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A or Z?: An Analysis of Thom v. Barnett

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A OR Z?: AN ANALYSIS OF *THOM V. BARNETT*

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On November 3, 2020, South Dakota voters took to the polls to cast their votes on Amendment A. If passed, South Dakota would become the nineteenth state to legalize recreational marijuana. The election results revealed that the people of South Dakota had approved Amendment A. However, victory was short-lived for that 54.2% of voters. Less than two weeks after the certification of the election results, the validity of Amendment A was challenged. A lawsuit was initiated, alleging Amendment A violated South Dakota's newly adopted single-subject rule—a result of the passage of Amendment Z in 2018. The South Dakota Supreme Court agreed, failing to adhere to the widely accepted principle that a constitutional amendment be upheld after its adoption by the people unless it is plainly and palpably invalid. Nevertheless, the majority rejected the notion that each provision of Amendment A related to a single, comprehensive plan of legalization, regulation, use, and production of cannabis. Not only should the court have found that Amendment A did not violate the single-subject and separate vote rules, but it also should have taken the review of Thom v. Barnett *as an opportunity to clarify the state's single-subject doctrine, a doctrine that has been widely criticized for its indeterminacy.*

I. INTRODUCTION

All throughout 2021, South Dakotans anxiously waited for the South Dakota Supreme Court to render its decision in *Thom v. Barnett*[1] as it concerned the validity of Amendment A.[2] If upheld, recreational marijuana would be legal in South Dakota.[3] Ironically, the validity of Amendment A was largely informed by South Dakota's recent adoption of Amendment Z, which added a single-subject rule and separate vote language to its article concerning constitutional amendments.[4] Therefore, while the legality of marijuana may be a "hot topic,"

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1. (*Thom I*), 2021 SD 65, 967 N.W.2d 261.

2. Nick Nelson, *South Dakota Supreme Court Has Yet to Rule on Amendment A*, KEVN BLACK HILLS FOX (Sept. 30, 2021, 6:17 PM), https://www.blackhillsfox.com/2021/09/30/south-dakota-supreme-court-has-yet-rule-amendment/; Paul Armentano, *South Dakota: Six Months Later, Supreme Court Still Silent on Marijuana Legalization Vote*, NORML (Oct. 21, 2021), https://norml.org/blog/2021/10/21/south-dakota-six-months-later-supreme-court-still-silent-on-marijuana-legalization-vote/.

3. Practical Law Commercial Transactions, *Marijuana State Legal Status Charts: Overview*, WESTLAW (2022).

4. S.D. CONST. art. XXIII, § 1, Historical Notes; *Thom I*, 2021 SD 65, 967 N.W.2d at 303 (Appendix B).

this case note addresses the slightly less hot topic of the single-subject and separate vote rules.

Part II of this case note addresses the facts and procedure of the case.[5] It relays how what became known as Amendment A made its way onto the ballot in the November 2020 general election through the state's initiative process.[6] It then discusses the initiation of the lawsuit and the circuit court's decision.[7] Finally, it addresses the South Dakota Supreme Court's three opinions.[8]

Part III discusses the law at issue in the case—the single-subject and separate vote rules.[9] First, the history of article XXIII, section 1 of the South Dakota Constitution is addressed.[10] Then, the court's jurisprudence under this article and the amendments to the article are highlighted, including the most recent amendment, Amendment Z.[11] Next, the history, purpose, and implications of the single-subject rule are detailed.[12] Lastly, the separate vote rule is defined and distinguished from the single-subject rule.[13]

Part IV analyzes the court's opinion in *Thom*.[14] It suggests the majority should have upheld Amendment A by finding it did not violate the single-subject and separate vote rules.[15] Using the three-part test that the South Dakota Supreme Court has used since the beginning of its judicial review of constitutional amendments, Part IV concludes that Amendment A satisfies the single-subject and separate vote rules.[16]

The analysis in Part IV then suggests *Thom* was the court's opportunity to clarify what article XXIII, section 1 requires.[17] Amendment Z changed, or should have changed, the way the South Dakota Supreme Court reviews constitutional

5. *See infra* II (discussing the facts and procedure surrounding the decision in *Thom*).

6. *See infra* II (outlining the ballot initiative process for a constitutional amendment in South Dakota).

7. *See infra* II (discussing the facts and procedure of the case at the circuit court level).

8. *See infra* II (discussing the South Dakota Supreme Court majority decision).

9. *See infra* III (providing a background of South Dakota's judicial review of constitutional amendments and generally discussing single-subject and separate vote rules).

10. S.D. CONST. art. XXIII, § 1, Historical Notes. *See also infra* III.A (noting section 1's language prior to the adoption of Amendment Z and providing the test South Dakota has adopted from Wisconsin).

11. *See infra* III.A (discussing the two cases that the South Dakota Supreme Court has reviewed under this section).

12. *See infra* III.B (outlining the origins of the single-subject rule, its purposes, and its application across jurisdictions).

13. *See infra* III.C (distinguishing the separate vote rule from the single-subject rule and discussing its implications).

14. *See infra* IV (analyzing both the majority and dissenting opinions). *See generally* Thom v. Barnett (*Thom I*), 2021 SD 65, 967 N.W.2d 261 (holding Amendment A unconstitutional).

15. *See infra* IV.A (addressing the presumption of constitutionality, the risks of logrolling, the purpose of the amendment, and whether each provision is related to that purpose).

16. *See infra* IV.A (concluding Amendment A should have been upheld).

17. *See infra* IV.B (discussing the need for a new test in South Dakota).

amendments.[18] At the very least, the review of Amendment A was the court's opportunity to create a more determinate doctrine for the state of South Dakota.[19]

II. FACTS & PROCEDURE

In 2019, former United States Attorney for the District of South Dakota, Brendan V. Johnson, initiated an amendment to the South Dakota Constitution that became known as Amendment A.[20] The proposed amendment consisted of fifteen primary provisions and multiple subsections.[21] The provisions related to the legalization, taxation, penalization, and licensure of recreational marijuana and the regulation of recreational marijuana, medical marijuana, and hemp.[22] As the prime sponsor of the proposed amendment, Johnson submitted a version of Amendment A to the Legislative Research Council in accordance with South Dakota Codified Law, section 12-13-25, in May of 2019.[23] The Legislative Research Council Director's comments were provided to Johnson, the Attorney General, and the Secretary of State, and on August 16, 2019, the Attorney General's statement of Amendment A's title and explanation was given to the Secretary of State.[24] After consideration of the comments, on September 11, 2019, the sponsors of the amendment submitted a petition to the Secretary of State with the purpose of it being placed on the 2020 general election ballot.[25] On January 6, 2020, it was announced that Amendment A had received the requisite number of signatures and would be placed on the November 2020 general election ballot.[26] That election was held on November 3, 2020, and on November 10, 2020, the election results were certified.[27] The results revealed that Amendment A had been approved by a majority vote of 54.2%.[28]

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18. *See infra* IV.B (suggesting Amendment Z may have changed the interpretation of section 1).

19. *See infra* IV.B (suggesting that even if Amendment Z did not change the interpretation of section 1, the court should have taken the review of *Thom* as its opportunity to revise its test under the section).

20. Contestants' Joint Statement of Undisputed Material Facts, In the Matter of Election Contest as to Amendment A, an Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as Well as Laws Ensuring Access to Marijuana for Medical Use, No. 32 CIV 20-000186, 2020 WL 8613320, ¶ 9 (S.D. 6th Cir. Dec. 23, 2020) [hereinafter Joint Statement of Undisputed Material Facts].

21. Thom v. Barnett (*Thom II*), No. 32 CIV 20-187, 2021 WL 641591, at *1 (S.D. 6th Cir. Feb. 8, 2021); Thom v. Barnett (*Thom I*), 2021 SD 65, 967 N.W.2d 261, 298-303 (Appendix A).

22. *Thom II*, 2021 WL 641591, at *1; *Thom I*, 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A).

23. *Thom I*, 2021 SD 65, ¶ 2, 967 N.W.2d at 264-65. *See also* SDCL § 12-13-25 (2018 & Supp. 2021) (requiring sponsors of an initiated amendment to submit a copy of the amendment to the Legislature Research Council for review and comment prior to being circulated for signatures).

24. *Thom I*, 2021 SD 65, ¶ 2, 967 N.W.2d at 265.

25. Joint Statement of Undisputed Material Facts, *supra* note 20, ¶ 13; *Thom I*, 2021 SD 65, ¶ 3, 967 N.W.2d at 265.

26. *Thom I*, 2021 SD 65, ¶ 3, 967 N.W.2d at 265; *Thom II*, 2021 WL 641591, at *1.

27. *Thom I*, 2021 SD 65, ¶ 3, 967 N.W.2d at 265; Joint Statement of Undisputed Material Facts, *supra* note 20, ¶ 16.

28. *Thom I*, 2021 SD 65, ¶ 3, 967 N.W.2d at 265.

On November 20, 2020, the Sheriff of Pennington County, Kevin Thom, and the Superintendent of South Dakota Highway Patrol, Colonel Rick Miller, initiated an action, challenging Amendment A.[29] They sought to undermine the validity of the election contest in their individual capacities and filed a declaratory action, challenging the validity of the amendment, in their official capacities.[30] The circuit court consolidated the two actions.[31] The plaintiffs filed motions for summary judgment in both actions on December 23, 2020, and simultaneously, the defendant filed motions for judgments on the pleadings.[32] The circuit court considered the motions at a hearing held on January 27, 2021.[33]

In the action challenging the validity of the election contest, the plaintiffs asserted Amendment A was placed on the ballot in violation of the constitution as it resulted in a "tainted" election process, arguing the results were not reflective of a "free and fair" election.[34] The Attorney General, on behalf of the Secretary of State, argued the plaintiffs failed to point to any irregularity in the election contest.[35] The circuit court agreed with the Attorney General and granted the motion to dismiss the election contest.[36]

In the declaratory judgment action, the Attorney General claimed Thom and Miller lacked standing to sue and, further, that such a challenge had to have been raised prior to the amendment's placement on the ballot.[37] Most importantly, the Attorney General argued that because Amendment A pertained to only one subject, it complied with article XXIII, section 1's single-subject rule.[38] The plaintiffs argued Amendment A was not an amendment but a revision and, further, that Amendment A violated section 1's single-subject rule as it related to at least five different subjects.[39] The circuit court granted the plaintiffs' motion for summary judgment in the declaratory action, meaning the amendment would not go into effect.[40]

In granting summary judgment to the plaintiffs, the circuit court concluded Thom and Miller both had standing to sue in their official capacities and had timely initiated the action.[41] As to the single-subject violation, the circuit court concluded that the "single scheme" of Amendment A consisted of "being able to possess and use marijuana . . . at any point from its growth through consumption,"

29. *Id.* ¶ 4, 967 N.W.2d at 265; *Thom II*, 2021 WL 641591, at *1.
30. *Thom I*, 2021 SD 65, ¶ 4, 967 N.W.2d at 265; *Thom II*, 2021 WL 641591, at *1.
31. *Thom I*, 2021 SD 65, ¶ 4, 967 N.W.2d at 265.
32. *Thom II*, 2021 WL 641591, at *1.
33. *Id.*
34. *Thom I*, 2021 SD 65, ¶ 5, 967 N.W.2d at 265.
35. *Id.*
36. *Id.* ¶ 8, 967 N.W.2d at 266.
37. *Id.* ¶ 6, 967 N.W.2d at 265; *Thom II*, 2021 WL 641591, at *3.
38. *Thom I*, 2021 SD 65, ¶ 6, 967 N.W.2d at 265.
39. *Id.* ¶ 7, 967 N.W.2d at 266.
40. *Id.* ¶ 8, 967 N.W.2d at 266.
41. *Thom II*, 2021 WL 641591, at *3-4.

including the regulation of marijuana.[42] The circuit court went on to identify "hemp" as an additional subject and identified provisions unrelated to the legalization of marijuana.[43] Lastly, the circuit court concluded Amendment A was a revision rather than an amendment and required a constitutional convention.[44]

The plaintiffs appealed the dismissal of the election contest, and the defendant appealed the court's granting of the declaratory judgment, challenging Thom and Miller's standing, the timing of the action, and the found violation of the single-subject rule.[45] The South Dakota Supreme Court affirmed the circuit court in a 4-1 decision.[46]

On appeal, the South Dakota Supreme Court determined the circuit court had properly dismissed the election contest, finding the alleged violations of article XXIII, sections 1 and 2 did not amount to an irregularity in the voting process.[47] Further, the South Dakota Supreme Court affirmed the existence of standing.[48] The court also affirmed the circuit court's decision that the declaratory judgment action was timely.[49]

The court's decision ultimately turned on holding that Amendment A violated the single-subject and separate vote rules provided in article XXIII, section 1 of the South Dakota Constitution.[50] Under this section, constitutional amendments may be made either through a citizen initiative or by the legislature's majority vote.[51] However, "no proposed amendment may embrace more than one subject."[52] Further, "if more than one amendment is submitted at the same election," each must be distinguished in such a way that they "can be voted upon

42. *Id.* at *6.

43. *Id.* at *6-7.

44. *Id.* at *10.

45. *Thom I*, 2021 SD 65, ¶ 12, 967 N.W.2d at 267.

46. *Id.* ¶ 66, 967 N.W.2d at 283.

47. *Id.* ¶ 16, 967 N.W.2d at 268. The court found an election contest "is a challenge of 'the election process itself." *Id.* ¶ 14, 967 N.W.2d at 267 (quoting *In re* Election Contest as to Watertown Special Referendum, 2001 SD 62, ¶ 7, 628 N.W.2d 336, 338). Therefore, the challenger must show that the will of the voters was suppressed by the irregularities in the election process. *Id.* The court affirmed the circuit court's dismissal, holding this burden was not met. *Id.* ¶ 16, 967 N.W.2d at 268.

48. *Id.* ¶ 32, 967 N.W.2d at 272. Although the court affirmed the circuit court's conclusion that standing existed, it did so on different grounds. *Id.* ¶¶ 17-32, 967 N.W.2d at 267-72. It found neither of the plaintiffs had suffered an actual injury, and Amendment A's potential impact on their official duties did not constitute an injury since they were required to comply with the law. *Id.* ¶ 21, 967 N.W.2d at 269. However, the court found standing existed because, through her executive order, Governor Kristi Noem ratified the bringing of the lawsuit. *Id.* ¶ 28, 967 N.W.2d at 271. Because the Executive Order revealed Governor Noem's clear intent to authorize the action and to be bound by the result, the court affirmed the circuit court's denial of the motion to dismiss due to a lack of standing. *Id.* ¶¶ 28, 32, 967 N.W.2d at 271-72.

49. *Id.* ¶ 34, 967 N.W.2d at 272. The court rejected the attorney general's arguments, finding a declaratory judgment action was not precluded because of the availability of other remedies and, further, finding some of its cited authorities which related to article III's single-subject rule were misplaced. *Id.*

50. *Id.* ¶¶ 35-60, 967 N.W.2d at 272-81.

51. *Id.* ¶ 35, 967 N.W.2d at 272.

52. *Id.* (citing S.D. CONST. art. XXIII, § 1).

separately."[53] This single-subject rule and separate vote language were added to article XXIII, section 1 through the passage of Amendment Z in 2018.[54] The court's first review of this language came in *Thom*.[55] It determined the language simply codified the rationale that the court had used since the beginning of its judicial review of constitutional amendments.[56] To determine whether these requirements were satisfied, the court used what it referred to as a three-part test, which states that "[i]n order to constitute more than one amendment[], the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes, [that are] not dependent upon or connected with each other."[57] Although the court referred to this as a three-part test, it did not analyze its parts as three separate elements.[58] Instead, the court's analysis intertwined the parts of the test.[59]

In applying this test to Amendment A, the majority first identified its purpose.[60] In doing so, the South Dakota Supreme Court determined Amendment A encompassed three separate and distinct purposes—the legalization and regulation of marijuana for those at least twenty-one years old, a mandate that the legislature pass laws relating to medical marijuana, and a mandate that the legislature pass laws relating to hemp.[61] The court rejected the proposition that all fifteen provisions were connected and related to a single, comprehensive plan.[62] Instead, the court found the fact that the first thirteen provisions related to recreational marijuana to be determinative of the amendment's purpose.[63] It viewed the fourteenth provision as distinct, finding the legislature's mandate to pass laws relating to medical marijuana expanded the amendment beyond what was contained in the first thirteen provisions.[64] Because medical marijuana applied to a select group of individuals and recreational marijuana applied to all

53. *Id.*

54. *Id.* ¶ 36, 967 N.W.2d at 273.

55. *Id.*

56. *Id.*

57. *Id.* ¶ 38, 967 N.W.2d at 274 (quoting Wisconsin *ex rel.* Hudd v. Timme (*Timme*), 11 N.W. 785, 791 (Wis. 1882)). The court rejected the "reasonably germane" standard that had been used in *Baker v. Atkinson* because *Baker* involved a referendum petition, not a constitutional amendment. *Id.* ¶ 42, 967 N.W.2d at 275 (quoting Baker v. Atkinson, 2001 SD 49, ¶ 25, 625 N.W.2d 265, 273-74). The court stated the single-subject and separate vote were more demanding of constitutional amendments the reasons for the rules "are more forceful when considered in connection with the action of electors upon proposed constitutional amendments than when considered in connection with the action of legislators" because legislators are able to provide comments and offer amendments, whereas electors are given one opportunity at the polls to either ratify or reject the amendment in its entirety. *Id.* ¶ 44, 967 N.W.2d at 275.

58. *See id.* ¶¶ 46-55, 967 N.W.2d at 276-79 (analyzing the three parts without clear divisions between them).

59. *See id.* (analyzing the three parts without clear divisions between them).

60. *Id.* ¶ 46, 967 N.W.2d at 276.

61. *Id.* ¶ 50, 967 N.W.2d at 277.

62. *Id.*

63. *Id.* ¶ 51, 967 N.W.2d at 277-78.

64. *Id.* ¶ 52, 967 N.W.2d at 278.

individuals, the court held this part of the fourteenth provision was not connected to the first thirteen.[65]

The court also found the provision requiring laws to be passed relating to hemp had a distinct purpose, determining hemp is not marijuana since it does not have psychoactive properties.[66] Further, it reasoned that the amendment itself distinguished hemp from marijuana as the definitions contained in the first section excluded hemp from the definition of marijuana.[67] Therefore, the court rejected the argument that all of the provisions were connected based on their biological makeup and was unconvinced that the fourteenth provision was a part of a comprehensive plan to regulate cannabis at large.[68]

After it had already determined the provisions did not constitute a single-subject, the court then analyzed whether there was a risk of logrolling,[69] defined as combining two or more propositions into one measure.[70] The court identified two risks of logrolling—voter confusion and the requirement of voters to cast a single vote on multiple propositions.[71] The court found it problematic that the first drafts of Amendment A that were submitted to the Legislative Research Council did not contain the fourteenth provision.[72] Therefore, it determined the fourteenth provision to be a "tack on" and was simply rolled up with the previous thirteen provisions in attempts to secure the amendment's passage.[73]

At the end of the opinion, the majority mentioned that the court was to give a "strong presumption of constitutionality [to Amendment A] after adoption by the people[.]"[74] Nevertheless, it had already determined Amendment A contained multiple subjects and, therefore, held it was "plainly and palpably" invalid.[75] Because of this, the court struck down Amendment A in its entirety.[76] The court

65. *Id.*

66. *Id.* ¶ 53, 967 N.W.2d at 278.

67. *Id.*

68. *Id.* ¶ 54, 967 N.W.2d at 278-79.

69. *Id.* ¶ 56, 967 N.W.2d at 279.

70. Thomas Rutherford, *The People Drunk or the People Sober? Direct Democracy Meets the Supreme Court of Florida*, 15 ST. THOMAS L. REV. 61, 106 (2002). The voter may have different views on each proposition but, nevertheless, has to vote on the propositions with a single vote. *Id.* "The idea is to entice a vote for something that a voter would ordinarily oppose if submitted singly by coupling it with something that the voter favors." *Id.*

71. *Thom I*, 2021 SD 65, ¶ 56, 967 N.W.2d at 279-80.

72. *Id.* ¶ 60, 967 N.W.2d at 281.

73. *Id.*

74. *Id.* ¶ 58, 967 N.W.2d at 280 (quoting Barnhart v. Herseth, 222 N.W.2d 131, 136 (S.D. 1974)).

75. *Id.* ¶ 60, 967 N.W.2d at 281.

76. *Id.* ¶ 64, 967 N.W.2d at 283. The court held the doctrine of severability did not apply to Amendment A, noting "judicial surgery" could not "cure" the violations. *Id.* ¶ 64, 967 N.W.2d at 282 (quoting Cal. Trial Laws. Ass'n v. Eu, 245 Cal. Rptr. 916, 922 (Ct. App. 1988)). The separate vote rule demands amendments be distinguished so that voters can vote on them separately. *Id.* The court refused to sever what it determined to be the dominant provisions from the remainder because doing so "may or may not reflect the will of the voters." *Id.* ¶ 64, 967 N.W.2d at 283.

did not reach the question of whether Amendment A constituted a constitutional revision rather than a constitutional amendment.[77]

There were two other opinions written.[78] Justice Mark E. Salter wrote a concurrence, agreeing with the majority's conclusion but expressing that he was unconvinced that a violation of the single-subject rule would render a constitutional amendment entirely void in all circumstances.[79] A situation could occur in which the separability doctrine may apply.[80] The last opinion was written by Justice Scott P. Myren, who concurred in part and dissented in part, dissenting from the majority's single-subject and separate vote analysis and holding.[81] Beginning with the presumption of constitutionality, Justice Myren reasoned that each provision of Amendment A related to a single, comprehensive plan to regulate cannabis, and each provision was connected to that purpose.[82] Justice Myren stated that the majority interpreted the purpose of the amendment too narrowly, substituting an incidental purpose for its primary purpose, noting the identical biological makeup of cannabis-containing products.[83] He pointed to separate measures concerning the legalization of medical marijuana and hemp to combat the majority's logrolling analysis.[84] Lastly, Justice Myren returned to the presumption of constitutionality.[85] Because the amendment was not plainly and palpably invalid, Justice Myren would have upheld Amendment A.[86]

III. BACKGROUND

While, at first glance, the validity of Amendment A may appear to be about the legalization of marijuana in South Dakota, the opinion itself has nothing to do with the actual merits of marijuana legalization.[87] Instead, the validity of Amendment A depends on South Dakota's interpretation of its newly codified single-subject and separate vote rules.[88]

77. *Id.* ¶ 65, 967 N.W.2d at 283. While Justice Myren analyzed whether Amendment A should be regarded as a revision, which would require a constitutional convention, this case note solely discusses the single-subject and separate vote rules at issue. *Id.* ¶¶ 100-22, 967 N.W.2d at 292-98 (Myren, J., concurring in part and dissenting in part). *See also infra* III-IV (analyzing the single-subject and separate vote rules and how they should apply in South Dakota).

78. *Thom I*, 2021 SD 65, ¶¶ 70-122, 967 N.W.2d at 284-98 (Salter, J., concurring) (Myren, J., concurring in part and dissenting part).

79. *Id.* ¶¶ 74-76, 967 N.W.2d at 284 (Salter, J. concurring).

80. *Id.* When the court applies the separability doctrine, it severs the unconstitutional provisions and upholds the constitutional provisions. *Id.* ¶ 74, 967 N.W.2d at 284. Partial unconstitutionality does not render the entire amendment void. *Id.* ¶¶ 73-74, 967 N.W.2d at 284.

81. *Id.* ¶¶ 77-122, 967 N.W.2d at 284-98 (Myren, J., concurring in part and dissenting in part).

82. *Id.*

83. *Id.* ¶¶ 93-96, 967 N.W.2d at 289-91.

84. *Id.* ¶¶ 97-98, 967 N.W.2d at 291.

85. *Id.* ¶ 99, 967 N.W.2d at 291-92.

86. *Id.*

87. *See generally id.* (discussing the single-subject rule and separate vote requirement, pursuant to article XXIII, not the merits of the legalization of marijuana).

88. *Id.*

A. CONSTITUTIONAL AMENDMENTS IN SOUTH DAKOTA

South Dakota's Constitution was adopted in 1889 after the 1885 Constitutional Convention.[89] The ratification of the state's constitution included ratification of article XXIII, section 1, which contained the following language: "[a] proposed amendment may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment . . . ."[90] Since the beginning of its judicial review of constitutional amendments, the South Dakota Supreme Court has used a three-part test it adopted from Wisconsin.[91] The test states the following: "[i]n order to constitute more than one amendment[], the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes, [that are] not dependent upon or connected with each other."[92] Under this test, the court is to construe the amendment as the legislature and the people would have construed it, giving it its intended effect if it can do so without disturbing governmental action.[93] In other words, the drafter is given discretion.[94] In 1972, South Dakota rewrote article XXIII, section 1 in its entirety.[95] Included in this rewriting was the adoption of proposed constitutional amendments by ballot initiative.[96]

South Dakota's jurisprudence under this article is slim. Only twice has the South Dakota Supreme Court reviewed constitutional amendments for allegedly constituting more than one amendment in violation of article XXIII, section 1.[97] Both times, the court upheld the constitutional amendment.[98]

First, the court upheld a constitutional amendment pursuant to article XXIII, section 1 in the 1897 case of *State ex rel. Adams v. Herried* (*Herried*).[99] The constitutional amendment concerned authority over state educational institutions.[100] The proposed amendment would alter two sections of article

89. *A Constitution for the New State of South Dakota*, S.D. HIST. SOC'Y FOUND. (Sept. 2014), https://www.sdhsf.org/news_events/monthly_history_article.html/title/sept-2014-a-constitution-for-the-new-state-of-south-dakota#.

90. S.D. CONST. art. XXIII, § 1.

91. *Thom I*, 2021 SD 65, ¶¶ 36, 38, 41, 967 N.W.2d at 273-74.

92. *Id.* ¶ 38, 967 N.W.2d at 274 (quoting Wisconsin *ex rel.* Hudd v. Timme (*Timme*), 11 N.W. 785, 791 (Wis. 1882)).

93. *Timme*, 11 N.W. at 785.

94. *Id.* at 791.

95. S.D. CONST. art. XXIII, § 1, Historical Notes.

96. S.D. CONST. art. XXIII, § 1.

97. *See generally* State *ex rel.* Adams v. Herried (*Herried*), 72 N.W. 93 (S.D. 1897) (reviewing a proposed amendment that would (1) change the terms and powers of the board of regents and (2) abolish the trustees); Barnhart v. Herseth, 222 N.W.2d 131 (S.D. 1974) (reviewing a proposed amendment that would replace the executive article of the constitution, making more than twenty changes).

98. *Herried*, 72 N.W. at 97; *Barnhart*, 222 N.W.2d at 138.

99. *Herried*, 72 N.W. at 97.

100. *Id.* at 93-94.

XIV.[101] The first alteration consisted of modifications to the makeup, powers, and terms of the board of regents.[102] The second alteration terminated the office of all trustees then appointed.[103] In its opinion, the court stated,

> [I]t is the duty of the courts, when [the] intent [of the people] is ascertainable . . . to carry [that intent] into effect . . . . [T]he will of the people . . . should not be set aside or disregarded upon purely technical grounds when no material requirement of the constitution has been omitted and where the proceedings taken clearly manifest the intention of those bodies and the people to amend the fundamental law.[104]

The court noted the importance of the proposed amendment's review, stating that "nothing has been more productive of evil than the practice of so combining meritorious and vicious legislation that the former could not be secured without tolerating the latter."[105]

Because South Dakota's state constitution was identical to Wisconsin's at the time it heard *Herried*, the South Dakota Supreme Court adopted the three-part test that the Wisconsin Supreme Court had used in its 1882 opinion of *Wisconsin ex rel. Hudd v. Timme* (*Timme*).[106] In *Herried*, the plaintiffs argued the amendment contained two subjects—(1) a modification to the regents' makeup and powers and (2) the abolition of trustees.[107] They contended that both of the provisions could have existed without the other, and for one reason or another, a voter may have approved of one provision and not the other.[108] Nevertheless, the court cautioned that if it were to agree with the plaintiffs' arguments, it would be substituting the amendment's real object or purpose with an incidental purpose.[109] The court determined the real purpose of the amendment was to place control of state educational institutions under one board.[110] It would have been unable to effectively accomplish this purpose if one of the provisions was not submitted.[111] The actual number and powers of each of the boards were incidental to the primary purpose of the amendment.[112] The court also made clear that whether the legislature could have submitted the provisions as separate amendments was

101. *Id.* at 94.
102. *Id.*
103. *Id.*
104. *Id.* at 95.
105. *Id.* at 96.
106. *Id.* at 97. *See generally* Wisconsin *ex rel.* Hudd v. Timme (*Timme*), 11 N.W. 785 (Wis. 1882) (reviewing a constitutional amendment for allegedly containing more than one amendment). The test states the following, "to constitute more than one amendment, 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." *Id.* at 791.
107. *Herried*, 72 N.W. at 97.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

irrelevant because it had discretion in determining what shall constitute a single amendment in order to accomplish one purpose.[113] Therefore, it held only one amendment was submitted.[114]

Interestingly, the court expressed doubt in rendering this decision and noted reasonable legal minds could differ on the conclusion.[115] Therefore, the court ultimately deferred to the well-recognized principle that a constitutional amendment shall be sustained unless it "plainly and palpably appear[s] to be invalid."[116]

Next, the court upheld a constitutional amendment in the 1974 case of *Barnhart v. Herseth*.[117] In *Barnhart*, the governor had expressed his belief that South Dakota needed a comprehensive constitutional revision program.[118] In response, a commission was created to study the constitution and report its findings to the legislature.[119] Eleven areas of the constitution were then split amongst the commission members to study, one being the executive article.[120] After some discussion, a new executive article was drafted.[121] The version that was ultimately sent to the legislature for a vote that included the termination of the superintendent.[122] Not without debate and discussion, House Joint Resolution 513 was passed by the house and the senate and was placed on November 1972 ballot.[123] The Attorney General's explanatory statement provided that the proposed amendment would replace the then-current executive article.[124] The statement highlighted the major changes, which included a term limit for the governor and lieutenant governor, a decrease in the size of the state government departments, and who was authorized to reorganize the departments.[125] Widespread publicity surrounded the proposed amendment, and it was debated in all types of social circles.[126] Ultimately, voters passed the constitutional amendment.[127]

Upon review, the circuit court held the constitutional amendment invalid, as the court found it embraced more than one subject as it contained over twenty changes to the executive branch's structure, and found the Attorney General's

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. 222 N.W.2d 131, 138 (S.D. 1974).
118. *Id.* at 132.
119. *Id.*
120. *Id.* at 133.
121. *Id.*
122. *Id.* at 133-34.
123. *Id.* at 134.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

statement was deficient since it did not mention the termination of the superintendent's office.[128] The South Dakota Supreme Court reversed.[129]

The court recognized the amendment had made many changes—consisting of term limits for numerous executive officers, the gambit of powers accorded to a variety of executive officers, rules regarding a gubernatorial campaign, deletion of officers, the list goes on—however, the court found this was not "determinative."[130] Instead, the court found each change contained in the amendment related to the broader, general purpose of creating "greater efficiency and responsibility" in the state government's executive branch.[131]

The court cited to its decision in *Herried* and precedent in other jurisdictions.[132] It noted that if the provisions may logically be a part of a single plan, then the provisions relate to a single-subject.[133] The number of provisions was indeterminate.[134] In holding that no violation of article XXIII, section 1 had occurred, the court stated,

> [W]e must keep in mind these basic principles. When considering a constitutional amendment after its [a]doption by the people, the question is not whether it is possible to [c]ondemn the amendment, but whether it is possible to [u]ph[o]ld it. It should be sustained unless it "plainly and palpably appear[s] to be invalid."[135]

Because of the purpose of the amendment, the strong presumption of constitutionality, and precedent, the court held no violation had occurred.[136]

Regarding the sufficiency of the Attorney General's statement and whether it adequately informed voters about the amendment, the court noted the legislative goal was for these statements to serve as identifiers.[137] The purpose of the statement was not to educate the voter on the amendment.[138] It was presumed that the voter had informed herself prior to going to the ballot box.[139] The court also

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128. *Id.* at 134-35.
129. *Id.* at 138.
130. *Id.* at 135.
131. *Id.*
132. *Id.* at 135-36.
133. *Id.* at 136.
134. *Id.* at 135. The South Dakota Supreme Court quoted the Idaho Supreme Court, which said:

> 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. The test for duplicity in a constitutional amendment, when viewed in the light of cases on the subject, is not that the matters contained therein might be divided and submitted in separate questions, byt [sic] that they are incongruous and essentially unrelated.

Id. (quoting Keenan v. Price, 195 P.2d 662, 678, 681 (Idaho 1948)) (internal quotations omitted).
135. *Id.* (quoting State *ex rel.* Adams v. Herried (*Herried*), 72 N.W. 93, 97 (S.D. 1897)).
136. *Id.*
137. *Id.* at 137.
138. *Id.*
139. *Id.*

found the vast publicity of the amendment to be significant as it diluted the appellee's argument that voters were uninformed when they cast their votes on the proposed amendment.[140] Therefore, the court held the Attorney General's statement was sufficient.[141]

Many years later, during the 2018 legislative session, the state legislature passed House Joint Resolution 1006, securing its place on the ballot of the November 2018 election.[142] This became known as Amendment Z.[143] It would add the following language to article XXIII, section 1: "however, no proposed amendment may embrace more than one subject. If more than one amendment is submitted at the same election, each amendment shall be prepared and distinguished that it can be voted upon separately."[144] While the legislative history surrounding Amendment Z is slim and rather uninformative, the Attorney General's statement explained that it would "add the requirement that a proposed amendment may not embrace more than one subject."[145] It further provided that if there were multiple amendments proposed at a single election, each must be presented in such a way that they could be voted on separately.[146] In the November 2018 election, 62.41% of South Dakota voters passed Amendment Z.[147]

B. THE SINGLE-SUBJECT RULE

The single-subject rule has its roots in ancient Rome.[148] Cunning Roman lawmakers began tacking on less popular provisions to more popular provisions in order to ensure enactment.[149] To stop this practice, Romans prohibited laws that consisted of unrelated provisions.[150] Similar devious behaviors were adopted

140. *Id.*

141. *Id.* at 138.

142. 2018 S.D. H.J.R. 1006; Marty J. Jackley, Attorney General, Attorney General's Statement for Constitutional Amendment Z (requirements regarding amendments to the constitution) (May 8, 2018) [hereinafter Attorney General's Statement for Constitutional Amendment Z].

143. Attorney General's Statement for Constitutional Amendment Z, *supra* note 142.

144. *Id.*

145. *Id.*

146. *Id.*

147. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, BALLOTPEDIA, https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Z,_Single-Subject_Rule_for_Constitutional_Amendments_(2018) (last visited Jan. 22, 2022). Proponents of Amendment Z argued a single-subject rule would benefit voters at the polls. Sarah McDonald, *What You Need to Know About Amendment Z*, KELOLAND (Oct. 11, 2018, 10:14 PM), https://www.keloland.com/news/politics/what-you-need-to-know-about-amendment-z/1517581505/. Opponents argued a single-subject rule was unnecessary and would result in a wasteful use of resources. *Id.*

148. Michael D. Gilbert, *Single-subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 811 (2006).

149. *Id.*

150. *Id.*

in colonial America.[151] As a result, by 1959, forty-three states had adopted a single-subject rule in some way, shape, or form, with New Jersey being the first to adopt a general single-subject rule in 1844.[152]

The single-subject rule prohibits an act or amendment from containing more than one subject.[153] The primary reason for this rule is to prevent logrolling.[154] Logrolling is combining two or more propositions into one measure.[155] When an amendment contains more than one subject, the voter has to cast a single vote on the multiple propositions, despite the fact that he or she may have different views on each proposition.[156] By combining the propositions together, voters may cast a vote for something that they would not have but for the fact that the proposition was submitted along with another that the voter favors.[157] In addition to logrolling, single-subject rules promote transparency in the lawmaking process and "reduces the chance of surprise" to the voters.[158]

While the single-subject rule has been widely adopted and its purpose remains the same, its application across jurisdictions is far from cohesive.[159] Some states have a single-subject rule only for ordinary legislative enactments, some have it for constitutional amendments, and some have it for both.[160] Some states have extended their single-subject rules to initiated statutes, some have extended them to initiated amendments, some to both, and some have no initiative process at all.[161] In those states that have multiple single-subject rules, some states apply the same test while some apply different tests, depending on the context.[162] No matter the test, jurisdictions generally adhere to the principle of liberally construing the provisions in favor of constitutionality.[163]

South Dakota has multiple single-subject rules in different contexts. Since the passage of Amendment Z in 2018, a single-subject rule exists in article XXIII, section 1.[164] This language states that "no proposed amendment may embrace

151. *Id.*

152. *Id.* at 812.

153. NORMAN SINGER & SHAMBIE SINGER, 1A SUTHERLAND STATUTORY CONSTR. § 17.1 (7th ed. 2021).

154. Rutherford, *supra* note 70, at 106.

155. *Id.*

156. *Id.*

157. *Id.*

158. Daniel N. Boger, *Constitutional Avoidance: The Single-subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1255 (2017).

159. Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1630-31, 1640 (2019). *See generally* Rachel Downey, Michelle Hargrove & Vanessa Locklin, *A Survey of the Single-subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (discussing whether each state has an initiative process and, if so, discussing whether the state has a single-subject rule, whether it applies to initiated laws or initiated amendments, and how it applies).

160. Downey, et al., *supra* note 159, at 579.

161. *Id.*

162. *Id.*

163. Briffault, *supra* note 159, at 1642-43; SINGER & SINGER, *supra* note 153, § 17.1.

164. S.D. CONST. art. XXIII, § 1.

more than one subject."[165] Additionally, South Dakota has single-subject rules in article III of its constitution and in its statutory law.[166] Article III, section 21's single-subject rule states that "[n]o law shall embrace more than one subject."[167] When interpreting article III's single-subject language, the court has held that an act will be found to relate to a single-subject so long as the provisions are "parts of [the object], incident to [the object], or in some reasonable sense auxiliary to the object in view."[168] Under this test, provisions are found to relate to a single-subject if each of the provisions are amongst the same group or class.[169]

This single-subject language is nearly identical to the language found in South Dakota Codified Law, section 7-18A-3, which states that "[a]n ordinance shall embrace only one subject, which shall be expressed in its title."[170] When interpreting this single-subject language, the South Dakota Supreme Court has found that the single-subject rule "is to be construed liberally to uphold proper legislation, all parts which are reasonably germane."[171] So long as the provisions "reasonably relate[] to a common theme or purpose, this requirement is met."[172] Both the test under article III, section 21 and the test under South Dakota Codified Law, section 7-18A-3 adopt a "reasonableness" standard for determining whether a single-subject rule has been violated.[173]

C. THE SEPARATE VOTE RULE

The separate vote rule is distinguishable from the single-subject rule.[174] It applies only to constitutional amendments.[175] The rule stands for the proposition that "if more than one constitutional amendment is presented to voters during the same election, voters must have the option to vote on each amendment separately."[176] It is often viewed as an additional restraint on constitutional amendments proposed by initiative; however, it applies to both the initiative process and legislative action.[177]

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165. *Id.*

166. S.D. CONST. art. III, § 21; SDCL § 7-18A-3 (2004).

167. S.D. CONST. art. III, § 21.

168. Meierhenry v. City of Huron, 354 N.W.2d 171, 182 (S.D. 1984) (quoting State v. Morgan, 48 N.W. 314, 317 (S.D. 1891)).

169. *Id.*

170. SDCL § 7-18A-3.

171. Baker v. Atkinson, 2001 SD 49, ¶ 25, 625 N.W.2d 265, 273-74 (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1290 (Cal. 1978) (en banc)).

172. *Id.* (quoting Legislature of the State of Cal. v. Eu, 816 P.2d 1309, 1321 (Cal. 1991)).

173. *See Meierhenry*, 354 N.W.2d at 182 (quoting *Morgan*, 48 N.W. at 317); *Baker*, 2001 SD 49, ¶ 25, 625 N.W.2d at 273-74.

174. 16 AM. JUR. 2D *Constitutional Law* § 37 (2022).

175. *Id.*

176. *Id.*

177. *See* Ryan Douglas, *From the Coils of the Anaconda, Restriction of Constitutional Amendment by Popular Initiative in* Montana Association of Counties v. State, 80 MONT. L. REV. 269, 281-83 (2019)

Like single-subject rules, the application of the separate vote rule varies across jurisdictions.[178] The Wisconsin Supreme Court was the first court to review a constitutional amendment containing more than one amendment in *Timme*.[179] This case developed the three-part test that many states, including South Dakota, still use today.[180] However, the test's nuances and its application are inconsistent.[181]

For instance, in Montana, each provision must relate to a single plan or purpose.[182] Ohio's test is satisfied so long as each provision relates to the same subject matter.[183] In Washington, multiple amendments are identified if the provisions could be adopted on its own, "without . . . being controlled, modified, or qualified by the other[.]"[184] Confusingly, some states interpret the separate vote rule for constitutional amendments as South Dakota interprets its single-subject rule for ordinary legislative enactments and statutory laws—so long as each provision is "reasonably germane" to the object or purpose, there is no violation.[185] For example, in Colorado, the test is satisfied if each part is germane to the general subject or if the amendment is so connected to it "that it may not be desirable" to have one provision adopted and not the other.[186] Others interpret the rule more narrowly, requiring an interrelatedness between the provisions.[187] These slight nuances in the rules result in some amendments being struck down and others being upheld due to state law variations.[188]

Historically, single-subject and separate vote rules were interpreted nearly identically; however, there has been a recent shift in distinguishing the two, with the separate vote rule being narrower than the single-subject rule.[189] What has remained consistent between the two is wide criticism of their indeterminacy.[190] This is because the court's role in reviewing an alleged violation is not to consider

(explaining the different ways the separate vote rule is used); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single-subject Rule*, 110 COLUM. L. REV. 687, 725 (2010).

178. *See generally* Annotation, *Proposition Submitted to People as Covering One or More Than One Proposed Constitutional Amendment within Contemplation of Constitutional Provision in that Regard*, 94 A.L.R. 1510 (1935) (discussing various applications of the requirement that constitutional amendments containing more than one amendment be submitted separately).

179. *Id.*

180. *See generally id.* (covering the resulting case law in various states, including South Dakota).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *See* Rutherford, *supra* note 70, at 87-88 (explaining how different the two have been interpreted differently in different states).

190. Boger, *supra* note 158, at 1262, 1266; Gilbert, *supra* note 148, at 806-07; Briffault, *supra* note 159, at 1630-31.

the merits of the proposed amendment.[191] Its role is not to "rescue" citizens from amendments it determines to be bad for the people.[192] Instead, it is simply to determine whether a violation exists, deferring to the presumption of constitutionality.[193] The vagueness of these rules often results in arbitrary decision-making, which may lead to accusations of judges and justices acting as judicial policymakers and furthering their own political agenda.[194] In fact, a correlation has been identified between aggressive enforcement of the rules and partisan judging.[195] This has been especially true in cases involving controversial issues.[196]

IV. ANALYSIS

Prior to Amendment Z's adoption, a single-subject rule did not exist in article XXIII, section 1 of South Dakota's constitution.[197] Therefore, *Thom* was the first time the South Dakota Supreme Court interpreted its single-subject doctrine.[198] Because of this, the decision in *Thom* has more to do with Amendment Z than it has to do with Amendment A.[199] Amendment A's validity was ultimately determined by the interpretation of Amendment Z's language.[200] All five justices on the court concluded article XXIII, section 1's single-subject rule and separate vote language codified the court's process of reviewing proposed amendments as it had been doing since statehood.[201] Therefore, all five justices of the court applied the same test it had applied in *Herried* and *Barnhart*.[202] The dissenting

191. *See* Rutherford, *supra* note 70, at 189 (stating the Florida Supreme Court has too often inappropriately reviewed the merits of a constitutional amendment rather than the alleged procedural violation).

192. *Id.* at 198. "Among the most fundamental [principles of the Constitution] is the exclusion of the judiciary from policymaking." *Id.* at 199 (quoting RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 465 (2d ed. 1997)).

193. *See* SINGER & SINGER, *supra* note 153, § 17.1 (stating courts will liberally construe an amendment in favor of constitutionality).

194. Boger, *supra* note 158, at 1249.

195. *Id.* at 1278.

196. *See* Briffault, *supra* note 159, at 1629-30. This is intriguing because the legalization of marijuana is currently a controversial topic in America. *See Deep Dive: Marijuana*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx (last visited Jan. 27, 2022).

197. Thom v. Barnett (*Thom I*), 2021 SD 65, ¶ 36, 967 N.W.2d 261, 273.

198. *Id.*

199. *See generally id.* (holding Amendment A invalid because it violated the single-subject and separate vote rules).

200. *See generally id.* (interpreting Amendment Z as a codification of the court's previous rationale when reviewing constitutional amendments for constituting more than one amendment).

201. *Id.* ¶ 36, 967 N.W.2d at 273; *id.* ¶ 81, 967 N.W.2d at 286 (Myren, J., concurring in part and dissenting in part).

202. *Id.* ¶ 46, 967 N.W.2d at 276 (Jensen, J., majority); *id.* ¶ 81, 967 N.W.2d at 286 (Myren, J., concurring in part and dissenting in part).

justice, however, reached a different conclusion than the majority.[203] He would have held Amendment A did not violate the single-subject or separate vote rules.[204] This case note argues the court should have held Amendment A constitutional and should have, at the very least, applied the test as done in the dissent.[205] This section analyzes the analytical steps taken by the dissent, bolstering the dissent's conclusions.[206]

Further, the test used by all five justices is rather subjective and was adopted from a state that does not have a single-subject rule nor an initiative process.[207] Because of this, the South Dakota Supreme Court should have taken the review of Amendment A as an opportunity to further develop its own single-subject and separate vote rules, being mindful of the need for a more determinate doctrine.

A. THE COURT SHOULD HAVE HELD AMENDMENT A CONSTITUTIONAL

The dissent, while it purported to use the test that had long been used in South Dakota when reviewing constitutional amendments, applied the test in a different manner and, in doing so, came to a different conclusion than the majority.[208] The dissent analyzed the alleged violation in four steps.[209] First, it began with a presumption of constitutionality, under which an amendment is struck down only if it is plainly and palpably invalid.[210] Second, it analyzed the risks of logrolling.[211] Third, it identified the amendment's purpose.[212] Finally, it determined whether each provision was connected to that purpose.[213] After applying this approach to the three-part test, the dissent concluded Amendment A did not violate the single-subject or separate vote rules.[214]

1. Presumption of Constitutionality

While the single-subject and separate vote rules and their application may be inconsistent throughout the United States, one thing is constant—courts utilize "a

203. *Id.* ¶ 99, 967 N.W.2d at 291-92.
204. *Id.*
205. *See infra* IV.A.
206. *See infra* IV.A.
207. *See* Staci Duros & Richard Loeza, *Ballot Initiative and Referendum in Wisconsin*, WIS. ELECTIONS PROJECT 1-2 (2020); *see also* WIS. CONST. art. XII, § 1 (dictating the process for amending the Wisconsin constitution).
208. *Thom I*, 2021 SD 65, ¶ 99, 967 N.W.2d at 292 (Myren, J., concurring in part and dissenting in part).
209. *Id.* ¶¶ 80, 82-85, 88, 90-92, 967 N.W.2d at 285-89.
210. *Id.* ¶ 80, 967 N.W.2d at 285.
211. *Id.* ¶ 82, 967 N.W.2d at 286.
212. *Id.* ¶ 86, 967 N.W.2d at 288.
213. *Id.* ¶ 90, 967 N.W.2d at 288-89.
214. *Id.* ¶ 99, 967 N.W.2d at 291.

liberal interpretation in favor of constitutionality."[215] It is undeniable that when reviewing a constitutional amendment, the court is to presume the amendment is constitutional after it has been passed by the voters.[216] The court is to uphold the amendment unless it is "plainly and palpably invalid."[217] Because of this strong presumption, "the question is not whether it is possible to condemn the amendment, but whether it is possible to uphold it."[218]

In South Dakota's jurisprudence, the constitutional amendments in both *Barnhart* and *Herried* were upheld based on this principle.[219] When considering a violation of what article XXIII, section 1 requires, the South Dakota Supreme Court had never before struck down a constitutional amendment prior to Amendment A.[220] In fact, in *Barnhart*, the court reversed the circuit court's finding that the amendment consisted of more than one amendment.[221] This is notable because lower courts infrequently get overturned.[222]

Significantly, the alleged violation in *Herried* was a close call.[223] However, because of the strong presumption of constitutionality, the court upheld the amendment.[224] Likewise, if the court had any inkling that Amendment A may be valid, it was the court's duty to uphold it.[225] Amendment A was passed by the people, showing support for the legalization of recreational marijuana.[226] As *Herried* cautioned, the will of the people should not be set aside on "purely technical grounds."[227] Contrary to the dissent, the majority did not address the presumption of constitutionality until after it had already determined a violation existed.[228] Therefore, while the majority recognized the presumption of constitutionality, it may not have given it as much attention as it deserved.[229]

2. No Risk of Logrolling

215. SINGER & SINGER, *supra* note 153, § 17.1. *See also supra* III.B-C (discussing the single-subject and separate vote rules).

216. *Thom I*, 2021 SD 65, ¶ 58, 967 N.W.2d at 280.

217. State *ex rel.* Adams v. Herried (*Herried*), 72 N.W. 93, 97 (S.D. 1897).

218. Barnhart v. Herseth, 222 N.W.2d 131, 136 (S.D. 1974).

219. *See Herried*, 72 N.W. at 97; *Barnhart*, 222 N.W.2d at 136.

220. *Thom I*, 2021 SD 65, ¶ 65, 967 N.W.2d at 283.

221. *Barnhart*, 222 N.W.2d at 138.

222. *See* Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1035 (2019) (stating appellate courts "rarely reverse lower court decisions").

223. *See Herried*, 72 N.W. at 97.

224. *See id.* (describing the various considerations that were at play).

225. *Id.* at 95.

226. Thom v. Barnett (*Thom I*), 2021 SD 65, ¶ 3, 967 N.W.2d 261, 265.

227. *Herried*, 72 N.W. at 95.

228. *Thom I*, 2021 SD 65, ¶¶ 56-58, 967 N.W.2d at 279-80; *id.* ¶¶ 82-85, 967 N.W.2d at 286-87 (Myren, J., concurring in part and dissenting in part).

229. *See id.* ¶¶ 56-58, 967 N.W.2d at 279-80 (Jensen, J., majority) (noting multiple concerns of logrolling, including "voter confusion" and "requiring the voters to decide on more than one separate and distinct proposition with a single vote").

Because the primary purpose of the single-subject and separate vote rules is to prevent logrolling and because what constitutes a "subject" is far from well-defined, some courts begin their analysis by determining the risks of logrolling.[230] By beginning the analysis here, a court may be able to avoid defining the subject of the amendment.[231]

The majority opinion did not discuss logrolling until it had already determined the amendment consisted of three subjects.[232] When it did address logrolling, it determined that the fourteenth provision was a "tack on" and, therefore, was the kind of practice the single-subject and separate vote rules sought to prevent.[233] It failed to address the publicity of the amendment and Initiated Measure 26's presence on the ballot, both of which reduced the risk of logrolling.[234]

In its analysis, the court recognized two subcategories of logrolling.[235] The first was voter confusion.[236] Such a contention is not warranted here due to Amendment A's publicity.[237] Amendment A was "subject to public debate and input, in the form of a year-long campaign and election."[238] Local and national journalists reported on the public sentiment surrounding Amendment A and speculated what a future with recreational marijuana would look like in South Dakota.[239] Various organizations took stances either for or against Amendment

230. Briffault, *supra* note 159, at 1650-57; Rutherford, *supra* note 70, at 106-12. Colorado employs a logrolling rationale in its statute. *Id.* at 89.

231. Boger, *supra* note 158, at 1252, 1262-63.

232. *Thom I*, 2021 SD 65, ¶¶ 56-57, 967 N.W.2d at 279-80.

233. *Id.* ¶ 60, 967 N.W.2d at 281.

234. *Id.* ¶ 97, 967 N.W.2d at 291 (Myren, J., concurring in part and dissenting in part).

235. *Id.* ¶¶ 56-57, 967 N.W.2d at 280 (Jensen, J., majority).

236. *Id.*

237. *Id.* ¶ 84, 967 N.W.2d at 287 (Myren, J., concurring in part and dissenting in part).

238. Memorandum in Opposition to Contestants' Motion for Summary Judgment, In the Matter of Election Contest as to Amendment A, an Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass Laws Regarding Hemp as Well as Laws Ensuring Access to Marijuana for Medical Use, No. 32 CIV 20-000186, 2021 WL 659394 (S.D. 6th Cir. Jan. 8, 2021) [hereinafter Memorandum in Opposition to Summary Judgment].

239. Joe Sneve, *Poll: South Dakotans narrowly favor legal marijuana in the state*, ARGUS LEADER (Sioux Falls, S.D.) (Oct. 24, 2020, 11:16 PM), https://www.argusleader.com/story/news/politics/elections/2020/10/24/argus-leader-kelo-tv-south-dakota-marijuana-poll/6012860002/; Joe Sneve, *Personal freedom not part of Noem's thinking on legal pot in South Dakota*, ARGUS LEADER (Sioux Falls, S.D.) (Oct. 26, 2020, 4:21 PM), https://www.argusleader.com/story/news/politics/2020/10/26/gov-kristi-noem-hopes-recreational-marijuana-doesnt-pass-south-dakota/6044351002/; Patrick Anderson, *Green machine: How legalizing marijuana could impact Dakota's economy*, ARGUS LEADER (Sioux Falls, S.D.) (Feb. 21, 2020, 3:44 PM), https://www.argusleader.com/story/news/business-journal/2020/02/21/how-legalizing-marijuana-could-impact-south-dakotas-economy/4806095002/; Bob Mercer, *Marijuana measures on S.D. ballot would conflict with federal firearms regulation*, KELOLAND (Oct. 26, 2020, 8:17 PM), https://www.keloland.com/news/capitol-news-bureau/marijuana-measures-on-s-d-ballot-would-conflict-with-federal-firearms-regulation/; Tom Angell, *South Dakota Voters Back Marijuana Legalization and Medical Cannabis Ballot Measures, Poll Finds*, MARIJUANA MOMENT (Oct. 26, 2020), https://www.marijuanamoment.net/south-dakota-voters-back-marijuana-legalization-and-medical-cannabis-ballot-measures-poll-finds/; Ivan Pereira, *How conservative South Dakota could be at the forefront of legalizing marijuana*, ABC NEWS (Oct. 22, 2020, 4:57 AM),

A and distributed guidance to their members.[240] In *Barnhart*, the court found the vast publicity of the constitutional amendment to be persuasive in finding no voter confusion had occurred.[241] Here, like in *Barnhart*, Amendment A was discussed in a variety of social circles because it concerned a "hot topic."[242]

Further, the title of the amendment and the Attorney General's explanation properly identified and sufficiently informed voters of Amendment A and its contents.[243] When a constitutional amendment is instigated by a citizen initiative, the full text of the amendment is not placed on the election ballot.[244] Instead, "the title, explanation, recitation, place for voting, and statement" is placed on the ballot after being prepared by the Attorney General.[245] The purpose of the statement is to clearly and succinctly state the legal effect of the constitutional amendment.[246] It serves as an identifier and is not meant to educate the voter on the proposed constitutional amendment while at the polls.[247] The assumption is that the voter educated herself prior to going to the polls.[248] Whether voters actually do what is expected of them is not a concern of the judiciary[249] and the Attorney General's explanation was not meant to serve as a substitute for voter self-education.[250]

The second category of logrolling identified by the majority was requiring voters to cast their votes on separate propositions with only one vote.[251] This was also not present in this case.[252] This subcategory of logrolling appears to be a mirror image of the separate vote rule.[253] Because of this, arguments against the

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https://abcnews.go.com/Politics/conservative-south-dakota-forefront-legalizing-marijuana/story?id=72780886.

240. Brenda Dreyer, *South Dakota Farm Bureau Urging Voters to Oppose Amendment A – Recreational Marijuana a Clear Threat to Safe Farm Operations*, S.D. FARM BUREAU (Sept. 28, 2020), https://www.sdfbf.org/Article/South-Dakota-Farm-Bureau-Urging-Voters-to-Oppose-Amendment-A-Recreational-Marijuana-a-Clear-Threat-to-Safe-Farm-Operations; *Vote No on Amendment A*, S.D. CATH. CONF., https://sdcatholicconference.org/vote-no-on-amendment-a/ (last visited Jan. 26, 2022); *Constitutional Amendment A*, S.D. RETAILERS, https://www.sdra.org/ballotmeasures.html (last visited Jan. 26, 2022); *AMA joins South Dakota physicians to urge "NO" vote on Constitutional Amendment A and Initiated Measure 26*, S.D. STATE MED. ASS'N (Oct. 15, 2020), https://www.sdsma.org/resources/Documents/NewsReleases/News%20Release%20-%20AMA%20Joins%20South%20Dakota%20Physicians%20to%20Urge%20NO%20Votes%20on%20Cannabis%20Ballot%20Measures%20-%2020201015.pdf.

241. Barnhart v. Herseth, 222 N.W.2d 131, 137 (S.D. 1974).

242. *Thom I*, 2021 SD 65, ¶ 84, 967 N.W.2d at 287 (Myren, J., concurring in part and dissenting in part).

243. *Id.* ¶ 82, 967 N.W.2d at 286-87.

244. Hoogestraat v. Barnett, 1998 SD 104, ¶ 8, 583 N.W.2d 421, 423.

245. *Id.*

246. *Id.* ¶ 12, 583 N.W.2d at 424.

247. *Id.* ¶ 11, 583 N.W.2d at 424.

248. Barnhart v. Herseth, 222 N.W.2d 131, 137 (S.D. 1974).

249. *See id.* The court does not inquire into whether the voters were in fact informed. *Id.*

250. *Id.*

251. Thom v. Barnett (*Thom I*), 2021 SD 65, ¶ 57, 967 N.W.2d 261, 280.

252. *Id.* ¶¶ 85, 97, 967 N.W.2d at 287, 291 (Myren, J., concurring in part and dissenting in part).

253. *See* S.D. CONST. art. XXII, § 1. "If more than one amendment is submitted at the same election, each amendment shall be so prepared and distinguished that it can be voted upon separately." *Id.*

majority's position on this point largely replicate arguments for the conclusion that Amendment A did not violate the separate vote rule.[254] First, in addition to Amendment A, Initiated Measure 26 was on the 2020 general election ballot.[255] This measure concerned the legalization of medical marijuana[256] and passed with the support of 69.92% of voters.[257] Voters were not coerced into voting either yes or no on Amendment A based on the combination of what the majority determined to be three subjects.[258] Instead, voters were given the choice to only vote for medical marijuana if that was all they supported.[259]

Additionally, hemp had already been legalized in South Dakota.[260] Therefore, a vote "yes" on Amendment A was not for the purpose of legalizing medical marijuana or hemp in South Dakota.[261] The first thirteen provisions could not have been seen as the "favorable" provisions and the fourteenth seen as the "unfavorable" provision by the voters. Conversely, the fourteenth provision did not have the force to be the "favorable" provision.[262] As mentioned, hemp was already legal and medical marijuana was separately placed on the ballot.[263] Therefore, the fourteenth provision did not have the force behind it to entice voters to accept the first thirteen provisions because they desired the fourteenth.[264]

3. Amendment A's Purpose was to Provide a Comprehensive Cannabis Plan and All Fifteen Provisions were Connected to that Purpose

Prior to November 2020, both recreational and medical marijuana were strictly prohibited in South Dakota.[265] Hemp was only recently legalized by the

254. *Infra* IV.A.3.

255. *Thom I*, 2021 SD 65, ¶ 97, 967 N.W.2d at 291 (Myren, J., concurring in part and dissenting in part).

256. *See* Jason R. Ravnsborg, Attorney General, Attorney General's Statement for Initiated Measure (Medical Marijuana) (Aug. 5, 2019) [hereinafter Attorney General's Statement for Initiated Measure (Medical Marijuana)].

257. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, *supra* note 147.

258. *See Thom I*, 2021 SD 65, ¶ 97, 967 N.W.2d at 291 (Myren, J., concurring in part and dissenting in part).

259. *See* Attorney General's Statement for Initiated Measure (Medical Marijuana), *supra* note 256 (providing an explanation of Initiated Measure 26 and included the full text of the measure).

260. SDCL §§ 38-35-1 to -21 (2004 & Supp. 2022).

261. *See Thom I*, 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A). Nowhere in the contents of the ballot initiative does it purport to legalize medical marijuana or hemp. *Id. See also* SDCL §§ 38-35-1 to -21 (providing South Dakota's enacted laws as it relates to hemp); Attorney General's Statement for Initiated Measure (Medical Marijuana), *supra* note 256 (providing an explanation and the contents of Initiated Measure 26, which would legalize medical marijuana in South Dakota).

262. *See Thom I*, 2021 SD 65, ¶ 97, 967 N.W.2d at 291 (Myren, J., concurring in part and dissenting in part).

263. *Id.*

264. *Id.*

265. Response to Contestants' Motion for Summary Judgment and Intervenors' Motion for Judgment on the Pleadings, In the Matter of Election Contest as to Amendment A, an Amendment to the South Dakota Constitution to Legalize, Regulate, and Tax Marijuana; and to Require the Legislature to Pass

state legislature in March 2020.[266] In the November 2020 general election, two cannabis measures were on the ballot—Amendment A and Initiated Measure 26.[267] Initiated Measure 26 related solely to the legalization of medical marijuana.[268] While Amendment A included provisions relating to the regulation of all cannabis, all that would be *legalized* through its passage was recreational marijuana.[269]

There is no state in which recreational marijuana is legal but medical marijuana is not.[270] Therefore, it is fair to assume that the majority of Americans are more accepting of medical marijuana than they are of recreational marijuana.[271] The results of the 2020 election confirm this as Amendment A was passed by 54.2% of voters, while Initiated Measure 26 was passed by 69.92% of voters.[272] It is likely the drafters of Amendment A believed that if Amendment A was passed, then Initiated Measure 26 would likely be passed as well.[273]

If Amendment A would have passed, South Dakota would have had three newly legalized cannabis-containing substances on its hands with no market to regulate them.[274] All three substances originate from the same plant, *Cannabis sativa*, yet all three substances are unique in such a way that the regulation of each in conjunction with the others would be necessary.[275] The title, the Attorney General's explanation, and the contents of Amendment A itself all reveal Amendment A's purpose was to create a comprehensive plan for the legalization,

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Laws Regarding Hemp as Well as Laws Ensuring Access to Marijuana for Medical Use, No. 32 CIV 20-186, 2021 WL 659395 (S.D. 6th Cir. Jan. 8, 2021) [hereinafter Response Brief].

266. H.R. 1008, 95th Legis. Sess. (S.D. 2020); SDCL §§ 38-35-1 to -21.

267. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, *supra* note 147.

268. *Id.*

269. *Thom I*, 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A).

270. Practical Law Commercial Transactions, *supra* note 3. In eighteen states and the District of Columbia, both recreational and medical marijuana are legal. *Id.* Medical marijuana alone is legal in nineteen states, including South Dakota. *Id.* Neither medical nor recreational marijuana is legal in the remaining thirteen states, although Georgia and Texas have certain exceptions. *Id.* The federal government classifies marijuana as an illegal drug under the Controlled Substances Act. *Id.*

271. *See* Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Apr. 16, 2021), https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use/ (polling support for medical marijuana only at thirty-one percent and support for both medical and recreational marijuana at sixty percent).

272. *South Dakota Constitutional Amendment Z, Single-Subject Rule for Constitutional Amendments (2018)*, *supra* note 147.

273. *See* Van Green, *supra* note 271. This case note suggests Americans are more accepting of medical marijuana than they are of recreational marijuana. *Id.* It is likely the proponents of Amendment A were aware of this fact as well and took it in consideration when drafting Amendment A.

274. *See* SDCL §§ 38-35-1 to -21 (providing South Dakota's enacted laws as it relates to hemp); SDCL §§ 34-20G-1 to -95 (2013 & Supp. 2021) (providing South Dakota's enacted laws as it relates to medical marijuana); *Thom I*, 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A) (providing what would have been South Dakota's law regarding recreational marijuana had *Thom v. Barnett* been upheld).

275. *Thom I*, 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A).

regulation, use, and production of cannabis, and each of the fifteen provisions related to that plan.[276]

First, the title of Amendment A suggests its purpose to create a comprehensive cannabis plan. The title of the amendment is as follows: "[a]n amendment to the South Dakota Constitution to legalize, regulate, and tax marijuana; and to require the Legislature to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use."[277] Reading the title in isolation may lead one to the conclusion of the majority—that the amendment contains three subjects—recreational marijuana, medical marijuana, and hemp.[278] However, when reading the title in light of the context of the state's cannabis law, it is clear that the legalization and regulation of recreational marijuana would not be successful without the regulation of the other cannabis-containing products.[279]

Another part of this context is the Attorney General's explanation, which included five paragraphs.[280] The first paragraph speaks to the legalization of recreational marijuana.[281] The second paragraph addresses those engaged in the commercial business of marijuana.[282] The fourth paragraph discusses the fifteen percent tax that would be imposed on marijuana sales and the use of the tax revenue.[283] The final provision recognizes that "judicial clarification of the amendment may be necessary" considering that marijuana was then illegal under both state and federal law.[284] Significantly, none of the above four paragraphs discuss the regulation of marijuana.[285] Regulation is addressed in the third paragraph, which states that "[t]he Department must enact rules to implement and enforce this amendment. The amendment requires the Legislature to pass laws regarding medical use of marijuana. The amendment does not legalize hemp; it requires the Legislature to pass laws regulating the cultivation, processing, and sale of hemp."[286] The explanation suggests regulation of recreational marijuana cannot be divorced from the regulation of medical marijuana or hemp.[287]

Lastly, the contents of Amendment A suggest the purpose of the amendment was to provide a comprehensive plan to create and regulate the cannabis market.[288] The legalization of a product is useless if a well-functioning, well-

276. *See id.*; *id.* 2021 SD 65, 967 N.W.2d at 303 (Appendix B).

277. *Id.* 2021 SD 65, 967 N.W.2d at 303 (Appendix B).

278. *Id.*

279. *See id.* 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A); *id.* 2021 SD 65, 967 N.W.2d at 303 (Appendix B); *see also* Attorney General's Statement for Initiated Measure (Medical Marijuana), *supra* note 256 (containing the text of Initiated Measure 26).

280. *Thom I*, 2021 SD 65, 967 N.W.2d at 303 (Appendix B).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *See* Response Brief, *supra* note 265 (stating the regulation of cannabis cannot "exist in a vacuum").

288. *See Thom I*, 2021 SD 65, 967 N.W.2d at 298-303 (Appendix A).

regulated market does not exist.[289] The legalization of cannabis would not have "a singular and limited effect on [South Dakota], its operation, and its citizens," but instead, would affect many areas of society.[290] As each provision in *Herried* was necessary to carry out the amendment's comprehensive plan of placing the control of the state educational institutions under one board,[291] and as each provision in *Barnhart* was necessary to carry out the amendment's purpose of creating a more efficient state executive branch,[292] each provision of Amendment A would be necessary to create an efficient, well-functioning market for cannabis.[293] "Cannabis is cannabis is cannabis; just like corn is corn is corn"; however, recreational marijuana could not be properly regulated without the regulation of medical marijuana, which could not be regulated without the regulation of hemp, and vice versa.[294] Nevertheless, the majority reasoned that because thirteen of the fifteen provisions related to recreational marijuana, the purpose of the amendment was the legalization of recreational marijuana.[295]

The first part of the fourteenth provision required the legislature to pass laws to "ensure access to marijuana beyond what is set forth in this article."[296] The majority reasoned this portion of the fourteenth provision expanded the amendment since it made medical marijuana accessible to different people in different circumstances.[297] In effect, the opposite is true.[298] It places a limit on recreational marijuana as regulations of medical marijuana would serve as a tool to enforce recreational marijuana laws.[299] Without clear and explicit medical marijuana laws, regulation and enforcement of recreational marijuana laws would be nearly impossible because medical marijuana and recreational marijuana are not distinguishable inside or outside of the body.[300] They are generally the same substance, used for different purposes.[301]

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289. Response Brief, *supra* note 265.

290. *Id.*

291. State *ex rel.* Herried (*Herried*), 72 N.W. 93, 97 (S.D. 1897).

292. Barnhart v. Herseth, 222 N.W.2d 131, 135 (S.D. 1974).

293. Response Brief, *supra* note 265.

294. Brief in Support of Motion on the Pleadings Under SDCL 15-6-12(c), Thom v. Barnett (*Thom II*), No. 32 CIV 20-187, 2020 WL 8613296 (S.D. 6th Cir. Feb. 23, 2020) [hereinafter Motion on the Pleadings Brief]. *See also* Response Brief, *supra* note 265 (discussing the need for a regulatory plan for cannabis).

295. Thom v. Barnett (*Thom I*), 2021 SD 65, ¶ 54, 967 N.W.2d 261, 278-79.

296. *Id.* 2021 SD 65, 967 N.W.2d at 303 (Appendix A).

297. *Id.* ¶ 52, 967 N.W.2d at 278.

298. *See* Motion on the Pleadings Brief, *supra* note 294 (stating that Amendment A's purpose was to establish a comprehensive plan of regulation of cannabis); *see also* Response Brief, *supra* note 265 (discussing the need for a regulatory plan for cannabis).

299. *See* Motion on the Pleadings Brief, *supra* note 294 (stating that Amendment A's purpose was to establish a comprehensive plan of regulation of cannabis); *see also* Response Brief, *supra* note 265 (discussing the need for a regulatory plan for cannabis).

300. *Drug Testing in the Era of Medical Marijuana*, CAPSTONE HEALTHCARE, https://capstonehealthcare.com/drug-testing-medical-marijuana/ (last visited Jan. 15, 2022).

301. *What's the Difference Between Medical & Recreational Marijuana?*, CANNAMD, https://www.cannamd.com/whats-the-difference-between-medical-recreational-marijuana/ (last visited Jan. 15, 2022).

Additionally, part two of the fourteenth provision required the legislature to pass laws to "regulate the cultivation, processing, and sale of hemp."[302] Both marijuana and hemp contain tetrahydrocannabinol ("THC").[303] The difference between the two is the amount of THC contained in each.[304] Marijuana contains more than 0.3% THC, whereas hemp contains less than 0.3% THC.[305] Although Congress has excluded hemp from the definition of marijuana, this explicit exclusion suggests hemp would otherwise be included in the definition of marijuana had Congress not intentionally excluded it.[306]

Despite some of the differences between each type of cannabis, the court's duty was not to identify where the provisions differed but to identify if the provisions were connected in any manner by reviewing the amendment in its entirety.[307] By reviewing the first thirteen provisions in isolation, the court substituted its actual purpose with an incidental purpose and, therefore, did not find each provision related to a single, comprehensive plan.[308] This is contrary to how the court analyzed the amendments in both *Herried* and *Barnhart*.[309]

In *Herried*, the court noted the provision that related to the board of regents could have been submitted separately from the provision that related to the trustees, and voters may have had reasons to desire one but not the other; nevertheless, to have found those two provisions to be separate subjects would have been to substitute the real purpose of the amendment for an incidental one.[310] The real purpose of the amendment was to place state educational institutions under a single board.[311] Therefore, like in *Herried*, it does not matter if the first thirteen provisions, the first part of the fourteenth provision, and the last part of the fourteenth provision could have been submitted separately.[312] Instead, what matters is whether each provision in the amendment related to a single plan.[313] Likewise, even though the constitutional amendment in *Barnhart* made over twenty changes, the court held those changes constituted a larger plan of creating efficiency within the executive branch.[314] Like *Barnhart*, each part of each provision in Amendment A related to a larger plan of efficiency—the creation of an efficient, well-functioning cannabis market.[315]

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302. *Thom I*, 2021 SD 65, 967 N.W.2d at 303 (Appendix A).
303. Practical Law Commercial Transactions, *supra* note 3.
304. *Id.*
305. *Id.*
306. 21 U.S.C. § 802(16) (2013 & Supp. 2022).
307. *Thom I*, 2021 SD 65, ¶ 93, 967 N.W.2d at 289-90 (Myren, J., concurring in part and dissenting in part).
308. *Id.*
309. State *ex rel.* Adams v. Herried (*Herried*), 72 N.W. 93, 97 (S.D. 1897); Barnhart v. Herseth, 222 N.W.2d 131, 135 (S.D. 1974).
310. *Herried*, 72 N.W. at 97.
311. *Id.*
312. *Id.*
313. *Id.*
314. *Barnhart*, 222 N.W.2d at 135.
315. *Id. See* Response Brief, *supra* note 265.

Because all three cannabis-containing products are derived from the same plant and because one cannabis-containing product could not be properly regulated without the regulation of the others, all fifteen provisions related to a single, comprehensive plan and, therefore, constituted one subject.[316]

B. THE COURT SHOULD HAVE CREATED A NEW TEST

The three-part test used by the court is outdated or, rather, incomplete.[317] Although a different test may not have impacted the outcome of the case, a new test is needed, nonetheless.[318] The South Dakota Supreme Court first reviewed the single-subject rule and separate vote language in article XXIII, section 1 in *Thom*, and so the court was given an opportunity to clarify and create a more determinate doctrine but did not do so.[319] While the dissent's approach offers some kind of framework to follow, there are still gaps to be filled.[320]

For starters, the court adopted the three-part test when it decided *Herried* in 1897.[321] When it was adopted by the South Dakota Supreme Court, the court noted Wisconsin's constitution was identical to South Dakota's.[322] This is no longer the case.[323] In 1972, South Dakota amended article XXIII, section 1 to allow for constitutional amendments to be proposed by the initiated process.[324] Wisconsin does not have an initiative process.[325] Further, in 2018, South Dakota again amended article XXIII, section 1, adding a single-subject rule.[326] Wisconsin also does not have a single-subject rule for constitutional amendments.[327]

Despite these changes, the court determined Amendment Z codified existing precedent.[328] However, the amendment may have changed things.[329] Although the legislative history surrounding Amendment Z is slim, the Attorney General's ballot explanation stated Amendment Z's adoption would *add* a single-subject

316. Thom v. Barnett (*Thom I*), 2021 SD 65, ¶¶ 94-95, 99, 967 N.W.2d at 289-92 (Myren, J., concurring in part and dissenting in part); Response Brief, *supra* note 265.

317. *See supra* III.C.

318. *See* Boger, *supra* note 158, at 1262 (explaining challenges to single-subject rule adjudication); Gilbert, *supra* note 148, at 807; Briffault, *supra* note 159, at 1630-31.

319. *Thom I*, 2021 SD 65, ¶ 36, 967 N.W.2d at 273.

320. *See id.* ¶¶ 77-99, 967 N.W.2d at 284-92 (Myren, J., concurring in part and dissenting in part) (reviewing Amendment A for a violation in the following fashion: (1) recognizing the presumption of constitutionality, (2) identifying the risks of logrolling, (3) identifying the amendment's object or purpose, (4) determining whether each provision is related to that object or purpose).

321. State *ex rel.* Adams v. Herried (*Herried*), 72 N.W. 93, 97 (S.D. 1897).

322. *Id.*

323. *Compare* S.D. CONST. art. XXIII, § 1 (providing for proposed amendments "by initiative or by a majority vote of all members of each house of the Legislature"), *with* WIS. CONST. art. XII, § 1 (providing only for proposed amendments "in either house of the legislature" and then ratified by the people).

324. S.D. CONST. art. XXIII, § 1, Historical Notes.

325. Duros & Loeza, *supra* note 207, at 2.

326. S.D. CONST. art. XXIII, § 1, Historical Notes.

327. *See* WIS. CONST. art. XII, § 1 (explaining the constitutional amendment process and rules).

328. Thom v. Barnett (*Thom I*), 2021 SD 65, ¶ 36, 967 N.W.2d 261, 273.

329. *See* Attorney General's Statement for Constitutional Amendment Z, *supra* note 142.

rule, indicating South Dakota did not have one at the time.[330] Under this new rule, if an amendment embraced more than one subject, it would be invalid.[331] Subsequently, the explanation stated that if more than one amendment was proposed at the same election, each must be presented separately so that they can be voted on separately.[332] This suggests an amendment that satisfies the single-subject rule also satisfies the separate vote rule since an amendment containing multiple subjects would be considered multiple amendments, and an amendment containing one subject would be considered one amendment.[333] This congruence of the single-subject and separate vote rules is how the relationship between the two had historically been treated.[334]

One option in further developing article XXIII, section 1's single-subject doctrine would be to treat the single-subject rule as it has been treated for both South Dakota's ordinary legislative enactments and its statutes. In both of these contexts, the court has applied a "reasonableness" approach.[335] The court could adopt a similar approach for the single-subject rule as it relates to constitutional amendments. In fact, it has long been recognized by the South Dakota Supreme Court that "where the same words are used in different parts of the Constitution or statute they are presumed to have a uniform meaning throughout the instrument."[336] Because all of South Dakota's single-subject language is nearly identical, it is arguable that the court's interpretation of article XXIII, section 1 should have been interpreted in the same manner as the rules in article III, section 21 and South Dakota Codified Law, section 7-18A-3.[337]

It is also arguable that it should be more difficult to amend the constitution than it is to pass new legislation.[338] In that case, however, the court must distinguish "reasonably auxiliary" and "reasonably germane" from "relating."[339]

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330. 2018 S.D. H.J.R. 1006; Attorney General's Statement for Constitutional Amendment Z, *supra* note 142 (listing requirements regarding amendments to the constitution).

331. Attorney General's Statement for Constitutional Amendment Z, *supra* note 142 (listing requirements regarding amendments to the constitution).

332. *Id.*

333. *See id.*

334. Rutherford, *supra* note 70, at 88-89.

335. *See* Meierhenry v. City of Huron, 354 N.W.2d 171, 182 (S.D. 1984); Baker v. Atkinson, 2001 SD 49, ¶ 25, 625 N.W.2d 265, 273-74. The *Baker* court held all parts of legislation are "reasonably germane" if they relate to a general object or purpose or constitute a single scheme. *Id.* ¶ 25, 625 N.W.2d at 273-74 (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1290 (Cal. 1978) (en banc)). This definition of the "reasonably germane" test is strikingly similar to the court's definition of the three-part test in *Thom*. *See* Thom v. Barnett (*Thom I*), 2021 SD 65, ¶ 38, 967 N.W.2d 261, 274. Nevertheless, the majority rejected to apply the "reasonably germane" test in its analysis of Amendment A. *Id.* ¶ 45, 967 N.W.2d at 276. This is evidence of the need for a more determinate doctrine surrounding single-subject rules in South Dakota's various legal contexts. *See supra* III.B-C (discussing the indeterminacy and confusing of the single-subject and separate vote rules).

336. Memorandum in Opposition to Summary Judgment, *supra* note 238.

337. *Id.*

338. *Thom I*, 2021 SD 65, ¶ 45, 967 N.W.2d at 275.

339. *See Meierhenry*, 354 N.W.2d at 182; *Baker*, 2001 SD 49, ¶ 25, 625 N.W.2d at 273-74; *Thom I*, 2021 SD 65, ¶ 38, 967 N.W.2d at 274; *see also* Briffault, *supra* note 159, at 1640-41 (discussing a range

While jurisprudence in both South Dakota and other jurisdictions suggest "relating" to a single-subject is a higher standard than being "reasonably germane" to a single-subject, the court has not offered any further guidance on what truly distinguishes the two.[340] Additionally, the court's single-subject analysis has been strikingly similar in all contexts; nevertheless, the court has rejected to interpret the single-subject rule consistently across those contexts.[341] This is rather confusing and "sponsors cannot predict with any accuracy whether the effect of a proposition . . . will be regarded as 'substantial' enough for the Court to treat it as a separate subject."[342] These unknowns could lead to additional and unnecessary litigation.[343]

Another option is to treat the single-subject doctrine as a theory of interpretation, much like the canon of constitutional avoidance.[344] Under this theory, the court may be able to avoid defining what constitutes a subject.[345] Similarly, under a different theory, the court could avoid defining "subject" by

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of tests courts use to determine what a single-subject is and suggesting the tests are not informative on what constitutes a subject).

340. *See* Douglas, *supra* note 177, at 281-82. *See generally Proposition Submitted to People as Covering One or More Than One Proposed Constitutional Amendment within Contemplation of Constitutional Provision in that Regard*, *supra* note 178 (discussing various case law throughout the United States relating to constitutional amendments).

341. *See Baker*, 2001 SD 49, ¶ 25, 625 N.W.2d 265, 273 (discussing the "reasonably germane" test); *Thom I*, 2021 SD 65, ¶¶ 42-43, 967 N.W.2d at 275 (declining to apply the "reasonably germane" standard).

342. Rutherford, *supra* note 70, at 187.

343. *See, e.g.*, Rae Yost, *Lawsuit says Supreme Court ruling on marijuana amendment should apply to state's Amendment C*, KELOLAND (Jan. 18, 2022, 1:28 PM), https://www.keloland.com/news/local-news/lawsuit-says-supreme-court-ruling-on-marijuana-amendment-should-apply-to-states-amendment-c/ (highlighting the effects of the *Thom v. Barnett* decision on other amendments).

344. *See generally* Boger, *supra* note 158 (covering constitutional avoidance). Daniel N. Boger has suggested that courts use two canons—the savings canon and the canon of constitutional avoidance—when reviewing a piece of legislation for a single-subject violation. *Id.* at 1291-92. The savings canon says that when there is a constitutional interpretation and an unconstitutional interpretation, a court should choose the constitutional interpretation. *Id.* at 1257. This serves a descriptive function because in applying this canon the court assumes the drafter would not draft an unconstitutional statute. *Id.* at 1257-58. It serves a normative function by respecting separation of powers, preventing stepping on the legislature's toes. *Id.* at 1258. The canon of constitutional avoidance is similar. *Id.* Here, when one interpretation would raise constitutional concerns and one would not, the court should choose the interpretation that would not. *Id.* Because the court's biggest challenge comes from defining "subject," the canon of constitutional avoidance allows courts to avoid having to do so altogether because the canon allows courts to avoid the answering the constitutional question. *Id.* This serves the descriptive function by assuming the drafters would not wish to toe the line of constitutionality if they could avoid it. *Id.* It serves a normative function because it allows courts to avoid constitutional questions. *Id.* at 1258-59. Boger suggests these canons be used when the following are present:

> (1) a [] ballot initiative is ambiguous, meaning that the textual analysis results in at least two plausible interpretations of the statute; (2) one interpretation suggests the presence of multiple subjects and thus renders the statute unconstitutional or possibly unconstitutional, while the other interpretation would point to the statutes having only one subject and thus being clearly constitutional; and (3) depending on whether the first interpretation is clearly unconstitutional or only possibly unconstitutional, the court would apply the saving or avoidance canon, respectively, to choose the interpretation that is clearly constitutional.

Id. at 1260-61.

345. *Id.* at 1258.

letting the people decide.[346] Under this theory, if voters cannot decide how to vote on one proposal without knowing whether the other proposal will become law, then the rule is satisfied.[347]

An abundance of inconsistency and indeterminacy exists within the interpretation and application of the single-subject and separate vote rules across jurisdictions.[348] Therefore, it is recognized that the creation of a new test or further development of the current one would not be easy.[349] Because of this, the reader will not find within this case note a test that it is suggested that the South Dakota Supreme Court adopt.[350] Nevertheless, it is vital that a more determinate test is established.[351] If one is not, the credibility of the court could be at stake.[352]

V. CONCLUSION

The South Dakota Supreme Court should have held Amendment A did not violate the single-subject and separate vote rules.[353] First and foremost, Amendment A was not plainly and palpably invalid.[354] If doubt existed as to whether the amendment related to a single-subject, the doubt did not constitute a plain and palpable violation great enough to counteract the amendment's strong presumption of constitutionality.[355] Amendment A also presented little risk of logrolling because of its publicity and because of the presence of Initiated Measure 26 on the 2020 general election ballot.[356] Nevertheless, the majority concluded the purpose of Amendment A was to create a comprehensive plan for the legalization and regulation of recreational marijuana instead of concluding that the amendment's broader purpose was to create a plan for the legalization, regulation, use, and production of cannabis-containing products.[357] Because cannabis was strictly prohibited not long before the November 2020 election, regulation of one

346. Cooter & Gilbert, *supra* note 177, at 691-92.

347. *Id.* at 692.

348. *Supra* III.B-C.

349. *See supra* III.B-C (discussing the lack of cohesiveness across jurisdictions in applying the single-subject and separate vote rules).

350. *See generally supra* I-IV (offering no suggestion of a new test for the South Dakota Supreme Court to adopt); *infra* V (offering no suggestion of a new test for the South Dakota Supreme Court to adopt).

351. *See* Boger, *supra* note 158, at 1262-63; Gilbert, *supra* note 148, at 806-07; Briffault, *supra* note 159, at 1630-31.

352. *See* Boger, *supra* note 158, at 1249, 1263-64 (discussing the fact that the single-subject rule sometimes leads to arbitrary decision making that may lead to accusations of the court being judicial policymakers).

353. *See supra* IV.A (concluding Amendment A did not violate the single-subject and separate vote rules, using the three-part test).

354. *See supra* IV.A.1 (analyzing the presumption of constitutionality).

355. *See supra* IV.A.1 (concluding Amendment A was not invalid because it was possible to construe Amendment A as one amendment).

356. *See supra* IV.A.2 (analyzing the risks of logrolling).

357. *See supra* IV.A.3 (suggesting the purpose of Amendment A was to create a single, comprehensive plan for cannabis regulation).

cannabis-containing product would depend upon the regulation of each cannabis-containing product.[358] Since each provision related to a single, comprehensive plan for the legalization, regulation, use, and production of cannabis, the court should have held Amendment A did not violate the single-subject or separate vote rules.[359]

Thom was not just about marijuana, however.[360] Even more, it was about South Dakota's single-subject rule that was added to article XXIII, section 1 through the passage of Amendment Z in 2018.[361] *Thom* was the court's opportunity to clarify what was, and still is, an indeterminate and rather outdated doctrine, but the court's decision provided very little clarity.[362] While there will be opportunities for the court to further define the single-subject rule, this much-needed clarity is, unfortunately, contained within future litigation.[363]

358. *See supra* IV.A.3 (discussing the previous prohibition of cannabis in South Dakota).

359. *See supra* IV.A.3 (concluding the court should have held Amendment A did not violate the single-subject and separate vote rules).

360. *See supra* IV.B (suggesting the larger implications of *Thom* was the majority's interpretation of the single-subject and separate vote rules).

361. *See supra* IV.B (suggesting Amendment Z changed the meaning of section 1).

362. *See supra* IV.B (suggesting the court should have revised its section 1 test).

363. *See, e.g.*, Yost, *supra* note 343 (reporting on a lawsuit being challenged based on an alleged single-subject violation).