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COMMENTS

FROM THE COILS OF THE ANACONDA, RESTRICTION OF CONSTITUTIONAL AMENDMENT BY POPULAR INITIATIVE IN *MONTANA ASSOCIATION OF COUNTIES V. STATE*

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I. Introduction

The citizens of Montana are empowered to propose constitutional amendments by popular initiative.[1] The right to amendment by constitutional initiative serves to ensure that the Constitution embodies the will of the people.[2] Embodying the will of the people, Montana's Constitution reflects the fundamental desires of freedom and independence from pervasive outside interests. In *Montana Association of Counties v. State*, the Montana Supreme Court paradoxically upheld the people's right to popular sovereignty and self-government by invalidating Constitutional Initiative 116 ("CI-116"), which a majority of the electorate approved.[3] The Court defended the right of Montana's citizens to be free from out-of-state interests by refusing to yield a strict adherence to the separate-vote provision set forth in the Constitution, but in applying a rigid reading of the provision, the Court also ran the risk of unduly restricting constitutional change by popular initiative in the future.[4]

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1. Mont. Const. art. XIV, § 9.

2. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 Mont. L. Rev. 325, 326 (2010).

3. 404 P.3d 733 (Mont. 2017).

4. Johnstone, *supra* note 2, at 381–82.

States are empowered to define their own political community through the powers and restraints articulated in each state's own constitution. Under the federalist system of government, power is divided between the states and the national government.[5] Those powers not granted to the federal government by the United States Constitution are reserved for the states.[6] Accordingly, federalism presupposes borders between the many states, between the states and the federal government, and also "between insiders and outsiders *within* the nation" itself.[7] Montana's Constitution, attempting to be both durable and flexible, reserves the power of constitutional amendment by popular initiative to ensure that the document continues to reflect the fundamental values of the state's citizens for future generations.[8]

Including the power of amendment by constitutional initiative within Montana's Constitution indicates that the framers of the state's current Constitution foresaw the paradox between making the document more responsive to the will of the people by allowing for voter-driven amendments and the danger of complicating the text over time, which would make it less responsive to the people.[9] The complicated relationship between responsiveness and durability is best summarized by the sentiments expressed at the Constitutional Convention: the initiative process could lead to "flooding Montana's constitution with amendment after amendment that would be better put in the statutes, and we'll have a Constitution that looks like California."[10] The difficulty of allowing for constitutional amendment by initiative lies in striking a balance between avoiding undue restrictions on change while ensuring that any modifications to the text are the product of the people within the state exercising their own political will.

CI-116 was largely funded by California billionaire Henry Nicholas.[11] Nicholas launched his self-funded crusade for crime victims' rights known as Marsy's Law in 1983, after the death of his sister, Marsalee (Marsy) Nicholas.[12] In 2008, Nicholas was the key backer and proponent of Proposition 9, a Victim's Bill of Rights Act, which California adopted by constitutional initiative in a process similar to that which exists in Montana.[13] After amending California's Constitution to reflect a problematic conception of judicial equality for crime victims, Nicholas then sought to qualify and en-

5. U.S. CONST. amend. X.

6. *Id*.

7. Anthony Johnstone, *Outside Influence*, 13 ELECTION L. J. 117, 122 (2014) (emphasis original).

8. Johnstone, *supra* note 2, at 374.

9. *Id*. at 381.

10. *Id.* at 326 (citing MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 506 (1979)).

11. Ryan S. Appleby, Note, *Proposition 9, Marsy's Law: An Ill-Suited Ballot Initiative and the (Predictably) Unsatisfactory Results*, 86 S. CAL. L. REV. 321, 362 (2013).

12. Marsy's Story, MARSY'S LAW US, https://perma.cc/98GK-Q2MS.

13. About Marsy's Law, MARSY'S LAW US, https://perma.cc/2D74-69P9.

act substantially similar victims' rights amendments in other states that allow for constitutional change by initiative.[14] Nicholas's campaign, Marsy's Law for All, expresses an ambition to "amend state constitutions . . . and, eventually, the U.S. Constitution to give victims of crime rights equal to those already afforded to the accused and convicted."[15]

In Montana alone, Nicholas contributed 94 percent of the $2,175,039 spent to promote CI-116.[16] In contrast, opposition expended no funds on fighting CI-116.[17] Nicholas' large expenditures and seemingly innocuous motive allowed proponents of CI-116 "to frame the issue as one of 'victims' rights' rather than costly criminal law reform."[18] Relying largely on his wealth and tragic story, Nicholas qualified CI-116 for the Montana ballot, confused voters, and attempted to significantly influence Montana's Constitution by amending the law in his own likeness. CI-116 was not a constitutional initiative generated by the citizens of Montana, nor was the language of the amendment fitted to Montana's own unique Constitution, which, as expressed by the delegates of the 1972 Constitutional Convention, was decidedly not to be like that of California.[19]

This note examines the ways in which *Montana Association of Counties* "concerns Montana law, Montana elections and . . . arises from Montana history."[20] While it is now nearly futile to suggest any regulation of campaign speech based on the speaker's corporate identity, it is possible to limit the influence of outsiders on the political process and fundamental text of the state.[21] Part II discusses the historical development of the statutory initiative and referendum regime that existed under the 1889 Constitution and tracks its transition to the constitutional amendment by popular initiative process that emerged as part of Montana's 1972 Constitution. Part III describes the factual background, holding, and dissent of *Montana Association of Counties*. Part IV provides analysis of the separate amendment rule as articulated by the Court. Part V explains how invalidating a constitutional initiative supported by a majority of the electorate serves to protect the citizens of Montana from the pervasive influence of outside interests, but in doing so also runs the risk of blocking future generations of Montanans from enacting meaningful reform to their own Constitution.

14. *Id.*

15. *Id.*

16. Montana Marsy's Law Crime Victims' Rights Initiative, CI-116 (2016), BALLOTPEDIA ORG, https://perma.cc/7N9S-PWL6.

17. *Id.*

18. Appleby, *supra* note 11, at 363. **R**

19. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 506 (1979).

20. Western Tradition P'ship v. Attorney Gen. of Mont., 271 P.3d 1, 6 (Mont. 2011).

21. Johnstone, *supra* note 7, at 119–20. **R**

II. Prior Law Under the 1889 Constitution

A. Historical Origins of the Direct Democracy in Montana

Montana's constitutional development is instructive to understanding the origins of the state's political community as expressed by the text and shaped by the state's history. Montana's constitutional history can be divided into two distinct periods, each reflecting the state's own unique social, economic, and political experience during a given time.[22] Montana's 1889 Constitution was primarily a tool of achieving statehood and gaining freedom from the restraints of the federal territorial administration.[23] Montana's 1972 Constitution built upon the prior text, but created a document that was more flexible and responsive to the will of the people which could endure for decades to come.[24]

At the turn of the century, both populist forces and the progressive agenda coalesced, demanding social and political reforms across the western United States.[25] In Montana, the rampant corruption in the state capitol due to mining companies exerting inordinate influence over the legislature was infamous.[26] Citizen concern over the increasing control of large corporations and wealthy individuals in the Montana legislature prompted citizens to advocate for a constitutional amendment to provide for a statutory initiative and referendum process.[27] Accordingly, in 1905, the Montana legislature passed a statutory initiative and referendum amendment, and in 1906, the people ratified the amendment.[28] The statutory initiative and referendum process allowed citizens to act as a check on the legislature's lawmaking power, which in turn forced the legislature to be more responsive to the will of the people. The statutory initiative and referendum process was a distant precursor to the constitutional amendment by popular initiative process that would emerge as part of Montana's 1972 Constitution.[29]

22. Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide 1 (G. Alan Tarr ed., 2001).

23. *Id.*

24. Johnstone, *supra* note 2, at 327. **R**

25. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L & Pol'y Rev. 11, 25 (1997).

26. Elison & Snyder, *supra* note 22, at 93. **R**

27. *Id.*

28. Jeff Wiltse, *The Origins of Montana's Corrupt Practices Act: A More Complete History*, 73 Mont. L. Rev. 299, 309 (2012).

29. Elison & Snyder, *supra* note 22, at 93–94. **R**

B. Early Constitutional Interpretation and Judicial Intervention

The framers of Montana's original Constitution did not intend to leave the Constitution's language open to the construction of the Court.[30] In several cases after the ratification of the 1889 Constitution, the Montana Supreme Court made clear that the provisions of the document were to be strictly adhered to, and deviations from the explicit language of text were not to be taken lightly.[31] The 1889 Constitution explicitly stated, "[t]he provisions of this constitution are mandatory and prohibitory unless by express words they are declared to be otherwise."[32] In *State ex rel. Woods v. Tooker*, the Court addressed whether a constitutional provision, which required that a proposed amendment be published three months in advance, was mandatory or permissive.[33] The Court held that provisions for amending the Constitution are mandatory because the "command of the constitution is in no unclear voice" and when another method is resorted to, "[t]hat method accomplishes nothing."[34]

In refusing to recognize laws enacted in violation of the Constitution, the Court looked to the text of the Constitution itself for guidance. In *State v. Mitchell*,[35] when presented with a question regarding a multifaceted bill passed by the legislature which prohibited gambling, the Court proclaimed, "[t]he constitution will easily guide us to a conclusive answer."[36] Accordingly, the Court held that the bill in question violated the "singleness of subject" provision of the Constitution,[37] which dictates that no bill, except general appropriation bills, shall be passed containing "more than one subject, which shall be clearly expressed in its title."[38] The Court expressed anxiety that if it were not to enforce the single subject requirement, that would be a clear violation of the plain text of the Constitution.[39] Further, the Court, in acknowledging its duty to uphold the Constitution as written, recognized that it was better to set precedent straight from the beginning, rather than allowing the text to "be nullified by loose and questionable interpretations of our fundamental law."[40] From the beginning, the Court has looked to the plain meaning of the Constitution's mandatory provisions

30. MONT. CONST. of 1889, art. III, § 29.
31. State *ex rel.* Woods v. Tooker, 37 P. 840, 841 (Mont. 1894).
32. MONT. CONST. of 1889, art. III, § 29.
33. *State ex rel. Woods*, 37 P. at 841.
34. *Id.* at 844.
35. 42 P. 100 (Mont. 1895) (mem.).
36. *Id.* at 102.
37. MONT. CONST. of 1889, art. V, § 23.
38. *Mitchell*, 42 P. at 102 (citing MONT. CONST. of 1889, art. V, § 23
39. *Id.*
40. *Id.* (citing State *ex rel.* Woods v. Tooker, 37 P. 840 (Mont. 1894)).

with a dedication to give full force to the text even when it required nullifying laws passed by the legislature.

Shortly thereafter, the Court took its refusal to enforce laws passed by the legislature in violation of the Constitution a step further by applying the principle to laws ratified by the people. In *Durfee v. Harper*,[41] the Court held that when the electorate is presented with a proposed amendment to the Constitution that is in "disobedience of the Constitution itself" and "ought never have been submitted," it is as if the amendment never existed.[42] Thus, when a proposed amendment was submitted for a vote in violation of the prescribed methods of the Constitution, it was "a nullity before it reached the people, and was not animated by them, because their own solemn commands empowering its proposal, and specifying the mode thereof, had been entirely ignored."[43] In the early years of the 1889 Constitution, the Court did not hesitate to intervene when the legislature and voters approved amendments in violation of the text.

C. The Development of the Unity of Subject Rule

In 1906, after the statutory initiative and referendum process was adopted as a product of popular demand for meaningful participation in the legislative process, the Court became more cautious of interfering with the will the people expressed in an election. With the progressive and populist origins of the process in mind, the Court's interpretation of the separate-vote requirement attempted to both adhere to the provisions set forth in the Constitution and to construe the purpose of the text in favor of the will of the people as expressed at the polls. Accordingly, the Court stated:

> [W]e do not know of anything in the Constitution which forbids the people to amend their own Constitution, even if the amendment go to the effect of repealing half thereof, provided the instrument, after amendment, insures a Republican form of government in this state and is not in violation of the Constitution of the United States.[44]

In an early series of cases from 1906 through 1924, the Court refined its interpretation of what constituted a single subject for the purposes of the separate-vote requirement.[45] Initially, the Court held that an amendment satisfied the single-subject requirement so long as all of the parts of the

41. 56 P. 582 (Mont. 1899).

42. *Id.* at 585.

43. *Id.*

44. State *ex rel.* Teague v. Board of Comm'rs of Silver Bow Cty., 87 P. 450, 451 (Mont. 1906) (overruled by Marshall v. State *ex rel.* Cooney, 975 P.2d 325 (Mont. 1999)).

45. *See infra* Part II; *see generally State ex rel. Teague,* 87 P. 450; State *ex rel.* Hay v. Alderson, 142 P. 210 (Mont. 1914) (overruled by Marshall v. State *ex rel.* Cooney, 975 P.2d 325 (Mont.1999)); State *ex rel.* Corry v. Cooney, 225 P. 1007 (Mont. 1924) (overruled by Marshall v. State *ex rel.* Cooney, 975 P.2d 325 (Mont.1999)).

amendment submitted to the voters related to a single plan or purpose.[46] The Court later expanded this concept to encompass amendments, so long as all the parts were logically related and the amendment did not have distinct separate purposes not dependent upon each other.[47]

From the inception of the statutory initiative and referendum process, the Court has had to balance adhering to the text of the Constitution and its provisions for amendment with the will of the people. In *State ex rel. Teague v. Board of Commissioners of Silver Bow County*, the Court continued to assert that amendments submitted to the voters in violation of the manner authorized by the Constitution were void, but at the same time the Court also liberally construed what constituted an amendment.[48] The 1889 Constitution provided that: "Should more than one amendment be submitted to the electorate at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted on separately."[49] In *State ex rel. Teague*, the Court faced a post-election challenge to an amendment approved by voters that: (1) changed the term for county commissioners; (2) extended the tenure for incumbents; and (3) gave district judges the power to fill vacancies on the board.[50] The appellant, Teague, argued that the amendment presented to the electorate was, in fact, three distinct matters which should have each been voted on separately.[51] Conversely, the Court held that "there is only one matter and one subject" because the amendment was unified by the single purpose of establishing and maintaining a board of commissioners.[52] Accordingly, the Court's interpretation of what constituted a single amendment was satisfied so long as all parts of an amendment were part of a single scheme or plan.

In further developing its interpretation of the amendment process, the Court continued to expand the separate-vote requirement by making it even more permissive. In *State ex rel. Hay v. Alderson*, the Court expanded the deference afforded to the will of the people, stating, "[T]he general rule is that every reasonable intendment will be indulged in favor of the validity of a constitutional amendment after its ratification by the people."[53] By establishing this new general rule, the Court explicitly acknowledged that challenges to election proceedings based on the separate-vote requirement prior to 1906 would have prevailed without a doubt.[54] The Court then further

46. *State ex rel. Teague*, 87 P. at 451.
47. *State ex rel. Hay*, 142 P. at 213.
48. *State ex rel. Teague*, 87 P. at 451.
49. MONT. CONST. of 1889 art. XIX, § 9.
50. *State ex rel. Teague*, 87 P. 450 at 451.
51. *Id.*
52. *Id.*
53. *State ex rel. Hay*, 142 P. at 217 (citing Colorado v. Sours, 75 P. 167 (Colo. 1903)).
54. *Id.*

demonstrated its deference to the will of the people when it noted that constitutions "are not designed for metaphysical or logical subtleties" but rather are "instruments of a practical nature, founded on the common business of human life . . . fitted for common understandings."[55] In determining that the constitutional amendment process should be informed by common understandings, the Court reasoned that the initiative and referendum were logically connected to one another, and thus, constitutional change would often require both the repeal and replacement of multiple provisions.

The Court, in applying a common-sense approach to its interpretation of the Constitution, later extended that same logic to the amendment process itself. In *State ex rel. Hay*, when the Court addressed a post-election challenge based on a multifaceted amendment approved by the electorate, the Court applied a broad "unity of subject" framework. Building from its recent decision in *State ex rel. Teague*, the Court determined that, "in the light of common sense," if amendments are "so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan," then they meet the constitutional requirement and are a single amendment.[56] In applying the unity of subject rationale, the Court equated the provisions for constitutional amendment by the people with the provisions that prohibit the legislature from passing a law which has more than one subject not clearly expressed in its title.[57] The unity of subject reasoning applied to constitutional referenda afforded the people a broad power to act as a corrective force on the legislature. In the Court's view, to otherwise interpret the rule would "render it practically impossible to amend the Constitution."[58] Accordingly, the unity of subject approach functioned as a broad expansion of the direct legislative power.

With the unity of subject framework, the people were empowered to make sweeping changes to the Constitution with a single vote. In *State ex rel. Corry v. Cooney*, the Court made clear that if "later amendments destroy, impinge upon, modify, or wipe out old provisions, the newer provisions must stand, because they were the last utterance of the people, who reserve to themselves the right to change the organic law, in the way provided by the organic law itself."[59] In *State ex rel. Corry*, the Court faced another post-election challenge on the basis that the initiative was not a constitutional amendment, but rather was an attempt to revise the Constitu-

55. *Id.* (internal quotation marks and citations omitted).

56. *Id.*

57. *Id.*

58. *Id.*

59. 225 P. 1007, 1011 (Mont. 1924) (citing Falstaff Corp. v. Allen, 278 F. 643, 648 (E.D. Mo. 1922)).

tion.[60] The appellant, Corry, challenged a constitutional amendment which authorized the consolidation of all the cities and towns within the county of Silver Bow into a single municipality.[61] The sweeping amendment provided for the abolishment, unification, and merger of city and town governments; the power to determine election procedures; the method for appointment and removal of officers; defining duties and fixing penalties thereof; and even the discontinuance of such form of government, if need be.[62]

The Court, relying upon the general principle that the amendment in question was intended to produce a progressive society,[63] determined that the people have the "privilege of changing radically, if they so desire, their former system of government" and replacing it with one they see fit.[64] Correspondingly, in *State ex rel. Corry*, the Court construed the unity of subject requirement to encompass not only a single purpose but, more broadly, also a single plan.[65] The Court held that the unity of subject requirement was only violated if the provisions of an amendment "relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other."[66] The Court reasoned that the "purpose of the amendment" process was "to furnish the people with an avenue of escape from the evils which have grown out . . . of the aldermanic system of municipal government," thereby freeing them to create a more responsive system of local government.[67] Thus, the Court's common sense, purpose-driven interpretation of the separate-vote requirement under the unity of subject reasoning allowed for broad applications of the constitutional referenda process over the next five decades.

D. From Constitutional Referenda to Amendment by Popular Initiative

For the next 50 years after *State ex rel. Teague*, *State ex rel. Hay*, and *State ex rel. Corry*, the Court faced very few challenges to the constitutional referenda process.[68] Between 1881 and 1971, the legislature approved 62 amendments to submit to the voters.[69] Of those 62 amendments, the Governor vetoed one, the Court invalidated four, and of the remaining 57 amendments submitted to the voters, the electorate rejected 18 and approved 40,

60. *Id.* at 1009.
61. *Id.* at 1008–09.
62. *Id.*
63. *Id.* at 1010.
64. *Id.*
65. *Id.* at 1011.
66. *Id.*
67. *Id.* at 1010.
68. Mont. Sec'y of State, *1906–Current Historical Ballot Initiatives and Referenda*, sosmt.gov, https://perma.cc/RST7-36DU.
69. Johnstone, *supra* note 2, at 332. **R**

with the Court later annulling three for procedural irregularities.[70] For the most part, the broad unity of subject approach served its intended purpose and empowered the citizens to act as a check on the legislature.

Montana's 1972 Constitution added a powerful tool of direct democracy by providing for constitutional amendment by popular initiative.[71] In building off the spirit of the initiative and referendum process, the new Constitution also empowered the people to propose constitutional amendments by initiative—requiring that a proposed amendment be signed by at least ten percent of the qualified electorate.[72] With this new power, the Court now had to determine how to interpret the process. Between 1972 and 2016, there were 112 attempts to amend the Constitution by initiative.[73] Of those 112 attempts, 84 failed to gain the requisite number of signatures to qualify for the ballot and 14 were withdrawn.[74] Accordingly, of the remaining 14 initiatives submitted to the voters, seven were rejected and seven were approved, with three of the approved initiatives subsequently voided by the Court.[75]

Early challenges to the constitutional amendment by popular initiative process defined the boundaries of the practice. Throughout the 1980s, the Court was forced to balance how the amendment process would work in practice with the populist origins of the power. In an early challenge, *State ex rel. Harper v. Waltermire*, the Court enjoined an initiative from appearing on the ballot on the grounds that it was facially unconstitutional, because if adopted, the initiative directed the legislature to apply to Congress to call a convention to consider a federal balanced budget.[76] In enjoining the initiative, the Court made clear that "labeling a document a constitutional amendment does not make it one."[77] Subsequent challenges to amendments by constitutional initiative served to further define the Court's jurisprudence in regards to the process. Consequently, the Court refused to intervene in a pre-election challenge based on the constitutionality of an initiative,[78] and the Court later held that initiatives could only be submitted

70. *Id.*

71. MONT. CONST. art. XIV, § 9; *see also* JAMES LOPACH, WE THE PEOPLE OF MONTANA 12–14 (1983).

72. MONT. CONST. art. XIV, § 9.

73. Mont. Sec'y of State, *1972-Current Constitutional Initiatives and Constitutional Amendments*, sosmt.gov, https://perma.cc/7X8Y-XGQA.

74. *Id.*

75. *Id.*

76. 691 P.2d 826, 830–31 (Mont. 1984).

77. *Id.* at 828.

78. State *ex rel.* Mont. Citizens for Pres. of Citizens' Rights v. Waltermire, 729 P.2d 1283, 1285 (Mont. 1986).

to voters at the election following the filing of the petition.[79] Although the Court was initially reluctant to intervene with the will of the voters once that will successfully overcame the difficult petition process to qualify an initiative for the ballot, the Court gradually returned to the plain language of the Constitution for guidance, which has resulted in a narrower interpretation of the rules that govern the popular initiative process.

E. The End of the Unity of Subject

In what has been viewed by some as extreme judicial intervention and a radical departure from precedent, the Court in *Marshall v. State ex rel. Cooney*[80] redefined its jurisprudence for determining when a proposed amendment to the Constitution requires a separate vote. While the Court previously interpreted Article V, Section 23 and Article XIX, Section 9 of Montana's 1889 Constitution as the basis of the unity of subject framework and required that proposed amendments be voted on separately unless the amendment had a single or unified purpose,[81] the *Marshall* Court held, for the first time, that Article XIV, § 11 of Montana's current Constitution imposes an *additional* separate-vote requirement when a proposed amendment would affect more than one part of the Constitution.[82] Thus, when the *Marshall* Court stated that "Article XIV, Section 11, has a substantively different meaning from that of Article V, Section 11(3),"[83] it essentially departed from the historical interpretation of the unity of subject framework under which the Court looked to Article V and Article XIX in unison and announced that Article V's legislative provisions were now inapplicable because "the plain meaning of Article XIV, Section 11, requires a separate vote for each constitutional amendment," rather than requiring that the amendment be unified by a single subject.[84] This additional separate-vote requirement is known as the "Separate Amendment Rule."[85]

In *Marshall*, the Court overruled *State ex rel. Teague*, *State ex rel. Hay*, and *State ex rel. Corry* to the extent they conflicted with the Court's new interpretation of the Separate Amendment Rule, as an amendment could relate to a single plan or purpose yet still violate the separate-vote

79. State *ex rel.* Montana Citizens for Preservation of Citizens' Rights v. Waltermire, 757 P.2d 746, 750 (Mont. 1988).

80. 975 P.2d 325, 331 (Mont. 1999).

81. State *ex rel.* Hay v. Alderson, 142 P. 210, 212–13 (Mont. 1914).

82. *Marshall*, 975 P.2d at 331 (citing MONT. CONST. art. XIV, § 11).

83. *Id*; *see also* ELISON & SNYDER, *supra* note 22, at 116–17 (explaining that MONT. CONST. art. V, § 11(3) was "derived from" Article V, Section 23 of the 1889 Montana Constitution, with the only changes between the provisions being grammatical). **R**

84. *Marshall*, 975 P.2d at 331.

85. Johnstone, *supra* note 2, at 229–30.

requirement of the Separate Amendment Rule.[86] Distinguishing *Marshall* from previous case law, the Court looked to the fact that the previous cases were decided prior to the ratification of the 1972 Constitution, when amendments could only be proposed by the legislature.[87] For the Court, the determinative factor was that, after the ratification of the 1972 Constitution, the citizens of Montana could amend the Constitution by popular initiative: because the citizens lacked the equivalent ability of the legislature to deliberate and debate the contents of a proposed amendment, the Court found that, when a proposed amendment affected more than one provision of the Constitution, a separate vote was therefore required in order to ensure that any constitutional amendment implemented explicitly had the backing of the people.[88] With its decision in *Marshall*, the Court overruled prior case law to the extent that previous decisions failed to distinguish between the former single-subject separate-vote requirement and the new Separate Amendment Rule separate-vote requirement.[89]

The defendants in *Marshall* were proponents of a constitutional initiative that would have prohibited the enactment of any new taxes unless approved by a majority of the electorate.[90] The defendants argued that, under the Court's interpretation of the initiative process in *State ex rel. Teague*, *State ex rel. Hay*, and *State ex rel. Corry*, the initiative at issue was constitutional because its provisions were germane to a single purpose and therefore satisfied the unity of subject requirement.[91] Looking back to the time when the unity of subject approach was developed, the Court disagreed with the defendants and justified its rationale for the refined requirements by citing *State ex rel. Hinz v. Moody*[92] as a guide to interpreting the Constitution.[93]

In *State ex rel. Hinz*, the Court stated that its method to interpret the Constitution was to give effect to the intent of the people who adopted it by giving force to the language used with the presumption that words convey their natural meaning.[94] Accordingly, the Court in *Marshall* asserted that the plain language of the 1972 Constitution simply could not allow for the unity of subject approach to continue to exist when the text of the current Constitution plainly stated that, if more than one amendment is presented to voters, "each shall be so prepared and distinguished that it can be voted on

86. *Marshall*, 975 P.2d at 331.
87. *Id.* at 330.
88. *Id.*
89. *Id.* at 331.
90. *Id.* at 327.
91. *Id.* at 329.
92. 230 P. 575 (Mont. 1924).
93. *Marshall*, 975 P.2d at 329 (citing *State ex rel. Hinz*, 230 P. at 578).
94. *State ex rel. Hinz*, 230 P. at 578.

separately."[95] In interpreting the Constitution to give effect to the people who adopted it, the Court made clear that arguments from the 1889 Constitution were no longer persuasive.

Returning to the plain text of the Constitution, the Court in *Marshall* relied on a case decided under Oregon's Constitution, which has a provision for constitutional amendment by popular initiative similar to Montana's Constitution.[96] The *Marshall* Court looked to the Oregon Supreme Court's rationale in *Armatta v. Kitzhaber*, explaining that because the unity of subject requirement was germane to the legislative process whereas the Separate Amendment Rule pertained to the constitutional amendment by popular initiative process, the separate-vote requirements under either states' constitution were inherently subject to different interpretations.[97] This was because, as the *Armatta* Court stated and the *Marshall* Court affirmed, "the act of amending the *constitution* is significantly different from enacting or enabling *legislation*."[98] Finding support in *Armatta*, the Court held that "the plain meaning of Article XIV, Section 11, requires a separate vote for each constitutional amendment," because to require otherwise would risk the broad elasticity of the unity of subject consuming Montana's entire Constitution.[99] To bolster its rejection of the longstanding unity of subject requirement, the Court explained that when the legislature amends the Constitution through referendum, the process is open to debate and deliberation.[100] However, when the Constitution is amended by popular initiative, the voters do not have the same opportunity to consider and debate the proposition.[101] Although, as the Court in *State* ex rel. *Hinz* stated, the "Constitution is not to be made to mean one thing at one time, and another at some subsequent time, when circumstances may have changed as to make a different rule in the case seem desirable,"[102] if the interpretation adopted is contrary to the text, a dedication to plain meaning would dictate that it should be disregarded.

F. Unity of Subject vs. Separate Amendment Rule

The Separate Amendment Rule underwent extensive revision by the Court in *Marshall*. Before the Court's ruling in *Marshall*, Montana was generally with the majority of states in its interpretation of the separate-vote

95. MONT. CONST. art. XIV, § 11.
96. *Marshall*, 975 P.2d at 331 (citing Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998)).
97. *Id.*
98. *Id.* (quoting *Armatta*, 959 P.2d at 63) (emphasis original).
99. *Id.*
100. *Id.* at 330.
101. *Id.*
102. State *ex rel.* Hinz v. Moody, 230 P. 575, 483 (Mont. 1924) (quoting THOMAS M. COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 88–89 (1868)).

requirement, but afterwards, Montana joined Oregon in the minority of states that severely limits how constitutional amendments can be enacted through the initiative process.[103]

Prior to the ratification of the 1972 Constitution, there was no process for constitutional amendment by popular initiative, and the fundamental text could only be altered through the constitutional referenda process.[104] With the constitutional referenda process under the 1889 Constitution, the legislature and electorate worked in unison to enact or reject constitutional change.[105] Although the statutory initiative and referendum process was the product of social upheaval and the manifestation of the electorate's desire to oversee the legislature, constitutional amendment required the cooperation of both legislative houses and approval by the people.[106] For a constitutional referendum to be submitted to the electorate, it required a vote of two-thirds of the legislative assembly.[107] Under this regime, and controlled by the Court's application of the unity of subject framework, the legislature acted as a check on constitutional change, because as required by the Constitution, voters could only be presented with amendments that embraced one subject. Moreover, the people also acted as another check on constitutional change, because any amendment that did not meet the requirements of the unity of subject rule had to be prepared so it could be voted on by the people separately, by subject. In this way, both the legislature and the people had a duty to ensuring the continued durability and functionality of Montana's Constitution.[108]

Employing the unity of subject framework, the Court articulated a broad test for when a separate vote was required on an amendment, holding that the submission of any proposed amendment was unconstitutional if the amendment related to more than one subject, had at least two separate parts, and these parts were not dependent and connected to one another.[109] This interpretation of the constitutional amendment process was deferential to both the legislature and the electorate because it presumed that, when the legislature and the voters acted together, their will was supreme. Under this interpretation, the Court was extremely hesitant to void amendments approved by the electorate because, with this process, the voters were essen-

103. MATHEW MANWELLER, THE PEOPLE VERSUS THE COURTS: INITIATIVE ELITES, JUDICIAL REVIEW AND DIRECT DEMOCRACY IN THE AMERICAN LEGAL SYSTEM 118–19 (2004).

104. MONT. CONST. of 1889, art. XIX, § 9.

105. Johnstone, *supra* note 2, at 330–33. **R**

106. MONT. CONST. of 1889, art. XIX, § 9.

107. *Id.*

108. *Id.*

109. State *ex rel.* Corry v. Cooney, 225 P. 1007, 1011 (Mont. 1924) (internal citations and quotation marks omitted).

tially acting as members of the legislature, but the electorate still got the final say.

With the ratification of the 1972 Constitution, the people reserved for themselves the power to amend the Constitution in three distinct ways: through constitutional convention, legislative referendum, and by popular initiative.[110] Amendment by popular initiative allowed the people to directly propose constitutional changes without the legislature's involvement. Therefore, with constitutional amendments proposed by popular initiative, the legislature and the electorate no longer worked together. Accordingly, in *Marshall*, the Court held that this distinction therefore required that the procedure for submitting an amendment to the electorate had to change as well.[111] Although the amendment by popular initiative process is similar to the previous system, the manner in which the Court has since applied the Separate Amendment Rule is fundamentally consequential.[112]

Following *Marshall*, the lingering question remained of how to interpret the Separate Amendment Rule going forward. The Court in *Montana Association of Counties* provided a resounding answer: strictly. This holding seemingly signaled a return to the reliance on the "mandatory and prohibitory" interpretation the Court employed before the development and implementation of the unity of subject approach.[113] Previously, the Court had been criticized for its reliance on the 1889 Constitution's mandatory and prohibitory provisions leading up to the 1972 Constitutional Convention.[114] The application of "mandatory and prohibitory" language, as applied to constitutional change, has been cited as a method for the Court to restrict change by judicial intervention.[115] Put more colorfully, the Court was criticized for the "oracular conceptual mare's nest" of Article III, Section 29 of Montana's 1889 Constitution, which served to support classical "activist" interventionism.[116] Regardless of the characterization, the application of the Separate Amendment Rule going forward has fundamental significance for the future of constitutional change by popular initiative in Montana.

110. MONT. CONST. art XIV, §§ 7–10.

111. Marshall v. State *ex rel.* Cooney, 975 P.2d 325, 330 (Mont. 1999).

112. Johnstone, *supra* note 2, at 367, 382. **R**

113. State *ex rel.* Woods v. Tooker, 37 P. 840, 842 (Mont. 1894) (citing MONT. CONST. of 1889, art. III, § 29).

114. Ellis Waldron, *The Role of the Montana Supreme Court in Constitutional Revision*, 35 MONT. L. REV. 227, 230 (1974).

115. *Id.* at 232.

116. *Id.*

III. *MONTANA ASSOCIATION OF COUNTIES V. STATE*

A. Factual Background

On November 8, 2016, a majority of Montana voters approved CI-116—a constitutional amendment proposed by popular initiative, commonly known as Marsy's Law.[117] If enacted, CI-116 would have amended Montana's Constitution by adding a new section, titled "Rights of Crime Victims."[118] CI-116 enumerated 18 rights to which crime victims would be entitled, the manner in which a victim's rights were to be recognized, insurances of how the rights would be construed, and provided new definitions for "crime" and "victim."[119]

In response to legal challenges regarding the constitutionality of the amendment, the Montana Supreme Court assumed original jurisdiction over the matter on the basis that the implementation of CI-116 was imminent, the interpretation of whether the initiative violates the Constitution was a purely legal question, and the normal appeals process was inadequate.[120] According to the Court, the factual record was irrelevant because the issue presented—the constitutionality of CI-116—was purely a legal question.[121]

CI-116 was to become effective July 1, 2017.[122] However, on June 20, 2017, the petitioners, Montana Association of Counties, the Montana Association of Criminal Defense Lawyers, and the ACLU of Montana (collectively "MACo") filed a petition for declaratory judgment and injunctive relief.[123] In its petition, MACo argued that CI-116 violated Article XIV, Section 11 of the Montana Constitution, which prohibits the ratification of multiple amendments with a single vote.[124] Moreover, MACo contended that the extensive language of CI-116 amended eight separate sections of the Constitution and, therefore, required eight separate votes to amend each individual section.[125] Conversely, the State asserted that CI-116 did not violate the separate-vote requirement because the initiative did not formally alter any preexisting constitutional provision.[126] Additionally, the State

117. Linda McCulloch, *Montana Secretary of State Linda McCulloch 2016 Statewide General Election Canvass*, MONT. SEC'Y OF STATE, https://perma.cc/LG6K-CRWX.

118. MONT. CONST. art. II, § 36 (held unconstitutional 2017).

119. *Id.*

120. Montana Ass'n of Ctys. v. State *ex rel.* Fox, 404 P.3d 733, 735 (Mont. 2017).

121. *Id.*

122. Order at 2, *Montana County Attorneys Association v. State ex rel. Fox*, https://perma.cc/8VPG-AV3H (Mont. 2017) (OP 16-0720).

123. *See generally* Pet. for Decl. and Inj. Relief on Original Jurisdiction, *Montana Ass'n of Counties v. State ex rel. Fox*, https://perma.cc/LDH3-VZQQ (Mont. 2017) (OP 17-0358) [hereinafter Petition].

124. *Id.* at 8.

125. *Id.*

126. Resp. to Pet. for Decl. Relief at 5, *Montana Ass'n of Ctys. v. State ex rel. Fox*, https://perma.cc/QAC3-U6BK (Mont. 2017) (OP 17-0358) [hereinafter Response to Petition].

claimed that construing the separate-vote requirement as the petitioners requested would effectively abolish the constitutional initiative process in Montana.[127]

B. The Majority Holding

The Court chose to treat whether the changes proposed by CI-116 violated the separate-vote requirement of Montana's Constitution as a dispositive issue.[128] In doing so, the Court reiterated numerous times that the merits of CI-116 and the policy implications behind the amendment were not at issue in the case.[129] In addressing whether CI-116 was constitutional as submitted to voters, the Court applied a rigid interpretation of the separate-vote provision.[130] The Court determined the Separate Amendment Rule was intended to safeguard against the grouping of "several issues under one innocuous title," so that voters are able to vote on each and every change to the Constitution individually.[131] In effect, the Separate Amendment Rule attempts to strike a balance between the right of the people to amend the Constitution and the strict adherence to the proscribed methods for amendment. Although the constitutional initiative process empowers the citizens of Montana to change the Constitution as they deem fit, the procedure by which the Constitution is amended must comply with the Separate Amendment Rule.[132]

In attempting to strike this delicate balance, the Court held that CI-116 was submitted to the voters in violation of the Separate Amendment Rule because CI-116 would, by implication, change the Constitution in numerous, substantive, unrelated ways.[133] The Constitution provides that each proposed amendment will be distinguished so that it can be voted on separately.[134] The Court held that the proper test to determine if an amendment is in violation of the Separate Amendment Rule is whether, if adopted, the proposed amendment would make two or more changes to the Constitution that are substantive and not closely related.[135] Accordingly, the Court determined that CI-116 would have effectively amended Montana's Constitution in the following ways: (1) modifying the due process provision of the Constitution by supplementing language exclusive to crime victims;[136] (2) af-

127. *Id.* at 16.
128. Montana Ass'n of Ctys. v. State *ex rel.* Fox, 404 P.3d 733, 735 (Mont. 2017).
129. *Id.* at 735, 747.
130. MONT. CONST. art. XIV, § 11.
131. *Montana Ass'n of Ctys.*, 404 P.3d at 738 (internal citations and quotation marks omitted).
132. *Id.* at 747.
133. *Id.*
134. *Id.* at 741 (interpreting MONT. CONST. art. XIV, § 9).
135. *Id.* at 742.
136. *Id.* at 743–44.

fecting the power of the Court to regulate the rules of professional attorney conduct by requiring a prosecutor to confer with the victim;[137] (3) amending the right to bail by prohibiting a court from releasing a defendant before all victims are given the opportunity to be present and heard;[138] (4) reworking the rules of criminal procedure intended to prevent improper prosecutions by limiting them to the victim's interest to push for prosecution;[139] (5) upending the defendant's right to prepare a defense by allowing victims the right to refuse discovery requests;[140] (6) reshaping an individual's right of privacy by giving "persons" and other non-human entities including corporations the right of privacy;[141] and (7) toppling the right to know by giving extended family members the same rights as the victim.[142]

C. Justice Rice's Dissent

Dissenting from the Court's majority opinion, Justice Rice contended that, as a threshold concern, the Court lacked original jurisdiction over the constitutional challenge and that the Court had adopted a flawed test for the application of the Single Amendment Rule.[143] Addressing the question of original jurisdiction, Justice Rice argued that the Court abused its judicial power because the issue to be adjudicated did not present an actual, present controversy.[144] The Court has a duty to determine if an initiative is facially unconstitutional, as opposed to examining the substance of the measure to determine if a case is justiciable.[145] Justice Rice contended that the petition failed to present a ripe issue[146] because the Court was not faced with a purely legal question and, in the absence of a factual record, the Court had to make assumptions based on MACo's theorized injury that would result from the implementation of CI-116.[147] Without a specific claim of injury, Justice Rice stressed, it would be impossible to properly determine whether a constitutional conflict existed.[148]

While Justice Rice acknowledged that he could end his dissent with the jurisdictional contention, he went on to voice his concerns with the

137. *Id.* at 744.
138. *Id.* at 744–45.
139. *Id.* at 745.
140. *Id.* at 745–46.
141. *Id.* at 746.
142. *Id.*
143. *Id.* at 748, 750–51 (Rice, J., dissenting).
144. *Id.* at 748 (Rice, J., dissenting).
145. Carina Wilmot, Note, Reichert v. State ex rel. McCulloch *and the Open Door for Increased Pre-Election Substantive Judicial Review*, 74 MONT. L. REV. 441, 450 (2013) (citing Reichert v. State *ex rel.* McCulloch, 278 P.3d 455, 473–74 (2012)).
146. *Montana Ass'n of Ctys.*, 404 P.3d at 750–51 (Rice, J., dissenting).
147. *Id.* at 749 (Rice, J., dissenting).
148. *Id.* at 750.

Court's application of the Separate Amendment Rule.[149] Justice Rice asserted that the test adopted by the Court is problematic because it will lead to the invalidation of most initiatives challenged on the basis that the amendment would effectuate multiple changes to the Constitution.[150] Justice Rice interpreted the consequence of the Court's test as undermining the rights of citizens to amend the Constitution by popular initiative.[151] Finally, Justice Rice urged the Court to focus on the substance of the proposed amendment, pointing to *Marshall*, where the amendment there violated the Separate Amendment Rule because it explicitly amended multiple parts of the Constitution and thus constituted multiple amendments. Applying that test to the present case, Justice Rice asserted that the correct analysis for a proposed amendment *that does not explicitly alter multiple parts of the Constitution* therefore requires evaluating whether the amendment substantively constitutes multiple amendments. Under Justice Rice's test, a proposed amendment—regardless of how many parts of the Constitution it altered—would satisfy the Separate Amendment Rule "as long as those revisions were part of one complete, substantive amendment."[152]

IV. Analysis

A. *The Separate Amendment Rule in* Montana Association of Counties v. State

Having decided *Marshall* largely relying on *Armatta*, the Court in *Montana Association of Counties* left open several questions surrounding how the single-subject and separate-vote provisions of the Constitution would be interpreted going forward. Mainly, the *Marshall* Court did not address what would constitute a separate amendment for the purposes of a separate-vote because the constitutional initiative in question there expressly violated the separate-vote requirement by explicitly amending three parts of the Constitution.[153] Further, the Court did not address whether an amendment that changed the Constitution by implication would violate the separate-vote requirement, as that was not at issue in *Marshall*. Thus, *Montana Association of Counties* required the Court to articulate whether an amendment proposed by popular initiative would constitute more than one amendment for the purposes of the Separate Amendment Rule if the amendment implicitly altered the Constitution in several substantive ways.[154]

149. *Id.* at 751.
150. *Id.* at 752.
151. *Id.*
152. *Id.* at 753 (Rice, J., dissenting).
153. Marshall v. State *ex rel.* Cooney, 975 P.2d 325, 331–32 (Mont. 1999).
154. *Montana Ass'n of Ctys.*, 404 P.3d at 742.

In keeping with the *Marshall* Court's earlier reliance on *Armatta*, the Court explained that the single-subject requirement only applies to the legislature—not to amendments proposed by popular initiative.[155] The Court justified this distinction by stating that the single-subject requirement was only intended to provide guidelines by which the legislature must present bills to the electorate, and, therefore, the single subject requirement did not apply to amendments proposed by popular initiative.[156] In adopting the rationale underlying *Armatta*, the Court held that Montana's Separate Amendment Rule was more narrow than the single-subject requirement because the constitutional initiative process was fundamentally different than amendments proposed by the legislature.[157] Although in *Marshall*, the Court went to great lengths to explain that the Separate Amendment Rule was narrower than the single subject requirement in order to overrule longstanding precedent, it did so while still essentially applying a single-subject rationale.

In rejecting the State's argument based on the longstanding unity of subject approach and the assertion that CI-116 did not explicitly alter any preexisting constitutional text, the Court adopted a very similar test for determining if a proposed amendment would constitute more than one amendment. Reasserting the Separate Amendment Rule announced in *Marshall,* but distinguishing that the single-subject provision was inapplicable, the Court concluded that the proper inquiry for whether a proposed amendment violated the Separate Amendment Rule was whether the amendment, if adopted, would make two or more changes to the Constitution that were substantive and not closely related.[158] The Court defined "substantive" changes as being an essential part of the whole or as relating to what is essential.[159] The "closely related" prong was comprised of several factors including whether provisions were facially related; concerned a single section of the Constitution; if voters and the legislature had historically treated the matters as one subject; and whether the effects would be qualitatively similar under either substantive or procedural law.[160] Then, the Court supplemented the Separate Amendment Rule by stating that, "if a proposed constitutional amendment adds new matter to the Constitution, that proposition is at least one change in and of itself," and if an amendment has the "effect of modifying an existing constitutional provision," whether explicit or implicit, that is additional change as well.[161] Therefore, the Separate

155. *Id*. at 740.
156. *Id.*
157. *Id.* at 739–40 (citing *Marshall*, 975 P.2d at 331).
158. *Id.* at 742.
159. *Id.* (citing *Substantive*, BLACK'S LAW DICTIONARY (6th ed. 1990)).
160. *Id.* (internal citations omitted).
161. *Id.* (internal citations and quotation marks omitted).

Amendment Rule as announced by the Court in *Montana Association of Counties* effectively reads: An amendment is unconstitutional if it makes two or more changes to the Constitution which are substantive and not closely related, with the addition of new text and the modification of any existing provisions each respectively constituting changes.

Excluding the *additional new matter* and *effect of modifying* provisions, the Court's new Separate Amendment Rule under *Montana Association of Counties* is strikingly similar to the old unity of subject requirement overruled in part by *Marshall*, but with radically different results as applied. Both rules consider whether an amendment makes changes that are unrelated and not interdependent, but whereas the unity of subject rule asked whether the changes related to more than one subject (which was prohibited), the new Separate Amendment Rule implies this assumption. Nonetheless, the Court in *Montana Association of Counties* asserted that the application of its two-prong test for determining whether a proposed amendment violates the Separate Amendment Rule "gives appropriate effect to the separate-vote requirement by ensuring each constitutional amendment receives its own vote without unduly restricting constitutional change."[162]

Although the Court had previously declined to apply an amendment-by-implication analysis, CI-116 required the Court to consider how to extend the Separate Amendment Rule to implicit modifications. The Court noted that sometimes "it will be clear from the text of the proposed initiative" if it violates the separate-vote requirement, and "[i]n other instances, it will be necessary to examine the implications of the proposal" to determine whether it contains more than one amendment.[163] Applying the new Separate Amendment Rule to CI-116, the initiative was bound to fail because it explicitly added a new section to Article II of the Constitution, which counted as one change, and implicitly modified numerous other provisions of the existing constitutional text, which counted as additional changes. Although the broad provisions of CI-116 related to the rights of crime victims and criminal prosecution, the amendment as applied to the existing Constitution would have clearly altered the text in numerous ways. Amidst the seemingly innocuous language of CI-116, the amendment would have altered the Constitution's provisions, including, but not limited to: due process; the right to bail; the right of privacy; the right to know; and criminal procedure, while also broadly expanding the definition of "victim." While CI-116 did not expressly repeal or modify any provisions of the Constitution, its implementation would have implicitly modified numerous provi-

162. *Id.* at 743.

163. *Id.* at 742 (quoting Armatta v. Kitzhaber, 959 P.2d 49, 64 (Or. 1998)).

sions of the existing constitutional text, often in opposition of their well-established understandings.

If enacted, CI-116 would have explicitly added a new section to Article II of Montana's constitutional Declaration of Rights, entitled "Rights of Crime Victims."[164] This new section sought to protect the rights of a crime victim by "ensur[ing] a crime victim has a meaningful role in [the] criminal . . . justice system[ ]" and a victim's rights would be equal to the protections afforded to a criminal defendant.[165] This new set of rights for crime victims would be effectuated by 18 enumerated rights, as well as an expansive definition of "victim" that included the victim's spouse, parent, grandparent, child, sibling, grandchild, or guardian.[166] The provisions of CI-116 were to be self-executing, with no action of the legislature required.[167]

The first and most prominent of the 18 rights provided by CI-116 would modify the preexisting right to due process by including a victim's right to "be treated with fairness and respect" for their dignity.[168] However, Montana's Constitution already provides: "No person shall be deprived of life, liberty, or property without due process of law."[169] If CI-116 were to have gone into effect, the Due Process Clause would presumably have needed modification to read: "No person shall be deprived of life, liberty, or property without due process of law, and a crime victim is to be treated with fairness and respect for the victim's dignity." The right of due process is fundamentally linked to the presumption of innocence, which is "a bedrock, axiomatic, and elementary tenet of our criminal justice system."[170] The right to due process is implicated when the government is depriving an individual of life, liberty, or property, and requires that the person facing deprivation is given an adequate opportunity to be heard.[171] Here, it is unclear of what the crime victim is being deprived and thus unclear what process they are due. Further, CI-116 would have essentially turned the fundamental presumption of innocence on its head because under the initiative, a criminal defendant would have been subject to the assumption of guilt "at the time of victimization," rather than after a trial had been conducted and due process afforded.[172]

Applying the Separate Amendment Rule as announced by the Court to the first provision of CI-116 is illustrative of its effects on the remainder of

164. *Id.* at 735–36.
165. CONST. INITIATIVE NO. 116 (May 16, 2016), https://perma.cc/33VV-YSK3.
166. MONT. CONST. art. II, § 36(1), (4)(b)(i)(A–B) (held unconstitutional 2017).
167. *Id.* art. II, § 36(3) (held unconstitutional 2017).
168. *Id.* art. II, § 36(1)(a) (held unconstitutional 2017).
169. MONT. CONST. art. II, § 17.
170. State v. Lawrence, 385 P.3d 968, 971 (Mont. 2016) (internal citations omitted).
171. *See* Mathews v. Eldridge, 424 U.S. 319, 332–33 (1979).
172. MONT. CONST. art. II, § 36(1) (held unconstitutional 2017).

the provisions. Applying the substantive prong (relating to the whole or what is essential), the right of crime victims "to be treated with fairness and respect" relates to the essential equality of due process, which is fundamental to our criminal justice system but is at odds with well-established applications of the right. Nonetheless, a provision providing due process rights for crime victims plausibly relates to the rights of all people as a whole. Reaching the closely related prong of the test and considering the relevant factors, the modification of the due process rights for crime victims would also logically implicate a modification of the due process rights of others already provided for by the Constitution. Therefore, even though the due process rights of crime victims and the rights of all people are facially related, they would implicate multiple sections of the Constitution. Additionally, considering whether the voters and the legislature would have historically considered the matter as one subject with qualitatively similar effects on procedural law demonstrates that the right to due process for crime victims is fundamentally at odds with the established conception of the right.

Considering the additional *text* and *effect* components of the Separate Amendment Rule, the due process provision of CI-116 both adds new text and affects multiple existing provisions of the Constitution. Although the due process right of crime victims provided by CI-116 satisfies the substantive prong, it does not meet the closely related prong as laid out by the Court. Further, because the provision adds additional text and affects other sections of the Constitution, this modification counts as two additional changes effectively requiring two separate votes.

In addition to reversing the fundamental presumption of innocence provided to all citizens under the United States Constitution, the sweeping language of CI-116 also modified provisions unique to Montana's Constitution without regard for the preexisting text. The right to know[173] and the right of privacy[174] are complementary rights distinct to Montana's Constitution. The Court has often made it known that it is "not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution."[175] The right to know and the right of privacy, while textually interdependent, are also inherently in tension with one another as an individual's right of privacy is interwoven with society's right to know, and vice versa.[176] The right to know provides: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies . . .

173. MONT. CONST. art. II, § 9(1).
174. *Id.* art. II, § 10(1).
175. State v. Hardaway, 36 P.3d 900, 909 (Mont. 2001).
176. *In re* Lacy, 780 P.2d 186, 187 (Mont. 1989).

except in cases which the demand of individual privacy clearly exceeds the merits of public disclosure."[177] In contrast, the right of privacy provides "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[178] Although the right to know and the right of privacy are distinct rights, because of their complementary nature, they are addressed together with regard to CI-116.

In providing a right of privacy for crime victims, CI-116 runs counter to the preexisting text of the Constitution which provides for a right to know. CI-116 provided crime victims the right "to privacy, including the right to refuse an interview, deposition, or other discovery request and to set reasonable conditions on the conduct of any interaction to which the victim consents."[179] Thus, CI-116 would have effectively modified the preexisting right to know by requiring that supplemental language be added to limit the right when a crime victim is involved. Conversely, the preexisting right of privacy would have effectively been altered from an individual right as it exists now in order to accommodate the expansive definition of "victim" provided by CI-116, which creates a group right to be informed.[180] Similar to the manner in which CI-116 effectively reversed the fundamental presumption of innocence provided by the right to due process, it also appears to reverse the established meanings of privacy and disclosure in Montana's Constitution by limiting the right to know and subjecting the individual right of privacy to the determination of an expansive group of family members and other people substantially related to the victim.

Once again applying the new Separate Amendment Rule as announced by the Court, while a crime victim's right of privacy and disclosure are substantially related to the rights of crime victim's and thus satisfy the first prong, they likely do not satisfy the second prong. This is because both the right of privacy and disclosure as provided by CI-116 have the effect of modifying and essentially reversing established constitutional text when the rights of crime victims are implicated. Further, the Constitution provided for the right to know and the right of privacy, as textually interdependent provisions, only after careful deliberation and attention to the balance they would strike. Specifically, the framers of the Constitution debated the effects of using the term "individual" versus "person," and after several insightful exchanges, intentionally chose to protect "individual" rather than "personal" privacy because it was their understanding that a corporation can

177. MONT. CONST. art. II, § 9.

178. *Id.* art. II, § 10.

179. *Id.* art. II, § 36(f) (held unconstitutional 2017).

180. *Id.* art. II, § 36(4)(b)(i)(A)-(B) (held unconstitutional 2017).

be a person, but an individual cannot be a corporation.[181] Therefore, when CI-116 states that a "[v]ictim means a person . . ." the provision is ignorant to the history that informs the preexisting text and would thereby give rights to non-human entities explicitly not afforded by the framers of the Constitution.[182]

Under the Court's current interpretation of the Separate Amendment Rule, adding new material to the Constitution constitutes one change, and therefore the application of the substantive and closely related prongs become essentially meaningless. Applying the substantive prong of the test to CI-116, it fundamentally changes every part of the Constitution it seeks to affect because it creates a never-before recognized right for an entirely new class of people—crime victims. The changes CI-116 sought to effectuate are substantive because, in amending the Constitution to broadly recognize the rights of crime victims, the initiative must, in effect, alter much of the Constitution's text, whether implicitly or explicitly.

As for the closely related prong, the application of CI-116 is also futile because, even though its provisions fall under the title of crime victims' rights, the amendment affects multiple parts of the Constitution that are not related. For example, in considering whether the legislature and voters would have historically thought of amending the Declaration of Rights to give special rights to a class of people when the text plainly states, "No person shall be denied the equal protection of the laws," CI-116 seems absurd in relation to the text.[183] Because, as the Court stated, it is "difficult to make related changes to unrelated constitutional provisions," the provisions of CI-116 necessarily also fail under the closely related prong.[184]

The purported defect of CI-116 was in its submission to the voters because the proposed initiative presented more than one constitutional change in a single amendment.[185] Under the Court's strict interpretation of the Separate Amendment Rule, each provision of CI-116 should have been presented to the electorate individually. When voters were required to vote "yes" or "no" on CI-116 in its entirety, they were forced to vote for or against multiple changes to the Constitution with no way to express their opinion on each provision. The Separate Amendment Rule, as applied by the Court, requires that voters have complete control over each and every constitutional change by enabling them to vote for or against each and every provision. The application of the Separate Amendment Rule articu-

181. V MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1680 (1979) (Delegate Dahood, stating, "An individual, in my judgment, would not be a corporation, no").

182. MONT. CONST. art. II, § 36(4)(b) (held unconstitutional 2017).

183. *Id.* art. II, § 4.

184. Montana Ass'n of Ctys. v. State *ex rel.* Fox, 404 P.3d 733, 742 (Mont. 2017) (quoting Lehman v. Bradbury, 37 P.3d 989, 998 (Or. 2002) (en banc)).

185. *Id.* at 747.

lated by the Court in *Montana Association of Counties* will almost inevitably lead to the invalidation of most multifaceted constitutional amendments proposed by popular initiative on the grounds that they do not provide for the opportunity to vote on both the text and the effect of each constitutional change separately.

B. Looking Backwards, Going Forward: Restraining Out-of-State Interests Without Unduly Restricting Constitutional Change

In distinguishing Montana from other states, its historical and political culture can be explained simply: "Montana is different."[186] Montana's Constitution, while "committed to an abstract ideal of just government," is "not merely a cookbook of heady aspirations."[187] Rather, the fundamental text is intended to be a peoples' document of interrelated rights, fitted for common understandings. Seventeen of the rights reserved by the people in Montana's Declaration of Rights are unique and have no parallel to the United States Constitution.[188] In providing rights unique and distinct from its federal counterpart, Montana's Constitution requires its state judiciary to serve as "guardian of the people's constitutional liberties" when interpreting the fundamental text.[189] Therefore, the Court must also work to protect against the narrow self-serving interests of those who seek to change the text without regard for what is being sacrificed.[190] It is fundamental to the system of government "to guard the minority in our society against injustice by the majority, as it was to guard society from the oppression of its rulers."[191] When the Court interprets the Constitution, it does so with the special role of protecting disaffected minorities from injustices proliferated by the majority of society, and as the Court has noted:

> [O]f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.[192]

186. William P. Marshall, *The Constitutionality of Campaign Finance Regulation: Should Differences in a State's Political History and Culture Matter?*, 74 MONT. L. REV. 79, 79 (2013).

187. James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 MONT. L. REV. 299, 302 (2010).

188. Fritz Snyder & Mae Nan Ellingson, *The Lawyer Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53, 60 (2011).

189. Nelson, *supra* note 187, at 307.

190. *Id.* at 305–06.

191. Gryczan v. State, 942 P.2d 112, 125 (Mont. 1997) (internal citations omitted).

192. *Id.* (quoting C.S. Lewis, God in the Dock: Essays on Theology and Ethics 292 (Walter Hooper ed. 1970)).

While the victim above is not a "crime victim" but is instead a minority group in society subjected to the tyranny of the majority's heteronormative moral prescriptions, it is nonetheless illustrative to consider the "victim" CI-116 sought to vindicate. CI-116 ostensibly sought to empower the victims of crime, but in doing so was an exercise of power over the politically powerless, *i.e.*, alleged delinquents who would be stripped of the right to due process "beginning at the time of victimization."

The paradox of CI-116 was its attempt to reshape part of Montana's Constitution into an incorrigible proposition. By presenting CI-116 as protecting the "Rights of Crime Victims," proponents were able to effectively obscure the subject matter of the initiative by offering a simplistic explanation that could not easily be opposed.[193] By submitting CI-116 as a constitutional initiative, the amendment's proponents attempted to bypass the rigorous legislative process under the guise of a popular initiative.[194] Supposedly promoting crime victims' rights, CI-116 effectively attempted to redraft large parts of Montana's Constitution. This move was ironic, given that the initiative process was designed to restrain and counteract the influence of special interests on the legislature.[195] While the people can use instrumentalities of direct democracy to liberate themselves from outside control, they must also be protected against manipulation by private interests that attempt to remake the state's Constitution from within. Proponents of CI-116 attempted to shoehorn the product of their nationwide crusade for Marsy's Law into the Montana Constitution, while ignoring the Constitution's pre-existing text and history.[196] Masquerading as a bill of rights for crime victims, CI-116 effectively worked to strip away protections of due process, privacy, and the fundamental presumption of innocence. While attempting to take away constitutional rights from the citizens of Montana, CI-116 simultaneously endeavored to give never-before-existing rights to "crime victims."

The narrow Separate Amendment Rule adopted by the Court has drawn sharp criticism from opponents who argue that imposing such a strict test does not comport with the spirit of the provision.[197] Opponents further contend that such a mechanical test will seriously impede and invalidate many legitimate constitutional initiatives. But when the Court deviates from its role as arbiter of justice and delves into the realm of politics it becomes a ripe target for criticism. As the Court's interpretation of the Separate Amendment Rule now stands, it is forced to employ a rigid reading of the

193. Appleby, *supra* note 11, at 358. **R**
194. *Id.* at 363–64.
195. *Id.* at 362.
196. Petition, *supra* note 1235, at 1. **R**
197. D. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 38 (2002).

provision which produces substantially different results than prior precedent. A nihilistic view would suggest that the courts should not apply such a formalistic rule to protect the citizens from themselves when they enact constitutional change.[198] While a "let them have their cake and eat it, too" approach would free the Court from interfering with the will of the electorate as expressed at the polls, it would be disingenuous and a profound disservice to the people of Montana who adopted and preside over this state's Constitution.

Realistically, the judiciary and politics are inseparably intertwined, and the text of the Constitution must inform and guide them both. The political reforms that emerged from the social and political upheaval of the early nineteenth century were the product of both populist and progressive forces coalescing to demand meaningful citizen participation in what was viewed as an indifferent legislature and a corrupt judiciary. With the early process, citizens and the legislature acted together, and the citizens were thus empowered to keep the legislature and judiciary in check. Under the present constitutional amendment by popular initiative process, there is not the same balancing check of the legislature in place and the Court is therefore often forced to step in. From the onset, the initiative process sought to assert the right of the people to self-government, and it must be allowed to continue to do so going forward, but is difficult for the power to be both a check and a balance simultaneously.

In 1913, former President and future Chief Justice of the United States Supreme Court, William Howard Taft, spoke about the rise of popular government and acknowledged that demands for direct democracy were rooted in the "corrupt and subterranean control of legislatures."[199] But, Taft warned that the constant use of instruments of direct government had the potential to "eliminat[e] all distinction between a constitution as fundamental law, and statutes enacted for the disposition of current matters" because in doing so it would minimize "the sacredness of those fundamental provisions securing the personal rights of the individual against the unjust aggression of the majority of the electorate."[200] Ominously, Taft also cautioned against coddling the people into thinking that they could not make a mistake in the successful execution of popular governance and that the assumption that all the defects that "manifested themselves [were] due to the machinations of wicked men, and [were] not due in any degree to the fault

198. Rick Hasen, *Ending Court Protection of Voters from the Initiative Process*, 116 YALE L.J. POCKET PART 117, 117 (2006).

199. WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 33 (1914).

200. *Id.* at 64.

of the people in discharging their political obligations, is a misrepresentation of the truth, but flattering to the people."[201]

V. Conclusion

The Separate Amendment Rule limits how constitutional amendments are presented to voters.[202] Limiting how a constitutional amendment is proposed serves to ensure that each amendment is clearly designated and can be voted on separately.[203] The strict separate-vote requirement is reasonable and necessary because proposed initiatives are "dealing with something as fundamental and important as constitutional change."[204] Nevertheless, the people of Montana also have the "exclusive right of governing themselves as a free, sovereign, and independent state" and "may alter or abolish the constitution and form of government whenever they deem necessary."[205] However, any attempt to amend the Constitution by popular initiative that does not adhere to the requirements of the new amendment procedure prescribed in *Montana Association of Counties* is a violation of the self-imposed restriction and is therefore unconstitutional.[206]

201. *Id.*

202. Mont. Const. art. XIV, § 11.

203. Johnstone, *supra* note 2, at 350.

204. Montana Ass'n of Ctys. v. State *ex rel.* Fox, 404 P.3d 733, 738 (Mont. 2017) (internal citations and quotation marks omitted).

205. Mont. Const. art. II, § 2.

206. *Montana Ass'n of Ctys.*, 404 P.3d at 737.

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