The Constitutional Initiative in Montana

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# THE CONSTITUTIONAL INITIATIVE IN MONTANA

Anthony Johnstone*

## Table of Contents

I. Introduction ........................................... 326

II. Origins of the Constitutional Amendment Process ...
    A. The History of the Constitutional Referendum .......... 328
       1. Proposal in the 1884 Constitution ................. 328
       2. Revision in the 1889 Constitution ................. 330
    B. The Practice of Constitutional Referendum .......... 332
       1. Use of the Referenda by the People ............... 333
       2. Review of the Referenda by the Supreme Court ... 335

III. The Adoption of the Constitutional Initiative ....... 336
    A. Pre-Convention Foundations ........................... 337
    B. Constitutional Revision Committee Report .......... 339
    C. Convention Debate ..................................... 341
       1. Legislative Amendments: A Constitution
          “Answerable Only to the People” ................... 343
       2. Signature Requirements: “A Constitution that Looks
          Like California” ....................................... 344
       3. Amendment Restrictions: “The People Should Not
          be Limited” ............................................ 345
          Are” .................................................... 346
    D. Ratification ............................................ 348

IV. The Constitutional Initiative in Practice ............. 351
    A. Subjects Addressed by Constitutional Amendments ...
       1. Revenue and Finance ................................. 353
       2. Governmental Structure ............................... 354
       3. Declaration of Rights ................................ 355
       4. Initiative Processes and Constitutional Revision ... 355
    B. Judicial Review of Constitutional Amendments ....... 356
       1. Procedural Review of the Amendment Process ....... 357
          a. The Inadequacy of Substantial Compliance .... 357
          b. Deference to Coordinate Branches ............... 360
          c. Legislative Refinement of the Process .......... 361
       2. Substantive Review of Amendments ................... 363
          a. What an “Amendment” Is .......................... 364

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The 1972 Montana Constitution gave the people a new power to propose and approve amendments by constitutional initiative. This innovation is basic to the Constitutional Convention's plan to increase the democratic responsiveness of a state government weighed down by detailed and inflexible constitutional provisions and interpretations that had accumulated since statehood. The framers of the constitutional initiative explained "the right to initiate Constitutional amendments . . . is an inherent right in a body politic whose Constitution is to be the embodiment of the will of the people." It serves, in other words, as a direct practical guarantee of the primary provisions of the Declaration of Rights, popular sovereignty and self-government. First, "All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole." Second, the people "may alter or abolish the constitution and form of government whenever they deem it necessary."

Popular sovereignty exercised through the constitutional initiative can lead to a paradox, however. While the constitutional initiative can make government more responsive to voters by constraining legislative policymaking or removing constraints on policymaking imposed by judicial review, it also can complicate the constitutional text over time so as to leave state government less responsive in the end. The originators of the constitutional initiative in Montana foresaw this possibility, suggesting "we might be in danger of flooding the Montana Constitution with amendment after amendment that would be better put in the statutes, and we'll have a Constitution that looks like California and Louisiana." This is a concern acknowledged by the Chief Justice of California himself in October 2009, when he observed that in times of fiscal crisis "Frequent amendments—

3. Id. at § 2.
The constitutional initiative in Montana—coupled with the implicit threat of more in the future—have rendered our state government dysfunctional.\(^5\)

This article discusses the function of the constitutional initiative as a direct expression of the popular sovereignty guaranteed by the Montana Constitution. Part I explores the historical roots of the constitutional initiative power and process in earlier Montana constitutions and elsewhere. Part II records the origin of the constitutional initiative in the debates that preceded, constituted, and followed the 1972 Constitutional Convention and ratification process. Part III describes voters’ use of the constitutional initiative and the Supreme Court’s active supervision of amendment procedures. Circulation of constitutional initiative petitions is the most common form of direct democracy in Montana, but at the polls voters more frequently shape the Constitution by approving amendments referred by the Legislature. Both processes focus on fiscal policy and individual rights. Part IV assesses the constitutional initiative in historical and national contexts and considers its future in Montana. The relative infrequency of constitutional initiatives could change as petitioners drive supply through the professionalization of signature gathering and voters drive demand through attempts to make the legislative and judicial branches more responsive on specific issues. Thus, the future form of the Montana Constitution depends on the state government’s fidelity to the principles of popular sovereignty in the current Constitution.

**II. Origins of the Constitutional Amendment Process**

History informs the structure of the constitutional initiative in Montana today. The basic process of publication, majority approval, and the Separate Amendment Rule originated in the pre-statehood Constitution of 1884 and its sources in other states. The 1889 Constitutional Convention previewed several of the concerns expressed by the framers of the 1972 Constitution and produced the relatively strict amendment process to which the later document would respond. The Legislature’s use of the amendment process over eight decades revealed basic faults in the Constitution’s rigidity, leading to calls for a flexible, new constitution. Fundamentally, the adoption of the constitutional initiative in 1972 was a reaction to the incumbent amendment process’s limitations, as well as to more general concerns about the responsiveness of the Constitution and its resulting government to the changing views of Montanans.

A. The History of the Constitutional Referendum

In the rush to ratify a constitution while political conditions were favorable to statehood, the 1889 Constitutional Convention largely re-adopted the 1884 Constitutional Convention, which in turn borrowed heavily from the 1876 Colorado Constitution. As Professors Larry Elison and Fritz Snyder explain, “The 1889 Constitution was enacted more as a tool to achieve statehood than to provide a well-thought-out structure of governance for the new state.”6 The chairman of that Convention, William Andrews Clark, expressed the delegates’ understanding that given the inevitable changes the new state would undergo, “[T]he genius and wisdom of our successors will eliminate, supplement, and amend” the text of the new constitution.7

The framers’ expediency in drafting the Constitution as a whole, therefore required special attention to the means of constitutional amendment. Unlike most of the final constitutional text, the amendment provisions in the 1884 Constitution departed from the Colorado model, and the amendment provisions in the 1889 Constitution departed again from the 1884 model. Instead, the early constitutions show that the delegates searched broadly for useful rules of amendment in various states and adapted them to their view of Montana’s circumstances.

1. Proposal in the 1884 Constitution

The 1884 Montana Constitution provided for amendment by proposal of a majority of each legislative house and approval by a majority vote at the next general election:

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

THE CONSTITUTIONAL INITIATIVE IN MONTANA

prepared and distinguished by numbers or otherwise that each can be voted upon separately.\textsuperscript{8}

These legislative and popular vote requirements also applied to a convention to prepare "such revisions, alterations, or amendments to the Constitution as may be deemed necessary."\textsuperscript{9}

An early historian of the Constitution observed that "[b]y far the larger part of our constitution was taken directly from that of Colorado."\textsuperscript{10} Montana's 1884 amendment provision drew on these Colorado origins, sharing substantially similar text with two important differences.\textsuperscript{11} First, the Colorado provision required a two-thirds vote in each legislative house instead of a majority.\textsuperscript{12} Second, the original Colorado provision allowed its general assembly to propose amendments to only a single article at the same session.\textsuperscript{13} The single-article limitation significantly reduced the flexibility of the constitutional structure, since amendments to such related articles as education, revenue, and public indebtedness only could occur serially over several elections.\textsuperscript{14} Even so, amendments to any one article were not limited to a single subject.\textsuperscript{15}

The 1884 Constitution omitted Colorado's single-article restriction in favor of a "separate amendment" rule allowing unlimited amendments if they "be so prepared and distinguished by numbers or otherwise that each can be voted upon separately."\textsuperscript{16} The direct source of the Separate Amendment Rule in Montana is unclear—Colorado did not adopt the rule until 1899—but several state constitutions contained variations on the rule at the time of the 1884 Convention, including the Kansas and Minnesota Constitutions that the 1889 framers specifically consulted.\textsuperscript{17} The rule itself occurs as early as the 1838 Pennsylvania Constitution's Article X: "That if more than one amendment be submitted, they shall be submitted in such a manner

\begin{itemize}
\item \textsuperscript{8} Mont. Const. art. XVI, \S\ 13 (1884) (Repealed 1889).
\item \textsuperscript{9} Id. at art. XVI, \S\ 12.
\item \textsuperscript{11} Id. at 7.
\item \textsuperscript{12} Colo. Const. art. XIX, \S\ 2.
\item \textsuperscript{13} Id. (amended 1899 by Colo. Laws 155) (providing for popularly initiated amendments, expanding legislatively proposed amendment limitation to six articles, and requiring all amendments to be voted upon separately).
\item \textsuperscript{14} See e.g. Colo. Const. Arts. IX, X, XI.
\item \textsuperscript{15} Nesbit v. People, 36 P. 221, 223 (Colo. 1894) (rejecting single subject challenge to proposal amending three different sections of the legislative article), superseded, S.C.R. 93-004 \S\ 1 (1993) (prohibiting amendments submitted by the general assembly that contain "more than one subject, which shall be clearly expressed in its title").
\item \textsuperscript{16} Mont. Const. art. XVI, \S\ 13 (1884).
\item \textsuperscript{17} Allen, supra n. 10, at 1; Kan. Const. art. XIV, \S\ 1 ("When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately"); Minn. Const. art. 14, \S\ 1 ("If two or more alterations or amendments shall be submitted at the same time, it shall be so regulated that the voters shall vote for or against each separately.").
\end{itemize}
and form that the people may vote for or against each amendment separately and distinctly.” 18 New Jersey had adopted a similar provision by 1844.19 Indiana followed in 1851, and Oregon followed Indiana’s example in 1859.20 By 1884, at least 17 states had adopted some form of a Separate Amendment Rule, including California.21 The choice of the more common Separate Amendment Rule rather than the more restrictive Single Article Rule, and majority vote for balloting rather than a two-thirds supermajority, made Montana’s first popularly ratified constitution more open to amendment than its primary model in Colorado.22

2. Revision in the 1889 Constitution

Although “[a]n estimated ninety percent of the wording of the earlier constitution was readopted” in the 1889 Constitution, its framers revised the rule for constitutional amendments.23 What would become the amendment provision was reported to the 1889 Convention with a two-thirds vote requirement in the Legislature.24 Delegate Walter Bickford sought to reduce the two-thirds requirement to a majority, provoking a short exchange that summarizes the subsequent debates over the relative ease or difficulty of amending the Constitution. Mr. Bickford explained that his “proposition is entirely in harmony with all our institutions, that a majority should rule.” So long as a majority of each house in the Legislature “deemed it fit that such an amendment should be offered,” he argued, “the people of this Territory should have the right to vote upon it.”25 Later, Delegate Martin McGinnis suggested the Convention should “trust the people in regard to these

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19. Cambria v. Soaries, 776 A.2d 754, 761 (N.J. 2000) (citing 1844 N.J. Const. art. IX (1844)); see also N.J. Const. art. IX, § 5 (“If more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly.”).
20. Armatta v. Kitzhaber, 959 P.2d 49, 57 (1998) (discussing origins of Oregon’s Separate Amendment Rule); see Or. Const. art. XVII, § 1 (“When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.”).
22. The 1866 Constitutional Convention produced a constitution “copied largely from that of California” but was lost before publication and never ratified. State Law Library of Montana, Constitutional and Statehood Resources, http://courts.mt.gov/library/montana_laws.mcpx#constitutional (accessed Apr. 13, 2010). The 1884 Constitution was ratified but did not result in statehood. Id.
25. Id. at 578.
amendments” on referral by a simple legislative majority, a “perfectly
secure and an entirely safe course to take.” If, according to Delegate Mc-
Ginnis, “any fantastic or any wicked measures would be submitted,” there
were no circumstances under which “the people would endorse them.”

Delegate Walter Burleigh argued against the prospect that “the organic
law of the land should be so constituted” by a majority vote in the Legisla-
ture. Such a low threshold would make it “so easy to amend this constitu-
tion upon every occasion when there is a majority of heads or of tails
down.” Mr. Burleigh appealed to precedent, citing the two-thirds require-
ment to propose an amendment to the United States Constitution. He also
noted, incorrectly, that “[t]he members of the former convention thought
the same thing and put [the two-thirds] provision in.” In a later speech
punctuated with applause, Delegate B. Platt Carpenter predicted that pro-
viding for “a bare majority” to “tamper with the constitution” would allow
“the most ridiculous, grotesque proposition you ever heard of” to be sub-
mitted to the people “with a single flit of the breeze.”

The majority requirement failed in two rounds of voting on a final vote
of 29–31, with 15 absent. The Convention also added, without debate, a
three-amendment limit on the number of proposals that could be submitted
at the same election. Although the 1876 Colorado Constitution contained
a two-thirds vote requirement, it had no three-amendment limit. Another
source consulted by the framers, the 1859 Kansas Constitution, did provide
a three-amendment limit with the version of the Separate Amendment Rule
that may have been borrowed by the 1884 Montana Constitution. The
1889 Convention gave no consideration to a popularly initiated amendment
process. As one student of the process explained, “[T]he real dispute was in
deciding whether to make the constitution difficult to amend or very diffi-
cult to amend.”

26. Id. at 648.
27. Id. at 654.
28. 1889 Constitutional Convention, supra n. 24, at 578.
29. Id.
30. U.S. Const. art. V.
31. 1889 Constitutional Convention, supra n. 24, at 578.
32. Id. at 652.
33. Id. at 649.
34. Id. at 577.
35. Colo. Const. art. XIX, § 2 (1876). Allen noted that Article XIX was taken from both California
and Colorado, although neither contained a Separate Amendment Rule or a three-amendment limit. See
Allen, supra n. 10, at 1.
XIX of the Montana Constitution with Similar Articles in the Constitution of Selected Other States
The 1889 Montana Constitution, therefore, increased the legislative requirement to two-thirds of each house and limited the number of amendments to three at each election:

Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; Provided, however, that not more than three amendments to this constitution shall be submitted at the same election. 38

This new rule for constitutional amendments reflected a similar increase in vote requirements for "revisions, alteration or amendments to the constitution" by convention. 39

B. The Practice of Constitutional Referendum

The Legislature under the two-thirds rule served as the primary check on amendments to the Constitution. In the 40 biennial sessions that passed between the first active legislative assembly in 1891 to the final session under the old constitution in 1971, more than 500 amendments were offered in the Legislature (more than 12 per biennium). 40 These proposals peaked with 15 in 1921, 22 in 1935, 18 in 1949, and a record 32 in 1965 as interest increased in broader constitutional change. 41 The Legislature qualified amendments at a steady pace for all but five general elections over eight decades. 42 Yet only 62 were qualified in total, and, after a governor's veto and four invalidations by the Supreme Court, only 57 appeared on the ballot...

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39. Id. at art. XIX, § 8.
42. See Constitutional Amendments, supra n. 40. The legislatures of 1893, 1911, 1929, 1939, and 1945 did not present amendments. The 1959 Legislature presented three amendments, but they were not presented to the Governor for signing and were invalidated on that ground. Id. at 10; see also State ex rel. Livingstone, 354 P.2d at 557.
(less than one-and-a-half per biennium). Voters approved 40 out of those 57 amendments, an approval rate at the ballot box more than six times higher than the approval rate in the Legislature. The Supreme Court invalidated three of the amendments, leaving a total of 37 amendments under the 1889 Constitution—less than one amendment per biennium.

1. Use of the Referenda by the People

The history of amendments to the 1889 Montana Constitution, like that of other state constitutions, may be read as a series of reactions by the people to two different branches of government. First, “Two forces, the corporation and the political boss, applied unparalleled [sic] pressures on legislatures,” prompting calls “for more direct control of government.” Over time, “there were sealed into the constitution cures for current difficulties, with the purpose of limiting legislative action” in reaction to distrust of elected officials. Later, suspicion of the Legislature was replaced with suspicion of the judiciary, as “federal and state supreme courts were declaring unconstitutional provisions which appeared in response to new social needs.” In response, “[N]ew constitutional provisions appeared, either to override adverse court decisions or to ‘constitutionalize’ new programs.”

Voters responded to these “new social needs” toward the beginning and the end of the 1889 Constitution’s life, first in the Progressive Era and later in the 1960s. In 1904, voters approved an eight-hour workday and a child labor prohibition in mines. Two years later voters approved the statutory initiative and referendum process. Women’s suffrage arrived in 1914. The eight-hour workday was extended to all non-agricultural industries in 1936. In 1966, voters responded to the United States Supreme Court’s decision in Reynolds v. Sims by requiring the state legislative dis-

43. See generally Constitutional Amendments, supra n. 40.
44. Id.
45. Id.
47. Id.
48. Id. at 2.
49. Id.
50. 1903 Mont. Laws 49.
51. 1905 Mont. Laws 61.
52. 1913 Mont. Laws 1.
54. Reynolds v. Sims, 377 U.S. 533, 576 (1964) (holding that “the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis” and invalidating Alabama’s county-based apportionment plan for its state senate).
districts to be apportioned on the basis of population instead of counties.\textsuperscript{55} Montanans extended the vote to nineteen-year-olds in 1970.\textsuperscript{56} Eleven other proposed statutory initiatives and referenda addressed social issues such as the legalization or prohibition of boxing, gambling, and liquor sales, and the rejection of stricter standards for marriage licenses, with varying success.\textsuperscript{57}

Most of the 57 balloted constitutional amendments, however, addressed “modest alterations in administrative structure or fiscal authority from the rigid specifications written into the 1889 Constitution.”\textsuperscript{58} Ten amendments addressed public finance and nine addressed local government.\textsuperscript{59} These technical revisions reflected how “the specificity of the 1889 Constitution bred a need for adjusting details.”\textsuperscript{60}

By the 1960s, the Legislature saw a need to revise the constitutional amendment process itself. It began with a proposal to increase the number of amendments on each ballot from three to six, but the voters narrowly defeated the amendment.\textsuperscript{61} Critics of the Three Amendment Rule later claimed it “tended to trivialize the subject matter of amendments” by screening out “[p]roposals of significant change in governmental organization” while encouraging “unimportant changes or those with widespread popular appeal.”\textsuperscript{62} The Legislature addressed the former concern by proposing a more specific expansion of the amendment process, excluding amendments providing for the reorganization of executive departments from the Three Amendment Rule in a proposal approved in 1970.\textsuperscript{63} Voters approved that amendment decisively, although it was overshadowed by the call for a constitutional convention at the same election.\textsuperscript{64}


\textsuperscript{56} 1969 Mont. Laws 14. The 1971 Legislature proposed an amendment lowering the voting age to eighteen, to be voted on in the 1972 general election, but the proposal was superseded by the approval of the 1972 Constitution on primary election day. \textit{See} 1971 Mont. Laws ch. 159; \textit{cf.} Mont. Const. art. IV, § 2.

\textsuperscript{57} Lopach, \textit{supra} n. 7, at 21; \textit{see e.g.} Initiative/Referendum 6 (Nov. 13, 1914) (rejecting legalization of boxing under an athletic commission); Referendum 10 (Nov. 7, 1916) (prohibiting liquor sales and consumption); Referendum 14 (Nov. 2, 1920) (legalizing boxing under an athletic commission); Initiative 30 (Nov. 2, 1926) (repealing prohibition of liquor sales and consumption); Initiative/Referendum 36 (Nov. 3, 1936) (rejecting requirement of medical certification and waiting period for marriage permits); Referendum 53 (Nov. 7, 1950) (failed initiative to legalize slot machines).

\textsuperscript{58} Lopach, \textit{supra} n. 7, at 7.

\textsuperscript{59} \textit{Constitutional Amendments, supra} n. 40, at 1.

\textsuperscript{60} Roeder, \textit{supra} n. 41, at 266.

\textsuperscript{61} 1967 Mont. Laws 315.

\textsuperscript{62} Lopach, \textit{supra} n. 7, at 7.

\textsuperscript{63} 1969 Mont. Laws 66.

\textsuperscript{64} Referendum 67 (Nov. 3, 1970).
Constitutional Convention, 11 of the Constitution's 20 articles had been amended, expanding the document from 157 to 181 sections.65

2. **Review of the Referenda by the Supreme Court**

The Supreme Court supervised the amendment process from the beginning. Its vehicle for intervention was § 29 of the former Article III: "The [p]rovisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."66 According to the early history of the 1889 Constitution, this section originated as "a rule drawn from court decisions"67 and was identical in language to a provision in the California Constitution's Declaration of Rights.68 The Supreme Court first described the provision as a limit on its authority in that the framers "did not leave the language of the constitution open to the construction of courts" and therefore relieved the Court "from much responsibility in the construction of the organic law."69 Yet the Court repeatedly applied § 29 to invalidate amendments to that same organic law, sometimes after the voters had approved the amendment.70

The Court became particularly strict as the 1972 Convention approached. In 1960, it voided a constitutional amendment to establish a Board of Regents to supervise the university system and to reestablish the Board of Education as an entirely appointed body to supervise public schools.71 Although the Article XIX amendment process required only legislative approval to ballot a proposal, the Court relied on the legislative Article V to impose a presentment requirement for amendments, citing the "mandatory and prohibitory" rule of Article II, § 29.72 The ruling contradicted an attorney general’s opinion that noted the rule against presentment of amendments was "universal" with "not a single judicial decision in opposition."73 It led to the removal from the ballot of two other proposed amendments to the constitutional structure that were balloted without pre-

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65. Elison & Snyder, supra n. 6, at 6.
67. Allen, supra n. 10, at 3.
69. State v. Tooker, 37 P. 840, 842 (Mont. 1894).
70. Id. (invalidating amendment, post-ratification, for error in publication); Durfee v. Harper, 56 P. 582 (Mont. 1899) (invalidating amendment, post-ratification, for error in legislative journal entry); Tip- ton v. Mitchell, 35 P.2d 110 (Mont. 1934) (removing amendment from ballot for error in legislative journal entry).
71. State ex rel. Livingstone, 354 P.2d 552.
72. Id. at 558. Justice Angstman rejected the holding on presentment and would have found the proposed amendment in violation of the Article XIX, section 9 Separate Amendment Rule. Id. (Angst- man J., concurring specially in the result).
sentiment to the governor. Both the Legislative Council Report and the Convention itself recommended abrogating the decision, which was accomplished by the adoption of the 1972 Constitution.

Professor Ellis Waldron, a member of the 1971 Constitutional Convention Commission, concluded that in the years before the Convention the Supreme Court had been “notably ‘activist’ in its willingness to become involved in the processes of constitutional revision, and notably ‘conservative’ in its view of the power of the people and their constituted representatives to change basic constitutional rules.” This “judicial activism” was supported by what he termed the “oracular conceptual mare’s nest” of § 29. Although the Court did not cite § 29 in its clashes with the Convention itself—in fact the “discredited crutch” did not appear in any of the delegates’ reports and was omitted from the 1972 Constitution—Waldron found it continued to stand behind “the court’s disposition to think by surface verbal analogy from legislative to constitutional revision processes and agencies,” thereby further limiting the people’s power of constitutional revision.

III. THE ADOPTION OF THE CONSTITUTIONAL INITIATIVE

Eight decades took their toll on the 1889 Constitution’s utility for a changing state. The amendment process, already limited by the three-amendment rule, now faced a skeptical Supreme Court. The Constitution, and, therefore, state government, became increasingly rigid and unresponsive to the people. In response, Montana became the only state from the so-called “class of 1889” states admitted in that year (Idaho, Montana, North Dakota, South Dakota, Washington, and Wyoming), and the only state in

74. Constitutional Amendments, supra n. 40, at 10.
75. Legislative Council Report, supra n. 46, at 28.
77. See Mont. Const. art. VI, § 10(1) (“Each bill passed by the legislature, except bills proposing amendments to the Montana constitution, bills ratifying proposed amendments to the United States constitution, resolutions, and initiative and referendum measures, shall be submitted to the governor for his signature.”) (emphasis added).
79. Id. at 232.
80. Id. at 256 (discussing Livingstone, 42nd Assembly v. Lennon, 481 P.2d 330 (Mont. 1971) (holding, among other things, that Article XIX, § 8 required partisan elections of delegates “in the same manner” as legislators) and State ex rel. Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972) (holding that the Convention had no power to spend public funds on voter education)).
the Rocky Mountains and Pacific Northwest, to adopt a second constitution.81

Although the delegates to the new Convention did not feel the statehood pressures of their predecessors, the amendment process remained a central issue. This was no longer a matter of preparing for unforeseen contingencies that newly conferred statehood would bring, as it was in 1889. Instead, the new Convention highlighted its commitment to responsiveness with a constitutional innovation in Montana: the amendment by initiative.

A. Pre-Convention Foundations

Montanans first reconsidered the amendment process in the decade leading to the third Constitutional Convention. Among the grounds expressed by the 1967 Legislature to commission a report “to determine if [the 1889 Constitution] is adequately serving the current needs of the people,” was its recognition that “the inauguration of constitutional amendments or revision is a legislative function which cannot be relinquished under the requirements of the present constitution.”82 The resulting Legislative Council Report concluded that just 48% of the sections in the 1889 Constitution were adequate in that they did not “present a major obstacle to effective government.”83 Piecemeal amendment could not clear the way for meaningful constitutional reform.

Finding a “need for substantial revision and improvement in the Montana Constitution,” the Council turned to the alternative methods for changing the document, including an assessment of the incumbent amendment process.84 Generally, the Council concluded that the provision for proposing constitutional amendments exclusively by two-thirds vote of the Legislature was adequate.85 Even the three-amendment limit “may not be as serious as it appears” given the then prevailing view that “the subjects contained in the proposed amendments might be very broad,” even if “in practice most amendments in Montana have been restricted to rather narrow subjects.”86

Yet the Council also recognized that Montana’s lack of a popularly initiated amendment process, and its dependence on the Legislature to propose changes, created “serious disadvantages” for any attempt at compre-
hensive constitutional reform. Legislators understandably are preoccupied with statutory proposals and "are not chosen for their views on constitutional change." Nor can they "give objective consideration to changes which affect their own structure or position within government." Structurally, the Council concluded, legislatively initiated constitutional amendments will tend toward "rather restrictive adjustments" as opposed to more extensive reforms.

The 1969 Legislature responded to the Council’s work with the appointment of a Constitutional Revision Commission and a referendum on calling a constitutional convention. Neither the Commission nor its subcommittees made a proposal regarding the amendment process. The Commission did, however, publish the Legislative Council’s earlier comparison of the incumbent amendment provision with those of relatively newer constitutions from other states: Alaska (1956), Hawaii (as amended in 1968), Michigan (1963), New Jersey (1947), Puerto Rico (1952), and the National Municipal League’s Model State Constitution (as revised in 1968). Each constitution allowed adoption of a proposed amendment by majority vote. To propose an amendment, Alaska and Hawaii required a two-thirds vote of each legislative house, Puerto Rico required a two-thirds vote of the total members of both houses, and New Jersey required a three-fifths vote of each house. Only Michigan provided for constitutional amendment by petition of ten percent of the number of votes last cast for governor, a right that dated to its 1908 Constitution, in addition to proposal by two-thirds vote of each house. The Model State Constitution also provided for amendment by initiative. Elsewhere, the Commission noted that 15 states allowed constitutional amendment through an initiated measure at the time of the Convention.

The Commission also examined the arguments for and against initiatives more generally as part of its study of the suffrage and elections provisions. It began its discussion by citing Woodrow Wilson’s analogy to the

87. Id.
88. Id.
89. Legislative Council Report, supra n. 46, at 90.
90. Id. at 5.
91. Referendum 67.
93. Comparison of the Montana Constitution, supra n. 37, at iii.
94. Id. at 9-9A.
95. Id.
96. Id. at 9A (citing Mich. Const. art. XII, § 2; Mich. Const. art. XVII, § 2 (1908)).
97. Id. (citing Model St. Const. art. XII, § 12.01(c)).
initiative as "the gun that the old settlers kept behind the door, just in case"—the threat of direct democracy could help keep government as responsive as would its actual use. 99 Among the common arguments the Commission cited in support of the initiative power was that it safeguarded "the restoration of popular control when such control is endangered," served as a "democratizing and educative influence" on the electorate, and could "guide the legislature on the course of public opinion." 100

Against these arguments, the Commission described opponents' criticisms, including that initiatives "cultivate 'buck-passing'" by the Legislature, are dominated by money and become "the instrument of large or wealthy organizations rather than the common man," "confuse and overburden the voter," and "prevent compromise and the clarification of issues available in the give and take of legislative debate." 101 The Commission did not attempt to resolve this debate. It did, however, note that if the Convention kept the statutory initiative, it should consider the scope of the power and whether it should extend to calling a convention itself or other matters outside of the process, including constitutional amendments. 102

B. Constitutional Revision Committee Report

At the Convention, the Constitutional Revision Committee took up the question of whether and how a new constitution might be amended by initiative. The leading proposal on constitutional revision came from Delegate Otto Habedank. It provided an initiative for calling a constitutional convention by petition of ten percent of the votes last cast for governor but only allowed constitutional amendments to be proposed by two-thirds of all members of the Legislature. 103 It also allowed amendments to be ratified by successive legislatures unless five percent of voters called for a referendum on the amendment. 104

Two other proposals introduced amendment by initiative. Delegate Charles Mahoney proposed an amendment process initiated by majority vote of each legislative house or by petition of ten percent of the votes last cast for governor. 105 Thirty delegates, led by Delegate Grace Bates, proposed a comprehensive revision of the legislative article that included an

99. Id. at 87.
100. Id. at 97.
101. Id.
102. Id. at 99.
103. Constitutional Convention vol. I, supra n. 1, at 210–211 (Delegate Prop. 94 (Habedank)).
104. Id.
105. Id. at 119 (Delegate Prop. 27 (Mahoney)).
initiative process for laws, including constitutional amendments, requiring eight percent of voters in one-fourth of legislative districts.\textsuperscript{106}

In the end, the Committee unanimously reported a proposal "with the basic purpose of making a fundamental yet flexible document," including initiatives both for a constitutional convention and for constitutional amendments.\textsuperscript{107} It set a signature threshold at ten percent of voters in two-fifths of legislative districts for a constitutional convention but raised it to fifteen percent of voters in two-fifths of districts for a constitutional amendment.\textsuperscript{108} Detailed filing and publication procedures were required for amendments.\textsuperscript{109} The proposal also included two methods of legislative amendment—a revised proposal for referred amendments by two-thirds of the total legislative membership (instead of two-thirds of each house) and Delegate Habedank's proposal for amendment by two successive legislatures.\textsuperscript{110} Both the initiated and legislative amendment proposals would be subject to the same Separate Amendment Rule from the prior constitution.\textsuperscript{111}

The Committee's comments invoked a series of guarantees "that the people will retain a firm hold on the power of constituting government."\textsuperscript{112} The power of amendment by popular initiative "is an inherent right to the body politic whose Constitution is to be the embodiment of the will of the people."\textsuperscript{113} That right would be channeled through signature and geographic distribution requirements that "check erratic whimsy" yet allow for "pressing popular and needed Constitutional reforms."\textsuperscript{114} The geographic distribution requirements in particular would help "insure [sic] a somewhat diversified body of petitioners on a successful petition" consistent with the one-person, one-vote principle.\textsuperscript{115} Retaining the Separate Amendment Rule would "aid voters in casting their votes" by checking "the possible action of grouping several issues under one innocuous title."\textsuperscript{116} Neighboring provisions addressed related concerns: "obstreperous and unresponsive representative bodies had thwarted the will of their constituents by tokenism" (by requiring the Legislature to pay the necessary expenses of a constitutional convention);\textsuperscript{117} and "cumbersome procedural detail," which had been a "burden to often-popular Constitutional change," should not allow the Su-
These principles fit within a broader framework of popular sovereignty and self-government founded in the Declaration of Rights. The Bill of Rights Committee recognized that "the guidelines and protections for the exercise of liberty in a free society come not from government but from the people who create that government." It therefore kept "popular sovereignty" as the first section of the Declaration of Rights to "announce the principles upon which legitimate government rests thereby providing yardsticks for assessing the quality of government operation," even if "this and other political philosophy provisions are not often immediately justiciable." The Committee also retained a slightly revised "self-government" provision as section two of the Declaration of Rights to reiterate the right of Montanans to govern themselves and to "alter or abolish their Constitution and form of government." The Convention adopted both sections unanimously and without discussion.

C. Convention Debate

On the Convention floor, the theme of popular control of a flexible Constitution sounded even more prominently. Professors Elison and Snyder explain, "The constitution, as ratified, indicates the populist inclination of the delegates in its consistent enhancement of the powers of the voters and the encouragement of direct participation in governmental decision making." Specifically, "the constitutional populists," as Professor Alan Tarr describes them, "sought to lodge policy-making authority directly in the people through the constitutional initiative and the referendum, so that they could reverse policies enacted by their elected representatives, and to limit the powers and tenure of government officials." In short, according

118. Id. at 362.
120. Id. at 626.
121. Id.
123. Elison & Snyder, supra n. 6, at 11; see also Diana Dowling, Implementation and Amendment of the 1972 Constitution, 51 Mont. L. Rev. 282, 283 (1990) ("[T]he 1972 Constitutional Convention delegates recognized that a constitution must allow the statutory law to be fluid and changeable to meet the ever-growing needs of society.").
124. Tarr, supra n. 81, at 9.
to Professor James Lopach, "The modern Montana Constitution called for a strong legislature kept close to the electorate."\(^{125}\)

Far from hobbling active state and local government, however, Montana’s constitutional populism was inseparable from the "managerial constitutionalism"\(^{126}\) that originally motivated theConvention, freeing elected officials from what the Legislative Council had earlier diagnosed as "major obstacles to effective government." A responsive constitutional structure would make "the idea of the people’s branch an operational reality," so "delegates did not hesitate to empower fully the legislature."\(^{127}\) These intertwined strands of populism and flexibility continued the progressive thread dating back to the period of the first Montana Constitution, where framers acknowledged the people’s need for "constant readjustment of past practices and past institutional arrangements in light of changes in circumstances and in political thought."\(^{128}\)

Although popular sovereignty set the terms of debate over the constitutional amendment process itself, the delegates also expressed this populist inclination in debates far removed from those provisions. For example, in the extended debate over whether gambling should be allowed, prohibited, or otherwise regulated by the Constitution, Delegate Habedank argued successfully for putting the gambling question to the people. He observed that in the absence of a constitutional initiative process under the incumbent constitution, "the people of Montana have never been given an opportunity to vote on this question."\(^{129}\) Such a politically and morally fraught question was "for the people to decide for themselves and settle once and for all this issue which we think we are so wise to determine."\(^{130}\) Elsewhere, an opposing view came in Delegate Marian Erdmann’s dissent from the proposed legislative vote requirements to approve a constitutional initiative for the ballot. She wondered why delegates wanted to make constitutional amendment "so very simple," asking "whether we, as an assembly, are already so lacking in self-confidence that we’re questioning our own ability to write an enduring document."\(^{131}\)

In revising the amendment process the Convention settled on the more modest and populist former view. At every opportunity, delegates opted for the more democratic rule of amendment over less democratic alternatives, rejecting several more restrictive proposals in the committee report despite


\(^{126}\) Tarr, supra n. 81, at 13.

\(^{127}\) Lopach, supra n. 125, at 269.

\(^{128}\) Tarr, supra n. 81, at 15.

\(^{129}\) Constitutional Convention vol. VII, supra n. 122, at 2745.

\(^{130}\) Id.

\(^{131}\) Constitutional Convention vol. III, supra n. 4, at 494.
the Constitutional Revision Committee’s demonstrated commitment to the constitutional initiative. Delegates chose a popular vote for all amendments over the committee proposal to allow the legislature alone to adopt amendments. They lowered the signature requirement for constitutional initiative petitions from the committee’s proposed 15% down to 10% of voters. And they rejected a floor proposal to reinstate limits on the number of amendments that could be submitted at one election. This further democratization of the amendment process on the convention floor entrusted the integrity of the constitutional text to the people, even at the expense of rules that might limit future amendments and preserve more of the convention’s work over time.

1. Legislative Amendments: A Constitution “Answerable Only to the People”

An early test of the delegates’ constitutional populism came in the debate over a proposal to allow two successive legislatures to approve constitutional amendments without a popular vote. Despite a provision allowing five percent of voters to petition for a referendum to reject such a legislative amendment, a process one delegate called “the easiest petition of all in this constitution,”\(^\text{132}\) it would still allow constitutional amendment by the Legislature alone. Proponents offered practical arguments that there would be “a lot of housecleaning” of noncontroversial or technical revisions to do after ratification, and that successive legislatures could accomplish those amendments “with a minimum of expense.”\(^\text{133}\) Delegate Habedank, the legislative amendment proposal’s original sponsor, explained that some amendments may be “of such technical nature as to make it so difficult to explain to the average voter as not to make this a practical method of referral.”\(^\text{134}\)

This idea—that anything in the Constitution should be beyond the understanding of the average voter—contradicted what Delegate George Harper called the Convention’s “fundamental premise . . . that the Constitution is the Constitution of the people,” and “every word of it is voted upon by the people.”\(^\text{135}\) He moved to strike the proposal.\(^\text{136}\) Delegate Ben Berg expanded on the idea of a “people’s Constitution” that would be “answerable only to the people” and should not be “amendable by one department of the government.”\(^\text{137}\) Delegate Wade Dahood, Chairman of the Bill of Rights Committee, opposed the legislative amendment proposal by con-

\(^{132}\) Id. at 498 (Delegate Vermillion).

\(^{133}\) Id. at 498 (Delegate Brown).

\(^{134}\) Id. at 496–497 (Delegate Habedank).

\(^{135}\) Id. at 498.

\(^{136}\) Id.

\(^{137}\) Constitutional Convention vol. III, *supra* n. 4, at 503 (Delegate Habedank).
trasting the Convention’s project with the United States Constitution, which as a practical matter “does not allow amendment by anyone.”138 Allowing constitutional amendments without a vote of the people, according to Delegate Dahood, “violates a basic principle” that the delegates “were sent here by the people to make sure that their rights were expanded, that governments stayed responsible to them.”139 In his final analysis, “a matter that deals with the very basic, fundamental law that governs our state should always be referred to the people that created the state.”140 The Convention defeated the committee proposal for amendment by successive legislatures by a 64–22 margin.141

2. Signature Requirements: “A Constitution that Looks Like California”

Similar populist arguments supported the delegates’ amendment, on voice vote, to lower the petition signature requirement from 15% to 10% of voters.142 Delegate Charles Mahoney proposed the lower threshold to bring it in line with the signature requirement for initiating constitutional convention calls.143 Delegate Lyman Choate opposed it, explaining the Committee’s belief “that, in the matter of amending, there would be more attempts made to raid the Constitution if the figure were low enough that it was a simple matter to do.”144 Yet others cited past experience in signature gathering for initiatives, which Delegate Bates assured her colleagues was “a mighty big job” even under an eight percent threshold.145 Delegate Magnus Aasheim noted the number of signatures implied by the ten percent threshold, and argued “anyone who can get 35,000 signatures is entitled to have the motion presented on the ballot.”146

Some Delegates expressed a related concern that if the threshold were set too low, supporters of a particular position would petition for a constitutional amendment rather than a statutory initiative. As Delegate Robert Vermillion put it, Montana would end up with “a Constitution that looks like California and Louisiana.”147 The incumbent Constitution’s threshold for statutory initiatives was eight percent,148 and the General Government Committee did not report its downward revision of the signature threshold.

138. Id.
139. Id.
140. Id.
141. Id. at 505.
142. Id. at 507.
143. Constitutional Convention vol. III, supra n. 4, at 506.
144. Id. at 507.
145. Id. at 508.
146. Id. at 506.
147. Id. (Delegate Vermillion).
for statutory initiatives to five percent until the next day.\(^{149}\) By the time the
Convention adopted the constitutional initiative with a ten percent petition
requirement, however, the five percent statutory initiative proposal had
been reported. The vote for the ten percent threshold was 87–7 with all of
the delegates who previously had spoken against it voting “aye,” including
Delegate Vermillion.\(^{150}\)

3. Amendment Restrictions: “The People Should Not be Limited”

A corollary to the delegates’ concern about the proliferation of amend-
ments over time was their concern about compound or multiple amend-
ments presented at the same election. The Convention unanimously ap-
proved retention of the Separate Amendment Rule from the incumbent con-
stitution, which originated with the 1884 Constitution: “Should more
amendments than one be submitted at the same election, they shall be so
prepared and distinguished, that each can be voted upon separately.”\(^{151}\)
The Style and Drafting Committee simplified the language into its present
form in a purely stylistic change: “If more than one amendment is submit-
ted at the same election, each shall be so prepared and distinguished that it
can be voted upon separately.”\(^{152}\) The Separate Amendment Rule was
adopted unanimously.\(^{153}\)

Although there was no debate of the Separate Amendment Rule itself,
the Delegates discussed their understanding of the limits it placed on the
amendment process. In response to Delegate Jerome Loendorf’s question
of whether an amendment could “include an amendment to an entire arti-
cle,” Delegate Felt responded, without citing the Separate Amendment
Rule, that “under our present Constitution, you can only deal with one sub-
ject and exactly what that means has been the subject of several court inter-
pretations.”\(^{154}\) It was unclear to delegates whether an entire article could be
amended by a single vote or even whether “a limit would prevent a major
revision through a court interpretation” as occurred in the adoption of the
1945 Georgia Constitution through an amendment process that the Georgia
Supreme Court held did not violate the Separate Amendment Rule.\(^{155}\)

Amend. Comm. No. 12) (1972). The Delegates unanimously adopted the five percent requirement a

vol. VI].

\(^{151}\) Constitutional Convention vol. III, \textit{supra} n. 4, at 521


\(^{153}\) \textit{Id.} at 1196.

\(^{154}\) Constitutional Convention vol. III, \textit{supra} n. 4, at 519.

\(^{155}\) \textit{Id.} at 520 (Delegate Choate); \textit{cf.} Wheeler v. Bd. of Trustees of Fargo Consol. Sch. Dist., 37
S.E.2d 322, 327 (Ga. 1946).
Neither question, however, led them to alter the Separate Amendment Rule from its 1884 form.

The Delegates did debate whether to retain the additional restriction of a given number of amendments at each election, a limit that was not present in the original 1884 provision but was added in the 1889 Constitution as a Three Amendment Rule. Delegate James Felt proposed an expanded five-amendment rule, and drew again on the California example, where “it has been found to actually be detrimental in preventing the people of the state from actually participating in the operation of their government when they are, potentially and actually, flooded by so many questions on a ballot that they are unable, and become unwilling therefore, to give full consideration to them.”

The source of the multiple amendment concern was not the people themselves in the initiative process, as no one disagreed that “the people, by the initiative process, could place any number [of amendments on the ballot] that they chose.” Instead, the “back-scratching” dynamics of the legislative process would make each legislator with an amendment proposal face the choice “to get yours on [the ballot] in a pack or not get it on at all,” and therefore vote for more proposals rather than limiting the ballot to the proposals with the most merit. Montana had not experienced this issue because of its Three Amendment Rule, and the Legislature had averaged well below three amendments per election, but Delegate Reichert cited an example from Hawaii where 21 amendments were presented at a single election. Delegate Choate responded that “we have to assume that the Legislature has some wisdom, and certainly the people should not be limited to a number of petitions if the Legislature is not.” The five-amendment rule failed in a vote of 23–69.


In the final vote, the Convention adopted the constitutional initiative by a vote of 87–7, the Separate Amendment Rule by a vote of 95–0, and adopted Article XIV by a vote of 93–3. The new power of the people to initiate amendments took shape:

156. Constitutional Convention vol. III, supra n. 4, at 515.
157. Id. at 517.
158. Id. at 515.
159. Id. at 520 (Delegate Melvin).
160. Id. at 516.
161. Id. at 520.
Section 9. Amendment by initiative. (1) The people may also propose constitutional amendments by initiative. Petitions including the full text of the proposed amendment shall be signed by at least ten percent of the qualified electors of the state. That number shall include at least ten percent of the qualified electors in each of two-fifths of the legislative districts.

(2) The petitions shall be filed with the secretary of state. If the petitions are found to have been signed by the required number of electors, the secretary of state shall cause the amendment to be published as provided by law twice each month for two months previous to the next regular state-wide election.

(3) At that election, the proposed amendment shall be submitted to the qualified electors for approval or rejection. If approved by a majority voting thereon, it shall become a part of the constitution effective the first day of July following its approval, unless the amendment provides otherwise.165

Thus, the proposed Constitution guaranteed that the people alone could have the last word on its text.

While the delegates democratized the constitutional amendment process, they also understood the problem of inserting detailed policy prescriptions into a state constitution. The Constitutional Convention Commission edited a study of state constitutions headed by two instructions on the nature of constitutional drafting. First was Justice Cardozo’s admonition that a constitution should “state not rules for the passing hour but principles for an expanding future.”166 Second was Chief Justice Marshall’s observation that a constitution that “would partake of a proximity of a legal code . . . could scarcely be embraced by the human mind,” and that “we must never forget that it is a Constitution we are expounding.”167 The Commission’s study criticized “the inclusion of much nonfundamental or transitory material,” and followed with a summary of “General Data on State Constitutions” listing the extent to which state constitutions had accumulated excessive detail and required frequent revision.168 That list provided the source for Delegate Vermillion’s reference to the California and Louisiana constitutions, whose lengths (at the time) of 62,000 words and 253,800 words, respectively, combined with Louisiana’s history of ten successive constitutions, suggested a cautionary example for the delegates.169

Earlier, the Legislative Council noted that the briefest state constitutions were “in many respects the best.”170 It warned, “The consequences of

ignoring the principle that a constitution should only contain fundamental law have been clear, and they have been serious.”171 The most serious consequence “is the impairment of the state’s capacity for self-government.”172 Both the Legislative Council and the Convention Commission quoted a contemporary study of state constitutions that explained, “To the extent that a government is kept from doing harm by detailed restrictions on the exercise of its power, it is also kept from doing good, i.e., in providing for the needs of its people in the wisest and most effective way.”173 Consistent with these preferences toward shorter, simpler constitutions, the Council’s comparison of the Montana Constitution with other state constitutions used a set of relatively short and new documents, all of which were shorter than the incumbent constitution’s 22,000 words: Alaska (12,000 words), Hawaii (15,000 words), Michigan (19,510 words), New Jersey (15,000 words), and Puerto Rico (9,000 words).174 The Convention produced a document of fewer than 13,000 words, shorter than all but seven other state constitutions.175

The proposed Constitution’s principled simplicity exemplified the value the delegates placed on a flexible and responsive state government. Their consistent rejection of restraints on the constitutional initiative process did not blindly consign the Constitution to the shifting winds of popular opinion. Instead they modestly entrusted the document to the people who sent them to the Convention—the people in whom “all political power is vested,” in the unchanged words recognizing Montanans’ first constitutional right.176 As Delegate James Garlington summarized in his speech at the end of the Convention, “[T]he Constitution has to be for most of the people. It therefore should be where they are.”177

D. Ratification

The official voter information pamphlet described the constitutional initiative as one of the highlights of the new constitution:

Changing the constitution made easier. Amendments and constitutional conventions could be proposed by initiative petitions from the people, as well as

171. Id. at 5.
172. Id.
173. Id.; Readings on State Constitutions, supra n. 166, at 26.
174. Legislative Council Report, supra n. 46, at 6; Readings on State Constitutions, supra n. 166, at 4–6.
175. Elison & Snyder, supra n. 6, at 16.
176. Mont. Const. art. II, § 1; see also id. at Art. III, § 1 (1889), Art. I, § 1 (1884).
by action of the legislature. The present limit on the number of constitutional amendments on any one ballot would be removed. 178

In its comprehensive summary, the pamphlet explained that under the new provision, “Ten percent of voters may propose constitutional amendments by petition.” 179 However, the pamphlet incorrectly described the retention of the Separate Amendment Rule as a “new provision,” despite only stylistic changes from the original 1884 text. 180 The Rule, according to the pamphlet, was “self-explanatory.” 181

The widely distributed newspaper supplement prepared by the pro-ratification group Concerned Citizens for Constitutional Improvement explained, “The main thrust of the proposed Constitution is toward openness and flexibility.” 182 The pamphlet summarized this flexibility as ultimately democratic:

The 1972 Constitution also offers flexibility. It achieves this by leaving many matters to future legislative determination. Some may regard the prospect of reliance on the legislature with fear. The fact of the matter is that ultimately there is no alternative. Also, such reliance is both necessary and democratic. It is necessary because constitutional language cannot be made to provide for all the unseen eventualities of the future. Consequently, constitutional details often do not work as intended. On the contrary, they sometimes hamper good government and result in costly litigation.

Reliance on the legislature is also one of the key elements of our democratic system. The legislative halls provide the primary arena where the political desires and needs of citizens are reflected. Of course needs and desires will be conflicting ones, but it is in our legislatures that conflicts are resolved by the kind of verbal hand-to-hand combat which is our American substitute for violence. Hopefully, dependence on the legislature—rather than the illusory safety of detailed constitutional language—will help to make our political system more issue oriented, and perhaps it will also tend to focus the spotlight on the places where the decisions are made which vitally affect the public welfare. 183

The pamphlet’s analysis concluded that “[i]f the 1972 Constitution is adopted, the legislature will occupy a position of front and center on our political stage.” 184 Therefore, “[T]he reality of a better governmental system for Montana depends on the future effort, vigilance, and wisdom of her citizens.” 185 In the end, “In a democratic system there can be no alternative

179. Id. at 18.
180. Id.
181. Id.
183. Id.
184. Id.
185. Id.
to dependence on the people." 186 Allowing for constitutional amendments by initiative in particular would be "an important change" 187 by the proposal that is "designed to make it easier for the people to secure constitutional change." 188 With the removal of the three-amendment limit, the only requirement for amendments "is that each one be clearly designated on the ballot so that they can be voted on separately." 189

There was no notable opposition to the constitutional initiative in the ratification process. Leading critic Gerald Neely, who still believed that "the good points do outweigh the bad points," 190 referred to the constitutional initiative only as "a new power for Montanans." 191 Citizens for Constitutional Government, a group claiming 5,000 members opposed to what it called the "Metro" interests behind the Convention, argued the even more populist position that the Legislature should have to obtain the same amount of signatures for legislation as petitioners do for initiatives. 192

An election day exit poll of 936 voters found that in ratifying the proposed constitution, "Supporters were attracted by the flexibility and ease of amendment of the proposed constitution and by the way it opened up the possibility of greater choice and participation by citizens." 193 Although more than half of supporters surveyed at the time of ratification did not identify any specific reason for their support, a plurality of supporters who gave a reason cited either "flexibility and ease of amendment" or "greater opportunity for choice and participation in government," the second and third most common specific responses, respectively, after "confidence in work of delegates." 194 The Constitution was ratified by a vote of 116,415 to

186. Id.
187. Id. at 3.
188. Concerned Citizens, supra n. 182, at 5.
189. Id.
194. Id. Of 521 supporters responding, 328 cited "General approval," 51 cited "Confidence in work of delegates," 43 cited "Flexibility and ease of amendment," and 29 cited "Greater opportunity for choice and participation in government." A category covering "strengthens rights and legislature" included 27 responses, fewer than the 31 responses by opponents to the Constitution who cited "Loss of freedom or rights." Id. at 2–3.
In the wake of ratification, Professors Margery Hunter Brown and Ellis Waldron suggested that “[t]he resurgence of direct democracy in Montana points to the attitude of the people that government is principally their prerogative and not the concern solely of their representatives.” First, it compensates for the fact that “the representative assembly is only imperfectly representative,” particularly in a part-time legislature that discourages participation by those in full-time jobs. Second, it can allow popular legitimization of issues “where public debate is so balanced or heated that a prevailing or acceptable view is not apparent” and where those dynamics may cause legislators to hesitate to act. Third, it can be “a weapon for penetrating the ‘pressure cooker’ that is Helena during the legislative session,” when legislators spend far more time with interest group lobbyists than with their own constituents. The 1972 Constitution introduced these democratic dynamics at the constitutional level.

IV. THE CONSTITUTIONAL INITIATIVE IN PRACTICE

At least one constitutional amendment has appeared on the ballot each election year in the eighteen election cycles from 1974 to 2008. More than three-quarters of the 55 officially balloted amendments since 1972 have been proposed by the Legislature rather than by petition, however. Including a constitutional initiative that was removed from the ballot for reasons unrelated to the petition process (CI-23), less than 13% of the 101 proposed constitutional initiatives received sufficient signatures to be presented to voters. Voters adopted five of the 12 balloted constitutional initiatives (42%) by an average margin of 58% for the successful measure, while they adopted 25 of the 43 constitutional referenda (58%) by a stronger average margin of 65% for the successful measure. Montanans, therefore, show more confidence in constitutional amendments that pass the
consideration and two-thirds approval of the Legislature than in amendments balloted by ten percent of their peers.\textsuperscript{202}

As the Delegates contemplated, the statutory initiative is a far more common form of popular lawmaking than constitutional initiatives. Proponents sought approval of constitutional initiatives (101 proposals) more often than statutory initiatives (84 proposals), but the signature requirement differential has effectively screened constitutional proposals more finely.\textsuperscript{203} Petitioners successfully balloted roughly one out of eight constitutional initiatives, but they balloted nearly half (39 of 84, or 46\%) of the statutory initiatives.\textsuperscript{204} Voters also approved statutory initiatives at a higher rate, passing 24 (62\%) of the 39 balloted measures.\textsuperscript{205} Those that passed also did so with slightly broader support than constitutional initiatives received, with 61\% for the average successful measure.\textsuperscript{206} Compared with constitutional amendments, voters show even greater deference to the Legislature in statutory referenda, passing nine (69\%) of the 13 legislative referenda since 1972 by 65\% for the average successful measure.\textsuperscript{207} Only one of three initiated referenda to repeal legislation passed.\textsuperscript{208}

\textbf{A. Subjects Addressed by Constitutional Amendments}

The record of constitutional amendments under the 1972 Constitution has been written predominantly by the Legislature’s constitutional referenda. A supermajority requirement for constitutional referenda encourages broadly popular rather than controversial measures, and their origins in the Legislature has tended to produce amendments that reflect the Legislature’s priorities in technical provisions addressing finance, revenue, and government structure. Even those referenda that amended the Declaration of Rights tended to arise from fiscal concerns rather than any sense of the proper relationship between the individual and the State. Only one section

\begin{footnotesize}
\textsuperscript{202} This finding is consistent with historical ratification rates in other states, where constitutional referenda receive nearly double the vote share of constitutional initiatives on average. See David B. Magleby, \textit{Direct Legislation, Voting on Ballot Propositions in the United States} 73 tbl. 4.4 (Johns Hopkins 1984) (between 1898 and 1978, the eight states that allowed constitutional initiatives had an average ratification rate of 60\% for constitutional referenda and 32\% for constitutional initiatives).


\textsuperscript{204} Id. One additional statutory initiative was decertified from the ballot by the Supreme Court for fraud in the petition process. \textit{Montanans for Just.}, 146 P.3d 759.

\textsuperscript{205} \textit{Past Statutory Ballot Issues, supra} n. 203.

\textsuperscript{206} Id.

\textsuperscript{207} Id.

\textsuperscript{208} Id.
\end{footnotesize}
of the Constitution, a salary commission for state officials, has been repealed.\textsuperscript{209}

By far the primary use of the constitutional initiative has been politically symbolic, because all but a dozen of the 101 initiative proposals either were withdrawn or never received enough signatures to qualify for the ballot. Nearly one-third of these failed petitions arose in 1988 and 1990, when movements converged in support of such issues as abolishing property taxes, constitutional recall of public officials, preventing revisions of approved initiatives, and prohibiting lawyers from serving in the executive or legislative branches.\textsuperscript{210} Of the dozen initiatives that qualified for the ballot, the voters approved only five, and of those five initiatives, the courts invalidated two.

1. Revenue and Finance

The most common subjects for either initiated or referred amendment proposals concern the revenue and finance provisions of Article VII. Yet with the notable exception of proposals to lock up certain revenues for trust funds dedicated to specific policies, amendments to repeal, restrict, or reform state finance provisions fare poorly at the polls. Seven of the 13 constitutional initiatives that qualified for the ballot targeted taxes and spending.\textsuperscript{211} Voters rejected all but one of these fiscal amendments, and the Supreme Court voided the remaining amendment (CI-75, which passed by 51\%) for violation of the Separate Amendment Rule.\textsuperscript{212} Another constitutional initiative that would have spent coal tax trust principal on local government improvements also failed.\textsuperscript{213}

Ten of the 43 constitutional referenda concerned Article VIII,\textsuperscript{214} and another five concerned the establishment or management of sources or uses

\textsuperscript{209} Mont. Const. art. XIII, § 3 ("The legislature shall create a salary commission to recommend compensation for the judiciary and elected members of the legislative and executive branches."); cf. Past Constitutional Ballot Issues, supra n. 198, at 5 (Const. Referendum 16).

\textsuperscript{210} Id. at 6–9 (Const. Initiatives 31–53, 54, 56–61).

\textsuperscript{211} Id. at 2, 5, 10 (Const. Initiatives 7 (limiting spending and phasing out federal funding), 8 (providing for county-level tax assessment), 27 (abolishing property taxes and requiring voter approval for income and sales taxes), 55 (repealing taxes and imposing charges on trade), 66 (requiring voter approval of tax increases), 67 (requiring two-thirds vote of legislature for new or increased taxes), 75 (requiring voter approval of new or increased taxes)).

\textsuperscript{212} Id. at 12; Marshall v. Cooney, 975 P.2d 325 (Mont. 1999).

\textsuperscript{213} Past Constitutional Ballot Issues, supra n. 198, at 10 (Const. Initiative 63).

\textsuperscript{214} Id. at 3, 6, 10, 11, 12, 13, 15 (Const. Referendum 10, 17, 39 (allowing investment of public funds in stocks), 25 (requiring funding of public pensions on an actuarially sound basis and management of public pensions as a trust), 27 (limiting any sales tax to four percent), 28 (equalizing tax property tax valuations), 31 (allowing investment of state workers compensation fund in stocks), 34 (allowing investment of 25\% of state workers compensation fund in stocks), 36 (allowing investment of local government insurance funds in stocks), 44 (allowing investment of 25\% of public funds in stocks)).
of revenue in state trust funds. Voters approved all four amendments establishing new trust funds, and a fifth that imposed constitutional trust duties on the existing public retirement system. Conversely, six of seven proposals to remove similar constraints on the management of various public assets have failed.

These patterns suggest a preference among Montanans over time to defer to the Legislature on general matters of taxation. Yet it also reflects a tendency by the Legislature to take difficult budgeting questions “off the table” in future votes, reinforced perhaps by voter skepticism about the Legislature’s long-term commitment to sustain specific programs.

2. Governmental Structure

Voters are skeptical about amendments concerning the Legislature itself. The most durable constitutional initiative is the first, which reestablished biennial legislative sessions, repudiating the annual session provision ratified in the 1972 Constitution just two years before. Twice voters have rejected legislatively-referred amendments to return to annual sessions; voters further refused to allow the Legislature to choose whether to hold sessions in odd or even years. Similarly, voters overwhelmingly approved a constitutional initiative limiting terms for state elected officials by 67% in 1992, the highest vote margin for any constitutional initiative. Twelve years later, voters rejected the Legislature’s proposal to relax those limits by an even greater margin of 69%, the third highest level of public opposition against any balloted constitutional referendum since 1972. Of the six amendments proposed by the Legislature to its own legislative Article V, the only referendum voters approved concerned the process for redistricting congressional districts.

215. Id. at 1, 9, 12, 14 (Const. Referendum 1 (establishing natural resource indemnity trust fund, art. IX, §2), 3 (establishing coal tax trust fund, art. IX, §5), 23 (allowing transfer of state trust lands for less than full market value), 35 (establishing tobacco settlement trust fund, art. XII, §4), 40 (establishing noxious weed management trust fund, art. IX, §6)).

216. Id. at 1, 9, 10, 12, 14 (Const. Referendums 1, 23, 25, 35, 40); see also Mont. Sec. of St., Constitutional Initiative No. 103 (available at http://sos.mt.gov/Elections/archives/2010s/2010/initiatives/CI-103.asp) (proposing constitutional trust fund to fund services for older Montanans).

217. Past Constitutional Ballot Issues, supra n. 198, at 3, 5, 9, 11, 13, 15 (Const. Referendums 10, 17, 23, 31, 36, 44); Const. Referendum 34 passed. Id. at 12.


219. Id. at 1 (Const. Initiative 1).

220. Past Constitutional Ballot Issues, supra n. 198, at 3, 6, 11 (Const. Referendum 11 (providing annual sessions), 20 (same), 32 (allowing biennial sessions in either even or odd years)).

221. Id. at 10 (Const. Initiative 64).

222. Id. at 14 (Const. Referendum 42).

223. Id. at 4 (Const. Referendum 14).
The Legislature has more success in proposing changes to the other two branches of government, most of which have the effect of strengthening the Legislature's lawmaking power relative to the executive or the judiciary. All four proposed amendments to the judicial Article VII passed by wide margins of between 58% and 81%. Similarly, voters approved two of the three constitutional referenda amending the executive Article VI, with the only exception being the nominal change in the office of state auditor to insurance commissioner.224

3. Declaration of Rights

Although the revenue and finance provisions are the most frequent target of proposed amendments, the single most amended article in the 1972 Constitution is the Declaration of Rights, Article II. All five proposed amendments to Article II passed by an average of 65%. They include constitutional referenda amending the § 18 waiver of sovereign immunity to allow exceptions by two-thirds vote of each legislative house,225 the § 14 adult rights to allow exceptions for consumption of alcoholic beverages (twice),226 and the § 28 purposes of criminal justice laws to add public safety and victims' rights, as well as a later voided constitutional initiative amending the § 16 guarantee of legal redress to allow the Legislature to determine the rights and remedies for injuries.227

At least three other amendments to other articles expanded or limited the recognition of certain individual rights. These include constitutional referenda to allow the Legislature broader powers in determining economic assistance policy,228 preserving a heritage of harvesting wild fish and game,229 and a constitutional initiative recognizing marriage as only between a man and a woman.230 The latter two amendments passed by the second largest margins of any constitutional referendum and initiative, respectively.231

4. Initiative Processes and Constitutional Revision

The Legislature and the people can and do revise the initiative process itself. In response to the Supreme Court's invalidation of the legal redress

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224. Id. at 14 (Const. Referendum 43).
225. Id. at 2 (Const. Referendum 2).
227. Id. at 11 (Const. Initiative 30) (approval voided by State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 738 P.2d 1255 (Mont. 1987)).
228. Past Constitutional Ballot Issues, supra n. 198, at 6 (Const. Referendum 18).
229. Id. at 14 (Const. Referendum 41).
230. Id. at 14 (Const. Initiative 96).
231. Id. at 14, 15.
amendment for a procedural error, voters approved Article IV, § 7 by constitutional referendum. It requires courts to give priority to ballot issue challenges, and the Secretary of State to resubmit at the next general election any otherwise qualified ballot issue that is invalidated because of election improprieties. Voters also approved a constitutional referendum to return to a version of the county-based geographic distribution requirement contained in the initiative provision of the 1889 Constitution. Like the county-based senate districts before reapportionment, however, a federal court held that such a requirement for petition signatures violated the Fourteenth Amendment’s Equal Protection Clause.

Voters left the basic structure of constitutional revision in Article XIV untouched. That is the only article of the Constitution that was not the subject of a balloted amendment proposal by either referendum or initiative, other than the Article I Compact with the United States. Voters in 1990 rejected the first 20-year constitutional convention call held under Article XIV, § 3 by 82%, the most lopsided rejection of any constitutional measure since 1972. This followed a 1988 election where proponents petitioned for an unprecedented and never repeated 22 constitutional amendments, a shotgun approach to constitutional revision without a convention, none of which qualified for the ballot.

B. Judicial Review of Constitutional Amendments

In his critique of the Supreme Court in the years preceding the Convention, Professor Waldron asked if the Court’s resistance to constitutional change would “overhang[ ] interpretation of the new constitution of 1972.” Nearly 40 years later, it is too soon to tell. The Court has recognized that the constitutional initiative and referendum “enable the people to peacefully accomplish” the popular sovereignty and self government goals of Article II, §§ 1 and 2 “by allowing important issues to be placed before the people for a popular vote.” Yet the Court continues to assert itself in the constitutional amendment process with mixed results. On the one hand, it has strictly policed the procedural requirements for constitutional initiatives according to the demands of the relevant constitutional texts. On the other hand, the Court’s substantive review of amendments’ content under

233. Past Constitutional Ballot Issues, supra n. 198, at 8 (Const. Referendum No. 21).
234. Article V, § 1 (1889) (amended 1905 by 1905 Mont. Laws 61).
236. Past Constitutional Ballot Issues, supra n. 198, at 8 (Const. Call No. 1).
237. Id.
238. Waldron, supra n. 78, at 256.
the state constitution has been more eclectic, defined mainly by several near misses when sweeping amendments failed due to procedural errors before the Court reached the amendments' substance.

Consequently, questions of whether there might be such a thing as a duly enacted but substantively "unconstitutional" constitutional amendment in Montana have been postponed to another day. With the exception of a successful equal protection challenge to the amendment changing initiative geographic distribution requirements from legislative districts to counties, Montana's amendments also have avoided the separate question of constitutionality under federal law. The most significant constitutional question for the amendment process remains the Court's shifting interpretation of the Separate Amendment Rule.

1. Procedural Review of the Amendment Process

The Supreme Court has addressed recent procedural challenges to the amendment process with more fidelity to the text of the constitution and laws than it did in the line of cases ending with the adoption of the 1972 Constitution. It rejected several proposed amendments on procedural grounds and left little room for "substantial compliance" with the constitutional process in reviewing procedural defects. The Court is similarly strict in its intolerance for abuse of the initiative process through fraud. Yet its textual approach to the clearly expressed rules of amendment allows the Legislature and the people to conform to those rules and revise them where they deem it necessary. Finally, where the law reposes a procedural responsibility in other officials, as in the case of ballot statement preparation, the Court exercises deference.

a. The Inadequacy of Substantial Compliance

One of the Supreme Court's strongest statements supporting its role in policing the constitutional amendment process followed a line of cases arising from one of the first constitutional amendments. Two years after ratification of the 1972 Constitution, the Legislature referred to the voters, and the voters approved, an amendment to the general sovereign immunity waiver of Article II, §18 to provide sovereign immunity on a two-thirds vote of the Legislature. In two subsequent cases, the Supreme Court invalidated caps on damages claims against the State under the equal protection guarantee of Article II, §4 and the right to full legal redress under federal law.

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241. Past Constitutional Ballot Issues, supra n. 198, at 1 (Const. Initiative No. 2).
Article II, § 16. Although the Court in both cases was asked to hold the constitutional amendment of § 18 effectively unconstitutional under its neighboring provisions, the Court framed its decision as a balancing of the right to full legal redress and the sovereign immunity provision. Justice Fred Weber dissented, claiming, "The effect of White and Pfost appears to be an improper judicial repeal of the exception in Art. II, § 18, Mont. Const., as adopted by the people in 1974." The Court later averted a potential clash between the original and amended constitutions by reinterpreting the meaning of § 16 in a private damages case that did not involve the amended § 18.

Before the Court revisited § 18, however, petitioners attempted to revise the Court's interpretation of “full legal redress” under § 16 with Constitutional Initiative 30. The measure passed with 56% of the vote in 1986, although the process was fatally flawed. The voter information pamphlet, which must contain “the complete text” of the proposed amendment, contained a typo that underlined the words “this full” as an addition to the guarantee that “No person shall be deprived of this full legal redress” instead of striking out “this full” as the Amendment actually did. Additionally, the Secretary of State attempted to meet the constitutional requirement to “cause the amendment to be published” by publishing only the Attorney General’s summary of the amendment.

The Court, in a pre-election challenge filed as an original proceeding, adhered closely to the constitutional and statutory processes and invalidated the election. In doing so, it rejected the rule of “substantial compliance” with publication requirements: “If there is any absolute in this matter, it is that the State Constitution must be expressed in words. Those words must reflect the considered will of the people. The State Constitution cannot be

242. White v. State, 661 P.2d 1272 (Mont. 1983); Pfost v. State, 713 P.2d 495 (Mont. 1985). For a detailed discussion of these cases from different critical perspectives, see generally Lopach, supra n. 125, at 270–283; (describing the constitutional basis for “governmental tort reform” and arguing for judicial restraint in the area); Bari R. Burke, Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?, 48 Mont. L. Rev. 53 (1987) (describing the constitutional basis for “equal redress” and arguing for legislative restraint in the area).

243. See Pfost, 713 P.2d at 505 (“We do not reach . . . whether the grant to the legislature under the amended version of art. II, § 18, is an impermissible grant to the legislature to amend the constitution”).

244. Id. at 515; see also id. at 516 (Weber, J., dissenting) (“What choices do the legislature and the people of Montana have in the event they desire to adopt immunity from suit, as authorized by art. II, § 18, Mont. Const. 1972?”).


248. Id. at 1259; see also Mont. Const. art. XIV, § 9; Mont. Code Ann. § 13–27–311 (publication of proposed constitutional amendments).

amended by fugitive forms." Three justices dissented, arguing that the majority opinion, "while perhaps defensible on technical legal grounds, fails completely to respect the will of the voters of Montana," where there was no evidence "the voters were materially misled under any of the issues raised here."

On reconsideration, the Court reaffirmed its strict approach to the amendment process as provided in constitutional text against the arguments that substantial compliance is sufficient where, as usually will be the case, there is no dispositive evidence of voter confusion. It also rejected a request to certify CI-30 for the 1988 general election, presumably following the proper publication of the proposed amendment. The Court held it had "no statutory authority for that step," and to do so "would stretch [its] inherent power to an unwarranted extent." Still, the flawed publication of CI-30 left the petitioners and people without a vote on the initiative through no fault of their own. The Legislature responded with a revision to the process itself. The proposed amendment required a new vote on any ballot issue "declared invalid because the election was improperly conducted." It also directed that "A preelection challenge to the procedure by which an initiative or referendum qualified for the ballot or a postelection challenge to the manner in which the election was conducted shall be given priority by the courts." The voters approved this amendment by nearly the same margin as they approved CI-30 in the first place.

The Court takes a similarly strict approach to fraud in the amendment process. In the petition gathering to qualify three initiatives proposed by the same sponsors in 2006, including two constitutional amendments, a trial court found a "pervasive and general pattern and practice of fraud and conscious circumvention of procedural safeguards." The practices included insufficient supervision of signature gatherers by petition affiants (those who swear to the authenticity of the signatures), affiants' use of unverifi-

250. Id. at 1263.
251. Id. at 1264 (Weber, J., dissenting).
252. Id. at 1272 (on reconsideration); the Court later declined to issue a writ of mandate to the Secretary of State to place CI-30 (and CI-27) on the ballot for the 1988 primary election. Marbut v. Waltermire, 752 P.2d 148 (Mont. 1988).
253. 1991 Mont. Laws 587 ("Const. Referendum No. 21").
254. Mont. Const. art. IV, § 7(3).
255. Id. at § 7(2).
256. Past Constitutional Ballot Issues, supra n. 198, at 8 (Const. Referendum 21).
257. Montana for Just., 146 P.3d at 776 (quoting Montanans for Just. v. State ex rel. McGrath, Cause No. CDV 06-1162(d) (Mont. 8th Jud. Dist. Sept. 13, 2006). The author served as counsel for the State in the case.
able addresses, and a "bait and switch" trick that led most voters to sign all three petitions sponsored by proponents.258

At trial, the proponents called none of the out-of-state signature gatherers accused of these practices to rebut the claims, resulting in a "totality of [ ] unrefuted evidence presented by Opponents without substantial objection from Proponents."259 In an echo of the substantial compliance debate two decades earlier, the Court acknowledged that "people will feel disenfranchised by our decision," but explained "that if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature," and the Court "must enforce the law as written and as the Legislature intended."260

b. Deference to Coordinate Branches

The Court alone cannot ensure the integrity of the amendment process. With the possible exception of the Separate Amendment Rule,261 it has avoided the judicial overreach criticized by Professor Waldron in the years leading up to the Constitutional Convention,262 and deferred to the roles of the executive and legislative branches. One of the most important executive branch safeguards of the amendment process is the preparation of unbiased ballot statements by state officials instead of proponents. They "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue."263 The Attorney General is generally responsible for all ballot statements, except when a petitioner prepares "true and impartial" statements264 or when the Legislature has prepared "statements of implication of a vote for or against" a referendum.265

For constitutional referenda, the Court defers to statements prepared by the Legislature.266 Although a given summary "may not be the best conceivable statement," the Court looks to whether the ballot statements "appear purposely misleading" or whether they "identify the measure on the ballot so that a Montana voter, drawing on both official and unofficial sources of information and education, will exercise his or her political judgment."267 The Court was unclear, for a time, whether ballot statements for

258. Id. at 770–775.
259. Id. at 777.
260. Id. at 778.
262. Supra Part II.B.2.
264. Id. at § 13–27–312(1) & (8)(b).
265. Id. at § 13–27–315.
267. Id. at 657.
an initiated amendment would merit the same deference "due to the differences between the two sources," even though initiative ballot statements are also prepared or approved by a state official.268

The Court recently clarified that it will not second-guess officially prepared ballot statements, whatever their source. The initiative at issue in the case posed an unusual challenge given its unprecedented length for a constitutional initiative in Montana: almost 1500 words, due to the proponent’s attempt to comply with the shifting separate amendment rule.269 With notable realism, the Court acknowledged "There are numerous portions of the initiative, which is lengthy and complicated, that could be deemed salient to voters," but "They cannot all be truthfully described in 100 words."270 Given this complication, without conceding "that the Court or individual Justices could not do a better job of drafting a statement of purpose," finality demands deference to the Attorney General’s ballot statement process "[t]o foreclose the prospect of endless and subjective challenges."271 This conclusion also respects the Attorney General’s position to receive public input on the ballot statements from persons who are not parties to the ballot statement litigation and may be more representative of voters than the interest groups on either side of a ballot statement challenge.272

c. Legislative Refinement of the Process

Historically, there was no clear path for judicial review of constitutional initiatives before their submission to the voters. At first, the Court established a rule that it would review pre-election challenges “only when there was a procedural defect or when the initiative was clearly unconstitutional on its face.”273 Yet even a pre-election challenge may not be resolved when the progress of the election process itself moots the case. In a challenge to signature disqualifications for CI-9 the Court held “Even though a sufficient number of valid signatures may in fact exist, there was not sufficient time available to qualify the matter for the 1978 ballot and we

268. Id. at 654; but see State ex rel. Wenzel v. Murray, 585 P.2d 633, 637–638 (Mont. 1978) (holding, in a challenge to statutory initiative ballot statements, that as long as the Attorney General’s wording “fairly states to the voters what is proposed within the Initiative,” “[h]is discretion as to the choice of language . . . is entirely his.”).
271. Id. at 791.
272. See Mont. Code Ann. § 13–27–312(2) (“The attorney general shall, in reviewing the ballot statements, endeavor to seek out parties on both sides of the issue and obtain their advice”); § 13–27–312(3) (providing for consultation with the budget director and a fiscal note under Mont. Code Ann. § 5–4–205 if the ballot issue “has an effect on the revenue, expenditures, or fiscal liability of the state.”).
find no means of legal or equitable relief is now available." 274 Despite the new constitutional direction that pre-election procedural challenges "shall be given priority by the courts" under Article IV, § 7(2), the Court is controlled by the Article III, § 4(3) jurisdictional limitation that "[t]he sufficiency of the initiative petition shall not be questioned after the election is held." Thus, an opponent who takes a chance on a late pre-election challenge may find that "their gamble failed when time for appellate review ran out." 275 Conversely, an opponent cannot challenge the submission of a constitutional initiative years after it has been voted upon. 276

These timing challenges arise because the initiative process must balance responsiveness to petitioners in an election year against allowing sufficient time to process and publish amendments before balloting. In a case that illustrated these tensions, Justice James Nelson observed that "[t]hese time frames are unrealistic given the time it takes to formulate and obtain review of the proposed language for the petition, file and conclude court challenges and appeals, if any, and then circulate a petition with the approved statements." 277 Therefore, he suggested, "[T]he Legislature should comprehensively review the statutory time frames for the whole initiative process." 278 These tensions arose out of the same 2006 initiative process marred by petition fraud.

The Legislature addressed both issues at its next session with a comprehensive revision of the initiative process. 279 It addressed timing problems and judicial review by providing original jurisdiction for challenges to ballot statements, 280 which had been exercised irregularly by the Court in the past and caused confusion among litigants. 281 Original jurisdiction also extends to challenges to the Attorney General's "legal sufficiency" determination, which protects petitioners through early review of whether "the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors," but not "consideration of the substantive legality of the issue if approved by the

277. Stop Over Spending, 139 P.3d 788, 794 n. 1 (Nelson, J., dissenting); see also id. at 801 ("[T]he timing of the petition and signature gathering processes—pursuant to the statutory requirements—essentially forced them to collect signatures on petitions containing the very statements by the Attorney General which they timely challenged in the District Court.") (Gray, C.J., dissenting).
278. Id. at 794 n. 1 (Nelson, J., dissenting).
279. See 2007 Mont. Laws 481. The author participated in drafting the legislation.
voters." Both the legal sufficiency determination and ballot statements are subject to a proponent's challenge before the petitioning process. This ensures signature gathering resources are not wasted. Opponents may challenge only after the initiative qualifies for the ballot to conserve pre-election review for those cases where the ballot issue will proceed to the voters.

The act addressed petition fraud by banning non-resident signature gatherers and payment per signature, and by clarifying a specific cause of action to decertify a ballot issue "for illegal petition signatures." The residency requirement for signature gatherers, who maintain the integrity of the petition process by gathering and attesting signatures, protects proponents and voters alike by increasing the likelihood that signature gatherers will be available in any challenge to (and defense of) an initiative petition. The ban on payment by the signature reduces the financial incentive for misleading voters or otherwise improperly gathering large numbers of signatures. The specific cause of action not only gives voters a remedy for illegal petitions but also serves as an incentive for initiative sponsors to comply with the prior two laws and prevent signature gatherer fraud, or else run the risk of decertification.

2. Substantive Review of Amendments

For constitutional initiatives, the primary determination of an amendment's "legal sufficiency" is whether it satisfies the Separate Amendment Rule. While the clear procedural mandates of the amendment process may be enforced straightforwardly, the meaning of the term "amendment" requires a more sophisticated substantive analysis of constitutional proposals.
a. What an "Amendment" Is

Some of the boundaries that define an "amendment" are more apparent than others. For example, the people's right to "propose constitutional amendments by initiative" is relatively uncontroversial given the common understanding that a "constitutional amendment" must be a constitutional amendment in both form and substance.289 In 1984, petitioners proposed a "constitutional amendment" that would require the Legislature to meet and adopt a resolution calling for a federal constitutional convention to adopt a balanced budget amendment and penalize legislators for failing to do so.290 The Supreme Court considered the measure "a transient amendment for a specialized purpose" that was "not a part of the permanent fundamental law of a state."291

Similarly, as a structural matter, an amendment must be self-contained and not contingent on the adoption of other amendments or legislation. In 1996, the Legislature proposed to eliminate the office of Secretary of State, and the amendment reassigned almost every duty of that office.292 But the Legislature neglected to reassign the Secretary's duty under C-21 to resubmit ballot issues invalidated due to election improprieties, which was imposed by another constitutional referendum approved a few years before.293 The Supreme Court rejected such an amendment that "would leave an obvious defect in the constitution," namely, "to abolish the office of secretary of state but leave[ ] one duty assigned to that office, with no provision for who must assume that duty."294 Again, substantial compliance would not suffice, even as the dissent claimed that the defect "is one of form and not one of substance" and did not merit denying "the people the right to vote on an important constitutional referendum."295

b. What a "Separate Amendment" Is

A more difficult question is how to define "amendment" for purposes of the submission rule, applicable to constitutional referenda and constitutional initiatives alike, that "[i]f more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately."296

289. Mont. Const. art. XIV, § 9(1).
292. 1995 Mont. Laws 69 § 5 ("Const. Referendum No. 29").
293. See Mont. Const. art. IV, § 7(3).
295. Id. at 271 (Turnage, C.J., dissenting).
For most of Montana’s history since statehood, and at the time the 1972 Constitution was framed and ratified, the Separate Amendment Rule rarely provoked judicial intervention in the constitutional amendment process. In 1906, a decade into the use of the constitutional amendment process by Montanans, the Supreme Court was asked to invalidate a constitutional amendment revising the terms and manner of election of county commissioners on separate amendment grounds. Opponents claimed the proposal contained three separate amendments concerning length of term, extending the term of incumbents, and filling vacancies. The Court refused to divide the proposal as suggested by the opponents, explaining that “This was all one single scheme, with the single purpose of establishing and maintaining in existence a board of commissioners two of whom at all times would be experienced men.” This was a highly deferential approach that left it largely to the voters on petitions and the ballot to disapprove compound amendments. At the time, other states had experimented with stricter scrutiny under the Separate Amendment Rule, but they found these tests unworkable and eventually relaxed or rejected them in favor of deferential review like that adopted by the Montana Supreme Court.

The Court refined the Separate Amendment Rule eight years later in a challenge to the initiative and referendum process itself. Again, opponents suggested that the amendment could be divided into an initiative proposal and a referendum proposal, each voted on separately. Emphasizing the practical nature of reforming the constitution over what Justice Story called

297. See State ex rel. Teague v. Bd. of Cmrs. of Silver Bow Co., 87 P. 450 (Mont. 1906).
298. Id. at 451.
299. Id.
300. State ex rel. McClurg v. Powell, 27 So. 927, 931 (Miss. 1900) (the Rule is violated when amendments “are separate and independent each of the other, so as that each can stand alone without the other, leaving the constitutional scheme symmetrical, harmonious, and independent on that subject”); McBee v. Brady, 100 P. 97, 103 (Idaho 1909) (amendments prohibited if “the change or changes proposed [can] be divided into subjects distinct and independent and . . . any one of which [can] be adopted without in any way being controlled, modified, or qualified by the other”); Kerby v. Luhrs, 36 P.2d 549, 554 (Ariz. 1934) (“[I]f, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted.”).
301. State ex rel. Collins v. Jones, 64 So. 241, 254 (Miss. 1913); Korte v. Bayless, 16 P.3d 200, 204 (Ariz. 2001); Idaho Water Resource Bd. v. Kramer, 548 P.2d 35, 53 (Idaho 1976); see also Farris v. Munro, 662 P.2d 821, 825 (Wash. 1983) (“The propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other.”) (citation omitted); Lee v. Utah, 367 P.2d 861, 863 (Utah 1962) (“It is not necessary that every possible change or abolition of the Constitution be set out separately on the ballot if the various propositions are concerned with the general subject of the Amendment and are not separate and distinct purposes not dependent on, or connected with each other.”).
302. State ex rel. Hay v. Alderson, 142 P. 210, 212 (Mont. 1914).
“metaphysical or logical subtleties,” the Court deferred to the democratic process. It applied the following standard:

If, in the light of common sense, the propositions have to do with different subjects, if they 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 the constitutional requirement is met in their submission as one amendment.

At issue was an amendment “[t]o express a reservation of legislative authority in the people” through the tools of direct democracy. The fact that the amendment provided both the initiative and the referendum to exercise that authority “does not suggest disconnection, but enumeration of the parts of a whole.” The opponents urged the amendment could be divided and voted on separately, and therefore “as the amendment was submitted, persons who approved the initiative, and not the referendum, or vice versa, were obliged to take both or neither.” The Court rejected the invitation to police the provisions of amendments in that manner, observing the practical reality that “such divergencies of opinion are conceivable as to any amendment involving particularization.”

The Court reinforced its practical approach to the rule in a challenge to an amendment providing the Legislature power to prescribe the form of local governments. Again, the Court acknowledged the nature of constitutional amendments, which “necessarily are couched in broad language for they are designed to have a comprehensive scope and operation.” Nor is “[t]he fact that an amendment impinges upon or affects various provisions of the Constitution . . . itself persuasive that essential unity was violated in its submission.” Although the Court continued to assert itself in the constitutional amendment process, it had abandoned the Separate Amendment Rule as a vehicle to do so. The deferential approach of the old Montana rule is shared by “a clear majority of the nearly 30 other jurisdictions that have a separate-vote provision.”

303. Id. at 212, 213.
304. Id. at 213.
305. Id.
306. Id.
307. Id. at 214.
309. Id. at 1010–1011.
310. Id. at 1011.
311. See The Review of Constitutional Referenda by the Supreme Court, supra Part I.B.2.
312. See Californians for an Open Primary, 134 P.3d at 319 (collecting cases).
c. The Separate Amendment Question

The Montana Supreme Court recently reconsidered its approach to the Separate Amendment Rule, based largely on the Oregon Supreme Court’s experiment with the kind of aggressive enforcement of the rule that came and went in many states a century ago. In *Armatta v. Kitzhaber*, Oregon’s court adopted an unusually strict new rule to invalidate a wide-ranging initiative that, ironically, probably would have failed under most of the less restrictive interpretations of the Separate Amendment Rule. Under *Armatta* the Oregon courts invalidated nearly every proposed constitutional initiative for a decade.

In *Marshall v. State ex rel. Cooney*, the Montana Supreme Court drew on *Armatta* to review an amendment that provided, “No new tax or tax increase may be enacted unless first approved by a majority of the electors voting on the measure in the geographic area subject to the tax.” The amendment implemented the tax approval condition (contained in Article VII, Revenue and Finance) in part by imposing civil liability on public officials notwithstanding any assertion of sovereign immunity (under Article II, § 18), and by allowing the governor to veto any tax referendum (under Article VI, § 10). The Court departed from Montana’s previous adherence to the majority rule that identifies “separate amendment” with “single subject.” Instead, the Court agreed with *Armatta* “that a separate-vote re-


314. *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998). Under the title of “crime victims’ rights,” the proposed amendment would have eliminated the unanimous verdict requirement in murder cases, barred recent felons from juries, restricted pretrial release, and denied suppression remedies except as required under the federal constitution, among other changes. Id. at 64–65.


316. *Marshall*, 975 P.2d at 327, 331–332 (invalidating CI-75 because it “expressly amends three parts of Montana’s Constitution”).

317. Id. at 331 (overruling *State ex rel. Hay v. Alderson*, 142 P. 210, 213 (Mont. 1914) (“If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts
requirement for constitutional amendments is a different and narrower requirement than is a single-subject requirement."

It justified its departure from precedent as "a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives," notwithstanding the absence of any textual basis for such a reading and the presence of strong arguments during the framing that the constitutional initiative should be a freer means of amending the constitution than the constitutional referendum. The Court stopped short of endorsing Armatta's "implied amendment" doctrine, invalidating the electoral approval of CI-75 because it "expressly amends three parts of Montana's Constitution but does not allow a separate vote for each amendment."

A concurring opinion argued for a kind of implied amendment doctrine, citing inconsistencies between CI-75 and other constitutional provisions, but cited no precedent for its interpretation.

The Court's departure in Marshall from its textually rooted and historically informed supervision of the initiative process drew sharp criticism alongside Armatta itself. One scholar of direct democracy, Professor Daniel Lowenstein, echoed the reasoning of earlier courts in his assessment of Marshall:

"The court appears to have outdone both its own precedents and Armatta in strict application of the separate vote requirement. . . . To limit a constitutional amendment to modifying not more than one provision of the existing constitution hardly recommends itself as sound public policy. Such a mechanical test makes proposed changes contingent on the way the existing constitution happens to be organized. It would encourage drafters of amendments to ignore loose ends that might be serious but that could only be tied up by referring to various existing constitutional articles or sections, and it would seriously impede many perfectly legitimate proposed constitutional amendments."

Professor Lowenstein doubted that "the Montana courts will impose such an absurd limitation on the Legislature when it proposes constitutional amendments." Meanwhile, recent scholarship by Professors Richard Hasen and John Matsusaka on the single subject rule (a similar restriction applicable to statutes) finds that in states where courts aggressively enforce
the rule against initiatives, decisions track individual judges’ partisan views of the initiative’s merit. 325

It remains to be seen if Marshall is an outlier addressing an extraordinarily broad-reaching amendment in CI-75, or whether the Court’s continued assertion of a strict Separate Amendment Rule will result in what Professor Lowenstein calls “The New Council of Revision” with what could amount to discretionary veto power over all new proposed constitutional amendments. 326 One consequence of the decision is that the Legislature appears to have taken the Court at its word that the adoption of the initiative and referendum in a single amendment, approved in the Teague case, would not have succeeded under Marshall (which overruled Teague). In its short-lived amendment to change from legislative district to county-based distribution requirements for petition signatures, the Legislature split the constitutional and statutory distribution requirements into two separate amendments. C-37 and C-38 both passed, with only 670 votes separating them in the final tally. 327

For now, the people of Montana and their Supreme Court have narrowly avoided several clashes that may have diverted the Separate Amendment Rule, and therefore the shape of the Constitution, on a different path. If the rights and remedies reform amendment of C-30 had been properly published with the words “this full” struck out, 328 would the equal protection clause or other provisions cabin the amendment’s intended effect? If the challenge to the term limits amendment of CI-64 had been brought before a laches defense accrued, 329 would it have violated the Separate Amendment Rule before the tightening of the rule in Armatta? Would the voter approval of taxes amendment of CI-75 have met the Separate Amendment Rule without the veto and civil liability provisions? 330 What about the elimination of the Secretary of State across multiple constitutional articles in C-29, if the Legislature had only accounted for Article IV, § 7(3) in drafting it? 331 What if the Separate Amendment Rule challenge to CI-97, a lengthy spending limit initiative drafted specifically to avoid even “implied amendments,” had reached the Court before the signature fraud challenge to the same initiative? 332 Going back to the beginning, would the Legislature have proposed the initiative without the referendum if the Court required

326. Lowenstein, supra n. 323, at 35.
each to be put to a separate vote? These repeated close calls under the Separate Amendment Rule reveal a remarkable level of contingency in the current doctrine of constitutional amendments and, therefore, in the current text of the Montana Constitution.

V. THE CONSTITUTIONAL INITIATIVE IN PERSPECTIVE

There are many ways to assess the Montana Constitution’s performance, but there is only one measure that the Constitution itself proposes. At least every twenty years the Constitution requires the people to choose “whether there shall be an unlimited convention to revise, alter, or amend this constitution.” The delegates could not and would not bind future generations to the ideas and words expressed by 100 Montanans in the late winter of 1972. So with a proposal by two-thirds of the Legislature or ten percent of the electorate, the same simple majority of voters that ratified the Constitution could update or correct the constitutional text by amendment or revise the entire document by a constitutional convention. By this measure of popular approval, the Constitution is a success. The people resoundingly rejected by more than eighty percent their one opportunity (until November 2010) to vote for constitutional revision in 1990.

Still, the 1889 Constitution stands as proof that the Declaration of Rights’ first provision—“All political power is vested in and derived from the people”—can be defied by default. The steady accretion of amendments and constitutional doctrine can weigh down democratic processes to the point at which the State becomes unresponsive to the people. Or, as Delegate Vermillion feared in his 1972 preview of Chief Justice George’s lament in 2009, “[W]e’ll have a Constitution that looks like California.”

So far, the Constitution has avoided Delegate Vermillion’s dire forecast. At 13,145 words, Montana has the ninth shortest state constitution in the country, and the shortest among the states that allow constitutional initiatives. “It is striking,” Professor Tarr observed here in 2003, “how little Montanans have found it necessary to change” the document they ratified in 1972. In terms of maintaining consistency and simplicity over

334. Mont. Const. art. XIV, § 2(1).
335. Id. at § 2.
336. Past Constitutional Ballot Issues, supra n. 198, at 8 (Const. Call No. 1).
338. Constitutional Convention vol. III, supra n. 4, at 506; George, supra n. 5.
340. Tarr, supra n. 81, at 20. In the same issue, Code Commissioner Gregory Petesch expressed a concern that voters were using the constitutional initiative to “stick turkey feathers on the constitutional eagle,” in Delegate J.C. Garlington’s words. Gregory J. Petesch, The State of the Montana Constitution
time, the Montana Constitution has performed well in its short history. It has been amended the second fewest number of times of any current state constitution. 341

The Montana Constitution has remained so concise over its relatively short life because it is amended at a slightly lower rate than those of other states, far lower than the rate for the most actively amended constitutions. Since 1972, Montanans amended the Constitution at an average rate of once each year, but nearly all of those amendments were referenda; even when the invalidated initiatives CI-30 and CI-75 are taken into account, Montanans approved initiated amendments less than once every seven years. 342 These rates fall below the median state rate of nearly one-and-one-half constitutional amendments per year, including one initiated amendment every five years in the sixteen states that provide for the direct constitutional initiative. 343 The eight most active states amended their constitutions more than twice per year on average (more than twice Montana’s rate), including Louisiana and Georgia, the only two states whose constitutions are newer than Montana’s. 344 Four states amended their constitution by initiative at least every three years on average (twice Montana’s rate): Florida, California, Oregon, and Colorado. 345

No single procedural requirement appears to be decisive in determining the Constitution’s relatively low rate of amendment. 346 Montana’s ten percent signature threshold 347 and time limit of one year for signature gathering 348 lie at the median among the 16 constitutional initiative states. 349

342. Id. (Montana averaged 0.94 amendments per year between 1973 and 2005, and 0.15 initiated amendments per year over the same period).
343. Id. (The fifty-state median for amendments is 0.99 amendments per year, and the eighteen-state median for initiated amendments is 0.19 amendments per year). Massachusetts and Mississippi have indirect constitutional initiative processes in which petitioners submit the proposed amendment to the legislature for action before it may be placed on the ballot. See Marvin Krislov & Daniel Katz, Taking State Constitutions Seriously, 17 Cornell J.L. & Pub. Policy 295, 316 (2008).
344. The eight states are, in order of annual amendment rates: Alabama (7.37), South Carolina (4.45), Louisiana (4.3), California (4.07), Texas (3.4), Florida (2.89), Georgia (2.86), and Hawaii (2.26). Id.
345. The annual constitutional initiative rates are: Florida (0.59), California (0.34), Oregon (0.33), and Colorado (0.33). Id.
346. The various state provisions for constitutional and statutory initiatives are summarized in detail by Magleby, supra n. 202, at 38–39 tbl. 3.1.
347. Mont. Const. art. XIV, § 9(1).
Geographic distribution requirements are more common among the less actively amending states, yet highly active Florida also requires eight percent of signatures in half of its congressional districts. Various supermajority requirements for voter approval distinguish several of the least active states but not Montana and the simple majority rule it shares with all of the most active states.

All four of the most actively amended state constitutions (Florida, California, Oregon, and Colorado) have lower signature thresholds of eight percent (or five percent for both statutory and constitutional initiatives in Colorado). In this way, at least, the spread between the number of signatures required for constitutional and statutory initiatives in Montana has served as “a valuable disincentive to constitutional tinkering” compared to the top states. Still, the next most actively amending states (Arizona and Oklahoma) have higher 15% signature thresholds, and three of the more active states (California, Colorado, and Oklahoma) allow six months or fewer to gather signatures.

The text of the Montana Constitution is less stable than this comparison suggests. Montanans still approved three-quarters as many amendments in the four decades since 1972 than they did in the eight decades before 1972. In practical terms, the number of successful constitutional initiatives is a function of the supply of proposed amendments from petitioners and the demand for approved amendments from voters, and both of these factors are subject to significant change in the future. Petitioners’ supply of constitutional initiatives depends on the ease with which potential proponents can meet the legal requirements for ballot qualification. Voters’ demand for constitutional initiatives depends on the more complicated dynamics of voter preferences in response to the activity of state government, specifically the legislative and judicial branches. An increase in either the petitioners’ supply of or the voters’ demand for constitutional initiatives, or a combination of the two, would accelerate the rate of amendment and soon lead to a longer, less flexible constitution.

349. See Krislov & Katz, supra n. 343, at 313 (2008). Only seven of the constitutional initiative states have geographic distribution requirements.
350. Id. at 313.
351. Id. at 316–317. Florida adopted a sixty-percent approval supermajority rule in 2006, effective after the collection of the amendment rate data discussed here.
353. Krislov & Katz, supra n. 343, at 313, 315.
354. Compare Part I.B (under the 1889 Constitution voters approved 40 constitutional referenda, but three were invalidated) with Part III (under the 1972 Constitution voters approved 30 constitutional amendments, including 25 constitutional referenda and five constitutional initiatives, but three were invalidated).
A. The Supply of Constitutional Initiatives

Trends elsewhere suggest that Montanans will see more frequent amendments on the ballot in coming years. Although only one in five Montana initiatives qualified using paid signature gatherers in the early 1980s, the effective all-volunteer petition campaign may give way to the California model, where just one in six qualified initiatives primarily relied on volunteers. In a series of cases, the United States Supreme Court restricted states’ authority to structure their own initiative processes to encourage citizen-driven initiative campaigns. As the law stands today, by opening the door to amendment by initiative, the Montana Constitution has joined the Montana Code in an area where “Money is a sufficient condition for a successful petition drive and increasingly a necessary one.”

A more professional constitutional initiative petition process in Montana could bring dramatic change to the ballot and the constitution. Only a dozen of the 101 constitutional initiative petitions have qualified for a vote under the 1972 Constitution. If constitutional initiative petitions qualified at even half the 46% qualification rate of statutory initiatives, assuming that requiring twice as many signatures makes qualification of a constitutional initiative twice as difficult, then the number of initiated amendments on the ballot would nearly double to 23. This could then double the number of approved initiated amendments from five to ten, based on the historical approval rate of constitutional initiatives (42%). At this rate Montana’s Constitution would, in Delegate Vermillion’s words, increasingly “look like California,” at least in terms of constitutional initiatives.

355. Ellis, supra n. 352, at 46–47. Still, as Ellis finds in an examination of early 20th Century initiatives in Oregon, “paid petitioners are as old as the initiative process.” Id. at 49. Further, professional signature gathering can only guarantee ballot access, “whereas no amount of money can guarantee an electoral victory.” Id. at 69.


357. Elizabeth Garrett, Money, Agenda Setting, and Direct Democracy, 77 Tex. L. Rev. 1845, 1889 (1999); see also Ellis, supra n. 352, at 59 (describing “the reality that organized and well-financed special interests have long been central players in the initiative process.”).

358. Past Constitutional Ballot Issues, supra n. 198, at 5.
In a changed petition process where financial resources from interest groups dominate indigenous political commitment by volunteers, the supply of amendments also is a function of procedural integrity. Petition fraud, for example, can function as a “black market” supplying initiatives through illegal means. Less directly, failure to publish the accurate text of the amendment or disclose the financial supporters of petition campaign can mislead voters about the true effects of sometimes complicated initiatives. Generally, strict enforcement of procedural requirements has limited the supply of constitutional initiatives. The Supreme Court invalidated five of the fifteen constitutional initiatives that qualified for the ballot on procedural grounds, and may have invalidated a sixth if it had not been rejected by the voters.

B. The Demand for Constitutional Amendments

Although moneyed interests may come to play a greater role in setting the agenda of amendments on the ballot, Montana’s voters still must determine which of the proposed amendments will be approved. Here, the same demand for a responsive and flexible state government that led to the 1972 Constitution also drives demand for constitutional amendments in general and constitutional initiatives in particular. Specifically, when voters see that the Legislature is responsive to their changing policy preferences, and the Supreme Court does not preempt the resulting policies as matter of judicial review, voters can rely on the ordinary politics of legislation through candidate elections and statutory initiatives. This reliance on “leaving many matters to future legislative determination” is, according to the leading proponents of the Constitution, “both necessary and democratic.”

359. Supra Part III.B.1.a.
362. The exception is strict enforcement of the Separate Amendment Rule, which causes proponents to subdivide their proposals into more and narrower amendments than may be necessary to ensure procedural integrity. See Part III.B.2.a, supra.
365. Supra Part II.
Conversely, when voters see that government is unresponsive, they can demand a constitutional initiative to constrain elected officials' policy choices to better match voter preferences. Or, as the Constitutional Revision Committee Report put it, the constitutional initiative ensures that the Constitution remains "the embodiment of the will of the people." The originators of the constitutional initiative understood, however, that such short-term responsiveness comes at a cost to long-term responsiveness as the Constitution itself becomes less like the "fundamental yet flexible document" the delegates first proposed. Over time, constitutional interventions that respond to the changing policy demands of voters can accumulate to the point that they "present a major obstacle to effective government" in the same way as the structure the 1972 Constitution replaced.

The California example illustrates how this ratcheting up of the Constitution's complexity may work in only one direction under existing conditions of political pluralism. Professors Bruce Cain and Roger Noll explain that "the growing number and sophistication of interest groups plus rising partisanship in American political parties have complicated the task of constitutional revision while stoking the fires of amendment." The path to the 1972 Montana Constitutional Convention and the current state of the California Constitution shows "the cumulative effect of separate policy amendments can amount to important revisions of the constitution." Yet, "[A]n attempt at global reform through revision is likely to create a coalition of strange bedfellows that collectively can block the entire package of reforms," short of "a drastic deterioration in the conditions of the status quo." Constitutional revision may be even more difficult now than in 1972, when voters approved the Constitution by a razor-thin margin despite the broad social and political shifts that had occurred since Montana statehood. Thus, the impracticability of revision compounds the complications caused by the accumulation of amendments.

Voter demand for constitutional amendments will determine whether and how far Montana follows a potentially irreversible trend toward an increasingly complicated Constitution. Government responsiveness to voter preferences, in turn, will determine voter demand for approval of constitutional amendments. First, voters can demand constitutional amendments to govern the Legislature's policymaking scope. Second, voters can demand

367. Id. at 363.
369. Legislative Council Report, supra n. 46, at 5.
370. Bruce E. Cain & Roger G. Noll, Malleable Constitutions: Reflections on State Constitutional Reform, 87 Tex. L. Rev. 1517, 1525 (2009);
371. Id. at 1542; see also id. at 1543-1544 ("A constitutional revision was not required to create California's fiscal mess, but a revision will be required to fix it.").
372. Id. at 1530.
constitutional amendments to govern the Supreme Court, eliminating constraints on legislation imposed by the exercise of judicial review. These demands are potentially contradictory; a constitutional check on the Legislature’s activities can expand the subjects of judicial review and a constitutional check on the Supreme Court’s activities can expand the subjects of legislation. In operation, however, the demands address largely separate policy spheres: legislative structure and fiscal policy, and judicial construction of individual rights.

1. The Demand to Govern the Legislature

Theoretically, it should be far easier for voters to control the Legislature by voting for or against legislative candidates already on the ballot than by petitioning for and approving amendments that limit the legislators’ authority once in office. The Legislature is, structurally speaking, the single most responsive political institution at the state level, with the shortest terms and the smallest constituencies. Unlike judicial review, most legislative policymaking can be reversed or preempted by statutory initiatives, which the Legislature rarely negates. Yet the Legislature is the single most common institutional target of the constitutional initiative process. More than half of initiated amendments that qualify for the ballot concern the legislature’s power to tax and spend. Two of the three approved constitutional initiatives that have not been invalidated limit legislative sessions and terms.

The Legislature itself is the leading supplier of amendments—including amendments that limit legislative powers—through the constitutional referendum process, and voters approve referred amendments at a higher rate than initiated amendments. In other words, the primary demand for constitutional amendments comes from voters who prefer to control not only the Legislature’s membership, but also its specific fiscal policies beyond the broad outlines of the original Constitution. Moreover, by approving many more constitutional referenda than constitutional initiatives, voters choose to limit the Legislature’s legislative power by deferring to the Legislature’s constitutional referendum power. Like the constitutional initiatives, most of these referenda seek to delegate fiscal and other policies to inflexible constitutional rules, away from the Legislature itself.

These developments might have disappointed the citizens who hoped that “dependence on the legislature—rather than the illusory safety of de-

374. Id. at § 2.
375. Supra Part III.A.1.
376. Supra Part III.A.2.
377. Supra Part III.
tailed constitutional language—will help to make our political system more issue oriented." More disappointing, at least to those delegates who distrusted legislative “back-scratching,” would be the fact that the Legislature has supplied constitutional referenda at three times the rate of constitutional initiatives. When the Legislature itself seeks to delegate current policy decisions to permanent constitutional rules instead of exercising its own political judgment or at least proposing a more flexible statutory referendum, it compounds the problems the delegates identified. Policy-based constitutional referenda not only create a more prescriptive and less flexible Constitution, but also devalue the political solution of “focus[ing] the spotlight on the places where the decisions are made which vitally affect the public welfare.”

Recent history suggests that the demand to constrain the Legislature will continue, or even increase. Half of the last dozen constitutional amendments to come to a vote since 2000 have attempted to establish or manage trust funds that take control of public money out of the hands of the Legislature, and half of these won approval; many other proposals that did not make the ballot attempted to eliminate or limit taxes. Of the five constitutional initiative petitions for the 2010 ballot, one would establish another constitutional trust fund and one would prohibit certain taxes. Professional signature gatherers, attracted by the money at stake in these proposals, can produce a steady supply of such issues on the ballot.

2. The Demand to Govern the Supreme Court

The constitutional initiative process can create a tension “between the principles of popular sovereignty and deference to the majority will as expressed in initiative outcomes on the one hand and the state-supplemented federal rights and court review on the other.” In Montana, the Declara-
tion of Rights is the most likely origin of countermajoritarian judicial decisions giving rise to this tension, and in fact it is the most frequently amended article in the Constitution. Yet few of the amendments concerning individual rights in Article II and elsewhere emerged as specific reversals of judicial review. Several other individual rights amendments are either symbolic or preemptive efforts to constrain future judicial review.

The only direct attempts to reverse specific constitutional decisions by amendment occurred in the late 1980s. In 1986, voters petitioned for CI-30 in response to the Supreme Court’s application of the Article II, § 16 right of “legal redress” to invalidate damages limits, but that attempt failed on procedural grounds and the Court later reversed itself on the constitutional question. Two years later voters approved C-18, a legislative referendum responding to the Court’s invalidation of welfare legislation under the Article XII, § 3(3) “institutions and assistance” provision. In 1990, while it did not directly overrule a contrary constitutional interpretation by the Court, C-21 did provide the Court the express authority it lacked when it refused to mandate a new election on CI-30. Beyond this brief run of controversy two decades ago, the Legislature and voters have not invoked—and the Supreme Court has not provoked—direct challenges to constitutional decisions through the constitutional amendment process.

Two of the most recent constitutional amendments concerning individual rights, both approved in 2004, seek to control judicial review prospectively and in the absence of any specific controversy. The proponents of the “preservation of harvest heritage” provision of Article IX, § 7, a constitutional referendum, made their argument for trumping ordinary politics and judicial review explicit: “Without C-41, it only takes one judge or a simple majority of the legislature to ban hunting/fishing. With C-41, it would take 2/3 of the legislature plus a majority of Montana voters to do so.” Proponents of the marriage provision of Article XIII, § 7 similarly intended to preempt a constitutional question that was not presented to Montana courts: “Public policy should be decided by the people, either directly through ballot initiative, or indirectly through their elected represent-

384. Supra Part III.A.3.
385. For a contemporary account of the underlying cases, see generally Lopach, supra n. 125, at 295 (arguing that the Supreme Court’s reviews of “tort reform and welfare reform are not in line with” the populist tradition in Montana).
386. Supra Part III.B.1.a.
atives, not by activist judges." A third recent rights amendment, a 1998 constitutional referendum that added public safety and victim restitution to the criminal justice policy provision of Article II, § 28, is primarily symbolic to the extent it does not seem to address an anticipated question of judicial review.

So far, the demand to limit judicial review of specific issues has been low, notwithstanding the relatively frequent amendments to the Declaration of Rights. Montanans are not too far removed from the debate, drafting, and approval of a distinctly contemporary Constitution. Indeed, the document as a whole became more popular in the time between its ratification by a bare majority in 1972 and the overwhelming vote of confidence it last received in 1990. The Legislature and the Supreme Court also have the benefit of working in proximity to the framing, making it easier to reach agreement on what the Constitution means for legislation. Going forward, changing times may dissipate some of this consensus.

Future demand to limit judicial review depends on how that power will be used. The Supreme Court is only imperfectly representative of what most Montanans understand their Constitution to mean. Misalignment between judicial and popular constitutional meanings can produce a demand to realign the judicial understanding with the popular understanding, especially when the judicial understanding prevents expression of the popular understanding in ordinary legislation. While in such circumstances "it is not impossible for a state citizenry to check an adventurous court" through elections, judicial campaigns are a crude proxy for constitutional discourse. For example, a supreme court campaign that appears to concern criminal procedure may actually be about the right to a clean and healthful environment. The constitutional initiative is a more direct method of "correcting" the Court when it strays from the popular understanding of the Constitutional text—in practical terms, the specific meaning that supported enactment of the challenged law and would receive majority approval on the amendment ballot.

A court that too often disregards what Professor Lopach has called the "persisting value of popular sovereignty" reflected in the constitutional

390. Id. at 23.
391. Past Constitutional Ballot Issues, supra n. 198, at 12 (Const. Referendum 33); see also Ellison & Snyder, supra n. 65, at 79 ("In large measure, the state legislature and the Montana Supreme Court have ignored" Article II, § 28).
392. Lopach, supra n. 125, at 294.
393. See e.g. Terry Carter, Mud and Money, ABA J. (Feb. 2005) (describing campaign advertising financed primarily by a coal company executive that criticized incumbent state supreme court justice "of casting the deciding vote to let a sex offender take a job in a school"); cf. Caperton v. Massey, 129 S. Ct. 2252 (2009) (holding that due process required recusal of justice from case involving the executive's coal company when the justice benefitted as a candidate from the executive's campaign expenditures).
structure can "damage democratic politics."394 Sweeping decisions may embed inflexible interpretations in the 1972 Constitution that limit the political process just as much as the detailed proscriptions of the 1889 Constitution. This, then, can trigger popular demand for amendments that either roll back broad constitutional protections or insert specific policy judgments into the constitutional text, replacing interpretative detail with even more rigid textual detail.

Significantly, the potential use of the constitutional initiative also may prevent strongly countermajoritarian rulings, consistent with Professor Laura Langer's finding that state supreme courts account for potential retaliation from political branches in their exercise of judicial review.395 In significant cases, the Court speaks in such important policy areas as school finance,396 environmental protection,397 and personal privacy,398 but it avoids displacing vast areas of policymaking power when it does so. Cases that do not purport to be the last word on a controversial constitutional question are less likely to encourage voters to test that premise. They invite deliberation and reform through democratic processes, beginning rather than ending the constitutional conversation. Given the Constitution's majoritarian power of constitutional initiative, the Supreme Court's generally sensitive use of judicial review has helped maintain the document's original text.

VI. CONCLUSION

The Montana Constitution provides innovative structural checks and individual rights that constrain the popular will in service to its aspirations of "quality of life, equality of opportunity and . . . the blessings of liberty."399 It is also fundamentally a democratic document that owes its current form and continuation to the consent of a simple majority of voters.

394. Lopach, supra n. 125, at 296.
395. Laura Langer, Judicial Review in State Supreme Courts 127–128 (St. Univ. N.Y. 2002) ("Overall, it seems that areas of law most salient to the other branches of government are likely to encourage the most strategic behavior, under certain conditions. Instead of serving as a countermajoritarian institution, when the issue resonates most with other branches of government state supreme court justices avoid getting involved in the first place. Judges rarely intervene and when they do, they are more likely to uphold the law.").
399. Mont. Const. preamble.
Popular sovereignty therefore motivates the Montana Constitution, not only as an original matter in the theory of its conception, but also as a contemporary matter in the practice of its amendment. The constitutional initiative originated and operates as a direct expression of popular sovereignty.

The power to amend the Constitution by petition and majority vote is a solution to the basic problem of inflexible and unresponsive state government that motived the 1972 Constitutional Convention. Delegates understood, however, that the use of that power also can cause the same problems it is intended to solve. The flexibility and responsiveness that the Constitution enables in state government, when translated into the process of amending the Constitution itself, can lead back to the eventual inadequacy of the 1889 Constitution or lead on to the political sclerosis of “a Constitution that looks like California.” Delegates in convention and proponents in ratification recognized that the best way to accommodate needed textual flexibility without compromising future responsiveness was “reliance on the legislature”: in a word, politics.

Although the Montana Constitution is amended more often than its predecessor, it is amended less often than many other state constitutions with similar amendment processes. The Legislature, not petitioners, dominates the amendment process, and only three constitutional initiatives are now part of the constitutional text. Strict enforcement of procedural rules and signature gathering reforms maintain the integrity of the petition and the vote against fraud or mistake, although too strict enforcement of the Separate Amendment Rule threatens a judicial veto of otherwise proper amendments. Montanans strongly endorsed the text of their Constitution when it last came to a vote, and they rarely seek to overrule its interpretation by the Supreme Court. Today, the Montana Constitution keeps remarkably close to its original form as one of the shortest state constitutions.

This may change. An increasingly easy supply of qualified initiatives balloted by professional signature gatherers will be more sensitive to popular demand for amendments. Demand, in terms of approval of amendments by the people, will depend on the state government’s responsiveness. If the Legislature is unable or, in the case of constitutional referenda, unwilling, to resolve policy issues, or if the Supreme Court is too willing to reject the Legislature’s resolution of policy issues, then demand for constitutional amendments may increase. Based on the number of proposed and nearly approved amendments in the past, a significant increase in either supply or demand could tip the Montana Constitution toward the length of the inflexible document it replaced, but with less of a possibility for revision.

The paradox of the constitutional initiative is that it guarantees popular sovereignty over the Constitution to an extent that government under the Constitution can become unresponsive to the people. The Montana Consti-
tution avoided this fate in its first four decades, but it continues to pose the question of its future in the amendment provisions of Article XIV. The delegates who authored and the voters who ordained the Constitution understood that the answer to that question depends on the people to whom they entrusted it. The Montana Constitution can enable politics as an enduring set of basic principles, or it can preempt politics as a contested list of detailed policies. It cannot do both, as long as the constitutional initiative gives the people the last word.