits that the portion of Section 8 of Article XIX of the Montana Constitution reads as quoted; admits that 116,415 electors voted for approval of said constitution; denies the remaining allegations of said paragraph; alleges that a majority of the electors voting at said election voted in favor of said constitution.

4. Denies the allegations of Paragraphs 7 and 8.

5. Answering Paragraphs 9 and 10, admits that the subject matter of this action is of great and widespread public concern and should be judicially resolved as rapidly as possible; denies the remaining allegations of said paragraphs; denies every other allegation of the petition not hereinabove specifically admitted.

II.

ANSWER TO PETITION NUMBERED 12310, ENTITLED "THE STATE OF MONTANA, EX REL. STANLEY BURGER, PETITIONER, VS. FORREST H. ANDERSON, AS GOVERNOR OF THE STATE OF MONTANA, RESPONDENT."

1. Admits the allegations of Paragraphs 1, 2, 3, 5, 6, 7 and 8.

2. Answering Paragraph 4, denies that the facts which give rise to this controversy are not in dispute; alleges that the total number of 237,600 is the total number of individuals receiving ballots at the polls plus those receiving and returning absentee ballots; alleges that the total number of electors voting at such separate election was less than, and perhaps markedly less than, 237,600.

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3. Answering Paragraph 9, admits the quoted portions of the provisions of Section 8, Article XIX of the Montana Constitution; denies that the official figures of the Board of State Canvassers shows that 237,600 electors voted at the election on June 6, 1972; admits that 116,415 electors voted for adoption of the proposed constitution at said election; denies the remainder of said paragraph.

4. Denies the allegations contained in Paragraphs 10 and 11.

5. Answering Paragraphs 12 and 13, admits that this is a matter of great and widespread public and governmental concern, and should be resolved at the earliest possible time; denies the remaining allegations of said paragraphs; denies every allegation of said petition not hereinabove specifically admitted.

WHEREFORE, this intervening respondent, on his own behalf, and on behalf of the executive branch of the government of the State of Montana, prays that this honorable Court, having assumed jurisdiction herein, issue its declaratory judgment, adjudicating and decreeing the Montana Constitution of 1972 to have been duly and properly adopted by the people of Montana at the separate election held June 6, 1972, all as earlier proclaimed by the Governor of the State of Montana.

ROBERT L. WOODAHL
Attorney General of the State of Montana

By: _____
CHARLES C. LOVELL
Chief Counsel
Office of Attorney General
P. O. Box 1645
Great Falls, Montana 59403

WILLIAM N. JENSEN
Assistant Attorney General
State Capitol Building
Helena, Montana 59601

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

The undersigned, FRANK MURRAY, Secretary of State of the State of Montana, being first duly sworn, upon his oath deposes and says:

That affiant, on Thursday, June 15, 1972, at 9:00 o'clock A. M., in the presence of the Governor and the State Treasurer, proceeded to canvass the votes cast at the election held in the State of Montana on Tuesday, June 6, 1972, and that affiant did thereafter on June 20, 1972, certify the results of said election, which said certification was concurred in by the Governor and the State Treasurer;

That the phrase "Total number of electors voting", as used in said canvass and certificate, refers to the total number of electors appearing at the polls and receiving ballots, plus the number of electors receiving and returning absentee ballots; that therefore, the number of persons

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EXHIBIT "A"

receiving ballots in the separate election and those receiving and returning absentee ballots in said separate election, total 237,600 electors.

Frank Murray

Frank Murray, Secretary of State
of the State of Montana

SUBSCRIBED AND SWORN to before me this 12th day of July, 1972.

NOTARY PUBLIC for the State of Montana.
Residing at Great Falls, Montana
My Commission Expires: August 10, 1974

(NOTARIAL SEAL)

STATE PUBLISHING CO. HELENA, MONT.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Answer of Attorney General upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

Joseph P. Monaghan
2218 Elm Street
Butte, Montana 59701

Hibbs, Sweeney, Colberg & Koessler
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Marshall G. Candee
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Libby, Montana 59923

A. W. Scribner
Power Block Building
Helena, Montana 59601

Gerald J. Neely
2822 First Avenue North
Billings, Montana 59101

Jerome T. Loendorf
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DATED this 12th day of July, 1972.

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Attorney General

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ORIGINAL

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12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

FILED
JUL 12 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

ANSWER OF ATTORNEY GENERAL

NOW COMES ROBERT L. WOODAHL, duly elected, qualified and acting Attorney General of the State of Montana, and on behalf of Respondent, himself, and the executive branch of the government of the State of Montana, answers the petitions on file herein as follows:

I.

ANSWER TO PETITION NUMBERED 12309, ENTITLED "THE STATE OF MONTANA, EX REL. WILLIAM F. CASHMORE, M. D., RELATOR, VS. FORREST H. ANDERSON, AS GOVERNOR OF THE STATE OF MONTANA, RESPONDENT."

1. Admits the allegations of Paragraphs 1, 2, 3 and 4.

2. Answering Paragraph 5, denies that 237,600 electors actually voted on the official ballot; admits that 116,415 electors voted for, and 113,883 voted against the proposed constitution; alleges that the number of persons receiving ballots in the separate election and those receiving and returning absentee ballots in said separate election total 237,600 electors, and that the total number of individual electors voting at such election is some

(41)

number less than, and perhaps markedly less than, 237,600; that this allegation is based upon the Affidavit of the Secretary of State of the State of Montana attached hereto, marked Exhibit "A", and by this reference hereby incorporated herein and made a part hereof.

3. Answering Paragraph 6, admits that the portion of Section 8 of Article XIX of the Montana Constitution reads as quoted; admits that 116,415 electors voted for approval of said constitution; denies the remaining allegations of said paragraph; alleges that a majority of the electors voting at said election voted in favor of said constitution.

4. Denies the allegations of Paragraphs 7 and 8.

5. Answering Paragraphs 9 and 10, admits that the subject matter of this action is of great and widespread public concern and should be judicially resolved as rapidly as possible; denies the remaining allegations of said paragraphs; denies every other allegation of the petition not hereinabove specifically admitted.

II.

ANSWER TO PETITION NUMBERED 12310, ENTITLED "THE STATE OF MONTANA, EX REL. STANLEY BURGER, PETITIONER, VS. FORREST H. ANDERSON, AS GOVERNOR OF THE STATE OF MONTANA, RESPONDENT."

1. Admits the allegations of Paragraphs 1, 2, 3, 5, 6, 7 and 8.

2. Answering Paragraph 4, denies that the facts which give rise to this controversy are not in dispute; alleges that the total number of 237,600 is the total number of individuals receiving ballots at the polls plus those receiving and returning absentee ballots; alleges that the total number of electors voting at such separate election was less than, and perhaps markedly less than, 237,600.

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3. Answering Paragraph 9, admits the quoted portions of the provisions of Section 8, Article XIX of the Montana Constitution; denies that the official figures of the Board of State Canvassers shows that 237,600 electors voted at the election on June 6, 1972; admits that 116,415 electors voted for adoption of the proposed constitution at said election; denies the remainder of said paragraph.

4. Denies the allegations contained in Paragraphs 10 and 11.

5. Answering Paragraphs 12 and 13, admits that this is a matter of great and widespread public and governmental concern, and should be resolved at the earliest possible time; denies the remaining allegations of said paragraphs; denies every allegation of said petition not hereinabove specifically admitted.

WHEREFORE, this intervening respondent, on his own behalf, and on behalf of the executive branch of the government of the State of Montana, prays that this honorable Court, having assumed jurisdiction herein, issue its declaratory judgment, adjudicating and decreeing the Montana Constitution of 1972 to have been duly and properly adopted by the people of Montana at the separate election held June 6, 1972, all as earlier proclaimed by the Governor of the State of Montana.

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By: Charles C. Lovell

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Lewis & Clark)

The undersigned, FRANK MURRAY, Secretary of State of the State of Montana, being first duly sworn, upon his oath deposes and says:

That affiant, on Thursday, June 15, 1972, at 9:00 o'clock A. M., in the presence of the Governor and the State Treasurer, proceeded to canvass the votes cast at the election held in the State of Montana on Tuesday, June 6, 1972, and that affiant did thereafter on June 20, 1972, certify the results of said election, which said certification was concurred in by the Governor and the State Treasurer;

That the phrase "Total number of electors voting", as used in said canvass and certificate, refers to the total number of electors appearing at the polls and receiving ballots, plus the number of electors receiving and returning absentee ballots; that therefore, the number of persons

EXHIBIT "A"

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receiving ballots in the separate election and those receiving and returning absentee ballots in said separate election, total 237,600 electors.

Frank Murray

Frank Murray, Secretary of State
of the State of Montana

SUBSCRIBED AND SWORN to before me this 12th day of July, 1972.

NOTARY PUBLIC for the State of Montana.
Residing at Great Falls, Montana
My Commission Expires: August 10, 1974

(NOTARIAL SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Answer of Attorney General upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

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DATED this 12th day of July, 1972.

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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.

FILED
JUL 12 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

BRIEF OF CITY OF BILLINGS, AMICUS CURIAE

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City Attorney of Billings,
Amicus Curiae

Filed _____

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Cause No. 12309

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

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.

Calvin A. Calton

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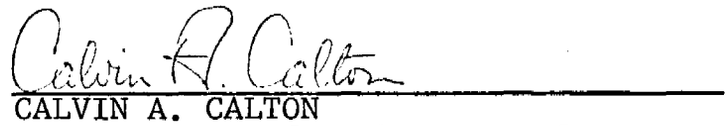
CERTIFICATE OF MAILING

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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on this 11th day of July, 1972.



CALVIN A. CALTON
City Attorney for the City of
Billings, Montana

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12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

FILED

JUL 12 1972

Thomas J. Kearney

CLERK OF SUPREME COURT
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.

MEMORANDUM IN SUPPORT OF APPLICATION FOR DECLARATORY JUDGMENT

Original Proceeding for Declaratory Relief

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Attorney General for the State of Montana for FORREST H. ANDERSON, as Governor of the State of Montana, Respondent

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HELENA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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.

MEMORANDUM IN SUPPORT OF APPLICATION FOR DECLARATORY JUDGMENT

STATEMENT OF ISSUES

1. Whether the proposed Constitution received the requisite number of votes to have been ratified by the voters at the election on June 6, 1972.

STATEMENT OF CASE

This is an original proceeding brought to determine whether a proposed constitution was ratified by the electors of this state. The relators filed separate applications for declaratory judgment, injunctive relief or other appropriate relief to prohibit a proclamation by respondent. The Court heard the applications ex parte and issued its order setting July 17, 1972 as the date for an adversary hearing on the matter and consolidated the two applications.

STATEMENT OF FACT

The electors of this state voted to call a Constitutional Convention, and pursuant to their vote and legislative enactment, delegates to such a convention were selected. The Convention adopted a Constitution and submitted it to the electorate on June 6, 1972. Two Hundred Thirty-seven Thousand Six Hundred (237,600) electors voted; One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) cast votes in favor of the Constitution, and One Hundred Thirteen Thousand Eight Hundred Eighty-three (113,883) cast votes against it.

ARGUMENT

In this matter, WILLIAM F. CASHMORE, M. D., a life-long resident of the State of Montana, is bringing an action to determine the validity of the proposed Constitution submitted to the voters of Montana on June 6, 1972, on the ground that the proposed Constitution did not receive a majority of the votes of those electors who voted on June 6, 1972, at the special election upon the Constitutional issue.

In Montana, there is no problem determining who voted on the proposed Constitution because it was a separate special election from the regular primary, and separate poll books were kept in all precincts in the State. The number of voters casting a ballot on the issue was kept in those poll books. The number of votes cast on the Constitution and the three other issues has been determined by the Board of State Canvassers of the State of Montana

THURBER'S HELENA

to be Two Hundred Thirty-seven Thousand Six Hundred (237,600) votes. This is not conjecture. We are calling this to the Court's attention at this time because in many states, there has been no accurate record kept of the persons who voted on special issues. State ex rel. Denman v. Cato (1923) 131 Miss. 719, 95 So. 691. By a reading of the cases, this Court will find that the number of votes actually cast in those cases was highly conjectural because no accurate list of the people was kept. No such conjecture needs be engaged in in Montana because each person who received a ballot on the Constitutional issue signed a poll book, and their number is known. They have a right to vote as they please, and if they did not vote for the Constitution, their vote cannot be counted as approving it.

There is a further thing in Montana which is highly important to the determination of this question. The Constitution of Montana provides for a convention to revise, alter or amend the Constitution. In so doing, substantially different language is used than is used in the subsequent section which relates only to amendments. Article XIX, Section 8, reads as follows: We have underlined the portion which is important here.

> "The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of mem-

THURBER'S
HELENA

bers of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; 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." (Emphasis supplied.)

Article XIX, Section 9, reads as follows:

"Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished

THURBER'S 4

by numbers or otherwise that each can be voted upon separately; provided, however, that nor more than three amendments to this constitution shall be submitted at the same election." (Emphasis Supplied)

We wish to emphasize to the Court the difference in the language in Section 8 and Section 9. A Constitution "takes a majority of the electors voting at the election", while an amendment takes "a majority of those voting thereon".

We submit that it is beyond legitimate argument that because of the clearly differentiating mandatory provisions and requirements of Section 8 and those of Section 9 of Article XIX, the framers of the Constitution had one thing in mindthat to revise, alter or amend the Constitution by the convention method, a majority of the electors voting at the election must approve such revision, alteration or amendment. In contrast, where the amendment is submitted through the legislature, only a majority of the persons voting on the specific amendment is needed to pass that amendment. We have examined the proceedings of the 1889 Constitution and have found that it was adopted from the 1884 Constitution; the same language was used there. The language in itself is crystal-clear.

We feel that it is not necessary to go beyond these two items; (1) That Montana has poll books which show exactly who voted on June 6, 1972 on the Constitution submitted by the convention; (2) that Section 8 requires that a majority of the electors voting at the election must approve the Constitution.

1. A MAJORITY OF ELECTORS VOTING AT

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THE ELECTION DID NOT APPROVE THE PROPOSED CONSTITUTION

The cases on this subject at first blush may seem to be split but there is something we should call to the Court's attention which we feel reconciles any apparent variance in the cases. That point is that Montana in the recent election of June 6, 1972, treated the vote on the proposed Constitution and the three matters submitted with it as a separate election from the regular primary. The fact that the Constitutional election was a separate one is conclusively established by the mandatory requirement of Article XIX, Section 8 (supra) which states that the radification or rejection by the people must be by an election "for that purpose." This is more clearly pointed out when it is found that the poll books disclose that more people voted in the regular primary than voted on the Constitutional issue. Also, the facts are that there was a great variance in the number of people who voted on the other three matters referred and on the proposed Constitution itself so it would be pure conjecture to determine who voted on the Constitution and who did not. We must have reference entirely to the poll books.

But we do know that Two Hundred Thirty-seven Thousand Six Hundred (237,600) votes were cast on the Constitutional issue of which One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) were for the proposed Constitution and One Hundred Thirteen Thousand Eight Hundred Eighty-three (113,883) were against the proposed Constitution. As is clear

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from these figures, less than a majority of those who voted at the election voted affirmatively, for such a majority would have been 118,801.

State ex rel Hayman, et al. v. State Election Board, et al. (1938) 181 Okla. 622, 75 P.2d 861 is a case in which a constitutional amendment was submitted to the voters, and the constitution of Oklahoma provided, in part:

> "... if a majority of all electors voting at election shall vote in favor of any amendment thereto, it shall thereby become a part of the Constitution ..."

Oklahoma also has a statute which makes every precinct election board return to the county election board the total number of electors voting at the election so the State Election Board could certify the total number of ballots cast at the particular election. The same statute requires the county election boards to record the number of ballots spoiled or not voted, all of which is reported to the state election board. The proposed amendment received an affirmative vote of 379,405, and a negative vote of 219,996. The total votes cast as shown by the certificate was 767,745 votes, and the election board determined that the amendment did not pass. An action was brought, and the Supreme Court held that the election board was correct. The Supreme Court refused to issue the writ to change what the election board had reported, and among other things made the following observation:

> "Under this suggested method, no elector would be considered who did not vote on the office or measure

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receiving the highest vote, thereby eliminating many voters who, in in the instant case, voted only State, county, or precinct ballots. The inaccuracy and fallibility of this method are conspicuously apparent. They assert that this number should arbitrarily be considered as representing the number of 'electors voting at such election.' This is predicated upon a presumption which is significantly contrary to the actual and admitted facts as presented in this case. By this method every voter appearing at the polls who did not see fit to cast a vote for presidential electors, but who may have voted for every other State officer, or county or precinct officer, or on the submitted amendment itself, is eliminated from consideration as an 'elector voting at such election.' This is in direct discord with the theory conceded by all parties to this proceeding that every voter appearing at the polls and casting a vote for or against any candidate or measure submitted is to be considered in determining the total number of 'electors voting at such election.'" (Emphasis supplied.)

In People v. Stevenson (1917) 281 Ill. 17, 117 NE 749, a constitutional amendment had been submitted to the voters by the legislature. The canvassing board returned that 1,343,381 male electors voted at the election ; 656,782 voted for the proposed amendment, and 295,782 voted against it. The canvassing board then determined the highest number of votes cast for the members of the legislative assembly, and since the vote on the constitutional amendment was more than half of the vote for the members of the assembly, as figured by their formula, the canvassing board determined that the amendment had been adopted. The trial court reviewed the decision of the canvassing board and determined that the

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amendment had not been adopted. In affirming this decision, the appellate Court discussed the 1818 constitution of Illinois and the 1848 constitution of Illinois. The decision was given under Section 1 of Article 14 of the constitution of 1870 which provided that "if a majority voting at the election" voted for the amendment, it was carried. The Court made the following observations:

> "It seems to us that the people who read and voted on the adoption of the Constitution would not have understood it to mean that an election at which a constitutional amendment was voted on, whether it was adopted or rejected, was to be determined by the vote of those, only who voted for members of the General Assembly. A more reasonable understanding, requiring no construction or conjecture, would seem to be that the amendment must receive a majority of the votes cast at the election.
>
> * * *
>
> [3] The intention to which force is given in construing constitutional provisions is that which is embodied and expressed in the language of the provisions.
>
> [4] As a Constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding.
>
> [5] The language and words of a Constitution, unless they be technical words and phrases, will be given effect according to their usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention. 6 R.C.L. 52; Law v. People, 87 Ill. 385; Hills v. City of Chicago, 60 Ill.86."

The Wyoming supreme Court in State ex rel Blair v. Brooks, (1909) 17 Wyo. 344, 99 P.874, considered

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a vote on a constitutional amendment. The Wyoming Constitution, in Article 20, Section 1, requires that an amendment receive a majority of the electors. It appeared that 37,561 votes were cast at an election on a constitutional amendment and 12,160 voted in favor of the amendment, and 1,363 voted against the amendment. The Court observed that the cases are in conflict but that the language used in the Wyoming Constitution referred to the electors of the state so that the matter must carry by more than a majority of those voting on the proposition, and it must be a majority of those who showed themselves to be electors.

In Green v. State Board of Canvassers, (1896) 5 Ida. 130, 47 P. 259, the Supreme Court of Idaho had before it a constitutional amendment which was voted upon by the electorate of Idaho to give women sufferage; 12,126 voted for and 6,282 voted against. The board of canvassers reported the amendment as not being adopted and an action ensued. The Idaho State Constitution contains a provision that amendments are approved " ... if a majority of the electors shall ratify the same ...". Idaho also has in Article 20, Section 3, a provision similar to ours, " ... if a majority of all electors voting at said election shall have voted for a convention ...". The Idaho Court made a great distinction between the meaning of the two provisions and made the following observation which is important here because of the similarity of the language construed to that to be construed in the instant case:

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"... If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of constuction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more strigent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words 'majority of the electors,' in section 1, should be construed to mean the same as the words 'majority of all the electors voting at such election,' in section 3. Even the authorities cited by counsel do not go to such an extent to sustain such a conclusion.

* * * "

It is submitted that the reasoning and construction of the Idaho Court is proper and logical. It is a maxim of statutory construction, no less applicable to constitutional law that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all," R.C.M. 1947, 93-401-15. Moreover, the intent of the framers must be determined from the language used in the document. The reasoning of the Idaho Court is consistent with these principles

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for it gives effect to two differently worded sections "majority of the electors" and "majority of all electors voting at said election." The apparent intent of the framers to impose a stricter requirement in convening a convention than in ratifying an amendment is also considered.

In the case of Lee v. State of Utah, (1962) 13 Utah 2d. 15, 367 P.2d 861, a constitutional amendment relating to wartime and emergency powers of the legislature was submitted to the voters and thereafter was attacked on the grounds that a majority of the electors registered had not voted. The Supreme Court of Utah held that as the majority of electors voting thereon, as provided by their constitution had voted in favor, the amendment had been ratified.

In Town of Pine Bluffs et al v. The State Board of Equalization, (1958) 79 Wyo. 262, 333 P.2d 700, 704, it was contended that a constitutional amendment was not properly adopted because it was not supported by a majority of the electors of the state although it got a majority of those voting on the proposition. However, it did have a majority also of those voting at that particular election. The argument was that there were more franchised voters in the state taking into consideration all the people who were registered, and as a consequence, it did not receive the support of a majority of the electors. The Court there held citing Indiana that a sensible construction had to be applied, and the wording "all electors of the state" are the electors voting at the particular election.

Article XIX, Section 8 of the Montana Constitution, relating to the ratification of constitutional revisions after a convention, provides in part that such ratification must be "by a majority of the electors voting at the election." Section 9, relating to the ratification of amendments proposed by the legislature, provides in part that such amendments must be "approved by a majority of those voting thereon." (Emphasis supplied.) It is this difference in language which dictates that the proposed Constitution failed. "Voting thereon" as interpreted by the Idaho Court in Green v. State Board, supra, may be taken to mean a count of ayes and nays. "Voting at the election" must mean something different and more; that is, all those who cast ballots whether ayes, or nayes, on any one of the four issues submitted.

In fact, in Stoliker v. White (1960) 359 Mich. 65, 101 NW.2d 299, the Court based its decision on such a distinction. The Court said at page 300:

> "The question before us is this: Does the Constitution require a different vote for the call of a constitutional convention than it requires for the adoption of an amendment to the Constitution?
>
> * * *
>
> What the Constitution actually says is that the adoption of a constitutional amendment requires a majority of the electors 'voting thereon,' whereas a call for a constitutional convention requires 'a majority of such electors voting at such election.'" (Emphasis supplied.)

Later at page 304, the Court said:

"In short, we are now asked to hold

that the people did not clearly understand what they were thus doing. We are asked to hold that, despite the 1899 opinion of the Attorney General upon the unsuccessful legislative attempt to overcome it immediately thereafter, despite the ruling of the Board of State Canvassers that the 1904 proposition had failed to carry for lack of the necessary majority, and despite the re-enactment in the new Constitution of the very language over which all of this turmoil had raged, the people did not really understand the clear meaning of the words they were using, once again, in their new Constitution. (Constitution of 1850, article 20, § 2: '* * * In case a majority of such electors voting at such election shall decide in favor of a convention * * *.') We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of our people is not so meager. Their distinguished leaders who framed the Constitution were not so inept, so thoughtless, so blind to the issues of the day. From the language used it is clear that they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention, and our holding is that they did so distinguish.

We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has a direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon. Such is not only the clear phrasing of the Constitution but the highest court in the State had unanimously so ruled with respect thereto. We have no way of knowing how many of the 900,000 electors who failed to vote on the issue would have voted

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in the affirmative thereon, had they voted, or how many who failed to vote did so because of reliance upon the practical effect of their failure to vote. Obviously we cannot say that the proposition carried nor can we command the Board of State Canvassers, as plaintiff wishes, 'to certify that the revision question carried.'"

There are two Montana cases construing the election provisions of the current Constitution voting on bond election. In Tinkel v. Griffin, (1902) 26 Mont. 426, 68 P. 859, the Supreme Court had before it a vote in Flathead County for the building of a new county courthouse and jail. The County Commissioners had regularly submitted to the voters the matter of the loan. That election was held under Article XIII, Section 5 of the Constitution which contains the following language:

"... No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

We should call attention to the Court that this language is somewhat different than the language in Sections 8 and 9 of Article XIX of the Constitution. The question arose as to what constituted a majority of the electors of the county voting. The Court pointed out that the election could have been held by itself or at any time. As a consequence, the majority of the electors voting at the election to be provided by law would be only those who voted on the bonds themselves. We should bear in mind here that the Supreme Court treated the election on bonding the county as a special election although

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it was held at the same time as the general election. Thus there were two elections the same day. The Court in that case made the following observations:

> " 2. It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of section 5, art. 13, of the constitution. It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at an election to be provided by law. As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., 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. If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted. It was none the less a special election, within the meaning of the law, though in this particular instance it was held, for convenience, on the day fixed for a general election. ***"

2. SEPARATE ELECTIONS

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The Court felt that only those who voted on the bond issue should have been counted in determining whether a majority voted for or against the bonds. We have no argument with that philosophy. It is the same argument that this applicant feels is applicable to the case at bar because the total number of votes for the proposed Constitution was less than a majority of those who voted on that separate issue.

That case was followed by the case of Morse v. Granite County, (1911) 44 Mont. 78, 119 P.286. The County Commissioners called an election to submit to the voters the matter of borrowing $50,000 to build a courthouse. The district court of Granite County ruled inter alia that not sufficient voters had voted in favor of the bond and held the bond issue void and ordered an injunction to issue. At page 296 of the Pacific Reporter, the Court cited with approval the case of Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859. "The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at the election,' etc., 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..." The Court then goes to say that the laws and the Constitution should be so interpreted as to become useful. We insist that a majority of the electors who voted at the election on the Constitution did not vote for the proposed Constitution,

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the same as the Court held in the two Montana cases just cited.

That is our argument here. The election on the proposed Constitution submitted by the Convention was a separate election from the primary. The fact that it was held at a time when another election was held is completely irrelevant. We are relying on the poll books which state that 237,600 persons voted at that election, and only 116,415 voted in favor of the Constitution which is not a majority of the electors voting at that election.

3. CONSTITUTIONAL CONSTRUCTION

In State ex rel Durland v. Board of County Commissioners, (1937) 104 Mont. 21, 64 P.2d. 1060, 1962, the Court said:

> "A part of the quotation from another case cited (Newell v. People, 7 N. Y. 9) is as follows: 'Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is, the thought which it expresses. To ascertain this, the first resort in all cases is the natural signification of the words employed in the order and grammatical arrangement is which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involved no absurdity or no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case, there is no room for construction. That which the words declare, is the meaning of the instrument; and neither courts nor legislatures have the right to add to or take away from that meaning."

4. WHO IS AN ELECTOR

Article IX, Section 2 of the Montana Constitution

which was just revised by the legislature and the voters in 1970 and became effective on November 20, 1970, makes 19-year old persons qualified to vote provided they have certain other qualifications set forth in the article which makes anyone who is registered over 19 an elector.

Chapter 296 of the laws of 1971 as amended by Chapter 11 of the Extra-ordinary session of 1971, sets forth the authority of the Constitutional Convention. Section 16, Subdivisions 6, 7, 8 and 9 of that act set forth the manner in which the election is held, and Section 18 of that chapter provides that every person who is a qualified voter shall be entitled to vote at such election. Section 19 provides for the county officers cooperating in the election.

The convention proclaimed the 6th day of June, 1972, as the time and used the regular out election procedures for holding the election. It would seem that Section 37105 relating to constitutional amendments probably applies to the voting on this constitution, and the ballots were supposed to be printed in accordance with Section 23-3507, R.C.M. 1947.

Since the general election laws are to be followed, all of Title 23, Chapters 26 through 46 would apply. Sections 23-3601 through 23-3618 set the procedure for voting in the State of Montana. This is important in this case because it shows that the canvassers were able to ascertain exactly how many voters voted on the proposed Constitution

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submitted by the convention. The voting on the Constitution was treated as a special election and special poll books were kept on the voting of the constitution so that the Board of State Canvassers in making the final canvass could tell exactly how many persons voted on the constitution in each county. Section 23-3610, R.C.M. 1947, provides that the person's name must be recorded in the poll book as he voted. Section 23-4003 provides for the keeping of records for the list of all voters who voted, and a certification by each precinct as to whom voted. Section 23-3610 provides that the clerk of elections shall keep a list of persons voting. The name of each person who votes must be entered thereon and numbered in the order voting. Such list is known as the poll book. From these poll books each county clerk knows exactly how many persons voted on the constitution. That was reported to the County Board of Canvassers, who in turn reported to the State Board of Canvassers.

This election was conducted under the amended sections on voting and elections, 23-3601 through 23-3618, R.C.M. 1947, as amended by the laws of 1969. We will call to the attention of the Court to subdivision 11 of Section 23-3605, R.C.M. 1947, which provides that an unmarked ballot should be returned to the election judges.

Subdivision 3 of 23-3606 provides for the voting on issues such as the constitution. Subdivision 7 of that section provides for the voter receiving a new ballot for a spoiled one.

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Section 23-3610, R.C.M. 1947, as amended, provides for marking the precinct register books for electors who voted. Chapter 40, Sections 23-4001 through 23-4019 relates to the counting of the votes. Section 23-4002 relates to the method of canvass, and that means the original counting of the ballots at the precinct level. That section provides for spoiled ballots and an actual tally of the number of ballots with the number of voters who cast ballots. Section 23-4004 provides for rejected ballots. Subdivision (5), Section 23-4003, provides that a rejected ballot or vote is not included in the count of the electors voting at the election.

We point out these provisions to show that the number of votes counted were all from good ballots. The precinct canvass submitted to the county canvassing board includes only ballots of persons who voted a ballot which was counted. We should also call to the attention of the court, subdivision (4) of Section 23-4002 which provides if part of the ballot is marked sufficiently plainly to determine the elector's intention, the election judges shall count that part.

This Court has previously passed upon this Section in the case of Peterson v. Billings, (1939) 109 Mont. 390, 96 P.2d 922, where the Court quoted with approval an Illinois case:

> "...The decision does hold the statutory provision as to the manner of making the cross to be directory and not mandatory, and then says [158 Ill. 609, 41 N.E. 1004, 30

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L.R.A. 227]: 'It has always been held in this state that if the intention of the voter can be farily ascertained from his ballot, though not in strict conformity with the law, effect will be given to that intention. In other words, that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot.'"

A public official, which these election judges are, and all of the canvassing boards, local, county and state, are presumed to do their duty in a proper manner, under the provisions of Section 93-1301-7, subsection 15. It is presumed that all of the election canvassers, precinct, county and state, did their lawful duty. Suffice it to say that it is presumed that an official does his duty as required by law.

Since the advent of voting machines, the entire election laws have been changed. The Board of County Commissioners are the Board of County Canvassers in Section 23-4009, R.C.M. 1947. Section 23-4012, R.C.M. 1947, as amended by the laws of 1969, provides that a record shall be made of the votes cast in the county and subdivision 5 provides for a record of the votes cast for or against a proposition. The County Clerk certifies to the Secretary of State and the Board of State Canvassers meet with the Secretary of States who is the Secretary of the Board under the provisions of Section 23-4016, R.C.M., 1947. It should be remembered here that the poll books were kept separately on the proposed Constitution, and these show that 237,600

votes were cast on the proposed Constitution which was submitted by those separate poll books. The Secretary of State received a report from each county showing the number of voters actually voting, and this number did not include spoiled ballots or ballots issued to absentee voters which were not returned. It was the number of votes actually cast at the election, including absentee voters who actually voted their ballots. The numbers, therefore, that were submitted by the Secretary of State to the Governor were not the number of ballots issued but the number of voters who actually voted.

The Constitutional Convention by Resolution 11 attached to petitioner's application as Exhibit "A" advised the Secretary of State how he should handle the election. It told him that there had to be separate poll books and an accurate count kept of the voters voting on the Constitution, and that tally sheets and other supplies necessary for holding a separate election should be furnished which was done. A report was made by each county on that showing exactly how many people voted. Each county has the name of each voter who voted on the Constitutional issue so the 237,600 is a figure of the people who actually voted on the Constitution. We refer the Court to Exhibit "A" attached to the application for declaratory judgment on file herein.

5. MULTIPLE SUBJECTS ON ONE BALLOT

As we have pointed out to the Court earlier in this brief, the election on the Constitution

was a separate election from the regular primary. That is more specifically pointed out by the fact that separate poll books were kept. 237,600 Montanans voted in the constitutional election, whereas the record in the Secretary of State's office shows that 238,215 voted in the regular primary, which election was held on the same day being June 6, 1972.

The fact is that the ballot upon which the constitutional issue was submitted contained four (4) integral parts. The report of the Board of Canvassers shows a divergence of opinion between the four parts that were submitted on the constitutional ballot. In other words, some people voted for one part and did not vote for another. A question might be raised--did a person vote who voted for or against gambling and did not vote on the proposed Constitution, and it is our position, of course, that he did. There are several California cases to sustain our position on that statement.

In Law v. City and County of San Francisco, (1904) 144 Cal. 384, 77 P. 1014, there was one ordinance submitting a bond issue which involved many different items. Several technical objections were raised but on the final proposition which was whether the bonds received two-thirds of those voting at the election, the Court had this to say:

> "...But, upon the other hand, where the meaning of the law is plain, and permits of but one construction, naught is left for a court to do but to give legal effect to its provisions. Thus, in City of Santa Rosa v. Bower, 142 Cal. 299, 75 Pac. 829, this court,

by the language of the law, which in terms required that the proposition ordered submitted at a general or special election must receive the assent of the majority of the qualified electors voting at that election, was reluctantly compelled to hold that the proposition there under consideration had not been carried, notwithstanding the fact that it had received the requiste majority of those voting upon the proposition."

To the same effect see:

City of Pasadena v. Chamberlain, (1923) 192 Cal. 275, 219 P. 965.

In People ex rel. Rowe v. West Side County Water District, (1952) 112 Cal. App.2d 128, 246 P.2d 119, two propositions were voted upon, and one failed to get a majority of the votes cast at the election.

In People ex rel. Smith v. City of Woodlake, (1940) 41 Cal. App.2d 119, 106 P.2d 71, there was an election to determine whether a town should be incorporated, and the state statute required also that the voters should vote on the persons to fill the various offices if the town was incorporated. Three hundred forty-three valid ballots were cast at the election; 170 for incorporation, 164 were against incorporation and 9 of the votes expressed no choice on incorporation. At the trial all of the ballots were recounted, and the vote was found to be 171 for, 163 against and 9 expressing no choice. The question was, were all of the voters at the election to be counted or only those who actually cast ballots on the proposition of incorporation. The Court there observed:

"[1] Cases from without this jurisdiction based on different statutes can be found which support either contention herein. 20 C.J., page 206, sec. 266; 20 C.J., p. 207, sec. 266, notes 38 and 39. It is the general rule that when a proposition is required to carry by a majority *of the votes cast* at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the votes on a particular question. 20 C.J., p. 207, sec. 266, note 39; People v. Town of Berkeley, 102 Cal. 298, 36 P.591, 23 L.R.A. 838. California has been classed among the majority holding to this construction. The case of People v. Town of Berkeley, supra, is cited as a case in which the identical question here presented was decided. That case involved the re-organization of the town of Berkeley under the Municipal Corporation Bill of 1883. This appears from the opinion of the court (page 307 of 102 Cal., page 593 of 36 P., 23 L.R.A. 838):

'At the election held on May 8th, a majority of all the electors who voted upon the proposition to reorganize were in favor of it, but not a majority of all who voted as the election.

'The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, "whenever a majority of the electors voting at a general election shall so determine." These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. And such was evidently the interpretation placed upon this provision by the legislature when it passed the general municipal incorporation act of 1883. * * *'

This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize."

* * *

" [2,3] The matter of electing officers

was an indivisible part of the election. The law required the matters to be submitted at the same time and one the same ballot and under the same call. It would be a strained construction of the law to hold that a valid vote for officers was not a vote cast at the election. To strengthen the position we here assume, it should be noted that the Municipal Bond Act of 1901, under which many of the above-cited cases were decided, was amended, Stats. 1927, chap. 315, p.527, to provide for the issuance of bonds when authorized by 'the votes of two-thirds of all the voters *voting on any such proposition*'. If the legislature had intended that the total votes cast the election here involved should be predicated on the total votes cast on the proposition, they might well have so provided. This should not be accomplished by judicial decision when the statute is clear and unambiguous. The governing statute is plain. It requires a clear majority of all votes cast at the election for the incorporation to succeed. Since that majority was not had, it follows that incorporation failed."

Thus, we see that each of the issues submitted had to have a majority of the votes cast to carry. The proposed Constitution and the three other issues submitted to the voters each had to receive a majority of the electors voting at the election to carry. The proposed Constitution did not have that majority and thus failed.

CONCLUSION

It is therefore the conclusion of the applicant that it would be torturing the language of Section 8 of Article XIX of the Constitution to interpret it in any other manner than to require a majority of the electors voting at the election which means that the proposed Constitution in this case did not receive the majority required for it to be adopted.

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it did not receive one-half of 237,600 votes, and to construe that section any other way would be denying the plain meaning of the English language.

There is no question who is an elector voting at the election. Any person who receives a ballot and properly marks any portion thereof has a ballot which was voted at the election. Neither this Court nor any other Court should now attempt to speculate why certain people voted in a certain way. The fact that there were four issues on the ballot should make no difference to us. The voter becomes a voter when he voted one of those issues.

There is nothing in the Constitution which provides that when a special election is set for voting on a Constitution that only those voting on the particular Constitution and not on the side issues should be construed as electors.

This Court should follow the reasoning of the Michigan case. It is the better reasoning.

DATED this 12 day of July, 1972.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum of Relator, WILLIAM F. CASHMORE, M.D., upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid, addressed to:

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12309

IN THE SUPREME COURT

OF THE STATE OF MONTANA

No. 12309

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.

FILED
JUL 13 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

BRIEF OF INTERVENORS LEO GRAYBILL, JR., JOHN TOOLE, BRUCE BROWN, DOROTHY ECK AND JEAN BOWMAN, AS INDIVIDUALS, TAXPAYERS, VOTERS AND OFFICERS OF THE CONSTITUTIONAL CONVENTION AND REPRESENTING THE DELEGATES TO THE CONSTITUTIONAL CONVENTION AS A CLASS

STATEMENT OF FACTS

The voters of the State of Montana, at the general election held on the 3rd day of November, 1970, voted to call a constitutional convention. Subsequent thereto, a convention was duly convened in accordance with the laws of the state of Montana (Chapter 296, Laws of 1971). The convention completed its work on a proposed constitution on March 24, 1972, and it was submitted to the voters of the state of Montana on June 6, 1972, for their ratification or rejection. The official canvass of the state of Montana indicated that 116,415 electors voted for the proposed constitution, and 113,883 electors voted against the proposed constitution. The official canvass further indicates that the "total number of electors voting" in

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the special election on the proposed constitution and the three alternative issues submitted on the same ballot was 237,600. However, the figure actually represents the total number of electors who are listed in the poll books. A copy of a letter of instructions from the Secretary of State to all County Clerks and Recorders so indicates. Subparagraphs (3) and (4) of that letter specifically instruct the various County Clerks and Recorders to enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election. The blank on the front of the abstract books for entry of the figure of the total number of electors listed in the poll book is labeled "Number of Electors Voting _____." A copy of the Secretary of State's letter and the front page of the abstract book are attached hereto and labeled Exhibit A.

ARGUMENT

Relators, in their application, assume that the figure 237,600 represents the total number of electors voting in the constitutional election. Relators in their application fail to point out to this Court that the figure 237,600 is actually the total number of electors whose names were listed in the poll books. Thus the statement of the facts as contained in said application is incomplete and, as a result, misleading.

The figure 237,600 does not reflect the total number who "voted" in the manner the word "vote" has been defined by this Court, and is therefore meaningless when one attempts to determine the number who voted in the constitutional election. Relators must assume that the recording

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of an elector's name in the poll book constitutes voting. However, under the procedures established for voting by the statutes of the state of Montana, the total of the names of electors recorded in the poll book will not necessarily equal the number of electors voting.

The process of voting entails the following:

(1) An elector must sign his name in the precinct register before being permitted to vote (Section 23-3610 (2), R.C.M. 1947).

(2) An election judge then stamps the words "official ballot" on the back of the ballot before delivering it to the elector (Section 23-3603(1) and (2), R.C.M. 1947).

(3) An election clerk enters the name of the elector and the number of the stub attached to the ballot given the elector on the poll lists (Section 23-3603(3), R.C.M. 1947).

(4) The elector must immediately retire to a voting booth on receipt of his ballot and prepare his ballot (Section 23-3606(1), R.C.M. 1947).

(5) If the ballot contains a constitutional amendment, the elector marks an X in the applicable square indicating his vote either for or against the amendment (Section 23-3606(3), R.C.M. 1947).

(6) The elector, after preparing and properly folding his ballot, returns it to an election judge, who shall announce the elector's name and the number on the stub of his ballot. The judge shall record the voter's name in the poll book. (Section 23-3606(5), R.C.M. 1947, and 23-3610(7).

(7) If the elector is entitled to vote and the number on the stub is the same as that entered in the poll

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book, the judge shall receive the ballot, remove the stub and deposit the ballot and the stub in the appropriate boxes (Section 23-3606(6), R.C.M. 1947.

At this point in the voting process, it is clear that the ballot box may contain:

(a) ballots on which a choice has been properly expressed on all issues;

(b) ballots on which a choice has been properly expressed on some issues;

(c) ballots on which no choices have been expressed (it should be noted that Section 23-3605(11), R.C.M. 1947, requires blank ballots to be returned to the election judges, and Section 23-3606(9) requires prepared ballots to be returned to the election judges);

(d) ballots which are partially void;

(e) ballots which are wholly void.

When the polls are closed, the election judges must immediately canvass the vote (Section 23-4001, R.C.M. 1947). They must insure that the number of ballots corresponds with the number of names in the poll books (Section 23-4002, R.C.M. 1947). If they find the number of ballots exceeds the number of names in the poll books, they must destroy a number of ballots equal to the excess (Section 23-4002(6), R.C.M. 1947). However, if the number of names in the poll books exceeds the number of ballots, there is no statutory procedure for eliminating names from the poll books. If ballots are found to be void under Section 23-4002(4), R.C.M. 1947, they are not counted and there is no procedure for eliminating a corresponding number of names from the poll books. If, after the process of counting the votes has begun, ballots are rejected as provided in Section 23-4003(5), R.C.M. 1947, they are not

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counted and, again, there is no procedure for eliminating a corresponding number of names from the poll books.

Thus the figure 237,600 given by Relators as the total number voting, but in fact being a count of the electors whose names are recorded in the poll books, cannot be assumed to be an accurate count of those who voted when an examination of the statutory procedure for voting shows that the poll books include the names of those who cast blank ballots and void ballots.

It has been assumed in the preceding sentence that voting is not the recording of an elector's name in a poll book. What constitutes voting in Montana?

VOTING IS AN AFFIRMATIVE ACT. IT IS A FORMAL EXPRESSION OF A WILL, PREFERENCE OR CHOICE FOR SOME PERSON OR FOR OR AGAINST A PROPOSED LAW

Voting was defined by this Court in Sawyer Stores v. Mitchell, 103 Mont. 148, 160, 62 P.(2d) 342, as follows: "A vote is a formal expression of a will, preference, wish or choice in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a person to fill a certain situation or office, or in passing laws, rules, regulations, . . ."

In State ex rel. Wolf v. Geurkink, 111 Mont. 417, 109 P.(2d) 1094, 133 A.L.R. 304, this Court described voting as an affirmative act. It stated:

> "Elections are held for the purpose of selecting persons to fill public office and to give the public an opportunity to express their choice in making the selection. Casting a ballot at such an election is an affirmative act, not a negative one. The provisions of our Constitution guaranteeing the citizenry the right to vote, as well as all statutory law enacted to make the exercise of that right available, clearly show that the exercise of the right must be by affirmative action." (Emphasis supplied.)

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The Court further stated that a voter who casts a ballot which does not express a preference has not voted at all. It declared, at page 427, as follows:

> "It is our opinion that a voter at the polls, unless he votes for some person, is not voting at all. A ballot cast which does not express the preference of the voter for some person to fill the office is a nullity, cannot be counted and cannot be given any effect in determining the result of the election as to that office."

Voting is completed, not merely by marking the ballot, but by its delivery to the election official and deposit in the ballot box before the closing of the polls on election day. Maddox v. Brd. of State Canvassers, 116 Mont. 217, 223, 149 P.(2d) 112. And before a vote may be counted, it must plainly appear what the intention of the voter was. Peterson v. Billings, 109 Mont. 390, 393, 96 P.(2d) 922.

Section 23-3606, R.C.M. 1947, describes the method of voting. It states:

> "(1) On receipt of his ballot, the elector must immediately retire to one of the booths and prepare his ballot.
>
> ***
>
> "(3) If the ballot contains a constitutional amendment, or other question to be submitted to the vote of the people, he shall mark 'X' in the applicable square indicating his vote, either for or against the amendment or question." (Emphasis supplied.)

Based on the above decisions and statute, it is submitted that the recording of an elector's name in a poll book is not voting. Neither does the depositing of a blank ballot or invalid ballot in the ballot box constitute voting. Rather, when a constitutional question is presented, it is the clear expression of a preference either for or against the amendment.

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THE PROPOSED CONSTITUTION OF 1972 WAS CORRECTLY PROCLAIMED AS ADOPTED BY A MAJORITY OF THE ELECTORS, EVEN IF IT IS ASSUMED THAT 237,600 ELECTORS CAST VALID BALLOTS VOTING ON AT LEAST ONE OF THE FOUR ISSUES IN THE CONSTITUTIONAL ELECTION

In the following discussion, it is assumed, for the purposes of argument only, that 237,600 electors cast valid ballots on at least one of the four issues in the constitutional election.

The last sentence of Article XIX, Section 8, of the Constitution of the state of Montana, provides as follows:

> "Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; 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."

Relators contend that because 237,600 electors cast ballots at the election, and of these only 116,415 electors voted to ratify the proposed constitution, the constitution was not "approved by a majority of the electors voting at the election," in spite of the fact that only 113,883 electors voted to reject the constitution. The total number of votes on the proposed constitution was 230,298; the total ballots cast at the election on all issues was 237,600, and the difference of 7,302 votes clearly represents voters who cast ballots at the election but did not vote on the primary issue of ratification or rejection of the proposed constitution. Thus, the real question for decision in this case is whether these 7,302 nonvoting electors should be counted in determining the required majority for approval of the constitution.

The answer to this paradoxical situation is found in

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our election laws and in the decisions of this and other courts. Section 23-4002(4), R.C.M. 1947, provides for the method of canvassing votes, and subsection (4) thereof provides that, "a ballot or a part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

If the results are analyzed in accordance with this legislative directive, it becomes clear that in counting the ballots the election judges, as the statute directs, counted only those votes where the elector's choice was plain, but did not count the ballots where the elector failed to express his intention. In other words, if an elector failed to vote for ratification or rejection of the proposed constitution, but did express his intention on the composition of the legislature, gambling or the death penalty, his vote on the constitutional issue was void and not counted, but it was counted on such part of the ballot where it was "sufficiently plain to gather the elector's intention." This accounts for the significant difference between the total ballots cast at the special election and the number of votes recorded for and against the proposed constitution, and reflects only the number of electors who failed to vote on that prime issue.

Under the Relators' contention, such portion of the ballots which the election laws declare void should be given the effect of negative votes. Such a contention is untenable. It would not only count as a negative vote a ballot in which the elector intentionally did not express a preference for or against the proposed constitution, but also counts as a negative vote the ballot of an elector

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who attempted to vote for the proposed constitution but fouled his ballot on that issue, although he voted properly on one or more of the other issues. Relators' contention really is in opposition to basic democracy in that it proposes the fundamental law of this state be based on something other than an expression of the majority of those voting, as the word "voting" has been defined by this Court and the election laws of this state.

The statutes of this state clearly do not support Relators' contention that the phrase in Article XIX, Section 8, requiring that the proposed constitution be approved by a "majority of the electors voting at the election," means that it must be approved, not by a majority of those who vote for or against it, but by a majority of those who vote for or against the constitution, plus those electors who decline to vote for or against the proposed constitution but vote on some other issue in the election. Do the decisions of our Supreme Court support the Relators? Again, the answer is in the negative. The leading case is Tinkel v. Griffin, et al., 26 Mont. 426, 68 Pac. 859. In the Tinkel case this Court was called upon to interpret language in Article XIII, Section 5, of the present constitution, which is essentially identical to the language in Article XIX, Section 8, now under consideration. Article XIII, Section 5, provides in part as follows:

> "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law." (Emphasis supplied.)

The Court interpreted the phrase "a majority of the electors thereof, voting at an election," as follows:

> "The evident meaning of the constitution

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is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., 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.

* * *

"It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.

"In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principal in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County Fiscal Court v. Trimble, 47 S.W. 773, 42 L.R.A. 738.)" (Emphasis supplied.)

This Court at that time recognized there were cases from other jurisdictions holding contrary to their

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decision in Tinkel, but nevertheless adopted the fundamental principle that a majority of those expressing their opinion on an issue should prevail. This principle, the Court stated, gave effect to the clear intention of the Montana constitution. This should be emphasized, that the Court did not confine this decision to the section of the constitution in question, but specifically stated the principle advanced gave effect to the constitution. The very fact that the Court found this principle to be fundamental would by itself lead to the conclusion it should be applied throughout the constitution, even if the Court had not stated it to be expressive of the clear intent of our fundamental document.

> "We are aware that the decided cases are somewhat in conflict; but, in the absence of an express direction requiring the application of a different rule, we think this fundamental principle should control in this case, as giving effect to the clear intention of the constitution." Tinkel v. Griffin, et al., supra, page 432.

This Court reaffirmed its decision in Morse v. Granite County, 44 Mont. 78, 95, 119 Pac. 286, noting that the language employed by the constitutional convention of 1889 indicated that it had adopted the fundamental principle of Tinkel v. Griffin, et al., supra.

> "This conclusion was reached because the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in them to give expression of their views at the ballot box."

It should be pointed out that this Court, over the years, has never deviated from the decision of the Tinkel case. The reason, no doubt, is because the basic principle of majority rule, espoused in Tinkel, is a fundamental

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tenet of democracy. It should also be noted that the general view in this country, as stated in 26 Am.Jur.(2d), Elections, Section 314, appears to support the Tinkel case. It is as follows:

> ". . . The general view is that a qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes."

Having examined both the Montana statutes and the decisions of the Montana Supreme Court concerned with the question before this Court, and presuming that cases will be cited to this Court in other briefs from many of the other 49 states advancing theories contrary to the principle of the Tinkel, case presents the question as to which precedents, if any, should the Supreme Court of this state base a decision. Should it follow the principle of Tinkel and other Montana precedents or should it rely on the precedents from one or more of our sister states? Do the people of the state of Montana have any right to expect their Supreme Court to follow its previous decisions? Are there any existing guidelines for the Court to follow?

This Court appears to have already answered all the above questions. In the recent case of State ex rel. Peery v. District Court, 145 Mont. 287, 400 P.(2d) 648 (1965), it discussed the doctrine of stare decisis as it applies to the interpretation of a constitution, and stated:

> "As we said in State ex rel. Kain v. Fischl, 94 Mont. 92, 20 P.2d 1057:
>
> "'The general rule is that when the highest court of a state has construed a constitutional provision, the rule of stare decisis--that a question once deliberately examined and decided should be considered as settled--

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> applies, unless it is demonstrably made to appear that the construction manifestly is wrong. Decisions construing the Constitution should be followed, in the absence of cogent reasons to the contrary, as it is of the utmost importance that our organic law be of certain meaning and fixed in interpretation. 7 R.C.L. 1002; Cooley's Constitutional Limitations (8th Ed.) 123.'
>
> "Then in State ex rel. Sparling v. Hitsman, 99 Mont. 521, 44 P.2d 747, this appears:
>
> "'We realize the force and the wisdom of the rule of stare decisis. We are not unmindful of the fact that principles of law should be positively and definitely settled in order that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day, with the resultant disorders that of necessity must accrue from such changes. . . . The rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong. State ex rel. Kain v. Fischl, supra.'" (State ex rel. Peery v. Dist. Ct., supra, pages 310 and 311.)

The rule of stare decisis, as stated above, would require the Relators to establish to this Court that the fundamental principle set forth in the Tinkel case is manifestly wrong before the principle of that case can be overturned. The wisdom of the rule of stare decisis is self-evident. It permits the people of this state to commit themselves to established procedures of constitutional law, knowing they will not be changed without a compelling reason. It would permit holding an election under the constitution in accordance with the case law interpreting that constitution unless a compelling reason to change the law is advanced.

Assuming the Court finds a cogent reason to overturn the Tinkel case, should the effect of such decision be prospective only, or should it operate to defeat the

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passage of the proposed constitution? This Court, in its opinion on a motion for rehearing in the case of Continental Supply Co. v. Abell, et al., 95 Mont. 148, 171, 24 P.(2d) 133, noted that a change in the judicial view of the law by a subsequent decision could not amount to more than a change in the law by legislation, and could act prospectively only. Although Continental Supply v. Abell, et al., supra, did not involve the interpretation of a constitutional provision, the logic and wisdom of that decision regarding the effect of a change in the law by judicial decision is certainly desirable. Again, when an election must be held or some other act of government performed under the provisions of a constitution, those who have carried out such governmental functions and citizens who have participated therein should not have the results voided if they complied with the existing law at the time of performance. Thus, if the Court in this case finds it necessary to deviate from the principle set forth in Tinkel, the application of such decision should be prospective only and not change the result of the June 6, 1972, constitutional election.

Although we believe the issue presented is controlled by the Montana decision previously discussed, we submit also for the Court's consideration the following discussion of decisions from other states because they support Tinkel v. Griffin, et al., and the fundamental principle stated therein as basic to democratic government.

In State v. Blaisdell (.N.D.), 119 N.W. Rep., at page 364, the Supreme Court of North Dakota clearly stated this fundamental principle or doctrine of American elections, saying:

"According to the American doctrine the

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> majority is entitled to rule--the preference of a majority on any question is expressed by the vote of those who actually vote, unless a different intention is clearly expressed. The choice of the voter is expressed by the vote he actually casts for or against a proposition. To adopt the relator's theory in this proceeding would be to give as great weight to a vote which was not cast as to one which was cast, and in effect would be to count the electors who voted for governor, and did not vote on the county division question, as voting against the division. It ought to require the plainest language, and that it be so expressed as to leave absolutely no doubt in the mind of the intelligent reader of its meaning to justify a court in holding that no vote counts precisely the same as though the vote had been cast against the proposition. The correct principle applicable in cases where the meaning is ambiguous, or is not so expressed as to clearly indicate that an elector who does not vote shall be held as voting 'No,' is that electors who do not participate in an election, or are not interested enough in public affairs to attend the polls and cast their vote and express a choice, acquiesce in the result of the votes cast by those who do vote, whatever such result may be. It is equally plain that if an elector enters the booth and votes for some candidates and not for others, or votes for all candidates, but fails to express his choice on a question submitted he delegates to those who do vote his rights as an elector and acquiesces in the result, be it one way or the other. See Marion v. Winkley, 29 Kan. 36; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859; Miller v. School Dist. 5 Wyo. 217, 39 Pac. 879; People v. Chute, 50 N.Y. 451, 10 Am. Rep. 508; Montgomery Co. Fiscal Court v. Trimble, 104 Ky. 629, 47 S.W. 773, 42 L.R.A. 738; Cass County v. Johnston, 95 U.S. 360, 24 L.Ed. 416. Also 9 Notes on United States Reports, page 269, and cases there cited." (Emp. sup.)

In Green v. State Board of Canvass, (Idaho), 47 Pac. 262, the Supreme Court of Idaho considered whether the women's suffrage amendment had been adopted under a constitutional provision requiring approval by a "majority of all of the electors voting at said election." The court put the facts, the issue and its answer as follows:

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"In Senate Joint Resolution No. 2, approved January 21, 1895, the same legislature provided that the following question shall be submitted to the electors of the state; 'Shall section 2 of article 6 of the constitution be so amended as to extend to women the equal right of suffrage?' In accordance with the constitution and the statute, the question was submitted with words 'Yes' and 'No' printed in separate spaces, with a circle of the required size opposite each, in one of which each voter who desired to express an opinion on the question was required to make a cross. Why should the constitution and two different legislatures provide that those who desired to vote against the proposition should make a cross opposite the word 'No' if these votes were not to be counted, and why should they be counted if all those who did not vote at all were to be counted as having voted 'No'? There is no answer. The constitution and the statutes say: 'All you electors who believe that equal right of suffrage should be extended to women stand up, and be counted.' 12,126 voters stand up, and are counted in the affirmative. The constitution and statutes say with equal distinctness: 'All you qualified electors who believe that the equal right of suffrage should not be extended to women stand up and be counted.' 6,282 stand up and are counted. 18,408 votes in all cast upon the question. But, say the defendants, there were about 10,000 qualified voters in the state who did not vote at all on the question, that should be counted as having voted 'No.' Why should they be counted in the negative? The constitution does not require it, neither do the statutes. These electors either have no opinion on the subject, or they have none that they care to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject? There is absolutely no reason, unless the constitution or the statutes require it, and we have seen they do not."

In Spickermon v. Goddard (Indiana), 107 N.E.(2d), the question arose as to whether in a local option election in the city of Muncie, a majority of the legal votes cast favored prohibition of the sale of intoxicating liquors in the city. The voting was on voting machines and 3,393 voted "Yes" and 2,931 voted "No." The names of 6,821 voters were entered on the poll list, making a difference

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of 497 between the poll list number and the number of votes cast.

The court first concluded "the only rational inference to be drawn from the evidence here is that 497 voters intentionally refrained from voting, or through ignorance of the working of the machines failed to so adjust the voting key as to register their intentions."

The appellants contended that in determining the vote basis, the 497 "unaccounted" voters must be considered, in which event the 3,393 "Yes" votes did not constitute a majority.

The Indiana courts rejected the appellants' contention, holding:

> "In our judgment, by the greater weight of American authority, under statutes of the character indicated, blank and illegal ballots must be rejected in fixing the basis."

The Court added significantly:

> "Had the election been held by paper ballots instead of machines, it is manifest that a blank ballot cast could not be deemed a legal vote. If the voter honestly, but through ignorance or carelessness, failed to mark his ballot in substantial compliance with the provisions of section 4 of the act, the ballot deposited could not constitute a legal vote. And so with voting on the machine. One who, through ignorance or carelessness, failed to so adjust the voting key as to register his choice, cannot be held to have cast a legal vote."

Other cases also holding that a blank ballot may not be counted for any purpose are Dickinson County Memorial Hospital Corp. v. Johnson (Iowa), 80 N.W.(2d) 756, where the court held:

> "Obviously, a blank ballot is not a vote for or against a proposition and should not be counted on either side. Nor may a ballot be counted which is denied recognition because it is found to be invalid as not properly marked, or for some other

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reason."

In Kellams v. Compton (Mo.), 206 S.W.(2d) 498, 499, 4 A.L.R.(2d) 612, 614, the Supreme Court of Kentucky said:

> "Votes cast on the proposition and voting thereon are to be construed in their ordinary and usual sense and they mean 'expressing the will, mind or preference; casting or giving a vote.' They do not include votes or ballots that do not cast a vote on the proposition. Illegal or void votes may not be counted, either for or against the proposition submitted, even though they may have been received, placed in the ballot box and constitute some of the total number of ballots."

In Wooley v. Sterrett (Tex. Civ.App.), the Supreme Court of Texas succinctly said:

> "We do not believe that it is, or should be, the law in Texas that blank ballots, or ballots that do not legally register the will of the voter, should be computed in determining a majority."

In the brief of Amicus Curiae, Joseph P. Monaghan, supporting Relators' position in the case at bar, much reliance is placed on the early decision of the Indiana court in the case of In re Denny, 59 N.E. 359, which held that approval of a constitutional amendment required a majority vote of all electors of the state. But, in the subsequent case of In re Todd (Ind.), 193 N.E.(2d) 875, the same court, in an exhaustive and critical analysis of the majority opinion in In re Denny, supra, refused to follow it and concluded, "Our conclusion is that under the submission provision of sections 1 and 2 a proposed amendment becomes a part of the Constitution if it receives a majority of the votes cast for and against its adoption, and that is true whether such amendment is submitted at a special election or at the time of a general election."

Referring to the dissenting opinion of In re Denny,

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the court in In re Todd adopted it, saying:

> "We believe the following general observations of Jordan, J. are sound and applicable to the construction of article 16: 'It is a fundamental principle under our government, as the authorities assert, which must have been understood by the framers and ratifiers of our constitution, that a majority of those who exercise the right of suffrage shall control in its affairs. It must be further presumed that they also knew and understood that the usual and ordinary mode of ascertaining or evidencing such majority is by giving all legally entitled to vote on a proposition an opportunity to do so, and then counting such persons as choose to exercise the right of suffrage by casting an affirmative and negative vote on the given proposition; the difference between the two votes constituting the majority essential to its adoption or approval. I may also indulge in the presumption that the men who framed the constitution, and the people who ratified their work, must have understood that the great body of electors of the state is composed of a changing, uncertain, or indefinite number, which it is difficult at any given time to actually ascertain. They also presumably knew that there are thousands comprising that body who, by reason or religious or conscientious views or indifference, or from other reasons, decline, when the opportunity is presented, to exercise the right of suffrage; that, while many do not vote at all, others will vote only for some particular proposition or officer, and will fail or decline to vote for others; and that therefore the most feasible and simplest method was the one universally recognized in the eye of the law long before the adoption of our constitution, namely, to give all entitled to vote an opportunity to exercise this privilege, and then combine or aggregate the whole number of votes upon a given proposition or measure submitted to the electors of a district or locality, -- such combined vote to be taken or accepted upon any given proposition, for all practicable purposes, as comprising the whole number of the electors of the particular district or locality. This method of measuring the whole number is the one, as the authorities disclose, generally adopted, except where a different one is expressly prescribed. In such cases the nonvoting must be counted as willing to be bound by the action of the majority who did vote upon the particular proposition, or, in other words, they may be considered as tacitly assenting to the result of those voting; and in this manner

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or by this method all of the electors of the district or state, as the case may be, are taken into account."

VARYING LANGUAGE IS USED THROUGHOUT THE CONSTITUTION REGARDING ELECTIONS TO EXPRESS THE SAME PRINCIPLE

The attempt may be made to cite the various provisions of the 1889 Constitution relative to submission of issues to the electorate to show a different intent must follow from the use of different language. This approach is of questionable validity unless the language employed is measured by the evident purpose sought to be achieved. We all know that the same idea can be expressed in varying ways and it is seldom that man uses identical language to express the same idea. However, we submit that an analysis of various provisions of the consitittion demonstrates a public policy that a majority of those voting (expressing a position pro or con) control the resolution of issues. An analysis, section by section, follows:

Article X, Section 2, on the permanent location of the seat of government, provides as follows:

"Sec. 2. At the general election in the year one thousand eight hundred and ninety-two, the question of permanent location of the seat of government is hereby provided to be submitted to the qualified electors of the state, and the majority of all the votes upon said question shall determine the location thereof. In case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast shall be, and is hereby, submitted in like manner to the qualified electors at the next general election thereafter; provided, that until the seat of government shall have been permanently located the temporary seat of government shall be and remain at the city of Helena."

Here it can be seen that the framers contemplated

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"a majority of all votes upon the question" was required. So, if more than two locations were submitted, a plurality but less than a majority would not settle the issue, but rather, a run-off between the two highest locations would be required. Care was used to delineate the "majority" required, but it is to be noted that it was a majority of all the "votes," and the nonvoters were not to be considered.

Article X, Section 3, regarding the change of the seat of government, once established, provides:

> "Sec. 3. When the seat of government shall have been located as herein provided the location thereof shall not thereafter be changed, except by a vote of two-thirds of all the qualified electors of the state voting on that question at a general election at which the question of the location of the seat of government shall have been submitted by the legislative assembly."

Here again we see the reference to the "qualified electors of the state voting on that question." However, a greater majority than a simple one was required, obviously to prevent harassing elections by contending cities for the honor and other emoluments of being the capitol site. No doubt it was contemplated that once a decision on a capitol site was reached, that it would not be easily changed, but nonetheless the contingency was provided for if a two-thirds majority desired a change. Significantly, the requirement is two-thirds of those "voting." Again, the nonvoters are not counted.

Article XII, Section 9, relative to when the two mill property levy for state purposes may be raised, provided:

> "Sec. 9. The rate of taxation on real and personal property for state purposes, except as hereinafter provided, shall never exceed two and one-half miles on each dollar of valuation; and whenever the taxable property of the state shall amount to six hundred million dollars ($600,000,000.00) the rate shall never exceed two (2) mills on each

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> dollar of valuation, unless the proposition to increase such rate, specifying the rate proposed and the time during which the rate shall be levied shall have been submitted to the people at the general election and shall have received a majority of all votes cast for and against it at such election; provided, that in addition to the levy for state purposes above provided for, a special levy in addition may be made on live stock for the purpose of paying bounties on wild animals and for stock inspection, protection and indemnity purposes, as may be prescribed by law, and such special levy shall be made and levied annually in amount not exceeding four mills on the dollar by the state board of equalization, as may be provided by law."

Here we see the requirement of "a majority of all votes cast for and against it." Under this section a single issue was to be submitted specifying the rate and time during which the rate was to be levied. Again we see the public policy that those voting (expressing an opinion for or against) were to be counted, not the non-voters who expressed no opinion.

Article XIII, Section 2, relative to increasing the state debt over $100,000, provided:

> "Sec. 2. The legislative assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof; but no debt of liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars ($100,000) except in case of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election."

Again we see it is a majority of the votes cast for and against the issue. Again we see the nonvoters are

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not counted. The consistent public policy that the majority of those who take a position control the resolution of issue is reiterated.

Article XIII, Section 5, relative to incurring county debt in excess of $10,000, provided:

> "Sec. 5. No county shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such county shall be void. No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

Here we have the requirement of "the approval of a majority of the electors thereof voting at an election to be provided by law." The word "thereof" refers to the electors of the county involved. This language is identical to the section under consideration in this case, Article XIX, Section 8. As previously noted in this brief, this Court has construed this language favorable to the respondent's position (Tinkel v. Griffin, supra). We simply note here the same public policy that those voting (expressing an opinion on the question at issue) control, not the nonvoters.

Article XVI, Section 2, regarding moving a county seat, provided:

> "Sec. 2. The legislative assembly shall have no power to remove the county seat of any county, but the same shall be provided for by general law; and no county seat shall be removed unless a majority of the qualified electors of the county, at a general election on a proposition to remove the county seat, shall vote therefor; but no such proposition shall be

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submitted oftener than once in four years."

Here we see the requirement "unless a majority of the qualified electors of the county * * * shall vote therefore; * * *" Here the argument could be made that the majority is of the qualified electors (those registered) and not a majority of those voting at the election if the language were to be given a literal interpretation. In the only case involving this section, Poe v. Sheridan County, 52 Mont. 279, 157 Pac. 185, this issue was not raised. The statement of the facts in the case indicate that a simple majority of those voting was assumed by the Court and the parties to be controlling, as Plentywood prevailed over Medicine Lake by a "majority of 46 votes." We submit that the reasonable common sense construction of this section would also be a simple majority of those voting was contemplated by the framers in view of the consistent public policy enunciated in the other sections. The word "qualified" no doubt was used to denote who could vote and not to require an abnormal majority. To hold otherwise is to disregard the injunction that "the word killeth but the spirit giveth life." Yet the Relators herein seem bent on that course.

Article XVI, Section 8, regarding the abandonment and consolidation of counties, provides:

> "Sec. 8. Any county or counties in existence on the first day of January, 1935, under the laws of the state of Montana or which may thereafter be created or established thereunder shall not be abandoned, abolished and/or consolidated either in whole or in part or at all with any other county or counties except by a majority vote of the duly qualified electors in each county proposed to be abandoned, abolished and/or consolidated with any other county or counties expressed at a general or special election held under the laws of said state."

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Here the language used is a "majority vote of the duly qualified electors." Again, a literal emphasis on the word "qualified" could lead to the absurd requirement of a super majority, but we submit such is not the necessary or sensible construction that should be placed on the language. In the absence of some controlling public policy requiring the greater majority, such intention should not be imputed, especially where the framers increased the numerical majority of two-thirds when a greater majority was thought desirable in the case of removing an established capitol site.

Article XVI, Section 7, an amendment to the original constitution, regarding changing forms of government for counties and cities, provides:

> "Sec. 7. The legislative assembly may, by general or special law, provide any plan, kind, manner or form of municipal government for counties, or counties and cities and towns, or cities and towns, and whenever deemed necessary or advisable, may abolish city or town government and unite, consolidate or merge cities and towns and county under one municipal government, and any limitations in this constitution notwithstanding, may designate the name, fix and prescribe the number, designation, terms, qualifications, method of appointment, election or removal of the officers thereof, define their duties and fix penalties for the biolation thereof, and fix and define boundaries of the territory so governed, and may provide for the discontinuance of such form of government when deemed advisable; provided, however, that no form of government permitted in this section shall be adopted or discontinued until after it is submitted to the qualified electors in the territory affected and by them approved."

This section uses loose language in that it requires submission to the qualified electors and by them approved. No mention is made of the word "majority." Again the word "qualified" is used. Surely the section means approved by a majority of those voting. Any other

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construction would be absurd. No method has been found to compel, nor has any election ever been held, where all the qualified electors actually voted. What public policy is served, other than to subvert the function of a free democratic society, by assuming the nonvoters are "no" voters, when the opportunity is afforded to register that "no" vote and it is not exercised?

Article XIX, Section 9, regarding the submission by the legislature of constitutional amendments, provided:

> "Sec. 9. Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election.

Here we have the requirement of a majority of those voting thereon. Again, only a majority of those voting on the issue is required and nonvoters are not counted.

Finally, Article XIX, Section 8, when analyzed carefully, its intent is consistent with the other provisions of the constitution dealing with elections and examined above:

> "Sec. 8 . . . such revisions, alterations or amendments . . . shall be submitted to the electors for their ratification or

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> rejection at an election appointed by the convention . . .; and unless . . . approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." (Emphasis supplied.)

The words "at the election" refer back to the words "at an election appointed by the convention." They describe when the elector votes. If the drafters intended an extra majority, it appears they would have specifically required it, as they did in Article X, Section 2, by requiring a vote of two-thirds of the qualified voters, or as they did in Article XIX, Section 8, itself, by requiring a vote of two-thirds of the members of each house of the legislature to submit the question of whether there shall be a constitutional convention.

If the drafters of our present constitution really intended the construction argued for by Relators, then a convention which submitted major and complete revisions to the constitution in one package could obtain passage by a mere majority, and a convention which submitted two or more minor amendments, and a number of voters voted on some but not all, such minor amendments would have to pass by an extra majority. Certainly such results were not intended. Rather, if the drafters of our fundamental law had intended an extra majority to pass revisions submitted by a convention, they would have used the words "three-fifths," two-thirds," three-fourths," or some other definite and precise language. Such language is used in all sections of the constitution which require an extra majority vote.

Why would the drafters assign a negative vote to a nonvoter in this section but in no other section of the constitution?

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Perhaps the drafters anticipated that any revisions by a convention would be submitted as the original constitution was submitted, namely, in one package, and therefore only contemplated approval of a single issue by a majority of those voting at the election. However, in 42nd Leg. Assembly v. Lennon, 196 Mont. 416, 481 P.(2d) 330, this Court held that the convention need not submit its proposals in one package.

We think it more likely that the drafters contemplated that more than one revision would be submitted for approval or rejection because they used the plural "revisions, alterations or amendments." Yet they must also have contemplated that not all the proposed revisions might be approved because they provided in the singular that the revision, the alteration, the amendment which received approval of a majority of those voting at the election would become part of the fundamental law. Is this not a logical, gramatical, common sense construction of Article XIX, Section 8?

Why put special emphasis on the words "at the election," so as to require an extraordinary majority? These words clearly refer only to when the voters would express their approval or rejection, namely, at the election provided for by the convention. Would anyone reading this section aloud naturally inflect his voice when he came to the words, "voting at the election"? Only if he was a poor reader, we submit.

Is it not more plausible to impute to the framers the fundamental belief on which our democratic institutions are founded, that the majority rules? Why not impute to them the belief that if experience dictates today's majority is in error, tomorrow's majority will

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change these errors. Providing for the process of revision itself and the method for its accomplishment manifests their belief that revision of their handiwork might be desirable in the future.

The narrowness of the majority can be interpreted as less than overwhelming support for the new constitution. Yet, given the propensity of all of us to be negative, realizing the virtual mathematical impossibility of unanimity and the complexity of constitutional law, it is an amazing credit to the majority of those who voted on the issue that they were willing to chart a new course and attempt different methods of solving old and new problems.

Should this majority be denied by playing on words? Should those who do not express their preference be counted as negative voters? If such were the law of the land, neither Presidents Kennedy nor Nixon, in recent times, would have been elected. Yet the nation accepts the results of narrow elections and goes on. This is the genius of the American system of government.

In passing, we observe that in the official canvass 238,215 were reported to have voted in the primary election. Yet only 224,098 voted for the various candidates for governor and only 209,796 voted for the various candidates for U.S. Senator. Thus, we have a graphic illustration, if one is needed, to prove the obvious, that the vagaries of the voters are such that for some reason not all voters vote on every issue. Yet all elections are deemed won by the person receiving the highest number of votes. The nonvoters are not arbitrarily assigned to an incumbent. Such a rule of law would bring on revolution. Why, therefore, should nonvoters be arbitrarily deemed to have voted "no" when the question submitted is an issue

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not a choice of candidates? The public policy underlying both situations should be the same, and the burden should be on those who urge the contrary to show that there is some reasonable public policy to thwart the expressed will of the majority.

Finally we note, Congress, by Section 8 of the Enabling Act, required approval of our present constitution by a majority vote for and against the proposed constitution, and approval of any article or proposition submitted separately by a majority voting for and against such article or proposition.

THE COUNTING OF THOSE WHO FAIL TO VOTE ON AN ISSUE IN AN ELECTION AS HAVING VOTED NEGATIVELY ON THAT ISSUE VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right to vote is now, and always has been, fundamental. It is a right that cannot be denied or diluted. The right to vote freely is of the essence of a democratic society. Any restriction on that right strikes at the heart of representative government. The right to vote can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting free exercise of suffrage (Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.(2d) 506, 523, 84 S.C. 1362). Relators' position would allow those voting against the proposed constitution to add to their total all persons who participated in the constitutional election but chose not to vote for or against the proposed constitution. They would express a negative preference for those who specifically chose to express no preference. By adding to the total vote against the constitution the total of all nonvoters who participated in the election, a person's vote who voted for the constitution

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is no longer equal to the vote of a person who voted against it.

In Hunter v. Erickson, 393 U.S. 385, at page 393, the court stated that "the state may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." This would appear to be especially true when dealing with fundamental law. Is a democratic government where fundamental law is determined by other than a majority of those expressing a preference for that law really a democratic government?

The above cited federal cases are recent and are based on the equal protection clause of the Fourteenth Amendment. It is interesting to observe that our Supreme Court, prior to these federal decision, had discussed approvingly the idea that an elector's vote counted just "one" and it could only be offset by the vote of another elector, and his vote counted just "one." The court in that case, in discussing the purpose of elections, went on to say:

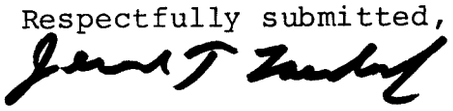
> "And all through the provisions of our Code for the election of public officers the only kind of votes that are spoken of are votes cast for some person.
>
> "And this court has held that the only way in which an elector may have his vote counted is by voting for someone.
>
> "In a Minnesota case the court, construing the provision of the Constitution of that State, which is similar to ours, said: 'When the Constitution was framed, and as used in it, the word "vote" meant a choice for a candidate by one constitutionally qualified to exercise a choice.' And further: 'The quotations made from the different cases are not chance expressions. They are indicative of the idea, which permeates all legal thought, that when a voter votes for the candidate of his choice,

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> his vote must be counted one, and it cannot be defeated or its effect lessened, except by the vote of another elector voting for one.' (Brown v. Smallwood, 130 Minn. 492, 153 N.W. 953, 956, 957, Ann. Cas. 1917C, 474, L.R.A. 1916B, 931.)" (Emphasis supplied. State ex rel. Wolff, et al., supra, page 427.

Although the Montana Court did not mention the Fourteenth Amendment, the language quoted indicates the Court's concern was one for fundamental fairness, and this is really what the equal protection clause is all about. We submit that this Court need only consider its own decision (State ex rel. Geurkink, et al., supra) in order to reject the proposition that nonvoters be counted in determining election results.

Respectfully submitted,



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CERTIFICATE OF MAILING

I, JEROME T. LOENDORF, one of the attorneys for the Intervenors, Leo Graybill, Jr., et al., in the above entitled matter, hereby certify that on this 13th day of July, 1972, I served the foregoing BRIEF OF INTERVENORS, LEO GRAYBILL, JR., ET AL., upon all parties of record, by depositing a full, true and correct copy thereof in the United States mail, first class postage prepaid, addressed to their attorneys of record at their respective addresses.

/s/ Jerome T. Loendorf

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12309

No.

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 INTERVENORS DAVE M. MANNING, CLYDE HAWKS, CARL M. SMITH, WALTER HOPE, JESS J. BLANKENSHIP and HERBERT J. KLINDT.

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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.	No. 12309 BRIEF OF INTERVENORS

* * * * *

Intervenors Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt, pursuant to the order herein duly entered June 28, 1972, hereby submit the following brief:

Forward

The instant proceeding poses a simple question. The answer to that question may be more easily reached than all of the clamor surrounding it might indicate.

Beyond question a Constitutional Convention met and submitted a proposed Constitution to the electors "for their ratification or rejection at an election appointed by the Convention for that purpose", pursuant to Article XIX, Section 8 of the Constitution of Montana. The election was held June 6, 1972. It was held as a special election at the same time as but separate from the regular primary election.

The question posed by this lawsuit is: "Was the Constitution approved by a majority of the electors voting at the election, as required by the above Article XIX, Section 8?" If the question were to be answered in the affirmative, the new Constitution would become the organic law of Montana. It is clear that this is not

the case.

The proposal failed to obtain the restrictive majority which our Constitution requires. Therefore, it was rejected by the electors.

Argument

It is understandable that in a matter of so much notoriety as the enactment of a new Constitution, the zeal of those who espouse the cause has led them to overlook the legal principles involved. There is a veritable flood of adjudicated cases. Their distinctions are, however, about as numerous as they are, as a cursory reading of the often cited annotation at 131 A.L.R. 1383 will disclose.

There are those who will cite the Montana bond cases as authority for the proposition that the vote on June 6 was adequate. Nothing could be less accurate.

The initial bond case in Montana was Tinkel v. Griffin, (1902) 68 P. 859, 26 Mont. 426. In that case a bond election was had at the same time as a general election, just as the election relative to the Constitution was held June 6, 1972, at the same time as the regular primary election. In Tinkel the Court said:

> "It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of section 5, art. 13, of the constitution. It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at an election to be provided by law. As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard

> of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, and not a majority of all the electors of the country, or of those who vote upon any other issue at the same or some other time."

The Court, again in Morse v. Granite County, (1911) 119 P. 286, 44 Mont. 78, cited Tinkel in concluding that a subsequent legislative enactment did not enlarge on the constitutional provision cited in Tinkel.

The Tinkel case has been often cited in other jurisdictions. It is noteworthy that those courts give to it the meaning which we ascribe to it here, namely - it stands for the proposition that the constitutional language limits the votes upon which the majority is to be based, to the votes cast (or the electors voting at) the particular election which is under consideration - not those of some other election held on the same day. A.L.R. so cites the Tinkel case in 131 A.L.R. at page 1394.

A discussion of some of the cases citing Tinkel may be informative.

In Board of Education v. Woodworth, (1923, Okla.) 214 P. 1077, the issue was the success or failure of a bond election. The constitutional mandate was "three-fifths of the voters thereof, voting at an election, to be held for that purpose". There were ballots cast for an excessive levy, a question voted upon at the same time the bond issue was being voted on. After throwing out the spoiled and unvoted ballots, the Court found, as in the Tinkel case, that the excessive levy election was a separate election. The same may be said of the primary election of June 6.

In Wilson v. Wasco County, (1917, Ore.) 163 P. 317, the

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Court cited the Tinkel case. The election in question was a bond election. Although authorized to be held at a general or special election, the bond issue was decided at the time of a general election. The question was whether the "majority of the voters voting at such an election" required by the constitution, would raise the need for bond votes to a majority of the votes cast for governor. The bond election was a separate election. So held the Oregon Court.

The North Dakota Court in State v. Blaisdell, (1909, N.D.) 119 N.W. 360, also cited our Tinkel case. That North Dakota case involved the vote for creation of a county. The constitutional provision was:

> "'All changes in the boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all the legal votes cast in each county at such election.'"

Again, the Court held that, although the vote on the change of county boundaries is cast at a general election, it is in a strictly legal sense the holding of a "separate election". The Court called particular attention to the fact that the constitutional reference was to the "votes cast", as distinguished from our constitutional word "electors".

Through the whole strained decision in the Blaisdell case it turns on the very point we make here, that is that there were two elections held. A count of the electors voting at one election did not fix the proportion applicable to the other. Further, by the North Dakota Constitution, the measure is the "majority of the legal votes cast" - not the "majority of the electors voting" as in the Montana instance. This latter distinction is one made by the cited case of Gillespie v. Palmer, (1866) 20 Wis. 544, in

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which it is pointed out that the word "votes" is not as broad as the word "voters". Thus, where the restrictive majority is from the "votes" cast, the controlling group is a part of a lesser group than when it is from a "majority of the electors voting".

We recognize that many cases have held that where, as here, there was an option to hold the election as a special one or with a general election, a majority of all the votes cast at the general or special election was needed to fulfill the constitutional requirement. (See 131 A.L.R. 1404). We believe that such holdings, although highly favorable to the result we seek, are at variance with the Tinkel case and we do not so contend.

The legislature, in fixing the ground rules for the election on the Constitution was even more restrictive than is the Montana Constitution. Section 17, Chapter 296 of the Session Laws of 1971, dealing with the subject, reads in part:

> "Section 17. (1) The revision or alteration of, or the amendments to the constitution, adopted by the convention, shall be submitted to the electors of this state for ratification or rejection, at an election appointed by the convention for that purpose, not less than two (2) months nor more than six (6) months after the adjournment of the convention.
>
> * * *
>
> "(9) If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana. The new constitutional provisions shall take effect as provided therein, or as provided in a schedule of transitional provisions attached thereto."

So much for the Tinkel case. It accomplished for its facts exactly what our legislature accomplished when it enacted Section 17 (9) of the Session Laws of 1971 (supra). It interpreted "majority of the electors" as the "majority of the electors voting at the special election".

We do not understand Tinkel and the bond cases to be adverse to the position we take in this matter. They are not relevant. The language in the bond cases which is urged in favor of this Constitution is, at best, dicta. If perchance, however, Tinkel is thought to be against us so that, in the light of cases herein cited, Montana would stand alone because of the Tinkel case, then we call the Court's attention to its well chosen words in State ex rel. Peery v. District Court, (1965) 400 P.2d 648, 145 Mont. 287, where, in the matter of stare decisis, the Court said:

> "Then in State ex rel. Sparling v. Hitsman, 99 Mont. 521, 44 P.2d 747, this appears:
>
> "'We realize the force and the wisdom of the rule of stare decisis. We are not unmindful of the fact that principles of law should be positively and definitely settled in order that courts, lawyers, and, above all, citizens may have some assurance that important legal principle involving their highest interest shall not be changed from day to day, with the resultant disorders that of necessity must accrue from such changes. We are mindful, however, of the fact, as stated by Mr. Justice Brandeis in a dissenting opinion in the case of DiSanto v. Comm. of Pennsylvania, 273 U.S. 34, 47 S.Ct. 267, 270, 71 L.Ed. 524, that 'in the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken.' The rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong.'"

A majority of the electors voting at the special election did not vote for the new Constitution.

Article XIX, Section 8 of the Montana Constitution, in pertinant part, concerned the proposed Constitution, reads:

> "--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."

At the outset, we direct attention to the fact that, so far as we can determine, the time has passed when the machinery

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may be set in motion for a recount under Chapter 41, Title 23, R.C.M. 47. There is not, however, an absence of evidence as to the number "of the electors voting" at the special election. The special canvassing board, consisting of the Governor, State Treasurer and Secretary of State, has certified to that fact. The certificate dated June 20, 1972, over signature of each of these officers signifies that the total number of electors voting was 237,600. (Exhibit "C" of Application for Declaratory Judgment filed by relator Cashmore). In the absence of a showing to the contrary, it will be presumed that these officers certified to the proper figure (Section 93-1301-7 (15), R.C.M. 47).

The same presumption supports the accuracy of the county canvass of votes which must be done per Chapter 40 of Title 23, R.C.M. 47 and particularly Section 23-4002 thereof.

Of interest, and bearing on the issues of this case, in part because of its view of a constitutional provision similar to our Article XIX, Section 8, is the Oklahoma case of State ex rel. Williamson v. State Election Board et al, (1943, Okla.) 135 P.2d 982. The constitutional provision, Section 1, Article 24 provided:

> "If a majority of all the electors voting at such election shall vote in favor of any amendment * * *".

The State Election Board certified as to the total number of electors voting. It also certified as to the number of votes cast for the proposed amendment and therefrom concluded that it failed. Strangely, the Attorney General in attacking the result did not suggest, nor did the Court, that the majority of electors meant anything but the majority voting at the election on all issues. He did, however, attack the results in an effort to show that the Election Board's certification as to the total votes cast was wrong. The Court said:

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"When that Board has so acted, in good faith, and correctly, upon the records and county certificates before it, without fraud or mistake on the part of that Board, then there is no escape from these conclusions: (1) That the law intends a time and manner of bringing finality to the result of an election such as this; (2) That this court has no power to check the result of the election in any county or precinct and then order the State Election Board to change its certified result of such an election to a different result which we conclude it should certify; (3) That if the power so to do is to be conferred on this court or upon any state official or department of government it must be done by an enactment expressly providing therefor."

One of the obvious reasons for the diversity in the Court decisions on the question of the number of votes needed to enact a measure when a Constitution or a statute imposes a restriction - as ours does - is the variety in the constitutional language used. The courts, of course, recognize that these differences often arise by reason of the seriousness and the magnitude of the issue involved. In our own State that factor should alone be determinative of this case.

Surely, the exchange of one entire constitution for a new and different one is a vote of greatest magnitude. To the entire state it surpasses in importance amendments to the Constitution. No vote could be of greater concern. It is understandable that the framers of our Constitution should impose the greatest restriction upon the majority which should control this final election. They provided against its adoption unless "approved by a majority of the electorsvoting at the election", (Article XIX, Section 8).

It is clear that they thought more lightly of amendments. The wording in the next succeeding section of the Constitution dealing with amendments reads:

"--and at said election the said amendment or

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> amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution." (emphasis supplied) (Montana Constitution, Article XIX, Section 9).

The provision in Section 9 is precisely the interpretation that the proponents of this new document contend for Section 8. Manifestly the framers of the Constitution in 1889 contemplated that more than one amendment might be voted on and, accordingly, provided that only those voting thereon need be counted in determining the majority. For the change of constitutions, however, they might have used the same words, they did not do so. They used words to properly restrict the majority as in their wisdom, they saw fit to do.

It is noteworthy, too, that the framers of the Constitution had before them the Enabling Act adopted February 22, 1889, (25 Stat. 676). In Section 5 of that Act, dealing with the adoption of the Sioux Falls Constitution, the words, less restrictive than those we have under consideration were:

> "--and if a majority of all votes cast on this question shall be for * * *"

The wording selected by the Constitutional Convention of 1889 in this regard cannot be said to have been chosen on the spur of the moment and by accident. It was a part of the Constitution proposed in 1884. The delegates had five years time within which to reconsider it, if they had seen fit to do so.

It cannot be argued that the wording of Section 8 was chosen by accident. To give meaning to that Section as contradistinguished from Section 9 it must be interpreted as we contend - there is no other way.

The cases covering the situation now before this Court are so numerous that we shall not attempt to cite all of them nor

to distinguish one from the other, except in a general way. Suffice it to say, although we can find cases, a part of whose language may argue against our position, we find not a single case seemingly against us, that cannot be distinguished.

Perhaps the strongest case against us is the New Mexico case of State v. State Canvassing Board, (1968, N.M.) 437 P.2d 143. A reading of that case indicates the horrible status into which the State of New Mexico had fallen and, in a sense, forgives the Court for its efforts at judicial legislation. Even that New Mexico Court might have found, as did this Court in the Tinkel case (supra), that the election for the constitutional amendment was a separate election. That, in a sense, is just what the New Mexico Court did. It was working with and considering amendments - not the adoption of a new constitution. It was working with a situation where three-fourths, not just a majority, was needed to enact the measure, and it was working with an otherwise insoluable problem on which the people of New Mexico had spoken ten successive times. To those extents, even the New Mexico case is distinguishable.

So far as meeting the factual and legal situation squarely is concerned, we have found no case more applicable to the present situation than the 1960 case of Stoliker v. Waite, (Mich.) 101 N.W.2d 299. The issue was the call of a constitutional convention.

The Constitution there had language requiring a vote of the "majority of electors voting at such election" as distinguished from the constitutional language applicable to adopting amendments, that was, "a majority of the electors voting thereon". The Michigan case is a "Black Horse" case with our situation now.

Justice Smith, speaking for the Court, in Michigan, among other things said:

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ROSWELL, NEW MEXICO

"In short, we are now asked to hold that the people did not clearly understand what they were thus doing. * * * We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of the people is not so meager. * * * From the language used it is clear that they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention and our holding is that they did so distinguish. (emphasis supplied)

"We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon.

* * *

"Many conceive the constitutional requirement hereinabove discussed to be an impediment to the economic and social well being of this State. We are urged, as though we were a constitutional convention faced with a choice of alternatives, to choose that one the more beneficial to our people. All of this misconceives the problem presented to this Court. We are not a constitutional convention. We have before us for consideration a Constitution already adopted, the words of which are clear and clearly stated. We have no choice of alternatives presented to us. The people themselves made the choice, now urged upon us, back in 1908. The argument that their choice is, a half-century later, shown to have been unduly restrictive of constitutional change does not constitute this Court into a constitutional convention, empowered somehow at this date, to make a wiser choice."

Arguendo--: The electors in the State of Montana went to the polls June 6, 1972, with the contemporaneous understanding identical with that of the Michigan voters indicated by Justice Smith. If they had read the Constitution, they could have no other understanding. To bolster that understanding, Community Services Programs of the Higher Education Act of 1965, (a

Federally funded program), together with a group of Montana citizens, financed and caused a supplement to be included with many leading Montana newspapers before the election. (See Affidavit of R. W. Harris herein on file). That supplement was over the endorsement of at least four of the elected delegates to the Constitutional Convention. They are Mrs. Thomas Payne (Katie Payne), Mr. Fred Martin (Fred M. Martin), Margaret S. Warden and Dr. Richard B. Roeder (Richard B. Roeder), all as appears from the supplement itself.

To the electors, the supplement conveyed precisely the interpretation of this Michigan Court. It said:

> "There is also a special consideration peculiar to the Montana situation. Article XIX, Section 8 of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot." (emphasis supplied)

The supplement closed with paragraphs containing the following words, directed to the voter:

> "If the proposed Constitution fails, your vote on the other measures--the make-up of the legislature, gambling, and the death penalty--will not count because they automatically fail if the proposed Constitution is rejected. Second, your vote on these three questions will not count unless each is decided by a majority of those voting in the election. If you fail to vote on any item, you will aid in its defeat." (emphasis supplied)

The ballot on which all electors at the special election voted contained an admonition to the voter outlined in black for emphasis. It read:

> "THE PROPOSED CONSTITUTION WILL INCLUDE A BI-CAMERAL (2 HOUSES) LEGISLATURE UNLESS A MAJORITY OF THOSE VOTING IN THIS ELECTION VOTE FOR A UNI-CAMERAL (1 HOUSE) LEGISLATURE IN ISSUE 2."

That admonition can only be interpreted to mean - "each issue which is presently on the ballot can be enacted only if it receives the affirmative vote of a majority of those voting in the election".

These were the bases on which the people cast their ballots June 6, 1972. Their response was the defeat of the proposed Constitution.

Interesting are some of the decisions - of ours and sister States:

Wyoming is cited as being a state whose Court imposes a most rigid limitation on the majority which may enact an issue with which the constitutional limitation is concerned. The first case of consequence was State ex rel. Blair v. Brooks, (1909, Wyo.) 99 P. 874. In that case, involving the amendment to the Constitution, the controlling clause required "a majority of the electors". The Court determined that an elector is one who is qualified and who, with that qualification, votes at the election in question (not necessarily on the involved proposition). The Court said:

> "The language is broader in meaning than a mere majority of the electors who actually vote upon the proposition. Neither residence of the elector nor failure to vote can militate against this proposition. The word 'elector' is generic. It includes, not only those who vote, but those who are qualified, yet fail to exercise the right of franchise. To hold otherwise would, in effect, give to the word 'electors' a narrower and more restricted meaning than that given to it in the Constitution.
>
> "* * * There were more than half of the electors voting at the November, 1908, election who failed to indicate their desires or wishes upon the adoption of the proposed amendment. It was the expression of the elector's wish upon the question which the law called for--a positive expression in a particular manner--and not the absence of such

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> expression which was authorized to be recorded. To ratify is to affirm, and the Constitution requires in order to ratify that there be an affirmative expression of a majority of the electors to whom the question is submitted, the withholding of which is not sufficient. The proposed amendment was submitted to the electors of the state, and it required a majority of those electors to ratify it. As it appears that the number of electors who voted at the election and in favor of ratification of the amendment were less than a majority of the electors who voted at the election, it follows that the amendment was not ratified. The demurrer should be sustained."

That case has been affirmed many times by the Wyoming Court, the last of which was in 1970, State ex rel. White v. Hathaway, (Wyo.) 478 P.2d 56.

Strangely, Blair v. Brooks cited the Idaho case of Green v. State Board of Canvassers, (1896, Ida.) 47 P. 259, with the comment that Wyoming would not follow the Idaho Court. One might opine that the ruling of the Idaho Court would be adverse to the position of the relator in the case at bar.

Not so, the Idaho case concerned an amendment to its Constitution. The effective constitutional provision was Article 20, Section 1.

> "--and if a majority of the electors shall ratify the same, such amendment * * * shall become a part of this constitution." (emphasis supplied)

The Court held that this language meant a majority of the electors voting on the proposition. However, the case is precisely in point for us now. The Idaho Court called attention to a following, differently worded Section (Section 3) of the same Article of its Constitution dealing with the calling of a Constitutional Convention which provides, much as does the Montana provision under consideration, "if a majority of all the electors voting at said election shall have voted for a Convention"--

The Court contrasted the two Sections and said:

"--So is also section 3 of article 20, which provides that when it shall be deemed necessary to call a convention to revise or amend the constitution, which shall be called if a majority of all the electors voting at said election shall have voted for a convention, etc. The language of these sections is clear and unmistakable. It needs no construction, and it is only necessary to count the ballots cast at any such election and those voting for the proposition, to ascertain if a majority of all those voting at said election were in favor of the proposition."

The Supreme Court of Utah in a decision dealing with an amendment to the Constitution of that State, placed the same emphasis on the use of the word "thereon" in Section 9, and its absence from Section 8 as we do here. Complaint was made that a majority of all the electors voting at the general election had not voted for the proposed amendment. In Lee v. State, (1962, Utah) 367 P.2d 861, the Court said:

"As to the first ground, suffice it to say that Section 1 of Article XXIII clearly provides that if a majority of the electors voting thereon, that is, on the proposed amendments, favor them, they shall become a part of our Constitution. It does not say that there must be approval by a majority of the electors casting votes in the general election to enable passage of a constitutional amendment submitted by a joint resolution of the Legislature."

In the A.L.R. annotation, supra (131 A.L.R. 1382, 1418), reference is made to a situation "where two or more questions (are) submitted together". The case of City of Sacramento v. Goddard, (1926, Cal.) 252 P. 329 is cited for the view that where twelve propositions were submitted at a special election, each proposition was deemed carried if it received the required two-thirds of the votes cast for that proposition. The City Charter provided:

"If two-thirds of the electors so voting at such election shall vote in favor..." (emphasis supplied)

The California Court concluded that the words "so voting" referred to the vote made on each proposition standing alone. The Court, however, confirmed our view of language very like the Montana

Statute when it said:

> "The Legislature, however, by a subsequent enactment (Stats. 1901, p.27), authorized the submission of more than one proposition or purpose at the same election, but provided that it shall 'require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds.' It is conceded here that, if the sufficiency of the vote on the filtration bond issue is to be determined in accordance with the provisions of the statute, proposition No. 4 did not carry."

The California case of People ex rel. Smith v. City of Woodlake, (1940, Cal.) 106 P.2d 71, purports to summarize many California cases. Among other things, that Court said:

> "'The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, 'whenever a majority of the electors voting at a general election shall so determine.' These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required.'" * * *
>
> "'This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize.'"
>
> * * *
>
> "In Howland v. Board of Supervisors, supra, relied upon by respondent, two separate and distinct elections were held, one a general election and one for the purpose of submitting a proposition to incur a bonded indebtedness. It was held that since the two elections were separate and distinct the number of votes cast in one did not affect those cast in the other."

Clearly, California agrees both with Tinkel and with our view of the present situation.

In Indiana, the Supreme Court dealing with amendments to the Constitution had language similar to our Section 8, "if a majority of said electors ratify the same". In Re Denny, (1901) Ind. 59 N.E. 359, 51 L.R.A. 722, took the strictest of views and held that the amendment must be approved by a majority measured by the vote for governor (the) candidate receiving the highest

number of votes at that election.

Conclusion

With almost complete uniformity the adjudicated cases agree that a "majority of the electors voting in the election" means just what the quoted phrase says. We do not presume upon this Court by citing cases on statutory or constitutional interpretation which can be more explicit.

Inasmuch as a majority, that is, one or more votes more than half of the total number of votes cast in the election were not cast for the proposed Constitution, the measure failed. By the ballot on which the electors voted, they were specifically advised that such would be the case. Any comment in the Tinkel case or otherwise made by this Court which may seem to be at variance with the above conclusion is, at best, obiter dictum.

These intervenors urge upon this Court that an order be made declaring that in the election held June 6, 1972, the proposed Constitution failed of passage and that any proclamation purported to have heretofore been made to the contrary is a nullity.

Respectfully submitted this 12th day of July, 1972.

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By

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Intervenors Dave M. Manning, Clyde Hawks, Carl M. Smith, Walter Hope, Jess J. Blankenship and Herbert J. Klindt upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

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Dated this 12th day of July, 1972.

R. F. HIBBS

12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

****

FILED

JUL 13 1972

Thomas J. Kearney

CLERK OF SUPREME COURT
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.

NO. 12309

.....

SUPPLEMENTAL BRIEF OF JOSEPH P. MONAGHAN ATTORNEY FOR "PUN"

.....

MAY IT PLEASE THE COURT : This is the fourth brief filed with this court opposing the proposed constitution of 1972, to-wit : one in the Kaavalen case, one in the " PUN" CASE, now on appeal to the Supreme Court of the U.S., brief on the question of the requisite vote to adopt a revised constitution filed herein before the court consolidated the above causes and before timely permission could be granted for an amicus curiae brief therein, and this one supplementing the previous briefs. My colleagues in Bozeman suggested that I waive my right to claim the privelege of oral argument and in as much as I have been afforded this opportunity before in the case brought by " PUN " I hereby relinquish any time that I might be allowed on July 17, 1972 to the firm of MORROW, NASH & SEDIVY, on this important question.

CONTRAST SHOWS INTENT

Reading section 7 of article XVI of the 1889 constitution we find this very pertinent language re: vote of adoption of its provisions : " ....provided, however, that no form of government permitted in this section shall be adopted

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or discontinued until after it is submitted to the qualified electors in the territory affected and by them approved." Compare this with the provision here in question in this cause : " 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." Sec. 8 of Article XIX of the 1889 constitution. Since all citizens are affected vitally by such drastic changes it was the intent of the framers of the 1889 constitution to not allow revisions and amendments in the fundamental law of the state to be made except by a decisive vote of the electorate. They chose not to employ the language of Art. XVI, Section 7 aforesaid thus evidencing their mandate in favor of the absolute majority as interpreted by the Secretary of State of Montana. One need not be a practicing lawyer to distinguish these two articles of the constitution. BLACK'S LAW DICTIONARY, Fourth Edition defines it as follows : MAJORITY VOTE. Where a question is required to be submitted at a certain regular election and is made to depend upon " majority of votes " cast at"such election" a majority of all votes cast at election is meant, and not merely majority of votes cast on that particular question 208 Ind.168,193 N.E.865.

> Where legislative body provides that proposition shall be submitted to voters and those in favor of **proposition** shall cast affirmative vote while those opposed shall cast negative vote , and that " majority of votes " given shall be requisite to adoption of measure, only votes to be counted in de-termining whether measure was adopted are those given on particular question involved. In re Todd,208 Ind168,193 N.E.865.

Following this general rule of law the court in the case of IN RE DENNY, 59 N.E. 359, at page 361,(Cited in our preceeding brief)held : " The general assembly enacted that a vote on the proposed amendments should be taken at

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the next general election. The trial court found that 240,031 votes were cast in favor of the adoption of the proposed amendment in question. The trial court probably made the finding from the facts within its judicial knowledge. It was unnecessary for the parties to prove the vote. This court takes judicial notice of the returns made to the Secretary of State, and if the trial court had stated a different number the finding would be ignored, because this court is charged with judicial knowledge of the fact that 240,031 is the correct number. From the same source and with the same authenticity this court knows judicially that at the same election 664,094 votes were cast for presidential electors, 655,965 for governor, and 493,670 votes on the other proposed amendment. Since we know absolutely that more than twice 240,031 electors of the state participated in the election, we hold that the proposed amendment in question was rejected. "

PROPOSED CONSTITUTION UNCONSTITUTIONAL

We trust this court will take judicial notice of the following which render the proposed constitution unconstitutional : 1. Article III Sec 2 of the 1889 Constitution provides : " The people of the state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent State, and to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States. "

As indicated in the attached copy of flyer to the electorate the deletion of the phrase begining with "whenever they deem it necessary etc." is repugnant to Article 4 Section 4 of the U. S. Constitution gauranteeing ". every state in this union a republican form of government,..." At page 629 Of Vol. 11 of American Jurisprudence Under Sec. 25 we find this pertinent language :

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-- REVOLUTIONARY CHANGES - It is universally conceded that the people are sovereign and that they have power to adopt a Constitution and to change their own work at pleasure.The people must act by majorities,however, and in adopting a Constitution the majority which does so has in effect prescribed the method by which the majority of the people may alter or amend it. An attempt by the majority to change the fundamental law in violation of the self imposed restrictions is unconstitutional and revolutionary.

2. Among the 130 deletions is Sec. 28 of Art.III providing:

" There shall never be in this state either slavery or involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted."

This attempts to repeal-and is therefore repugnant to the Constitution of the U.S.- the identical proviso known as Amendment 13,Sec. 1. " Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party has been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. "

3. Making all citizens subject to militia service regardless of sex or age is repugnant to Art. I Sec.8 of the U. S. Constitution.

4. Repeal by deletion of Articles I.&II. of the 1889 constitution regarding Boundaries and military reservations is also violative of Article I. Sec. 8 of the U.S. Constitution.

WATER RIGHTS THE KEY TO A SINE CURE

Fortifying the"Missouri River Compact"has,it seems,become a sort of executive attraction which has engaged the various Governors major attention since out of its accomplishment will arise a grand plum for some deserving or rather undeserving governor to the tune of a $72,000 ayear position. What price glory ? Executive Director ofthe Missouri River Compact- Salary $72,000 annually. Why should the Advisory Commission on Intergovernmental Relations worry about the tab as long as their scheme to enslave the people is accomplished.

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Consider the irregularities involved in this election : the people themselves did not initiate it; they were totally unaware of its importance and consequences; the representation they got was unsolicited; the ideas advanced were not theirs; the time of voting was not their choice; the leadership was foreign; the money although supplied by them was not of their instigating; the revisions were not sought by them; the laws made to protect them were not adhered to or obeyed; in fact they had no part whatsoever in the making of the so-called improvement, towit: the new constitution. Yet they must be bound by its treasonous provisions. If you do not believe this to be a conspiracy please read the attached proposed new Constitution for the United Republics of America. These outsiders and schemers are fully aware of the weaknesses that permeate our society: money and its undue influence. So they have used money,- ours- not theirs, to initiate, promulgate, and promote their diabolical plot. To many money is the be all and end all of their existence. But the scriptural admonition is good for you and me : " SEEK YE FIRST THE KINGDOM OF GOD AND HIS JUSTICE AND ALL THESE THINGS WILL BE ADDED TO YOU."

Respectfully submitted,

Joseph P. Monaghan

Attorney for " PUN "

STATE PUBLISHING CO., HELENA, MONT.

12309

NO. [redacted]

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA ex. rel.
STANLEY C. BURGER,

Petitioner,

-vs-

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

Respondent.

BRIEF OF AMICUS CURIAE

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Filed [redacted]

JUL 18 1972

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CLERK OF SUPREME COURT
STATE OF MONTANA

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NO. 12310

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

THE STATE OF MONTANA ex. rel.
STANLEY C. BURGER,

Petitioner,

-vs-

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

Respondent.

* *

BRIEF OF AMICUS CURIAE

MONTANA FARMERS UNION

INTRODUCTION

The purpose of the matter at bar is to determine whether the people of Montana have rejected or approved a new Constitution. The question submitted to this Court is whether a, "* * * majority of the electors voting at the election * * *" approved of the new Constitution. Article XIX, Section 8, Montana Constitution, 1889. Your Amicus Curiae, Montana Farmers Union, respectfully submits that the answer to this question must be "Yes". The Constitution has been approved by a majority of the electors voting at the election.

No question of like importance, of such breadth and magnitude, has ever been submitted to this Court in its existence. If the question is decided in the affirmative, the State of Montana shall finally be streamlined to meet the needs of the Twentieth Century rather than be saddled with a document of a previous era. The issue demands careful deliberation and considerate judgment.

The 1889 Constitution must be viewed in the context in which it was written: the great upheaval following the Civil War; the emergence of a new State and all the attendant social pressures brought on by the increased migration. The new Constitution deserves a scrutiny which is as fair: Modern problems demand modern techniques for their solutions.

We all know of the difficulty our Legislature has in coping with these modern problems, being hampered by a document that foresaw neither the scope nor the variety of issues of nearly a century later. What Montana needs is not necessarily more law, but more fundamental change.

The reasons that the Montana Farmers Union supports this new Constitution have been ably expressed by its President, Clyde Jarvis, in a letter dated May 15, 1972, to Montana Farmers Union members, a copy of which is attached hereto as Exhibit "A" and by reference incorporated herein.

ARGUMENT

The fundamental attack on the new Constitution by its opponents hinges on a technical and erroneous interpretation of the will of the people. Their interpretation is tantamount to supplanting their own desires on the proposition

for the feelings of those people who apparently abstained from voicing a preference between the old and the new Constitution. The opponents of the new Constitution would weight their own position - ex post facto - by telling this Court, and the people of this State, what the 7,000 or more abstainers really meant while in the privacy of the ballot booth.

Opponents of the new Constitution would have this Court believe that Article XIX, Section 8, Montana Constitution, means something other than " * * *a majority of the electors voting upon the proposition." They would emphasize a strict-letter interpretation of that provision which would be narrow in scope and uncertain in nature. In order to support their view, the opponents of the new Constitution would advocate that Article XIX, Section 8, means a majority of ALL the electors voting at the election, whether or not they cast a valid ballot on the proposition. We suggest that such an interpretation and amendment to Article XIX, Section 8, are neither what the Constitutional Fathers in 1889 desired or intended. Such interpretation would utterly defeat the aims and objectives of good government.

It has been traditionally held that he who is silent is considered as assenting, when his interest is at stake. Qui tacet consentire videtur, ubi tractatur de ejus commodo. (Black's Law Dictionary, 4th Edition)

However, these opponents contend that the electors who for some reason did not cast a vote for or against the Constitution must now be considered in determining the fate of the doctrine. And the emphasis they would urge in this regard is that "He who did not vote must be construed as voting against the proposition."

To this we say "No." Why should these electors be counted as having voted in the negative? The 1889 Constitution does not require it. These electors must be considered either to have no opinion on the subject or to have none which they care to express. Why should they be counted as having voted in the negative?

Some 7,000 or more electors would seem to have been entirely indifferent upon the question of the adoption of the Constitution, even though prior to the election much information was available, publicized and disseminated, advising them of the importance of the question. Should this indifference be taken as conclusive of their opposition to the new Constitution? Upon what basis can this honestly be claimed? Is it reasonable to say that in a matter about which they manifested such indifference, their silence should be taken as a repudiation? We think not. Rather, it is more reasonable that their silence, if to be counted at all, should be taken as an assent. Green v. State Board of Canvassers, (Ida.) 47 Pac. 259 (1896).

It is a fundamental tenet of democracy that laws are enacted and Constitutions framed by those people, and those people only, who actually vote. Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859 (1902); Morse v. Granite County, 44 Mont. 78, 119 Pac. 286 (1911).

In reviewing and researching the issue as it applied to other jurisdictions, it is clear that this Court will be inundated today with numerous citations on the subject. There will be authority for the proposition and, of course, there will be

those cases against the proposition. We contend that the touchstone of this Court's deliberations should be the fundamental policy and philosophy surrounding the issue. And that policy has been enunciated by this Court in Martien v. Porter, 68 Mont. 450, 219 Pac. 817 (1923). The question should be resolved in the context of not whether it is possible to condemn the new Constitution, but whether it is possible to uphold that Constitution. The Court, in the Martien case, supra, ruling on the validity of a constitutional amendment, clearly stated that the presumption is in favor of constitutionality, and the burden of proof is on the one asserting it is unconstitutional. Consequently, the burden must fail unless it appears beyond a reasonable doubt that the document has not been constitutionally adopted.

SUMMARY

Article XIX, Section 8 of the old Constitution, should not be interpreted to mean that a majority of ALL the electors must pass on the issue; rather, that provision demands only a majority of those actually voting on the issue. Those who do not vote upon the question either assent to the will of the majority who do vote on the question, or they manifest either having no opinion on the subject or none which they care to express. Not having voted on either side of the issue, at the very least these electors should not be counted on either side.

It is fundamental and axiomatic that those who seek an extraordinary writ from this Court must disclose that they are clearly entitled to such a writ.

The opponents of the new Constitution have not shown that the Constitution did not receive a vote equal to a majority of the electors voting at the election. Having so failed to meet this burden, the relief asked for must fail.

The interpretation Amicus Curiae gives to this question is an endorsement for the need of a simple and understandable application of Article XIX, Section 8, Montana Constitution of 1889, to the question at bar. This interpretation will assure accuracy and certainty. It gives to those electors who have taken the initiative and their responsibility at heart and who have exercised their franchise, the right and the power of determining the destiny of Montana.

For the foregoing reasons, it is respectfully submitted that the proposed Constitution was adopted by the people of Montana, and the ruling of this Court should uphold that position.

Dated This 24 Day of July, 1972.

Respectfully submitted,

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By: R. Gahnt McKittrick

CERTIFICATE OF MAILING

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12309

IN THE SUPREME COURT

OF THE STATE OF MONTANA

No. 12309

FILED
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CLERK OF SUPREME COURT
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,
MONTANA LEAGUE OF WOMEN VOTERS

The Relators in the above entitled action allege that the proposed constitution of 1972 was not properly adopted, as required by Section 8, Article XIX, of the Montana Constitution, which requires the proposed constitution to be "approved by a majority of the electors voting at the election."

The "Certificate of Abstract of Votes" issued by Frank Murray, Secretary of State, on June 20, 1972, shows that 116,415 electors voted FOR the proposed constitution and that 113,883 electors voted AGAINST the proposed constitution, making a total of 230,298 voting for or against the proposed constitution, of which 115,150 would be a majority. The certificate also shows the number of votes cast for and against the three separate propositions appearing on the same ballot and also states: "Total number of electors voting -- 237,600."

Relators contend that it was necessary to have a majority of 237,600 (at least 118,801) vote FOR the proposed constitution for it to be properly adopted and of

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any force or effect.

As amicus curiae, the League of Women Voters of Montana believes that the proposed constitution has been approved by a majority of the electors voting at the election, as proclaimed by Governor Forrest H. Anderson. In support of that belief, we hereby submit that:

I. The figure 237,600, as shown on the certificate of abstract of votes as the "total number of electors voting," shows the total number of electors "participating" in the election but not necessarily voting and, as shown on the face of the abstract, certainly not the number voting " for" or "against" the proposed constitution.

II. The term "a majority of the electors voting at the election" means a "majority of the electors voting on the question at the election."

III. To allow nonvoters to be counted defeats the "one man--one vote" principle prevalent in these United States because, in effect, it dilutes the "for" vote.

IV. Those who failed to vote "for" or "against" the proposed constitution should be considered as acquiescing in the result of the majority who did so vote.

In support of the four previous contentions, we cite the following:

I.

Section 23-3606, R.C.M. 1947, in subparagraph (3) thereof, provides that an elector votes on a constitutional amendment submitted to the people by marking an X in the applicable square indicating his vote either for or against the proposed constitution. Subsection (5) thereof provides that after the voter has prepared his ballot, he returns it to the election judge. (Section 23-3605(11), R.C.M. 1947, provides that he return it to

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such judge even if entirely blank.) The voter's name is announced and recorded in the poll book and his ballot placed in the ballot box (Section 23-3606(5) and (6), R.C.M. 1947). It is clear then that the ballot box contains blank, partially blank, as well as invalid ballots.

Sections 23-4002, 23-4003 and 23-4004, R.C.M. 1947 (canvass of votes), read as follows:

> "23-4002. Method of canvass. (1) The canvass shall begin by a comparison of the pollbooks and the correction of any mistakes until they agree.
>
> (2) The election judges shall take ballots unopened out of the box to determine whether each ballot is single.
>
> (3) They shall count the ballots to ensure that the number of ballots corresponds with the number of names on the pollbooks.
>
> (4) A ballot which is not endorsed by the official stamp is void and shall not be counted. A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part.
>
> (5) If two (2) or more ballots are folded together to look like a single ballot, they shall be laid aside until the count is complete. The election judges shall compare the count with the pollbooks and if a majority believe that the ballots folded together were voted by one (1) elector, they must be rejected; otherwise they must be counted.
>
> (6) If the ballots exceed the number of names on the pollbooks they shall be placed in the box, and one (1) of the election judges shall publicly draw from the box and destroy unopened ballots equal to the excess. The election judges shall record in the pollbooks the number of ballots destroyed."
>
> "23-4003. Counting ballots--pollbooks. (1) When the ballots and poll lists agree, the election judges shall count and determine the votes cast for each person.
>
> (2) In counting, the ballots shall be opened singly by one (1) of the election judges and the contents read aloud to the other judges.
>
> (3) As the ballots are read, each clerk must write on a tally sheet the name of every person voted for and the office, and keep tallies of the number of votes for

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each person.

(4) The tally sheets shall be compared and their correctness ascertained, and the clerks, under the supervision of the election judges, shall immediately write in the pollbooks:

(a) The names of all persons who received votes;

(b) The offices for which they received votes;

(c) Total votes received by each person as shown by the tally sheets.

(5) A ballot or vote rejected by the election judges shall not be included in the count."

"23-4004. Marking rejected ballots. A ballot rejected for illegality shall be marked by the election judges, by writing across the face 'Rejected on the ground of _____,' filling the blank with a brief statement of the reasons for the rejection. The statement shall be dated and signed by a majority of the judges."

A close reading of these statutes shows that even though an elector appears at the polling place, the ballot he has deposited in the ballot box will not be counted if he fails to express his preference or is void. Yet his name remains on the pollbooks.

The case of State v. City of Miami Beach (1971), 257 S.(2d) 25, was concerned with a constitutional provision requiring majority approval of a bond issue by vote of electors. At the election in question, the bond issue and other propositions were on the ballot. 5,847 voters appeared at the polls, but only 3,528 voted on the bond issue. Presumably those not voting on the bond issue voted on other issues on the ballot. The state of Florida opposed the validation of the bond issue, arguing that a majority of those participating in the election did not approve since the vote was 2,851 "for" the bond issue and 677 "against", and 2,851 was not half of the 5,847 voters entering the polling booths. In holding that the Florida constitution required a majority of the votes

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cast, not a majority of those participating, the court said:

> ". . . We think that an abstention from voting, once in the polling booth, should not be construed as a vote either 'for' or 'against' any given proposition. Any one of a number of disparate reasons might compel an elector to abstain; he may desire to demonstrate by his physical presence that he is aware of his obligation to vote in a democratic society; or he might have decided at the last moment that he is unfamiliar with the candidates or issues and would prefer not to vote rather than to vote blindly; or when multiple issues or candidates are involved, he might be interested in voting only in certain races or on certain issues, without voting on every race or issue."

Likewise, some of the electors appearing at the polls for the June 6, 1972, primary election in Montana may never have intended to vote in the separate constitutional election. Obviously, many electors chose to vote on one or more of the separate propositions but did not vote "for" or "against" the proposed constitution. Some ballots were most likely voided for illegibility, improper marking or some other reason. Thus it can be seen that the figure 237,600 does not necessarily represent the number of electors actually casting legal ballots.

II.

As shown in the brief of Respondent, filed by Governor Anderson, in the case of Tinkle v. Griffin, 26 Mont. 426, the term "majority of the electors voting at the election" has been determined in Montana to mean "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." This same question continues to be litigated in other jurisdictions.

In State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.(2d) 143, 152, 153, the New Mexico court

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construed constitutional language requiring "at least three-fourths of the electors voting in the whole state" to pass constitutional amendments. In discussing this language, the court said:

> "Do the quoted words refer to the total number voting at the election, so as to require approval by at least three-fourths of the largest number voting on any proposition submitted in the election, or do they merely refer to votes on the particular proposition? . . . We recognize it as our responsibility to attempt to arrive at the meaning of the framers of the constitution and to give to their work an interpretation that is reasonable--not one that is illogical or incongruous. . . . It is thus quite evident that to hold that three-fourths of those voting at any given election is required to amend Art. VII, Sec. 1, would give effect as having cast negative votes to those voters at the election who because of negligence, lack of interest, or some other unexplained reason failed to register their votes on the particular proposition.
>
> "No logical reason for counting as opposed those who do not express their preference has been suggested."

Consequently, the Court held that the requirement of "at least three-fourths of the electors voting in the whole state," was met when the percentage voting on the particular proposition favored it, notwithstanding the fact that this constituted less than three-fourths of all those voting at the election on some other propositions.

We acknowledge the opposite line of authorities, which hold that a majority of all those participating in an election is required to approve a proposition. However, we believe the reasoning in the Tinkle and Witt cases to be more logical and fair to the individual elector casting a legal ballot. We cite the following cases as also holding that a majority voting on the question, rather than a majority participating in the election, is required under statutory and constitutional language similar to that

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of Section 8, Article XIX, of the Montana Constitution.

Sacramento v. Goddard, 200 Cal. 143, 252 Pac. 329;
Harris v. Walker (1917), 199 Ala. 51, 74 So. 40;
Brannon v. Perkey, 127 W.Va. 103, 31 S.E.(2d) 898;
Chapel v. Allen, 334 Mich. 176, 54 N.W.(2d) 209;
Tracy v. Barnes County, 69 N.D. 602, 289 N.W. 377;
Munce v. O'Hara, 340 Pa. 209, 16 A.(2d) 532.

III.

Since the reapportionment cases, each of the states has been concerned with the one man--one vote principle laid down by the United States Supreme Court. We believe that it violates this principle to require that to be approved, a proposition must carry a majority of electors not even voting on the proposition. Under such a scheme, more weight is given to the negative voter.

In State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.(2d) 143, 150, cited above, the Court also discussed a provision in the New Mexico Constitution which required a two-thirds vote in each county to amend the constitution. The Court held that because of the disparity in populations such a requirement was invalid under the "one person one vote" principle and the equal protection clause of the Fourteenth Amendment to the United States Constitution. In citing the so-called reapportionment cases, starting with Baker v. Carr, 369 U.S. 186, Gary v. Sanders, 372 U.S. 368, Reynolds v. Sims, 377 U.S. 533, WMCA, Inc. v. Lomenzo, 377 U.S. 633, Maryland Committee v. Towes, 377 U.S. 656, Davis v. Mann, 377 U.S. 678, Roman v. Sencock, 377 U.S. 695, and Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U.S. 713 -- all dealing with voting on legislative representatives -- the Court said it saw:

"no rational basis to distinguish between

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> voting on representatives in the legislature, and voting on constitutional amendments . . . Nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on changes in our basis constitution."

IV.

To require a majority of all electors participating in an election to approve a proposition upon which some of the electors fail to vote is contrary to the fundamental principle that qualified electors who fail to vote are presumed to acquiesce in the express will of the majority who do.

In Kuhrt v. Sully County Board of Education, 176 N.W.(2d) 479, in holding that certain statutory language meant a majority of votes cast rather than a majority of the entire electorate, the Court quoted from Cashman v. City Clerk of Salem, 213 Mass. 153, 100 N.E. 58, where the Court said:

> "It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. . . . Elections must be settled as a practical matter by those manifesting interest enough to vote . . . apathy is not the equivalent of open opposition . . ."

In Munce v. O'Hara, 340 Pa. 209, 16 A.(2d) 532, the Court said:

> "No method having as yet been devised whereby to compel a complete vote by all the voters, the practical working of the elective system necessarily requires that those who abstain from voting be considered as acquiescing in the result declared by a majority of those who exercise the suffrage."

The League of Women Voters of Montana is made up of approximately 450 members from throughout the state. Women join the League to learn more about government and how to act constructively on governmental issues. League

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decisions are made through a democratic process, patterned on the American system of representative government.

League members believe each voter should have equal opportunity to participate and influence government.

League members hope the language of the 1889 Constitution will be interpreted to promote the will of the majority of the people voting on the proposed constitution rather than to defeat that will. We hope that this Court will not let legal technicality control or destroy the common ordinary meaning of the language decided upon by the framers of our constitution, as interpreted by Tinkel v. Griffin, et al., supra. It is in the spirit of the League members throughout the United States to abide by majority choices. The majority of the voters of Montana voting on the proposed constitution have chosen to approve it.

We submit that the application of Relators be dismissed and the voting majority allowed to prevail.

Respectfully submitted,

/s/ Diana S. Dowling
Diana S. Dowling
Attorney for Montana League
of Women Voters

I, DIANA S. DOWLING, attorney for the Montana League of Women Voters, in the above entitled matter, hereby certify that on this 13th day of July, 1972, I served the foregoing BRIEF OF AMICUS CURIAE, LEAGUE OF WOMEN VOTERS, upon all parties of record, by depositing a full, true and correct copy thereof in the United States mail, first class postage prepaid, addressed to their attorneys of record at their respective addresses.

/s/ Diana S. Dowling

STATE
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HELENA, MONT.

No. 12309

12309

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.

FILED
JUL 13 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

AMICUS CURIAE BRIEF

of

MONTANA STUDENT PRESIDENTS' ASSOCIATION

Submitted by:

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Filed: July ____, 1972

_____
Clerk

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ARGUMENT

The 1969 Montana Legislature recognized the need for updating our 1889 Constitution and placed the question of a Constitutional Convention on the November 1970 election ballot. The people of Montana concurred in this need, and the issue was passed by an overwhelming majority of 133,482 to 71,643. The 1971 Legislature then passed the enabling Act establishing the Constitutional Convention and 100 delegates were elected on November 7, 1971. It is clear that both the Legislature and the people of this state recognize the many deficiencies in the 1889 Constitution and the need for a new document to meet the demands of a modern Montana.

The Montana Student Presidents Association has unanimously resolved that "the Montana Constitution framed in 1889 impairs effective state and local government; that there was need for substantial revision and improvement of the Montana Constitution; and that the changes needed in the Montana Constitution could not be accomplished adequately through the present amendment process". After studying the proposed Constitution, the people of Montana voted on the new document in the June 6, 1972 special election with 116,415 voting for the approval thereof and 113,883 voting against.

Eric Hoffer, in his treatise The Ordeal of Change, predicted this action when he stated:

> "It is my impression that no one really likes the new. We are afraid of it. It is not only as Dostoyevsky put it that 'taking a new step, uttering a new word is what people fear most.' Even in slight things the experience of the new is rarely without some stirring of foreboding."

The question before this court is whether the proposed Constitution was "approved by a majority of the electors voting at the election" as required by Section 8, Article XIX of the present Montana Constitution. It is undisputed that more electors voted in favor of the new document than against it. The Relators argue, however, that the official figures of the State Board of Canvassers show that 237,688 electors voted at the election on June 6, 1972, and, because only 116,415 electors voted in favor of the Constitution, the new document failed to receive the approval required in Article XIX, Section 8, of the 1889 Constitution.

It is submitted that the Relators' contention is untenable either on the grounds of existing case authority or principles of sound logic. As judicial decisions in other states of the Union constitute secondary authority, this court should first turn to precedents in Montana.

Article XIII, Section 5, of the 1889 Montana Constitution contains legally identical language to that at issue in the present case. The additional word "thereof" found in that

section is of no interpretative significance. The Montana Supreme Court in construction of that language in Tinkle v. Griffin, 26 Mont. 426, 68 Pac. 859, 861, decided in 1902, only 12 years after the adoption of the Constitution, examines the 1889 document for its interpretation of the same language dealing with bond issues and in reviewing the drafters' intent, the Court stated:

> "The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'the majority of the electors thereon voting at an election", etc., clearly means a majority of those who vote and not a majority of all the electors of the County, or of those who vote on any other issue at the same or some other time."

This was affirmed in Morse v. Granite County, 44 Mont. 78, 119 Pac. 286, 291, which stated:

> "In the case of Tinkle v. Griffin, 26 Mont. 426, 68 Pac. 859, this court, construing the provision of the Constitution, supra, said: 'The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., 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.' This conclusion was reached because the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in them to give expression to their views at the ballot-box."

Prior decisions of this Court also support the adoption of the new Constitution in holding that it is a majority of those who express their opinions at the election who determine its result and that those who do not feel qualified should not be the ones to determine its outcome. In State ex rel Wolff v. Guerkirk, 111 Mont. 417, 427, 109 P.2d 1094, the Montana Supreme Court states:

> "It is our opinion that a voter at the polls, unless he vote for some person (or on some issue), is not voting at all. The ballot cast, which does not express the preference of the voter for some person (or on some issue) to the office is a nullity, can not be counted and can not be given any effect in determining the result of the election as to that office (or issue)." (Parentheses added)

This reasoning is in keeping with the admonition of Theodore Roosevelt, as given when he spoke to the framers of a new Ohio Constitution in 1912, wherein he stated:

> "We have no higher duty than to promote the efficiency of the individual."

Further in that speech, Roosevelt stated:

> "I no less emphatically protest against any theory that would make the constitution a means of thwarting instead of securing the absolute right of the people to rule themselves and to provide for their social and industrial well being."

The Montana Student Presidents Association feels that the sound reasoning expressed in the Tinkle case should

control an issue of this importance to all of the people of Montana. In that case, it is stated:

> "It is the theory of our Government that those electors control public affairs who take a sufficient interest therein to give expression to those views. Those who refrain from such expression are deemed to yield acquiescence." Tinkle at 431.

In favorably citing a Kentucky case, the Court continued:

> "It has not been a policy of our Government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is the majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voters who are silent and expressed no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose."

Thus holding, the Montana Supreme Court adopted the rule that a majority of those electors voting meant a majority of those who express an opinion and thus support the adoption of the new Constitution. It should be emphasized that the language interpreted in these cases was legally in point with that at issue in the present case. We submit that this

primary authority from the highest court of Montana should be followed in the controversy at hand. As Justice Parke wrote in Mirehouse v. Rennell, 1 Cl. & F. 527, 546 (1883):

> "Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."

Moreover, the fundamental doctrine set forth in the Tinkle and Morse decisions is emphasized by R.C.M., 1947, §49-119, which states that: "The law helps the vigilant, before those who sleep in their rights." To count those individuals who signed the poll book as voting against the proposed constitution would not be to help the vigilant, but to aid those who were so passive as not to exercise their right to vote one way or the other on this important issue before the electorate.

As Chief Justice Marshal remarked in Cohens v. Virginia, 6 Wheat 264, 389, 5 L ed 257, 287:

> "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will."

We submit that the holdings of this Court in Tinkle and Morse should be followed in the present case for the following reasons. First, at the time Tinkle v. Griffin was decided, the 1889 Constitution was only twelve years old and the Supreme Court justices were familiar with the original convention and the intention of the framers. Secondly, the Court in Tinkle was well aware that the decided cases were in conflict, but felt that their holding gave "effect to the clear intention of the Constitution." Third, the decision was based on the sound fundamental policy that the affairs of government should not be left to those who are so indifferent or negligent that they do not affirmatively express themselves on important public issues and that those who do not participate "are deemed to yield acquiescence." It is unfair to those who do express their opinions positively to be controlled by those who do not. Fourth, the original decision by this Court in 1902 has not only been followed in subsequent cases, but has been relied upon for the last 70 years by the people of this state. Consistency of interpretation, particularly of a Constitution, provides the stability which is so essential to sound government. We submit that provisions in a constitution should not be held to mean one thing at one time and something different at a later time, unless the previous interpretation was necessarily absurd or unjust. In 1902,

the Court found no ambiguity in the language and found the intention of the framers perfectly clear. There is nothing which has transpired since that time which would draw into question the logic of the court's reasoning. It would seem somewhat paradoxical if this same language is interpreted more restrictively in 1972 than it was some 70 years earlier.

In addition, the figure of 237,688 who allegedly were "voting at the election" only represents the number of electors signing a poll register. This figure does not take into account unmarked or voided vallots. There is considerable evidence that many people were not allowed to enter the polling booth without signing the poll book, yet these people may have been interested in only a legislative candidate, a bond issue, or some other side issue put before the people. We feel that those individuals signing the poll book, but not voting on the main issue concerning passage of the constitution itself, fall into two categories:

1. Those who simply signed the book because they were told to do so, or asked if they wanted to and yet did not vote one way or the other on the main issue or any of the side issues. These individuals clearly fall within the language of Tinkle in terms of being "deemed to yield acquiescence."

2. Those individuals who signed the poll book and voted on one of the side issues included on the constitutional convention ballot, but yet neglecting to vote on the main

issue. These individuals might also be deemed to acquiescence, but more than that. To give effect to their expression on the side issues, on which they have some feeling, the constitution would have to be declared as passed.

In his opening address to the Constitutional Convention in November 1971, Governor Anderson pointed out that a new document was needed to approach modern problems in Montana and that we should work toward reversing the outward flow of young people whom we educate, train and then who are forced to seek employment in other states. In his opening remarks in January, President Leo Graybill stated that the young people of Montana were the state's greatest resource and that by the adoption of a new Constitution we could preserve and promote the participation of young people in Montana's government.

During the first weeks of the Constitutional Convention, delegate James C. Garlington asked fellow delegates to join the young in seeking new approaches to old problems and not to resist change for resistance's sake. In the closing days he concluded that the Convention did achieve the goals he had outlined and called the new Constitution the gift to the young that it is in our power to give.

The Montana Student Presidents Association, through a resolution unanimously adopted on May 20, 1972, unanimously

endorsed the propsed Montana Constitution as "highly superior to our present antiquated document". The full text of this resolution is attached hereto as Exhibit A. The Montana Student Presidents Association represents over 30,000 young people throughout the state who are actively participating in improving Montana government and who feel that the adoption of the new Constitution is proper under the above cited Montana Supreme Court decisions and the reasoning contained therein. We submit that a decision upholding the proposed Montana Constitution is consistent with the modern trend of encouraging positive participating in governmental affairs by those who have affirmative opinions to express. This modern trend of broadening the political base is manifested by the recent lowering of the voting age to 18 years. The election of Constitutional Convention delegates provided the first opportunity for 18-year-old citizens to express their opinions on issues of public importance. It would be frustrating for young people to see that those who affirmatively express their opinions on a matter of grave public concern can be thwarted by those who are so passive as to remain silent. This would appear to be an undemocratic disenfranchisement for those who clearly expressed their approval of the new document.

The Montana voters who expressed their opinion on the new document clearly favored it, and it is submitted that all of Montana would benefit from the adoption of the new Constitution.

It might be said of the participation of the Montana Student Presidents Association that the duty to state and to defend what we conceive to be the true principles of the Constitution under which we are here assembled should have fallen into other and abler hands. We could have wished that it should have been executed by those whose character and experience give weight and influence to their opinions, such as cannot possibly belong to us. But, Sirs, we have met the occasion, not sought it, and have proceeded with studied plainness and as much precision as possible. (Daniel Webster's introduction to his refutation of John C. Calhoun's doctrine of nullification.)

THEREFORE, we ask this Court to deny the application and alternative writs sought and dismiss this cause.

Respectfully submitted,

Laurence Eck

Ronald B. MacDonald

Ronald B. MacDonald
Counsel for Montana Student
Presidents Association

EXHIBIT A

MONTANA STUDENT PRESIDENTS' ASSOCIATION RESOLUTION

RE: ENDORSEMENT OF PROPOSED MONTANA CONSTITUTION

WHEREAS, the Montana Student Presidents' Association concluded that the Montana Constitution framed in 1889 impairs effective state and local government; that there was need for substantial revision and improvement of the Montana Constitution; and that the changes needed in the Montana Constitution could not be accomplished adequately through the present amendment process, and

WHEREAS, the Montana Student Presidents' Association concluded that the called Constitutional Convention afforded the most feasible and desirable method of accomplishing comprehensive revision, and

WHEREAS, our activities in state and local government have convinced us that the 1889 document presents obstacles to effective governmen t in the 20th Century, and

WHEREAS, our organization feels that the Constitutional Convention drafted a proposed Constitution that is highly superior to our present antiquated document;

NOW, THEREFORE, BE IT RESOLVED BY THE MONTANA STUDENT PRESIDENTS' ASSOCIATION:

That it go on record as endorsing the proposed Constitution to be voted upon on June 6, and

BE IT FURTHER RESOLVED, that the members of the Montana Student Presidents' Association take an active part in promoting the proposed Constitution by urging the students in the state of Montana to vote favorably on June 6, 1972 for the proposed Montana Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the foregoing Amicus Curiae Brief for the Montana Student Presidents' Association this date pursuant to the order of this Court.

Dated this 11th day of July, 1972.

Laurence Zot

12309

No. ~~12310~~ 12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA,
ex.rel. STANLEY C. BURGER,

Petitioner;

-vs-

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

Respondent.

AMICUS CURIAE BRIEF OF
GERALD J. NEELY
ON HIS OWN BEHALF

Filed _____

FILED
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CLERK OF SUPREME COURT
STATE OF MONTANA

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No. 12310

IN THE SUPREME COURT OF THE STATE OF MONTANA

* *

THE STATE OF MONTANA,
ex. rel. STANLEY C. BURGER,

Petitioner,

-vs-

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

Respondent.

* *

AMICUS CURIAE BRIEF OF
GERALD J. NEELY
ON HIS OWN BEHALF

* *

I.

INTRODUCTION.

Constitutional change at the state level involves two distinct steps: proposal and approval. Proposals may be made by a constitutional convention, the legislature or by initiative by the voters. The manner and method, of course, depends on the particular provisions of the state constitution in question. Approval - except in Delaware - involves action by the people in a referendum.

Amendments to state constitutions and revisions of state constitutions through the devices of a convention, directly by the legislature, or by initiative of the voters provide parallel situations with respect to their proposal and approval. And, depending on the state, stage and process used, the amount of

votes required for passage of the proposals or approval of the proposals differ.

The question before this court is what type of majority is required by the current Montana Constitution to pass the proposed constitution.

It is submitted that both simple majorities and extra-ordinary majorities are common to American Constitutional Law. And, that the question is not what is preferable or convenient, but what is required. A majority of what group of the electorate is required?

It is also submitted that the effect of every extra-ordinary majority is to count abstentions, absences, or failures to vote as "negative votes" in the sense that a simple majority of those casting their vote on the proposition involved is insufficient. Such a characterization merely states the effect of what is required - if it is required - and cannot be a reason for rejection of a requirement of an extra-ordinary majority.

Montana requires approval of a revision effort by "a majority of the electors voting at the election..." (Mont. Const. XIX, 9). The question thus is, again, a majority of what group is required? Clearly, that of "electors voting at the election" is required. What that means is the next question.

It is submitted that a question of fact exists: How many electors cast totally blank ballots, ballots improperly marked, or ballots marked only on one or more side issues but not the main issue? Those facts cannot be determined without a recount. If a recount and applicable law would establish that

the number of "electors voting at the election" was 4,771 votes fewer than the 237,600 certified to by the Secretary of State, the 116,415 votes in favor of the proposed constitution would carry it regardless of whether a simple majority or extra-ordinary majority were required, because they would be identical. Such a recount has not been requested.

It is submitted that if the Secretary of State's figures of "total number of electors voting" is accepted, that the proposed constitution must fail because an extra-ordinary majority is required by law and the number voting in favor of the passage is not a majority of the Secretary of State's certification.

The positive assent of all those voting at the election is required by our Constitution, it is contended, and the above-cited provision does not imply an acquiescence or negative assent inferred from a blank ballot on the main proposition.

That that positive assent - not negative consent - is required,was recognized by the Constitutional Convention and the ballot, publicity items and source materials of the Convention advertised it as such to the voters. It is submitted that those knowing this before who now take the opposite position suffer from an exceedingly low level of constitutional morality.

II.

THE RECENT MONTANA CONSTITUTIONAL CONVENTION EITHER KNEW THAT AN EXTRA-ORDINARY MAJORITY WAS REQUIRED, OR THE VOTERS WERE MISLED.

The Constitutional Convention was aware of the requirement of an extra-ordinary majority on passage of the proposed Constitution and side issues. They often incorrectly assumed, however, that the problem posed to this Court would only arise as voters approached the end of the ballot and failed to vote on the side issues near the end of the ballot.

If in fact the public was led to believe that a simple majority was insufficient and that an extra-ordinary majority was required, it is submitted that the voters were either misled prior to the election, or that proponents of the simple majority version now who publicly promoted the idea of the extra-ordinary majority suffer from a low threshold of Constitutional morality. It is somewhat like changing the rules of the game after the game has been played.

For example, delegates to the Montana Convention were provided with an analysis of the Enabling Act passed by the Legislature. The analysis of Section 17 (9) read as follows:

> "Since 25% of the voters at general elections commonly do not vote on constitutional questions, Convention proposals placed on the general election ballot almost certainly would not receive the vote of a majority of the persons voting at the election, as is required by the Constitution. This problem can be avoided by conducting a special election on the

> proposed constitution on the same day as the general election but not as part of the general election." Montana Constitutional Convention Studies, "Constitutional Convention Enabling Act", Report Number 1, p. 28.

This explanation recognized that voters sometimes do not vote on portions of their ballots, and that if the constitutional election questions were placed on the same ballot as the names of candidates, many voters would not vote on the constitutional questions and even though the individual questions might receive a favorable majority, they might not pass because they would "not receive the vote of a majority of the persons voting at the election ...".

If, of course, all that was needed was a majority of those voting on the proposition to vote in favor of it, the above discussion would have been meaningless. The Convention did provide for a special election on the proposed constitution on the same day as the primary election.

The Convention assumed that by placing the main question first that they would not have to face the problem now before the court, but rather than the side issues might fail because not receiving a majority of the voters voting at the election.

An advertising supplement funded by the Community Services programs, Title I of the Higher Education Act of 1965 and reviewed for "accuracy, style and objectivity" by Convention delegates discussed the problem in the following terms:

> "Why can't we vote on more separate issues? Why can't we vote on the proposal article by article?

> The convention had to strike a medium between a manageable and understandable ballot and a ballot so long it would be confusing. An article by article ballot would have contained at least 14 separate items and would have necessitated a most complicated adoption schedule. There is also a special consideration peculiar to the Montana situation. Article XIX, Section 8 of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot." Advertising Supplement, p. 10. (Emphasis Added)

The discussion would have absolutely no meaning unless an extraordinary majority were required, as the number voting for or against a side issue would have no relationship to failures to vote if a simple majority was all that was required.

Of course the conclusion was not borne out in the actual results, as all of the side issues received a majority of the votes cast at the election as determined by the Secretary of State. The problem was with the main question.

But the discussion does point out the awareness that the Convention had of the Constitutional requirement.

The sample ballot in the official text distributed to the registered voters bears this out also:

> "The proposed constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in issue 2." Proposed 1972 Constitution for the State of Montana, Official Text with Explanation, Montana Constitutional Convention, p. 2.

The same wording was present on the official ballot. The explanation would have no purpose unless it was being used to tell

the voters that if a majority voting on the bicameral-unicameral question vote for a unicameral legislature but if it doesn't receive a majority of those voting at the election also, the side issue would fail and the language inserted in the proposed document - a bicameral legislature - would prevail. The explanation would not have been necessary if the convention only felt a simple majority were required.

In the publication mentioned above as the Advertising Supplement, the following appeared under the "Explanation of the Ballot":

> "If the proposed constitution fails, your vote on the other measures - the make-up of the legislature, gambling, and the death penalty - will not count because they automatically fail if the proposed constitution is rejected. Second, your vote on these three questions will not count unless each is decided by a majority of those voting in the election. <u>If you fail to vote on any item, you will aid in its defeat</u>." p. 12 (Emphasis supplied)

This is complete recognition by the Convention's authorized publication that a simple majority on an issue - including the main issue - was insufficient, and that an extra-ordinary majority was required. If only a simple majority were needed, a failure to vote would not aid in defeat.

The Convention was further advised of the problem in a reprint of a law review article discussing the question of popular ratification of the call for a constitutional convention:

> "The proportion of the vote required for affirmation of the referendum varies among the states. In nine states a majority of all persons voting in the election must affirm the proposition. This requirement has hindered the calling of a convention since those who vote for an office-seeker but not on the convention issue are counted with those who

> voted against the proposition." Carrol L. Wagner, Jr., "State Constitutional Change: The Constitutional Convention, " Virginia Law Review 54 (1968), reprinted in Montana Constitutional Convention Memorandums, "Selected Readings on the Organization of Constitutional Conventions," Memorandum Number 9, p. 15.

This selection clearly points out that a simple majority is not sufficient and is different from the extra-ordinary majority required by some states. The law review article even contrasts the extra-ordinary majority of those voting at the election with the simple majority by stating:

> "Three states require a certain minimum proportion, but less than a majority, of the total vote ... In the remaining states requiring a referendum, a simple majority of those voting on the proposition is sufficient to pass it." Ibid., at p. 15.

A variety of other publications available to the Delegates in the Convention library have pointed out the distinction that the court is faced with.

A widely-used publication called the "Model State Constitution" suggests the following provision for a new constitution:

> "Any constitutional revision submitted to the voters in accordance with this section shall require the approval of a majority of the qualified voters voting thereon..." (emphasis supplied) Model State Constitution, (6th Edition, 1968, National Municipal League: New York), p. 109.

The above provision is of course identical to the interpretation placed upon the Montana Constitution by the Governor of Montana.

However, the above publication states in its comment to the suggested provision that the issue of a majority of the voters voting thereon vs. a majority of those voting at the election was the same as the discussion of submission of consti-

tutional amendments to the voters. In that discussion the above publication recommended approval by a "majority of those voting on the question" and goes on to say:

> "This eliminates the hurdle present in a number of states where a majority voting in the election is required. Unfortunately, constitutional issues generally attract less voter participation than do electoral contests. Therefore, when the constitutional issues are presented at the same time as elections for public office, the number of people voting in the election will exceed the number voting on the constitutional issue. A majority voting in the election then, in effect, becomes an extraordinary majority. Amendments, and also votes on such questions as the calling of a constitutional convention, have actually received a majority of the votes cast on the issue in a number of instances but have failed to carry because the majority did not constitute a majority voting in the election." Model, Ibid., p. 108 (emphasis supplied)

The point is clear. Material available to the Convention apprised them of the problem of the extra-ordinary majority. They conveyed that problem to the voters. The voters were either misled or the Convention representatives wish to now change the rules of the game.

III.

A PATTERN OF EXTRA-ORDINARY MAJORITIES IN CONSTITUTIONAL REFORM EXISTS IN MOST STATES.

As indicated, constitutional change involves proposal and approval, proposals being made by Convention, Legislature, or by initiative. Approval - except in one state - involves a vote by the people. Each stage is relevant in looking at the concept of the extra-ordinary majority.

The legislative vote required to place an amendment on the ballot differs significantly from state to state. (See

Strurm, Albert L., Thirty Years of State Constitution-Making: 1938 - 1968, National Municipal League, New York, 1970, p. 118-127).

No legislature in the United States requires a simple majority of those voting on the proposition to propose amendments to the voters. Eighteen states require a majority of the members elected to each House - an extra-ordinary majority. Even in those eighteen states further extra-ordinary majorities are required. Thirty Years, op. cit. pp. 118-127.

In Oregon, if revision - as opposed to mere amendments - is proposed, a 2/3 vote of the members of each House is required. In New Mexico, proposed amendments concerning certain franchise and education matters require a 3/4 vote of the members elected to each House. Thirty Years, op. cit, pp. 118-127.

In North Carolina, it is necessary to have 3/5 of the vote cast in each house of the legislature; eight other states require a 3/5 vote of the members elected to each house of the legislature.

In Alaska and Maine, a 2/3 of the vote cast in each house of the legislature is necessary; fourteen other states, including Montana, require a 2/3 vote of the members elected to each house of the legislature.

The balance of the states have a variety of requirements that all constitute extra-ordinary majorities.

This requirement of more than a simple majority does defeat many measures. In Louisiana, for example, between 1921 and 1960, only 518 of the almost 2,000 amendments introduced into

the legislature received the requisite two-thirds vote of the elected membership of each house. Louisiana Legislative Council, Report to the Council No. 28, The Amending Process in Louisiana, 1, (1961).

Fourteen states permit amendment by constitutional initiative by the people directly. Eleven of these require a majority voting on the proposal, one of which requires that approval in two successive elections. Three states require a form of extra-ordinary majority: Oklahoma (majority of votes cast in the election); Nebraska (majority on proposal, but not less than 35% of the ballots cast); Massachusetts (majority on proposal, but at least 30% of the ballots cast.) Thirty Years, op.cit., pp. 128-130.

The legislative vote required for submission of whether to have a Constitutional Convention also reflects the concept of the extra-ordinary majority.

Twenty-two states either do not authorize legislative action or have no provision. Only one state - Missouri - allows approval by a simple majority of those legislators present and voting. All others require a majority, 3/5, or 2/3 of the members elected to each House, all extra-ordinary majorities. Thirty Years, op. cit., pp. 132-137.

The Convention (1889, Montana) fully recognized the concept of the extra-ordinary majority, and debated the concept in relation to the number of legislative votes required to submit an amendment to the voters. Proceedings and Debates, Constitutional Convention, 1889 State Publishing Co., Helena, Montana, 1921.

When considering Art. XIX, sec. 9, relating to amendments proposed by the Legislature, delegate Bickford, of Missoula, moved to strike the words "two-thirds" and insert in lieu thereof the word "majority"in the second line of the section referring to the amount of vote necessary to cause an amendment to be placed on the ballot. (p. 577). His motion was defeated. In urging it, he had stated:

> "My object in offering the amendment was simply that a majority might rule in a matter of that kind. I submit, however, the proposition is entirely in harmony with all our institutions, that a majority should rule ..." (p. 578).

Certainly, a majority should rule, but what kind of a majority? A majority of what? We should and do have a majoritarian rule, but the group of which it is composed is important.

At any rate, delegate Bickford argued for a "majority of the members elected to each house" as opposed to "two-thirds of the members of each house". He thus argued not a majority of those voting on the proposition in the two houses, but a majority of those elected. Even this was rejected by the Constitutional Convention.

Mr. Carpenter, of Lewis and Clark stated:

> "...I believe it is dangerous to leave it to the Legislature to pass a bill by a bare majority of the members present, and I have voted against that. I have known again and again of the most cruel and improvident measures because a simple majority could pass them, and Legislatures over again have changed that rule, and a majority of them now favor upon good grounds that no bill shall pass except by a majority of all elected."

IV.

OTHER EXAMPLES OF EXTRA-ORDINARY MAJORITIES.

Extra-ordinary majorities are familiar in other areas of Montana law. This is apparent in the area of county consolidation:

> "Any county or counties in existence on the first day of January, 1935, under the laws of the state of Montana or which may thereafter be created or established thereunder shall not be abandoned, abolished and/or consolidated either in whole or in part or at all with any other county or counties except by a majority vote of the duly qualified electors in each county or counties expressed at a general or special election held under the laws of said state." Mont. Const. Art. XVI, sec. 8. (emphasis supplied).

In a study prepared by the Montana Constitutional Convention Commission, this provision was discussed:

> "Thus, an attempt to consolidate counties must be approved by voters in each county affected. And the approval must be 'by a majority vote of the duly qualified electors' in each county, not by a simple majority of those voting on the question. For example, if a county to be consolidated had 5,000 'duly qualified electors' but only 3,000 of them voted on the consolidation question, a majority of the 5,000 (or 2,501) rather than a majority of the 3,000 (or 1,501) apparently would have to favor consolidation to meet the constitutional requirement." Local Government, (Montana Constitutional Convention Commission, Report No. 16), p. 200. (emphasis supplied).

It is apparent that the delegates were aware of this requirement for an extra-ordinary majority, the result of which is to count as negative votes those who do not show up at the polls.

One looks with interest at the proposed section in the proposed constitution:

> "...No county boundary may be changed or county seat transferred until approved by a majority of those voting on the question in each county affected." Art. XI, Sec. 2, proposed Montana Constitution.

The official explanation was as follows:

> "Revises 1889 constitution by requiring only majority of those voting to approve county seat or boundary changes. 1889 constitution requires majority of qualified electors." Official Text with Explanation, Montana Constitutional Convention, p. 16.

Would some now argue that a majority of the qualified electors and a majority voting on the question are identical?

V.

THE MICHIGAN EXPERIENCE.

The experiences of the state of Michigan provide an interesting case study of the problems posed by the Montana experience that is now before the Supreme Court. The "Michigan Experience" concerns the use of the constitutional initiative to effect constitutional change. The background on Michigan was generally available to the Montana Constitutional Convention in the publications in the Convention library, many of which are referred to here.

In Michigan, the 1908 constitution provided that every sixteen years the question of calling a constitutional convention should automatically be placed on the ballot. (Michigan Constitution, Art. XII, Sec. 2, 1908).

In a study conducted by the National League of Women Voters, the problems of Michigan were discussed:

> "In Michigan, the 1908 constitution provided that every 16 years the question of calling a constitutional convention should automatically be placed on the ballot. On each of these occasions,

> the last time in 1942, voters had rejected the measure. Indifference to ballot issues and reluctance to tamper with this most basic of documents both no doubt played a part in voter refusal." League of Women Voters, Inventory of Work On Constitutional Revision, 1966, p. 58.

What, the League of Women Voters in that state wondered, could be done about this problem? The League had its first opportunity to attack it in 1948 when the state legislature passed a bill placing the question of a constitutional convention on the ballot.

According to the League:

> "As usual, however, it failed at the polls although for the first time the proposal received a majority of 'yes' votes. The Supreme Court upheld an attorney general's ruling that the constitution required approval of a majority of all those voting in the election. The small majority received by the proposal was not sufficient to be a majority in the election. In effect, all those who had not voted on the proposal actually cast a 'no' vote." (emphasis not supplied) Inventory of Work, op. cit., p. 58.

One study noted: (As to the 1948 election)

> "A majority of those who voted on the issue favored calling a convention by a vote of 844,451 to 799,198, but the Michigan Supreme Court ruled that a majority of those voting in the election was needed for a call to be approved." Buechner, John, State Government in the Twentieth Century (Houghton Mifflin Co: Boston, 1967) p. 60.

In 1958, a major campaign for constitution revision was waged. As in the 1949 election, the call for the convention was defeated because of the Supreme Court ruling. According to the League:

> "Yet, despite the zeal and thoroughness of the campaign, it ended in failure that November. Even though the measure received an actual majority of 'yes' votes (roughly 820,000 to 600,000), a full one-third of the voters chose to ignore the Con Con ballot ques-

> tion entirely. By the 1948 court ruling, these blank votes - 900,000 of them - had to be counted as 'no' votes. The fate of the measure had again been decided by default." Inventory of Work, op. cit., p. 59.

The actual vote had been 821,282 to 608,365. Sturm, Albert L., Thirty Years of State Constitution-Making: 1938-1968, National Municipal League: New York, 1970) p. 65. In a footnote to the above figures, the NML publication - which was available to Montana delegates, it was stated:

> "Total vote cast on proposal: 1,429,647. Total vote cast in election: 2,341,829. Proposal failed because it was not approved by a majority of those voting in the election." Thirty Years, op. cit., p. 65, note b.

The extra-ordinary majority required by the state constitution had not been met, even though a simple majority had been.

This was again noted by the National Municipal League in a recent publication:

> "The voters of Michigan in 1948 and again in 1958 had provided a favorable majority on the question of calling a constitutional convention, but the affirmative failed to carry because the majority was not a majority of those voting in the election as required in the fundamental law." (emphasis supplied) Wheeler, John P., Jr., Salient Issues of Constitutional Revision, (National Municipal League: New York, 1961) p. 57.

For the League of Women Voters there was in fact a whole series of tough campaigns ahead. The next five years saw the League exploring every possible route to constitutional revision. According to the League:

> "Delegates assembled for state convention in 1959 kept Con Con on the current agenda, with an added twist. This was agreement to work for a constitutional amendment changing the requirement from a majority of those voting in the election to a majority of those voting on the question." (emphasis not supplied) Inventory of Work, op. cit., p. 59.

The National Municipal League has discussed the efforts that followed:

> "Led by the League of Women Voters and the Junior Chamber of Commerce proponents of a convention successfully initiated an amendment in 1960 which changed the requirement to a majority of those voting on the question." (emphasis not supplied), Salient Issues, op. cit., p. 57.

With that change behind them, the Michigan voters in April, 1961, authorized the calling of a convention. On April 3, 1961, the call was approved by a vote of 596,433 to 573,012. Thirty Years, op. cit., p. 65.

VI.

THE HAWAII EXPERIENCE.

In its brief constitutional history, Hawaii has experienced matters that bear on the Montana experience now before the Court.

Hawaii has an unique Constitutional provision on ratification of a revision or amendments:

> "The revision or amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least thirty-five percent of the total vote cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty percent of the total number of registered voters." Hawaii Constitution, Art. XV, sec. 2.

The extra-ordinary majority contemplated is a combination of a majority of those voting on the "question" and a specific percentage of either the "total vote cast at the election" or a specific percentage of the "total number of registered voters" if a special election is used.

The use of words points up the absurdity of equating a majority of votes on the question with phraseology that speaks of the total votes cast at the election.

The Constitutional Convention of 1968 anticipated, in Hawaii, the possible problems that might arise, and constructed their ballot accordingly. A three-part ballot was used. The voter was able to express approval for or reject the entire revision, and a third portion allowed the voter to negate any of the side issues or amendments that were placed on the ballot, but otherwise have his ballot counted as being in favor of all proposals for which he failed to express a "no" vote.

The National Municipal League has published a sample ballot from Hawaii, and the instructions read as follows:

> "Part A - if you vote in Part A you will be voting Yes on all of the questions.
> Part B - if you choose Part B you will be voting No on all of the questions.
> Part C - if you vote in Part C you will have a listing of twenty-three questions. Your vote will be counted as a Yes vote, except where you choose to make a No vote." Meller, Norman, With an Understanding Heart: Constitution Making In Hawaii, (National Municipal League: New York, 1971), p. 124.

According to that publication:

> "The 'yes,no and yes-but' ballot promised to be particularly well-phrased for satisfying the 35 percent qualification. The average voter, desiring to oppose one or more amendments, normally would not bother to vote on all of the remainder in view of their lacking political saliency; these proposals without 'no' votes would be included in the 'yes' count." Constitution Making In Hawaii, op. cit., p. 123.

The Hawaii Convention was well-advised as to the problems involved:

> "The main worry was over whether there would be too many spoiled ballots or people not bothering to vote on the constitutional issue, so as to fail to meet the requisite 35 percent figure ... A spoiled ballot would be included in the total count against which the 35 percent requirement would be measured, while a vote in either the 'yes' or 'yes-but' portions would provide affirmative tallies toward satisfying the constitutional minimum." Constitution Making in Hawaii, op. cit., p. 129.

It is submitted that the Montana Constitutional Convention was also well-advised of the problems. The ballot used, however, did not provide a manner to overcome the problem. It is submitted that the law requires that the blank ballots on the main question of passage should be counted as "no" votes because that is what is required by the law. The question is not whether it is right or proper to do so by some undefinable standard of majority rule, but rather "what does the law require"; in Montana it requires an extra-ordinary majority.

Indeed, if one does consider the abstract correctness of the counting of blank ballots on the main question as "no" votes, let us consider the Hawaii experience through the eyes of the National Municipal League, an advocate of constitutional reform:

> "In retrospect, use of the 'yes' by implication vote constituted a questionable practice. Many voters failed to appreciate that their voting 'no' on one issue was not interpreted as being neutral on the others, but instead, automatically meant a 'yes' vote on all items not singled out for separate, negative treatment." Ibid., p. 131.

> "The question of whether the means are ever justified by the end, however, was dramatically raised at the 1968 elections. The 'yes-but' portion of the ballot was indeed effective, but was it moral?" Ibid., p. 134.

In all, 25,387 voters had voted against the constitutional revision in its entirety while 49,546 had endorsed it en toto without any qualification, but the success of the revision in Hawaii is directly attributable to the some 81,313 voters who punched 'no' votes on lowering the voting age and thereby registered an affirmative vote on the balance of the proposals on which they took no action. Ibid., p. 131.

At the general election in 1968, 239,765 votes were cast, and none of the 23 issues received a positive 'yes' vote equalling 35 percent of this amount. It was the 'yes by implication' procedure which saved them, and only the 18 year old minimum voting age was defeated, its 'no' votes being instrumental in passing the rest.

VII.

THE TINKEL CASE: DISTINGUISHABLE BAD LAW.

The case of Tinkel v. Griffin, 26 Mont. 426, 68 P. 859 is relief upon by proponents of the view that a majority of the electors voting on the proposition of the passage or defeat of the proposed constitution is sufficient, and that it is not necessary that they also constitute a majority of all those voting at the election.

The Court in Tinkel was called upon to construe the meaning of Art. 13, Sec. 5 of the Montana Constitution which requires, for counties to incur single-purpose indebtedness in excess of $10,000.00, the "approval of a majority of the electors thereof, voting at an election to be provided by law."

The case involved a vote on the single issue of whether

to approve issuance of bonds to secure a loan. The Court, in the official record, dealt only with the following figures: The highest number of votes cast for any office voted upon at the election, 2400; 1,000 voting in favor of the bond proposition; 462 voting against the bond proposition.

The Court in Tinkel held that a favorable majority of all the votes cast on the question of incurring the indebtedness is sufficient though such majority is not a majority of all the electors voting at such election.

It is clear that the Court in Tinkel was not faced with the question of what number of voters voted at the election except in terms of the number of votes cast for an elective office during the general election held the same day, and not in the terms of ballots wholly blank or blank on the main issue with votes on related issues.

The holding in Tinkel is thus limited to a holding that in single-issue bond elections, a majority on the proposition is sufficient and it is not necessary that a majority of the votes cast in the unrelated office-seeker election for the office receiving the highest number of votes be obtained. That it did not consider the circumstances before the Court today can be seen from the language used.

The Court in Tinkel stated:

> "If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted." (At p. 861).

That, of course, is not true in the case before this Court, because the same issue would be before this Court had the election

for the Constitution been on a different day.

The substantial difference is that the Court in Tinkel did not deal with the question of what constitutes a "voter", other than concluding that one not voting on the bond issue at all is not a voter. They did not decide - because it was not presented - what the status is of the partially blank ballot.

The cases relied upon by the Court in Tinkel call into question the propriety of that decision.

Tinkel relied upon Gillespie v. Palmer, 20 Wisc. 544. Tinkel, op. cit., p. 861. That case has not only been most severly criticised by every court of last resort to which it was cited except Montana - among others those of Minnesota, Nebraska, Michigan, Indiana, Mississippi, and Ohio, but also by the Supreme Court of Wisconsin. (See Knight v. Shelton, 134 F.423).

In Sawyer v. Insurance Co., 37 Wisc. 524, that Court, in referring to Gillespie, said:

> "It has been subjected to the criticism that the court decided it in accordance with the logic of the war, rather than by the logic of the law."

The Supreme Court of Michigan in Stebbins' Case, 108 Mich. 695, 66 N.W. 594, treats Gillespie as overruled.

Tinkel also relied upon the Supreme Court cases of Cass Co. v. Johnston, 95 U.S. 360, 24 L. Ed. 416, and Carroll Co. v. Smith, 111 U.S. 556, 4 S. Ct. 539, 28 L. Ed. 517. These decisions only hold that constitutional provisions merely providing that an act should be declared adopted if a majority of the electors shall ratify the same or consent thereto is fully complied with when a majority of those voting on that question vote in favor

thereof. Neither of these two cases, nor any U.S. Supreme Court case has ever directly passed upon such a provision as is found in the Constitution of Montana in relation to bond issues on constitutional revision.

The case of Howland v. Board, 41 P. 864 (Calif.) was also cited by Tinkel. That case, however, states that "the votes cast for and against the issuance of bonds were all the votes cast at that election." (at p. 864). The issue of partially or totally blank ballots was not at issue.

The Howland case is clearly distinguishable from the case at bar, and also from the Tinkel case. Howland is discussed in City of Santa Rosa v. Bower, 75 P. 829. In that case the Court dealt with a constitutional provision that declared that a freeholder's charter should be submitted to electors at a general or special election, and that, if a majority of the electors voting thereat ratified the same, it should be submitted to the Legislature. The Court held that a majority of those voting on the question was not sufficient and that the clause under consideration is "exactly the same in meaning as if the sentence had read 'if a majority of such qualified electors voting at such election shall ratify the same.'" (At p. 830).

The Bower case distinguished the Howland case and considered it not controlling. (At p. 830-831).

As the provisions of these cases are different from the one now under consideration, these authorities were inapplicable and should not have controlled the decision in Tinkel.

The Court in Tinkel relied more heavily on the case of

Fiscal Court v. Trimble, 47 S.W. 773, 42 L.R.A. 738 (Kentucky) and quoted liberally from it. That case, however, also uses the discredited Gillespie case, op. cit., and the inapplicable Supreme Court cases discussed above. More importantly, however, is the point that the Trimble case interpreted a provision virtually identical to the Bower case, op. cit., which has been distinguished by the California courts from a case like that before this Court.

The Trimble case decided that only a simple majority was required because it would require a new rule foreign to the state:

> "... we cannot believe that the constitutional convention intended that some tribunal should be established to ascertain the number of electors in a county, and then require the assent of two-thirds of them to a proposition for the county to incur an indebtedness. That would introduce a new rule in this state, - one which would require accurate information, which is almost impossible to obtain." 42 L.R.A., at p. 740.

The interesting point about the Trimble case - heavily relied upon by Tinkel - is that the constitutional provision therein interpreted stated: "That the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose." (42 L.R.A. at p. 740.) (Emphasis Supplied). The Court then distinguished its provision with one nearly identical to one under consideration by this Court and stated:

> "If it had been said the County could not incur an indebtedness 'without the assent of two-thirds of the electors thereof' we would understand that an elector's failure to vote was equivalent to voting against the proposition.'" (At p. 740) (Emphasis Supplied.)

Thus, the prime case relied upon by Tinkel actually supports the interpretation that an extra-ordinary majority is required in the case before this court. Thus, to quote the paragraph quoted by Tinkel from Trimble:

> "Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose." (At p. 740) (Emphasis Supplied)

That crucial difference - between policy and law - is the crucial difference between broad expressions generally claiming what the law should be and what the law requires and is the responsibility which this court must face.

The interesting thing is, as has been noted, that a constitutional convention call has been defeated before in Kentucky, the State of the Trimble case, because of the clear requirement that the majority on the question of the convention call must equal one-fourth of the vote cast at the last preceding general election. (Kent. Const., Secs. 258-63).

VIII.

POPULAR RATIFICATION OF CONVENTION CALLS.

The most highly litigated area of the popular ratification necessary in constitutiona change is in the area of ratification of amendments to Constitutions.

The constitutional procedure for calling a convention in most states requires the submission of the question to the voters before enactment of enabling legislation.

Thirty-three refernda on the convention call question were held in nineteen states from 1938 - 1968, with twelve calls being rejected. Thirty Years of Constitution-Making: 1938-1968, (National Municipal League, New York, 1970) p. 64.

Two of the defeated convention calls bear particular scrutiny. In November, 1960, 342,501 voters voted to have a constitutional convention in Kentucky, while 324,777 voted against it; it was defeated because the majority on the question must equal one-fourth of the vote cast at the last preceding general election. Thirty Years, op. cit., p. 65, p. 134, note i. This, of course, is a form of extra-ordinary majority clearly different than a simple majority by the clear wording of the provision. The other interesting example is Michigan, treated above.

IX.

POPULAR RATIFICATION OF AMENDMENTS.

The method by which proposed constitutional amendments shall be submitted to the people for their approval or disapproval is, of course, specified in the provisions of the State Constitution.

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

In some states the requirement for ratification is clearly a majority of the electors voting on the question, it having been held in such states that a simple majority as to

each amendment is adequate without reference to the number of votes cast on other propositions cast at the same election. People ex. rel. Elder v. Sours, 31 Colo. 369, 74 P. 167 ("approved by a majority of those voting thereon..."). Such decisions are not authority for what the words "majority voting at the election" means.

In some states the requirement of an extra-ordinary majority is clear beyond dispute: Tennessee requires a majority of those voting for Governor, it being required that the time for the propular referendum is the next general election in which the governor is elected. (Tenn. Const.,A.XI, 3); in New Hampshire, the requirement is 2/3 of the qualified voters present and voting on the proposal. (N.H. Const., Pt. Second, Arts. 99, 100); in Hawaii, a majority of the votes cast is necessary, such majority being at least 35 percent of the total votes cast at the election (in a general election) or thirty-five percent of the registered voters (at a special election). (Hawaii Const. XV, Sec. 2).

Such provisions would be meaningless if interpreted to mean something other than an extra-ordinary majority. Similarly, Rhode Island requires 3/5 voting on the proposal (R.I. Const. XIII) and Nebraska requires a majority on the proposal, which majority is 35 percent of the total votes cast at the election. (Neb. Const., XVI, Sec. 1).

In Green v. State Board of Canvassers, 5 Idaho 130, 47 Pac. 259, 95 Am. St. Rep. 169, the court was called upon to determine whether an amendment to the Constitution had been adopted. The Constitution provided (article 20, § 1):

> "And if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of the Constitution."

Section 3 of the same article referred to the calling of a convention for the purpose of framing a new Constitution, and, after providing for a submission thereof at the next general election, proceeded:

> "And, if a majority of all the electors voting at said election shall have voted for a convention, the Legislature shall at the next session provide by law for calling the same."

The amendment having received a majority of the votes cast on the question, but not a majority of all the votes cast at the election, the court was called upon to determine whether it had been adopted or not, and the court, in holding that it was adopted, said:

> "We confess ourselves unable to appreciate the argument which would make the language of Section 1 of Article 20 and Section 3 of said article synonymous, or expressive, of the same intention. If they were, as counsel for the defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to be the other way. We can understand why the makers of the Constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment." (Emphasis Supplied) (At. p. 260).

The comparison is instructive, because the dicta in the case supports the proposition that a more stringent rule than required for bond issues is necessary and required for ratification of Montana's Constitution.

The same conclusions were reached by the Supreme Court

of Oregon in State v. Grace, 20 Ore. 154, 25 P. 382, and the Court of Appeals in Maryland in Walker v. Oswald, 68 Md. 146, 11 Atl. 711.

The words of the Wyoming Court in State ex. rel. Blair v. Brooks, 17 Wyo. 344, 99 P. 874 is instructive. The Court, in interpreting a provision requiring "a majority of the electors" to ratify an amendment stated:

> "The provision of the Constitution is explicit in its terms. Such proposed amendment can only be ratified by a majority of the electors. It would be anomalous to say, in view of the section taken as a whole, that it was intended to mean only those who actually voted upon the amendment, or in other words, a majority of some of the electors, excluding others. It requires the proposed amendment to be submitted to the electors of the state, those who are entitled to vote, and it is by a majority of the electors ... and not a majority of those actually voting upon the question, that such a proposed amendment is ratified. Any other construction would authorize the counting of all who did not vote on the question as in favor of the adoption, a construction which is not borne out by the language, nor is it in harmony with the spirit of the Constitution ... There were more than half of the electors voting at the ... election who failed to indicate their desires or wishes upon the adoption of the proposed amendment. It was the expression of the elector's wish upon the question which the law called for - a positive expression in a particular manner - and not the absence of such expression which was authorized to be recorded. To ratify is to affirm, and the Constitution requires in order to ratify that there be an affirmative expression of a majority of the electors to whom the question is submitted, the withholding of which is not sufficient. The proposed amendment was submitted to the electors of the state, and it required a majority of those electors to ratify it. As it appears that the number of electors who voted at the election and in favor of ratification of the amendment were less than a majority of the electors who voted at the election, it follows that the amendment was not ratified."

In construing a provision of the Indiana Constitution, the Court In re Todd, 208 Ind. 168, 193 N.E. 865 (overruling In

re Denny, 156 Ind. 104, 59 N.E. 359) made an extremely interesting distinction:

> "We are convinced that the reasoning and conclusions of the opinion in City of South Bend v. Lewis are sound and should be followed as applicable to the question under consideration: 'From what we have said, we think it clearly appears that four leading principles may be considered as fully established, namely: First. Where a measure is proposed to the people, and its adoption is made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote, even though those voting constitute a minority of those entitled to vote. Second. Where a question is required to be submitted at a certain regular election, and is made to depend upon a majority of the votes cast at 'such election,' a majority of all the votes cast at the election is meant, and not merely a majority of the votes cast on that particular question. Third. Where, at a general election, a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of the provision in the law, under which it is submitted, to the contrary' ..." P. 874. (Emphasis Supplied).

The second proposition clearly applies to Montana, and clearly is recognized by the Courts in this country.

In 1905, a Federal Court interpreting the Constitution of Arkansas stated that the approval of a proposed amendment by a majority of the electors voting on the proposition is not sufficient for its adoption, unless they also constitute a majority of all those voting at the election. Knight v. Shelton, 134 F. 423 (1905 Arkansas).

Under Art. 19, Sec. 22, it was provided in Arkansas that "if a majority of the electors voting at such election" adopt an amendment, it becomes part of the Constitution. The Court in Knight v. Shelton, op.cit., stated:

> "Without stating the facts of each case, it is sufficient to say that the courts construing statutes or constitutional provisions requiring a majority of the votes cast at the election have almost unanimously held that it required a majority of all the voters who participated at that election, and not merely a majority of those who voted on the particular question submitted." (At P. 432).

In Nebraska, Mississippi, and Ohio, the courts of last resort have passed upon the question of what a majority voting at the election means, and the conclusions reached by each of these courts are that an amendment to the Constitution under a constitutional provision of this kind must receive not only a majority of the votes cast on the proposition to amend the Constitution, but must receive a majority of all the votes cast at the general election at which the proposed amendment was voted on. The earliest case in Nebraska was State v. Lancaster, 6 Neb. 474. The question involved there related to township organizations, and the constitutional provision required in order to adopt such organization, a majority of all the legal voters voting at the general election at which the question was submitted. The Court held that a mere majority of those voting on the subject was not sufficient unless that majority also constituted a majority of all the votes cast at such election.

It next came before the court in State v. Babcock, 17 Neb. 188, 22 N.W. 372. In that case the question was - like the one in the case at bar - whether an amendment to the Constitution had been adopted when there were but 51,959 votes cast for the amendment, which was a majority of the votes cast on that subject, although there were 134,000 votes cast for the Governor at that election. Maxwell, J., in delivering the opinion of the Court, says:

> "The language of the Constitution would seem to require a majority of all the votes cast at that election; otherwise the words 'voting at said election' would be entirely without meaning. The words were evidently intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the state to incorporate new provisions therein."

The same question came again before the Court in Tecumseh National Bank v. Saunders, 51 Neb. 801, 71 N.W. 779, and the same conclusion was reached in that case.

The same question came before the Supreme Court of Ohio in State v. Foraker, 46 Ohio St. 677, 23 N.E. 491, 6 L.R.A. 422. The constitutional provision there was very muck like that of this state, "if a majority of the electors voting at such election should adopt it" it should become a part of the Constitution. There were 780,304 votes cast at the general election and only 257,662 votes were cast in favor of the amendment, which was a majority of all the votes cast on the amendment, but 112,491 less than a majority of all the votes cast at that election. The court, in a very elaborate opinion, in which it reviewed a large number of cases bearing on that subject said:

> "The plain meaning of this language would seem to indicate but one construction, and that is that an amendment so submitted would require for its adoption a majority of all the electors voting at the election for senators and representatives, as being the election indicated by the language 'such election.' * * * 'Such' is a pronominal adjective, and necessarily defines an 'election' previously mentioned, and the only one found in the context is an 'election for senators and representatives.'"

In Mississippi that question came before the Supreme Court in State v. Powell, 77 Miss. 545, 27 South 927. The Constitution of that state provides (section 273, art. 15):

> "And if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration or amendment, then it shall be inserted by the next succeeding Legislature as a part of the Constitution, and not otherwise."

The Chief Justice, who spoke for the court, delivered one of the most exhaustive and learned opinions ever written on that subject, in which a large number of the most important cases bearing on that question were thoroughly reviewed, and the conclusions reached by that Court were the same as those reached by the Supreme Courts of Nebraska and Ohio.

In State v. Mayor of St. Louis, 73 Mo. 435, the Constitution provided that no amendment to the charter of St. Louis should be adopted without submission to a general or special election, and there ratified by three-fifths of the qualified voters voting thereat. In holding that this provision required, for adoption of an amendment to the charter, three-fifths of all those voting at the election, Judge Norton, who delivered the opinion of the court, said:

> "The provision of the Constitution is free from ambiguity, and, giving the words employed their natural and usual signification, we think it clear that, before any amendment can be adopted, it must be accepted by three-fifths of the qualified voters voting at either a special or general election. If the framers of the Constitution intended otherwise, they would have used the word 'thereon' instead of 'thereat'."

In State v. McGowan, 138 Mo. 187, 39 S.W. 771, the Constitution required a majority of all the voters voting at any general election to adopt a township organization. The Court held that a majority of those voting on the proposition, unless they constituted a majority of all who voted at that election,

was not sufficient. Barkley, C.J., in speaking for the court, said:

> "The sole question before the court is the true meaning of the clause, 'whenever a majority of the legal voters of such county voting at any general election shall so determine.' But the majority required must be a majority of the legal voters voting at any general election, just as the Constitution declare. We must ascertain whether the Constitution is to be taken to mean exactly, what it says on the point of present controversy, or to be taken with the shade of meaning proposed in the able argument for relators."

In Bayard v. Klinge, 16 Minn. 249 (Gil. 221,) it was held:

> "Where the Constitution provides that a majority of those voting at a general election shall be required to remove a county seat, it is not in the power of the Legislature to alter the rule, and direct that a majority voting on the question shall be sufficient."

To the same effect is Everett v. Smith, 22 Minn. 53.

In People v. Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L.R.A. 838, the constitutional provision before the court was:

> "Towns might be organized under general laws whenever a majority of the electors voting at a general election should so determine."

The court held that the annual election provided by law for the election of municipal officers was a general election, as there are only two classes of elections, and this was not a special election. The court then proceeded to say:

> "The words of the Constitution clearly do not intend that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. A majority of all the electors voting at the election is necessary to carry the proposition to organize."

In Stebbins.v. Superior Court, 108 Mich. 693, 66 N.W. 594, a statute of the state authorized the city of Grand Rapids

to issue bonds, "if authorized by a majority of the qualified electors at a regular or special election called for that purpose," and it was held that, the matter having been submitted at a general election, it required a majority of all who voted at that election. Merely a majority of those voting on the question was held to be insufficient.

That writers generally recognize the distinction between the simple and extra-ordinary majority can be seen by looking to Minnesota. One author has stated that from 1898 to 1946, only 26 out of 80 proposed amendments were adopted, and that all but two of those which failed received a simple majority but not a majority of those voting on the proposal. Laughlin, A Study in Constitutional Rigidity, I, 10 U. Chi. L. Rev. 143 (1943) at pp. 161-166.

Mississippi formerly required a majority of the votes cast on a proposal until a 1959 amendment which changed the requirement to a majority of those voting on the proposal, interpreted to mean if a proposition, by one writer, receives more affirmative vote than negative vote, it will fail if the number of affirmative votes is fewer than a majority of those cast at the election:

> "In other words, a voter's failure to cast a vote on a proposed amendment has the same effect as a negative vote." Grad, Frank P., "The Drafting of State Constitutions, Working Papers for a Manual, NML, 1967, Part III, "Some Implications of State Constitutional Amendment for the Draftsman," (note 79 at p. 11 of notes)

The writer was speaking of a common situation:

> "Most states provide for adoption by a majority of the votes cast on a proposal; but in Minnesota, Oklahoma, Wyoming, and Tennessee (and until recently in Illinois and Mississippi) adoption of a proposed amendment is by a majority of the votes cast (for any purpose) at the election. Thus, even if a proposition receives more affirmative than negative votes it will fail if the number of affirmative votes is fewer than a majority of those cast at the election. In other words a voter's failure to cast a vote on a proposed amendment has the same effect as a negative vote." Drafting, Ibid., p. 22.

A 1950 amendment in Illinois permitted ratification alternatively by two-thirds of the votes on the proposal, or by a majority of the votes cast at the election. N. 78 of above, P. 10.

The new Illinois constitution, recently adopted, states:

> "either three-fifths of those voting on the question or a majority of those voting in the election." XIV, Sec. 2.

In Illinois between 1892 and 1950 only three out of 15 proposed amendments were adopted, and of those defeated through 1942, all but two received favorable votes by a majority of those voting thereon. Laughlin, supra, at 152.

Author, Grank P. Grad notes that: (in Illinois)

> "Between 1870 and 1892, although the constitution provided for ratification by a majority of those voting at the election, each of the five proposed amendments was ratified. This is due to the fact that the political parties at that time printed the ballots, and they would often merely print a statement approving the proposal, and all ballots left unchanged were counted as favoring the amendment." Grad, Drafting, op. cit., at note 86, p. 12-13 of Notes.

The five Minnesota proposals between 1946 and 1958 which failed despite a favorable vote by a majority voting thereon. Mitau, Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Convention in Ten Years Perspective, 44 Minn. L.R. 461 (1960).

X.

THE CONSTITUTIONAL MODE OF CHANGE IS MANDATORY AND EXCLUSIVE AND MUST BE FOLLOWED.

It is settled that amendments or revisions of state constitutions are to be made only in the modes pointed out or sanctioned by the instrument itself, the legal exponent of the will of the majority, which alone is entitled to the force of the law.

The Supreme Court of Indiana has enunciated this doctrine in a clear manner:

> "The Constitution is the fundamental law of the state. It received its force from the express will of the people, and in expressing that will the people have incorporated therein the method and manner by which the same can be amended and changed, and when the electors of the state have incorporated into the fundamental law the particular manner in which the same may be altered or changed, then any course which disregards that express will is a direct violation of that fundamental law." Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, Error dismissed, 231 U.S. 250, 58 L. Ed. 206, 34 S. Ct. 92.

None of the requisite steps may be ommitted. Stated differently, the rule is that the constitutional mode of making changes in a constitution is mandatory and exclusive, and must be substantially followed, and that change does not become effective as such unless it has been duly adopted in accordance with the provisions of the existing constitution. State v. Tooker, 15 Mont. 8, 37 P. 840.

The Tooker case involved compliance with Art. 19, sec. 9 of the Montana Constitution requiring the Secretary of State to publish proposed amendments in full for three months before

the election to be held for their ratification. The Court, in holding that the publishing requirement is essential to the validity of any amendment rested on Art. 3, Sec. 29 of the Montana Constitution, which makes all provisions of the Constitution mandatory, unless expressly declared to be otherwise, stated that to disregard the requisites:

> "...would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." At p. 844.

Stated otherwise, the people themselves are bound by their own constitution, and where they have provided therein a method for its change, they must conform to that procedure; any other course would be revoluntionary. Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657.

If essential mandatory provisions of the organic law respecting its change are ignored in changing a constitution, it violates the right of all the people of the state to government regulated by law. Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963.

The constitution is the organic and fundamental law, and to permit a change in it without a strict adherence to the rules therein laid down would be a step in the direction of the destruction of the stability of the government. Edwards v. Lesuerur, 132 Mo. 410, 33 S.W. 1130.

It is also submitted that there are certain rules of law which are so well settled that it is unnecessary to refer to

authorities to sustain them. Among these are the following:

> The language used is to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or unambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers.

Also, a proclamation by the Governor that a constitutional change was adopted is not conclusive, and the courts can inquire into the question of ratification. Towns v. Shuttles, 69 S.E.2d 742, 208 Ga. 838.

XI.

CONCLUSION:

Even were the constitutional provision now under consideration less clear than it is, a careful examination of the entire instrument and the provision on that subject in the Constitution in force prior thereto would remove any doubt on the subject. Comparing the various clauses in that instrument on the subject of elections and majorities required, it will clearly appear that the framers thereof intended to establish a different rule for different elections.

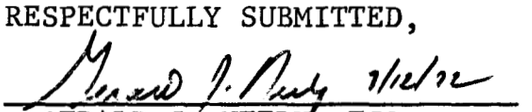
If the intention of the framer of the present Constitution had been to require only a majority of those voting thereon in order to amend the Constitution, how natural it would have been to use the same language found in the Constitution then in force. The majority of that convention was composed of some of the ablest lawyers in the state, men who were thoroughly familiar with every provision of the Constitution which was about to be replaced; and when they saw proper to change the wording of that particular article it is but reasonable to suppose that it was done for a purpose.

The framers of the Montana Constitution evidently did not believe that there should be casual change in the Constitution.

They thought that it would be best to require the positive assent of a majority of those who voted at the election and not just the positive assent of those who voted on the proposition, which would be dramatically low.

If such an extra-ordinary majority is required by law, it is meaningless to speak of votes not cast as being counted as negative votes because that is the precise effect of a requirement of extra-ordinary majorities.

RESPECTFULLY SUBMITTED,



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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.

FILED
JUL 13 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

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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12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

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No. 12309

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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 ATTORNEY GENERAL

STATE
PUBLISHING CO.
HELENA, MONT.

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STATE PUBLISHING CO. HELENA, MONT.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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 ATTORNEY GENERAL

I.

STATEMENT OF THE CASE

On February 21, 1969, the Forty-Second Legislative Assembly passed Chapter 65, Laws of 1969 providing for an election in November, 1970 to determine whether a constitutional convention should be called.

On November 3, 1970, the referendum was submitted to the electors, was adopted and proclaimed to be in full force and effect.

In accordance with the referendum, the Legislative Assembly adopted chapter 1, Extraordinary Seccion, Laws of 1971 calling a convention and outlining its powers.

The convention met and prepared for submission a proposed Constitution and three alternative proposals. On March 4, 1972 the convention passed Resolution No. 11 fixing the date of a separate election for June 6, 1972, and outlining procedures for conduct of the election.

On June 6, 1972, at the separate election, the proposed constitution and three alternate provisions were sub-

mitted to the electors of the State. A majority of the electors voting at the election voted in favor of the proposed constitution.

On June 15, 1972 the board of canvassers, consisting of the Secretary of State of the State of Montana, Governor of the State of Montana, and Treasurer of the State of Montana met to canvass the votes. On June 20, 1972, the board issued its certificate showing 116,415 electors voting for the proposed constitution and 113,883 electors voting against the proposed constitution. The certificate discloses that the number of ballots issued plus the number of absentee ballots issued and returned, totaled 237,600. See Exhibit "A", Answer of Attorney General.

On June 20, 1972, respondent Forrest H. Anderson, Governor of Montana issued a proclamation proclaiming:

> "that a majority of all votes cast at said election for and against the proposed Constitution were in favor of said proposed Constitution and that, therefore, the said proposed Constitution will be in full force and effect at the time and in the manner provided in the proposed Constitution."

On June 20, 1972 relators Cashmore and Burger filed separate actions petitioning this court to assume original jurisdiction, and to declare that the proposed Constitution had not received a majority as required by Section 8, Article XIX, Constitution of Montana.

On June 20, 1972, this court ordered the actions consolidated and ordered an adversary hearing.

There is no dispute in the facts except for that arising from the phrase, "Total number of electors voting," set forth in the canvass certificate. Relators erroneously claim that this is the total number of electors actually casting ballots. Respondents have demonstrated that this figure, instead, represents the number of ballots issued

plus the absentee ballots issued and returned.

The number of ballots actually cast in the separate election is unknown, but clearly it is less than the number issued, 237,600.

II.

QUESTIONS PRESENTED

(1. Whether prior Montana decisions construing the phrase "majority of the electors voting", to mean a majority of the number of votes cast on the individual issue in question, are controlling here and should be followed by this court in this case.

(2. If not, whether the phrase "majority of electors voting" means a majority of the number of electors voting on all issues in the separate election, in which case:

A. Relators must fail, and the Constitution be held to have been adopted, since there is no evidence before the court that such a majority did not vote "for" the Constitution, and consequently nothing which validly can impeach the Governor's proclamation.

or

B. Whether a state-wide precinct by precinct recount would have to be accomplished, which conceivably could result in confirming that such majority did vote "for" the Constitution.

or

(3. Whether the phrase "majority of the electors voting", means, as many courts hold, a majority of the largest total number of electors voting

for and against any issue on the ballot, which would, again, uphold the 1972 Constitution.

(4. Whether a federal question, i.e. equal protection of the laws, is raised, should the court apply a standard different from that set forth in paragraph (1. hereinabove.

III.

ARGUMENT

A. THE 1972 CONSTITUTION WAS CLEARLY ADOPTED UNDER PRIOR DECISIONS OF THIS COURT, HOLDING THAT THE PHRASE "A MAJORITY OF THE ELECTORS VOTING AT THE ELECTION" IS DETERMINED BY COUNTING THE VOTES CAST ON THE PROPOSITION IN ISSUE.

Section 8, Article XIX, Constitution of Montana provides for a separate election where a revision to the Constitution is proposed by a convention. That section provides:

> "...unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." Section 8, Article XIX, supra.

The issue before the court is whether the phrase quoted requires a majority of all those electors voting in the separate election, or a majority of votes cast for and against the proposed constitution.

Respondent contends that the issue is stare decisis, and relies on this court's prior decisions. We urge the court to reaffirm and apply its decision in Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859 (1902).

There, the electors of Flathead County voted on a bond issue for construction of a courthouse and jail. The question was submitted at a general election in which the highest vote cast for any office was 2,400. The bond

issue received 1,000 in favor and 462 against. Tinkel attempted to enjoin issuance of the bonds because less than a majority of those voting voted for issuance.

The court held that the bond election was a separate election and the votes cast in the general election had no bearing on the bond issue. In dictum, Mr. Justice Brantley stated that the phrase "majority of the electors thereof voting at an election" meant those actually voting on the proposition in issue.

> "The expression 'majority of the electors thereof voting at an election,' etc., 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." Tinkel v. Griffin, supra., p. 431. (emphasis supplied)

The philosophy of the court was explained in view of the irreconcilable differences in other jurisdictions.

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.
>
> In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the

> one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County Fiscal Court v. Trimble, 47 S.W. 773, 42 L.R.A. 738.)" Tinkel v. Griffin, supra., pp. 431-432.

On close examination, it can be seen that the case stands for two propositions. First, that a separate election may be held concurrently with a general election without destroying its separate identity. Second, that in an election requiring a majority of electors voting to pass an issue, the majority is determined by counting those voting on the issue itself.

Section 5, Article XIII, supra., uses the phrase, "a majority of the electors thereof, voting". Section 8, Article XIX, supra., uses the phrase "a majority of the electors voting." The word thereof refers back to the word county. The two phrases can be read without change in the meaning as "a majority of the electors of the county voting" and "a majority of the electors of the state voting". The language of the two sections is identical. Tinkel v. Griffin, supra., cannot be distinguished from the case at bar, on the language interpreted, and its mandate is clear.

In 1911, an argument was made to the court that Tinkel v. Griffin, supra., was changed by statutory enactment. The legislature had used the phrase "a majority of the electors of the county". The argument was made that, that required a majority of all the electors.

The court concluded that Section 5, Article XIII, supra., meant a majority of those who vote on the issue because:

> "the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in

them to give expression to their views at the ballot box." Morse v. Granite County, et al., 44 Mont. 78, 95, 119 Pac. 286 (1911).

A weak argument, of course, can be made that the quoted portions of Tinkel v. Griffin, supra., are dicta. Even so, the case reflects the philosophy of the court and constitution that the control of public affairs belongs to those who take sufficient interest to vote on the issue. To imply the Constitution provides that a non-voter in a bond issue is deemed to yield acquiescence, but a non-voter in an election for a proposed Constitution is deemed to vote no, when the phrase under consideration is identical, is clearly wrong.

On examining cases considering what constitutes a majority, we find seven states indicate a majority is determined by the vote on the proposition in issue, and eight states indicate that the majority is determined by the total vote cast. It should be noted that most cases construe constitutional provisions similar to Section 9, Article XIX, Constitution of Montana. Several well-reasoned cases strongly support the Tinkel decision.

In State ex rel. Witt v. State Canvassing Bd. (N.M., 1968), 437 P.2d 143, the court considered special language concerning New Mexico's voting article. The applicable language of the provision read:

"...And the provisions of this section and of section one of this article shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, ...shall vote for such amendment."

The court determined that "three-fourths of the electors voting in the whole state..." meant voting on the proposition.

"While aware, as already noted, that the use of different words within the same provision might

lead to a conclusion that different meanings were thereby intended, we should not lose sight of the fact that to construe 'electors voting in the whole state' to in effect mean 'all electors voting at the election' as distinguished from those voting on the particular amendment would have the effect of making the 'unamendable section' even more unamendable than would otherwise be true...

It is quite evident that to hold that three-fourths of those voting at any given election is required to amend Art. VII, Sec. 1, would give effect as having cast negative votes to those voters at the election who because of negligence, lack of interest, or some other unexplained reason failed to register their votes on the particular proposition. No logical reason for counting as opposed those who do not express their preference has been suggested. Nevertheless, this is the effect of requiring a three-fourths majority of those voting at an election whether or not they voted on the particular proposition. It would have been just as reasonable only in degree than the present contention here held to be without merit." State ex rel Witt v. State Canvassing Bd., supra., p. 153.

In re Todd, infra. reversed a line of cases in existence for 50 years to adopt the rule we urge here. In doing so, the court discussed the adoption of the Indiana constitution in which both the constitution and a separate article were voted on.

The enabling act provided that poll books were to be kept, the votes counted and a canvass made, but the election was decided on the actual votes cast for the constitution and the separate article separately.

The enabling act provided:

"If it shall appear that a majority of all the votes polled at such election were given in favor of the adoption of said constitution, it shall then become the constitution of the State of Indiana." In re Todd, 208 Ind. 168, 193 N. E. 865, 869 (1926)

On page 876, the court discussed the reasons for counting only the votes cast for and against the proposition in question. Its reasons accord fully with the reasons given by this court in Tinkel v. Griffin, supra.

Tinkel is not to be distinguished on the ground that

it should be more difficult to change a constitution than to adopt a bond issue. The people of Montana have now expressed their intention to modify the constitution of 1889 three times. In 1969, the legislature by two-thirds vote enacted legislation to submit the question of a convention to the people. Chapter 65, Laws of 1969. In 1970 the people voted for having a convention. In 1972 the people voted for the adoption of the proposed Constitution.

There is no language in the proceedings of the constitutional convention indicating the desire for a more difficult voting standard for the adoption of a new constitution. The only language showing the desire to make change difficult was in reference to the vote of the legislature. Proceedings and Debates Constitutional Convention, 1889, pp. 648-655.

We do not contend that the holding in Tinkel v. Griffin, supra., is the only way the phrase in question can be interpreted. We grant that there is some conflict in the cases. We do maintain that this approach is the most reasonable and is the law.

B. EVEN IF IT IS DETERMINED THAT A "MAJORITY OF THE ELECTORS VOTING AT THE ELECTION" MEANS A MAJORITY OF ALL ELECTORS VOTING, THE EVIDENCE IS INSUFFICIENT FOR THE COURT TO DETERMINE THE RESULT ON THE FACTS PRESENTED.

The court has before it a "Certificate of Canvass" signed by the Secretary of State and witnessed by the Governor and State Treasurer. That Certificate indicates the total vote for and against the proposed constitution and the other issues voted on. The certificate also reports the "Total number of Electors Voting" as 237,600, but this figure represents the total number of ballots

issued plus the total number of absentee ballots issued and returned, Exhibit "A", Answer of Attorney General. The number of ballots issued, of course, does not represent the number of electors voting.

To arrive at the correct number of "electors voting" requires exclusion of blank, void, unintelligible and illegal ballots cast. These ballots should be excluded because under Montana law an elector has not voted until a ballot is properly marked and delivered to the ballot box.

An elector goes through three steps in casting his ballot. The first step constitutes an "offer to vote". Section 23-3018, R.C.M. 1947, provides that an elector signs his name in the precinct register. This step is to identify the elector.

This court has held that failure to sign the precinct registry book before casting a ballot does not affect the legality of the elector's voting, if the failure is caused by the election officials, Thompson v. Chapin, 64 Mont. 376, 209 Pac. 1060 (1922). It should be further noted that if the elector's name does not appear on the registry, he may still cast his ballot on production of a registrar's certificate indicating his entitlement to vote. Section 23-3020, R.C.M. 1947.

After identification, the elector is issued a ballot and his name is placed on the poll list. Section 23-3603, R.C.M. 1947. This list is used to determine the number of ballots issued.

The second step in the electoral process is the "preparation of the ballot". Section 23-3308, R.C.M. 1947 provides the method by which an elector prepares his ballot in a primary election. There is no requirement that the

elector mark his ballot, but even after marking the ballot, the elector has not voted.

The third step, as provided for in section 23-3308(4)(a), R.C.M. 1947, indicates that the elector is to "vote the marked ballot without leaving the polling place". Respondent maintains that the final step is completed by the depositing of a validly marked ballot in the ballot box by an election judge.

This court has confronted the issue of what constitutes the act of voting a number of times. The clearest expression is found in cases interpreting absentee voting statutes. In Goodell v. Judith Basin County, et al., 70 Mont. 222, 224 Pac. 1110 (1924), it was contended that an elector must personally appear at the polls to vote and thus an absentee ballot was invalid. The court said:

> "Under this statute (Section 703, Rev. Codes 1921) and under the authorities generally, the act of voting is not completed until the ballot is deposited in the ballot box." Goodell v. Judith Basin County, et al., supra., p. 233.

In Maddox, et al., v. Board of State Canvassers, et al., 116 Mont. 217, 149 P.2d 112 (1944), a challenge was made to the absentee voting law for servicemen which allowed ballots marked prior to the closing of the polls on election day to be received by December 31. The court said:

> "Voting is done not merely by marking the ballot but by having it delivered to the election officials and deposited in the ballot box before the closing of the polls on election day."

Further that:

> "Nothing short of this delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot," supra., p. 115.

It is apparent from an examination of these cases and statutes, that mere issuance of a ballot to an elector does not make that person an "elector voting at the elec-

tion."

In Sawyer Stores, Inc. v. Mitchell, et al., 103 Mont. 148, 160, 62 P.2d 342 (1936), this court said:

> "The distinction between the term "ballot" and the term "vote" must be kept clearly in mind. The former (ballot) is merely the piece of paper upon which the voter gives expression to his choice. (State v. Blaisdell, 18 N.D. 31, 119 N.W. 360; Clary v. Hurst, 104 Tex. 423, 138 S.W. 566.) A vote 'is the formal expression of a will, preference, wish or choice in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a person to fill a certain situation or office, or in passing laws, rules, regulations, etc.' (Century Dictionary)
>
> Manifestly, the purpose of submitting this proposed measure to the vote of the people is to ascertain whether or not a majority of the electors are in favor of its becoming a part of the law of this state. The purposes of the ballot are: (1) to inform the voters of the nature and purposes of the measure; and (2) to afford each elector a means of expressing his approval or disapproval thereof, that is, voting thereon." supra., p. 160.

Section 23-3606, R.C.M. 1947 the method of voting by an elector states in subsection (3):

> "If a ballot contains a Constitutional amendment, or other question to be submitted to the vote of the people, he shall mark an 'X' in the applicable square indicating his vote either for or against the amendment or question."

In determining the number of electors voting at the election, a court should exclude blank ballots, void ballots, unintelligible ballots and illegal ballots from the count.

We believe it can be fairly stated that there is a common law presumption that persons who are present but do not vote acquiesce in the final outcome of an election. We further believe that to vote, an elector must do so in accordance with the law.

In considering the electors voting, blank ballots should not be counted in determining whether the proposed

constitution received a majority.

A clear majority of jurisdictions speaking to the question of whether to consider blank ballots in determining whether a proposition has received a majority of the votes cast, exclude blank ballots. Cases are compiled in 131 A.L.R. 1382, 1386-1387.

In Rex v. Foxcraft, 2 Burrows 1017, 97 Eng. Rep. 683 (1760), Lord Mansfield said:

> "Whenever electors are present, and do not vote at all, (as they have done here,) 'they virtually acquiesce in the election made by those who do.'"

This court stated in Tinkel v. Griffin, supra., p. 431 that:

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence."

Montana's election laws are plain regarding which ballots shall not be counted. Section 23-4002, R.C.M. 1947 states:

> "A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

In State ex rel. Wolff v. Geurkind, 111 Mont. 417, 109 P.2d 1094, 133 A.L.R. 304 (1941) four hundred electors cast ballots for a clerk of court who had died a month before the election. The electors thought by so casting their ballots, the deceased would be declared the winner, and his widow would be appointed in his stead.

This court said:

> "It is our opinion that a voter at the polls, unless he votes for some person, is not voting at all. A ballot cast, which does not express the preference of the voter for some person to fill the office is a nullity, cannot be counted and cannot be given any effect in determining the result of the election, as to that office." Supra., 109 P.2d 1099.

Further:

> "It is contended by respondents that, notwithstanding the failure of the 400 to vote for anyone, they nevertheless, in casting their ballots as they did, evidenced a purpose to defeat the relator or any other person for whom votes might be cast, and that because of the overwhelming majority of their number their expression of dissent should be recognized and given effect... True, the will of the majority, when properly expressed should govern. But experience in the early beginning of popular government in this country taught that provision was needed for the orderly expression of that will, and regulatory laws were passed for orderly assembly and to give opportunity to the citizen to express his individual will effectively. And out of this have grown our election laws; and these laws, even though in their operation at a time a result is obtained without the sanction of the majority, have been sustained by the courts. If there is opportunity for the majority a like opportunity for each individual citizen to express himself in conformity with regulations that are reasonable, the principle of majority rule is not infringed upon. And the very purpose, and the effect, of these regulatory provisions is to protect the rights of the citizen in the exercise of the elective franchise and give effect to an expression of choice as made by the majority or other controlling number." Supra., p.1100.

This court has stated that unintelligible ballots will not be counted if the elector's intent cannot be determined. Peterson v. Billings, 109 Mont. 390, 393, 96 P.2d 922 (1939).

Finally, this court has held that where a number of illegal ballots are cast, and it cannot be determined which, ballots will be stricken pro rata from the precinct count. Heyfron v. Mahoney, 9 Mont. 497, 505, 24 Pac. 93 (1890).

An Arkansas case in which the court was urged to accept the number of votes cast as shown by poll books states why that method of enumeration would not accurately reflect the number of electors voting at the election, and we urge that it is applicable here:

> "The appellant says that if the Legislature required the election judges of each precinct to return to the county commissioners, the total number of votes cast as shown by the poll books and the county commissioners then required to return the total number of votes in each county to the Secretary of State or the Speaker, together with

> the vote on the amendment, that this would give the total number of electors voting in the state, and with such returns it could be easily and accurately determined whether or not the amendment received the required majority. This method could have been adopted by the Legislature, and it looks like the natural method to adopt to comply literally with the Constitution; but even this method is only an approximation. It is common knowledge that many electors vote a blank ticket, and others vote defective tickets, and they are not counted as voting in the election, but would be counted as voting on the amendment, under this plan, as this number would increase the majority required to be reached to adopt the amendment...In a sense in all of these instances the electors participated in the election; but in a broader sense they were no more participants in the general election for state and county officers than the electors who passed by the polls without stopping to cast their ballots." St. Louis Southwestern Ry. Co. v. Kavanaugh et al. (Ark., 1906), 96 S.W. 409, 411.

Therefore, it is respectfully submitted that Relators have not demonstrated, and cannot (without a state-wide recount) demonstrate whether or not a majority of the electors voting on any or all propositions voted "for" the proposed constitution. In this state of the record, the Governor's proclamation cannot be inpeached. We submit that this consideration, as a policy matter in this and future elections, militates in favor of Tinkel.

C. SHOULD THIS COURT DECIDE "A MAJORITY OF THE ELECTORS VOTING AT THE ELECTION", MEANS MAJORITY OF THOSE VOTING ON ALL PROPOSITIONS, THEN THE PROPOSITION RECEIVING THE LARGEST NUMBER OF VOTES SHOULD BE THE BASE ON WHICH THE MAJORITY IS DETERMINED.

In the proclamation issued by the Governor on June 20, 1972, the vote on the proposed Constitution and alternate proposals was reported as follows:

FOR the proposed Constitution:	116,415
AGAINST the proposed Constitution:	113,883
FOR a unicameral (1 house) legislature:	95,259
FOR a bicameral (2 houses) legislature:	122,425

FOR allowing the people or the legislature to authorize gambling:	139,382
AGAINST allowing the people or the legislature to authorize gambling:	88,743
FOR the death penalty:	147,023
AGAINST the death penalty:	77,733

The proposed Constitution received the largest vote totaling 230,298. The alternate proposals received the following totals: Legislative proposal - 217,684; Gambling proposal - 228,123; and Death penalty proposal - 224,756.

If this court determines that "a majority of the electors voting at the election" is based on the largest number of votes cast for any proposal, the proposed Constitution passed and the proclamation issued was correct.

We have found no case holding that "a majority of electors voting at the election" is determined by counting those persons who were issued ballots. There are no cases of which we are aware holding a count can be based on any figure arrived at without excluding improperly cast ballots. All cases seem to base a determination on the largest number of votes cast for a proposition or an office.

State ex rel. Hayman v. State Election Board, 181 Okl. 622, 75 P.2d 861 (1938), appears to say that the use of the total number of ballots issued less spoiled ballots is permissible to determine a majority, but does not decide the question. A measure was proposed and submitted at a general election. The votes on the measure were 379,405 in favor and 219,996 against. The highest vote total received was that of presidential electors of 749,740. Total ballots issued less spoiled ballots were 767,745. The State Election Board contended that by taking the number of ballots issued, minus spoiled ballots, the number of voters voting at the election would be correctly deter-

mined. While the court indicated that the method might be permissible it stated:

> "It will be noted that whether we take the ballots issued less the ballots spoiled as the method for determination of the number of 'electors voting at such election', or whether we take the highest vote cast and counted for any office or measure in the various precincts of the State, as certified by the State Election Board, the measure failed to receive votes equal to "a majority of all the electors voting at such election..." State ex rel. Hayman v. State Election Board, supra., p. 863.

Two justices dissented, giving a well reasoned discussion stating why they would have rejected using the figure arrived after taking total ballots issued less spoiled:

> "But the question remains as to how we are to determine the total number of electors voting at the election. There are three possible methods, namely: (1) the highest vote cast for any office or measure at the election held November 3, 1936; (2) the total ballots issued throughout the State, less spoiled ballots; (3) the certificate of the election officers as to the 'total number of electors voting in such elections' as required under Section 5586, O.S. 1931, 34 Okl. St. Ann. Sec. 22. The relators contend for the first, the State Election Board applied the second, and the Legislature prescribed the third."
>
> "The majority opinion criticizes the first method for the reason that it would exclude those persons who voted but who did not vote for the particular office or measure which was used as the test. I recognize this to be a legitimate criticism. However, the second method, which was used by the State Election Board, has been expressly rejected and disapproved in the cases of State ex rel. Saunders v. Clark, 59 Neb. 702, 82 N.W.8, and Hopkins v. City of Duluth et al., 81 Minn. 189, 83 N.W. 536, and it is apparent, from the evidence in this case, that it does not represent correctly the number of electors voting at the election. For illustration, it is shown that the number of ballots issued, less spoiled, for presidential electors was 762,654, while the vote actually cast and counted for presidential electors was 749,740, which demonstrates that there were 12,914 ballots for presidential electors which were issued and not spoiled, but never accounted for. These were blank ballots, mutilated ballots, or otherwise illegal ballots, which were included since they were not considered as spoiled, but which should not, by the holding of this court, have been counted in determining the total number of electors voting..." State ex rel. Hayman v. State Electoral Board, supra., p. 865 (emphasis supplied)

In St. Louis Southwestern Ry. Co. v. Kavanaugh et al., supra., the court was asked to consider the highest vote cast for any office or measure in each county to arrive at the largest state vote. The court took the vote for Governor as the largest number cast. The court noted that in the general election of 1880, the secretary of state had addressed a circular letter to all county clerks requiring them to certify votes cast as shown by the poll books. The criticism of the Secretary of State's actions were:

> "While the Constitution requires the affirmative vote of a majority of electors voting in the general election to adopt an amendment, yet it contemplated a majority of those really participating in the 'general election for senators and representatives,' but the method pursued enabled those who voted merely on license, the amendment, or some one county or township candidate to so swell the total vote that an amendment supported by a good majority of electors voting for state officers was defeated." St. Louis Southwestern Ry. Co. v. Kavanaugh et al., supra., p. 412.

See also State v. Brantly, 112 Miss. 786, 74 So. 662, Ann. Cas. 1917E, 723 (1911) where the "number of qualified electors who deposited ballots in the ballot boxes as appeared from the list thereof made by the clerk of the election as each ballot was deposited", supra., p. 665., was rejected because:

> "...the amended returns are of no value here; for they show not the number of "qualified electors voting," but simply the number thereof who appeared at the polls and deposited ballots, legal or otherwise, in the ballot boxes, which ballots may or may not have been counted by the managers or commissioners in ascertaining the result of the election. 'Though a qualified voter succeeds in getting his name on the poll list and a ballot in the box, he is not a voter voting unless his ballot is such as is prescribed by law and conforms to the general law regulating elections' (citing cases)." State v. Brantly, supra., p. 665.

Other cases in which a majority was determined by the largest number of votes cast for a particular office or measure include: Pasadena v. Chamberlain, 192 Cal. 275,

219 P. 965 (1923) two-thirds of the largest vote for any bond issue in a special election; Town of Pine Bluffs v. State Board of Equalization, (Wyo., 1958), 333 P.2d 700, explaining State ex rel. Blair v. Brooks, 17 Wyo. 344, 99 P. 874, 22 L.R.A. (N.S.) 478 (1909); State v. Cato, 131 Miss. 719, 95 So. 691 (1923), highest number of votes cast for candidate or measure; People v. Stevenson, 281 Ill. 17, 117 N.E. 747 (1917) highest vote for legislature from each county; Rice v. Palmer, 78 Ark. 432, 96 S.W. 396 (1906) votes cast for governor.

Thus it can be seen that courts which accept the meaning of majority as one more than fifty per cent of the total votes cast in the election, uniformily use the proposition receiving the largest number of votes as the base. In the case at bar the proposition receiving the largest number of votes as the base was the proposed constitution, and we therefore submit that it was validly adopted as proclaimed by the Governor.

D. ADOPTION OF THE RULE PROPOSED BY RELATORS COULD DENY EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES CONSTITUTION TO THE MAJORITY VOTING "FOR" THE 1972 CONSTITUTION.

Relators argue that even though a majority of those voting for or against the Constitution, favored it, the document should nonetheless be stricken down. The fundamental precept of our society is majority rule, and a serious question--a federal question--is presented where those of the majority are denied equal protection of the law under the United States Constitution. This issue is now raised at the first opportunity to do so in this case.

The rule relators contend for has the result of giving a non-vote the effect of a "no" vote. This dilutes

the weight of each of the 116,415 "for" votes and converts a "majority" to an insufficiency. Termed negatively, a single "no" vote is given more weight and effect than a "for" vote.

This result, we have argued, is contrary to the fundamental rule of our 1889 Constitution as interpreted by Tinkel. Such result also encroaches on areas protected by the United States Constitution. The Fourteenth Amendment extends equal protection of the laws to the citizens of the states. The rule applies to state elections. Equal protection requires one vote for one man and is not satisfied where this requirement is not met. Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362; Ely v. Klahr, 1971, 403 U.S. 108, 91 S.Ct. 1803; Avery v. Midland County, 1968, 390 U.S. 474; Kirkpatrick v. Preisler, 1969, 394 U.S. 526; Wells v. Rockefeller, 1969, 394 U.S. 542.

We respectfully submit therefore that the fundamental fairness of majority rule as stated in Tinkel, is also required by the United States Constitution. Surely the framers of our present constitution did not intend to adopt a standard questionably deficient when put to the equal protection test.

IV.

CONCLUSION

The court would seem to be faced with three definitions possibly applicable to the questioned phrase. First, that interpretation applied in Tinkel. Second, the view of many courts which adopt a majority of the largest number of electors voting on any individual issue. Either of these results would uphold the constitution.

The third possibility would require a majority of all electors voting on any issue. This alternative would give

no clear answer, and, is fraught with problems here. The total number of individual electors who voted on any proposition is unknown. A recount would be required. Questions of equal protection are raised. And there is a violation of the basic principle of majority rule. These problems would require time and expense to solve, and even then could have the same result--that of upholding the 1972 Constitution.

In the face of these problems, the logic of the Tinkel court is unassailable and shines as a beacon of truth begging to be heeded.

For all the foregoing reasons it is respectfully submitted that the Court should uphold the proclamation of Governor Anderson and decree that the 1972 Constitution was approved by the people of Montana at the election held June 6, 1972.

Respectfully submitted,

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

ORIGINAL

No. 12309

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

FILED
JUL 14 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

MEMORANDUM OF AMICUS CURIAE
(COMMON CAUSE)

INTRODUCTION

Common Cause, a non-partisan Montana Organization, as well as a National Organization of concerned citizens (sometimes popularly described as "The Citizens Lobby") through its Counsel of Record and with permission of court respectfully submits, this, its memorandum on the issues presented herein.

Of course, the literal meaning of the term "amicus curiae" is a friend of the court. The undersigned would be no "friend" if there was merely submitted herein a repetition of authorities previously cited on arguments previously advanced.

Therefore what is attempted here by the undersigned, for the aid of the court, is a study of the positions advanced, and the arguments therein, in an effort to aid the Court by taking all of these into consideration and by offering a fair critique of these positions and arguments advanced.

ISSUES

Undersigned would suggest agreement that the issue is correctly stated in the memorandum of William F. Cashmore, in support of application for declaratory judgement as:

(56)

THURDER'S
HELENA

Whether the proposed Constitution received the requisite number of votes to have been ratified by the voters at the election on June 6, 1972.

STATEMENT OF CASE

Undersigned would also agree with the Statement of the Case as set forth in the Cashmore memorandum and the memorandum of petitioner Burger.

STATEMENT OF FACT

It is believed that the "Statement of Facts" as set forth in the brief of petitioner Burger is also accurate insofar as it goes. However this amicus curiae would also point out an additional and pertinent "fact" that there was in force and effect, at the time of the Constitutional election involved, a Montana statutory provision--Section 23-3606 R.C.M. 1947--which stated in pertinent part as follows:

> METHOD OF VOTING. (1) On receipt of his ballot, the elector must immediately retire to one of the booths and prepare his ballot.
> (2) He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote.
> (3) If the ballot contains a constitutional amendment, or other question to be submitted to the vote of the people, he shall mark an "x" in the applicable square indicating his vote either for or against the amendment or question (emphasis supplied).

SUMMARY OF ARGUMENTS PREVIOUSLY ADVANCED

Relators, and those intervening therewith argue that:

1. In this subject constitutional election the requirement of Article XIX Section 8 of the Montana Constitution requiring approval "by a majority of the electors voting at the election" meant a majority of those who signed the poll book at the constitutional election.

2. That by publicity directed at the Montana electors prior to the Constitutional election, the said electors were advised that a failure to vote on an issue would have the

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effect of a negative vote and that, therefore (it is argued) proponents of the ratification of the new Constitution are estopped from saying anything else.

The respondent Governor, and respondent's supporters contend that what was required in order to ratify the new Constitution was a favorable majority of those casting valid ballots.

The respondent side of the issue cite and quote the Montana decisions Tinkle v. Griffin (26 M. 426) and Morse v. Granite County, (44 Mont. 78, 19 Pac. 286) in support of that position.

Relators side takes the tack of distinguishing the two cited Montana cases and, also, of distinquishing the language of Section 8 of Article XIX from Section 9.

Both sides quote authority from other jurisdictions in support of their theories, construction and arguments.

STATEMENT OF AMICUS CURIAE

A study, by this writer, of most of the briefs submitted thus far, by both sides makes it incumbent for this Amicus Curiae, in aid to the Court, to respectfully point out to the Court that the Relator's briefs read by writer thus far overlook cogent and pursuasive, and probably determinative points.

A reading of Relator's memoranda (and those in support thereof) together with those filed on behalf of Respondent's position lead this writer to conclude, and urge, that the Respondent's side of it must necessarily prevail.

It is to be pointed out that the arguments advanced by Relator (and supporters) continually and consistently beg the question of what is meant by the words "vote" or "voting" as contained in Article XIX of the Montana Constitution.

Inherent in all arguments on the side of the Relator is the argument and assumption that "voting" in terms of the subject Constitutional provision means signing of the poll book, and receiving the ballot involved.

This is not a correct assumption.

It is here contended that as used in Article XIX the word "voting" can only mean the marking and casting of a valid ballot.

Section 23-3606, Revised Codes of Montana, in pertinent part states:

> METHOD OF VOTING. (1) On receipt of his ballot, the elector must immediately retire to one of the booths and prepare his ballot.
> (2) He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote.
> (3) If the ballot contains a constitutional amendment, or other question to be submitted to the vote of the people, he shall mark and "x" in the applicable square indicating his vote either for or against the amendment or question (emphasis supplied).

This section was in force and effect all the time of this Constitutional election, having been enacted in 1969.

Prior to 1969, Section 23-1210 stated, in pertinent part as follows:

> METHOD OF VOTING. On receipt of his ballot the elector must forthwith, without leaving the polling place and within the guardrail provided, and alone, retire to one of the places, booths, or compartments, if such are provided, and prepare his ballot. He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote. In case of a ballot containing a constitutional amendment, or other question to be submitted to the vote of the people, by marking an "X" in the square before the answer of the question or amendment submitted.

At the time of, and immediately prior to, the adoption of our original Constitutional Convention, the applicable Territorial Statute stated, as to the method of voting--as follows: (Compiled Statutes, Mont. Terr. 1887)

> Sec. 1017. At all elections to be held under this article, the polls shall be opened at eight o'clock in the forenoon and continue open until six o'clock in the afternoon of the same day, at which time the polls shall be closed, and at the opening of the polls one of the clerks, under the direction of the judges, shall make proclamation of the same, and thirty minutes before the closing of the polls proclamation shall be made in like

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manner, and the polls shall be closed in a half hour; but the board may, in their discretion, adjourn the polls at twelve o'clock at noon for one hour, proclamation of the same being made.

Sec. 1018. Every elector shall deliver, in full view of one of (the) judges of election, a single ballot or piece of paper, on which shall be written or printed the names of the persons voted for, with a pertinent designation of the office which he or they may be intended to fill. Said ballots may be open or folded, as the voter may choose.

Sec. 1019. The judges to whom any ticket may be delivered shall, upon the receipt thereof, pronounce with an audible voice, the name of the elector, and if no objections be made to him and the judges shall be satisfied that the elector is legally entitled to vote, he shall immediately put the ballot in the box, without inspecting the name thereon. The clerk of the election shall enter the name of the elector and number in the poll book.

Section 23 and 24 of the 1889 Laws of Montana (Territorial) stated (at page 142) as follows:

Sec. 23. At any election the judges of election shall designate two of said judges whose duty it shall be to deliver ballots to the qualified electors. Before delivering any ballot to an elector, the said judges shall print on the back and near the top of the ballot, with the rubber or other stamp provided for the purpose, the designation, "Official Ballot," and the other words on the said stamp as provided for for in section twenty of this act. Each qualified elector shall be entitled to receive from the said judges one ballot.

Sec. 24. On receipt of his ballot, the elector shall forthwith and without leaving the polling place, retire alone to one of the places, booths, or compartments provided, to prepare his ballot. He shall prepare his ballot by marking a cross before or after the name of the person or persons for whom he intends to vote. For example, X; or in case of a ballot containing a constitutional amendment, or other question, to be submitted to the vote of the people, by crossing out therefrom parts of the ballot in such a manner that the remaining part shall express his vote upon the question submitted. Or the elector may write in the blank spaces or paste over another name the name of any person for whom he may wish to vote. In marking a ballot, any elector shall be a liberty to use or copy any unofficial sample ballot which he may choose to mark or to have had marked in advance of entering the polling place or booth; but no elector shall be at liberty to use or bring into the polling place any unofficial sample ballot printed in the exact style, manner, width or character of paper of the official ballot. After preparing his ballot, the elector shall fold it so that the face of the ballot will be concealed and so that the endorsement stamped thereon may be seen. He shall then vote forthwith

and before leaving the polling place: Provided, however, That any elector who desires to vote for an entire group may mark a cross as above described against the political designation of such group, and shall then be deemed to have voted for all the persons named in such group whose names shall not have been erased.

In 16 Am. Jur 2nd, Constitutional Law 887, it is stated:

> A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them[13] and, like a statute, is properly to be expounded in the light of conditions existing at the time of its adoption,[14] the general spirit of the times, and the prevailing sentiments among the people.[15] It has been said that an understanding of the meaning of constitutional language makes appropriate a review of the background and environment of the period in which that constitutional language was fashioned and adopted.[16] Reference may be made to the historical facts relating to the origin of the political institutions of the community[17] and to prior well-known practices and usages.[18]

Article IX, Section 9 of the original Constitution states as follows:

> The legislative assembly shall have the power to pass a registration and such other laws as may be necessary to secure the purity of elections and guard against abuses of the elective franchise.

The State Legislature, in the absence of constitutional restriction has the right to control elections and to provide for the method of conducting the same. 25 Am. Jur.,2nd, Elections §6.

In 26 Am. Jur. 2nd, Elections, §314, it is stated that the general view is that blank, illegal and unintelligible ballots should be rejected in determining the total vote cast.

In view of the authority cited above, it is here contended, the following conclusions are inescapable.

1. In 1889, the framers of the original constitution provided that new constitutional changes proposed by a Constitutional Convention must be approved "by a majority of the electors voting at the election." The contemporaneous and immediately pre-existing language of the territorial statute describing "voting" must be taken into consideration in construing the meaning of the word "voting" as intended by,

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and within the thoughts of, the Constitutional framers. As noted above from the 1887 and 1889 Territorial Laws the process of "voting" was contemplated to be the appropriate marking and casting of the ballot. Therefore, it necessarily follows that the subject constitutional language must be held to be properly paraphrased as an approval of "a majority of the electors marking and casting a ballot" at the election. It is apparent that what was in the contemplation of the territorial legislators and the Constitutional framers was that the process of signing of the poll book and the process of voting were separate and distinct procedures and it was the count of the voting which was made determinative--not the count of those who signed the poll book nor of those who received ballots.

2. Regardless of the interpretation of non-official pre-election advertising or newspaper publications, the electors who went to the polls in the June, 1972 Constitutional election must be presumed to have known that the proper method of "voting" for or against the constitutional proposals was by proper marking and casting of their ballots as provided for by Section 23-3606 of the Revised Codes of Montana, (Supra).

3. It follows from 1 and 2 above that not voting cannot be held to be voting and the Tinkle and Morse cases are proper authority for these propositions.

4. The instructions of the Secretary of State to the Clerks and Recorders that "the total number of votes cast" should be taken from the poll book (See Exhibits A, B and C attached hereto) was in error or, at least, was immaterial to the question of how many voted approval or disapproval of the constitutional proposals. It follows that his subsequent certificate of the total number of votes cast at the election, prepared and computed on the basis of such instructions was

likewise in error or immaterial.

5. Further, on the action of the Secretary of State, on June 20, 1972, in making certificate that the total number of electors voting as being "237,600". This also was in error in light of the language of Article XX, Section 8 or 9. As noted above the term "voting" must be held to mean (under the Constitutional provision) the marking and casting of the ballot. On the face of the said certificate there could not have been such a number of electors voting in view of the fact that the same certificate speaks eloquently of the fact that maximum number of electors who placed their "x" "in the applicable square indicating (their) vote either for or against the amendment or question," (Section 23-3606, R.C.M. 1947) was the 230,298 who voted either for or against the proposed constition.

6. In light of what is pointed out above, the argument that "the certified total of 237,600 means anything more than 237,600 electors signed the poll book is specious. This is especially so in light of the fact that the Secretary of State specifically told the Clerks and Recorders that total votes cast was to be taken from the poll books and then computed the total based upon the figures submitted in accordance with the instructions.

7. It is clear that the Respondent Governor's action in promulgating the new constitution was correct as was the argument and conclusions advanced in his brief herein.

8. The constitutional proposal was clearly approved by those "voting" on the issues involved--by those appropriately marking their "X".

The proclamation of the Governor of the State of Montana should be sustained and concurred in by the Honorable Court.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Clayton R. Herron upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

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Dated this 14th day of July, 1972.

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OFFICE OF THE

SECRETARY OF STATE

FRANK MURRAY
SECRETARY OF STATE

GAIL M. DEWALT
CHIEF DEPUTY

HELENA, MONTANA 59601
June 2, 1972

TO ALL COUNTY CLERK AND RECORDERS:

I have today mailed to you, under separate cover, abstract books for reporting the vote cast in your county for (1) state, national and legislative partisan offices, (2) non partisan judicial offices and (3) the separate election for ratification or rejection of the proposed constitution.

Two copies of each of the books are being sent to you. Some counties will receive a set of state at large, national and legislative books for two different legislative districts. The district numbers are entered on the cover of the book. Upon completion retain one of each for your files, and return the second copy to this office. The State canvass has been set to begin June 15, 1972, so the abstracts should be sent in time to reach this office by that date.

In preparing and sending the abstracts:

(1) Check all totals against precinct entries.
(2) See that the certificates on the face of the books are properly signed and sealed.
(3) Please enter the total number of votes cast taken from your poll book in the space provided on the front cover of the partisan abstract book.
(4) It is very important that you enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election. Please check this figure carefully for accuracy.
(5) Please be sure to use the mailing envelope which is enclosed with the abstract books, and make the transmittal by certified mail. (Sections 19-122 and 23-4015, R.C.M. 1947).

I look forward to a state canvass with as few technical difficulties as possible, thanks to your usual good help.

Sincerely yours,

Frank Murray

FRANK MURRAY
Secretary of State

FM:wbj

"SAFE DRIVERS MAKE SAFE HIGHWAYS"

Proposed Constitution

Number of Electors Voting .....

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of Cascade

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in

.....County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this.....day of June, 1972.

.....
.....
.....
County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the.....day of.....1972, at the hour of .....M.

.....
Secretary of State.

By..... Deputy

STATE OF MONTANA }
County of..... } ss.

I, ..., County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this.....day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

.....
County Clerk and Clerk of said Board of County Canvassers of.....
County, State of Montana.

Ratification or Rejection of the Proposed Constitution	Precinct 1	Precinct 2	Precinct 3	Precinct 4	Precinct 5	Precinct 6	Precinct 7	Precinct 8	Precinct 9	Precinct 10	Precinct 11	Precinct 12	Precinct 13
1.													
R THE PROPOSED CONSTITUTION.													
AINST THE PROPOSED CONSTITUTION.													
2.													
FOR A UNICAMERAL (1 HOUSE) LEGISLATURE.													
FOR A BICAMERAL (2 HOUSES) LEGISLATURE.													
3.													
FOR ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.													
AGAINST ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.													
4.													
FOR THE DEATH PENALTY.													
AGAINST THE DEATH PENALTY.													

The STATE of Montana ex rel. William F. CASHMORE, M.D., and Stanley C. Burger, Relator,

v.

Forrest H. ANDERSON, as Governor of the State of Montana, Respondent.

No. 12309.

Supreme Court of Montana.

Submitted July 17, 1972.

Decided Aug. 18, 1972.

Rehearings Denied Sept. 25, 1972.

Original proceeding seeking a judicial determination as to whether proposed 1972 Montana Constitution was approved and adopted by the electors at special election of June 6, 1972. The Supreme Court, Haswell, J., held that the phrase "approval by a majority of the electors voting at the election," as used in eighth section of Article XIX of the Montana Constitution relating to constitutional revisions, alterations or amendments, meant approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of proposed 1972 Montana Constitution; the phrase does not refer to or include those electors who failed to express an opinion by a vote on that particular issue.

Judgment accordingly.

James T. Harrison, C. J., and Castles, J., dissented and filed an opinion.

1. Elections ⇐213

Voting is the affirmative act of marking the ballot and depositing it in the ballot box in conformity with the election laws; neither signing the registry of voters, nor being issued a ballot, nor having one's name appear on the poll book is enough, standing alone, to constitute the act of voting.

2. Constitutional Law ⇐12

Rules of statutory construction are applicable to interpretation of the meaning of provisions in the Montana Constitution.

3. Statutes ⇐181(1)

In construing the meaning of a statute, intent of the framers, that is, the legislature, is paramount. R.C.M.1947, § 93-401-16.

4. Statutes ⇐188

In determining legislative intent, resort must first be made to the plain meaning of the words used.

5. Statutes ⇐203, 206

In construing a statute, function of court is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted nor to omit what has been inserted. R.C.M.1947, § 93-401-15.

6. Statutes ⇐205

A statute must be read and considered in its entirety and the legislative intent may not be determined from the wording of any particular section or sentence, but only from a consideration of the whole.

7. Statutes ⇐239

When a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. R.C.M.1947, § 93-401-23.

8. Elections ⇐237

Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, that is, an extraordinary majority, is required in a given situation will suffice.

9. Constitutional Law ⇐14

Differences in language employed by the framers of the Montana Constitution in the different election provisions of the eighth and ninth sections of Article XIX are no evidence of a differing intent on the part of the framers, but are the result of inherent constitutional differences in the elections themselves, which in turn require different language. Const. art. 19, §§ 8, 9.

10. Constitutional Law ⇐9(3)

The phrase "approval by a majority of the electors voting at the election," as used in eighth section of Article XIX of the Montana Constitution relating to constitutional revisions, alterations or amendments, meant approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of proposed 1972 Montana Constitution; the phrase does not refer to or include those electors who failed to express an opinion by a vote on that particular issue. Const. art. 19, § 8.

See publication Words and Phrases for other judicial constructions and definitions.

11. Constitutional Law ⇐9(3)

Within the meaning of eighth section of Article XIX of the Montana Constitution, the phrase "electors voting in the election" means those persons entitled to vote who cast a properly marked ballot which is counted in the election; accordingly, electors casting blank ballots, unintelligible ballots, fouled, void, or illegal ballots are not included in the phrase since their ballots are not entitled to be counted in the election. Const. art. 19, § 8; R.C.M.1947, §§ 23-4002(4), 23-4003(5).

See publication Words and Phrases for other judicial constructions and definitions.

Paul T. Keller, argued, Paul F. Reynolds, Charles E. Petaja and P. Keith Keller, Helena, Morrow, Nash & Sedivy, Edmund P. Sedivy, argued, Bozeman, for relators.

Douglas Freeman, argued, Hardin, R. F. Hibbs, argued, Billings, for intervenor.

Forrest H. Anderson, Governor, Robert L. Woodahl, Atty. Gen., Helena, Charles C. Lovell, Asst. Atty. Gen., argued, Great Falls, William Jensen, Asst. Atty. Gen., argued, Helena, for respondent.

Eugene H. Mahoney, argued, Thompson Falls, Randall Swanberg, argued, Great Falls, James E. Murphy, argued, Kalispell, for intervenor.

John A. Layne III, argued, Helena, amicus curiae.

HASWELL, Justice.

This original proceeding seeks a judicial determination by this Court whether the proposed 1972 Montana Constitution was approved and adopted by the electors at the special election of June 6, 1972.

The essential facts are undisputed. The 1969 Montana Legislature provided for a referendum election on the calling of a constitutional convention. Article XIX, Section 8, Montana Constitution; Chapter 65, Session Laws 1969. This election was held on November 3, 1970, at which time the electors approved the calling of a constitutional convention to revise, alter, or amend the present Montana Constitution. Thereafter, the 1971 Legislature enacted the necessary enabling act for such constitutional convention. Chapter 1, Extraordinary Session Laws 1971. The delegates to the constitutional convention were duly elected at the election held on November 2, 1971. The convention convened, held hearings, debated, and eventually agreed upon a proposed 1972 Constitution to be submitted to the electors for their approval or rejection at a special election to be held in conjunction with the primary election on June 6, 1972.

The separate constitutional election ballot is herewith set forth:

" INSTRUCTIONS TO VOTERS: PLACE AN "X" IN THE BOXES WHICH EXPRESS YOUR PREFERENCES. THE FULL TEXT OF THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS IS AVAILABLE FOR INSPECTION AT YOUR POLLING PLACE. IF THE PROPOSED CONSTITUTION FAILS TO RECEIVE A MAJORITY OF THE VOTES CAST, ALTERNATE ISSUES ALSO FAIL.

OFFICIAL BALLOT

PROPOSED CONSTITUTION

PLEASE VOTE ON ALL FOUR ISSUES

1.
(Vote for One)

☐ **FOR** the proposed Constitution.

☐ **AGAINST** the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.
(Vote for One)

☐ 2A. **FOR** a unicameral (1 house) legislature.

☐ 2B. **FOR** a bicameral (2 houses) legislature.

3.
(Vote for One)

☐ 3A. **FOR** allowing the people or the legislature to authorize gambling.

☐ 3B. **AGAINST** allowing the people or the legislature to authorize gambling.

4.
(Vote for One)

☐ 4A. **FOR** the death penalty.

☐ 4B. **AGAINST** the death penalty. "

[A6360]

Following the election, the election returns were canvassed by the state canvassing board and the results of that canvass were contained in a certificate of the abstract of the votes by the Secretary of State as follows:

"FOR the proposed Constitution.	116,415
"AGAINST the proposed Constitution.	113,883
"2A. FOR a unicameral (1 house) legislature.	95,259
"2B. FOR a bicameral (2 houses) legislature.	122,425
"3A. FOR allowing the people or the legislature to authorize gambling.	139,382
"3B. AGAINST allowing the people or the legislature to authorize gambling.	88,743
"4A. FOR the death penalty.	147,023
"4B. AGAINST the death penalty.	77,733
"Total number of electors voting.	237,600"

Thereupon the Governor proclaimed the proposed 1972 Montana Constitution approved and adopted.

Relators filed the instant action as an original proceeding in this Court seeking a declaratory judgment that the proposed 1972 Montana Constitution was not ratified and adopted because it was not "approved by a majority of the electors voting at the election" as required by Article XIX, Section 8 of the present Montana Constitution. Relators also sought appropriate remedial writs ancillary thereto. The Governor was named as sole defendant in relators' action.

This Court accepted original jurisdiction, ordered the separate actions filed by the two relators consolidated, and set the consolidated action for adversary hearing. Prior to the hearing an answer was filed by the Governor, a complaint in intervention was filed by six individuals, the Attorney General intervened as an additional respondent and filed a separate answer, and answers were filed to intervenors' complaint. In all, twenty written briefs were filed by the parties, intervenors, and amici curiae. Oral argument was heard on behalf of all interested parties, including amici curiae. This case was exhaustively briefed and argued.

The ultimate issue for determination can be simply stated: Was the proposed 1972 Montana Constitution "approved by a majority of the electors voting at the election" of June 6, 1972, as required by Article XIX, Section 8, of the present Montana Constitution?

The principal contentions of relators and others who contend the proposed 1972 Montana Constitution did not receive the required majority approval can be summarized in this manner: They contend the phrase "approved by a majority of the electors voting at the election" as provided in Article XIX, Section 8, of the present Montana Constitution means a majority of the electors who cast a valid ballot on any of the four questions on the ballot; that the quoted language speaks for itself and there is nothing for this Court to construe; that the Legislature, the constitutional convention commission, and the constitutional convention itself all understood what the constitutional language meant as evidence by their official acts; and their own interpretation can not be changed now after the election has been held and the vote has become known. They also point out that the Secretary of State's certification of 237,600 as the total number of electors voting is presumptively correct by statute and as there is nothing to indicate such figure is incorrect, the presumption controls. They conclude that because the provisions of the present Constitution on determining approval or rejection of the proposed constitution are mandatory and exclusive, and because 237,600 electors voted at the election and less than half of that number (116,415) voted for the proposed 1972 Constitution, it lacked the required majority approval to take effect.

On the other hand, the basic thrust of respondents and those who contend the proposed 1972 Constitution received the required majority approval and became effective according to its provisions can be summarized in these words: They take the position that the phrase "approved by a majority of the electors voting at the election" means a majority of electors voting on approval or rejection of the proposed 1972 Constitution, and does not include the electors voting only on one or more of the alternative proposals.

Respondents argue that there is no valid basis for considering nonvotes on approval or rejection of the proposed constitution as votes against its approval, which would be the effect of including as part of the required majority those ballots containing a vote on one or more of the alternative questions which did not contain a vote "for" or "against" the proposed constitution itself. They contend the figure of 237,600 represented as the total number of electors voting in the Secretary of State's certificate is incorrect; that in fact it represents the total number of ballots issued which includes blank ballots, totally void ballots, partially void ballots, and the like; that such ballots cannot be counted in determining the total number of electors voting at the election in computing the required majority vote, but only valid ballots cast can be counted. The Attorney General alternatively argues that if the required majority means a majority of the electors voting on any of the four issues, then the evidence before this Court is insufficient to make that determination; or this Court should use the issue receiving the largest number of votes (the approval or rejection of the proposed constitution) as a basis for determining the necessary majority; or otherwise those voting in favor of the proposed constitution are denied "due process" and "equal protection of the laws" by dilution of their vote by those not voting on that question in contravention of the Fourteenth Amendment to the United States Constitution.

At the outset we need not concern ourselves with any technical legal question concerning the parties, procedure, the acceptance of original jurisdiction by this Court, and related matters. This Court has previously accepted jurisdiction of this cause, no issues have been raised by the parties on these subjects, and such matters are irrelevant to our decision here. Instead, we direct our exclusive attention to determination of the substantive issue here involved.

Neither do we consider the pleading conflict raised by the Attorney General concerning the meaning and effect of the Secretary of State's certification of the "total number of electors voting" germane. The facts speak for themselves and only legal questions remain for our determination.

Directing our attention to the substantive issue, we observe that Article XIX, Section 8, of the present Montana Constitution provides for a separate election where a constitutional convention submits a proposed new constitution to the voters for their approval or rejection. We quote Article XIX, Section 8, in full, the emphasized words being the portion thereof which we are called upon to construe:

"The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the

constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; *and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall taken effect.*" (Emphasis added).

The crux of the issue is whether the emphasized quoted language requires a majority of electors voting on approval or rejection of the proposed constitution or whether it requires some other majority.

Relators and others espousing their view contend that the quoted constitutional language is clear and we must declare what it plainly says. They argue that the use of different language in various election provisions of Sections 8 and 9 of Article XIX indicates an intent by the framers of the Montana Constitution to require something more than a simple majority to approve a proposed constitution submitted by a constitutional convention. They conclude that a majority of the total number of electors voting on any of the four questions on the ballot is required to approve the proposed 1972 Montana Constitution.

[1] We note that all parties agree that the act of voting consists of marking a valid ballot that is deposited in the ballot box and counted in the election. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P.2d 112, stand for the proposition that voting is the affirmative act of marking the ballot and depositing it in the ballot box in conformity with the election laws. Neither signing the registry of voters, nor being issued a ballot, nor having one's name appear on the poll book is enough, standing alone, to constitute the act of voting.

The issue before us is a narrow one but its solution is not simple. We recognize that there are two distinct and opposing lines of authority in other jurisdictions having the same or similar constitutional language. Earlier cases are collected in the Annotation appearing at 131 A.L.R. 1382. For examples of later cases see: State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143; In re Todd, 208 Ind. 168, 193 N.E. 865; Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299. These cases are cited merely to indicate the two conflicting lines of authority but are not relied upon or determinative of our decision in the instant case. We prefer to look to Montana statutes and cases for guidance in interpreting the meaning of our own constitutional provisions.

[2-6] The rules of statutory construction are equally applicable to interpretation of the meaning of provisions in the Montana Constitution. State ex rel. Gleason v. Stewart, 57 Mont. 397, 188 P. 904; Vaughn & Ragsdale Co. v. State Board, 109 Mont. 52, 96 P.2d 420. In construing the meaning of a statute, the intent of the framers, i. e., the legislature, is paramount. Section 93-401-16, R.C.M.1947. In determining legislative intent, resort must first be made to the plain meaning of the words used. Dunphy v. Anaconda Co., 151 Mont. 76, 438 P.2d 660, and Montana cases cited therein. In construing a statute the function of the court is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted nor to omit what has been inserted. Section 93-401-15, R.C.M.1947. A statute must be read and considered in its entirety and the legislative

intent may not be determined from the wording of any particular section or sentence, but only from a consideration of the whole. Home Bldg. & Loan v. Fulton, 141 Mont. 113, 375 P.2d 312.

Applying these rules to the quoted constitutional language, a literal construction would seem to support relators. The quoted language speaks of approval "by a majority of the electors voting at the election". But voting on what? The constitutional language does not expressly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors.

[7, 8] We are mindful of the principle that when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Section 93-401-23, R.C.M. 1947. Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, i. e., an extraordinary majority, is required in a given situation will suffice. Here no such evidence exists.

Nor, in our view, is the difference in language employed in different election provisions of Article XIX controlling, or indicative of an intent by the framers of our Constitution to require approval of a proposed constitution by an extraordinary majority. The first part of Section 8 relating to calling a constitutional convention requires a referendum vote by "a majority of those voting on the question"; Section 9 dealing with submission of individual constitutional amendments by the legislature requires referendum to the qualified electors and approval "by a majority of those voting thereon". That part of Section 8 we are called upon to construe requires submission of the proposed constitution to the electors "at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof" and approval by "a majority of the electors voting at the election".

[9] The reason for the difference in language between these three provisions is readily apparent. The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here; consequently, the phrase requiring "a majority of those voting on the question" was employed to distinguish the constitutional referendum question from other general election issues. The language of Section 9 relating to submission to the electors of individual constitutional amendments proposed by the legislature must be at a general election where up to three such amendments can be submitted at the same election, thus the language "approved by a majority of those voting thereon" is used. The language of Section 8, that we must construe.—"a majority of the electors voting at the election" was used because a separate election is required for approval or rejection of a constitution proposed by a constitutional convention and there is no need to differentiate between approval or rejection of a proposed constitution at such separate election and issues at some other election held at the same time. Accordingly, these differences in the language employed by the framers of our Constitution in the different election provisions of Sections 8 and 9 of Article XIX are no evidence of a differing intent on the part of the framers, but are the result of inherent constitutional differences in the elections themselves, which in turn requires different language.

Finally, if the framers of our Constitution had intended to require an extraordinary majority for approval of a proposed constitution submitted by an elected constitutional convention, they could easily have said so. Our Constitution contains several provisions requiring extraordinary majorities, but wherever such requirement is imposed the language is loud, clear and unambiguous. Examples of such provisions are: Changing the seat of government requiring "a vote of two-thirds of all the qualified electors of the state", (Article X, Section 3); overriding the governor's veto of a legislative act which requires that such act shall "be repassed by two-thirds of both houses" in order to become effective, (Article V, Section 40) and a specific detailed procedure therefor (Article VII, Section 12); submission by the legislature to the electors the question of calling a constitutional convention which requires "a vote of two-thirds of the members elected to each house", (Article XIX, Section 8); submission by the legislature to the electors of individual legislative proposed constitutional amendments which require a vote of "two-thirds of the members elected to each house", (Article XIX, Section 9).

We must also consider the effect of requiring an extraordinary majority in an election by counting the electors who vote on issues other than approval or rejection of the proposed constitution. In 18 counties of this state more electors voted on the gambling issue than voted on approval or rejection of the proposed constitution. If we interpret the constitutional provision in question as requiring the inclusion of these nonvoters on the proposed constitution in determining the required majority for its approval, we are in effect holding that the framers of our Constitution intended to give such abstainers the status of electors voting against the proposed constitution. This we refuse to do in the absence of a clear and unmistakable requirement of an extraordinary majority vote.

Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including Tinkel v. Griffin, 26 Mont. 426, 431, 68 P. 859. There the Court said:

> "The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, *and not a majority* of all of the electors of the county, or *of those who vote upon any other issue*, at the same or some other time." (Emphasis added).

The philosophy of our Constitution was further explained in this language from *Tinkel*:

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.
>
> "In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who

are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County Fiscal Court v. Trimble, Ky., 47 S.W. 773, 42 L.R.A. 738.)"

This Court reaffirmed the rule of *Tinkel* in Morse v. Granite County, 44 Mont. 78, 119 P. 286.

We consider the constitutional philosophy expressed therein concerning the Montana Constitution as valid today as it was when originally expressed three generations ago. We extend that constitutional philosophy to the instant case involving Article XIX, Section 8, and the multiple issue election here involved. Here, we are simply not satisfied that the framers of our Constitution intended to require more than a simple majority vote on approval of the proposed constitution.

[10] Accordingly, we hold that "approval by a majority of the electors voting at the election" as used in Article XIX, Section 8, of the Montana Constitution means approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of the proposed 1972 Montana Constitution. We hold that it does not refer to or include those electors who failed to express an opinion by a vote on that issue. The Secretary of State's certificate shows 116,415 votes in favor of the proposed constitution and 113,883 votes against the proposed constitution and no one contends these figures are incorrect. As these figures carry a presumption of correctness by statute, section 93-1301-7(15), R.C.M.1947, and as there is nothing to indicate otherwise, we hold that the proposed 1972 Montana Constitution was approved by the required majority and the Governor's proclamation thereof was correct.

Even under relators' interpretation of the constitutional requirement in question which we expressly reject, relators still cannot prevail. Relators would require an extraordinary majority to approve the proposed 1972 Montana Constitution, i. e., a majority of the total number of electors voting at the special constitutional election on any issue. The Secretary of State's certificate of the abstract of votes as determined by the state canvassing board shows "Total number of electors voting. 237,600" which relators contend must be accepted as correct by statute. This figure is clearly incorrect even under relators' interpretation of Article XIX, Section 8.

The Secretary of State by letter dated June 2, 1972, instructed the county clerks and recorders of each county to "enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election". The affidavit of the members of the state canvassing board indicates that the phrase " 'Total number of electors voting', as used in said canvass and certificate, refers to the total number of electors appearing at the polls and receiving ballots, plus the number of electors receiving and returning absentee ballots." The affidavit of the Secretary of State is to the same effect.

[11] An "elector" is a person possessing the legal qualifications that entitle him to vote. State ex rel. Lang v. Furnish, 48 Mont. 28, 134 P. 297. The word "voting" means the affirmative act of marking one's ballot properly and depositing it in the ballot box in conformity with the election laws. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P. 2d 112. Thus "electors voting in the election" within the meaning of Article XIX, Section 8, of the Montana Constitution means those persons entitled to vote who

cast a properly marked ballot which is counted in the election. Electors casting blank ballots, unintelligible ballots, fouled, void, or illegal ballots are not included as "electors voting in the election" because their ballots are not entitled to be counted in the election. See section 23–4002(4) and section 23–4003(5), R.C.M.1947; Peterson v. Billings, 109 Mont. 390, 96 P.2d 922; Heyfron v. Mahoney, 9 Mont. 497, 24 P. 93. Thus, it is not the total number of electors appearing at the polls and receiving ballots as listed in the poll books that constitutes the total number of "electors voting in the election", but the total number of electors casting properly marked ballots that are counted in the election. Accordingly, the figure of 237,600 labeled "total number of electors voting at the election" on the Secretary of State's certificate is demonstrably incorrect, and the disputable statutory presumption of correctness of such figure (Section 93–1301–7 (15)) must yield to the facts.

What then, under relators' interpretation of Article XIX, Section 8, is the correct figure on the total number of electors voting at the election? We can make that determination on the materials before us. If we take the total number of electors who cast ballots that were counted on the issue receiving the largest total vote, this should approximate the total number of electors voting in the election. On a statewide basis, the issue of approval or rejection of the proposed constitution received the highest total vote, 116,415 "for" and 113,883 "against", or a total vote of 230,298.

However, the Secretary of State's printed report of the official canvass, county by county, discloses that the electors in 18 of Montana's 56 counties cast a higher total vote on the gambling issue than on the issue of approval or rejection of the proposed constitution. In those 18 counties 290 more electors cast valid votes that were counted on the gambling issue than upon the issue of the proposed constitution; no other issue on the ballot in the special constitutional election received more total votes cast and counted in any county, with this exception. These 290 electors must be added to the statewide total of electors voting on approval or rejection of the proposed constitution (230,298) in order to get the total number of electors voting in the election, 230,588. As more than one-half of this 230,588 figure voted "for" the proposed constitution (116,415), "a majority of the electors voting at the election" voted for the proposed 1972 Montana Constitution, even under relators' interpretation of Article XIX, Section 8, of Montana's present Constitution.

The other issues raised not being germane to our decision herein they need not be discussed nor determined in this opinion.

JOHN C. HARRISON and DALY, JJ., concur.

JAMES T. HARRISON, Chief Justice, and CASTLES, Justice (dissenting):

We dissent.

The majority opinion states "The crux of the issue is whether the emphasized quoted language requires a majority of electors voting on approval or rejection of the proposed constitution or whether it requires some other majority." We would hold that the quoted language "a majority of the electors voting at the election", means just what it says. The majority opinion goes on to say "There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors."

The majority opinion then goes on to say the language is not ambiguous but is clear,

and that the reason for the difference in language between the three provisions in Article XIX, Sections 8 and 9 of the Montana Constitution is "readily apparent".

This is the fourth case to be before this Court involving the effort to amend, revise, or alter the Constitution of this state. The interpretation and language of each of the previous three cases was consistent. But now, we depart from that consistency. The three previous are: 42nd Leg. Assembly v. Lennon, 156 Mont. 416, 427, 431, 481 P.2d 330; Mahoney v. Murray, Mont., 496 P.2d 1120; State ex rel. Kvaalen v. Graybill, Mont., 496 P.2d 1127.

In *Lennon*, Mr. Justice Haswell had this to say:

"At issue is whether the phrase requiring that constitutional delegates be 'elected in the same manner' as members of the house of representatives appearing in Article XIX, section 8 of the Constitution refers only to constitutional requirements for the election of state representatives, or whether it encompasses both constitutional and statutory requirements for election of state representatives. We hold that the phrase 'elected in the same manner' means exactly what it plainly says—that constitutional delegates are required to be elected by the same election procedures applicable to election of members of the house of representatives without limitation as to the source of such election procedures be they constitutional or statutory. Had the framers of the Constitution intended to limit this phrase to constitutional requirements only, they would hardly have used this particular language knowing that the Constitution contained only broad requirements for elections in general without specific constitutional procedures applicable to election of representatives. By their language coupled with the absence of specific constitutional procedures applicable to the election of representatives, the framers of our Constitution must have intended the requirement to apply to statutory election procedures for representatives to be subsequently enacted by the legislature and amended from time to time. We remain unimpressed with the applicability to Montana of three cited cases from other states to the contrary: Livingston v. Ogilvie, 43 Ill.2d 9, 250 N.E.2d 138; Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430; and In re Opinion of the Justices, 76 N.H. 586, 79 A. 29. These holdings are understandable under their particular state history and their particular constitutional provisions, but their application to Montana in the light of its history and constitutional provisions is entirely unwarranted."

And further:

"A further observation, albeit unsolicited, is that since the referendum uses the language 'revise, alter, or amend the constitution' it must have been contemplated that the work of the convention might be partial or total and that the individual parts might be submitted to the people. Therefore each Article might be separately submitted."

Yet here, in the majority opinion, Mr. Justice Haswell states that there is nothing to indicate the framers had in mind a multiple issue ballot. He must have forgotten what he wrote in *Lennon*. Also, he must have ignored the plain meaning of the language in Sections 8 and 9, Article XIX.

Following is our view of the law and our resolution of the problem at issue. The issue is a narrow one but the solution is difficult.

Article XIX, Section 8, states:

"The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if *a majority of those voting on the question* shall declare in favor of such convention, the legislative assembly shall at its next session provide for the call-

ing thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; 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.*" (Emphasis supplied)

Article XIX, Section 9, states:

"Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and *such as are approved by a majority of those voting thereon shall become part of the constitution.* Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election." (Emphasis supplied)

In the foregoing quoted Sections 8 and 9 of Article XIX, the italicized portions show these distinct language differences:

Section 8. In a call for a convention —those voting *on the question.*

Section 8. In approval of a revision— the electors voting *at the election.*

Section 9. In approval of amendments —those voting *thereon.*

Our constitutional provisions on voting in different types of elections have other examples of varying language used, e. g.:

Article X, Section 2, concerning the permanent seat of government—"the majority of all the votes upon said question";

Article X, Section 3, concerning a change of the seat of government—"a vote of two-thirds of all the qualified electors of the state voting on that question";

Article XII, Section 9, concerning a statewide tax rate of 2 mills—"a majority of all votes cast for and against it";

Article XIII, Section 2, concerning debt limit—"a majority of the votes cast for and against it";

Article XIII, Section 5, concerning county debt limit—"a majority of the electors thereof, voting at an election to be provided by law";

Article XVI, Section 2, concerning removal of a county seat—"a majority of the qualified electors of the county, at a general election on a proposition to remove the county seat, shall vote therefor";

Article XVI, Section 8, concerning consolidation of counties—"a majority vote of * * * electors in each county * * * expressed at a general or special election held * * *".

The basic issue before this Court should require us to determine the intent of the framers of the Montana Constitution when they adopted Section 8 of Article XIX at the constitutional convention, August 17, 1889. That section reads in part:

"* * * 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 traditional rules of construction in cases of this kind have been succinctly set forth in the classic decision Knight v. Shelton, (E.D.Ark.1905), 134 F. 423, 426, wherein the court was confronted with the construction of the constitutional provision of the Arkansas Constitution concerning amendment to its constitution. There the court summarized:

"1. There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode therein prescribed. The construction of constitutional provisions is governed by the same rules which apply to the construction of statutes. The language used is to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or ambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers. If any of the provisions are unjust, so that their enforcement will work a hardship to any class of persons, the remedy must come from the people who have adopted them. Construction can furnish no remedy under our system of government."

Under Section 8, the natural significance of the phrase "majority of the electors voting at the election" is that to determine whether the proposed constitution was adopted, you count the total number of electors voting at the election, and one-half plus one must have voted for the measure or it fails.

We shall analyze this interpretation on which, at first blush, the authorities may seem to be split, but there is something we feel reconciles any apparent variance in the cases. That point is that Montana in the recent election of June 6, 1972, treated the vote on the proposed constitution and the three matters submitted with it as a separate election from the regular primary. The fact that the constitutional election was a separate one is conclusively established by the mandatory requirement of Article XIX, Section 8, which states the ratification or rejection by the people must be by an election *"for that purpose."* This is more clearly pointed out when it is found that the poll books disclose more people voted in the regular primary than voted on the constitutional issue. Also, the facts are that there was a great variance in the number of people who voted on the other three matters referred and on the proposed constitution itself, so it would be pure conjecture to determine who voted on the constitution and who did not.

All briefs touching the point at issue here discuss two Montana cases, Tinkel v. Griffin, 26 Mont. 426, 68 P. 859 and Morse v. Granite County, 44 Mont. 78, 119 P. 286. We shall discuss these cases later after first turning our attention to other authorities.

State ex rel. Hayman v. State Election Board, (1938), 181 Okla. 622, 75 P.2d 861, 862, 864, is a case in which a constitutional amendment was submitted to the voters, and the constitution of Oklahoma provided, in part:

> "If a majority of all the electors voting at such election shall vote in favor of any amendment thereto, it shall thereby become a part of the Constitution."

Oklahoma also has a statute which makes every precinct election board return to the county election board the total number of electors voting at the election so the state election board could certify the total number of ballots cast at the particular election. The same statute requires the county election boards to record the number of ballots spoiled or not voted, all of which is reported to the state election board. The proposed amendment received an affirmative vote of 379,405, and a negative vote of 219,996. The total votes cast as shown by the certificate was 767,745 votes, and the election board determined that the amendment did not pass. An action was brought, and the Oklahoma Supreme Court held that the election board was correct. The Supreme Court refused to issue the writ to change what the election board had reported, and among other things made the following observation:

> "Under this suggested method, no elector would be considered who did not vote on the office or measure receiving the highest vote, thereby eliminating many voters who, in the instant case, voted only State, county or precinct ballots. *The inaccuracy and fallibility of this method are conspicuously apparent.* They assert that this number should arbitrarily be considered as representing the number of 'electors voting at such election.' This is predicated upon a presumption which is significantly contrary to the actual and admitted facts as presented in this case. By this method every voter appearing at the polls who did not see fit to cast a vote for presidential electors, but who may have voted for every other State officer or county or precinct officer, or on the submitted amendment itself, is eliminated from consideration as an 'elector voting at such election.' This is in direct discord with the theory conceded by all parties to this proceeding that every voter appearing at the polls and casting a vote for or against any candidate or measure submitted is to be considered in determining the total number of 'electors voting at such election.'" (Emphasis supplied).

In People v. Stevenson, (1917), 281 Ill. 17, 117 N.E. 747, 749, a constitutional amendment had been submitted to the voters by the legislature. The canvassing board returned that 1,343,381 male electors voted at the election; 656,782 voted for the proposed amendment, and 295,782 voted against it. The canvassing board then determined the highest number of votes cast for the members of the legislative assembly, and since the vote on the constitutional amendment was more than half of the vote for the members of the assembly, as figured by their formula, the canvassing board determined that the amendment had been adopted. The trial court reviewed the decision of the canvassing board and determined that the amendment had not been adopted. In affirming this decision, the appellate court discussed the 1818 Constitution of Illinois and the 1848 Constitution of Illinois. The decision was given under Section 1, Article 14, of the Constitution of 1870, which provided that "if a majority voting at the election" voted for the amendment, it was carried. The Court made the following observations:

> "It seems to us that the people who read and voted on the adoption of the Consti-

tution would not have understood it to mean that an election at which a constitutional amendment was voted on, whether it was adopted or rejected, was to be determined by the vote of those, only, who voted for members of the General Assembly. A more reasonable understanding, requiring no construction or conjecture, would seem to be that the amendment must receive a majority of the votes cast at the election.

"* * *

"The intention to which force is given in construing constitutional provisions is that which is embodied and expressed in the language of the provisions.

"As a Constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding.

"The language and words of a Constitution, unless they be technical words and phrases, will be given effect according to their usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention. 6 R.C.L. 52; Law v. People, 87 Ill. 385; Hills v. City of Chicago, 60 Ill. 86."

The Wyoming Supreme Court in State ex rel. Blair v. Brooks, (1909), 17 Wyo. 344, 99 P. 874, considered a vote on a constitutional amendment. The Wyoming Constitution, in Article 20, Section 1, requires that an amendment receive a majority of the electors. It appeared that 37,561 votes were cast at an election on a constitutional amendment and 12,160 voted in favor of the amendment, and 1,363 voted against the amendment. The Court observed that the cases are in conflict, but that the language used in the Wyoming Constitution referred to the electors of the state so that the matter must carry by more than a majority of those voting on the proposition, and it must be a majority of those who showed themselves to be electors.

In Green v. State Board of Canvassers, (1896), 5 Idaho 130, 47 P. 259, 260, the Supreme Court of Idaho had before it a constitutional amendment which was voted upon by the electorate of Idaho to give women suffrage; 12,126 voted for and 6,282 voted against. The board of canvassers reported the amendment as not being adopted and an action ensued. The Idaho State Constitution contains a provision that amendments are approved "if a majority of the electors shall ratify the same". Idaho also has in Article 20, Section 3, a provision similar to ours, "if a majority of all the electors voting at said election shall have voted for a convention * * *." The Idaho Court made a great distinction between the meaning of the two provisions and made the following observation which is important here because of the similarity of the language construed to that to be construed in the instant case:

"If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise, are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and

provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words 'majority of the electors,' in section 1, should be construed to mean the same as the words 'majority of all the electors voting at such election,' in section 3. Even the authorities cited by counsel do not go to such an extent to sustain such a conclusion."

The reasoning and construction of the Idaho Court is proper and logical. It is a maxim of statutory construction, no less applicable to constitutional law, that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Section 93-401-15, R.C.M.1947. Moreover, the intent of the framers must be determined from the language used in the document. The reasoning of the Idaho Court is consisted with these principles for it gives effect to two differently worded sections "majority of the electors" and "majority of all electors voting at said election." The apparent intent of the framers to impose a stricter requirement in convening a convention than in ratifying an amendment is also considered.

In Lee v. State of Utah, (1962), 13 Utah 2d 15, 367 P.2d 861, a constitutional amendment relating to wartime and emergency powers of the legislature was submitted to the voters and thereafter was attacked on the grounds that a majority of the electors registered had not voted. The Supreme Court of Utah held that as the majority of electors voting thereon, as provided by their constitution, had voted in favor, the amendment had been ratified.

In Town of Pine Bluffs v. State Board of Equalization, (1958), 79 Wyo. 262, 333 P.2d 700, it was contended that a constitutional amendment was not properly adopted because it was not supported by a majority of the electors of the state although it got a majority of those voting on the proposition. However, it did have a majority also of those voting at that particular election. The argument was that there were more franchised voters in the state taking into consideration all the people who were registered, and as a consequence, it did not receive the support of a majority of the electors. The Court there held, citing Indiana, that a sensible construction had to be applied, and the wording "all electors of the state" are the electors voting at the particular election.

Article XIX, Section 8, of the Montana Constitution relating to the ratification of constitutional revisions after a convention, provides in part that such ratification must be "by a majority of the electors voting at the election." Section 9, relating to the ratification of amendments proposed by the legislature, provides in part that such amendments must be "approved by a majority of those voting thereon." It is this difference in language which dictates that the proposed constitution may have failed. "[V]oting thereon" as interpreted by the Idaho Court in *Green*, may be taken to mean a count of ayes and nays. "[V]oting at the election" must mean something different and more; that is, all those who cast ballots whether ayes, or nays, on any one of the four issues submitted.

In fact, in Stoliker v. White (1960), 359 Mich. 65, 101 N.W.2d 299, 300, 304, the Court based its decision on such a distinction:

"The question before us is this: Does the Constitution require a different vote for the call of a constitutional convention than it requires for the adoption of an amendment to the Constitution?

"* * *

"What the Constitution actually says is that the adoption of a constitutional amendment requires *a majority of the*

electors 'voting thereon,' whereas a call for a constitutional convention requires a *'a majority of such electors voting at such election.'*

"* * *

"In short, we are now asked to hold that the people did not clearly understand what they were thus doing. We are asked to hold that, despite the 1899 opinion of the Attorney General upon the very issue here presented, despite the unsuccessful legislative attempt to overcome it immediately thereafter, despite the ruling of the Board of State Canvassers that the 1904 proposition had failed to carry for lack of the necessary majority, and despite the re-enactment in the new Constitution of the very language over which all of this turmoil had raged, the people did not really understand the clear meaning of the words they were using, once again, in their new Constitution. (Constitution of 1850, article 20, § 2: '* * * in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention * * *.' Constitution of 1908, article 17, § 4: '* * * In case a majority of such electors voting at such election shall decide in favor of a convention * * *.') We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of our people is not so meager. Their distinguished leaders who framed the Constitution were not so inept, so thoughtless, so blind to the issues of the day. From the language used it is clear that they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention, and our holding is that they did so distinguish.

"We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has a direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon. Such is not only the clear phrasing of the Constitution but the highest court in the State had unanimously so ruled with respect thereto. We have no way of knowing how many of the 900,000 electors who failed to vote on the issue would have voted in the affirmative thereon, had they voted, or how many who failed to vote did so because of reliance upon the practical effect of their failure to vote. Obviously we cannot say that the proposition carried nor can we command the Board of State Canvassers, as plaintiff wishes, 'to certify that the revision question carried.' "

There are two Montana cases construing the election provisions of the current Constitution concerning voting on bond elections. In Tinkel v. Griffin, (1902), 26 Mont. 426, 431, 68 P. 859, the Supreme Court had before it a vote in Flathead County for the building of a new county courthouse and jail. The county commissioners had regularly submitted to the voters the matter of the loan. That election was held under Article XIII, Section 5, of the Constitution which contains the following language:

"* * * No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

This language is somewhat different than the language in Sections 8 and 9, Article

XIX, of the Constitution. The question arose as to what constituted a majority of the electors of the county voting. The Court pointed out that the election could have been held by itself or at any time. As a consequence, the majority of the electors voting at the election to be provided by law would be only those who voted on the bonds themselves.

The Supreme Court treated the election on bonding the county as a special election, although it was held at the same time as the general election. Thus there were two elections the same day. The Court in *Tinkel* said this:

"It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of section 5, art. 13, of the constitution.

"It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at *an election to be provided by law*.

"As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., 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. If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted. It was none the less a special election, within the meaning of the law, though in this particular instance it was held, for convenience, on the day fixed for a general election."

The Court felt that only those who voted on the bond issue should have been counted in determining whether a majority voted for or against the bonds. We have no argument with that philosophy. *The same argument is applicable to the case at bar because the total number of votes for the proposed constitution may have been less than a majority of those who voted on that separate issue.*

Tinkel was followed by Morse v. Granite County, (1911), 44 Mont. 78, 95, 119 P. 286. There, the county commissioners called an election to submit to the voters the matter of borrowing $50,000 to build a courthouse. The district court of Granite County ruled inter alia that not sufficient voters had voted in favor of the bond and held the bond issue void and ordered an injunction to issue. The Court cited *Tinkel* with approval:

" 'The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression "majority of the electors thereof voting at an election," etc., 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.' "

The Court then went on to say that the laws and the Constitution should be so inter-

preted as to become useful. A majority of the electors who voted at the election on June 6, 1972, may not have voted *for* the proposed constitution, the same as the Court held in the two Montana cases just cited.

We would find then that "positive assent" is the same as "a majority of the electors voting at the election". This positive assent is referred to by many writers and courts as an extraordinary majority.

The question in the instant case is a majority of what group? Clearly, that of "electors voting at the election" is required. What that means under the facts here is the problem.

As related heretofore, the relators' position is simply that the Secretary of State's certified number voting is 237,600 and that answers the question.

But does it?

The respondent says simply that the group "voting at the election" is confined to those voting on issue # 1, or as he puts it the "main issue" and that answers the question.

But does it?

We should then attempt the analyze the figure certified by the Secretary of State. The Secretary of State recited that he had computed and determined the votes from the abstracts transmitted to him by the county clerk and recorders of all fifty-six counties. Those abstracts were produced and furnished according to the following instructions dated June 2, 1972:

"TO ALL COUNTY CLERK AND RECORDERS:

"I have today mailed to you, under separate cover, *abstract books for reporting the vote cast in your county for* (1) state, national and legislative partisan offices, (2) non partisan judicial offices and (3) *the separate election for ratification or rejection of the proposed constitution.*

"Two copies of each of the books are being sent to you. Some counties will receive a set of state at large, national and legislative books for two different legislative districts. The district numbers are entered on the cover of the book. Upon completion *retain one of each for your files,* and return the second copy to this office. The State canvass has been set to begin June 15, 1972, so the abstracts should be sent in time to reach this office by that date.

"In preparing and sending the abstracts:

"(1) Check all totals against precinct entries.

"(2) See that the certificates on the face of the books are properly signed and sealed.

"(3) Please enter the *total number of votes cast taken from your poll book* in the space provided on the front cover of the partisan abstract book.

"(4) It is very important that you enter the *total number of electors who are listed on the poll books* for the separate election on the proposed constitution on the front of the abstract book for that election. Please check this figure carefully for accuracy.

"(5) *Please be sure to use the mailing envelope which is enclosed with the abstract books,* and make the transmittal by *certified mail.* (Sections 19–122 and 23–4015, R.C.M.1947).

"I look forward to a state canvass with as few technical difficulties as possible, thanks to your usual good help.

"Sincerely yours,

"S/ Frank Murray
"FRANK MURRAY
"Secretary of State"

A form consisting of two pages was furnished with the foregoing instruction letter, as follows:

Proposed Constitution

Number of Electors Voting .....

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of Cascade

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in

..... County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this..... day of June, 1972.

.....
.....
.....

County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the.....day of .....1972, at the hour of .....M.

.....
Secretary of State.

By..... Deputy

STATE OF MONTANA }
County of..... } ss.

I, ..., County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this.....day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

.....
County Clerk and Clerk of said Board of County Canvassers of.....
County, State of Montana.

[A6358]

	Ratification or Rejection of the Proposed Constitution	Precinct 1	Precinct 2	Precinct 3	Precinct 4	Precinct 5	Precinct 6	Precinct 7	Precinct 8	Precinct 9	Precinct 10	Precinct 11	Precinct 12	Precinct 13
1	1.													
2	FOR THE PROPOSED CONSTITUTION.													
3	AGAINST THE PROPOSED CONSTITUTION.													
4														
5	2.													
6	2A. FOR A UNICAMERAL (1 HOUSE) LEGISLATURE.													
7	2B. FOR A BICAMERAL (2 HOUSES) LEGISLATURE.													
8														
9														
10														
11	3A. FOR ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.													
12														
13	3B. AGAINST ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.													
14														
15	4.													
16	4A. FOR THE DEATH PENALTY.													
17	4B. AGAINST THE DEATH PENALTY.													
18														
19														
20														
21														
22														
23														
24														
25														
26														
27														
28														
29														
30														

[A6359]

From the Secretary of State's certificate of canvass it is obvious that some electors did not vote for or against all of the issues on the ballot. A total of 230,298 electors voted on the first issue, 217,684 electors voted on the second issue, 228,125 electors voted on the third issue, and 224,756 electors voted on the fourth issue. The total number of electors voting was certified as 237,600. In a compilation of votes by counties prepared by the Secretary of State from the abstracts, on issue #3 there were 18 counties which had more votes than on issue #1, by a total of 290 votes. This fact, standing alone, demonstrates conclusively that electors voted on the ballot (thus at the election) but did not all vote on issue #1. But of the 7,302 votes difference between the number voting on issue #1 and the total number certified as voting at the election, it is impossible on the record before us to determine how many of that number are actual votes cast or just ballots issued. In other words, does 237,600 represent a net voting figure or a gross figure of those receiving ballots?

Section 23-4002(4), R.C.M.1947, provides:

"A ballot which is not endorsed by the official stamp is void and shall not be counted. A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If a part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

It is clear that the "number voting" should be the net figure. Further proof of this statement can be found by examining the voting process under our statutes. Since the general election laws are to be followed, sections 23-3601 through 23-3618, R.C.M.1947, set the procedure for voting. The voting on the proposed constitution was treated as a special election and special poll books were kept on the voting. Section 23-3610 provides that the person's name must be recorded in the poll book as he voted; provides for the keeping of records for the list of all voters who voted, and a certification by each precinct as to who voted; and provides that the clerk of elections shall keep a list of persons voting. The name of each person who votes must be entered thereon and numbered in the order voting. Such list is known as the poll book. From these poll books each county clerk and recorder should know exactly how many persons voted on the constitution. If the officials followed the law, section 23-3605 provides that unmarked ballots should be returned to the election judges. Section 23-3606 provides that a voter shall receive a new ballot for a spoiled one.

As to the counting and canvassing of the count, sections 23-4001 through 23-4019, R.C.M.1947, make the provisions. Section 23-4002 provides for a method of handling spoiled or voided ballots and for an actual tally of the number of voters who cast ballots. If the provisions of the law were followed meticulously, the number of votes counted would be all good ballots and result in a net figure.

On the other hand, we have previously set forth in full the Secretary of State's directive or instructions dated June 2, 1972. There he states: "In preparing * * * the abstracts * * * (1) Check all totals against precinct entries. * * * (4) It is very important that you enter the *total number of electors who are listed on the poll books* for the separate election on the proposed constitution on the front of the abstract book for that election. Please check this figure carefully for accuracy. * * *"

Note the underlined instructions—*electors listed.* Is that consistent with the figure required by the statutes, electors who voted a valid ballot after the tally of the poll books was adjusted?

We were assured when we assumed jurisdiction of this matter that *no factual* dispute existed. Yet, the Governor's answer admits the allegation of the petition that 237,600 electors voted at the special election and then files with his brief, through the Attorney General, an affidavit of himself, the Secretary of State, and the State Treas-

urer, constituting the state canvassing board, which asserts that the figure 237,600 was the total number receiving ballots plus absentees, thus a gross figure rather than a net figure as is seemingly admitted in the answer. This presents a fact issue as discussed before—in fact the critical, controlling fact figure.

Examining the tabulation by counties of the two separate elections held on the same day and judged, counted, and canvassed by the same election officials, it appears that in the primary election a total of 238,215 votes were cast, while in the special constitutional election 237,600 votes were cast. Out of those total votes cast, 24 counties show differences between the primary and special election totals, while, significantly, 32 counties show identical totals! Using one example, in Lewis and Clark County, the seat of the State Capitol, 13,867 votes were cast in the primary and 13,867 votes were cast in the special. Can these be possible net figures? Was not a single ballot mutilated or voided for some reason in one or the other election?

Or taking another example from Beaverhead County, the first county listed alphabetically, the total votes cast in the two separate elections is recorded as 2,832, identical in each. Yet in the partisan races for nominations to the United States Senate where two men, including incumbent Senator Metcalf, vied for the Democratic nomination and four men vied for the Republican nomination, a total of 2,391 votes was tallied. 441 voters either did not vote at all on that important race or their ballots were not properly accounted for. In that same county with nine candidates running for the nomination for governor, a total of 2,686 votes cast was tallied. 146 votes reported as voting on that important office were not accounted for but significantly 295 more voters expressed a preference here than in the senatorial race. This example demonstrates that voters do not vote on all offices or all issues, but nevertheless *do vote*, and the total number of electors voting at an election cannot be measured by a single issue or office in that particular election.

These questions pose other questions. Did the precinct and county election officials follow the election laws by adjusting or balancing their poll books with the valid ballots? Or, did they follow the Secretary of State's instructions by inserting the number of *electors listed* in their poll books? It appears beyond a doubt that some precincts and some counties did it each way! Thus the figure of 237,600 certified by the Secretary of State likely reflects a combination among counties of net and gross figures. It is a critical fact question that no analysis short of a recanvass by precinct can answer.

It is noted here that no suggestion of fraud, bad faith, irregularity or anything of that nature has been reported or urged in any of the 981 precincts in the entire state. That the election result on the proposed constitution was close is self-apparent—a difference of only 2,532 votes. The proposed constitution was approved in 12 counties and defeated in 44 counties. Would a recanvass affect the result? Who knows, without the correct figure in the formula?

The foregoing should pose a dilemma for this Court. We are aware that the briefs argue on burden of proof and presumptions of law. Each side applies these legal arguments to prove its position. But from our previous discussion it is clear that to change such a basic document as our Constitution, a clear cut will of the people expressed within the rules laid out in Article XIX, Section 8, is mandatory and should not rest on the niceties and subtleties of the rules on burden of proof and presumptions of law. We are here concerned with hard, cold, mathematical facts which can be determined. This Court has the responsibility to see that the facts are determined.

We would find that the only solution to this problem is to grant a writ of mandamus to compel a recanvass by precinct of the votes cast in the June 2, 1972 election. A canvassing board cannot evade its duties by adjourning without taking the action required by law, and mandamus lies to compel its members to reassemble and perform

their duty. A partial or incomplete canvass is viewed in the same manner as a total failure to make a canvass in the first instance, and a writ may issue to compel the board to reassemble and make a complete and accurate canvass of all the returns. This is supported by ample statutory and case law.

In this analysis the first point that must be considered is the statutory law. Sections 23-4007 and 23-4008, R.C.M.1947, state:

"23-4007. *Disposition of items by registrar.* (1) When the registrar receives the packages or envelopes, he shall file those containing the ballots voted and detached stubs and the unused ballots and keep them unopened for twelve (12) months. After twelve (12) months, if there is no contest begun in a court or no recount, he shall burn the envelopes without opening them or examining their contents.

"(2) The registrar shall file the envelopes or packages containing the precinct registers, certificates of registration, pollbooks, tally sheets, and oaths of election officers. He shall keep them unopened until the commissioners meet to canvass the returns. The commissioners shall open the envelopes or packages.

"(3) Immediately after the returns are canvassed, the registrar shall file the pollbooks, election records, and the papers delivered to the commissioners."

"23-4008. *Disposition of items in event of contest.* If there is a contest within twelve (12) months, the registrar shall keep the envelopes or packages unopened until the contest is finally determined and then destroy them. If the court has custody of the envelopes or packages as evidence, they are in the custody of the court and the registrar shall not destroy them."

There is no dispute that the issue before the Court is an election contest. Did the proposed constitution pass or fail? This contest was filed in this Court and the above cited statutes explicitly and implicitly grant the Court the authority to compel a reexamination of the original canvass in order to determine the exact number of votes, both gross and net, that were cast "for" or "against" the proposed constitution.

We recognize the argument that the time for a recount has expired. However, the legislature has provided exact instructions by which a recount may be held, and this Court readily submits to those instructions.

The legislature has provided for the retention of ballots for a period of 12 months in the event a dispute may arise as to the exact outcome of a given election. This is the case at hand, therefore, the requisite power and means exist for a recanvassing of the June 2, 1972, special election, in order to determine the exact number of electors voting "for" or "against" in that election.

A recanvass is not a new or unusual remedy. In State ex rel. Lynch v. Batani, 103 Mont. 353, 362, 62 P.2d 565, 568, we stated:

"We think what the court said in the similar case of Capper v. Anderson, 88 Kan. 385, 128 P. 207, is applicable here.

"There it was recorded: 'A canvassing board, in ascertaining and registering the effect of the returns, acts in a purely ministerial capacity, and is subject to control by mandamus. * * * The power to compel a canvass implies the power to compel a correct one. A ministerial duty wrongly performed is not performed at all. The correction of an erroneous computation can, of course, be compelled by a court. The mistakes here complained of are substantially of that character. They consist of treating the face of the poll books and tally sheets as indicating a result which a proper consideration of the entire document shows beyond question to be wrong. Whatever might be the rule in a situation admitting of a substantial difference of opinion, when a court can determine with certainty that the poll books and tally sheets

show a certain number of votes to have been cast and counted for a particular candidate, it can require a board of canvassers to give proper effect to that determination."

Case law from other jurisdictions supports the principle expressed in *Lynch*. The following cases stand for the single proposition that a board of canvassers can be reconvened to correctly, accurately, and truly ascertain the result of an election. State v. Mills, 132 W.Va. 580, 53 S.E.2d 416; Eaton v. County Court of Cabell County, 140 W.Va. 498, 85 S.E.2d 648; Kane v. Registrars of Voters of Fall River, 328 Mass. 511, 105 N.E.2d 212; Dotson v. Ritchie, 211 Ark. 789, 202 S.W.2d 603; Mahoney v. Board of Supervisors of Elections, 205 Md. 325, 108 A.2d 143; State v. County Court of Logan County, 145 W.Va. 581, 116 S.E.2d 125; and State v. Mercer County Court, 129 W.Va. 584, 41 S.E.2d 855. The list is endless, but the simple proposition exists that this Court has the power through the statutes heretofore cited, and the means, through the granting of a writ, to order a recanvass of the precincts of Montana to determine the total number voting at the special election on the proposed constitution.

We would order the Secretary of State to immediately take action by issuing instructions to the fifty-six county clerk and recorders in Montana to conduct a recanvass by precinct to balance the poll books with the valid ballots to determine the total number of electors voting at the special election.

In filing the foregoing dissent, we recognize the futility of it. By a three to two vote this Court is declaring a new constitution to have been adopted. We believe the majority opinion to be wrong; and therefore dissent.

We are aware that under our proposed solution a recanvass might reveal the same result; that is, that it would show a majority of those voting at the election did approve. If that were to occur, we would be satisfied.

The HOME INSURANCE COMPANY, a corporation, Plaintiff and Appellant,

v.

PINSKI BROTHERS, INC., a corporation, et al., Defendants and Respondents.

Kenneth K. KNIGHT, Counterclaimant,

v.

HOME INDEMNITY COMPANY, a corporation, Involuntary Plaintiff and Defendant to Counterclaims and Appellant.

No. 12080.

Supreme Court of Montana.

Submitted June 12, 1972.

Decided Aug. 22, 1972.

Rehearing Denied Sept. 25, 1972.

Action between an insurer and its insured involving insurer's subrogation rights and insured's right to damages for breach of insurance contract. After remand, 156 Mont. 246, 479 P.2d 274, the Eighteenth District Court, Cascade County, Paul Hatfield, J., granted summary judgment to insured, and insurer appealed. The Supreme Court, Haswell, J., held, inter alia, that wrongful acts of insurer in suing its insured under its nonexistent subrogation rights on both covered and noncovered claims and its refusal to defend action on behalf of insured constituted breaches of its obligation and duty rendering insurer liable for damages by way of attorney fees, expenses, and court costs occasioned thereby.

Affirmed and remanded.

1. Judgment ⇐185(2)

Burden of establishing absence of any issue of material fact is on party seeking summary judgment. M.R.Civ.P. rule 56(c).

2. Judgment ⇐185(2)

Where record before court discloses no genuine issue as to any material fact, burden is upon party opposing entry of summary judgment to present evidence of a material and substantial nature raising a

No. 12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

1972

THE 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.

Original Proceedings.

Counsel of Record:

For Relators:

Paul T. Keller argued, Helena, Montana.
Paul T. Keller, Paul F. Reynolds, Charles E. Petaja and P. Keith Keller, Helena, Montana.
Morrow, Nash and Sedivy, Bozeman, Montana.
Edmund P. Sedivy argued, Bozeman, Montana.

Intervenors:

Douglas Freeman argued, Hardin, Montana.
R. F. Hibbs argued, Billings, Montana.

For Respondent:

Forrest H. Anderson, Governor, Helena, Montana.
Robert L. Woodahl, Attorney General, Helena, Montana.
Charles C. Lovell, Assistant Attorney General, Great Falls, Montana, argued.
William Jensen argued, Assistant Attorney General, Helena, Montana.

Intervenors:

Eugene H. Mahoney argued, Thompson Falls, Montana.
Randall Swanberg argued, Great Falls, Montana.
James E. Murphy argued, Kalispell, Montana.

Amicus Curiae:

John A. Layne III argued, Helena, Montana.

Submitted: July 17, 1972

Decided: AUG 18 1972

Filed: AUG 18 1972

Thomas J. Kearney
Clerk

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

This original proceeding seeks a judicial determination by this Court whether the proposed 1972 Montana Constitution was approved and adopted by the electors at the special election of June 6, 1972.

The essential facts are undisputed. The 1969 Montana Legislature provided for a referendum election on the calling of a constitutional convention. Article XIX, Section 8, Montana Constitution; Chapter 65, Session Laws 1969. This election was held on November 3, 1970, at which time the electors approved the calling of a constitutional convention to revise, alter, or amend the present Montana Constitution. Thereafter, the 1971 Legislature enacted the necessary enabling act for such constitutional convention. Chapter 1, Extraordinary Session Laws 1971. The delegates to the constitutional convention were duly elected at the election held on November 2, 1971. The convention convened, held hearings, debated, and eventually agreed upon a proposed 1972 Constitution to be submitted to the electors for their approval or rejection at a special election to be held in conjunction with the primary election on June 6, 1972.

The separate constitutional election ballot is herewith set forth:

" INSTRUCTIONS TO VOTERS: PLACE AN "X" IN THE BOXES WHICH EXPRESS YOUR PREFERENCES. THE FULL TEXT OF THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS IS AVAILABLE FOR INSPECTION AT YOUR POLLING PLACE. IF THE PROPOSED CONSTITUTION FAILS TO RECEIVE A MAJORITY OF THE VOTES CAST, ALTERNATE ISSUES ALSO FAIL.

OFFICIAL BALLOT

PROPOSED CONSTITUTION

PLEASE VOTE ON ALL FOUR ISSUES

1.
(Vote for One)

☐ **FOR** the proposed Constitution.

☐ **AGAINST** the proposed Constitution.

The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2.

2.
(Vote for One)

☐ 2A. **FOR** a unicameral (1 house) legislature.

☐ 2B. **FOR** a bicameral (2 houses) legislature.

3.
(Vote for One)

☐ 3A. **FOR** allowing the people or the legislature to authorize gambling.

☐ 3B. **AGAINST** allowing the people or the legislature to authorize gambling.

4.
(Vote for One)

☐ 4A. **FOR** the death penalty.

☐ 4B. **AGAINST** the death penalty. "

Following the election, the election returns were canvassed by the state canvassing board and the results of that canvass were contained in a certificate of the abstract of the votes by the Secretary of State as follows:

"FOR the proposed Constitution.	116,415
"AGAINST the proposed Constitution.	113,883
"2A. FOR a unicameral (1 house) legislature	95,259
"2B. FOR a bicameral (2 houses) legislature	122,425
"3A. FOR allowing the people or the legislature to authorize gambling.	139,382
"3B. AGAINST allowing the people or the legislature to authorize gambling.	88,743
"4A FOR the death penalty.	147,023
"4B AGAINST the death penalty.	77,733
"Total number of electors voting.	237,600"

Thereupon the Governor proclaimed the proposed 1972 Montana Constitution approved and adopted.

Relators filed the instant action as an original proceeding in this Court seeking a declaratory judgment that the proposed 1972 Montana Constitution was not ratified and adopted because it was not "approved by a majority of the electors voting at the election" as required by Article XIX, Section 8 of the present Montana Constitution. Relators also sought appropriate remedial writs ancillary thereto. The Governor was named as sole defendant in relators' action.

This Court accepted original jurisdiction, ordered the separate actions filed by the two relators consolidated, and set the consolidated action for adversary hearing. Prior to the hearing an answer was filed by the Governor, a complaint in intervention was filed by six individuals, the Attorney General intervened as an additional respondent and filed a separate answer, and answers were filed to intervenors' complaint. In all,

twenty written briefs were filed by the parties, intervenors, and amici curiae. Oral argument was heard on behalf of all interested parties, including amici curiae. This case was exhaustively briefed and argued.

The ultimate issue for determination can be simply stated: Was the proposed 1972 Montana Constitution "approved by a majority of the electors voting at the election" of June 6, 1972, as required by Article XIX, Section 8, of the present Montana Constitution?

The principal contentions of relators and others who contend the proposed 1972 Montana Constitution did not receive the required majority approval can be summarized in this manner: They contend the phrase "approved by a majority of the electors voting at the election" as provided in Article XIX, Section 8, of the present Montana Constitution means a majority of the electors who cast a valid ballot on any of the four questions on the ballot; that the quoted language speaks for itself and there is nothing for this Court to construe; that the legislature, the constitutional convention commission, and the constitutional convention itself all understood what the constitutional language meant as evidenced by their official acts; and their own interpretation can not be changed now after the election has been held and the vote has become known. They also point out that the Secretary of State's certification of 237,600 as the total number of electors voting is presumptively correct by statute and as there is nothing to indicate such figure is incorrect, the presumption controls. They conclude that because the provisions of the present Constitution on determining approval or rejection of the proposed constitution are mandatory and exclusive, and because 237,600 electors voted at the election and less than half of that number (116,415) voted for the proposed 1972 Constitution, it lacked the required majority approval to take effect.

On the other hand, the basic thrust of respondents and those who contend the proposed 1972 Constitution received the required majority approval and became effective according to its provisions can be summarized in these words: They take the position that the phrase "approved by a majority of the electors voting at the election" means a majority of electors voting on approval or rejection of the proposed 1972 Constitution, and does not include the electors voting only on one or more of the alternative proposals.

Respondents argue that there is no valid basis for considering nonvotes on approval or rejection of the proposed constitution as votes against its approval, which would be the effect of including as part of the required majority those ballots containing a vote on one or more of the alternative questions which did not contain a vote "for" or "against" the proposed constitution itself. They contend the figure of 237,600 represented as the total number of electors voting in the Secretary of State's certificate is incorrect; that in fact it represents the total number of ballots issued which includes blank ballots, totally void ballots, partially void ballots, and the like; that such ballots cannot be counted in determining the total number of electors voting at the election in computing the required majority vote, but only valid ballots cast can be counted. The Attorney General alternatively argues that if the required majority means a majority of the electors voting on any of the four issues, then the evidence before this Court is insufficient to make that determination; or this Court should use the issue receiving the largest number of votes (the approval or rejection of the proposed constitution) as a basis for determining the necessary majority; or otherwise those voting in favor of the proposed constitution are denied "due process" and "equal protection of the laws" by dilution

of their vote by those not voting on that question in contravention of the Fourteenth Amendment to the United States Constitution.

At the outset we need not concern ourselves with any technical legal question concerning the parties, procedure, the acceptance of original jurisdiction by this Court, and related matters. This Court has previously accepted jurisdiction of this cause, no issues have been raised by the parties on these subjects, and such matters are irrelevant to our decision here. Instead, we direct our exclusive attention to determination of the substantive issue here involved.

Neither do we consider the pleading conflict raised by the Attorney General concerning the meaning and effect of the Secretary of State's certification of the "total number of electors voting" germane. The facts speak for themselves and only legal questions remain for our determination.

Directing our attention to the substantive issue, we observe that Article XIX, Section 8, of the present Montana Constitution provides for a separate election where a constitutional convention submits a proposed new constitution to the voters for their approval or rejection. We quote Article XIX, Section 8, in full, the underlined words being the portion thereof which we are called upon to construe:

> "The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding,

> the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; 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." (Emphasis added).

The crux of the issue is whether the underlined quoted language requires a majority of electors voting on approval or rejection of the proposed constitution or whether it requires some other majority.

Relators and others espousing their view contend that the quoted constitutional language is clear and we must declare what it plainly says. They argue that the use of different language in various election provisions of Sections 8 and 9 of Article XIX indicates an intent by the framers of the Montana Constitution to require something more than a simple majority to approve a proposed constitution submitted by a constitutional convention. They conclude that a majority of the total number of electors voting on any of the four questions on the ballot is required to approve the proposed 1972 Montana Constitution.

We note that all parties agree that the act of voting consists of marking a valid ballot that is deposited in the ballot box and counted in the election. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P.2d 112, stand for the proposition that voting is the affirmative act of marking the ballot and depositing it in the ballot box in conformity with the election laws. Neither signing the registry of voters, nor being issued a ballot, nor having one's name appear on the poll book is enough, standing alone, to constitute the act of voting.

The issue before us is a narrow one but its solution is not simple. We recognize that there are two distinct and opposing lines of authority in other jurisdictions having the same or similar constitutional language. Earlier cases are collected in the Annotation appearing at 131 A.L.R. 1382. For examples of later cases see: State ex rel. Witt v. State Canvassing Board, 78 N.M. 682, 437 P.2d 143; In re Todd, 208 Ind. 168, 193 N.E. 865; Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299. These cases are cited merely to indicate the two conflicting lines of authority but are not relied upon or determinative of our decision in the instant case. We prefer to look to Montana statutes and cases for guidance in interpreting the meaning of our own constitutional provisions.

The rules of statutory construction are equally applicable to interpretation of the meaning of provisions in the Montana Constitution. State ex rel. Gleason v. Stewart, 57 Mont. 397, 188 P. 904; Vaughn & Ragsdale Co.v. State Board, 109 Mont. 52, 96 P.2d 420. In construing the meaning of a statute, the intent of the framers, i.e., the legislature, is paramount. Section 93-401-16, R.C.M. 1947. In determining legislative intent, resort must first be made to the plain meaning of the words used. Dunphy v. Anaconda Co., 151 Mont.76, 438 P.2d 660, and Montana cases cited therein. In construing a statute, the function of the court is simply to ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted nor to omit what has been inserted. Section 93-401-15, R.C.M. 1947. A statute must be read and considered in its entirety and the legislative intent may not be determined from the wording of any particular section or sentence, but only from a consideration of the whole. Home Bldg. & Loan v. Bd. of Equalization, 141 Mont. 113, 375 P.2d 312.

Applying these rules to the quoted constitutional language, a literal construction would seem to support relators. The quoted language speaks of approval "by a majority of electors voting at the election". But voting on what? The constitutional language does not expressly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors.

We are mindful of the principle that when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Section 93-401-23, R.C.M. 1947. Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, i.e., an extraordinary majority, is required in a given situation will suffice. Here no such evidence exists.

Nor, in our view, is the difference in language employed in different election provisions of Article XIX controlling, or indicative of an intent by the framers of our Constitution to require approval of a proposed constitution by an extraordinary majority. The first part of Section 8 relating to calling a constitutional convention requires a referendum vote by "a majority of those voting on the question"; Section 9 dealing with submission of individual constitutional amendments by the legislature

requires referendum to the qualified electors and approval "by a majority of those voting thereon". That part of Section 8 we are called upon to construe requires submission of the proposed constitution to the electors "at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof" and approval by "a majority of the electors voting at the election".

The reason for the difference in language between these three provisions is readily apparent. The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here; consequently, the phrase requiring "a majority of those voting on the question" was employed to distinguish the constitutional referendum question from other general election issues. The language of Section 9 relating to submission to the electors of individual constitutional amendments proposed by the legislature must be at a general election where up to three such amendments can be submitted at the same election, thus the language "approved by a majority of those voting thereon" is used. The language of Section 8, that we must construe --- "a majority of the electors voting at the election" was used because a separate election is required for approval or rejection of a constitution proposed by a constitutional convention and there is no need to differentiate between approval or rejection of a proposed constitution at such separate election and issues at some other election held at the same time. Accordingly, these differences in the language employed by the framers of our Constitution in the different election provisions of Sections 8 and 9 of Article XIX are no evidence of a differing intent on the part of the framers, but are the result of inherent constitutional differences in the elections themselves, which in turn requires different language.

Finally, if the framers of our Constitution had intended to require an extraordinary majority for approval of a proposed constitution submitted by an elected constitutional convention, they could easily have said so. Our Constitution contains several provisions requiring extraordinary majorities, but wherever such requirement is imposed the language is loud, clear and unambiguous. Examples of such provisions are: Changing the seat of government requiring "a vote of two-thirds of all the qualified electors of the state", (Article X, Section 3); overriding the governor's veto of a legislative act which requires that such act shall "be repassed by two-thirds of both houses" in order to become effective, (Article V, Section 40) and a specific detailed procedure therefor (Article VII, Section 12); submission by the legislature to the electors the question of calling a constitutional convention which requires "a vote of two-thirds of the members elected to each house", (Article XIX, Section 8); submission by the legislature to the electors of individual legislative proposed constitutional amendments which require a vote of "two-thirds of the members elected to each house", (Article XIX, Section 9).

We must also consider the effect of requiring an extraordinary majority in an election by counting the electors who vote on issues other than approval or rejection of the proposed constitution. In 18 counties of this state more electors voted on the gambling issue than voted on approval or rejection of the proposed constitution. If we interpret the constitutional provision in question as requiring the inclusion of these nonvoters on the proposed constitution in determining the required majority for its approval, we are in effect holding that the framers of our Constitution intended to give such abstainers the status of electors voting against the proposed constitution. This we refuse to do in the absence of a clear and unmistakable requirement of an extraordinary majority vote.

Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including Tinkel v. Griffin, 26 Mont. 426, 431, 68 P. 859. There the Court said:

> "The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, and not a majority of all of the electors of the county, or of those who vote upon any other issue, at the same or some other time." (Emphasis added).

The philosophy of our Constitution was further explained in this language from Tinkel:

> "It is the theory of our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.
>
> "In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (Montgomery County Fiscal Court v. Trimble, 47 S.W. 773, 42 L.R.A. 738.)"

This Court reaffirmed the rule of Tinkel in Morse v. Granite County, 44 Mont. 78, 119 P. 286.

We consider the constitutional philosophy expressed therein concerning the Montana Constitution as valid today as it was when originally expressed three generations ago. We extend that constitutional philosophy to the instant case involving Article XIX, Section 8, and/multiple/election here involved. Here, we are simply not satisfied that the framers of our Constitution intended to require more than a simple majority vote on approval of the proposed constitution.

Accordingly, we hold that "approval by a majority of electors voting at the election" as used in Article XIX, Section 8, of the Montana Constitution means approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of the proposed 1972 Montana Constitution. We hold that it does not refer to or include those electors who failed to express an opinion by a vote on that issue. The Secretary of State's certificate shows 116,415 votes in favor of the proposed constitution and 113,883 votes against the proposed constitution and no one contends these figures are incorrect. As these figures carry a presumption of correctness by statute, section 93-1301-7(15), R.C.M. 1947, and as there is nothing to indicate otherwise, we hold that the proposed 1972 Montana Constitution was approved by the required majority and the Governor's proclamation thereof was correct.

Even under relators' interpretation of the constitutional requirement in question which we expressly reject, relators still cannot prevail. Relators would require an extraordinary majority to approve the proposed 1972 Montana Constitution, i.e., a majority of the total number of electors voting at the special constitutional election on any issue. The Secretary of State's certificate of the abstract of votes as determined by the state canvassing board shows "Total number of electors voting. 237,600" which relators contend must be accepted as correct by statute.

This figure is clearly incorrect even under relators' interpretation of Article XIX, Section 8.

The Secretary of State by letter dated June 2, 1972, instructed the county clerks and recorders of each county to "enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election". The affidavit of the members of the state canvassing board indicates that the phrase "'Total number of electors voting', as used in said canvass and certificate, refers to the total number of electors appearing at the polls and receiving ballots, plus the number of electors receiving and returning absentee ballots." The affidavit of the Secretary of State is to the same effect.

An "elector" is a person possessing the legal qualifications that entitle him to vote. State ex rel. Lang v. Furnish, 48 Mont. 28, 134 P. 297. The word "voting" means the affirmative act of marking one's ballot properly and depositing it in the ballot box in conformity with the election laws. Goodell v. Judith Basin County, 70 Mont. 222, 224 P. 1110; Maddox v. Board of State Canvassers, 116 Mont. 217, 149 P.2d 112. Thus "electors voting in the election" within the meaning of Article XIX, Section 8, of the Montana Constitution means those persons entitled to vote who cast a properly marked ballot which is counted in the election. Electors casting blank ballots, unintelligible ballots, fouled, void, or illegal ballots are not included as "electors voting in the election" because their ballots are not entitled to be counted in the election. See section 23-4002(4) and section 23-4003(5), R.C.M. 1947; Peterson v. Billings, 109 Mont. 390, 96 P.2d 922; Heyfron v. Mahoney, 9 Mont. 497, 24 P. 93. Thus, it is not the total number of electors appearing at the polls and receiving ballots as listed in the poll books that constitutes the total number of "electors voting in the election", but the

total number of electors casting properly marked ballots that are counted in the election. Accordingly, the figure of 237,600 labeled "total number of electors voting at the election" on the Secretary of State's certificate is demonstrably incorrect, and the disputable statutory presumption of correctness of such figure (Section 93-1301-7(15)) must yield to the facts.

What then, under relators' interpretation of Article XIX, Section 8, is the correct figure on the total number of electors voting at the election? We can make that determination on the materials before us. If we take the total number of electors who cast ballots that were counted on the issue receiving the largest total vote, this should approximate the total number of electors voting in the election. On a statewide basis, the issue of approval or rejection of the proposed constitution received the highest total vote, 116,415 "for" and 113,883 "against", or a total vote of 230,298.

However, the Secretary of State's printed report of the official canvass, county by county, discloses that the electors in 18 of Montana's 56 counties cast a higher total vote on the gambling issue than on the issue of approval or rejection of the proposed constitution. In those 18 counties 290 more electors cast valid votes that were counted on the gambling issue than upon the issue of the proposed constitution; no other issue on the ballot in the special constitutional election received more total votes cast and counted in any county, with this exception. These 290 electors must be added to the statewide total of electors voting on approval or rejection of the proposed constitution (230,298) in order to get the total number of electors voting in the election, 230,588. As more than one-half of this 230,588 figure voted "for" the proposed constitution (116,415),

"a majority of the electors voting at the election" voted for the proposed 1972 Montana Constitution, even under relators' interpretation of Article XIX, Section 8, of Montana's present Constitution.

The other issues raised not being germane to our decision herein they need not be discussed nor determined in this opinion.

Frank I. Haswell
Associate Justice

We Concur:

Chief Justice

John Conway Harrison

Gene B. Daly

Associate Justices.

Mr. Chief Justice James T. Harrison and Mr. Justice Wesley Castles dissenting:

We dissent.

The majority opinion states "The crux of the issue is whether the underlined quoted language requires a majority of electors voting on approval or rejection of the proposed constitution or whether it requires some other majority." We would hold that the quoted language "a majority of the electors voting at the election", means just what it says. The majority opinion goes on to say "There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself. The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional provision relating to submission of the proposed constitution to the electors."

The majority opinion then goes on to say the language is not ambiguous but is clear, and that the reason for the difference in language between the three provisions in Article XIX, Sections 8 and 9 of the Montana Constitution is "readily apparent".

This is the fourth case to be before this Court involving the effort to amend, revise, or alter the Constitution of this state. The interpretation and language of each of the previous three cases was consistent. But now, we depart from that consistency. The three previous are: 42nd Leg. Assembly v. Lennon, 156 Mont. 416, 427, 431, 481 P.2d 330; Mahoney v. Murray, _____Mont._____, 496 P.2d 1120, 29 St.Rep. 289; State ex rel. Kvaalen v. Graybill, _____Mont._____, 496 P.2d 1127, 29 St. Rep. 313.

In Lennon, Mr. Justice Haswell had this to say:

"At issue is whether the phrase requiring that constitutional delegates be 'elected in the same manner' as members of the house of representatives appearing in Article XIX, section 8 of the Constitution refers only to constitutional requirements for the election of state representatives, or whether it encompasses both constitutional and statutory requirements for election of state representatives. We hold that the phrase 'elected in the same manner' means exactly what it plainly says----that constitutional delegates are required to be elected by the same election procedures applicable to election of members of the house of representatives without limitation as to the source of such election procedures be they constitutional or statutory. Had the framers of the Constitution intended to limit this phrase to constitutional requirements only, they would hardly have used this particular language knowing that the Constitution contained only broad requirements for elections in general without specific constitutional procedures applicable to election of representatives. By their language coupled with the absence of specific constitutional procedures applicable to the election of representatives, the framers of our Constitution must have intended the requirement to apply to statutory election procedures for representatives to be subsequently enacted by the legislature and amended from time to time. We remain unimpressed with the applicability to Montana of three cited cases from other states to the contrary: Livingston v. Ogilvie, 43 Ill.2d 9, 250 N.E.2d 138; Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430; and In re Opinion of the Justices, 76 N.H. 586, 79 A. 29. These holdings are understandable under their particular state history and their particular constitutional provisions, but their application to Montana in the light of its history and constitutional provisions is entirely unwarranted."

And further:

"A further observation, albeit unsolicited, is that since the referendum uses the language 'revise, alter, or amend the constitution' it must have been contemplated that the work of the convention might be partial or total and that the individual parts might be submitted to the people. Therefore each Article might be separately submitted."

Yet here, in the majority opinion, Mr. Justice Haswell states that there is nothing to indicate the framers had in mind a multiple issue ballot. He must have forgotten what he wrote in Lennon. Also, he must have ignored the plain meaning of the language in Sections 8 and 9, Article XIX.

Following is our view of the law and our resolution of the problem at issue. The issue is a narrow one but the solution is difficult.

Article XIX, Section 8, states:

"The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; 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." (Emphasis supplied)

Article XIX, Section 9, states:

"Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election." (Emphasis supplied)

In the foregoing quoted Sections 8 and 9 of Article XIX, the underlined portions show these distinct language differences:

Section 8. In a call for a convention----those voting on the question.

Section 8. In approval of a revision----the electors voting at the election.

Section 9. In approval of amendments ----Those voting thereon.

Our constitutional provisions on voting in different types of elections have other examples of varying language used, e.g.:

Article X, Section 2, concerning the permanent seat of government----"the majority of all the votes upon said question";

Article X, Section 3, concerning a change of the seat of government ----"a vote of two-thirds of all the qualified electors of the state voting on that question";

Article XII, Section 9, concerning a statewide tax rate of 2 mills----"a majority of all votes cast for and against it";

Article XIII, Section 2, concerning debt limit ----"a majority of the votes case for and against it";

Article XIII, Section 5, concerning county debt limit ---- "a majority of the electors thereof, voting at an election to be provided by law";

Article XVI, Section 2, concerning removal of a county seat ----- "a majority of the qualified electors of the county at a general election on a proposition to remove the county seat, shall vote therefor";

Article XVI, Section 8, concerning consolidation of counties ---- "a majority vote of * * * electors in each county * * * expressed at a general or special election held * * *".

The basic issue before this Court should require us to determine the intent of the framers of the Montana Constitution when they adopted Section 8 of Article XIX at the constitutional

convention, August 17, 1889. That section reads in part:

> "* * * 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 traditional rules of construction in cases of this kind have been succinctly set forth in the classic decision Knight v. Shelton, (E.D.Ark.1905), 134 Fed. 423, 426, wherein the court was confronted with the construction of the constitutional provision of the Arkansas Constitution concerning amendment to its constitution. There the court summarized:

> "1. There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode therein prescribed. The construction of constitutional provisions is governed by the same rules which apply to the construction of statutes. The language used is to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or unambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers. If any of the provisions are unjust, so that their enforcement will work a hardship to any class of persons, the remedy must come from the people who have adopted them. Construction can furnish no remedy under our system of government."

Under Section 8, the natural significance of the phrase "majority of the electors voting at the election" is that to determine whether the proposed constitution was adopted, you count the total number of electors voting at the election, and one-half plus one must have voted for the measure or it fails.

We shall analyze this interpretation on which, at first blush, the authorities may seem to be split, but there is something we feel reconciles any apparent variance in the cases. That point is

that Montana in the recent election of June 6, 1972, treated the vote on the proposed constitution and the three matters submitted with it as a separate election from the regular primary. The fact that the constitutional election was a separate one is conclusively established by the mandatory requirement of Article XIX, Section 8, which states the ratification or rejection by the people must be by an election "for that purpose." This is more clearly pointed out when it is found that the poll books disclose more people voted in the regular primary than voted on the constitutional issue. Also, the facts are that there was a great variance in the number of people who voted on the other three matters referred and on the proposed constitution itself, so it would be pure conjecture to determine who voted on the constitution and who did not.

All briefs touching the point at issue here discuss two Montana cases, Tinkel v. Griffin, 26 Mont. 426, 68 P. 859 and Morse v. Granite County, 44 Mont. 78, 119 P. 286. We shall discuss these cases later after first turning our attention to other authorities.

State ex rel. Hayman v. State Election Board, (1938), 181 Okla. 622, 75 P.2d 861,862,864, is a case in which a constitutional amendment was submitted to the voters, and the constitution of Oklahoma provided, in part:

> "If a majority of all the electors voting at such election shall vote in favor of any amendment thereto, it shall thereby become a part of the Constitution."

Oklahoma also has a statute which makes every precinct election board return to the county election board the total number of electors voting at the election so the state election board could certify the total number of ballots cast at the particular election. The same statute requires the county election boards to record the number of ballots spoiled or not voted, all of which is reported to the state election board. The proposed amendment received a affirmative vote of 379,405, and a negative vote of 219,996. The

total votes cast as shown by the certificate was 767,745 votes, and the election board determined that the amendment did not pass. An action was brought, and the Oklahoma Supreme Court held that the election board was correct. The Supreme Court refused to issue the writ to change what the election board had reported, and among other things made the following observation:

> "Under this suggested method, no elector would be considered who did not vote on the office or measure receiving the highest vote, thereby eliminating many voters who, in the instant case, voted only State, county, or precinct ballots. The inaccuracy and fallibility of this method are conspicuously apparent. They assert that this number should arbitrarily be considered as representing the number of 'electors voting at such election.' This is predicated upon a presumption which is significantly contrary to the actual and admitted facts as presented in this case. By this method every voter appearing at the polls who did not see fit to cast a vote for presidential electors, but who may have voted for every other State officer, or county or precinct officer, or on the submitted amendment itself, is eliminated from consideration as an 'elector voting at such election.' This is in direct discord with the theory conceded by all parties to this proceeding that every voter appearing at the polls and casting a vote for or against any candidate or measure submitted is to be considered in determining the total number of 'electors voting at such election.'" (Emphasis supplied).

In People v. Stevenson, (1917), 281 Ill. 17, 117 N.E. 747, 749, a constitutional amendment had been submitted to the voters by the legislature. The canvassing board returned that 1,343,381 male electors voted at the election; 656,782 voted for the proposed amendment, and 295,782 voted against it. The canvassing board then determined the highest number of votes cast for the members of the legislative assembly, and since the vote on the constitutional amendment was more than half of the vote for the members of the assembly, as figured by their formula, the canvassing board determined that the amendment had been adopted. The trial court reviewed the decision of the canvassing board and determined that the amendment had not been adopted. In affirming this decision, the appellate court discussed the 1818 Constitution of Illinois and the 1848 Constitution of Illinois. The decision was given under Section

1, Article 14, of the Constitution of 1870, which provided that "if a majority voting at the election" voted for the amendment, it was carried. The Court made the following observations:

> "It seems to us that the people who read and voted on the adoption of the Constitution would not have understood it to mean that an election at which a constitutional amendment was voted on, whether it was adopted or rejected, was to be determined by the vote of those, only, who voted for members of the General Assembly. A more reasonable understanding, requiring no construction or conjecture, would seem to be that the amendment must receive a majority of the votes cast at the election.
>
> "* * *
>
> "The intention to which force is given in construing constitutional provisions is that which is embodied and expressed in the language of the provisions.
>
> "As a Constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding.
>
> "The language and words of a Constitution, unless they be technical words and phrases, will be given effect according to their usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention. 6 R.C.L. 52; Law v. People, 87 Ill. 385; Hills v. City of Chicago, 60 Ill.86."

The Wyoming Supreme Court in State ex rel. Blair v. Brooks, (1909), 17 Wyo. 344, 99 P. 874, considered a vote on a constitutional amendment. The Wyoming Constitution, in Article 20, Section 1, requires that an amendment receive a majority of the electors. It appeared that 37,561 votes were cast at an election on a constitutional amendment and 12,160 voted in favor of the amendment, and 1,363 voted against the amendment. The Court observed that the cases are in conflict, but that the language used in the Wyoming Constitution referred to the electors of the state so that the matter must carry by more than a majority of those voting on the proposition, and it must be a majority of those who showed themselves to be electors.

In Green v. State Board of Canvassers, (1896), 5 Ida. 130, 47 P. 259,260, the Supreme Court of Idaho had before it a constitutional amendment which was voted upon by the electorate of Idaho

to give women suffrage; 12,126 voted for and 6,282 voted against. The board of canvassers reported the amendment as not being adopted and an action ensued. The Idaho State Constitution contains a provision that amendments are approved "if a majority of the electors shall ratify the same". Idaho also has in Article 20, Section 3, a provision similar to ours, "if a majority of all the electors voting at said election shall have voted for a convention * * *." The Idaho Court made a great distinction between the meaning of the two provisions and made the following observation which is important here because of the similarity of the language construed to that to be construed in the instant case:

> "If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words 'majority of the electors,' in section 1, should be construed to mean the same as the words 'majority of all the electors voting at such election,' in section 3. Even the authorities cited by counsel do not go to such an extent to sustain such a conclusion."

The reasoning and construction of the Idaho Court is proper and logical. It is a maxim of statutory construction, no less applicable to constitutional law, that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Section 93-401-15, R.C.M. 1947. Moreover, the intent of the framers must be determined from the language used in the document. The reasoning of the Idaho Court is consistent with these principles for it gives

effect to two differently worded sections "majority of the electors" and "majority of all electors voting at said election." The apparent intent of the framers to impose a stricter requirement in convening a convention than in ratifying an amendment is also considered.

In Lee v. State of Utah, (1962), 13 Utah 2d. 15, 367 P.2d 861, a constitutional amendment relating to wartime and emergency powers of the legislature was submitted to the voters and thereafter was attacked on the grounds that a majority of the electors registered had not voted. The Supreme Court of Utah held that as the majority of electors voting thereon, as provided by their constitution, had voted in favor, the amendment had been ratified.

In Town of Pine Bluffs v. State Board of Equalization, (1958), 79 Wyo. 262, 333 P.2d 700, it was contended that a constitutional amendment was not properly adopted because it was not supported by a majority of the electors of the state although it got a majority of those voting on the proposition. However, it did have a majority also of those voting at that particular election. The argument was that there were more franchised voters in the state taking into consideration all the people who were registered, and as a consequence, it did not receive the support of a majority of the electors. The Court there held, citing Indiana, that a sensible construction had to be applied, and the wording "all electors of the state" are the electors voting at the particular election.

Article XIX, Section 8, of the Montana Constitution relating to the ratification of constitutional revisions after a convention, provides in part that such ratification must be "by a majority of the electors voting at the election." Section 9, relating to the ratification of amendments proposed by the legislature, provides in part that such amendments must be "approved by a majority of those voting thereon." It is this difference in language which dictates that the proposed constitution may have failed. "[V]oting

thereon" as interpreted by the Idaho Court in Green, may be taken to mean a count of ayes and nays. "[V]oting at the election" must mean something different and more; that is, all those who cast ballots whether ayes, or nays, on any one of the four issues submitted.

In fact, in Stoliker v. White (1960), 359 Mich. 65, 101 N.W.2d 299, 300,304, the Court based its decision on such a distinction:

> "The question before us is this: Does the Constitution require a different vote for the call of a constitutional convention than it requires for the adoption of an amendment to the Constitution?
>
> "* * *
>
> "What the Constitution actually says is that the adoption of a constitutional amendment requires a majority of the electors 'voting thereon,' whereas a call for a constitutional convention requires a 'a majority of such electors voting at such election.'
>
> "* * *
>
> "In short, we are now asked to hold that the people did not clearly understand what they were thus doing. We are asked to hold that, despite the 1899 opinion of the Attorney General upon the very issue here presented, despite the unsuccessful legislative attempt to overcome it immediately thereafter, despite the ruling of the Board of State Canvassers that the 1904 proposition had failed to carry for lack of the necessary majority, and despite the re-enactment in the new Constitution of the very language over which all of this turmoil had raged, the people did not really understand the clear meaning of the words they were using, once again, in their new Constitution. (Constitution of 1850, article 20,§2: '* * * in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention * * *.' Constitution of 1908, article 17, §4: ' * * * In case a majority of such electors voting at such election shall decide in favor of a convention * * *.') We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of our people is not so meager. Their distinguished leaders who framed the Constitution were not so inept, so thoughtless, so blind to the issues of the day. From the language used it is clear that

> they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention, and our holding is that they did so distinguish.
>
> "We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has a direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon. Such is not only the clear phrasing of the Constitution but the highest court in the State had unanimously so ruled with respect thereto. We have no way of knowing how many of the 900,000 electors who failed to vote on the issue would have voted in the affirmative thereon, had they voted, or how many who failed to vote did so because of reliance upon the practical effect of their failure to vote. Obviously we cannot say that the proposition carried nor can we command the Board of State Canvassers, as plaintiff wishes, 'to certify that the revision question carried.'"

There are two Montana cases construing the election provisions of the current Constitution concerning voting on bond elections. In Tinkel v. Griffin, (1902), 26 Mont. 426,431, 68 P. 859, the Supreme Court had before it a vote in Flathead County for the building of a new county courthouse and jail. The county commissioners had regularly submitted to the voters the matter of the loan. That election was held under Article XIII, Section 5, of the Constitution which contains the following language:

> "* * * No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

This language is somewhat different than the language in Sections 8 and 9, Article XIX, of the Constitution. The question arose as to what constituted a majority of the electors of the county voting. The Court pointed out that the election could have been held by itself or at any time. As a consequence, the majority of the electors voting at the election to be provided by law would be only those who voted on the bonds themselves.

The Supreme Court treated the election on bonding the county as a special election, although it was held at the same time as the general election. Thus there were two elections the same day. The Court in Tinkel said this:

> "It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of Section 5, Article XIII, of the Constitution.
>
> "It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at an election to be provided by law.
>
> "As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., 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. If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted. It was none the less a special election, within the meaning of the law, though in this particular instance it was held, for convenience, on the day fixed for a general election."

The Court felt that only those who voted on the bond issue should have been counted in determining whether a majority voted for or against the bonds. We have no argument with that philosophy. The same argument is applicable to the case at bar because the total number of votes for the proposed constitution may have been less than a majority of those who voted on that separate issue.

Tinkel was followed by Morse v. Granite County, (1911), 44 Mont. 78, 95, 119 P. 286. There, the county commissioners called

an election to submit to the voters the matter of borrowing $50,000 to build a courthouse. The district court of Granite County ruled inter alia that not sufficient voters had voted in favor of the bond and held the bond issue void and ordered an injunction to issue. The Court cited Tinkel with approval:

> "'The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression "majority of the electors thereof voting at an election," etc., 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.'"

The Court then went on to say that the laws and the Constitution should be so interpreted as to become useful. A majority of the electors who voted at the election on June 6, 1972, may not have voted for the proposed constitution, the same as the Court held in the two Montana cases just cited.

We would find then that "positive assent" is the same as "a majority of the electors voting at the election". This positive assent is referred to by many writers and courts as an extraordinary majority.

The question in the instant case is a majority of what group? Clearly, that of "electors voting at the election" is required. What that means under the facts here is the problem.

As related heretofore, the relators' position is simply that the Secretary of State's certified number voting is 237,600 and that answers the question.

But does it?

The respondent says simply that the group "voting at the election" is confined to those voting on issue # 1, or as he puts it the "main issue" and that answers the question.

But does it?

We should then attempt to analyze the figure certified by the Secretary of State. The Secretary of State recited that he had

Proposed Constitution

Number of Electors Voting .....

ELECTION RETURNS

ELECTION FOR THE RATIFICATION OR REJECTION OF THE PROPOSALS OF THE CONSTITUTIONAL CONVENTION, JUNE 6, 1972

For the County of Cascade

The undersigned hereby certify that the within constitutes a full, true and complete Abstract of Votes cast in

.....County, at an election held June 6, 1972, for:

Ratification or rejection of the proposals of the Constitutional Convention.

Attest our hands this.....day of June, 1972.

.....
.....
.....
} County Canvassing Board

Note: County Canvassing Board must individually sign this certificate.

FILED Office Secretary of State on the.....day of.....1972, at the hour of .....M.

.....
Secretary of State.

By.....Deputy

STATE OF MONTANA }
County of.....} ss.

I, ..., County Clerk and Ex-Officio Clerk of the Board of County Canvassers of said County, do hereby certify that the within constitutes a true, full and complete abstract of the number of votes cast in each precinct of said County, for the proposals enumerated herein.

Attest my hand and the seal of said County, hereto affixed this.....day of June, 1972.

OFFICIAL SEAL COUNTY CLERK

.....
County Clerk and Clerk of said Board of County Canvassers of.....
County, State of Montana.

	Ratification or Rejection of the Proposed Constitution	Precinct 1	Precinct 2	Precinct 3	Precinct 4	Precinct 5	Precinct 6	Precinct 7	Precinct 8	Precinct 9	Precinct 10	Precinct 11	Precinct 12	Precinct 13
1	1.													
2	FOR THE PROPOSED CONSTITUTION.													
3	AGAINST THE PROPOSED CONSTITUTION.													
4														
5	2.													
6	2A. FOR A UNICAMERAL (1 HOUSE) LEGISLATURE.													
7	2B. FOR A BICAMERAL (2 HOUSES) LEGISLATURE.													
8														
9	3.													
10														
11	3A. FOR ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.													
12														
13	3B. AGAINST ALLOWING THE PEOPLE OR THE LEGISLATURE TO AUTHORIZE GAMBLING.													
14														
15	4.													
16	4A. FOR THE DEATH PENALTY.													
17	4B. AGAINST THE DEATH PENALTY.													
18														
19														
20														
21														
22														
23														
24														
25														
26														
27														
28														
29														
30														

From the Secretary of State's certificate of canvass it is obvious that some electors did not vote for or against all of the issues on the ballot. A total of 230,298 electors voted on the first issue, 217,684 electors voted on the second issue, 228,125 electors voted on the third issue, and 224,756 electors voted on the fourth issue. The total number of electors voting was certified as 237,600. In a compilation of votes by counties prepared by the Secretary of State from the abstracts, on issue #3 there were 18 counties which had more votes than on issue #1, by a total of 290 votes. This fact, standing alone, demonstrates conclusively that electors voted on the ballot (thus at the election) but did not all vote on issue #1. But of the 7,302 votes difference between the number voting on issue #1 and the total number certified as voting at the election, it is impossible on the record before us to determine how many of that number are actual votes cast or just ballots issued. In other words, does 237,600 represent a net voting figure or a gross figure of those receiving ballots?

Section 23-4002(4), R.C.M. 1947, provides:

> "A ballot which is not endorsed by the official stamp is void and shall not be counted. A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If a part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

It is clear that the "number voting" should be the net figure. Further proof of this statement can be found by examining the voting process under our statutes. Since the general election laws are to be followed, sections 23-3601 through 23-3618, R.C.M. 1947, set the procedure for voting. The voting on the proposed constitution was treated as a special election and special poll books were kept on the voting. Section 23-3610 provides that the person's name must be recorded in the poll book as he voted; provides for the keeping of records for the list of all voters who voted, and a certification by each precinct as to who voted;

and provides that the clerk of elections shall keep a list of persons voting. The name of each person who votes must be entered thereon and numbered in the order voting. Such list is known as the poll book. From these poll books each county clerk and recorder should know exactly how many persons voted on the constitution. If the officials followed the law, section 23-3605 provides that unmarked ballots should be returned to the election judges. Section 23-3606 provides that a voter shall receive a new ballot for a spoiled one.

As to the counting and canvassing of the count, sections 23-4001 through 23-4019, R.C.M. 1947, make the provisions. Section 23-4002 provides for a method of handling spoiled or voided ballots and for an actual tally of the number of voters who cast ballots. If the provisions of the law were followed meticulously, the number of votes counted would be all good ballots and result in a net figure.

On the other hand, we have previously set forth in full the Secretary of State's directive or instructions dated June 2, 1972. There he states: "In preparing * * * the abstracts * * * (1) Check all totals against precinct entries. * * *(4) It is very important that you enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election. Please check this figure carefully for accuracy. * * *"

Note the underlined instructions----electors listed. Is that consistent with the figure required by the statutes, electors who voted a valid ballot after the tally of the poll books was adjusted?

We were assured when we assumed jurisdiction of this matter that no factual dispute existed. Yet, the Governor's answer admits the allegation of the petition that 237,600 electors voted

at the special election and then files with his brief, through the Attorney General, an affidavit of himself, the Secretary of State, and the State Treasurer, constituting the state canvassing board, which asserts that the figure 237,600 was the total number receiving ballots plus absentees, thus a gross figure rather than a net figure as is seemingly admitted in the answer. This presents a fact issue as discussed before---in fact the critical, controlling fact figure.

Examining the tabulation by counties of the two separate elections held on the same day and judged, counted, and canvassed by the same election officials, it appears that in the primary election a total of 238,215 votes were cast, while in the special constitutional election 237,600 votes were cast. Out of those total votes cast, 24 counties show differences between the primary and special election totals, while, significantly, 32 counties show identical totals! Using one example, in Lewis and Clark County, the seat of the State Capitol, 13,867 votes were cast in the primary and 13,867 votes were cast in the special. Can these be possible net figures? Was not a single ballot mutilated or voided for some reason in one or the other election?

Or taking another example from Beaverhead County, the first county listed alphabetically, the total votes cast in the two separate elections is recorded as 2,832, identical in each. Yet in the partisan races for nominations to the United States Senate where two men, including incumbent Senator Metcalf, vied for the Democratic nomination and four men vied for the Republican nomination, a total of 2,391 votes was tallied. 441 voters either did not vote at all on that important race or their ballots were not properly accounted for. In that same county with nine candidates running for the nomination for governor, a total of 2,686 votes cast was tallied. 146 votes reported as voting on that important office were not accounted for but significantly 295 more voters expressed

a preference here than in the senatorial race. This example demonstrates that voters do not vote on all offices or all issues, but nevertheless do vote, and the total number of electors voting at an election cannot be measured by a single issue or office in that particular election.

These questions pose other questions. Did the precinct and county election officials follow the election laws by adjusting or balancing their poll books with the valid ballots? Or, did they follow the Secretary of State's instructions by inserting the number of electors listed in their poll books? It appears beyond a doubt that some precincts and some counties did it each way! Thus the figure of 237,600 certified by the Secretary of State likely reflects a combination among counties of net and gross figures. It is a critical fact question that no analysis short of a recanvass by precinct can answer.

It is noted here that no suggestion of fraud, bad faith, irregularity or anything of that nature has been reported or urged in any of the 981 precincts in the entire state. That the election result on the proposed constitution was close is self-apparent----a difference of only 2,532 votes. The proposed constitution was approved in 12 counties and defeated in 44 counties. Would a recanvass affect the result? Who knows, without the correct figure in the formula?

The foregoing should pose a dilemma for this Court. We are aware that the briefs argue on burden of proof and presumptions of law. Each side applies these legal arguments to prove its position. But from our previous discussion it is clear that to change such a basic document as our Constitution, a clear cut will of the people expressed within the rules laid out in Article XIX, Section 8, is mandatory and should not rest on the niceties and subtleties of the rules on burden of proof and presumptions of law. We are here concerned with hard, cold, mathematical facts which can be determined. This Court has the responsibility to see that the facts are determined.

We would find that the only solution to this problem is to grant a writ of mandamus to compel a recanvass by precinct of the votes cast in the June 2, 1972 election. A canvassing board cannot evade its duties by adjourning without taking the action required by law, and mandamus lies to compel its members to reassemble and perform their duty. A partial or incomplete canvass is viewed in the same manner as a total failure to make a canvass in the first instance, and a writ may issue to compel the board to reassemble and make a complete and accurate canvass of all the returns. This is supported by ample statutory and case law.

In this analysis the first point that must be considered is the statutory law. Sections 23-4007 and 23-4008, R.C.M. 1947, state:

> "23-4007. Disposition of items by registrar. (1) When the registrar receives the packages or envelopes, he shall file those containing the ballots voted and detached stubs and the unused ballots and keep them unopened for twelve (12) months. After twelve (12) months, if there is no contest begun in a court or no recount, he shall burn the envelopes without opening them or examining their contents.
>
> "(2) The registrar shall file the envelopes or packages containing the precinct registers, certificates of registration, pollbooks, tally sheets, and oaths of election officers. He shall keep them unopened until the commissioners meet to canvass the returns. The commissioners shall open the envelopes or packages.
>
> "(3) Immediately after the returns are canvassed, the registrar shall file the pollbooks, election records, and the papers delivered to the commissioners."
>
> "23-4008. Disposition of items in event of contest. If there is a contest within twelve (12) months, the registrar shall keep the envelopes or packages unopened until the contest is finally determined and then destroy them. If the court has custody of the envelopes or packages as evidence, they are in the custody of the court and the registrar shall not destroy them."

There is no dispute that the issue before the Court is an election contest. Did the proposed constitution pass or fail? This contest was filed in this Court and the above cited statutes explicitly and implicitly grant the Court the authority to compel

a reexamination of the original canvass in order to determine the exact number of votes, both gross and net, that were cast "for" or "against" the proposed constitution.

We recognize the argument that the time for a recount has expired. However, the legislature has provided exact instructions by which a recount may be held, and this Court readily submits to those instructions.

The legislature has provided for the retention of ballots for a period of 12 months in the event a dispute may arise as to the exact outcome of a given election. This is the case at hand, therefore, the requisite power and means exist for a recanvassing of the June 2, 1972, special election, in order to determine the exact number of electors voting "for" or "against" in that election.

A recanvass is not a new or unusual remedy. In State ex rel. Lynch v. Batani, 103 Mont 353, 362, 62 P.2d 565, we stated:

> "We think what the court said in the similar case of Capper v. Anderson, 88 Kan. 385, 128 Pac. 207, is applicable here.
>
> "There it was recorded: 'A canvassing board, in ascertaining and registering the effect of the returns, acts in a purely ministerial capacity, and is subject to control by mandamus. * * * The power to compel a canvass implies the power to compel a correct one. A ministerial duty wrongly performed is not performed at all. The correction of an erroneous computation can, of course, be compelled by a court. The mistakes here complained of are substantially of that character. They consist of treating the face of the poll books and tally sheets as indicating a result which a proper consideration of the entire document shows beyond a question to be wrong. Whatever might be the rule in a situation admitting of a substantial difference of opinion, when a court can determine with certainty that the poll books and tally sheets show a certain number of votes to have been cast and counted for a particular candidate, it can require a board of canvassers to give proper effect to that determination."

Case law from other jurisdictions supports the principle expressed in Lynch. The following cases stand for the single proposition that a board of canvassers can be reconvened to

correctly, accurately, and truly ascertain the result of an election. State v. Mills, 132 W.Va.580, 53 S.E.2d 416; Eaton v. County Court of Cabell County, 140 W.Va. 498, 85 S.E.2d 648; Kane v. Registrars of Voters of Fall River, 328 Mass. 511, 105 N.E.2d 212; Dotson v. Ritchie, 211 Ark. 789, 202 S.W.2d 603; Mahoney v. Board of Supervisors of Elections, 205 Md. 325, 108 A.2d 143; State v. County Court of Logan County, 145 W.Va. 581, 116 S.E.2d 125; and State v. Mercer County Court, 129 W.Va. 584, 41 S.E.2d 855. The list is endless, but the simple proposition exists that this Court has the power through the statutes heretofore cited, and the means, through the granting of a writ, to order a recanvass of the precincts of Montana to determine the total number voting at the special election on the proposed constitution.

We would order the Secretary of State to immediately take action by issuing instructions to the fifty-six county clerk and recorders in Montana to conduct a recanvass by precinct to balance the poll books with the valid ballots to determine the total number of electors voting at the special election.

In filing the foregoing dissent, we recognize the futility of it. By a three to two vote this Court is declaring a new constitution to have been adopted. We believe the majority opinion to be wrong; and therefore dissent.

We are aware that under our proposed solution a recanvass might reveal the same result; that is, that it would show a majority of those voting at the election did approve. If that were to occur, we would be satisfied.

James L. Harrison
Chief Justice

Wesley Castles
Associate Justice.