

ORIGINAL

12309

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IN THE SUPREME COURT OF THE STATE OF MONTANA

for the adoption of a measure before  
those qualified and entitled to vote, but to  
qualified and actually voting." 24 Am Jur 2d  
Elections Sec. 310.

No. 12309

No. 12310

The Court's attention has already been called to the

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

BRIEF OF INTERVENOR  
ROBERT L. KELLEHER

The words, "a majority of the Relators, those voting on the question"  
vs.

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

FILED

JUL - 6 1972

Thomas J. Kearney

CLERK OF SUPREME COURT  
STATE OF MONTANA

Respondent.

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 ab-  
sence 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 de-  
termining the result. This is true whether the  
matter is submitted at a meeting under a statute  
requiring the assent of a majority, to be ascer-  
tained by taking and recording the ayes and nays of  
the inhabitants attending the meeting, or is sub-  
mitted 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 pro-  
portion 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-

(34)



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

4 The Court's attention has already been called to its  
5 own decisions<sup>1</sup> which support the position of the Governor.

6 MEANING OF SECTION 8, ART. XIX

7 The words "a majority of those voting on the question"  
8 in the first sentence of Sec. 8 of Art. XIX are in pari  
9 materia with the last sentence. The words "on the  
10 question" should be included in the last sentence of  
11 the section between the words "voting" and "at the elec-  
12 tion."

13 Federal Questions of DUE PROCESS and EQUAL PROTECTION

14 Query: Would a ruling that unmarked ballots consti-  
15 tute a negative vote violate the "one-man  
16 one-vote" rule of Baker vs. Carr (369 US 186,  
17 7 L ed 2d 663, 82 S Ct 691) and Reynolds vs.  
18 Sims (377 US 533, 12 L ed 2d 506, 84 S Ct  
19 1362)?

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

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

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

28 A collection of cases from other jurisdictions up  
29 to 1940 on this question is found in 131 ALR beginning  
30 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".



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

7 The traditional test under the Equal Protection  
8 Clause has been whether a State has made 'an in-  
9 vidious discrimination,' as it does when it  
10 selects 'a particular race or nationality for  
11 oppressive treatment.'"

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

21 "...Fraudulent acts that dilute the votes of some  
22 have long been held to be within judicial cogni-  
23 zance. (Citing case) The 'right to have one's vote  
24 counted' whatever his race or nationality or creed  
25 was held (citing case) to be 'as open to protection  
26 by Congress as the right to put a ballot in a box.'"  
27 7 L ed 2d 701-703

28 Mr. Chief Justice Warren in Reynolds pointed out  
29 that:

30 "...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 debase-  
ment 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

#### 31 CONCLUSION

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



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Just Call 223  
Phone 223-1000

July 4, 1972

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

Respectfully submitted,

*Robert L. Kelleher*

ROBERT L. KELLEHER  
Intervenor  
2108 Grand Ave.  
Billings, Montana 59102

Thomas J. Kearney  
Clerk of Supreme Court  
Helena, Montana 59601

Dear Tom:

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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*Robert L. Kelleher*  
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