

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.

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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Thomas J. Kearney

CLERK OF SUPREME COURT  
STATE OF MONTANA

1 any force or effect.

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

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

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

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

19 IV. Those who failed to vote "for" or "against"  
20 the proposed constitution should be considered as acquiesc-  
21 ing in the result of the majority who did so vote.

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

24 I.

25 Section 23-3606, R.C.M. 1947, in subparagraph (3)  
26 thereof, provides that an elector votes on a constitu-  
27 tional amendment submitted to the people by marking an  
28 X in the applicable square indicating his vote either for  
29 or against the proposed constitution. Subsection (5)  
30 thereof provides that after the voter has prepared his  
31 ballot, he returns it to the election judge. (Section  
32 23-3605(11), R.C.M. 1947, provides that he return it to

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

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

8 "23-4002. Method of canvass. (1) The  
9 canvass shall begin by a comparison of  
10 the pollbooks and the correction of any  
11 mistakes until they agree.

(2) The election judges shall take  
ballots unopened out of the box to deter-  
mine whether each ballot is single.

(3) They shall count the ballots to  
ensure that the number of ballots corres-  
ponds 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 bal-  
lots 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."

26 "23-4003. Counting ballots--pollbooks.

27 (1) When the ballots and poll lists  
28 agree, the election judges shall count and  
determine the votes cast for each person.

29 (2) In counting, the ballots shall be  
opened singly by one (1) of the election  
judges and the contents read aloud to the  
30 other judges.

31 (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  
32 keep tallies of the number of votes for

1 each person.

2 (4) The tally sheets shall be compared  
3 and their correctness ascertained, and the  
4 clerks, under the supervision of the elec-  
5 tion judges, shall immediately write in the  
6 pollbooks:

7 (a) The names of all persons who re-  
8 ceived votes;

9 (b) The offices for which they received  
10 votes;

11 (c) Total votes received by each per-  
12 son as shown by the tally sheets.

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

16 "23-4004. Marking rejected ballots. A  
17 ballot rejected for illegality shall be  
18 marked by the election judges, by writing  
19 across the face 'Rejected on the ground of  
20 \_\_\_\_\_,' filling the blank with a brief  
21 statement of the reasons for the rejection.  
22 The statement shall be dated and signed by  
23 a majority of the judges."

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

29 The case of State v. City of Miami Beach (1971), 257  
30 S.(2d) 25, was concerned with a constitutional provision  
31 requiring majority approval of a bond issue by vote of  
32 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

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

3 ". . . We think that an abstention from  
4 voting, once in the polling booth, should  
5 not be construed as a vote either 'for' or  
6 'against' any given proposition. Any one  
7 of a number of disparate reasons might  
8 compel an elector to abstain; he may desire  
9 to demonstrate by his physical presence  
10 that he is aware of his obligation to vote  
11 in a democratic society; or he might have  
12 decided at the last moment that he is un-  
13 familiar with the candidates or issues and  
14 would prefer not to vote rather than to  
15 vote blindly; or when multiple issues or  
16 candidates are involved, he might be  
17 interested in voting only in certain races  
18 or on certain issues, without voting on  
19 every race or issue."

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

22 II.

23 As shown in the brief of Respondent, filed by Gover-  
24 nor Anderson, in the case of Tinkle v. Griffin, 26 Mont.  
25 426, the term "majority of the electors voting at the  
26 election" has been determined in Montana to mean "a majori-  
27 ty of those who vote, and not a majority of all the elec-  
28 tors of the county, or of those who vote upon any other  
29 issue at the same or some other time." This same question  
30 continues to be litigated in other jurisdictions.

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

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

5 "Do the quoted words refer to the total  
6 number voting at the election, so as to  
7 require approval by at least three-fourths  
8 of the largest number voting on any pro-  
9 position submitted in the election, or do  
10 they merely refer to votes on the particu-  
11 lar proposition? . . . We recognize it as  
12 our responsibility to attempt to arrive  
13 at the meaning of the framers of the con-  
14 stitution and to give to their work an  
15 interpretation that is reasonable--not one  
16 that is illogical or incongruous. . . .  
17 It is thus quite evident that to hold that  
18 three-fourths of those voting at any given  
19 election is required to amend Art. VII,  
20 Sec. 1, would give effect as having cast  
21 negative votes to those voters at the elec-  
22 tion who because of negligence, lack of  
23 interest, or some other unexplained reason  
24 failed to register their votes on the par-  
25 ticular proposition.

26 "No logical reason for counting as opposed  
27 those who do not express their preference  
28 has been suggested."

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

35 We acknowledge the opposite line of authorities, which  
36 hold that a majority of all those participating in an  
37 election is required to approve a proposition. However,  
38 we believe the reasoning in the Tinkle and Witt cases to  
39 be more logical and fair to the individual elector casting  
40 a legal ballot. We cite the following cases as also hold-  
41 ing that a majority voting on the question, rather than  
42 a majority participating in the election, is required un-  
43 der statutory and constitutional language similar to that

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

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

8 III.

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

16 In State ex rel. Witt v. State Canvassing Board, 78  
17 N.M. 682, 437 P.(2d) 143, 150, cited above, the Court al-  
18 so discussed a provision in the New Mexico Constitution  
19 which required a two-thirds vote in each county to amend  
20 the constitution. The Court held that because of the dis-  
21 parity in populations such a requirement was invalid under  
22 the "one person one vote" principle and the equal protec-  
23 tion clause of the Fourteenth Amendment to the United  
24 States Constitution. In citing the so-called reapportion-  
25 ment cases, starting with Baker v. Carr, 369 U.S. 186,  
26 Gary v. Sanders, 372 U.S. 368, Reynolds v. Sims, 377 U.S.  
27 533, WMCA, Inc. v. Lomenzo, 377 U.S. 633, Maryland Com-  
28 mittee v. Towes, 377 U.S. 656, Davis v. Mann, 377 U.S.  
29 678, Roman v. Sencock, 377 U.S. 695, and Lucas v. Forty-  
30 Fourth General Assembly of the State of Colorado, 377  
31 U.S. 713 -- all dealing with voting on legislative repre-  
32 sentatives -- the Court said it saw:

"no rational basis to distinguish between

1 voting on representatives in the legisla-  
2 ture, and voting on constitutional amend-  
3 ments . . . Nor can it be said that an  
4 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."

5 IV.

6 To require a majority of all electors participating  
7 in an election to approve a proposition upon which some  
8 of the electors fail to vote is contrary to the fundament-  
9 al principle that qualified electors who fail to vote are  
10 presumed to acquiesce in the express will of the majority  
11 who do.

12 In Kuhrt v. Sully County Board of Education, 176  
13 N.W.(2d) 479, in holding that certain statutory language  
14 meant a majority of votes cast rather than a majority of  
15 the entire electorate, the Court quoted from Cashman v.  
16 City Clerk of Salem, 213 Mass. 153, 100 N.E. 58, where  
17 the Court said:

18 "It is a fundamental principle of our sys-  
19 tem of representative government that the  
20 will of the majority expressed according  
21 to law must prevail. . . . Elections must  
22 be settled as a practical matter by those  
manifesting interest enough to vote . . .  
apathy is not the equivalent of open oppo-  
sition . . ."

23 In Munce v. O'Hara, 340 Pa. 209, 16 A.(2d) 532, the  
24 Court said:

25 "No method having as yet been devised where-  
26 by to compel a complete vote by all the  
27 voters, the practical working of the elec-  
28 tive 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."

29 The League of Women Voters of Montana is made up of  
30 approximately 450 members from throughout the state.  
31 Women join the League to learn more about government and  
32 how to act constructively on governmental issues. League



1 decisions are made through a democratic process, patterned  
2 on the American system of representative government.

3 League members believe each voter should have equal  
4 opportunity to participate and influence government.

5 League members hope the language of the 1889 Consti-  
6 tution will be interpreted to promote the will of the  
7 majority of the people voting on the proposed constitu-  
8 tion rather than to defeat that will. We hope that this  
9 Court will not let legal technicality control or destroy  
10 the common ordinary meaning of the language decided upon  
11 by the framers of our constitution, as interpreted by  
12 Tinkel v. Griffin, et al., supra. It is in the spirit of  
13 the League members throughout the United States to abide  
14 by majority choices. The majority of the voters of  
15 Montana voting on the proposed constitution have chosen to  
16 approve it.

17 We submit that the application of Relators be dis-  
18 missed and the voting majority allowed to prevail.

19 Respectfully submitted,

20  
21 /s/ Diana S. Dowling  
22 Diana S. Dowling  
23 Attorney for Montana League  
of Women Voters

24 I, DIANA S. DOWLING, attorney for the Montana League  
25 of Women Voters, in the above entitled matter, hereby  
26 certify that on this 13th day of July, 1972, I served the  
27 foregoing BRIEF OF AMICUS CURIAE, LEAGUE OF WOMEN VOTERS,  
28 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.

29 /s/ Diana S. Dowling  
30  
31  
32