12309

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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 _____

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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.

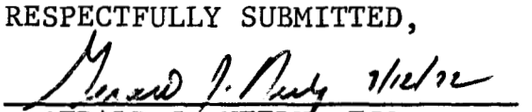
If the intention of the framer of the present Constitution had been to require only a majority of those voting thereon in order to amend the Constitution, how natural it would have been to use the same language found in the Constitution then in force. The majority of that convention was composed of some 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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