SCR 4007 - Testimony by Dustin Gawrylow, ND Watchdog Network (#266)

Position: Neutral With Amendments, Opposed Without Amendments

Madam Chair,

The idea of a single subject rule for ballot measures sounds good - in theory.

But much like how communism sounds good in theory, what happens in practice is very different.

The legislature itself found out how this works in 2023 when the OMB bill was challenged partially based on the existing single-subject rule in the constitution applicable to the legislature.

Attached to my testimony are several documents, including some case law documents and organizational writings.

The lack of definition to what a “single-subject” really is was part of the criticism of Measure 2 in 2024. The legislature has now had two full years, a Supreme Court decision, and another failed ballot measure to come up with a way to define “single-subject” in the context of ballot measures.

Background

The single-subject rule, which exists in most states, is designed to prevent laws from addressing multiple unrelated topics. It aims to ensure that laws have a clear purpose and prevent unrelated items from being bundled together. However, the rule can be challenging to apply to citizen initiatives, which often address complex, interconnected issues.

The South Dakota Supreme Court case involving a marijuana legalization initiative highlights the challenges of applying the single-subject rule. Opponents of the initiative argued that it encompassed multiple subjects, including medical marijuana, hemp regulations, and local government control of dispensaries. The court agreed, delaying the implementation of the initiative.

The single-subject rule can be used to challenge citizen initiatives even if they have significant public support. This can discourage people from pursuing initiatives and raises concerns about fairness and the potential for manipulation. The definition of a single subject is open to interpretation, leading to inconsistent application of the rule. This inconsistency makes it difficult for citizen groups to predict whether their initiatives will be challenged.

There are arguments for and against strict enforcement of the single-subject rule. Some argue that strict enforcement prevents voter confusion, while others contend that it can be used to manipulate the process and silence certain voices.

Potential solutions to address the challenges of the single-subject rule include adopting a more flexible definition of a single subject, creating clearer guidelines, and establishing consequences for those who abuse the rule to challenge initiatives.

Citizen initiatives often address complex issues that are interconnected and difficult to separate into neat single subjects. Forcing initiatives to address these issues separately could hinder effective problem-solving. The single-subject rule has become increasingly complex and open to interpretation over time, undermining its original purpose. The lack of clarity and consistency in the single-subject rule creates a system that can be easily abused by those with resources and legal knowledge.

Potential solutions include reforming the rule to make it more citizen-friendly, adopting clearer guidelines, and encouraging courts to exercise caution when using the rule to overturn citizen initiatives.

The key takeaways from the discussion are that the single-subject rule can hinder citizen initiatives, its definition is vague and inconsistently applied, and it can be manipulated by those with resources. It is important to educate the public about the single-subject rule and advocate for changes that protect direct democracy. The challenge lies in finding a balance between protecting direct democracy and ensuring that laws are clear and well-organized.

Subject vs. Topic

Within the discussion of single-subject, one thing that often comes up is whether a “topic” and a “subject” are the same thing. If a sponsoring committee wants to eliminate the income tax and cut the sales tax by 1%, is that one subject: taxes, or two subjects: sales tax and income tax?

The legislature’s own website sorts bills by “topic” not by “subject” (attachment), and lists “Sales Tax” and “Income Tax” as two different topics. SCR 4007 either requires a declaration of how this will be determined, or a requirement that the legislature will provide the Secretary of State with guidance.

Danger Of Weaponization

Unilateral and undefined power given to one elected official can be abused. In order to ensure a “single-subject rule” is not abused, it needs to be defined.Attached to my testimony are many legal sources showing how hard it is to define.

Proposed Amendment

The following amendment is proposed to create guardrails against a single-subject rule being weaponized:

(Bold underlined is the proposed amendment language to the language being added by SCR 4007)

> **Prior to approval for circulation, a** proposed amendment may not embrace or be comprised of more than one subject **functionally related and germane to each other**, as determined by the secretary of state and the secretary of state may not approve the initiative petition for circulation if the proposed amendment comprises more than one subject. **Prior to application of this provision the legislative assembly, or citizens by initiative, shall enact statute(s) providing clear guidance to the secretary of the state, incorporating any rulings by state or federal courts on the matter into such guidance. The secretary of state may not apply this rule any differently than it applies to the legislative assembly as determined by the courts.**
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> **Automatic Appeal: If rejected by the secretary of the state the state supreme court shall convene within seven business days to hear an appeal to the rejection. If the supreme court over-rules the secretary of state's rejection, the state shall reimburse the sponsoring committee for all legal fees incurred due to the appeal.**

Intent of Amendment Provisions

1. Require determination of "single-subject" to occur BEFORE approval to circulate.
    a. Letting signatures be collected prior to ruling would lead to weaponization.
2. Add "functionally related and germane" clause. (Source: Nevada version of rule)
3. Require the legislature to provide guidance prior to SecState enforcement.
4. Ensure that enforcement is the same as it would be on legislative actions for fairness.
5. Create an easy and fast appeals process for sponsoring committees.

Without reasonable guardrails, there is too much opportunity for future Secretary of States to use the power unilaterally against measures.

Furthermore, I would urge this committee to change which election this measure appears on from the June 2026 ballot to the November 2026 ballot to ensure maximum voter involvement in such a change.

FAQ On Single Subject Rules

1. What is the single-subject rule, and why is it important in the context of laws and constitutional amendments?

The single-subject rule, present in the constitutions of several states, mandates that a piece of legislation or a ballot initiative can only address one subject. This prevents "logrolling" (combining unrelated items to gain support) and ensures transparency, so voters understand what they're voting on. Courts use this rule to strike down initiatives that violate it, either removing them from the ballot or voiding them after enactment. However, the interpretation and enforcement of this rule vary significantly across states, with some applying it more aggressively than others.

2. How do courts determine whether a law or initiative violates the single-subject rule? What tests or standards are used?

Courts employ various tests to determine if multiple parts of a bill are sufficiently related to constitute a single subject. These include:

Whether the provisions are "rationally related."
If there is a "unifying principle."
Whether there is a "natural and logical connection."
If they share a "common purpose or relationship."
Whether they have a "nexus to a common purpose."
If they "fairly relate to the same subject."
Whether they "relate, directly or indirectly, to the same general subject and have a mutual connection."
If there is a "common thread" or "filament" linking them to each other.

The most common standard is whether the provisions are "germane" or "reasonably germane" to each other or to some general subject. Courts often look for a reasonable basis for grouping multiple proposals together. Ultimately, the goal is to prevent unrelated provisions from being combined in a way that could mislead voters or create undesirable legislative bargains.

3. What are the potential consequences if a law or initiative is found to violate the single-subject rule?

If a court finds that a law or initiative violates the single-subject rule, it typically has two main options: invalidation (striking down the entire law) or severance (removing the problematic parts of the law). Invalidation can undo popular decisions and disrupt existing policy. Severance can distort the legislative process if the removed provisions were crucial to a political compromise, potentially creating winners and losers unintended by the original legislation.

4. How can the "saving and avoidance canons" be applied to the single-subject rule, and what benefits would this offer?

The saving and avoidance canons are principles of statutory interpretation. When applied to the single-subject rule, they suggest that if a law or ballot initiative is ambiguous, and one interpretation suggests multiple subjects while another suggests a single subject, the court should choose the

interpretation that upholds the law's constitutionality. The saving canon applies when one interpretation clearly renders the statute unconstitutional and the avoidance canon applies when one interpretation possibly renders the statute unconstitutional. This approach can prevent the need to invalidate laws or excise portions of them, minimizing conflict with the legislative branch and respecting popular sovereignty. This approach can also avoid "de-constitutionalizing" single subject rule adjudication.

5. How do political factors and judicial ideology influence decisions in single-subject rule cases?

Studies suggest that judges are more likely to vote to uphold an initiative if their political affiliations align with the initiative's policy goals. In states with strict enforcement of the single-subject rule, this partisan influence is more pronounced. Judges may interpret the rule more liberally or strictly depending on their personal views on the underlying policy issue.

6. What are some common countermeasures used by state governments to evade initiatives, and how might the single-subject rule be affected?

State governments may attempt to undermine initiatives through various countermeasures, such as implementation sabotage, collateral attacks, direct repeal, judicial review, or reforms of the initiative process itself. When initiatives anticipate these countermeasures and attempt to address them preemptively, they often become more complex, increasing the likelihood that they will be challenged for violating the single-subject rule. The very act of trying to make an initiative "airtight" against governmental interference can ironically make it more vulnerable to legal challenges based on the single-subject rule.

7. In the context of marijuana legalization, what specific issues have led to single-subject rule challenges?

In the context of marijuana legalization, single-subject challenges have arisen due to the bundling of distinct but related issues within a single initiative. For example, an initiative that combines recreational marijuana, medical marijuana, and hemp regulation might be challenged on the grounds that these are separate subjects. Similarly, an initiative that legalizes marijuana and also addresses related issues like taxation, licensing, and regulation by local governments could face similar challenges.

8. What is the overall trend in single-subject rule jurisprudence regarding state legislation?

Most courts appear to interpret the concept of a "single subject" liberally and reject most single-subject challenges. Courts often state that they will only strike down laws on single-subject grounds if the violation is "clearly, plainly, and palpably so," or "manifestly gross and fraudulent". This deferential approach reflects respect for the legislative branch. However, nearly all courts that claim to be committed to this deferential and liberal interpretation of "subject" have, at one point, struck down laws on single-subject grounds.

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STATE GOVERNMENTS AND LEGISLATURES

Capital Closeup: In the Midwest, every state constitution has a 'single subject' rule, which was at the center of two recent cases in Nebraska and North Dakota

JANUARY 5, 2024 | BY TIM ANDERSON

CAPITAL CLOSEUP SINGLE SUBJECT RULE STATE CONSTITUTIONS

The language in state constitutions is sometimes as old as the documents themselves: No bill or law shall "embrace" or "contain" more than a single subject.

Every state in the Midwest, and 43 of the 50 U.S. states, has some version of this single-subject rule, a constitutional provision adopted by states to prevent legislative mischief and "logrolling" and to control the powers of special interests, says David Schultz, a political science professor at Hamline University who also teaches law at the University of Minnesota.

"It remains relevant as a provision that can be used to maintain transparency and accountability," he says.

But is it being used?

Midwest in 2023 were based on claims that state legislatures had violated the single-subject rule — one, a challenge to a new law on abortion and gender-affirming care in Nebraska; and the second, a Supreme Court ruling in North Dakota that struck down an omnibus bill (mostly) on state government operations and spending.

Nebraska's 'Christmas tree' session, single-subject case

The lawsuit in Nebraska was filed near the end of an unusual 2023 session in that state. First, there was an extended filibuster from opponents of proposals to outlaw most abortions after 12 weeks of pregnancy and to ban gender-transition surgeries for individuals 18 and under. The response to this filibuster, and its delaying of action on other measures, was for legislators to adopt a "Christmas tree" approach: package provisions from different bills into larger, omnibus bills.

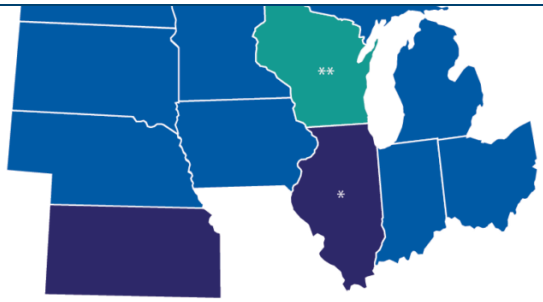
Nebraska's LB 574 was amended during session to pair the prohibitions on abortion and transgender care (they originally were separate bills); after being signed into law, this measure was challenged over this constitutional language in Nebraska:

"No bill shall contain more than one subject."

In August, a state District Court upheld the Legislature's actions, saying the two provisions in LB 574 "relate to health care." The court also noted that Nebraska's judicial branch has historically been "circumspect about acting as a super-parliamentarian." On the single-subject rule, this has meant that so long as a bill's provisions fall under some "general object" (health care, in this instance), the measure gets upheld.

Court decision in North Dakota necessitates special session

Near the end of their 2023 regular session, North Dakota legislators passed SB 2015, which funded certain operations in state government but also changed composition of the North Dakota Public Employees' Retirement System Board of Trustees. The number of members was changed from nine to 11, and the number of legislators on it was increased from two to four.



State constitution limits bills to a single subject

State constitution limits bills to a single subject; appropriations bills are exempt from this rule*

State constitution limits "private or local" bills to a single subject**

* The Illinois Constitution also states, "Appropriation bills shall be limited to the subject of appropriations."

** Court decisions in Wisconsin have established a standard for when bills should be deemed "private" or "local."

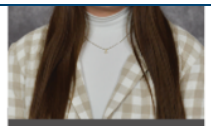
The board challenged this legislative action on several grounds, including violation of North Dakota's single-subject rule:

"No bill may embrace more than one subject, which must be expressed in its title."

In fall 2023, the North Dakota Supreme Court ruled that SB 2015 violated this rule by embracing "multiple distinct subjects extraneous and not germane to even the impermissibly broad topic of state government operations" — grants for public broadcasting, fertilizer-development incentives, penalties for drug trafficking that lead to injury or death, etc.

The justices noted, too, that the legislature had earlier in the session voted down a stand-alone measure seeking a change in composition of the retirement board.

The court's decision struck down SB 2015 in its entirety. To avoid a shutdown of the government services funded in the bill, legislators came back to Bismarck for an October special session, during which they approved 14 separate measures, including one changing composition of the retirement board.



North Dakota Rep. Claire Cory

North Dakota Rep. Claire Cory says the court's decision caught her and other lawmakers by surprise because seemingly similar Office of Management and Budget bills had been passed in previous sessions.

"My first session [in office], it was fine; in other sessions, it was fine," she notes. "This time, it was not."

The difference was that this year's measure prompted a legal challenge, namely because of the changes to the retirement board.

'Good idea in principle ... Hard to operationalize'

According to Columbia Law School professor Richard Briffault, courts, on balance, have shown deference to legislatures and often rejected lawsuits based on the single-subject rule. However, there have been notable exceptions, including decisions in recent decades that invalidated state laws on guns, abortion, tort reform and immigration.

"The ultimate problem is the lack of definition of 'single subject,' "Briffault says. "Courts can read that word 'subject' broadly or they can read it narrowly. There is no real guidance on this, and it's not clear to me how there really could be.

"Where that leaves us is a good idea in principle, but one that is so hard to operationalize, and may turn out to backfire in practice."

One potential problem, he adds, is that it leaves open the possibility of "outcome-driven decisions" by judges — overturn a legislative action they don't like by applying a narrow interpretation of "single subject," or uphold a law by taking a broader view.

Second, the functioning of legislatures may suffer under a narrowly interpreted single-subject rule.

"As we see with the increasing difficulties of Congress getting anything done, we want to make sure there is some room for compromise," Briffault says. "Part of that may

‘Not fair to voters’

Though every state in the Midwest has “single subject” constitutional language, it doesn’t necessarily apply to citizen-initiated ballot measures (see map).

Cory says this can create a dilemma for voters when they are asked to decide the fate of one proposal with multiple, unrelated provisions in it. The North Dakota legislator points to a proposed constitutional amendment from 2020 in her home state as a case in point. It called for North Dakota to adopt ranked-choice voting as well as an independent redistricting commission. Also in that same measure was language to improve the overseas voting process for members of the military.

The amendment never made it to state ballots (it was blocked by the courts for a reason other than single subject), but Cory believes it’s an example of the potential problem of having distinct policy changes being included in a single ballot initiative: A person may have supported more help for overseas voters, for example, but not wanted ranked-choice voting.

“We’ve seen ballot initiatives with multiple subjects that would change the [North Dakota] Constitution in several ways, but then supporters campaign on just one aspect of it,” Cory says. “That’s not fair to voters.”

will go before voters in November 2024.

In states where the single-subject rule does apply to both legislative actions and citizen-initiated measures, one question for the courts is whether the same standard should apply. Three years ago, a proposal to legalize medical cannabis in Nebraska was kept off ballots by the state Supreme Court on the grounds that it violated the single-subject rule by including sections on cultivation, use, possession, health insurance and more.

Judges in that state have said that a stricter single-subject standard should be applied to citizen-initiated ballot measures than to bills coming out of the Unicameral Legislature.

Columbia Law School Professor Richard Briffault says it makes sense to have such a varying standard.

“The case [for single subject] is stronger with ballot propositions, and that’s because ballot propositions aren’t amendable by the voters, whereas with legislatures, provisions always can be taken out.”

Capital Closeup is an ongoing series of articles from CSG Midwest that focus on institutional issues in state governments and legislatures.

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STATECOURTREPORT

GOVERNMENT STRUCTURE | JUDICIAL INTERPRETATION

North Dakota Budget Bill Struck Down as Violation of 'Single Subject' Constitutional Rule

The state supreme court relied on a seldom-used state constitutional provision to upend a long-standing state legislative practice.

By Kevin Frazier | **Published:** October 31, 2023

North Dakota

Though there's been increased attention on state constitutional law recently, many provisions that have the potential to impact state governance and even day-to-day life of the general public remain understudied.

One such forgotten provision is sowing discord in North Dakota.

Earlier this month, the North Dakota Supreme Court relied on an infrequently cited constitutional provision to **invalidate** the **budget bill** for the state's Office of Management and Budget. The provision, **Article IV, Section 13**, is known as the "single subject rule." It holds that "no bill shall contain more than one subject, and the subject shall be clearly expressed in the title."

The **aim** of the single subject rule is to prevent "**logrolling**" — the undemocratic combination of disparate provisions into a single act — as well as the passage of legislation that members of the legislature and public do not fully understand. The good governance motives behind single subject rules explain why **43 states** have some version of it. But the commonalities end there. State courts have **collectively struggled** to precisely define what constitutes a "subject," leading to differing interpretations and **concerns** that such provisions conflict with rule-of-law principles such as clarity of the law and predictability in its application. Those concerns have manifested in North Dakota.

The board that oversees North Dakota's government retirement plans **sued** the North Dakota Legislative Assembly to block the budget bill, which increased the number of lawmakers who sat on the retirement board. The board made several state constitutional arguments against the bill — including that the appointment of legislators to the board violated separation of powers principles and ran afoul of prohibitions on lawmakers holding other appointments during their terms in office — but the supreme court declined to address the board's remaining claims after **finding** the single subject rule dispositive.

In defending the bill before the state supreme court, the North Dakota Legislative Assembly **argued**, first, that the court's precedent has tended toward a "loose" interpretation of the rule that affords tremendous deference to the legislature. Next, it said, "an act is not invalidated simply because the title may enumerate a plurality of subjects, when all of these subjects taken together are but one subject." In other words, a "broad subject" is still a single subject. The assembly also argued that invalidation of a legislative act under the single subject rule is a practice of the past, calling the rule "antiquated and rare." Finally, it maintained that the presumption of constitutionality afforded to legislative acts supported the validity of the budget bill.

Though the court agreed that all statutes are presumed to be constitutional, the court did not find that presumption dispositive. The court then picked apart each of the assembly's arguments. First, it made clear that though the single subject limitation may not regularly lead to invalidation of legislative acts it remains a "valid and active part of [the state's] fundamental law." In other words, infrequent use is not a bar on judicial enforcement of a constitutional provision.

Next, on the question of the consistency of the court's enforcement, the state contested the assembly's characterization of the court's precedent as "loose." It acknowledged precedent liberally construing legislation to satisfy the single subject rule but said that did not mean "that no judicially enforceable limits exist for the breadth of a legislative subject or whether a provision is germane to that subject."

To illustrate those limits, the court looked to decisions by other state supreme courts interpreting similar single subject rules. For example, it quoted a California Supreme Court case that held statutory provisions in a fiscal affairs bill were "too broad in scope" because they encompassed any "measure which has an effect on the budget."

Finally, the court zeroed in on the length and variety of covered topics in the bill's title as evidence that it addressed more than one subject. Indeed, the title of the final version of the bill contained **630** words — enough to fill a single-spaced page (which the court reprinted in its opinion). Within the bill itself, the legislature packed 68 sections — some appropriating funds, others setting school funding, another pertaining to transportation, and yet another related to a commission overseeing construction at the state capitol building. So, despite the court granting the legislature "considerable flexibility in defining the subject of legislation" and liberally interpreting the title to assess its compliance with the rule, the court nevertheless concluded that the bill amounted to the "clearest [kind of] violation of the single subject rule because the act embraces multiple subjects, all of which are expressed in the title."

The decision has the potential to drastically change legislative work and policymaking in North Dakota. Unsurprisingly, political actors across the state have voiced passionate, conflicting **assessments** of the court's action. North Dakota's attorney general **called** the ruling "seismic in its impact." Some state officials lamented the upending of the legislature's long-running practice of turning this budget bill into a "cleanup bill" at the end of session. Other officials agreed with the court that the budget bill had inappropriately become a major policy package. Gov. Doug Burgum, a Republican candidate for president, demonstrated the seriousness of the decision by leaving the campaign trail and convening an emergency session of the assembly. Tellingly, the assembly successfully passed **14 bills** to fill in the appropriation blanks left by the voided bill.

It's relatively easy to see why the bill violated the single subject rule. The harder question — and the question that requires additional scholarly attention — is what courts should do with a state constitutional provision that is invoked so infrequently advocates label it "a dead letter," like this one. The reawakening of dormant constitutional provisions will almost always raise concerns about arbitrary enforcement, especially from targeted parties who may question the motives behind its application to their case. Underused, perhaps understudied, provisions are also vulnerable to critiques that the rigor of the legal analysis is lacking in the rare cases they arise.

Advocates of the rule of law, therefore, should encourage good "constitutional hygiene" — pointing out provisions that may need to be refreshed or, in some cases, removed.

Kevin Frazier is an assistant professor of law at the Benjamin L. Crump College of Law at St. Thomas University. He previously served as a clerk on the Montana Supreme Court.

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Scholarship Roundup: New Year Edition

The last few months brought a rich array of articles and books about state constitutions, courts, and governance.

By Miriam Seifter

New Mexico Montana Ohio Maryland January 27, 2025

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Measure 2's Single-Subject Rule Is A "Back-Door Veto"

By creating an undefined rule for the Secretary of State to enforce, Measure 2 unintentionally creates a "back-door veto" on the will of the people based on the abuses in other states.

DUSTIN GAWRYLOW
SEP 11, 2024 · PAID

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On Sunday, I wrote about how Measure 2 is yet another attempt to remedy the mistrust legislators have when it comes the way their own voters decide how to vote on ballot measures.

Measure 2 Reflects Distrust Of Voters
DUSTIN GAWRYLOW • SEPTEMBER 8, 2024
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I had a couple people respond asking why I thought the "single-subject rule" in Measure 2 is a problem, since I have advocated for that sort of transparency in legislation in the past, which I have.

Here's a short explanation as to why the "single-subject rule" as found in Measure 2 is different than other versions, and why it is problematic.

Measure 2 Grants Undefined And Open-Ended Power To The Secretary of State

Section 2 of Measure 2 states: "An initiated measure may not embrace or be comprised of more than one subject, as determined by the secretary of state."

That is repeated in Section 9 to apply to constitutional initiated measures in a slightly different way: "The petition may be circulated only by qualified electors. The proposed amendment may not embrace or be comprised of more than one subject, as

determined by the secretary of state, and the secretary of state may not approve the initiative petition for circulation if the proposed amendment comprises more than one subject."

Neither of these clauses actually define what a "subject" is, which is perpetual argument among lawyers involved in legislation.

In fact, the definition of "single-subject" was the basis of lawsuit that forced the legislature to go into special session to remedy the problems in the OMB budget.

Single-Subject And The Supreme Court

DUSTIN GAWRYLOW • SEPTEMBER 30, 2023

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This court case was exactly about how the legislature has not been able to follow their own mandate to maintain a single subject in each piece of legislation that they pass.

Back to Measure 2, the legislature decided not to define what this means directly, which leaves it up to the Secretary of State when approving petitions for circulation and leaves it up to the Supreme Court to define once the people have voted.

This lack of defining "single-subject" is why the North Dakota Watchdog Network will oppose Measure 2 in 2024, and why voters should vote NO on a measure that does not actually state or explain what it will and not will not prevent voters from voting on.

States With Single Subject Rules Have A History Of Abusing It, Against The Will Of The People

In 2020, South Dakota voters approved legalizing marijuana with 54% Yes vote.

Governor Kristi Noem sued to have the will of the people overturned via South Dakota's "single subject rule" on ballot measures:

> *The South Dakota Supreme Court on Wednesday upheld a lower court's ruling that nullified a voter-passed amendment to the state constitution that would have legalized*

> *recreational marijuana use.*
>
> *Gov. Kristi Noem instigated the legal fight to strike down the amendment passed by voters in November. Though the Republican governor opposed marijuana legalization as a social ill, her administration's arguments in court centered on technical violations to the state constitution.*
>
> *The high court sided with those arguments in a 4-1 decision, ruling that the measure — Amendment A — would have violated the state's requirement that constitutional amendments deal with just one subject.*
>
> *"It is clear that Amendment A contains provisions embracing at least three separate subjects, each with distinct objects or purposes," Chief Justice Steven Jensen wrote in the majority opinion, which found recreational marijuana, medical marijuana and hemp each to be separate issues.*

Would a normal person say that "recreational marijuana, medical marijuana, and hemp" to be three separate subjects? Probably not, but the lawyers and judges sure did.

These three issues are certainly under the same "topic" but "topic" and "subject" are different in the realm of lawyers.

This is just the most recent and geographically close case where "single-subject rule" was used to veto the will of the people after the people have voted in favor of something.

Legal Research Supports These Arguments

According to a legal white paper written at the University of Southern California School of Law written in 2010, the aggressive enforcement of "single-subject rules" has been a tool to veto the will of the people and prevent the people from even being able to vote on certain things.

> *The single subject rule, on the books in at least 14 states, requires that initiatives embrace only one subject. This paper studies the decisions of state judges in cases in which opponents of voter initiatives raised single subject claims. Courts used the rule to strike down or remove initiatives from voter consideration in at least 70 cases during the period 1997–2006 in five initiative states applying the rule.*
>
> *The single subject rule is controversial in part because the definition of a "single subject" is unclear and, as Daniel Lowenstein has argued, it is infinitely malleable in theory. As a result, courts have a great deal of discretion in single subject cases, unless the judges themselves put meaningful restraints on their interpretation of the rule. Because of the discretion inherent in deciding single subject challenges, critics have argued that the rule cannot be enforced in an objective manner and should not be used (Hasen, 2006; Campbell, 2001: 163), or, as Lowenstein (1983, 2002) argues, should be used only in a restrained manner. Defenders have responded that the rule is amenable to objective application and that in practice judges have not allowed their personal beliefs to influence their decisions.*

Again, this paper is from 2010 lacks recent history, but in the 44-page document, it illustrates the problem with the enforcement and selective enforcement of the "single-subject rule"

> *Because "subjects" are chosen for convenience, notions of what forms a coherent subject in politics and legislation will depend in part on ideologies and "worldviews." When judges apply the single subject rule aggressively, even if they seek to do so in accord with their sense of what the public understanding is, they will inevitably be exercising their own judgments in the most general way about what makes good political or policy sense. That is not to say that their single subject rule judgments will necessarily turn on whether they personally favor the proposals before them. But their judgments will necessarily reflect the way they have chosen to subjectively organize the world. (Lowenstein 2002: 47–48)*

Single Subject Requires A Single Standard

The legislature should consider taking up the task of defining "single-subject" for itself and for citizens so that there is not an issue going forward. That would require drafting a new constitutional amendment defining "single-subject" and placing that in front of voters.

If the legislature cannot find a way to define "single-subject" in a way that is workable for itself, then it certainly should not be holding The People to a standard it cannot reach on its own.

And if that is the case - the legislature should consider rescinding SCR 4013 (2024 Measure 2) until it can define the law in a way that the legislature can live up to that is fair to The People.

Afterall, in a government by the people, for the people, and of the people, why should The People be held to a higher standard than the legislature itself when it comes to defining the framework of government?

Considering that the legislature could not abide by its own single-subject rule (the 2023 OMB budget was just the first time they got caught), it should not be demanding that citizens follow such a rule without defining what that rule is.

Too Much Power In One Officials' Hands

Beyond the lack of defining what a "single-subject" is, and the fact that the legislature cannot meet the standard, the other issue is the concept of putting all the power in the Secretary of States' hands.

In other areas of Article III, the language directs the Secretary of State to consult with the Attorney General on these issues. But in the provisions of Measure 2, it cuts the Attorney General out of the process, and gives the Secretary of State sole discretion.

Why?

One answer is that by removing the legal analysis, the Secretary of State can make his/her decision on "gut feelings" rather than an actual legal rational.

When I have suggested this to legislators, they say that was not the intent.

If that is the case, the more simple conclusion is that the legislators that approve SCR 4013 just don't know how the current process works and didn't care to replicate the language to match other areas of the Article III of the constitution.

Measure 2 Itself Potentially Would Fail The "Single-Subject Rule"

Measure 2 itself is a complex ballot measure as illustrated by the language generated by the current Secretary of State.

OFFICIAL BALLOT LANGUAGE
FOR MEASURES APPEARING ON THE
ELECTION BALLOT
November 5, 2024

Vote by darkening the oval next to the word "YES" or "NO" following the explanation of each measure.

Constitutional Measure No. 2
(Senate Concurrent Resolution 4013, 2023 Session Laws, Ch. 598)

This constitutional measure would amend and reenact sections 2, 3, 4, and 9 of article III of the Constitution of North Dakota, relating to initiated constitutional amendments. The proposed amendments would require both constitutional and non-constitutional initiated measures to be limited to one subject as determined by the Secretary of State, who may not approve the initiated petition if it comprises more than one subject; require that measure sponsors be qualified electors; require that only qualified electors may circulate a petition; require petition signers to provide a complete residential address; and increase the number of signatures required to place a constitutional initiated measure on the ballot from four percent to five percent of the North Dakota resident population. Additionally, the proposed amendments would require that constitutional initiated measures approved by the Secretary of State be voted upon by the voters at the next primary election and, if approved by a majority of the voters, voted upon at the general election immediately following the primary election; if the measure fails at either the primary or general election, the measure is deemed failed.

The estimated fiscal impact of this measure is none.

Yes – Means you approve the measure as summarized above.
No – Means you reject the measure as summarized above.

By my count, there are 4 semi-colons within 2 sentences explaining what Measure 2 itself does. While each of these tackles the "topic" of initiated measures, are they all one subject, or is each action a subject.

An extremely aggressive enforcement the single subject rule could say there are 6 separate subjects in Measure 2:

1. **The single-subject rule itself;**
2. **Requiring measure sponsors be electors (which they already have to be);**
3. **Requiring circulators be electors (which is already in Century Code, despite federal courts striking down that same law in South Dakota);**

4. **Requiring residential addresses instead of mailing addresses;**
5. **Increasing the signature requirement for constitutional measures from 4% to 5%;**
6. **Requiring two separate votes of the people.**

Are all these things "one subject" or "one topic" addressing six different subjects?

We don't know because the "single-subject rule" is not defined.

Should only the Secretary of State make that decision, even though the Supreme Court had to get involved when the Legislature could not meet the standard?

Conclusions

Article III of the North Dakota Constitution is titled the "Powers Reserved the People".

While the idea of a single subject rule may sound good, without defining it, the only thing is can do is hinder the ability of the people to use the rights the constitution reserves to them.

Measure 2 places arbitrary and undefined power in the hands of one non-lawyer state official to make legal determinations. This can easily be abused, as it has been in other states.

All 6 of the actions in Measure 2 are designed to make it harder for the people to exercise their rights - and will have no impact on the special interests that have millions and millions of dollars to work with.

Measure 2 punishes North Dakota residents without deep pockets due to the problems created by special interests with unlimited resources.

It is wrong for the legislature to continue to try to convince voters they should give up the rights reserved to the voters.

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South Dakota Constitutional Amendment A, Marijuana Legalization Initiative (2020)

South Dakota Constitutional Amendment A, the **Marijuana Legalization Initiative**, was on the ballot in South Dakota as an initiated constitutional amendment on November 3, 2020. It was **approved** but overturned in a supreme court ruling.

A **"yes"** vote supported the constitutional amendment to legalize the recreational use of marijuana and require the South Dakota State Legislature to pass laws providing for the use of medical marijuana and the sale of hemp by April 1, 2022.

A **"no"** vote opposed legalizing marijuana for recreational use and requiring the state legislature to pass laws providing for the use of medical marijuana and the sale of hemp.

On February 8, 2021, Circuit Judge Christina Klinger ruled that the measure was unconstitutional, finding that it violated the state's single-subject rule and constituted a *revision* of the constitution rather than an amendment. Amendment A sponsors South Dakotans for Better Marijuana Laws appealed to the South Dakota Supreme Court, which upheld the lower court ruling.

South Dakota Constitutional Amendment A

Election date
November 3, 2020

Topic
Marijuana

Status
✔/ *Overturned*

Type
Constitutional amendment

Origin
Citizens

List of South Dakota measures

Submit

Aftermath

House Bill 1100

House Bill 1100 was introduced in the South Dakota House of Representatives on January 27, 2021, and was passed by the House in a vote of 40-28 on February 25, 2021. The bill stated that "Due to the pending litigation [surrounding Constitutional Amendment A], the Department of Health's continued efforts against COVID-19, and the complexity of marijuana's status under federal law, the State needs more time to establish a medical marijuana program with integrity and prudency than its current effective date of July 1, 2021." The bill was designed to amend language in Initiated Measure 26 to change the effective date from July 1, 2021, to January 1, 2022, and to delay the deadlines for certain provisions from Fall 2021 (under IM 26) to Spring 2022.[1]

On March 8, 2021, the Senate amended House Bill 1100 to allow the possession of up to one ounce of marijuana. The House did not concur with the Senate's amendments and a conference committee was appointed. The two chambers did not reach an agreement and the bill died on March 11, 2021.[1]

Lawsuit

Lawsuit overview

Issue: Whether the amendment comprises more than a single subject; whether the amendment is considered to be an *amendment* or a *revision* to the state constitution

Court: Hughes County Circuit Court appealed to the South Dakota Supreme Court

Ruling: Circuit Judge Christina Klinger ruled in favor of plaintiffs, overturning Amendment A; the ruling was upheld by the South Dakota Supreme Court upon appeal.

Plaintiff(s): Pennington County Sheriff Kevin Thom and South Dakota Highway Patrol Superintendent Rick Miller

Defendant(s): State of South Dakota; intervention by South Dakotans for Better Marijuana Laws and New Approach South Dakota

Plaintiff argument:
The measure comprises more than one subject; the measure does not simply *amend* the constitution but, rather, *revises* the constitution and therefore required a constitutional convention to be called for by a three-fourths vote of all the members of each house in the state legislature

Defendant argument:
Amendment A contains one subject to which all provisions are essentially related, and the state constitution's definition of *amendment* and *revision* is permissive, not obligatory.

Source: South Dakota Department of Public Safety

On February 8, 2021, Circuit Judge Christina Klinger ruled in favor of plaintiffs, finding that the measure violated the state's single-subject rule and was a *revision* of the constitution rather than amending it. Klinger wrote that "Amendment A is a revision as it has far-reaching effects on the basic nature of South Dakota's governmental system." Governor Kristi Noem (R) said, "Today's decision protects and safeguards our constitution. I'm confident that South Dakota Supreme Court, if asked to weigh in as well, will come to the same conclusion." Sponsors of the measure, South Dakotans for Better Marijuana Laws, appealed the ruling to the South Dakota Supreme Court. On November 24, 2021, the South Dakota Supreme Court upheld the circuit court ruling.[2][3] According to *Marijuana Moment*, Ian Fury, a spokesperson for the South Dakota Governor's office told *The Argus Leader* that proponents of the amendment should pay for the governor's legal fees because they "submitted an unconstitutional amendment and should reimburse South Dakota taxpayers for the costs associated with their drafting errors." South Dakotans for Better Marijuana Laws said, "South Dakota cannabis reform advocates have no obligation to pay for Governor Noem's political crusade to overturn the will of the people. To suggest otherwise is ridiculous."[4]

Pennington County Sheriff Kevin Thom and South Dakota Highway Patrol Superintendent Rick Miller filed a lawsuit in Hughes County Circuit Court seeking to block Amendment A from taking effect. Plaintiffs alleged that the measure comprises more than one subject and that the measure does not simply *amend* the constitution but, rather, *revises* the constitution and therefore required a constitutional convention to be called for by a three-fourths vote of all the members of each house in the state legislature. Miller said, "Our constitutional amendment procedure is very straightforward. In this case, the group bringing Amendment A unconstitutionally abused the initiative process. We're confident that the courts will safeguard the South Dakota Constitution and the rule of law."[5]

In South Dakota, all citizen initiatives—both initiated constitutional amendments and initiated state statutes—must concern only one subject. South Dakota did not have a single-subject rule for ballot measures until 2018. Constitutional Amendment Z was approved on November 6, 2018. It enacted a single-subject rule to initiated constitutional amendments and legislatively referred constitutional amendments and required that constitutional amendments be presented so that multiple proposed amendments to the constitution be voted on separately.[5]

Plaintiffs alleged that the measure concerns five subjects: legalizing marijuana; regulating, licensing, and taxing marijuana; licensing and regulating marijuana by political subdivisions; regulating medical marijuana; and regulation of hemp.[5]

Article XXIII of the South Dakota Constitution provides that a constitutional amendment "may amend one or more articles and related subject matter in other articles as necessary to accomplish the objectives of the amendment; however, no proposed amendment may embrace more than one subject."

Plaintiffs alleged that Amendment A should be considered a *revision* to the constitution rather than an *amendment* and therefore that the measure should be declared invalid. In South Dakota, revisions to the constitution may be called by a three-fourths vote of all the members in each house of the state legislature. Revisions resulting from a revision convention would require a majority vote of members of the convention before being placed on the ballot for voter ratification.

Proponents of the measure, South Dakotans for Better Marijuana Laws, said, "We are prepared to defend Amendment A against this lawsuit. Our opponents should accept defeat instead of trying to overturn the will of the people. Amendment A was carefully drafted, fully vetted, and approved by a strong majority of South Dakota voters this year."[5]

The office of the South Dakota Attorney General asked the court to dismiss the lawsuit. Hughes County Circuit Judge Christina Klinger granted requests by South Dakotans for Better Marijuana Laws and New Approach South Dakota to intervene, allowing the groups' attorneys to file arguments in defense of the measure.[6]

CannabisWire reported that this is the first time a state's governor led an effort to overturn a marijuana legalization measure passed by voters. Governor Kristi Noem (R) said, "I directed [petitioners] to commence the Amendment A litigation on my behalf."[7][8]

Election results

South Dakota Constitutional Amendment A		
Result	Votes	Percentage
✔ **Yes**	**225,260**	54.18%
No	190,477	45.82%

Results are officially certified.
Source

Overview

What did Constitutional Amendment A do?

See also: Measure design

Amendment A legalized the recreational use of marijuana for individuals 21 years old and older. Under the measure, individuals are allowed to possess or distribute up to one ounce of marijuana. The amendment required the South Dakota State Legislature to pass laws providing for a program for medical marijuana and the sale of hemp by April 1, 2022.[9]

Individuals who live in a jurisdiction with no licensed retail stores can grow up to three marijuana plants in a private residence in a locked space, though not more than six marijuana plants could be kept in one residence at a time. Under the amendment, marijuana sales were set to be taxed at 15%. After the tax revenue is used by the Revenue Department to cover costs associated with implementing the amendment, 50% of the remaining revenue was set to be appropriated to fund state public schools and 50% would be deposited in the state's general fund.[9]

Under the amendment, a local government could ban marijuana cultivators, testing facilities, wholesalers, or retail stores from operating in its limits. Under the amendment, a local government cannot prohibit the transportation of marijuana on public roads in its jurisdiction by those who are licensed to do so.

How did Constitutional Amendment A get on the ballot?

See also: Path to the ballot

The initiative was filed by Brendan Johnson, former U.S. Attorney for the District of South Dakota. Proponents reported submitting more than 50,000 signatures on November 4, 2019. On January 6, 2020, the South Dakota Secretary of State's office announced that proponents of the measure had submitted 36,707 valid signatures, indicating a signature validity rate of about 73%.[10]

What did the *other* marijuana initiative on the ballot do?

See also: South Dakota Initiated Measure 26, Medical Marijuana Initiative (2020)

Initiated Measure 26 was also on the 2020 ballot in South Dakota. It established a medical marijuana program in South Dakota for individuals who have a debilitating medical condition as certified by a physician. New Approach South Dakota, Marijuana Policy Project, and South Dakotans for Better Marijuana Laws support Initiated Measure 26 as well as Constitutional Amendment A. South Dakota was the first state to vote on recreational and medical marijuana at the same election.[11]

What is the status of recreational and medical marijuana in the United States?

See also: Recreational marijuana in the United States, Medical marijuana in the United States, and Federal policy on marijuana

As of 2020, 33 states and Washington, D.C., had passed laws legalizing or decriminalizing medical marijuana. Additionally, 13 states had legalized the use of cannabis oil, or cannabidiol (CBD)—one of the non-psychoactive ingredients found in marijuana—for medical purposes. As of 2020, 11 states and the District of Columbia had legalized marijuana for recreational purposes; nine through statewide citizen initiatives, and two through bills approved by state legislatures and signed by governors.

The federal government has classified marijuana as an illegal controlled substance since 1970. Marijuana is a Schedule I drug under the Controlled Substances Act (CSA). As of 2020, the possession, purchase, and sale of marijuana were illegal under federal law.

Measure design

Amendment A legalized the recreational use of marijuana for individuals 21 years old and older. Under the measure, individuals are allowed to possess, use, and distribute up to one ounce of marijuana. No more than eight grams can be in a concentrated form.[9]

Amendment A required the South Dakota State Legislature to pass laws providing for a program for medical marijuana and the sale of hemp by April 1, 2022. The measure required the Department of Revenue to adopt rules and regulations to implement the amendment including the issuance of licenses, health and safety requirements, and more.[9]

Home-grow provisions

Individuals who live in a local government jurisdiction with no licensed retail stores may grow up to three marijuana plants. The plants need to be kept in a private residence in a locked space that is not visible from a

public place. Not more than six marijuana plants can be kept in one residence at a time, regardless of how many individuals may grow marijuana plants.[9]

Civil penalties

The amendment provided for the following civil penalties (fines):[9]

- $250 if a person grows marijuana plants that are visible from a public place;
- $250 if cultivated marijuana plants are not kept in a locked space;
- $250 if a person grows marijuana in a local government jurisdiction that has marijuana retail stores (unless the jurisdiction has authorized home-grow for individuals);
- $100 for smoking marijuana in a public place unless the place is licensed for such activity;
- $100 *or* attending up to four hours of a drug education/counseling program for smoking marijuana if a person is under the age of 21.

Taxes on marijuana sales

Under the amendment, marijuana sales were set to be taxed at 15%. Under the amendment, the South Dakota State Legislature can adjust the tax rate after November 3, 2024. After the tax revenue is used by the Revenue Department to cover costs associated with implementing the amendment, 50% of the remaining revenue was set to be appropriated to fund state public schools and 50% would be deposited in the state's general fund.[9]

Licenses types

The measure authorized the Department of Revenue to create four licenses types, as follows:

- licenses for commercial cultivators;
- licenses for testing facilities;
- licenses for wholesalers to package, process, and distribute marijuana to retail sales outlets; and
- licenses for retail stores to sell marijuana.

Amendment A directed the Department to issue "enough licenses to substantially reduce the illicit production and sale of marijuana throughout the state" and, if necessary, limit licenses "to prevent an undue concentration of licenses in any one municipality."[9]

Local government regulation

Amendment A authorized local governments to enact regulations surrounding licensees operating in its jurisdiction, including how many licensees there can be and where they may be located. Under the amendment, a local government can ban licensees or any category of licensee from operating in its limits. Under the amendment, a local government cannot prohibit the transportation of marijuana on public roads in its jurisdiction by those who are licensed to do so.[9]

Text of measure

Ballot title

The ballot title for this measure was as follows:[9]

> 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.[12]

Ballot summary

The ballot explanation for this measure was as follows:[9][13]

> This constitutional amendment legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older. Individuals may possess or distribute one ounce or less of marijuana. Marijuana plants and marijuana produced from those plants may also be possessed under certain conditions.
>
> The amendment authorizes the State Department of Revenue ("Department") to issue marijuana-related licenses for commercial cultivators and manufacturers, testing facilities, wholesalers, and retailers. Local governments may regulate or ban the establishment of licensees within their jurisdictions.
>
> The 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.
>
> The amendment imposes a 15% tax on marijuana sales. The tax revenue will be used for the Department's costs incurred in implementing this amendment, with remaining revenue equally divided between the support of public schools and the State general fund.
>
> Judicial clarification of the amendment may be necessary. The amendment legalizes some substances that are considered felony controlled substances under current State law. Marijuana

Constitutional changes

See also: South Dakota Constitution

The measure added a new article to the South Dakota Constitution. The following underlined text was added:[9] *Note*: Use your mouse to scroll over the text below to see the full text.

> § 1. Terms used in this article mean:
>
> (1) "Department," the Department of Revenue or its successor agency;
> (2) "Hemp," the plant of the genus cannabis, and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis;
> (3) "Local government," means a county, municipality, town, or township;
> (4) "Marijuana," the plant of the genus cannabis, and any

Readability score

See also: Ballot measure readability scores, 2020

Using the Flesch-Kincaid Grade Level (FKGL and Flesch Reading Ease (FRE) formulas, Ballotpedia scored the readability of the ballot title and summary for this measure. Readability scores are designed to indicate the reading difficulty of text. The Flesch-Kincaid formulas account for the number of words, syllables, and sentences in a text; they do not account for the difficulty of the ideas in the text. The state legislature wrote the ballot language for this measure.

The FKGL for the ballot title is grade level 20, and the FRE is 13. The word count for the ballot title is 34, and the estimated reading time is 9 seconds. The FKGL for the ballot summary is grade level 15, and the FRE is 15. The word count for the ballot summary is 196, and the estimated reading time is 52 seconds.

Support

South Dakotans for Better Marijuana Laws led the campaign in support of Amendment A.[14] Drey Samuelson was the political director for both Constitutional Amendment A and Initiated Measure 26 on the 2020 ballot.[15][16][17]

Supporters

Organizations

- Marijuana Policy Project
- New Approach PAC
- South Dakotans for Better Marijuana Laws

Arguments

- **South Dakotans for Better Marijuana Laws:** "Our mission is to reform South Dakota's harmful and outdated marijuana policies. We believe arresting adults for something objectively safer than alcohol is a wasteful and unjust use of public resources. We also believe patients deserve safe, legal access to medical marijuana."

Official arguments

- **Ballot Question Pamphlet Arguments:** "Amendment A will legalize, regulate, and tax marijuana for adults 21 and older and require that patients be protected for medical use. Amendment A is designed specifically for South Dakota to work for South Dakotans. Amendment A: •Includes strong protections for children. Marijuana will only be sold to adults age 21 or older in regulated, licensed businesses that check I.D. before every single sale. •Protects health. When marijuana is sold on the illicit market it can be contaminated with chemicals or laced with other drugs. Amendment A will ensure that consumers know what they are buying and consuming and that products are safe. •Creates jobs: All marijuana sold in South Dakota must be grown and packaged inside our borders, which will lead to hundreds of jobs for construction workers, plumbers, electricians, HVAC workers, laborers, and retail workers. •Creates new revenue: According to the Legislative Research Council, Amendment A will generate $60M by 2024, including millions of

*The arguments in support of Constitutional Amendment A in the 2020 Ballot Question Pamphlet were written by **Brendan Johnson** (former South Dakota U.S. Attorney); **Chuck Parkinson** (former Associate Commissioner, U.S. Customs Service, Presidents Ronald Reagan, and George H.W. Bush); **Bill Stocker** (retired Marine, disabled veteran, retired Sioux Falls Police Officer); and **Drey Samuelson** (Campaign Manager).*[18]

Opposition

NO Way on Amendment A led the campaign in opposition to Amendment A. The committee was filed by David Owen, president of the South Dakota Chamber of Commerce.[19]

Opponents

Organizations

- Association of General Contractors
- Greater Sioux Falls Chamber of Commerce
- South Dakota Association of Cooperatives
- South Dakota Association of Healthcare Organizations
- South Dakota Chamber of Commerce
- South Dakota Farm Bureau
- South Dakota Retailers Association
- South Dakota State Medical Association

Arguments

- **South Dakota Chamber of Commerce and Industry:** The chamber said, "While Amendment A says businesses can refuse to hire people that fail a drug test now, the States of New York and Nevada

have recently passed laws that prohibit that very activity; meaning businesses can no longer use a failed drug test as a reason to not hire an applicant." A board member of the South Dakota Chamber of Commerce and Industry said, "We can't find anyone that can pass a drug test now; you make pot legal and we won't have a workforce." The chamber said that the measure does not belong in the constitution because "The only way to change any of the provisions of Amendment A if it passes will be to put it back on the ballot for another election. That only happens every two years and is expensive." The chamber also said that people under the age of 21 will have increased access to marijuana and that marijuana legalization will result in an increase in fatal car accidents due to people driving under the influence.

Official arguments

- **Ballot Question Pamphlet Arguments:** "The South Dakota State Medical Association urges a "no" vote and maintains that marijuana is a hazardous drug and a public health concern. As such, the SDSMA believes the sale and possession of marijuana – especially for recreational purposes – should not be legalized. At the time of this writing, the DEA has more than doubled the number of individuals and institutions allowed to conduct research on marijuana, as well as increasing the amount of marijuana to study due to public demand – this includes over 90 researchers registered to conduct CBD research on humans. Marijuana remains classified by the federal government as a schedule 1 drug – meaning there is no accepted medical use and a drug with a high potential for abuse. Research has shown marijuana to be highly addictive with well documented negative consequences with both short- and long-term use. Consequences include impaired short-term memory and decreased concentration, attention span, and problem solving. Alterations in motor

The arguments in opposition to Constitutional Amendment A in the 2020 Ballot Question Pamphlet were written by ***Benjamin Aaker, MD*** *(South Dakota State Medical Association President).*[20]

Campaign finance

See also: Campaign finance requirements for South Dakota ballot measures

The campaign finance information on this page reflects the most recent scheduled reports that Ballotpedia has processed, which covered through **December 31, 2020**.

New Approach South Dakota and **South Dakotans for Better Marijuana Laws** supported Initiated Measure 26 **and** Constitutional Amendment A. Together, the committees raised $2.35 million and spent $1.6 million. New Approach PAC contributed $1.82 million in cash and $54,892 in in-kind contributions to both committees.[21]

South Dakotans for Better Marijuana Laws spent $595,235.22 on signature gathering to collect the 33,921 required signatures for Constitutional Amendment A, resulting in a cost-per-required-signature of $17.55. The committee also spent $252,616.78 on signature gathering to collect the 16,961 required signatures for Initiated Measure 26, resulting in a cost-per-required-signature of $14.89. That amount was reported as an in-kind contribution given to New Approach South Dakota.[21]

No Way on Amendment A opposed Amendment A. The committee reported $259,035 in contributions and $249,035 in expenditures. South Dakota Chamber Ballot Action Committee was the largest donor, which

provided $87,325.[21]

	Cash Contributions	In-Kind Contributions	Total Contributions	Cash Expenditures	Total Expenditures
Support	$1,941,158.79	$412,105.37	$2,353,264.16	$1,190,373.91	$1,602,479.28
Oppose	$259,035.00	$0.00	$259,035.00	$249,035.00	$249,035.00
Total	$2,200,193.79	$412,105.37	$2,612,299.16	$1,439,408.91	$1,851,514.28

To avoid double-counting funds, Ballotpedia subtracts contributions from one committee to another from the contributing committee's contributions and expenditures.

Support

Committees in support of Constitutional Amendment A

Committee	Cash Contributions	In-Kind Contributions	Total Contributions	Cash Expenditures	Total Expenditures
South Dakotans for Better Marijuana Laws	$1,865,753.79	$125,221.94	$1,990,975.73	$1,116,168.35	$1,241,390.29
New Approach South Dakota	$75,405.00	$286,883.43	$362,288.43	$74,205.56	$361,088.99
Total	$1,941,158.79	$412,105.37	$2,353,264.16	$1,190,373.91	$1,602,479.28

Top donors

The top five donors to the support campaign are listed below.

Donor	Cash Contributions	In-Kind Contributions	Total Contributions
New Approach PAC	$1,867,115.94	$54,152.97	$1,921,268.91
FSST Pharms, LLC	$100,000.00	$0.00	$100,000.00
Justin Johnson	$100,000.00	$0.00	$100,000.00
Marijuana Policy Project	$4,129.03	$54,891.55	$59,020.58
Riichard J Steves Jr	$50,000.00	$0.00	$50,000.00

Opposition

Committees in opposition to Constitutional Amendment A

Committee	Cash Contributions	In-Kind Contributions	Total Contributions	Cash Expenditures	Total Expenditures
No Way on Amendment A	$259,035.00	$0.00	$259,035.00	$249,035.00	$249,035.00
Total	$259,035.00	$0.00	$259,035.00	$249,035.00	$249,035.00

Top donors

The top five donors to the opposition campaign are listed below.

Donor	Cash Contributions	In-Kind Contributions	Total Contributions
South Dakota Chamber Ballot Action Committee	$87,325.00	$0.00	$87,325.00
Open for Business	$50,000.00	$0.00	$50,000.00

Avera Health	$20,000.00	$0.00	$20,000.00
SDEUC Ballot Question Committee	$20,000.00	$0.00	$20,000.00
Daugaard For South Dakota	$10,000.00	$0.00	$10,000.00

Methodology

To read Ballotpedia's methodology for covering ballot measure campaign finance information, click here.

Polls

See also: Ballotpedia's approach to covering polls and 2020 ballot measure polls

Mason-Dixon Polling & Strategy conducted a poll of 625 registered South Dakota voters from October 19-21, 2020. Participants were asked how they planned to vote on the measure. Poll results for the measure are detailed below.

South Dakota Constitutional Amendment A [hide]					
Poll	**Support**	**Oppose**	**Undecided**	**Margin of error**	**Sample size**
Mason-Dixon Polling & Strategy poll 10/19/20 - 10/21/20	51.0%	44.0%	5.0%	+/-4.0	625
Note: The polls above may not reflect all polls that have been conducted in this race. Those displayed are a random sampling chosen by Ballotpedia staff. If you would like to nominate another poll for inclusion in the table, send an email to editor@ballotpedia.org.					

Background

Recreational marijuana in the United States

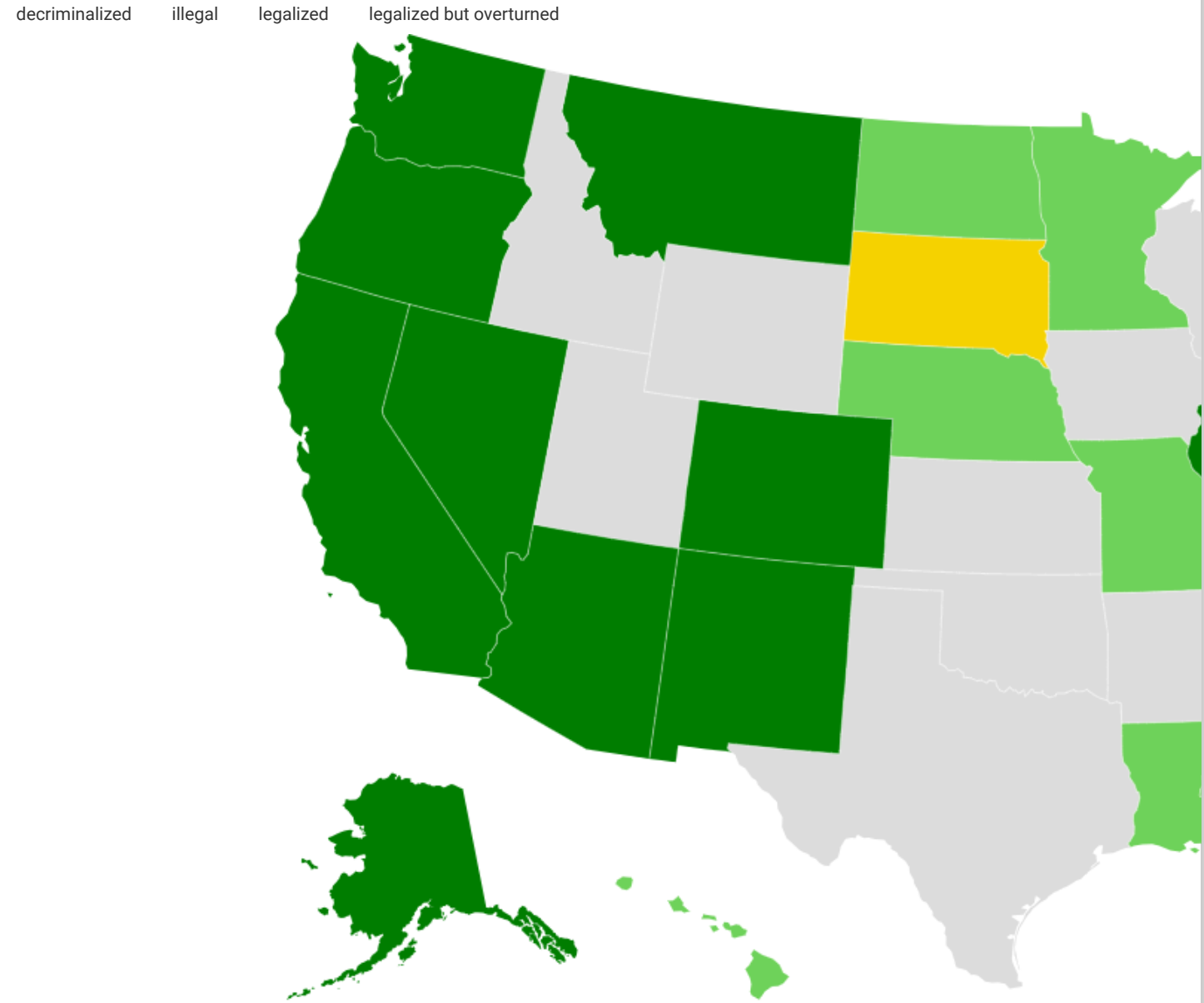
See also: Marijuana laws and ballot measures in the United States

As of July 2019, 11 states and the District of Columbia had legalized marijuana for recreational purposes; nine through statewide citizen initiatives, and two through bills approved by state legislatures and signed by governors. Colorado and Washington both opted to legalize **recreational marijuana** in 2012. In a subsequent Colorado measure, voters enacted a statewide marijuana taxation system. The three ballot measures that passed in 2014 were Oregon's Measure 91, Alaska's Measure 2, and the District of Columbia's Initiative 71. Voters in California, Maine, Massachusetts, and Nevada approved recreational marijuana legalization ballot measures in November 2016. The Vermont State Legislature approved a bill in mid-January 2018 to allow recreational marijuana, and Gov. Phil Scott (R) signed it into law on January 22, 2018. Gov. Scott vetoed a previous bill to legalize marijuana in May 2017. On June 25, 2019, Illinois Gov. J.B. Pritzker signed a bill into law legalizing the use and possession of recreational marijuana. Initiatives legalizing recreational marijuana were on the ballot in November 2018 in Michigan and North Dakota. The Michigan initiative was approved, and the North Dakota initiative was defeated.[22][23][24]

The map below details the status of recreational marijuana legalization in the states as of November 2018. States shaded in green had legalized recreational marijuana usage (the shades of green indicate the years in which ballot measures were adopted; light green indicates measures approved in 2012, medium green

indicates measures approved in 2014, medium-dark green indicates measures approved in 2016, and dark green indicates measures approved in 2018). The states shaded in dark gray had defeated ballot measures that proposed to legalize recreational marijuana. States in blue had recreational marijuana approved by the state legislature and signed by the governor. The remaining states (those shaded in light gray) had not legalized recreational marijuana.

Recreational marijuana legal status as of January 2022



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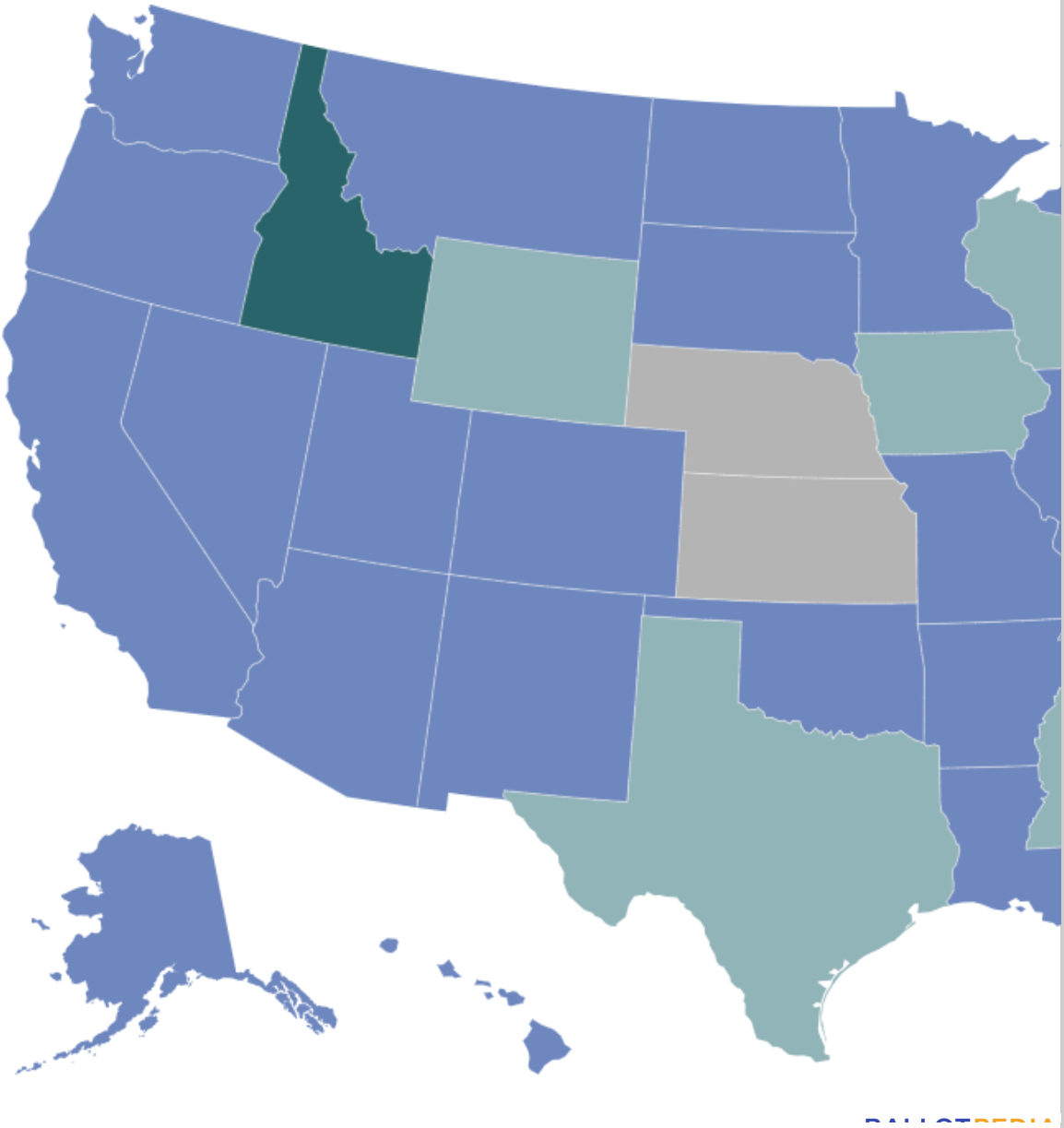
Medical marijuana in the United States

See also: Medical marijuana and Marijuana laws and ballot measures in the United States

As of May 2021, 36 states and Washington, D.C., had passed laws legalizing or decriminalizing **medical marijuana**. Additionally, 10 states had legalized the use of cannabis oil, or cannabidiol (CBD)—one of the non-psychoactive ingredients found in marijuana—for medical purposes.[25] In one state—Idaho—medical marijuana was illegal, but the use of a specific brand of FDA-approved CDB, Epidiolex, was legal.[26] Based on 2019 population estimates, 67.5 percent of Americans lived in a jurisdiction with access to medical marijuana.

Medical marijuana by state

States shaded in blue had passed laws permitting the use of medical marijuana. The states in green allowed for the use of CBD in some circumstances but did not allow medical marijuana. Dark green indicates the state did not allow medical marijuana and allowed only a specific brand of cannabis oil. The states shaded in tan did not allow medical marijuana or the use of any type of cannabis oil.



Unique instances

Idaho: In 2015, the Idaho State Legislature passed a bill legalizing certain types of CBD oil that was later vetoed by Governor Butch Otter (R). In response, Otter issued an executive order allowing children with intractable epilepsy to use Epidiolex in certain circumstances. [27]

South Dakota: In 2019, the South Dakota State Legislature passed a bill amending one section of law by adding Epidiolex to its list of controlled substances. The bill also exempted CBD from the state's definition of marijuana in that section.[28] Elsewhere in state law, CBD was *not* exempted from the definition of marijuana. This discrepancy led to confusion that left the legal status of CBD in the state unclear for a year.[29]

After the 2019 changes, Attorney General Jason Ravnsborg (R) issued a statement, wherein he argued all forms of CBD oil, apart from Epidiolex, were illegal under state law.[30] Several state's attorneys expressed disagreement with the Attorney General's statements. Aaron McGown and Tom Wollman, state's attorneys for

Minnehaha and Lincoln counties, respectively, issued a joint statement where they said the discrepancy left legality open to differing interpretations. Mark Vargo, the Pennington County state's attorney, said his office would not prosecute CBD cases based on his interpretation of the state law.[29]

On March 27, 2020, Gov. Kristi Noem (R) signed House Bill 1008 into law, which legalized industrial hemp and CBD oil in the state.[31]

Federal policy on marijuana

See also: Federal policy on marijuana, 2017-2018

The federal government has classified marijuana as an illegal controlled substance since 1970. Marijuana is a Schedule I drug under the Controlled Substances Act (CSA). According to the White House Office of National Drug Control Policy, marijuana has "high abuse potential and no approved therapeutic use through the Food and Drug Administration (FDA) process for establishing medications."[32]

On January 4, 2018, the Trump administration rescinded the Cole Memorandum, a 2013 policy that deprioritized the enforcement of federal marijuana laws in states where marijuana had been legalized. Attorney General Jeff Sessions said that in deciding which activities to prosecute under federal laws, such as the Controlled Substances Act, "prosecutors should follow the well-established principles that govern all federal prosecutions. ... These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community."[33][34]

As of 2020, the possession, purchase, and sale of marijuana were illegal under federal law.

The following table compares a selection of provisions, including possession limits, local control, taxes, and revenue dedications, of ballot initiatives that were designed to legalize marijuana.

Click "Show" to expand the table.

Comparison of marijuana ballot measure provisions, 2012-2022 [show]

The following table provides information on the political context of the states that had voted on legalization measures as of 2022.

Click "Show" to expand the table.

Political factors and marijuana ballot measures, 2012-2022 [show]

Marijuana on the ballot in 2020

See also: 2020 marijuana legalization and marijuana-related ballot measures

State ballot measures

The following is a list of marijuana-related statewide ballot measures that were on the ballot in 2020:

Ballot Measure:	Outcome:
Mississippi Initiative 65 and Alternative 65A: Medical Marijuana Amendment	

Marijuana on the South Dakota ballot

South Dakotans rejected medical marijuana initiatives in 2006 and 2010. Initiative 4 on the 2006 ballot was defeated by a vote of 52% against to 48% in favor. Initiative 13 on the 2010 ballot was defeated by a vote of 63% against to 37% in favor.

Path to the ballot

See also: Laws governing the initiative process in South Dakota

The state process

In South Dakota, the number of signatures required to qualify an initiated constitutional amendment for the ballot is equal to 10 percent of the votes cast for governor in the previous gubernatorial election. Signatures must be submitted by the first Tuesday of May during a general election year.

The requirements to get an initiated constitutional amendment certified for the 2020 ballot:

- **Signatures**: 33,921 valid signatures were required.
- **Deadline**: The deadline to submit signatures was November 4, 2019.

Once the signatures have been gathered and filed, the secretary of state verifies the signatures using a random sample method.

Details about this initiative

- Brendan Johnson, former U.S. Attorney for the District of South Dakota, sponsored the initiative. It was approved for circulation on September 11, 2019.[35]
- Proponents reported submitting more than 50,000 signatures on November 4, 2019.[16]
- The South Dakota Secretary of State's office announced the measure qualified for the ballot on January 6, 2020, after finding through a random sample that proponents submitted about 36,707 valid signatures.

Cost of signature collection:
Sponsors of the measure hired a signature gathering company to collect signatures for the petition to qualify this measure for the ballot. A total of $595,235.22 was spent to collect the 33,921 valid signatures required to put this measure before voters, resulting in a total cost per required signature (CPRS) of $17.55.

How to cast a vote

See also: Voting in South Dakota

Click "Show" to learn more about voter registration, identification requirements, and poll times in South Dakota.

How to cast a vote in South Dakota	[show]

See also

2020 measures

- 2020 ballot measures
- Marijuana on the ballot

South Dakota

- South Dakota ballot measures
- South Dakota ballot measure laws

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- Ballot measure lawsuits
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External links

- Attorney General's statement and full text
- 2020 Ballot Question Pamphlet

Support

- South Dakota for Better Marijuana Laws campaign website
- South Dakota for Better Marijuana Laws Facebook page
- South Dakota for Better Marijuana Laws Twitter page

Opposition

Submit links to editor@ballotpedia.org.

Footnotes

1. *South Dakota State Legislature*, "House Bill 1100," accessed February 22, 2021
2. *Spectrum News 1*, "South Dakota judge rejects amendment legalizing marijuana," accessed February 9, 2021
3. *Marijuana Moment*, "South Dakota Supreme Court Invalidates 2020 Marijuana Legalization Initiative As Activists Pursue 2022 Ballot," November 24, 2021
4. *Marijuana Moment*, "South Dakota Governor Wants Marijuana Activists To Pay Legal Bill For Her Lawsuit That Blocked Legalization," accessed January 14, 2022
5. *Dakota News Now*, "Lawsuit filed challenging South Dakota's voter-approved recreational marijuana

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Aggressive Enforcement of the Single Subject Rule

John G. Matsusaka and Richard L. Hasen*

Most states require voter initiatives to embrace only a single subject, and courts have invalidated many initiatives for violating the single subject rule. Critics argue that the definition of a "subject" is infinitely malleable, so that if judges attempt to enforce the single-subject rule aggressively, their decisions will be based on their personal views rather than neutral principles. We investigate this argument by studying the decisions of state appellate court judges in five states during the period 1997–2006. We find that judges are more likely to vote to uphold an initiative against a single subject challenge if their partisan affiliations suggest they would be sympathetic to the policy proposed by the initiative. More important, we find that partisan affiliation is highly consequential in states with aggressive enforcement of the single subject rule — the rate of voting to uphold an initiative jumps from 41 percent when a judge agrees with the policy to 83 percent when he disagrees — but not very consequential in states with restrained enforcement. The evidence suggests that it may be possible to apply the single subject rule in a neutral way when the judiciary is restrained, but with aggressive enforcement decisions are likely to driven by the political preferences of judges.

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I. Introduction

The single subject rule, on the books in at least 14 states, requires that initiatives embrace only one subject.[1] This paper studies the decisions of state judges in cases in which opponents of voter initiatives raised single subject claims. Courts used the rule to strike down or remove initiatives from voter consideration in at least 70 cases during the period 1997–2006 in five initiative states applying the rule.[2]

The single subject rule is controversial in part because the definition of a "single subject" is unclear and, as Daniel Lowenstein has argued, it is infinitely malleable in theory.[3] As a result, courts have a great deal of discretion in single subject cases, unless the judges themselves put meaningful restraints on their interpretation of the rule. Because of the discretion inherent in deciding single subject challenges, critics have argued that the rule cannot be enforced in an objective manner and should not be used (Hasen, 2006; Campbell, 2001: 163), or, as Lowenstein (1983, 2002) argues, should be used only in a restrained manner. Defenders have responded that the rule is amenable to objective application and that in practice judges have not allowed their personal beliefs to influence their decisions.[4]

Inspired by Lowenstein's analysis of the dangers of aggressive enforcement of the single subject rule, this paper investigates single subject rulings in five key initiative states over a 10-year period to determine the extent to which partisan inclinations, career

[1] The 14 states are Alaska, Arizona, California, Colorado, Florida, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Washington, and Wyoming. See Waters (2003). Downey (2004) and Dubois and Feeney (1998) have somewhat different counts, but these discrepancies are not important for purposes of this Article. All authors agree that the five states studied here – California, Colorado, Florida, Oregon, and Washington – have a single-subject rule applicable to voter initiatives. We are not here concerned with the single subject rule for laws passed by the legislature. Most states have such a rule.

[2] See Part IV below.

[3] Lowenstein (2002, 47): "The difficulty of applying the term 'subject' in a single subject rule . . . is that by its very nature, the permissible content of a 'subject' is infinitely and essentially malleable."

[4] For example, Gilbert (2006, p. 810) proposes the following definition: "A bill can be said to embrace but one subject when all of its components command majority support due to their individual merits or legislative bargaining and the title gives notice of the bill's contents." Cooter and Gilbert (2010) propose a "separable preference" principle for applying the single subject rule that they argue can be applied neutrally. Gilbert (2009) argues that judges do in fact apply a neutral principle.

concerns, and other factors that should be irrelevant in deciding single subject challenges play a role in judicial decisions. Our main finding is that decisions in single subject cases are heavily influenced by a judge's partisan inclinations, but that the amount of partisan influence depends on whether the state's judicial doctrine directs judges to apply the single-subject rule aggressively or with restraint. Specifically, in a sample of 154 cases during the period 1997–2006, we find that in states with aggressive enforcement judges voted to uphold an initiative 83 percent of the time when it proposed a policy congruent with their partisan leanings but voted to uphold only 41 percent of the time when an initiative proposed a policy at odds with their partisan leanings. In contrast, in states with restrained enforcement judges voted to uphold 88 percent of congruent cases and 81 percent of noncongruent cases.

This evidence provides strong support for Lowenstein's argument that aggressive enforcement is inevitably subjective:

> Because "subjects" are chosen for convenience, notions of what forms a coherent subject in politics and legislation will depend in part on ideologies and "world-views." When judges apply the single subject rule aggressively, even if they seek to do so in accord with their sense of what the public understanding is, they will inevitably be exercising their own judgments in the most general way about what makes good political or policy sense. That is not to say that their single subject rule judgments will necessarily turn on whether they personally favor the proposals before them. But their judgments *will* necessarily reflect the way they have chosen to subjectively organize the world. (Lowenstein 2002: 47–48)

The evidence suggests that in practice the way judges subjectively organize the world is closely linked to their political ideologies, causing their single-subject decisions to be strongly connected to their political views concerning the policy proposed by the initiative.

In addition to its relevance for understanding initiatives and the single subject rule, our study speaks to broader issues related to judicial behavior, discretion, and the rule of law. At the heart of the rule of law is the idea that judges make decisions based on

general rules rather than to achieve particular policy outcomes. Rule-based decisions create predictability in the legal system, which is conducive to enterprise, and provide a form of equality before the law, which is essential for justice.[5] This idea is central to the legal model of judging, which holds that decisions should be impartial, objective, unrelated to a judge's personal experiences and attitudes, and driven by legal doctrine and rules (Heise 2002). Unfortunately, empirical legal scholars have unearthed a great deal of evidence that is inconsistent with the legal model. Well known examples include Cross and Tiller (1998), Revesz (1997), and Sisk et al. (1998). In particular, numerous studies have found that partisan attitudes influence judicial decisions, mainly for federal judges, leading to what is sometimes called the behavioral or political model of judging (Heise 2002). Our study contributes to this body of knowledge by showing the importance of partisan affiliation in the context of state decisions. In contrast to most previous research, which finds measurable but modest effects of partisanship, we find effects that are quite large.

Public choice scholars have advanced another model of judging that posits decisions are driven by career concerns of judges. (See Posner (1993) and McNollgast (1995) for theoretical arguments.) For example, in the federal context, judges may tailor their decisions to appeal to the President in order to increase their chances of appointment to a higher court. The public choice model is supported by a large empirical literature showing that judges decide differently when they must stand for re-election compared to when they are independent of the voters. (For example, see Hanssen (1999), La Porta et al. (2004), Klerman and Mahoney (2005), and Lim (2008).) In all of the states we study, judges face periodic elections. A judge who rules against a voter initiative runs the risk of being accused of behaving anti-democratically when he or she stands for re-election,

[5] Hayek (1960: 208): "There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here." Page 214: "[T]he essence of the rule of law [is] that the private citizen and his property should not … be means at the disposal of government. Where coercion is to be used only in accordance with general rules, the justification of every particular act of coercion must derive from such a rule. To ensure this, there must be some authority which is concerned only with the rules and not with any temporary aims of government." Page 218: "Judicial forms are intended to insure that decisions will be made according to rules and not according to the relative desirability of particular ends or values."

which could imperil his or her prospects of remaining in office. To assess the importance of career concerns, we examine if judges behave differently when they are about to face the voters than when their next election is many years distant, and if they behave differently when they are on the verge of retirement than when they have many years of judging ahead of them. Consistent with the idea that career concerns matter, we find evidence that younger judges were less likely to strike down an initiative than older judges who were closer to retirement. However, we fail to find statistically significant evidence that behavior is different when a judge is about to stand for re-election than when an election is many years away, which is inconsistent with the public choice model. In neither case, are the career concern effects large.

These findings taken together have two implications for the question of what can be done to minimize the role of partisanship in judicial decisions and increase objectivity. In terms of external solutions, our evidence suggests that increasing judicial accountability or reducing judicial independence through re-elections is likely to be of little help. There is even a countervailing danger with frequent elections that judges may replace one form of bias (the judge's partisan leanings) with another (catering to the majority of the electorate). In terms of internal solutions, some scholars have suggested that judges should be encouraged to become more self-aware or self-conscious of the influence of political attitudes on their decisions. (For example, Sisk (2000: 211).) That seems a worthwhile aspiration, but may not be a realistic solution since the danger of partisan influence has been known for some time yet still appears in the data. Our finding that judicial bias is severe with aggressive enforcement but modest with restrained enforcement suggests a different possible approach, through the use of a decisionmaking principle or "canon" of interpretation that begins with deference to the initiative.[6]

If courts approach the single subject rule with a restrained rather than aggressive approach, our evidence suggests that the role of partisan leanings will be sharply minimized. We believe our finding that the role of partisanship is strongly connected to the degree of aggressiveness in enforcement of a law is novel. At the most general level, it raises the question whether aggressive judging is likely to be more prone to partisan

[6] On the role of canons of constructions applicable in interpreting direct democracy legislation, see Frickey (1996) and Eskridge et al. (2007).

decisionmaking than restrained judging in other contexts.[7] In terms of the single subject rule itself, our evidence suggests that the most effective way to promote objectivity may be to adopt a restrained approach rather than to seek additional interpretive "tests" that operationalize the concept of a single subject.

This Article proceeds as follows. Part II gives background on the single subject rule in law and theory. Part III reviews the little empirical evidence that others have collected to this point on judicial application of the single subject rule. Part IV presents the evidence from our new empirical study. Part V discusses the implications of our study for the single subject rule.

II. The Single Subject Rule in Law and Theory

A. Law

At least fourteen states that allow initiated statutes or constitutional amendments provide that the initiated measure presented to the voters shall not contain more than a single subject (Waters, 2003). Some of these states further provide that each constitutional amendment put before voters be subject to a "separate vote."[8] A court determining that an initiated measure contains more than one subject will often remove it from the ballot or declare the measure void if it has already been enacted; some courts consider the less drastic step of severing the measure and placing only part of it before voters.[9]

---

[7] Whether aggressive enforcement leads to partisan decisionmaking in other contexts remains to be seen. The crux of the problem with the single subject rule is the malleability of the concept of a "subject" and it is the act of trying to define a subject that seems to open the door for partisanship. An aggressive approach that rejected almost every initiative without grappling with the notion of a "subject" could also be relatively immune to partisan influences.

[8] Lowenstein (2002) explores the separate vote cases in detail and explains how some courts with restrained enforcement of the single subject rule have adopted aggressive enforcement of the separate vote requirement to achieve the same result as aggressive enforcement of the single subject rule. In this Article, we analyze single subject and separate vote requirements together, and we discuss both requirements simply as the "single subject rule."

[9] *See, e.g.*, Nevadans for the Prot. of Prop. Rights v. Heller, 141 P.3d 1235, 1245–46 (Nev. 2006).

Table 1 reports the single subject language in the five initiative states we study. The language is similar though not identical across states, but in every case depends on the meaning of the term "subject." The term "subject" is not self-defining, and therefore courts must specify the appropriate standard for counting the number of subjects in an initiative. As Lowenstein (2002: 47) pithily put it,

> [S]uppose I am giving a lecture and I announce at the outset that my subject will be the battle of Antietam, the contributions made to health by vitamin C, and Shakespeare's *The Merchant of Venice*. You would undoubtedly find it a surprising subject, but you could not say in advance that it is not a subject. . . . [N]o combination of matters can be ruled out in advance as a single subject. Defining a subject is purely and essentially a matter of convenience.

[Table 1 about here]

Single-subject litigation during the 2006 election season showed the potential for arbitrary outcomes when courts apply a single subject rule. Consider two proposed initiatives and ask yourself if either, or both, violate the single-subject rule:

Initiative A shifts responsibility for drawing state legislative and congressional districts from the state legislature to a redistricting commission. The commission must draw single-member districts, changing current practice which allows multi-member districts for the state legislature.

Initiative B limits marriage to one man and one woman. It also prevents localities from adopting "civil unions" for non-married couples that would give those in such unions any of the rights of married couples.

In two opinions issued on the same day in March 2006, the Florida Supreme Court struck down *Initiative A* and upheld *Initiative B* against single-subject challenges.[10] The court ruled that federal redistricting and state redistricting are separate subjects, and

[10] Advisory Opinion to the Attorney Gen. Re: Indep. Nonpartisan Comm'n To Apportion Legislative and Cong. Dists. Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) [hereinafter Redistricting Case]; Advisory Opinion to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229 (Fla. 2006).

both differ from the use of single-member districts.[11] In contrast, the court held that both parts of *Initiative B* dealt with the subject of marriage.[12]

It is not hard to imagine other courts reaching different conclusions. Indeed, some have. A California court upheld an election reform measure much more disparate than the Florida redistricting measure against a single-subject challenge.[13] A state court in Georgia struck down a measure very similar to *Initiative B* on the grounds that same-sex marriage and civil unions are separate subjects[14] (a decision later reversed by the Georgia Supreme Court).[15]

In his 1983 article, Lowenstein traced the history of California's single subject rule applicable to initiatives. He noted the two main approaches to single subject adjudication in the state, a liberal or restrained interpretation (under which most single subject challenges to initiatives should be rejected) requiring that the different provisions of the initiative be "reasonably germane" to one another to be upheld, and a more stringent or aggressive interpretation (under which more single subject challenges to initiatives would succeed) requiring that the different provisions of the initiative be "functionally related" to one another. California has opted for the "reasonably germane" test; not surprisingly, California's courts ordinarily have rejected most single subject challenges. But in 2002, Lowenstein wrote a second article on the single subject rule, lamenting what he saw as newly aggressive enforcement of the rule in many states, including in California.

Each state has developed its own single-subject jurisprudence and linguistic glosses on the rule. It is not our purpose here to provide a detailed exegesis of these states' glosses.[16] Florida, for example, has earned a reputation as a state with aggressive enforcement of the rule (Miller 2009: 182), requiring that all parts of an initiative have a

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[11] See Redistricting Case, 926 So.2d at 1225–26.

[12] Advisory Opinion to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229 (Fla. 2006).

[13] Fair Political Practices Comm'n v. Superior Court, 599 P.2d 46, 47–48 (Cal. 1979).

[14] O'Kelley v. Perdue, No. 2004CV93494, 2006 WL 1350171 (Ga. Super. Ct. May 16, 2006), *rev'd*, 632 S.E.2d 110 (Ga. 2006).

[15] Perdue v. O'Kelley, 632 S.E.2d 110, 113 (Ga. 2006).

[16] For detailed analysis, see Lowenstein, Hasen, and Tokaji (2008: 382–394).

zen-like "logical and natural oneness of purpose" in order to steer clear of a single subject violation.[17] The Florida Supreme Court relied on this test in striking down the redistricting initiative described above: "A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place. Thus, a voter would be forced to vote in the 'all or nothing' fashion that the single subject requirement safeguards against."[18] Because a voter would be required to make this choice, the Florida high court held, the measure did not have a "oneness of purpose," and it therefore violated the single subject rule.

Regardless of the verbal formulation of the test, and whether or not the test requires aggressive or restrained implementation, courts typically have identified two potential interests served by the single-subject rule: prevention of logrolling and avoiding voter confusion.[19] It is to these interests we now turn.

B. Theory

The theoretical underpinnings of the single subject rule are remarkably weak. As Lowenstein (1983, pt. III) observes, the two most common rationales for the single subject rule are (1) to prevent logrolling, and (2) to prevent voter confusion. This section briefly sketches the main theoretical issues, most of which have been explored at greater length in the existing literature, as indicated throughout.

1. Logrolling

Logrolling may be undesirable if it subverts the electorate's will, but it does not necessarily do so. There are clearly situations where allowing logrolling can lead to outcomes more consonant with the majority's preferences. Logrolling's beneficial potential in some situations has been recognized by public choice scholars at least back to

[17] Redistricting Case, at 1225.

[18] Redistricting Case, at 1226.

[19] *See, e.g.*, Redistricting Case, at 1225; Californians for an Open Primary v. McPherson, 134 P.3d 299, 336 (Cal. 2006).

Buchanan and Tullock (1962). Here we provide a brief recap of the argument (see also Kousser and McCubbins (2005) and Gilbert (2006)).

One concern with logrolling is that by combining two "projects," one that is good and one that is bad, the voters will be forced to adopt the bad project against their interests (what Lowenstein (1983) calls a "rider"). To see the limits of this argument, consider the following hypothetical situation:

	Project A	Project B
Adopted	2	-1
Not adopted	0	0

There are two projects, A and B, where A delivers the voters a utility payoff of 2 if adopted and zero otherwise, while B delivers a payoff of -1 if adopted and zero otherwise. If voted on separately, A will pass and B will fail.

If the two are bundled into a single proposition, voters would receive a payoff of 1 by approving the bundle, and zero by rejecting the bundle. The bundled measure will then pass. It is not clear why this is a problem. The voters are better off with the bundle than without it, which is why they approved it in the first place. It is true that voters would be better off if they had the opportunity to vote on the projects separately rather than as a package, but nothing guarantees this would happen if the package is not allowed. Indeed, when a court strikes down a measure on single subject grounds, it does not give voters the opportunity to vote on the separate pieces, but rather forces rejection of *both* projects, which in this case is not optimal.

A different configuration would be the following:

	Project A	Project B
Adopted	2	-3
Not adopted	0	0

Here the bad project is really bad. As before, in a separate vote, project A will pass, and project B will fail. If voters are forced to decide on a bundle of A and B, they

will reject the bundle (preferring the default payoff of zero to the bundle payoff of -1). In this case, there is no need for intervention by a court because voters would reject the package on their own. It could be argued that voters lack the ability to discern the payoffs of the different elements of the package, but this argument speaks more to the validity of the entire direct democracy enterprise than the single subject rule. In order to ask voters to make policy decisions, it seems necessary to grant that they have some competence in recognizing their own interests.

The two preceding examples indicate that if the second option is not too bad, a single subject rule will prevent voters from adopting a package that makes them better off than not having the package, while if the second option is very bad, the voters will reject the bundle on their own. At best, the single subject rule is redundant; at worst, it is harmful.

The concern is deepened once we recognize that it may be possible to approve some valuable projects only through a bundle (what Lowenstein (1983) calls "coalition-building"). Consider the following situation, with three voters.

	Voter 1		Voter 2		Voter 3	
	A	B	A	B	A	B
Adopted	100	-1	-1	100	-1	-1
Not adopted	0	0	0	0	0	0

In this case, voter 1 enjoys very high benefits from project A and is mildly hurt by project B; voter 2 enjoys very high benefits from project B and is mildly hurt by project A; and voter 3 is mildly hurt by both projects. If we count the welfare of each person equally, the socially optimal choice is to approve both projects: project A produces a net gain of 98 as does project B.

If the projects are decided separately, both will fail: voters 2 and 3 will vote against project A, and voters 1 and 3 will vote against project B. If the projects are bundled, then both will pass: voter 1 will support the package (the gain of 100 from A offsets the loss of 1 from B); voter 2 will support the package (the gain of 100 from B offsets the loss of 1 from A); and voter 3 will vote no. Allowing the projects to be

bundled brings about the socially optimal outcome. In this situation, enforcement of a single subject rule will make it impossible to achieve the optimal outcome. (As an aside, critics of direct democracy often celebrate the give and take of legislatures as compared to the one-shot nature of ballot propositions. It should be recognized that legislatures rely extensively on logrolls to implement their agreements. Indeed, without the ability to logroll it is hard to imagine how complicated legislative bargains could be struck and enforced.)[20]

The previous example is not intended to suggest that logrolling is always beneficial. To the contrary, there are also situations where a logroll can bring about a socially undesirable outcome, such as the following:

	Voter 1		Voter 2		Voter 3	
	A	B	A	B	A	B
Adopted	3	-1	-1	3	-10	-10
Not adopted	0	0	0	0	0	0

Here the socially optimal course is to reject both measures. If they are voted on separately, both will fail. If they are voted on as a package, however, the package will pass, with voters 1 and 2 in support.

To be clear, the point here is not that logrolls are always beneficial but rather that logrolls can be good or bad. Much of the doctrine and analysis surrounding the single subject rule presumes that logrolls are always bad, so that voters need to be protected against all logrolls.[21] As we have seen, this view is overly simplistic, lacks theoretical justification, and stands a real chance of inhibiting socially desirable policy changes.

[20] Our discussion here does not consider the case where the projects are interrelated in some way, as might be the case with a proposal to build a new train station and a new rail line. Forcing separate votes on possibly connected issues could lead to poor public decisions (Lacy and Niou, 2000). Kousser and McCubbins (2005, page 961) criticize the single subject rule on precisely these grounds.

[21] For example, Cooter and Gilbert (2010) describe the premise of the single subject rule to be: "bargaining in the initiative process is likely to be harmful and should be forbidden." As we have shown, the theoretical argument can go either way, and we are not aware of any evidence that would justify the claim that logrolling in initiatives is "likely" to be harmful.

2. Voter Confusion

Another alleged purpose of the single subject rule is to prevent voter confusion (Dubois and Feeney 1998: 148). The issue of voter competence has been a central concern in thinking about direct democracy for as long as the process has been around, and it is well recognized that voters must have access to information to make wise decisions (Lupia and Matsusaka, 2004). Contrary to simple intuitions, empirical research suggests that citizens are able to vote in a sophisticated manner if they have access to endorsements and other "information cues" (Lupia, 1994; Lupia and McCubbins, 1998). Be that as it may, it is difficult to see the single subject rule as a vehicle for reducing complexity and alleviating voter confusion. We cannot improve on Lowenstein's brief-yet-effective argument:

> The rule is ill-suited to prevent voter confusion because no matter how the rule is construed, it will bar some initiatives that are simple and permit others that are hopelessly complex. Consider, for example, an initiative containing two provisions: (1) change the date of the primary election from June to May; and (2) increase the maximum sentence for the crime of rape by one year. While most people would regard it as odd for these two and only these two provisions to be combined in one initiative, and while the measure would presumably violate the single-subject rule, it would also be one of the simplest and most easily understood initiatives ever proposed in California. On the other hand, one can easily imagine a proposal that would contain extensive but more or less technical revisions in a single, specialized area—say, school finance—that could not be understood thoroughly by anyone but a handful of experts, but that would satisfy the single-subject rule under any plausible construction.
>
> It is no doubt true that, all else being equal, a measure with fewer provisions will be easier to understand than a measure with more provisions. All else is seldom equal, however, and in most cases the complexities of the individual provisions and of the general subject matter are likely to be far more significant factors in the measure's overall complexity than the mere number of

> provisions. Furthermore, the correlation between the diversity of the initiative's subject matter and the number of provisions is likely to be very weak. An outlandishly diverse measure could contain one simple provision per "'subject," whereas a unified measure could contain thousands of provisions.[22]

We are unaware of any empirical evidence that the single subject rule in practice has reduced complexity or alleviated voter confusion.

III. Other Research on Judicial Application of the Single Subject Rule

Empirical research on the single subject rule is scarce. Miller (2009: ch. 4) examined single subject challenges to voter-approved initiatives in five initiative states (Arizona, California, Colorado, Oregon, and Washington) during the period 1904–2008 as part of a larger study of court invalidation of voter-approved initiatives. Miller considered only challenges to voter-*approved* initiatives; he did not consider pre-election challenges, as are routine in Colorado and sometimes used in other states. Miller found a total of 7 cases in which there was a single subject or separate vote violation (Miller, 2009: 116 tbl. 4.3.) but he did not go beyond this descriptive information to consider the factors that motivated judges to vote to uphold or reject an initiative. Based on a rough survey of state use of the single subject rule in recent years, he concluded: "By the early 2000s the trend was clear: Courts in several initiative states were more strictly enforcing two technical rules, the single-subject rule and the separate-vote requirement, as a constraint on the initiative power." (Miller 2009: 184).

The most comprehensive and informative study of judicial behavior in single subject cases is Gilbert's (2009) analysis of California, Colorado, Florida, and Oklahoma between 1980 and 2007. The key part of his analysis is statistical evidence on the factors

[22] Lowenstein (1983:954–55, footnotes omitted). Given Lowenstein's rejection of both the anti-logrolling and anti-voter confusion arguments, it is somewhat puzzling why he does not simply reject the single subject rule outright (as opposed to calling for its liberal interpretation). According to Lowenstein, the liberal test should be used because it would block only outlier initiatives that went "beyond the intended scope of the initiative as an instrument of governance" toward "wholesale law revisions" *Id*. at 964. But on that basis, a cleaner rule would simply target revisions directly, rather than using the clumsy device of the single subject rule.

that explain the decision of judges in single subject cases. Gilbert includes variables that are intended to capture objective legal factors as well as attitudinal variables that should not be relevant for decisions. For each case, he constructs what he considers "an objective measure of the number of subjects" by surveying UC-Berkeley undergraduate and law students. The students were given two principles to define the number of subjects — what he calls the "categorization subject count" and "democratic process subject count" — and asked to count the number of subjects in the initiatives that came before the courts in his sample. Gilbert finds that both subject count variables are correlated with the voting behavior of judges, meaning that the decisions of judges are to some extent associated with these underlying principles, at least as interpreted by the survey respondents. More important for our purposes, Gilbert constructs an index of each judge's "liberalness" based on the partisan makeup of the state's legislature at the time of the judge's appointment (following Brace et al. (2000)), and constructs an index of each initiative's "liberalness" based on classifications by graduate students at UC-Berkeley. He finds that judges were more likely to uphold an initiative if the judge and the initiative both had a high liberalness score, or the judge and the initiative both had a low liberalness score, that is, if there was an affinity between the judge's presumed ideological orientation and the orientation of the initiative.

Using a statistical technique to compare the two explanatory factors — objective subject count and political affinity — Gilbert concludes that (2009: 51) "law trumps politics." However, the method by which he reaches this conclusion (2009: 45-47) is not entirely satisfying. He uses the coefficient estimates from a logit model to generate predicted probabilities of a judge finding a single subject violation, evaluated at different values of the number of subjects and political affinity, holding the other explanatory variables at their mean values. He finds that a swing in the number of subjects changes the predicted probability of a single subject violation more than a swing in political affinity. While interesting, this approach is limited in that it only involves *predicted* probabilities, not actual probabilities, and the predictions rely on the assumption that the

estimated model accurately represents the process by which judges reach their decisions (that is, it assumes the model parameters are accurate).[23]

We follow Gilbert's analysis by considering the match between the content of the initiative and the judge's views, although we rely on more transparent measures. Rather than rely on predicted probabilities to assess the magnitude of effects, we examine the actual frequency that decisions are upheld conditional on political affinity. The critical innovation of our study is to compare the influence of judge-initiative affinity in states with aggressive enforcement to the influence in states with deferential enforcement. Lowenstein's argument was not that the single subject rules is incapable of being enforced in a neutral way, but that neutral enforcement was impossible if a state adopted an aggressive posture.

IV. New Evidence

A. Description of Data and Variables

Our analysis is based on a sample of 154 single-subject cases decided during the decade 1997–2006 by the supreme and intermediate appellate courts in five major initiative states: California, Colorado, Florida, Oregon, and Washington. The states were chosen because they are heavy initiative users, and contain a mix of aggressive and restrained stances toward the single subject rule. The cases were identified by Lexis and Westlaw searches in the state caselaw databases for initiative cases decided by state appellate courts containing the words "single subject" or "separate vote." We then examined the actual decisions to verify that a single subject challenge was in fact part of the case. For each case, we identified the participating judges and collected a variety of information on their personal characteristics, terms, and ideological orientation, as discussed below. We also collected information on the content of the initiatives that were under review. The key explanatory variables are discussed next:

- *Partisan orientation of judge.* We are interested in understanding how often a judge's decision in a single subject case appears to be influenced by his or her

[23] Logit models also incorporate sometimes subtle interactions between the explanatory variables that can sharply influence marginal effects.

view of the policy merit of the initiative under review. To that end, we classify each judge as either a Democrat or Republican. The judges in the states we study must all stand for re-election at some point, but the elections are nonpartisan, so we rarely have a judge's self-described political affiliation. Instead, we assign each judge to the party of the governor that first nominated him or her to the court. A few judges in the state of Washington won their seats in an open election rather than being appointed by a governor. For those judges, we assigned a party based on their past career (for example, a judge who previously held office in the state legislature was assigned his or her party from that period), endorsements and fundraising (for example, a judge who received funding primarily from Democratic groups was classified as a Democrat), and other miscellaneous information. For some judges, we were unable to discover any evidence suggesting a party affiliation, and they were dropped from the sample.[24]

Assigning a partisan orientation to judges based on the party of the official appointing them has a long tradition in research on courts (Brace et al., 2000). We believe the transparency of this measure makes it better suited for our purposes than index approaches (such as the one developed by Brace et al. (2000) that imputes a continuous ideology score based on the relative strength of the parties in the judge's state in the year he or she was appointed). Our classification system is imperfect — indeed, casual observation of the U.S. Supreme Court makes it clear that the party of the nominating president is not a perfect predictor of a justice's subsequent behavior — but to the extent that our classifications are wrong, the result will be to introduce noise into the estimates, biasing against finding evidence that a judge's partisan affiliation matters. That is, to the extent our classification system is crude, it will make it more difficult to find evidence of political motivations in judicial decisions.[25]

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[24] We were able to assign a partisan orientation to all judges in California, Colorado, Florida, and Oregon, and all but eight judges in Washington.

[25] There is an ongoing debate about the appropriate way to measure the ideology of a judge (Heise, 2002), but for our purposes it is not important whether we are measuring the "true" preferences of the judge so much as whether our variable predicts voting behavior: if judges are applying the law in an objective way,

- *Ideological orientation of initiative.* A second important variable is the ideological orientation of the initiative being challenged. Since we are interested in knowing whether a judge is likely to be favorably or unfavorably inclined toward the policy proposed by the initiative, we attempt to classify each initiative as "conservative" or "liberal/progressive". Such classifications are inherently subjective, but we think our choices are not overly controversial. Table 2 shows how we classified the different types of initiatives to allow the reader to form his or her own opinion about the validity of our measure. Some initiatives do not fit into an obvious left-right box, such as open primary laws and laws affecting the judiciary, and we assign those initiatives to a separate "other" category. Initiatives where the ideological classification seems arguable are noted with an asterisk in Table 2; in our empirical analysis, we estimate our model treating the asterisked initiatives in different ways to establish robustness. We recognize that this type of classification is simplistic, but again, to the extent that it incorporates error, it will only bias against finding any effects. As will be seen, even with our crude classification system, we find that partisanship explains a significant amount of voting behavior on single subject rulings.

  [Table 2 about here]

- *Career concerns.* A large literature suggests that the behavior of judges, like that of other public officials, responds to their career concerns (for example, Hanssen, 1999; LaPorta et al., 2004; Klerman and Mahoney, 2005). If career concerns are important, we expect that judges would feel pressured by re-election considerations to uphold initiatives because voters strongly support the initiative process. Judges that strike down a popularly approved measure or remove a measure from the ballot without giving voters a chance to weigh in could be seen

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their decisions should have no connection to the party of the official that appointed them. To the extent we find that our measure of partisanship matters, it undercuts the idea that the law is being applied objectively on the basis of neutral rules.

as anti-democratic, and pay a price at the polls.[26] In all five states in our sample, judges must stand for re-election. The terms vary, ranging from a low of 6 years in Washington to a high of 12 years in California, and the type of election varies (such as open elections where anyone can run in Washington, and pure retention elections where only the incumbent judge's name is on the ballot in California).[27] To test for the possibility that judges weigh the consequence of their votes on their career prospects, we construct two variables: the number of years until the judge's next election and the age of the judge. If judges take into account career concerns when making decisions, a judge will be more likely to vote to uphold an initiative when there are fewer years until his or her next election and when the judge is farther from retirement age – Florida has a mandatory retirement of 70, Colorado has a mandatory retirement age of 72, and Oregon and Washington have a mandatory retirement age of 75, but all judges anticipate retirement at some point.

- *Number of words in initiative.* One argument for the single subject rule is to reduce complexity of initiatives and minimize voter confusion (Dubois and Feeney 1998). Long initiatives are likely to be more complex, and extensive verbiage is a barrier to voter understanding. For this reason, some reformers have argued that the number of words on an initiative should be limited. For example, the California Commission on Campaign Financing (1992) recommended a 5,000-word limit on all ballot propositions. To test if decisions reflected a concern with complexity, we collected data on the number of words in each initiative. If reducing complexity is an important factor in single subject rulings, we would expect judges to be more skeptical of long initiatives than short initiatives. When a case reviewed more than one initiative at a time, we used the average number of

[26] This is perhaps an oversimplification. A judge who strikes down an unpopular initiative in a pre-election challenge could gain the support of voters who dislike the measure, even if they support the process itself.

[27] In all five states we study, judges stand in nonpartisan elections (retention in California, Colorado, and Florida; contested in Oregon and Washington). There is not a strong connection between a state's type of election and its courts' enforcement stance regarding the single subject rule.

words across the involved initiatives. There is a huge variation in the length of initiatives in our sample, ranging from 12 at the low end to almost 32,000 at the high end. The longest initiatives tend to appear in California.

- *Enforcement Stance.* We classify Colorado, Florida, and Oregon as having an aggressive enforcement stance, and California and Washington as having a restrained stance. (Oregon arguably could be included in either group. Because there are relatively few observations from Oregon, the broad pattern of our main results does not depend on how Oregon is classified.) These classifications are standard in the literature (Lowenstein, 2002; Miller, 2009). In practice, states with aggressive enforcement of the rule tend to use verbal formulations of the rule, such as Florida's "oneness of purpose" test, directing judges to delve deeply into the interrelation of various provisions of an initiative. States with more restrained enforcement tend to use less intrusive verbal formulations, such as California's "reasonably germane test," directing judges to take a more superficial look at the interrelation of various provisions of an initiative. Judicially-proclaimed doctrine therefore suggests that a Florida judge would be much more likely than a California judge to find a single subject violation in an initiative that both creates a redistricting commission and gives criteria for that commission to apply to future redistrictings.

B. Summary Information on Judges

Table 3 provides summary information on judges in the sample. Overall, our data set contains 765 votes on single subject cases. On average, 30 percent of the sample judges are classified as Republicans and 70 percent are classified as Democrats. In contrast, 57 percent of the initiatives under review are classified as conservative in their policy orientation compared to 24 percent that are classified as liberal. The remaining 19 percent do not have an obvious classification on a conservative-liberal spectrum and are therefore in our "other" category. A typical case, then, consists of judges with Democratic leanings deciding on whether to vote to uphold an initiative that implements a policy with a conservative bent.

[Table 3 about here]

To make this more concrete, we construct a variable called AGREE that takes on the value of one if the judge's partisan affiliation agrees with the initiative, and zero otherwise. That is, AGREE = 1 if the judge is Republican and the initiative is conservative, or the judge is Democratic and the initiative is liberal/progressive. Across the sample, 42 percent of judges find themselves agreeing (in this sense) with the initiative under review, and 38 find themselves disagreeing.

The average age of sample judges is 56.5 years, with the youngest 41 years old and the oldest 87 years old. On average, a judge deciding on a single subject case faces election in 2.8 years, with some facing election in the year of the decision and others facing election 12 years in the future.

C. Summary of Outcomes

To provide context for the results that follow, we begin by summarizing the outcomes of the cases in the sample. Table 4 reports the frequency with which the initiatives were upheld by state and level of court. Consistent with California's reputation of restrained enforcement of the single subject rule, California courts upheld the initiative in question in 98 percent of cases during the sample period. Washington courts were also fairly accommodating, upholding in 91 percent of cases. Florida is usually considered to have strict enforcement, but its courts upheld initiatives against single subject challenges in 79 percent of cases. At the other end, Colorado courts upheld initiatives 50 percent of the time, and only 25 percent of initiatives were upheld in Oregon. It should be kept in mind that these approval numbers do not necessarily indicate the aggressiveness of enforcement. Even though Florida's approval rate is high, it could be that its courts are so well known to enforce strictly that many initiatives never come to the ballot, while those that do are carefully crafted to survive challenges. The numbers do suggest that there are state-specific forces at work, so our multivariate analysis will take that into account.[28]

[28] The number of failed cases in states such as Colorado and Florida which allow pre-election review might be greater than in other states because initiative proponents sometimes submit variations of the same measure for approval to see which variations can survive single subject challenge.

[Table 4 about here]

Table 4 also shows that state supreme courts are much less likely to uphold an initiative against a single subject challenge than state intermediate appellate courts, 62 percent versus 92 percent. Indeed, the intermediate appellate courts almost always uphold initiatives in the face of single subject challenges across both deferential and strict states. This pattern, in part, is due to the fact that most decisions in California, a state that rarely finds single subject violations, are made at the intermediate appellate court level, so it is not clear if it reflects a general deference by lower level courts, or a California effect.

We also explored but do not separately report the trend in approval rates over time. Contrary to what might be expected based on Lowenstein (2002) and Miller (2009), the fraction of cases upheld against single subject challenge has not fallen over time. Indeed, if anything, courts are more likely to uphold initiatives against single subject challenges in the later than earlier years of our sample.[29] Again, this does not necessarily indicate less aggressive enforcement over time: it could be that enforcement is becoming stricter, leading to fewer initiatives, drafted more narrowly to avoid violating the rule. There could also be a delay in observing effects. Key decisions of a state supreme court could have a significant but lagged effect at the intermediate appellate courts.

D. Unanimity

Lowenstein (1983) argued that the single subject rule is impossible to enforce objectively due to the inherent subjectivity of the definition of a "subject." One way to get a rough sense of the objectivity of single subject rulings is to examine the amount of agreement in decisions. If it is possible to determine objectively the number of subjects, and judges are applying the rule neutrally, decisions should be unanimous.

[29] Unfortunately, this statement conceals a remarkable fact: while the percent of judges voting to approve was never less than 58 percent in nine of our ten sample years, it was only 8 percent in 1999. Furthermore, some of the 1999 cases in which measures were found to have violated the rule were particularly prominent. Exactly what happened in 1999 is a mystery that is beyond the scope of our study to answer but it would be unwise to make trend inferences using data from that year.

Table 5 reports the frequency of cases in which the decision was unanimous. For the sample as a whole, 80 percent of cases were unanimous, indicating that judges were able to agree on the proper outcome in a large majority of cases. The strongest agreement was in California (91 percent unanimous decisions) and Washington (85 percent unanimous decisions), where courts apply the single subject rule with deference to the initiative. In Colorado (75 percent), Florida (66 percent), and Oregon (67 percent), where enforcement is more aggressive, unanimous decisions were less common. Nevertheless, even in the most aggressive states, we still see at least two-thirds of the cases being decided unanimously.

[Table 5 about here]

The interpretation of the evidence in Table 5 is ambiguous. A high level of agreement could mean that judges have found neutral principles that are broadly shared. On the other hand, it could be that that these decisions are determined by partisan considerations, and that we see so much unanimity because courts are typically composed entirely of members of the same party. In our sample, the judges were all of the same party in 42 percent of cases, and homogeneous courts were 16 percent more likely to reach a unanimous decision.[30] The next section examines the votes of individual judges for more direct evidence.

E. Explaining the Votes of Individual Judges

Our core evidence concerns the votes of individual judges. We are particularly interested in understanding to what extent a judge's views on the substantive policy implications of the initiative under review can explain his or her vote. We are not asserting that the judges deliberately make single subject decisions in order to impose their policy views, although some of our results might allow that as one interpretation. Rather, we are investigating Lowenstein's (1983) argument that because the single subject rule cannot be applied objectively, judges will be forced to introduce subjective

[30] A regression of unanimity on a dummy variable for courts consisting entirely of members of one party (parameters not reported) reveals that ideologically homogeneous courts are more likely to reach a unanimous decision, but the coefficient is not statistically significant after controlling for number of judges, number of words in the initiative, level of court, year, and state.

considerations into their decision making, and that the set of beliefs and philosophies that drive their party affiliation will come into play in their determinations on the single subject rule. A critical implication of this view, which we test, is whether judges appear to rely more on their substantive policy preferences when the single subject rule is applied strictly as opposed to loosely. Note that a crucial distinction between the Lowenstein view and a simple partisan-decisionmaking view is that in the Lowenstein view partisan factors are important primarily when judges attempt to apply the rule aggressively.

Table 6 reports our central results, multivariate logistic regressions that estimate the probability that a judge votes to uphold an initiative. Each column reports estimates from a separate model, in which the dependent variable can be understood as an increasing (nonlinear) function of the probability that a judge votes to uphold. The variables listed are the explanatory factors. The main entries are the coefficient estimates, with the standard errors in parentheses. A positive coefficient means that an increase in the variable increases the likelihood of voting to uphold, while a negative coefficient means that an increase in the variable reduces the likelihood of voting to uphold.[31] Asterisks indicate coefficients that can be distinguished from noise at conventional levels of statistical significance. All regressions include indicator variables for California, Colorado, Florida, Oregon, Washington that allow for state-specific effects on the mean probability of approval, but we do not report the coefficients.[32]

[Table 6 about here]

The regression in column (1) of Table 6 includes as explanatory factors a variable for the number of words in the initiative, the year, and dummy variables for the states. The number of words is a crude proxy for the complexity of the initiative and/or the number of subjects; the year is included to allow for a trend in enforcement practices over time; and the state dummies capture differences in state single subject laws. Because there are huge differences between states in the number of words (the average number of words in California is seven times the average in Washington and more than 20 times the

[31] Unfortunately, the actual coefficient estimates cannot be interpreted directly in terms of marginal changes in probabilities.

[32] Our main findings do not change in substance if the models are estimated without the state fixed effects.

average in the other states), a variable equal to the absolute number of words would capture primarily state effects rather than length effects. So we use instead a dummy variable equal to one if the number of words is greater than the median number of words on initiatives that are reviewed *in that state* (and takes on a value of zero otherwise). The dummy variable for the number of words indicates whether the initiative under consideration is longer or shorter than the typical initiative reviewed in that state.[33]

The coefficient on the number of words is positive and significantly different from zero, indicating that judges are more likely to vote to uphold longer – and presumably more complex – initiatives than shorter initiatives. As will be seen in the later columns, this coefficient loses significance when other explanatory variables are included, so the relation is apparently spurious and not much should be made of the positive coefficient. However, the consistent failure to find evidence that judges reject long initiatives undercuts the view that the single subject rule is used to protect voters from complex measures. The coefficient on the year is also positive and significant, indicating that judges are increasingly likely to vote to uphold in the later years of our sample. This finding is robust to inclusion of other control variables, so does not appear to be spurious. Apparently, there has been a gradual trend toward voting to uphold initiatives during our sample period. The unreported state dummies are significant and generally similar to each other.

The regression in column (2) of Table 6 adds explanatory variables that capture potential political considerations. The first new variable is a dummy for cases decided at the supreme court level, as opposed to the state's intermediate court of appeals. The negative and significant coefficient indicates that supreme court justices are less likely to vote to uphold an initiative than intermediate appellate court judges, even controlling for state, year, number of words, and so on. A possible explanation for this pattern could be that lower-court judges have their eye on promotion to a higher court and thus are less inclined to make decisions limiting the popular initiative process.

The next variable is the political affiliation of the judge, which takes on a value of one if the judge is a Republican and zero if the judge is a Democrat. As discussed above, these affiliations are based on the party of the governor who appointed the judge to the

[33] We also find a significant positive coefficient when we use a variable that is simply the number of words.

court, and in some cases, other information in the judge's background. The coefficient is positive but not statistically significant – a pattern that holds for all reported regressions – suggesting that Democratic and Republican judges do not have a fundamentally or philosophically different approach to single subject rulings.

A third new variable in column (2) captures the ideological orientation of the initiative, taking a value of one if the initiative has a conservative orientation, and zero otherwise. We also include a variable equal to one if the initiative affects the judiciary, such as term limits for judges. The estimates indicate that judges are significantly less likely to vote to uphold conservative initiatives and initiatives concerning the judiciary (compared to the omitted categories of "liberal/progressive" and "other" initiatives.) The fact that conservative initiatives fare less well than other initiatives suggests that political factors are connected with a judge's decision on a particular case.[34] This coefficient remains negative and significant for all reported regressions.

The regression in column (3) of Table 6 drills down into this issue by adding three new variables. The key variable is AGREE, which as discussed above takes on the value of one if the judge's partisan orientation agrees with the content of the initiative, and zero otherwise. As can be seen, agreement (so measured) is strongly and positively associated with the likelihood of voting to uphold an initiative against a single subject challenge. This is fairly direct evidence that single-subject decisions are not made neutrally, independent of a judge's substantive policy view of the initiative in question. [35]

[34] It is also possible that conservative initiatives tend to be more wide-ranging than liberal initiatives, though we can think of no reason to believe this is the case. Another situation where judges may vote strategically is when their vote is not decisive. For example, if all of the other judges intend to uphold the initiative, a judge may go with the majority view even though he or she believes rejection would be a better decision. To investigate this possibility, we estimated regressions including a dummy variable for unanimous decisions, finding that judges are significantly more likely to uphold in unanimous decisions. Because the theoretical justification for this variable is not clear, and its inclusion does not have an important impact on the effects we are interested in, the unanimity variable is not included in the regressions reported in the table.

[35] We also estimated but do not report the effects of agreement separately for Democratic and Republican judges. For Democratic judges, a positive and statistically significant effect of agreement continues to appear. For Republican judges, the effect is estimated too imprecisely to achieve statistical significance,

Gilbert (2009), using somewhat different methods, reports a similar finding in a partially overlapping sample. He assigns each judge a numerical value for partisanship and assigns each initiative a numerical value for ideological orientation. He finds that the likelihood of voting to uphold is positively related to the similarity in scores. Our results reinforce Gilbert's findings and show that simple and fairly transparent partisan affiliations go a long way toward explaining voting behavior.

The regression in column (3) of Table 6 tests for career concerns by including two additional variables, the number of years until the judge's next election and the age of the judge (which is negatively related to the expected number of years before retirement).[36] If career concerns are important, we expect that a judge will be more likely to vote to uphold as an election draws near, producing a negative coefficient. Similarly, as a judge grows older and gets closer to retirement, he or she should become less concerned with re-election issues; because older judges would be less likely to cater by voting to uphold an initiative, approval rates should be negatively associated with age.

The estimates for both career variables take on the predicted negative sign, but only age is significantly different from zero at the 10 percent level of significance. The voting behavior of judges is not reliably different when an election is near than when it is distant, but judges are less likely to vote to uphold an initiative as they become older. Put differently, young judges are less likely to challenge the will of the voters by rejecting an initiative. Explanations other than career concerns are conceivable. We did not include seniority as a separate variable, but age and seniority will tend to correlate. It is possible that with seniority a judge becomes more willing to wield judicial power aggressively. All told, we have not found particularly strong evidence for career concerns.[37]

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most likely due to the small number of cases (5 percent) with a disagreeing Republican judge (i.e. Republican judge with liberal/progressive initiative).

[36] Because very long time periods to the next election can only occur in states with long terms, there is a danger that "years to next election" may be capturing state-specific effects. To adjust for this possibility, we truncate the variable at six years, that is, if the number of years to the next election is more than six years, we treat it as six years. It turns out that the results do not change in a material way with or without this adjustment.

[37] We also investigated if the effect of agreement becomes weaker as an election or retirement approaches by including an interaction term between AGREE and age/years, and failed to find robust effects.

The estimates in column (3) of Table 6 indicate that judges are more likely to vote to uphold an initiative when they agree with its substance, compared to initiatives they oppose or whose content does not have an obvious partisan orientation. Since there is some ambiguity about how to interpret the cases that lack a partisan orientation, the regression in column (4) of Table 6 reports a regression with the same specification as column (3) except that the nonpartisan initiatives are omitted. In this case, the coefficient on AGREE can be interpreted as the effect of agreement relative to the case of disagreement. The basic picture remains the same: judges are more likely to vote to uphold cases when they agree with the initiative than when they disagree with the initiative.

The evidence to this point suggests that a judge's policy preferences play a role in how he or she applies the single subject rule. Lowenstein's argument is that this is an inevitable consequence of attempting to apply the rule aggressively: because it is impossible to apply the single subject rule strictly in an objective way, judges will be forced to introduce other considerations that are likely to be correlated with their general world view that also shapes their partisan affiliation. The flip side of this, Lowenstein argues, is that if judges adopt a deferential or restrained approach to the single subject rule, they are more likely to be able to apply it objectively and are less likely to rely on their subjective intuitions to make the decision. Or, perhaps more precisely, when the unconnectedness of the initiative's provisions is extreme, the subjective intuitions of judges are likely to align, even when the judges have different ideologies.

Column (5) of Table 6 tests this proposition by allowing the effect of agreement to be different in "aggressive" states (states that are believed to apply the single subject rule strictly, here Colorado, Florida, and Oregon) and "restrained" states (states that tend to give the benefit of the doubt to the initiative in single subject rules, here California and Washington). Lowenstein's argument suggests that subjective factors such as a judge's personal views will be more important in aggressive than restrained states. Consistent with this idea, column (5) shows that whether or not a judge agrees with the initiative policy is a strong predictor of his or her voting behavior in aggressive states: the coefficient on agreement in a state with aggressive enforcement is 0.93 and statistically different from zero at the 5 percent level. In contrast, the coefficient on agreement in a

state with restrained enforcement is 0.26 and statistically insignificant. In words, decisions are strongly predicted by whether judges agree with the content of the initiative in aggressive states, but there is little or no relation in restrained states.[38] The finding that partisanship matters with aggressive enforcement but not with restrained enforcement undercuts the view that judges are using the single subject rule deliberately to impose their policy preferences, independently of legal doctrine. If this was the case, it is not clear why a judge's partisanship would not matter in restrained states.

The coefficients in Table 6 are difficult to interpret except in terms of the direction of the effects. To give a sense of the magnitude of the effects, Table 7 reports the raw percentage of votes to uphold, conditional on agreement and whether the state has an aggressive or restrained approach. In restrained states, judges voted to uphold the initiative 88.3 percent of the time when they agreed with it compared to 80.6 percent of the time when they disagreed. We see that even in restrained states, judges are less likely to support an initiative they disagree with, but the effect is modest.

The case of states with aggressive enforcement is eye-opening. Judges voted to uphold initiatives they agreed with 83.2 percent of the time in aggressive states, almost the same approval rate as in restrained states. However, in aggressive states, judges voted to uphold initiatives they disagreed with only 41.1 percent of the time. Thus, *in states with aggressive enforcement judges were 42.1 percent less likely to approve an initiative they disagreed with than an initiative they agreed with*. This is a huge effect, which

[38] A nontrivial fraction of cases in our sample appear to be frivolous challenge by criminal defendants to two crime initiatives (Proposition 21 in California and I-159 in Washington). To be sure crime initiatives are not driving our results, we reestimated the main results after deleting all crime initiatives. The findings did not change in any important way. We also explored a number of other control variables, many of which have been used in the literature, including gender and ethnicity of the judge, legislative background, and academic background. See Sisk et al. (1998) for comparison. None of these variables had significant explanatory power or affected the main findings. Finally, we reestimated the regression in column (5) after deleting initiatives that one could argue are nonpartisan (those with asterisks in Table 2), and found similar results.

highlights the important role played by subjective considerations when courts attempt to apply the single subject rule strictly.[39]

Table 7 also reports how judges voted on issues concerning the judiciary. In our sample, these initiatives mainly proposed to curtail the prerogatives of judges. In the aggressive states (the only states where such initiatives appeared in our sample), judges voted to uphold these initiatives 54.8 percent of the time, again far below the percentage of time they voted to uphold initiatives they agreed with.

A potential econometric concern with our results arises from the connection between votes to uphold and enforcement stance. Our regressions are explaining the votes of individual judges, but those votes also contribute to a state's classification as aggressive or restrained. If we were trying to explain votes to uphold based on enforcement stance itself, we would be concerned about "hard-wiring" of a connection (that is, we would be using votes to uphold to predict votes to uphold). However, what we are actually exploring is the effect of *partisanship* on voting, conditional on enforcement stance, and we cannot think of a reason why this relation would be hard-wired. If we had a larger sample we could get at this issue directly by studying only lower courts, since a state's enforcement stance is imposed by its supreme court, but we lose 69 percent of our observations if we omit supreme courts and the results become too noisy to make inferences.

V. Discussion

[39] An alternative approach to estimating the marginal effects that allows use of the conditioning information is to use the coefficient estimates from column (5) of Table 5 to calculate a predicted probability of approval for cases of agreement and cases of disagreement. Such estimates can be highly sensitive to the assumed values of the control variables. We follow standard practice by holding them at their mean values (words=0.58, year=2001, supreme court, Democratic judge, conservative initiative, initiative does not concern judiciary, age=56.5, time to next election=2.5). For a restrained state (California in this exercise), agreement increases the probability of approval by 5.6 percent. For an aggressive state (Florida in this exercise), agreement increases the probability of approval by 21.2 percent. The curvature of the logit function tends to mute extreme effects, but even so, the strong tendency of partisanship to matter with aggressive enforcement is clear.

The single subject requirement is a technical rule that is often used to invalidate voter initiatives, either before they go to the ballot, or after they are approved. The rule is controversial, with critics claiming that it cannot be enforced in an objective, consistent way because the definition of a "subject" is infinitely elastic. Our evidence, based on analysis of more than 500 judicial votes in single subject cases during the period 1997–2006 strongly supports these criticisms. We find that in states with aggressive enforcement of the single subject rule, decisions are well predicted by whether or not a judge is likely to agree with the substance of the initiative under review based on his or her partisan affiliation.

The finding that political preferences play a role in judicial decisions is not novel — a sizeable literature has established that point, and Gilbert (2009) has shown that political preferences play a role specifically in the context of single subject rulings. The novelty of our paper is, first, showing that the influence of a judge's political preferences grows as enforcement of the rule becomes more aggressive. This is precisely what Lowenstein (2002:48) argued: "Aggressive application of the single subject rule therefore necessarily entails a subjective, standardless veto on the part of judges of the sort that was rejected by the framers of the Constitution when they rejected the proposed Council of Revision. Only the deferential approach permits judges honestly to apply standards drawn from the public understanding rather than from their own subjective ways of organizing the world." Our evidence provides clear support for the underlying mechanism that Lowenstein identified as problematic for enforcement of the single subject rule and builds a normative case for a restrained or deferential approach to enforcing the rule.

A second novelty of our paper is the finding of a huge effect of political preferences on judicial decisions. While many previous studies have found a connection between a judge's political inclinations and his or her decisions, in most cases those effects have been modest. In contrast, we find that political inclinations play a huge, perhaps dominant role, in single subject decisions. When enforced aggressively, judges vote to uphold initiatives that agree with their political preferences 83 percent of the time, while voting to uphold initiatives that disagree with their political preferences only 41 percent of the time. There is a sense in some of the literature on judicial behavior that political preferences matter, but are small enough that they can be ignored in most cases.

Our evidence shows one context where political factors appear to be central drivers of judicial decisions and suggests they must be center stage in any appraisal of the single subject rule.[40] Related to this, our results suggest that partisan decisionmaking is not deliberate or inherent to the judging process, but an outcome that emerges when judges are put in position where neutral principles are not available to guide their decisions.

In terms of the single subject rule specifically, as noted above, our evidence strongly suggests that in the aggressive states, the rule has not been applied in a neutral way. Some defenders of the single subject rule, while acknowledging the potential dangers of decisionmaking to suit the policy preferences of judges, claim that the problem has not appeared in practice.[41] Our evidence identifies a central role of political preferences in single subject decisions, at least in the three aggressive states and the period we study. Aggressive enforcement not only raises the bar, but significantly increases the role of political preferences in judging.

One limitation of our study is that we do not include controls for legal factors that might drive decisions (other than the number of words), and therefore we are not running a race between political and legal determinants of decisions (Gilbert, 2009). While it would be desirable to include more explanatory variables, we believe the possibility of omitted legal variables does not cast significant doubt on our findings. Our conclusions would be spurious if there was an omitted legal variable that persuades Democratic and Republican judges differently *and also* happens to persuade them that there is a single subject violation primarily in cases where they dislike the underlying initiative *and also* is more persuasive in states with aggressive than restrained enforcement. We cannot think of an obvious candidate for what such an omitted variable might be.

Another limitation of our study is the potential endogeneity of a state's decision to adopt an aggressive versus strict approach to enforcement. Because we do not know what caused one state to adopt an aggressive stance and another to adopt a restrained stance,

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[40] Of course, our results hold for a particular group of states and time period; it remains to be seen whether our findings hold for other states and other time periods. Some caution is in order when generalizing beyond our sample.

[41] Gilbert (2009, p. 5): "I find that law trumps politics. Judges apply the rule more objectively that most observers expect, although politics does matter."

we cannot rule out the possibility that some underlying factor in the state's political environment drives both the choice of aggressive enforcement and partisan judicial decisionmaking. If this was the case, it would not be aggressive enforcement itself that led to partisan decisions, but the unidentified factor. While we acknowledge this possibility, the fact that there is a strong theoretical case for drawing a line of causality from aggressive enforcement to partisan decisions goes some way toward allaying the concern that our finding is entirely spurious.

The politicization of judging that accompanies aggressive enforcement of the single subject rule undermines the rule of law and leads to several potential problems. To the extent that decisions depend on the identity of the judges that hear a case, initiative sponsors will find it difficult to determine the legal validity of their proposals. The problem is especially acute at the intermediate appellate level where proponents face the possibility of their measure being challenged in any number of courts, with judges of varying partisan orientation. This form of judicial roulette acts as a deterrent to the extent that proponents are risk averse, with the result that some proponents will choose to forgo the costs of an initiative campaign rather than face the uncertainty of judicial reversal.[42] As a consequence, the electorate will end up with fewer options, and policy choices will be less congruent with the will of the majority.[43] Lowenstein observes that a purpose of the single subject rule is to perfect the initiative process. Contrary to this purpose, subjective decisionmaking by judges will have the effect of inhibiting its use. Politicization of the rule also threatens to undermine the direct democracy process itself by undermining the belief that the initiative process is equally available to people of all political stripes. Another problem, noted by Lowenstein (1983), is that political

[42] See Lowenstein (1983, Section III(4)) for a discussion of the problems created for initiative proponents by aggressive enforcement.

[43] For theory and evidence that initiatives bring about policies more consonant with public opinion, see Gerber (1999), Matsusaka and McCarty (2001), and Matsusaka (2004, forthcoming). For surveys of recent research on direct democracy, see Lupia and Matsusaka (2004) and Matsusaka (2005).

decisionmaking will be seen as arbitrary by citizens, thus undermining confidence in the judicial system.[44]

For the same reason, our results suggest we should be pessimistic about efforts to discover a legal theory that could objectively discriminate between one and multiple subjects. Experience shows that judges so far have been unable to settle on a doctrine that can be enforced in a neutral and consistent manner. Instead, our evidence suggests that neutrality and consistency would be better advanced by adoption of a restrained or deferential posture. As discussed by Lowenstein and elaborated above, we believe the dangers that the single subject rule is purported to address are exaggerated in any case, and the hope of alleviating these modest dangers is unlikely to outweigh the costs of aggressive enforcement.[45]

[44] Hayek (1960, p. 219): "To use the trappings of judicial form where the essential conditions for a judicial decision are absent, or to give judges power to decide issues which cannot be decided by the application of rules, can have no effect but to destroy the respect for them even where they deserve it."

[45] For an interesting recent effort to develop an implementable neutral principle, see Cooter and Gilbert (2010). We explain our concerns with their proposal in Hasen and Matsusaka (2010).

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Table 1. Single Subject Rules in Specific States

State	Rule	Source
California	"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."	California Constitution, Article II, Section 8 (d)
Colorado	"No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title …"	Colorado Constitution Article V, Section 1 (5.5)
Florida	"…any … revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith."	Florida Constitution, Article XI, Section 3
Oregon	"A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith."	Oregon Constitution, Article IV, Section 1 (2d)
Washington	"No bill shall embrace more than one subject, and that shall be expressed in the title."	Washington Constitution, Article II, Section 19

Table 2. Classification of Initiatives by Ideology
An asterisk indicates subjects for which we believe the classification is arguable.

Conservative	Liberal/Progressive	Other
Abortion, restrictions	Animal rights, increased	Campaign finance, disclosure
Campaign finance, ban on public funding*	Campaign finance, spending limits*	Gambling
Criminal sanctions, tougher	Crime, increased rights for accused	Initiative procedures
English only	Criminal sanctions, weaker	Judicial term limits and discipline
Illegal immigrants, reduction in services	Education, increased spending	Medical, choice of providers
Land use, limits on takings	Environment, pro-conservation	Medical, disclosure of hospital performance
Lawsuits, limits on noneconomic damages & limits on contingency fees	Gun ownership, restrictions	Medical, loss of license
Nonpartisan redistricting in Democratic state (CA)	Land use, limits on development	Medical insurance
Racial preferences prohibited	Medical, limit on doctor fees*	Open primaries
Same-sex marriage, restrictions	Minimum wage increase	Smoking prevention
Tax decrease	Nonpartisan redistricting in Republican state (FL)	State universities, governance
	Product disclosure, increased*	Taxes, replace all taxes with gross receipts tax
	Same-sex marriage, expansion	Term limits
	Tax increase	Tobacco education
	Transportation, mass	Water district revenue, transfer to education

Table 3. Summary Statistics on Judges

This table reports summary statistics where the unit of observation is a judge voting to uphold or strike down an initiative. AGREE is equal to one if (i) the judge is a Democrat and the initiative is liberal/progressive, or (ii) the judge is a Republican and the initiative is conservative. The sample covers the period 1997-2006 and the states of California, Colorado, Florida, Oregon, and Washington.

	Mean	SD	Min	Max	N
Dummy = 1 if judge votes to uphold	0.70	0.46	0	1	765
Number of words in initiative	5,701	9,110	12	31,942	624
Year of decision	2001.2	2.6	1997	2006	765
Dummy = 1 if judge Republican	0.30	0.46	0	1	729
Dummy = 1 if conservative initiative	0.57	0.50	0	1	765
Dummy = 1 if liberal initiative	0.24	0.43	0	1	765
AGREE: Dummy = 1 if initiative agrees with judge's party	0.42	.49	0	1	729
DISAGREE: Dummy = 1 if initiative disagrees with judge's party	0.38	0.49	0	1	729
Age of judge	56.5	7.0	41	87	691
Years to next election	2.8	2.8	0	12	751

Table 4. Percent of Decisions that Upheld Initiative
The number of cases is reported in square brackets. Data cover the period 1997-2006.

	Supreme Courts	Intermediate Appellate Courts	Supreme + Intermediate Courts
California	50 [2]	100 [45]	98 [47]
Colorado	50 [32]	…	50 [32]
Florida	79 [29]	…	79 [29]
Oregon	43 [7]	0 [5]	25 [12]
Washington	67 [6]	96 [28]	91 [34]
TOTAL	62 [76]	92 [78]	76 [154]

Table 5. Percent of Unanimous Decisions
The number of cases is reported in square brackets. Data cover the period 1997-2006.

	All Cases	Cases where all judges are same party	Cases where all judges are not same party
California	91 [47]	95 [20]	89 [27]
Colorado	75 [32]	79 [19]	69 [13]
Florida	66 [29]	78 [9]	60 [20]
Oregon	67 [12]	100 [1]	64 [11]
Washington	85 [34]	100 [16]	72 [18]
TOTAL	80 [154]	89 [65]	73 [89]

Table 6. Logistic Regressions Predicting Vote of Individual Judges

Each column reports estimates from a logistic regression that predicts the probability that a judge votes to uphold the initiative and reject the single subject challenge. Standard errors are in parentheses beneath coefficient estimates. All regressions include state-specific dummy variables for California, Colorado, Florida, Oregon, and Washington. The estimates include initiatives with conservative and progressive orientations, and initiatives involving the judiciary, but columns (4) and (5) exclude observations that do not have a partisan orientation. The data cover the period 1997-2006. Significance levels are indicated: *=10%, **=5%, ***=1%.

	(1)	(2)	(3)	(4)	(5)
Words: Dummy = 1 if number of words greater than median for state	0.81***	0.48**	0.52**	0.45*	0.43
	(0.20)	(0.22)	(0.24)	(0.27)	(0.27)
Year	0.17***	0.14***	0.13***	0.10**	0.10**
	(0.04)	(0.04)	(0.04)	(0.05)	(0.05)
Dummy = 1 if supreme court (0 = intermediate court of appeals)	…	-1.24**	-1.66***	-2.21***	-2.15**
		(0.50)	(0.60)	(0.69)	(0.68)
Dummy = 1 if judge is Republican (0 if Democrat)	…	0.35	0.14	0.35	0.43
		(0.28)	(0.29)	(0.32)	(0.33)
Dummy = 1 if conservative initiative	…	-1.07***	-0.71***	-1.06***	-0.95***
		(0.25)	(0.27)	(0.33)	(0.35)
Dummy = 1 if initiative concerns judiciary	…	-0.78*	-0.17	-0.54	-0.38
		(0.40)	(0.45)	(0.51)	(0.53)
Age of judge	…	…	-0.03*	-0.03*	-0.03*
		…	(0.02)	(0.02)	(0.02)
Years to next election	…	…	-0.07	-0.01	-0.002
			(0.05)	(0.06)	(0.06)
AGREE: Dummy = 1 if conservative initiative and Republican judge, or liberal initiative and Democratic judge	…	…	0.96***	0.70**	…
			(0.26)	(0.31)	
AGREE in "aggressive" states: Dummy = 1 if AGREE and state is Colorado, Florida, or Oregon	…	…	…	…	0.93**
					(0.39)
AGREE in "restrained" states: Dummy =1 if AGREE and state is California or Washington	…	…	…	…	0.26
					(0.54)
Observations	624	618	589	506	506

Table 7. Percent of Judges Voting to Uphold in Aggressive and Restrained States
This table reports the percentage of judges voting to uphold, conditional on whether they "agree" or "disagree" with the policy of the initiative, and conditional on whether the state has an "aggressive" or "restrained" approach to the single subject rule. Initiatives are classified ideologically as in Table 2. The number of observations is in square brackets. Data cover the period 1997-2006.

	States with "restrained" enforcement (CA, WA)	States with "aggressive" enforcement (CO, FL, OR)	All states together
AGREE: Democratic judge and progressive initiative, or Republican judge and conservative initiative	88.3 [154]	83.2 [155]	85.8 [309]
DISAGREE: Democratic judge and conservative initiative, or Republican judge and progressive initiative	80.6 [98]	41.1 [180]	55.0 [278]
Initiative pertaining to judiciary	…	54.8 [42]	….

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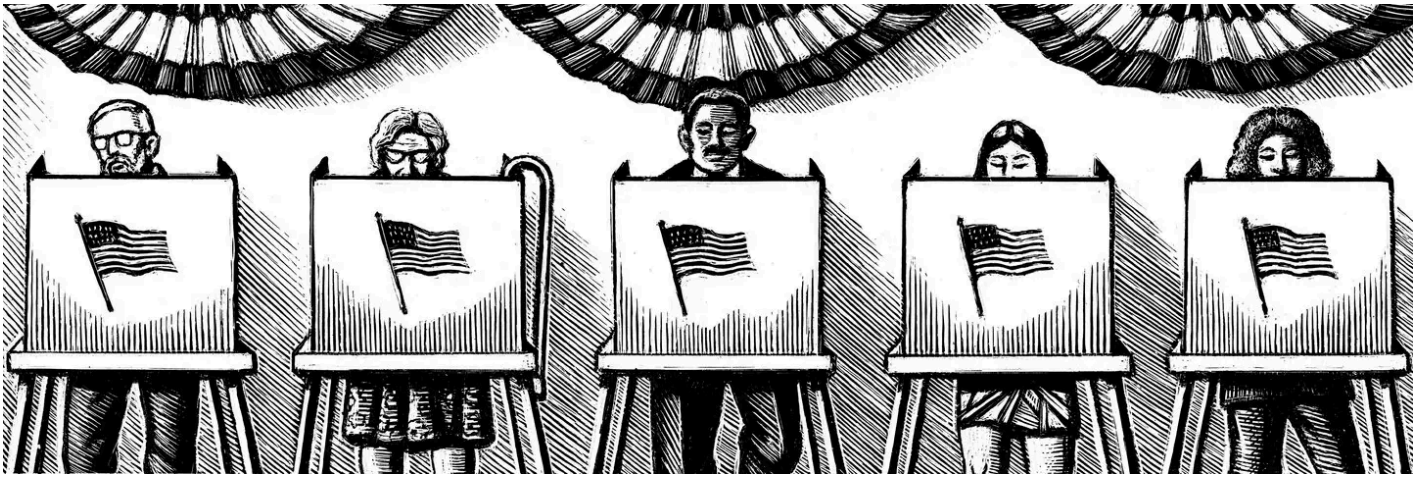

VOTING RIGHTS AND ELECTIONS | GOVERNMENT STRUCTURE | ELECTION 2024

How Courts Oversee Ballot Initiatives

State courts — and to some degree federal courts — play a significant role in every stage of the direct democracy process.

By Alice Clapman, Alon Goldfinger, Connie Wu

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Colorado Oregon Massachusetts Pennsylvania North Dakota Ohio Alaska Idaho Michigan South Dakota Missouri Arkansas Florida Nevada California

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The United States is primarily a representative democracy in which voters play an indirect role in making laws by electing legislators. **Twenty-five states** have added some degree of direct democracy to their constitutions, allowing citizens to enact statutes or constitutional amendments by popular vote via a ballot initiative or to reject recently enacted legislation via a referendum. Other states have a less direct process for involving voters in lawmaking: they allow the legislature to refer statutes or constitutional changes for a popular vote.

Most states with direct democracy **added** this feature during the Progressive Era around the turn of the 20th century in **response** to concerns that legislatures were being corrupted by wealthy insiders and were not responding to the popular will. Progressive reformers **sought to**

reclaim for citizens a certain amount of the lawmaking power they had ceded to their representatives, albeit with various procedural constraints designed to ensure sufficient deliberation.

Since its inception, American direct democracy has faced legal challenges. An early lawsuit claimed it was incompatible with the "republican form of government" guaranteed to states in the U.S. Constitution. The U.S. Supreme Court **held** that "the framework and political character" of a state's government is a political question outside the Court's power to decide, thereby leaving it to states to decide whether to innovate in this way.

These days, federal courts play a relatively limited, but still important, role in adjudicating disputes related to direct democracy. Because initiatives are an exercise in politics, federal courts apply First Amendment protections to the initiative process to ensure that state restrictions do not impinge on free speech. And after initiatives pass, federal courts review them to determine whether they violate federal constitutional rights or conflict with any federal laws.

State courts are more closely involved in the initiative process. They adjudicate disputes over technical requirements governing how many signatures are required to qualify for placement on the ballot, how signatures can be gathered, how an initiative is worded, how broad it can be, and how it is described to voters. In adjudicating these disputes, courts are sometimes called on to decide whether statutory requirements unreasonably interfere with petition and referendum rights, and sometimes merely to determine whether initiative sponsors are meeting the requirements. State courts also ensure that initiatives do not violate state constitutional constraints. Finally, they enforce initiatives after they pass, just as they enforce other constitutional and statutory laws.

Courts shield the ballot initiative process from political interference.

Initiatives are a mechanism for citizens to override legislators and officials — and the party leaders who influence them. As such, initiatives often involve policy issues where lawmakers are misaligned with citizens, and they often provoke a backlash. Time and again, legislators and officials have responded to successful initiatives by attempting to ratchet up procedural requirements for future initiatives. When they do, voters bring suit, calling on courts to draw a line between the proper role that state politicians play in ensuring orderly electoral processes and the people's constitutionally protected right to direct democracy.

For example, the Michigan Supreme Court is **poised to hear a dispute** over whether the legislature has the power to "adopt and amend" a proposed initiative, thereby altering its contents, or whether the people have a right to vote on the initiative as initially proposed. This

dispute arose after the legislature "adopted and amended" (and watered down) a minimum wage initiative and an accumulated paid leave initiative.

Sometimes, ballot sponsors sue because state officials are holding up the ballot initiative process. The Missouri Supreme Court **recently ordered** the attorney general to certify a reproductive rights initiative he had blocked. Similarly, the Arkansas Supreme Court **recently intervened** to require certification of a marijuana legalization initiative, invalidating a statute that had empowered the board of election commissioners to hold up initiatives.

Other specific instances of this interplay are discussed below.

Courts oversee signature collection requirements.

Direct democracy states require sponsors to obtain a certain number of signatures before an initiative can be placed on the ballot. This threshold is intended to ensure that only initiatives with broad popular appeal come before the electorate. Recently, some legislatures have imposed new, stricter requirements around signature gathering. Such requirements touch on how many signatures sponsors must collect, when and how they must do so, and from what parts of the state they must obtain these signatures. Courts often adjudicate disputes over whether these statutory requirements are reasonable or whether they unduly constrain the constitutional right to direct democracy.

For example, the Idaho Supreme Court **blocked legislation** that would have increased the signature threshold from 6 percent of qualified electors in 18 legislative districts to 6 percent in 35 legislative districts. The court held that because the Idaho Constitution enshrines the people's right to enact laws "independent of the legislature," the legislature may not restrict that right absent a compelling state interest — and even then must tailor any restriction narrowly to that interest. The court also held that, by handing a kind of veto power to lower-population districts, the statute would institute a "'tyranny of the minority' . . . [that would] seriously undermine[] the people's initiative and referendum powers enshrined" in the state constitution.

Similarly, the Michigan Supreme Court **invalidated** a statutory geographic distribution requirement for petition signatures, holding that a 15 percent cap of signatures per congressional district "imposes an additional substantive requirement that does not advance any of the express constitutional requirements."

The Arkansas Supreme Court, meanwhile, recently **rejected** a challenge to a new law that requires signatures to be gathered from at least 50 counties (up from the original requirement of 15 counties) and prohibits sponsors from curing signature defects if the deadline for filing petitions has passed.

Courts have invalidated various other canvassing restrictions as inconsistent with direct democracy rights. For example, in Missouri, a closely divided supreme court **rejected** a legislative effort to prohibit signature gathering before a secretary of state certifies a referendum, holding that this requirement did not guarantee sufficient time to gather signatures and therefore unreasonably impinged on the constitutional right to hold popular referenda. Similarly, the Arkansas Supreme Court **invalidated** a requirement that sponsors of ballot initiatives obtain background checks on canvassers.

Courts also review canvassing restrictions to ensure they do not implicate other rights. Federal courts have **recognized** that petition circulation is "core political speech because it involves 'interactive communication concerning political change.'" Accordingly, courts have invalidated various restrictions on signature collection, such as **prohibitions** on paid canvassers, **requirements** that petition circulators be registered voters and wear badges displaying their names, **requirements** that their names and addresses be made publicly available, and **restrictions on where** and **when** they can canvas. Courts have divided on whether states **can** or **cannot**, consistent with the First Amendment, prohibit sponsors from paying canvassers per signature gathered

In addition to reviewing restrictions on signature gathering, courts also resolve disputes over the validity of individual signatures and whether state officials are properly reviewing them. For a term limits initiative in North Dakota, the secretary of state invalidated nearly 30,000 signatures because he perceived a pattern of fraud based on a small number of signature inconsistencies. The sponsors sued, and the North Dakota Supreme Court **ordered** the secretary to place the initiative on the ballot, holding that state law did not authorize these rejections. The Arizona Supreme Court **similarly rejected** an attempt to throw out signatures for a proposed campaign finance transparency initiative based on technical legal defects.

Courts have also **applied First Amendment principles** to invalidate state actions that disqualify signatures for immaterial reasons. Courts sometimes uphold official decisions to exclude signatures. In Oregon, for example, the state supreme court **agreed** with the secretary of state's decision to exclude signatures from inactive voters based on the state constitution's specification that signatures be from "qualified" voters.

Courts review ballot descriptions.

When measures are placed on a ballot, they are accompanied by a brief description intended to inform voters as to how the measure, if adopted, would change state law. In some states, the secretary of state drafts this description, sometimes together with a special ballot board or the attorney general; in others, the sponsor drafts it. Courts **adjudicate disputes** over whether explanatory language is "clear and honest," often with some deference toward any state officials

involved in the process but with an eye to ensuring that voters have the information they need to make a "**reasoned, rational decision**." In deciding these cases, courts can become participants in the drafting process, revising the challenged description and issuing the final version.

In states where officials draft the ballot description, sponsors sometimes challenge these descriptions as misleadingly negative. Courts have been confronted with this issue recently because reproductive rights advocates have been proposing constitutional protections by ballot initiatives in several states, and state officials opposed to these initiatives have been in charge of drafting these ballot descriptions. In Ohio, sponsors **challenged** the description drafted by the state ballot board on the grounds that it was argumentative, misleading, and confusing. The court mostly rejected these claims, requiring only one minor tweak to the description. By contrast, when the Missouri Secretary of State tried to describe proposed reproductive rights initiatives as allowing "dangerous" abortions by unlicensed individuals up to "live birth," a court **invalidated** these descriptions as "argumentative" and as "not fairly describ[ing] the purpose or probably effect of the initiative[s]." The court then wrote and certified its own descriptions. The decision was **largely upheld** by an intermediate appellate court and is likely to go up to the state supreme court.

Voters sometimes challenge descriptions drafted by state officials as misleadingly positive, particularly if they fail to explain how an initiative will alter the status quo. For this reason, the Oregon Supreme Court recently held up an initiative that would give parents a constitutional right to enroll their child in any K–12 public school statewide that had capacity. The court **ordered** the attorney general to revise the initiative's caption and description to clarify that it would eliminate the discretion school administrators currently exercise in admitting nonresident students.

Some other courts afford state officials more leeway. In Ohio, for example, not only did the court recently reject a challenge to the ballot board's *unfavorable* description of a reproductive rights initiative, but just before that, the court **allowed** the board to *favorably* describe a legislatively referred initiative. That referred initiative would have made it harder for voters to amend the constitution, including by requiring a supermajority, and the court allowed the board to describe this change as "elevating" the standard without explaining what that meant. Even that favorable description could not save the initiative from defeat.

Courts hear similar challenges to descriptions drafted by sponsors. In Nevada, for example, a citizen **challenged** a ballot initiative that would have required voters to present certain identification at the polls, arguing that the initiative description was misleading because it claimed that the initiative would improve "voter integrity" and speed up the processing of mail-in ballots. The court **agreed**, rewriting the description to be briefer and more neutral in tone.

Sometimes, instead of rewriting a description, courts simply strike it from the ballot. For example, in Florida, where the legislature **requires** that the Florida Supreme Court review every initiative beforehand, the court struck down a proposed 2022 ballot initiative that would have allowed for the purchase and personal use of marijuana. The court **ruled** that the ballot summary was "affirmatively misleading" because it implied that voters could legalize marijuana completely, when they could only remove state, but not federal, prohibitions.

Sometimes, state officials deem a description inaccurate and refuse to place it on the ballot, and sponsors ask the court to intervene. For example, in 2022, the Michigan Board of Canvassers' Republican members tried to block a voting rights initiative from the ballot, claiming that the initiative failed to adequately warn voters of the degree to which it would alter the Michigan Constitution. The Michigan Supreme Court **rejected** this position and ordered the board to place the initiative on the ballot. It held that that the board was overstepping its narrow discretion and rejected its substantive objections. The initiative **passed resoundingly**. The court **similarly intervened** when the board tried to block a reproductive rights initiative on the ground that the spacing between words made it too difficult to read.

In addition to reviewing ballot descriptions, courts also review descriptions used to solicit signatures supporting an initiative. For example, opponents of an Alaska initiative to require parental involvement for minors seeking an abortion sued to block the initiative from the ballot, arguing that the signatures were invalid because sponsors had not disclosed to signatories that minors currently can access abortion without informing a parent and that the proposed restriction would be enforced through criminal penalties imposed on physicians. The Alaska Supreme Court **agreed** that these omissions were misleading but held that they were not so misleading as to necessitate striking the initiative from the ballot. Instead, the court ordered that the description be corrected to convey this information to voters.

Courts enforce single-subject rules.

State constitutions that allow direct democracy generally have a "single-subject rule" requiring that each initiative only include provisions that are reasonably related to each other and can be grouped together under a single subject. At least one state **initiated** this requirement by statute. Single-subject rules serve two related purposes: preventing sponsors from aggregating support for multiple proposals, some or all of which would never have sufficient popular support to pass on their own (sometimes called "logrolling"), and avoiding voter confusion.

Different state courts enforce these rules with different levels of strictness. In some states, courts allow any provisions to be grouped together that are "**germane**" to a common purpose. In others, courts **require** some stronger connection, such that the provisions "function together in an interrelated way," "depend upon one another," or "form an interlocking package necessary

to accomplish one overarching objective." An example of a measure that might satisfy the weaker but not the stronger test is the victims' bill of rights invalidated by the Pennsylvania Supreme Court in 2021. Although this measure **included** a package of rights all relating to crime victims, the specific rights included — such as a right to restitution and a right to participate in parole proceedings — were not interdependent. Similarly, the South Dakota Supreme Court **invalidated** an initiative to legalize medical marijuana that had passed by over 54 percent, because it combined three independent goals: legalizing and regulating marijuana, ensuring access to medically necessary marijuana, and regulating hemp.

Sometimes courts, applying a single-subject rule, strike an initiative from the ballot before the election. The Colorado Supreme Court **blocked** an animal welfare initiative from appearing on the ballot because it combined the objective of extending animal welfare standards to livestock with the objective of broadening protections against sexual acts with animals of any kind. The court ruled that "animal cruelty" was too broad a unifying subject to satisfy the state single-subject rule. This is a fairly typical dispute in single-subject rule cases: initiative sponsors propose a unifying concept, and courts decide whether this concept is specific enough to satisfy the rule's goals of preventing logrolling and avoiding voter confusion.

In another pre-election case, the Massachusetts Supreme Court applied a single-subject rule to block an initiative sponsored by rideshare companies to classify drivers as independent contractors. Critically, the sponsors had tried to include a provision narrowing rideshare companies' legal liability toward third parties harmed by drivers. In an **opinion** reflecting the overlap between single-subject rules and other rules protecting voters against misleading ballot language, the court focused on the vague, misleading language in the description, as well as the fact that the initiative combined multiple independent provisions.

Some courts prefer to review single-subject rule challenges after rather than before an election, **generally** on the theory that before an initiative is passed, its constitutionality is not a live controversy, and **sometimes** also to avoid a rushed judgment. For example, although the Pennsylvania victims' rights measure mentioned above was challenged prior to its placement on the ballot, the Pennsylvania Supreme Court allowed the measure to appear on the ballot but ordered the secretary to hold off on certifying the results. Ultimately, the court **permanently blocked** certification.

In cases where courts have found a single-subject rule violation, they have provided differently scaled remedies. Specifically, courts have differed on whether valid pieces of an initiative **can be severed** from the invalid pieces and preserved or whether an initiative **must be struck down** in full if any part of it is invalidated.

In addition to reviewing initiatives under a single-subject rule, courts sometimes intervene when state officials invoke such a rule to block an initiative. For example, the Alaska Supreme Court recently ordered the lieutenant governor to certify an election reform initiative for the ballot, rejecting his position that the initiative violated the state single-subject rule. The initiative — encompassing campaign finance reform, open primaries, and ranked-choice voting — might well have been held to violate the stricter single-subject rules applied in some other states, but the Alaska Supreme Court **applied a more lenient test** merely requiring a logical connection between these three provisions.

Courts ensure consistency with other constitutional and statutory law.

As the country's foundational document, the U.S. Constitution trumps state law when the two conflict. That includes the individual rights the Constitution enumerates — states cannot violate these by any means, including through direct democracy. Sometimes ballot initiatives impinge on federal constitutional rights and are challenged in state or federal court on that basis. Additionally, state constitutions, including the individual rights they enumerate, constrain what statutes citizens can enact through ballot initiatives.

In 1992, Coloradans amended their constitution to prohibit local governments from enacting antidiscrimination protections for LGBTQ+ residents. The U.S. Supreme Court **struck this amendment down**, holding that the Equal Protection Clause prohibited states from singling out groups for disparate treatment based on sheer animus.

In several states, voters have approved initiatives to regulate gun purchases and ownership. These have been challenged under the Second Amendment. When passed as statutory initiatives, they have also been challenged under state constitutional analogues of the Second Amendment. In Oregon, an initiative requiring registration and banning large-capacity magazines is **currently enjoined** by a state judge under the Oregon Constitution, whereas a federal judge had **ruled it constitutional** under the U.S. Constitution. A similar initiative in California was **upheld** in a lower federal court in a decision that was recently vacated and remanded by the U.S. Supreme Court.

Campaign finance has been another locus of contest, as voters try to reduce the influence private campaign donations have on elections. These initiatives have been challenged based on the theory that donations are a protected form of speech or association. These challenges have met mixed results, with disclosure requirements faring better than prohibitions. While the U.S. Supreme Court **invalidated** a state initiative to create a voluntary public funding system, an Arizona court **recently upheld** a statutory initiative requiring donor disclosure of "the original source of all major contributions used to pay . . . for campaign media spending." A case is **pending** in Alaska challenging disclosure rules, including disclaimer requirements for ads and

required reporting around contributions from certain third-party groups. Free speech and association claims **have also been raised** in challenges to reform initiatives, such as those that would require open primaries and ranked-choice voting. The Alaska Supreme Court recently rejected one such challenge.

Sometimes, initiative opponents claim that a particular initiative upsets the balance of authority between the federal government and the states. Because Congress has the authority to regulate interstate commerce, courts limit the role states can play in doing so. This limitation on states is called the "dormant" Commerce Clause because it is not directly stated in the Constitution but rather implied by the Constitution's grant of authority to Congress. In *Jones v. Gale*, for example, the Eighth Circuit invalidated a Nebraska ballot initiative barring most corporations and other non-family-owned partnerships from buying interest in land in Nebraska used for farming or ranching, finding that the initiative discriminated against out-of-state conduct in violation of the interstate commerce clause. At the same time, courts have upheld ballot measures that burden out-of-state conduct in a nondiscriminatory way. For example, a fractured U.S. Supreme Court **rejected a challenge** brought by meat producers against a California animal welfare initiative that set standards for meat sold in the state (most of which was produced out of state).

Along similar lines, entities regulated by a ballot initiative sometimes claim the initiative is "preempted" by federal law — either by an express provision of federal law or by a comprehensive statutory scheme that leaves no room for parallel state regulation. (The latter type of claim is called "field preemption.") Federal courts **recently rejected** a field preemption challenge to a California initiative banning the sale of flavored tobacco, holding that the U.S. Food and Drug Administration has very limited authority, leaving states free to regulate much of the market. In other cases, courts have blocked initiatives that would cover areas governed by the U.S. Constitution, such as initiatives that would impose **term limits** on federal offices or **require certain ballot notations** intended to pressure candidates to support federal term limit reform.

Courts also enforce state constitutional constraints on initiatives, such as **prohibitions** on unfunded mandates, **restrictions** on the resubmission of initiatives that have failed in the past, and **limitations** on more significant changes to the constitution being done through the process.

Mississippi's supreme court not only has enforced state constitutional constraints on the ballot initiative process but has done so in such a way as to nullify that process altogether. In 2021, the court **held** that the state constitutional provisions for initiatives are inoperable because of outdated constitutional language requiring signature gathering from five congressional districts (when as a factual matter the state is now divided into only four congressional districts). In

doing so, the court **also invalidated** a medical marijuana initiative that had just passed with 74 percent of the vote. This is the **second time** in just over a century that the Mississippi Supreme Court has nullified the state's mechanism for direct democracy.

The Mississippi Supreme Court's approach stands out from that of other state courts, which take their constitution's commitment to direct democracy as the starting point and then reason from there as the best way to effectuate that commitment alongside other commitments.

• • •

State courts — and to some degree federal courts — are closely involved in the direct democracy process at every stage, adjudicating disputes over signature collection, drafting, participation by other political actors, and more. In a sense, and when functioning optimally, they are part of a checks and balances system, ensuring that constitutional rights to direct democracy are respected but that the process is a deliberative one and that citizens, acting as lawmakers, do not exceed their retained authority.

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NOTE

CONSTITUTIONAL AVOIDANCE: THE SINGLE SUBJECT RULE AS AN INTERPRETIVE PRINCIPLE

Daniel N. Boger[*]

The single subject rule, which prohibits bills from containing more than one "subject," is in place in forty-three state constitutions and has existed since the nineteenth century. It is frequently litigated and has led to many high-profile laws being invalidated or severed. Although the policy rationales behind the rule are well known and largely agreed upon, applying the rule has proven challenging. Courts have struggled to formulate coherent doctrine for what constitutes a distinct "subject," as demonstrated by the myriad of vague, malleable tests developed by state courts. As a result, single subject rule jurisprudence suffers from fundamental flaws, including unpredictable, arbitrary decision making and high enforcement costs.

This Note posits that the single subject rule's enforcement problems stem from courts' perception of it exclusively as a substantive rule to prevent logrolling and to further other policy goals. This Note proposes an alternative conception of the single subject rule: as an interpretive principle based on the canon of avoidance of constitutional doubt. Approaching single subject rule adjudication in this way would allow courts to enforce the principles of the single subject rule without having to precisely define the contours of a statute's "subjects," thus averting many of the difficulties in applying the rule. Employing the rule as an interpretive tool would also allow courts to uphold a law while still enforcing the single subject rule by narrowly construing the law's various ambiguous provisions. In this way, it would help courts skirt the negative consequences that may

[*] J.D. University of Virginia School of Law, 2017; Associate, White & Case LLP, Washington, D.C. Special thanks to Michael Gilbert for supplying the inspiration for this Note and for his continuing guidance during the writing process. I am also indebted to my Notes Editor, Phillip Ogea, who diligently shepherded the Note through to publication, and to the Executive Editor, Ryan Witt, who provided useful input at the end. Finally, many thanks to Ethan Boger and Michelle Garafalo for taking the time to read the Note and for providing comments.

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result from severing or invalidating popularly enacted statutes and initiatives.

INTRODUCTION

SINGLE subject rules prohibit state statutes and ballot initiatives from containing multiple "subjects." They have existed in the United

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States since the beginning of the nineteenth century and are currently enacted in forty-three states.[1] A typical example can be found in Article III, Section 6 of the Florida constitution, which reads, "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."[2] The two main policy justifications for single subject rules are (1) combatting what are seen as nefarious legislative practices, including logrolling and the attachment of riders and (2) providing better notice to legislators and the public as to what a bill contains and its purpose.[3]

In addition to being widespread, the rule is also frequently adjudicated; courts heard at least 102 cases involving single subject rules in 2016 on issues ranging from fracking to sales tax increases.[4]

Out of the forty-three states that have enacted the rule, forty also contain a title requirement, which requires that the bill's subject be expressed in the title of the law.[5] In addition, eighteen states have extended their single subject rules to ballot initiatives.[6]

Although the policy rationales behind the rule are well known and largely agreed upon, applying the rule has proven enormously challenging. Single subject rules are frustratingly vague, and courts have struggled to formulate coherent doctrine for what constitutes a distinct "subject," as demonstrated by the myriad of vague, malleable tests state courts have developed across the country. As a result, single subject rule jurisprudence suffers from fundamental flaws. As Professor Michael Gilbert has noted, confusion over how to apply the rule has led to

[1] Michael D. Gilbert, Single Subject Rules and the Legislative Process, 67 U. Pitt. L. Rev. 803, 812 & n.43 (2006). Forty-one states apply their single subject rules to all legislation, while the rule in two states—Mississippi and Arkansas—applies only to appropriations bills. Id. at 812 n.41.

[2] Fla. Const. art. III, § 6.

[3] See infra notes 25–33 and accompanying text.

[4] This number was collected from a Westlaw search for "single subject" or "title object" within 2016 cases and is current as of August 1, 2017. See, e.g., Robinson Twp. v. Commonwealth, 147 A.3d 536, 542 (Pa. 2016) (discussing fracking); Lee v. State, 374 P.3d 157, 161, 164 (Wash. 2016) (discussing sales tax increases).

[5] Brannon P. Denning & Brooks R. Smith, Uneasy Riders: The Case for a Truth-in-Legislation Amendment, 1999 Utah L. Rev. 957 app. A at 1005–23.

[6] Robert D. Cooter & Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 Colum. L. Rev. 687, 705 (2010).

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enforcement problems, where judges have upheld and struck down laws on seemingly arbitrary bases.[7]

In addition to being difficult to apply, judges may be reluctant to fully enforce the rule because of legitimate fears of political backlash and interbranch strife that may result from striking down or severing popularly enacted laws, many of which touch on politically sensitive issues, such as same-sex marriage, abortion, and redistricting.[8] Some scholars and judges have responded to the dysfunction present in single subject jurisprudence by criticizing the rule and even calling for its abolition.[9] However, although the rule presents difficulties for courts, it remains codified in state constitutions across the country, and it continues to have popular support.[10] Therefore, courts cannot—and should not—water down or abandon the single subject rule.

Existing scholarship has thoroughly documented the trouble courts have had with adjudicating single subject rule disputes. Some support stronger enforcement of the rule,[11] while others have favored weakening or abandoning the rule altogether, arguing that aggressive enforcement accentuates the rule's tendency to increase inconsistent and biased judging.[12] Still other scholars have focused on the use of the single subject rule to put limits on the harmful effects of popular lawmaking by

[7] Gilbert, supra note 1, at 807.

[8] See infra Section III.C.

[9] See, e.g., In re Title & Ballot Title & Submission Clause for 2005-2006 #55 (In re Initiative #55), 138 P.3d 273, 284 (Colo. 2006) (en banc) (Coats, J., dissenting) (viewing the single subject rule as an "amorphous" standard that cannot be implemented "without conforming it to [judges'] own policy preferences"); Richard L. Hasen, Ending Court Protection of Voters from the Initiative Process, 116 Yale L.J. Pocket Part 117, 117 (2006) (advocating for repeal of the single subject rule).

[10] In the last century, many states have expanded the reach of single subject rules to include ballot initiatives. Colorado did so legislatively as recently as 1994, while many other states have done so through judicial opinions. See Cooter & Gilbert, supra note 6, at 705 & nn.78–86 (providing a brief history of the expansion of the single subject rule). Finally, as Gilbert points out, judicial attention to the single subject rule has increased dramatically in the past several decades, most often by elected state court judges. Gilbert, supra note 1, at 819 fig.1, 820.

[11] Marilyn E. Minger, Comment, Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California, 24 U.C. Davis L. Rev. 879, 880 (1991) (calling for stronger enforcement of the single subject rule in California).

[12] See Hasen, supra note 9, at 117 (advocating for repeal of the single subject rule); Daniel H. Lowenstein, Initiatives and the New Single Subject Rule, 1 Election L.J. 35, 40–44 (2002) (arguing for weaker enforcement of the rule).

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giving courts a mechanism to strike down ballot initiatives.[13] In sum, literature on the single subject rule has predominantly focused on how aggressively to enforce the rule, improving the substantive policy outcomes of single subject adjudication, and increasing administrability of the rule.

To date, several scholars have studied how better to apply the single subject rule substantively.[14] In doing so, these scholars have proposed improved ways in which courts may distinguish between "subjects" in a law and, therefore, more precisely identify single subject rule violations. For the most part, however, alternative tests for parsing out multiple "subjects" merely reformulate those already in existence and contain a similar degree of vagueness and indeterminacy. One exception is Professors Cooter and Gilbert's proposal, which in theory allows for a judge to apply the single subject rule completely determinatively and, therefore, has the potential to improve accuracy and reduce arbitrariness in single subject rule adjudication.[15] Nonetheless, it remains too difficult to implement in practice.[16] Furthermore, there is no evidence that courts have been willing to adopt any of the new formulations of the single subject rule that scholars have put forth. Therefore, single subject rule jurisprudence needs a new direction. By rethinking the single subject rule as a principle of interpretation, this Note proposes a fresh, creative solution to some of the most vexing issues in single subject rule jurisprudence. Although trailblazing in this regard, the idea of the single subject rule as a canon of construction draws on traditional, well-known methods of statutory interpretation, thus making this Note's proposal relatively easy to apply.

This Note posits that the single subject rule's enforcement problems stem from courts' perception of it exclusively as a *substantive* rule devised to prevent logrolling and to further other policy goals. That is, courts have traditionally decided single subject rule challenges on the

[13] Richard B. Collins & Dale Oesterle, Structuring the Ballot Initiative: Procedures that Do and Don't Work, 66 U. Colo. L. Rev. 47, 109 (1995) (favoring more aggressive enforcement of the single subject rule to improve the quality of ballot initiatives).

[14] See, e.g., Cooter & Gilbert, supra note 6, at 709; Justin W. Evans & Mark C. Bannister, Reanimating the States' Single Subject Jurisprudence: A New Constitutional Test, 39 S. Ill. U. L.J. 163, 164, 221 (2015).

[15] See Cooter & Gilbert, supra note 6, at 691–92.

[16] See infra Section III.A.

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basis of whether the statute or initiative was the product of logrolling or some other nefarious legislative practice.[17] In the initiative context specifically, courts often ask whether the initiative is confusing or misleading to voters.[18] In doing so, courts attempt to peer into the legislative backstory of a law and make arbitrary determinations as to what constitutes a "subject."[19] Once a court finds a single subject rule violation, it typically behaves as if its only choice is to invalidate or sever the law.[20]

This Note proposes an alternative conception of the single subject rule: as an *interpretive* principle to guide courts in determining textual meaning. Specifically, courts should use the canon of avoidance of constitutional doubt (and when appropriate, the closely related saving canon) to interpret ambiguous language in statutes and ballot initiatives in ways that avoid creating constitutional single subject rule violations. To illustrate briefly, when a statute or initiative could be interpreted in multiple ways—one that creates a serious possibility of a single subject rule violation and another that does not—courts should choose the narrow interpretation that avoids conflict with the single subject rule.

Doing so would allow courts to enforce the principles of the single subject rule without having to precisely define the contours of a statute's "subjects," thus averting many of the difficulties in applying the rule. Employing the rule as an interpretive tool would also allow courts to uphold a law while still enforcing the single subject rule by narrowly construing the law's various ambiguous provisions. In this way, it would

[17] See, e.g., Wash. Ass'n for Substance Abuse & Violence Prevention v. State, 278 P.3d 632, 641 (Wash. 2012) (en banc) (rejecting a single subject rule challenge to Initiative I-1183 and noting that "appellants ha[d] not established that I–1183's public safety earmark [was] the result of logrolling, rather than the product of permissible law making").

[18] In re Proposed Initiative 1996-4, 916 P.2d 528, 538 (Colo. 1996) (en banc) (Mullarkey, J., concurring in the result) (finding an initiative to contain multiple subjects and asserting that "[s]uch an amalgamation could very well lead to voter confusion").

[19] Douglas v. Cox Ret. Props., 302 P.3d 789, 792 (Okla. 2013) (stating that the "most relevant question" in single subject rule analysis is "whether a voter, or legislator, is able to make a choice without being misled and is not forced to choose between two unrelated provisions contained in one measure").

[20] Gilbert, supra note 1, at 828 (stating that courts consider two remedies when finding a single subject rule violation: invalidation and severance); see, e.g., People v. Olender, 854 N.E.2d 593, 606–07 (Ill. 2005) (discussing the choice between severing and invalidating a statute in violation of the single subject rule); Nevadans for the Prot. of Prop. Rights v. Heller, 141 P.3d 1235, 1246–47 (Nev. 2006) (same, except in the context of an initiative).

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help courts skirt the negative political consequences that may result from severing or invalidating popularly enacted statutes and initiatives.

Part I of this Note introduces the single subject rule in detail, including its historical origin and underlying policy rationales. Part II discusses the saving and avoidance canons. Section II.A provides background on the general issue of ambiguity in statutes, while Section II.B provides an overview of the saving and avoidance canons. Section II.C then applies the canons to the single subject rule. Part III explains how the rule is traditionally applied and discusses some of the major challenges involved in its implementation, including difficulty in defining "subject" and the high costs of enforcement. It then discusses the danger that high enforcement costs will deter judges from fully enforcing the rule, and it provides an example of one court's unwillingness to enforce the single subject rule. Part IV highlights an Arizona Supreme Court opinion that attempts to use the rule in the way this Note advocates. It points out places where the court succeeded and failed, and it demonstrates the potential benefit of using the single subject rule as an interpretive principle. Part V concludes the Note by suggesting some additional advantages associated with using the single subject rule as a principle of interpretation, including the normative benefits of the rule as applied to ballot initiatives.

I. BACKGROUND ON THE SINGLE SUBJECT RULE

A. History and Purpose

Single subject rules have existed in state constitutions since the middle of the nineteenth century. New Jersey was the first state to adopt the rule in 1844, and many other states quickly followed suit.[21] By the turn of the century, thirty-six states would join in enacting the rule.[22] Today, forty-three states have codified the single subject rule in their constitutions.[23] Eighteen have extended it to ballot initiatives.[24]

[21] Denning & Smith, supra note 5, at app. B.
[22] Gilbert, supra note 1, at 822 fig.2.
[23] Id.
[24] Michael D. Gilbert, Does Law Matter? Theory and Evidence from Single-Subject Adjudication, 40 J. Legal Stud. 333, 338 (2011).

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The principal policy underlying the single subject rule is the prevention of "logrolling."[25] Logrolling is a practice where legislators trade votes on proposals—one or both of which lack majority support—and combine them into a single omnibus bill that can be supported by a majority.[26] At the time when most single subject rules were enacted, logrolling was seen as particularly pernicious.[27] Courts feared that it would undermine the legislative process, which they saw as rooted in the concept of majority support for enacted legislation.[28] Single subject rules were also viewed as a solution to logrolling's effect of forcing legislators to vote for bills with provisions that they opposed.[29]

A related rationale for the single subject rule is to prevent riders.[30] Riders are proposals "attached to bills that are popular and so certain of adoption that the riders will secure adoption, not on their own merits, but on the merits of the measure to which they are attached."[31]

[25] Id. at 334; see, e.g., People v. Collins, 3 Mich. 343, 384 (Mich. 1854) (noting that the Michigan single subject rule was adopted "with the avowed intention on the part of the framers, as arresting, as far as possible, corruption and log rolling in legislation"); Wash. Ass'n for Substance Abuse & Violence Prevention v. State, 278 P.3d 632, 650 (Wash. 2012) (en banc) ("The overriding purpose of the single-subject rule is to prevent logrolling . . . .").

[26] Gilbert, supra note 1, at 808.

[27] Some states during this time prohibited logrolling at common law, invaliding contracts between lobbyists and corporations where it was found that logrolling was used to achieve passage of legislation. See Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 336 (1853); Clippinger v. Hepbaugh, 5 Watts & Serg. 315, 320 (Pa. 1843); Powers v. Skinner, 34 Vt. 274, 280 (1861). A smaller subset of courts even treated logrolling as a criminal offense, see *Marshall*, 57 U.S. (16 How.) at 336 (citing Commonwealth v. Callaghan, 2 Va. (1 Va. Cas.) 460 (1825)), but criminal prosecution was rare. See Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 814 (1985) (claiming to have found only one case of prosecution for legislative vote trading).

[28] Gilbert, supra note 1, at 814.

[29] Nova Health Sys. v. Edmondson, 233 P.3d 380, 381 (Okla. 2010) (noting the concern with logrolling where a legislator is "forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure that an unfavorable provision is not enacted"); Gilbert, supra note 1, at 814. The concern with the effect of logrolling on legislative behavior can also be applied to the executive. See Fent v. Fallin, 315 P.3d 1023, 1025 (Okla. 2013) (explaining that a purpose of the single subject rule is to "prevent the legislature from making a bill 'veto proof' by combining two unrelated subjects in one bill").

[30] Gilbert, supra note 1, at 818; see, e.g., Pennsylvanians Against Gambling Expansion Fund v. Commonwealth, 877 A.2d 383, 395 (Pa. 2005) ("[T]he single subject requirement prohibits the attachment of riders that could not become law as is, to popular legislation that would pass.").

[31] Long v. Bd. of Supervisors, 142 N.W.2d 378, 382 (Iowa 1966).

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Although riders often have much less support than the bills to which they are attached, they often become part of the enacted legislation because the majority that supported the bill did not remove them for reasons such as inattention, insurmountable procedural hurdles, or legislative efficiency.[32] Single subject rules ameliorate the problem of riding when riders are sufficiently unrelated to the subject matter of the bill and, as such, constitute distinct "subjects."[33]

Courts have also identified subsidiary policy goals underpinning the single subject rule. In brief, the single subject rule promotes transparency and clarity in the lawmaking process by requiring that a bill's subject be identified in its title, thus giving notice of the bill's contents and narrowing its scope.[34] The rule also promotes transparency and reduces the chance of surprise by preventing authors of bills and initiatives from including unrelated provisions that would trick or mislead legislators and voters.

Single subject rules have frequently been injected into contentious public policy debates. Nowhere is this clearer than in the context of abortion. Across the country, state statutes instituting strict regulations on access to abortion have sparked controversy and faced high profile challenges.[35] Just recently, the U.S. Supreme Court struck down a Texas abortion statute that imposed heightened standards for doctors and facilities performing abortions on *substantive grounds*.[36] Another of these controversial abortion statutes, Oklahoma Senate Bill 642, was struck down at the state level in October 2016, not for a substantive federal violation but for a *procedural* violation of the state's single subject rule.[37] In *Burns v. Cline*, the Oklahoma Supreme Court held

[32] Gilbert, supra note 1, at 837.

[33] See Wash. State Legislature v. Lowry, 931 P.2d 885, 895 (Wash. 1997) (en banc) ("Our constitution also evidences a clear policy that bills should pertain to single subjects and should not be encumbered by 'riders' containing divergent subjects . . . .").

[34] Giles v. State, 511 N.W.2d 622, 625 (Iowa 1994) ("The purpose of the title requirement is to provide reasonable notice to lawmakers and the public regarding proposed legislation, thereby preventing surprise and fraud."); Burns v. Cline, 382 P.3d 1048, 1050 (Okla. 2016) ("The purpose of [the title requirement] is not to impede legislation. Rather it is to insure transparency in the legislative process.").

[35] Mattie Quinn, 5 States Where the Supreme Court's Abortion Ruling Could Spur More Lawsuits, Governing (June 27, 2016), http://www.governing.com/topics/health-human-services/gov-scotus-texas-abortion-ruling.html [https://perma.cc/L2ZU-PH7K].

[36] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[37] *Burns*, 382 P.3d at 1052.

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unanimously that SB 642's provisions relating to (1) parental consent for a minor to obtain an abortion, (2) licensing and inspection procedures for abortion clinics, and (3) heightened penalties for violations of existing abortion laws were not sufficiently "germane, relative and cognate" to constitute a single subject.[38]

II. THE SINGLE SUBJECT RULE AS AN INTERPRETIVE TOOL: USING THE SAVING AND AVOIDANCE CANONS

A. Ambiguity in Law: Interpretation and the Canons

Rarely are legal texts sufficiently clear on their face such that they yield only one plausible interpretation.[39] As a result, disagreement about the meaning of written text is a common issue courts have to confront.[40] Uncertainty about the meaning of a textual provision can arise from (among other things) conflicting evidence of legislative intent or uncertainty in the meaning of the words themselves. A well-known example of the latter is the phrase "flying planes can be dangerous."[41] To resolve ambiguities in legal texts, judges apply a variety of interpretive tools, including (1) the legal or factual context in which a statute was drafted, (2) a statute's legislative history, and (3) "canons of construction."[42] "Canons of construction" are background principles that courts use to interpret language in legal texts.[43] For example, one of the most common canons of construction is the "ordinary meaning" canon,

[38] Id. at 1051–52.

[39] See generally Brian G. Slocum, The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State, 69 Md. L. Rev. 791, 805 (2010) (noting that "statutes are often vague or ambiguous for various reasons, including legislative compromises, the inherent imprecision of language, and the difficulty of drafting language to address unknowable future events"); Lawrence M. Solan, Pernicious Ambiguity in Contracts and Statutes, 79 Chi-Kent L. Rev. 859, 859–66 (2004) (discussing the issue of multiple interpretations of language in contracts as well as statutes).

[40] See generally Caleb Nelson, Statutory Interpretation 77–80 (2011) (discussing indeterminacy in statutory language).

[41] This example is pulled from Noam Chomsky, Aspects of the Theory of Syntax 20–21 (1965).

[42] See generally Nelson, supra note 40, at 81–91 (introducing many of the most well-known canons of construction).

[43] See id. at 81.

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which instructs courts to give words in a statute their ordinary or "plain" meaning in the English language.[44]

Some canons of construction serve *descriptive* purposes. For example, some descriptive canons function as "policy-neutral rules about vocabulary and syntax" to grasp the objective meaning of legal text.[45] Other descriptive canons help to ascertain the drafter's intent or (as Justice Scalia would have advocated) shed light on what a "reasonable reader" would understand the text to mean.[46] The ordinary meaning canon is descriptive in that a legislature would want—or reasonable reader would expect—a statute's words to be interpreted according to their ordinary, everyday meaning. By contrast, certain canons serve a *normative* purpose.[47] That is, they seek to advance various policy goals. For example, the rule of lenity requires that courts interpret ambiguous criminal statutes in favor of the defendant.[48] The rule of lenity is understood to advance certain substantive policies, including giving adequate notice to potential defendants and avoiding unconstitutionally vague penal laws.[49]

B. Background on the Saving and Avoidance Canons

The saving canon is an enduring, well-recognized principle of statutory interpretation.[50] When there are two plausible interpretations of a statute—one constitutional and one unconstitutional—the saving

[44] Id. at 83.

[45] Id. at 82.

[46] Id. at 81–83 (discussing some different types of descriptive canons). Professor Kent Greenawalt distinguishes the "reasonable reader" approach from the intentionalist approach, stating, "We may speak of a fully objective legislative intent as one that does not depend on the mental states of any particular legislators. It may be assessed mainly in terms of how a reasonable reader would understand the language the legislature has used." Kent Greenawalt, Statutory Interpretation: 20 Questions, at 92 (1999). Professor Nelson notes that, despite the differences in the two approaches, "the reasonable reader imagined by Justice Scalia and Judge Easterbrook has the same basic mission as the typical intentionalist: he is trying to figure out 'what Congress meant by what it said.'" Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 354 (2005) (quoting In re Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.)).

[47] Nelson, supra note 40, at 81–83.

[48] Id. at 108–10.

[49] Id. at 109–13.

[50] Id. at 138.

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canon instructs courts to choose the constitutional one.[51] As Professor Caleb Nelson notes, the saving canon serves a descriptive function by helping courts determine a statute's meaning as the legislature likely intended it.[52] The assumption underlying the canon's descriptive benefit is that legislatures would want to avoid passing statutes that they know to be unconstitutional.[53] The canon fulfills a second descriptive rationale: by choosing an interpretation that retains a statute's constitutionality, courts are adhering to the interpretive principles legislatures would want them to employ generally when construing statutes.[54] The saving canon also has normative justifications independent of ascertaining statutory meaning. The most prominent normative rationale is preventing friction between the judicial and legislative branches of government that may occur when the courts declare a statute unconstitutional.[55]

The canon favoring avoidance of constitutional doubt—also known as the avoidance canon—is related to, but distinguishable from, the saving canon. The avoidance canon dictates to judges that when a statute has two plausible interpretations—one that would put it in an area of constitutional uncertainty and one that would not—the court should choose the latter.[56] The avoidance canon differs from the saving canon in that courts do not have to make a determination on the merits as to

[51] Id. (citing Hooper v. California, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."), and United States v. Coombs, 37 U.S. (12 Pet.) 72, 76 (1838) ("If the section [of an act of Congress] admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous.")).

[52] Nelson, supra note 40, at 138.

[53] Id.

[54] Id. at 139.

[55] Id.

[56] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); Nelson, supra note 40, at 147 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.")).

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whether a particular interpretation of the statute would violate the Constitution before choosing an alternate interpretation that "saves" the statute. Rather, the avoidance canon becomes applicable even in situations where—although not certainly unconstitutional—a construction of a statute raises a "serious doubt of constitutionality."[57]

As with the saving canon, courts have justified use of the avoidance canon as a means to ascertain legislative intent. The implication of this descriptive justification is that legislatures would not want to pass laws that abut the constitutional line.[58] Also like the saving canon, use of the avoidance canon reduces friction between branches of government because it leads to fewer laws being invalidated. An additional normative justification unique to the avoidance canon is that it allows courts to "avoid constitutional questions where possible."[59] Courts have long held that judges should not decide constitutional questions unnecessarily.[60] Constitutional text can be broad and far reaching, thus increasing the chances that courts may interpret it incorrectly. Incorrect interpretations of the constitution are particularly harmful because stare decisis may lock them in, and, unlike statutes, constitutions are extremely difficult to change.[61]

Although the saving canon stands in high regard among judges and scholars, the avoidance canon is considerably more controversial. Many criticize the avoidance canon's descriptive premise that legislatures do not want to test constitutional boundaries when they pass statutes.[62]

[57] *Crowell*, 285 U.S. at 62.

[58] Clark v. Martinez, 543 U.S. 371, 381 (2005) (stating that the avoidance canon reflects "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); see also Al Bahlul v. United States, 767 F.3d 1, 15–16 (D.C. Cir. 2014) ("We assume that, in meeting [its constitutional] oath, [Congress] 'legislates in the light of constitutional limitations.'" (quoting Rust v. Sullivan, 500 U.S. 173, 191 (1991))).

[59] See, e.g., Hayes v. Cont'l Ins. Co., 872 P.2d 668, 677 (Ariz. 1994) (en banc) ("[I]f possible we construe statutes to avoid unnecessary resolution of constitutional issues.").

[60] See, e.g., Burton v. United States, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."); see also Nelson, supra note 40, at 148 (explaining that, in *Ashwander v. Tennessee Valley Authority*, the Court had developed a version of the avoidance canon "for its own governance" (quoting 297 U.S. 288, 348 (Brandeis, J., concurring) ("The Court developed, for its own governance . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.")).

[61] Nelson, supra note 40, at 148.

[62] Id. at 147.

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Others reject the avoidance canon because it is difficult to apply in the absence of the precise meaning of "constitutional doubt."[63] Finally, there is disagreement as to when a statute is sufficiently ambiguous so as to trigger application of the avoidance canon. To some extent, all law is ambiguous;[64] therefore, deciding at what point a statute is sufficiently ambiguous to warrant use of interpretive rules is up for debate. Professor Fred Schauer argues that, because the avoidance canon's descriptive justification is weak, use of the canon should be reserved for the few instances where the various interpretations of the statute are at equipoise.[65]

Courts generally do not, however, maintain this rigorous standard before applying the avoidance canon.[66] In fact, in the seminal modern case on the avoidance canon, *NLRB v. Catholic Bishop of Chicago*, the Supreme Court employed the canon—even absent ambiguity in the text of the National Labor Relations Act—in order to avoid potential conflict with the Free Exercise Clause.[67] The Court maintained that, absent a clear statement from Congress, it would apply the avoidance canon any time there was a serious question as to a statute's constitutionality.[68] The Supreme Court has since stated that the avoidance canon is "settled policy," and lower federal courts and state supreme courts use the canon routinely.[69] Therefore, despite the debate about the avoidance canon in

[63] See Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism?, 73 U. Colo. L. Rev. 1401, 1405 (2002) (arguing that constitutional doubt is "pervasive" and thus the avoidance canon acts as a "roving commission to rewrite statutes to taste").

[64] See The Federalist No. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal . . . .").

[65] Frederick Schauer, *Ashwander* Revisited, 3 Sup. Ct. Rev. 71, 84, 98 (1995).

[66] See, e.g., Clark v. Martinez, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*.").

[67] 440 U.S. 490, 500 (1979) (citing Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

[68] Id. (requiring an "affirmative intention of the Congress clearly expressed" before adopting the interpretation in the constitutional gray area (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1963))).

[69] Gomez v. United States, 490 U.S. 858, 864 (1989); see, e.g., Al Bahlul v. United States, 767 F.3d 1, 16 (D.C. Cir. 2014); State v. Irby, 848 N.W.2d 515, 521–22 (Minn. 2014); see also Nelson, supra note 40, at 147 (observing that, while the avoidance canon has recently

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academic circles, it remains a well-known and important tool of statutory interpretation in courts across the country.

C. Application of the Canons to the Single Subject Rule

In single subject rule jurisprudence, the saving and avoidance canons would apply when the following conditions are present: (1) a statute or ballot initiative is ambiguous, meaning that the textual analysis results in at least two plausible interpretations of the statute;[70] (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 statute 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.

Consider a hypothetical ballot initiative that states, "No two persons of the same sex shall have a legally recognized union equivalent to that currently allowed between persons of the opposite sex." This initiative may be read to prohibit only same-sex marriage, only same-sex civil unions, or both. The initiative is ambiguous on its face—each reading is plausible. By viewing the single subject rule as a purely substantive tool, judges fall victim to a false dichotomy: either (A) interpret the initiative to cover same-sex marriage and same-sex civil unions as two separate subjects or (B) view the "subject" of the law more abstractly so that both same-sex marriage and same-sex civil unions fall under the subject of "same-sex relationships."

A judge employing Reading A would find the presence of multiple subjects and thus strike down or sever the law for violating the single subject rule. A court that is more hesitant to strike down a popular initiative would adopt Reading B, find the presence of only one subject, and thus uphold the initiative under the single subject rule. This Note offers a third approach: use the avoidance canon to construe the initiative narrowly and uphold the law. Specifically, courts should

been criticized, "the Supreme Court has 'repeatedly affirmed' it and continues to apply it today" (quoting Jones v. United States, 526 U.S. 227, 239 (1999))).

[70] For an example of conflicting views on when to apply the avoidance canon in the context of the single subject rule, see the discussion in Section IV.B.

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interpret the above initiative to prohibit only same-sex marriage so that it clearly covers only one subject.

Viewing the rule as a principle of interpretation thus allows the single subject rule to have force while reducing the enforcement costs associated with striking down a law in its entirety. It also saves the court from having to definitively state the highly subjective proposition that "same-sex marriage" and "same-sex civil unions" constitute separate subjects. Finally, narrowing the scope of the initiative would lessen the discriminatory impact of the law on same-sex couples while respecting the will of the majority of voters.

The Parts below look more closely at some of the difficulties of applying the single subject rule and how employing the avoidance canon alleviates many of the problems that arise when courts use traditional methods of enforcing the rule.

III. CHALLENGES IN SINGLE SUBJECT RULE ADJUDICATION

The purposes behind the single subject rule have been almost universally agreed upon but applying the rule has proven to be uncertain and challenging. Although the meaning of the word "subject" is not controversial in everyday speech, its definition in the legislative context has been frustratingly difficult to pin down.[71] Certain cases present relatively easy applications of the single subject rule. Cooter and Gilbert use the example of a legislative enactment containing provisions on protection of spotted owls and the death penalty as a straightforward single subject rule violation.[72]

Aside from these easy examples, what constitutes multiple "subjects" can be ambiguous because it depends on how broadly the "subject" is defined.[73] To illustrate, in *Burns v. Cline*,[74] the Oklahoma statute contained provisions regulating parental consent for a minor to obtain an abortion, as well as licensing and inspection procedures for abortion clinics. Viewed one way, these two provisions deal with distinct

[71] See Lowenstein, supra note 12, at 47–48 (examining the difficulty in defining a "subject").

[72] Cooter & Gilbert, supra note 6, at 709.

[73] Korte v. Bayless, 16 P.3d 200, 205 (Ariz. 2001) (en banc) ("Taken to a sufficient degree of generality, nearly any group of provisions could claim some relationship.").

[74] See 382 P.3d 1048, 1052 (Okla. 2016); supra notes 37–38 and accompanying text.

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subjects: (1) regulations regarding consent to obtain an abortion and (2) safety requirements for hospitals that perform abortions. However, viewed from a higher level of abstraction (as the defendants argued), the whole statute addresses only one subject: "women's reproductive health."[75]

Courts have attempted to arrive at a logical meaning for the word "subject" by asking whether multiple provisions in an enactment are sufficiently related.[76] At bottom, whether an enactment's different proposals are sufficiently related is a mechanism for determining whether the enactment at issue has violated any of the substantive bases for the single subject rule, including logrolling, riding, or legislative transparency.[77] To direct this inquiry, courts have devised myriad verbal formulations for deciding single subject questions. For example, Indiana and West Virginia courts determine whether there is a "reasonable basis" for grouping multiple proposals together.[78] Illinois courts find a single subject rule violation when the legislature "includes within one bill unrelated provisions that by no fair interpretation have any legitimate relation to one another."[79] California courts similarly ask whether challenged provisions are "reasonably germane to a common theme, purpose, or subject."[80] The test in Minnesota is another variation on the same theme: whether separate provisions "fall under some one general idea, [are] so connected with or related to each other, either

[75] *Burns*, 382 P.3d at 1051.

[76] Evans & Bannister, supra note 14, at 209 ("Although the decisional law across the states may vary somewhat in its phraseology and application, it appears that most single subject states have adopted the same general line of common law principles . . . ."); Gilbert, supra note 1, at 827 ("While the language of the tests differs, their purpose is the same: to identify bills that, based on a commonsense interpretation of context, contain provisions that are unrelated to one another.").

[77] See Douglas v. Cox Ret. Props., 302 P.3d 789, 794 (Okla. 2013) (remarking that "the constitutional infirmity of logrolling, which is the basis of this opinion, can only be corrected by the Legislature by *considering the acts* within the [logrolled Act] *separately*"); Am. Petroleum Inst. v. S.C. Dep't of Revenue, 677 S.E.2d 16, 18 (S.C. 2009) ("What remains for consideration [as to whether there is a single subject violation] is whether the Act constitutes legislative logrolling, thus invalidating the Act in part or in its entirety.").

[78] Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 214 (Ind. 1981); Kincaid v. Mangum, 432 S.E.2d 74, 82 (W. Va. 1993).

[79] People v. Reedy, 708 N.E.2d 1114, 1117 (Ill. 1999).

[80] Brown v. Superior Court, 371 P.3d 223, 231–32 (Cal. 2016) (emphasis omitted) (quoting Californians for an Open Primary v. McPherson, 134 P.3d 299, 318 (Cal. 2006)).

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logically or in popular understanding, as to be parts of, or germane to, one general subject."[81]

A. Difficulty in Administering the Rule and Arbitrary Decision Making

Although tests such as "germaneness" may be effective in smoking out obvious single subject violations, courts and commentators alike find these tests to be subjective, imprecise, and difficult to apply.[82] It is also questionable whether, under the current doctrinal framework, courts are even capable of consistently detecting the influence of logrolling on particular statutes or ballot initiatives.[83] Thus, current judicial tests often fail to provide sufficient guidance in adjudicating closer cases where violations are less obvious.[84] Worse still, the subjective nature of substantive legal tests leads to unpredictable and arbitrary decision making.[85] This, in turn, fuels allegations that judicial decisions regarding the single subject rule—especially in controversial public policy areas—are merely pretext for judges furthering their own partisan political agenda;[86] these accusations are supported by empirical data.[87]

[81] Townsend v. State, 767 N.W.2d 11, 13 (Minn. 2009) (alteration in original) (quoting Johnson v. Harrison, 50 N.W. 923, 924 (Minn. 1891)).

[82] See Gilbert, supra note 24, at 334, 339 (providing examples of both judges and scholars who complain about the difficulty of administering the single subject rule).

[83] Robert D. Cooter & Michael D. Gilbert, Chaos, Direct Democracy, and the Single Subject Rule 15 (Berkeley Electronic Press, Working Paper No. 38, 2006), http://law.bepress.com/cgi/viewcontent.cgi?article=1849&context=alea ("Logic and doctrine do not help courts determine whether the context in which an initiative was drafted justifies the inclusion of various provisions.").

[84] Gilbert, supra note 24, at 339.

[85] Minger, supra note 11, at 902.

[86] Lowenstein, supra note 12, at 47–48 (stating that "[w]hen judges apply the single subject rule aggressively, even if they seek to do so in accord with their sense of what the public understanding is, they will inevitably be exercising their own judgments in the most general way about what makes good political or policy sense").

[87] See John G. Matsusaka & Richard L. Hasen, Aggressive Enforcement of the Single Subject Rule, 9 Election L.J. 399, 400 (2010) (finding that "decisions in single subject cases are heavily influenced by a judge's partisan inclinations, but that the amount of partisan influence depends on whether the state's judicial doctrine directs judges to apply the single-subject rule aggressively or with restraint"). Gilbert takes a more nuanced view of ideology's role in judicial decision making. Gilbert, supra note 24, at 354–56 (agreeing with Matsusaka and Hasen's conclusion that ideology and judicial decision making are correlated but adding that judges' faithful application of the law also impacts judicial decision making in single subject jurisprudence).

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Professors Hasen and Matsusaka use the examples of two ballot initiatives adjudicated in Florida to demonstrate that judges apply the single subject rule arbitrarily and inconsistently.[88] The first initiative transferred the authority for redistricting from the state legislature to an independent commission. It also mandated that the newly formed commission change how districts were apportioned—from multimember districts to single-member districts.[89] On the same day, the court considered another ballot initiative, prohibiting both same-sex marriage and same-sex civil unions.[90] The Florida Supreme Court struck down the first initiative on the grounds that changing who decided legislative district boundaries and changing the substantive rules of reapportionment constituted separate subjects.[91] By contrast, the court upheld the second initiative on the basis that it amounted to the single subject of "marriage."[92]

As Hasen and Matsusaka point out, the unpredictability of outcomes in these cases is illustrated by the fact that other state courts have ruled the opposite way on almost identical laws. For instance, Louisiana and Georgia state trial courts invalidated on single subject grounds constitutional amendments prohibiting both gay marriage and civil unions (these decisions were later overturned by the state supreme courts).[93] Regarding the redistricting initiative, the California Supreme Court likewise upheld a similar initiative containing what appeared to be even more distinct subjects.[94]

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[88] Matsusaka & Hasen, supra note 87, at 402.

[89] Advisory Op. to the Attorney Gen. Re: Indep. Nonpartisan Comm'n to Apportion Legislative and Cong. Dists. Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1221 (Fla. 2006).

[90] Advisory Op. to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229 (Fla. 2006).

[91] *Advisory Op. Re: Nonpartisan Comm'n*, 926 So.2d at 1225–26.

[92] *Advisory Op. Re: Marriage Prot.*, 926 So.2d at 1234.

[93] See O'Kelley v. Perdue, No. 2004CV93494, 2006 WL 1350171, at *10 (Ga. Super. Ct. May 16, 2006), rev'd, 632 S.E.2d 110, 113 (Ga. 2006); Forum for Equal. PAC v. McKeithen, 893 So.2d 715, 719–22, 737 (La. 2005) (discussing the trial court opinion and reversing its decision). Kentucky and Arizona courts had upheld similar marriage initiatives. Ariz. Together v. Brewer, 149 P.3d 742, 744 (Ariz. 2007) (en banc); Wood v. Commonwealth, No. Civ.A. 04-CI-01537, 2005 WL 1258921, at *7–8 (Ky. Cir. Ct. May 26, 2005).

[94] See Fair Political Practices Comm'n v. Superior Court, 599 P.2d 46, 47–48 (Cal. 1979) (upholding an initiative creating an election commission, regulating campaign finance, regulating lobbying, and mandating voter education).

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Scholars have attempted to formulate improved tests to determine when there has been a single subject rule violation.[95] For example, Cooter and Gilbert suggest a test for determining single subject violations on ballot initiatives based on democratic process theory.[96] The test instructs judges to identify whether a particular initiative contains "sufficiently separable" preferences in the eyes of voters.[97] If voters would make independent decisions about each provision of the initiative, then each should be classified as a distinct "subject" under the rule. Conversely, if a voter's decision about one provision depends on whether another passes, those two provisions would properly constitute one "subject."[98] Cooter and Gilbert argue that their test would help standardize judicial application of the rule, reduce political partisanship in judicial decision making, and lead to greater transparency in the initiative process.[99]

Although Cooter and Gilbert's test would reduce indeterminacy in single subject rule adjudication in theory, it suffers from the fact that judges often lack the information necessary to properly apply it in practice. Perhaps because of this, there is no evidence to indicate that courts have departed from previous, long-standing doctrine. Thus, there remains a need for better mechanisms to enforce the rule that courts will readily adopt. This Note's proposal to consider the single subject rule as an interpretive principle would provide a method of effectively enforcing the single subject rule that merely involves applying existing rules of statutory interpretation. As a result, the rule as this Note conceives of it will be relatively easy for courts to implement.

B. Minimizing Indeterminacy: In re Initiative #55

As discussed above, much of the indeterminacy in single subject adjudication stems from the difficulty of properly defining the nature and scope of a "subject." Accordingly, courts struggle to find with certainty whether a statute contains one or multiple "subjects" for single subject rule purposes.

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[95] See, e.g., Evans & Bannister, supra note 14, at 164.
[96] Cooter & Gilbert, supra note 6, at 691.
[97] Id. at 692 (emphasis omitted).
[98] Id.
[99] Id. at 693.

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Viewing the rule as a principle of interpretation can aid courts in this difficult inquiry. Because the avoidance canon is triggered in cases where there is a *serious question* of a statute's constitutionality—rather than an absolute certainty—judges do not have to reach the merits of whether there are in fact multiple subjects in a statute before interpreting it in a way to avoid a single subject violation. Stated differently, when one interpretation of a statute or initiative suggests a mere *likelihood* of multiple subjects in a statute, courts may choose the interpretation that avoids constitutional doubt. As Professor Nelson notes, "courts are not actually supposed to *answer* the specific constitutional questions that they use the [avoidance] canon to avoid."[100] Therefore, judges need not confront head-on the thorny questions of which "subjects" exist in a statute before ruling in a way that gives force to the single subject rule. This can be particularly beneficial for judges when evaluating single subject challenges to long, complex laws in which parsing out multiple "subjects" with any degree of certainty may be impossible.

Consider the 2006 single subject rule challenge to Colorado Initiative #55, a controversial statewide ballot measure that prohibited any state or local government entity from providing "non-emergency services" to unauthorized immigrants.[101] In what was viewed as a politically motivated decision that divided the court along party lines,[102] the court found that the initiative violated the single subject rule and struck it down accordingly.[103] In finding multiple subjects in the initiative, the court employed strained and confusing analysis that is typical of single subject decisions. The court interpreted the term "non-emergency services" broadly to include two distinct categories of services: (1) traditional "medical and social services such as child, adult and financial

[100] Caleb Nelson, Avoiding Constitutional Questions Versus Avoiding Unconstitutionality, 128 Harv. L. Rev. F. 331, 339 (2015).

[101] See In re Title & Ballot Title & Submission Clause for 2005–2006 #55 (In re Initiative #55), 138 P.3d 273 (Colo. 2006) (en banc). Section 1 of the initiative is written as follows: "Except as mandated by federal law, the provision of non-emergency services by the State of Colorado or any city, county or other political subdivision thereof, is restricted to citizens of and aliens lawfully present in the United States of America." Id. at 275 (emphasis omitted).

[102] Michael Riley, Court Bars Immigration Vote, Denver Post (June 12, 2006, 4:47 PM), http://www.denverpost.com/2006/06/12/court-bars-immigration-vote/ [https://perma.cc/G94B-4ZXG] (noting that all four justices in the majority were Democratic appointees, while the lone dissenter was appointed by a Republican).

[103] *In re Initiative #55*, 138 P.3d at 275.

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assistance programs," and (2) "administrative services," which the court viewed as encompassing "recording, registration and regulatory services."[104] As an example of the second category, the court pointed to the state court system, which provides a service by resolving property disputes between parties.

The court's arbitrary distinction between the two types of "non-emergency services" led it to conclude that the former accomplished the purpose of reducing taxpayer burdens, while the latter's purpose was "denying [unauthorized immigrants] access to unrelated administrative services."[105] The court further concluded that, while the first purpose was readily apparent in the text of the initiative, the second purpose was "incongruous" with the first and "hidden from the voter."[106] Therefore, the two purposes contained in the initiative constituted multiple subjects and violated the single subject requirement in the state constitution.[107]

The court's decision suffered from several flaws that are symptomatic of traditional single subject jurisprudence: first, as the dissent pointed out, it "underst[ood] the term 'subject' to be so elastic as to give [the] court unfettered discretion to either approve or disapprove virtually any popularly-initiated ballot measure at will."[108] Second, the decision ignited a political firestorm and led to allegations of politicized judging and encroachment on popular sovereignty.[109] Even assuming that the Colorado Supreme Court was attempting to faithfully apply the rule to prevent voter deception, its approach unnecessarily inserted the single subject rule into the center of a public policy debate. Consequently, the single subject rule was disparaged as little more than a tool to be used to advance a partisan agenda.[110]

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[104] Id. at 280.

[105] Id. at 282.

[106] Id.

[107] For a criticism of the court's reasoning in *In re Initiative #55*, see Hasen, supra note 9, at 117, 119 (suggesting the court erred by conflating "purpose" and "subject"); and Florin V. Ivan, Note, Revising Judicial Application of the Single Subject Rule to Initiative Petitions, 66 N.Y.U. Ann. Surv. Am. L. 825, 847 (2011) (asking "why the court stopped at this level of specificity and did not drill further").

[108] *In re Initiative #55*, 138 P.3d at 283 (Coats, J., dissenting).

[109] See Riley, supra note 102 (observing the angry reactions to the court's decision by the initiative's supporters, including many top state officials).

[110] Nicholas Riccardi, Court Kills Measure to Deny Immigrant Services, L.A. Times (June 13, 2006), http://articles.latimes.com/2006/jun/13/nation/na-immig13 [https://perma.cc/37TP-TNUF]. Riccardi notes former Colorado Democratic Governor Richard Lamm's

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The court could have avoided this outcome by employing a different conception of the single subject rule—as a tool of interpretation rather than a substantive rule to prevent voter deception. In short, the legislature ought to have upheld the initiative while construing the term "non-emergency services" narrowly to avoid a possible violation of the single subject rule in the state constitution.

The court was correct in noting that the term "non-emergency services" was ambiguous; the term was not defined in the initiative and could plausibly have applied to any range of services provided by state and local governments. The court went astray, however, when it applied the traditional, vague tests to determine if the initiative contained multiple subjects. The court arguably stood on shaky ground when it held that "non-emergency services" included two types of services: (1) both traditional social and medical services, as well as (2) "administrative services." The court then went a step further by arbitrarily ruling that these two types of services were "disconnected and incongruous measures that have no necessary or proper connection." Applying this vague standard led the court to strike down the law on single subject grounds.

Had the court employed the avoidance canon from the start, it would have quickly realized that a broad reading of the ambiguous term "non-emergency services" would have suggested the presence of multiple subjects and, thus, have raised a serious question as to the initiative's constitutionality. From there, the court would have given "non-emergency services" a limited construction so that it incorporated only a narrow, discrete class of services that would have clearly encompassed only one subject. This approach would have saved the court from going so far as to precisely define which subjects existed in the initiative and exactly how they related to each other under the "necessary and proper connection" test.

As *In re Initiative #55* demonstrates, the single subject rule, when viewed as an interpretative principle, allows courts to sidestep the difficult task of precisely defining a "subject." To be clear, judges still have to think some about whether a law contains multiple subjects. Yet, judges do not have to declare outright precisely which subjects a law

statement that the court's ruling was "outrageous judicial activism." Speaking further on the court's decision, Governor Lamm stated, "This isn't law—it's raw, naked politics." Id.

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contains, as they must make only an initial determination before choosing an interpretation of the law that avoids conflict with the single subject rule.

C. High Costs of Enforcement and Limited Remedial Options

In addition to the difficulty of applying the single subject rule on a case-by-case basis, there are significant negative consequences of striking down legislation that deter some judges from fully enforcing the rule. First, unelected judges enforcing the single subject rule to strike down statutes passed by a majority of legislators may be seen as countermajoritarian.[111] Similarly, a decision to invalidate a popularly enacted ballot initiative may be viewed as offensive to popular sovereignty.[112] Hence, striking down enacted laws can be politically troublesome for state courts.[113] Second, enforcement of the single subject rule to invalidate statutes may increase friction between branches of government.[114]

On top of separation of powers and political considerations as reasons for lax enforcement of the rule, courts are often constrained by the limited number of remedies available when single subject rule violations are found. Judges generally have only two options after they detect multiple subjects in a statute or initiative: (1) invalidate the law or (2)

[111] Gilbert, supra note 1, at 807–08 (observing that "resolution of single subject disputes raises the classic countermajoritarian difficulty").

[112] Id.; Lowenstein, supra note 12, at 36–39 (claiming that aggressive enforcement of the single subject rule erodes popular sovereignty); see Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (characterizing the Court's decision to strike down a Colorado ballot initiative on federal constitutional grounds as imposing the views of an "elite class" on the people of Colorado).

[113] Ivan, supra note 107, at 825 (claiming that "[f]ew situations are as sensitive as cases in which state courts invalidate action by political branches"); see also Devera B. Scott et al., The Assault on Judicial Independence and the Uniquely Delaware Response, 114 Penn St. L. Rev. 217, 227–34 (2009) (profiling political controversies resulting from state court invalidation of legislative and executive actions).

[114] See Martha J. Dragich, State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges, 38 Harv. J. on Legis. 103, 164 (2001) (noting that "[c]ourts must walk a fine line between enforcing these constitutional requirements and unduly interfering with the legislative process"); Michael B. Rappaport, The President's Veto and the Constitution, 87 Nw. U. L. Rev. 735, 755 (1993) ("[T]he subjectivity of the single subject rule permits the judiciary to exercise control over the legislature, which conflicts with the relative autonomy of each branch under the separation of powers.").

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sever the offending portion and uphold the rest.[115] Striking down a law in its entirety is obviously a drastic remedy. When a court strikes down a statute because of the presence of riders, for example, it wipes away the rest of the statute that was supported by a majority of legislators.[116] Thus, nullifying a law can be costly in terms of legislative time and resources. Because of this, some courts have favored severing the offending portion of the statute to preserve the legitimate portions.[117]

Yet, severing a law can be equally destructive for a variety of reasons.[118] First, courts generally face significant challenges when severing a law. They must necessarily "engage in a species of imaginative reconstruction" to determine which parts of a law (if any) the legislature would have wanted to keep if it had known that a portion of the law would be held unconstitutional.[119] In the single subject rule context, the presence of riders or logrolls in a statute is sometimes difficult to discern, and courts may make mistakes in deciding which parts of the law to sever.[120]

Second, before severing a law on single subject grounds, a court must determine with certainty that the law contains multiple subjects. As discussed in Section III.A, determining the presence of multiple "subjects" in a law with a high degree of accuracy is often impossible. Third, when a court detects two subjects and decides to sever the law, it will uphold provisions that fall under the "dominant" subject and sever the provisions that do not.[121] Deciding what the dominant subject is—and, furthermore, which parts of the law the dominant subject covers—is a subjective inquiry.[122]

Finally, severing has the potential to distort the legislative process. To explain, if the statute's various provisions constituted pieces of a political bargain, then the court's decision as to what constitutes the "dominant" subject ends up deciding the winners and losers of that

[115] Gilbert, supra note 1, at 828 (discussing invalidation and severance as the two remedies courts use after finding a single subject rule violation).

[116] Id.

[117] Id. at 828 n.133 (citing Simpson v. Tobin, 367 N.W.2d 757, 768 (S.D. 1985) (favoring severance over invalidation as the remedy for a single subject rule violation)).

[118] Id. at 867.

[119] Nelson, supra note 40, at 143.

[120] Gilbert, supra note 1, at 829.

[121] Id.

[122] Id.

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bargain.[123] As Professor Gilbert explains, invalidation may be superior to severance in these situations, as unwinding the deal avoids delivering a windfall—and simultaneous loss—to certain legislators.[124]

Because of the drawbacks associated with invalidation and the severability doctrine, enforcing the single subject rule through interpretation—when possible—is often the superior option. When a court finds a possible—or definite—single subject violation in an ambiguous statute, it can choose to interpret it narrowly to avoid the single subject problem. Unlike with invalidation or severance, courts can choose to lessen the statute's reach without having to find with certainty that there are multiple subjects. Narrowing the reach of the law through interpretation also avoids the problem of having to choose the "dominant" subject in a statute. Finally, as *In re Initiative #55* demonstrates, viewing the rule as an interpretive tool enforces the principles of the single subject rule without having to strike down laws with popular support or excise portions of a law's text, thus avoiding unnecessary conflict with the legislative branch or infringement on popular sovereignty. The use of the rule as a principle of interpretation thus provides an alternative to the remedies of invalidation and, consequently, a less costly way of enforcing the rule.

In addition, the traditional remedies of invalidation and severance are only available for cases where the single subject rule is invoked. By contrast, courts may choose interpretations of statutes or ballot initiatives that avoid potential single subject rule violations, regardless of whether the single subject rule has been put into issue. Therefore, viewing the rule through an interpretive lens allows the rule to be enforced with a much higher frequency at a much lower cost.

In response to concerns about high enforcement costs and limited remedial options, courts have exercised greater caution when enforcing the single subject rule. For instance, many courts have explicitly voiced concerns about the effects of enforcing the rule on coordinate political branches and, in response, have developed highly deferential standards for adjudicating single subject rule violations.[125] In *Gregory v. Shurtleff*, for example, the Supreme Court of Utah expressed its reluctance to

[123] Id. at 868.

[124] Id.

[125] See Dragich, supra note 114, at 105–06 & nn.18–24 (surveying several states' extremely deferential constitutional standards for statutes).

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intrude on the legislature's "law making power" when applying the single subject rule.[126] The *Gregory* court and others have expressly noted separation of powers concerns that arise when striking down legislation under the single subject rule and have adopted deferential standards for determining violations.[127] A typical standard for single subject challenges is the one adopted by Indiana courts, which states, "[I]n considering the validity of an act under [the single subject rule], a very liberal interpretation is to be applied, with all doubts resolved in favor of the legislation's validity."[128]

Lax judicial standards appear to have had an impact on the rate at which courts have enforced the rule. For example, the Supreme Court of Minnesota remarked that, from the 1970s to 2000, it had failed to invalidate a single statute under the state's single subject rule.[129] For

[126] 299 P.3d 1098, 1112 (Utah 2013) (quoting Kent Club v. Toronto, 305 P.2d 870, 873 (Utah 1957)).

[127] Roeschlein v. Thomas, 280 N.E.2d 581, 589–91 (Ind. 1972) (refusing to consider legislative history as a means of detecting a possible single subject rule violation because of separation of powers concerns); *Gregory*, 299 P.3d at 1112 (construing the term "subject" liberally "to permit the adoption of comprehensive measures covering a whole subject"); Virginia A. Stuelpnagel et al., Constitutional Law, 50 Md. L. Rev. 1051, 1056 (1991) (concluding that "courts are reluctant to intrude upon the legislative domain; they do not wish to belittle or embarrass the legislature by implying that it has passed a bill through questionable means of log-rolling, or by using subversive techniques to sneak a rider through passage").

[128] Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 214 (Ind. 1981).

[129] Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 300 (Minn. 2000) (referencing five failed challenges under the single subject rule). Commentators have observed this trend as well. See Dragich, supra note 114, at 106 n.27 (noting that Missouri had failed to invalidate a single law on single subject rule grounds in thirty years); Evans & Bannister, supra note 14, at 163 (discussing underenforcement of the single subject rule in Indiana courts and observing that "most states have similarly given little weight to their respective single subject rules"); Stuelpnagel et al., supra note 127, at 1058 (reporting that Maryland courts had only struck down statutes on three occasions as of 1991 and noting that the judiciary's weak standard for judging single subject rule violations "indicate the courts' strong reluctance to strike down a legislative act"); Kurt G. Kastorf, Comment, Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule, 54 Emory L.J. 1633, 1662 n.233 (2005) (asserting that the vague nature of terms such as "reasonable germaneness" in courts' single subject rule tests "reduce[s] the incidence of cases finding a violation of the single subject rule, but make[s] those few cases that do find a violation unpredictable"). Professor Martha Dragich observed more generally that a result of high standards for proving single subject rule violations is that "state courts uphold legislation against procedural challenges 'more often than not.'" Dragich, supra note 114, at 106 (quoting Michael W. Catalano, The Single Subject Rule: A Check on Anti-Majoritarian Logrolling, 3 Emerging Issues St. Const. L. 77, 80 (1990)).

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over one hundred years, Ohio even made enforcement of its single subject rule "directory rather than mandatory."[130] In addition, state supreme court rulings in the previous decade upholding initiatives that prohibited both same-sex marriage and same-sex civil unions appear to be examples of courts ignoring flagrant single subject rule violations, not wanting to face the political consequences involved with invalidating the initiatives.[131] The following case provides another stark example of a court's unwillingness to enforce the single subject rule, an outcome that could have been avoided with the use of the rule as an interpretive principle.

D. An Example of Underenforcement: Mayor of Detroit v. Arms Technology

Mayor of Detroit v. Arms Technology involved a single subject rule challenge to a Michigan gun control statute.[132] The City of Detroit and Wayne County sued gun manufacturers, distributors, and retailers alleging that the defendants' methods of marketing and distributing

[130] See State ex rel. Dix v. Celeste, 464 N.E.2d 153, 156 (Ohio 1984) (stating that a "long line of unbroken cases" hold that Ohio's single subject rules are "directory rather than mandatory"). The Ohio Supreme Court announced in 2004 that it would no longer view the single subject rule as "directory" but suggested that the rule would remain mostly powerless, stating, "We hold that a manifestly gross and fraudulent violation of the one-subject provision contained in . . . the Ohio Constitution will cause an enactment to be invalidated." In re Nowak, 820 N.E.2d 335, 344 (Ohio 2004).

[131] Kastorf, supra note 129, at 1638 (arguing that "[t]he drafters of the Georgia marriage amendment employed both logrolling and voter confusion" and providing evidence of the fact that a significant number of voters supported prohibiting gay marriage but did not want to prohibit gay civil unions). The Florida, Georgia, and Louisiana supreme courts all rejected single subject rule challenges to their respective state's gay marriage bans. See Advisory Op. to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229, 1235 (Fla. 2006); Perdue v. O'Kelley, 632 S.E.2d 110, 113 (Ga. 2006); Forum for Equal. PAC v. McKeithen, 893 So.2d 715, 737 (La. 2005). The gay marriage bans for Florida, Georgia, and Louisiana received sixty-two percent, seventy-six percent, and seventy-eight percent popular support, respectively. See Fla. Dep't of State, Div. of Elections, Official Results, Florida Marriage Protection Amendment (2008), https://results.elections.myflorida.com/Index.asp?ElectionDate=11/4/2008&DATAMODE [https://perma.cc/RNH9-ES3Y]; Sec'y of State, Georgia Election Results, Georgia Constitutional Amendment 1 (2004), http://sos.ga.gov/elections/election_results/2004_1102/judicial.htm#qa [https://perma.cc/9HNS-CBY9]; La. Sec'y of State, Official Elections Results, Constitutional Amendment No. 1 (Act 926-2004) (2004), https://voterportal.sos.la.gov/static/#/2004-09-18/resultsRace/Statewide [https://perma.cc/CC9Q-ZHDM].

[132] 669 N.W.2d 845 (Mich. Ct. App. 2003).

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firearms increased gun violence in their communities and thus constituted a public nuisance.[133] The defendant gun companies claimed that a Michigan statute, M.C.L. 28.435, prohibited "political subdivisions" such as the city and county from bringing nuisance actions against them.[134] In response, the plaintiffs argued that although M.C.L. 28.435 would otherwise prohibit their lawsuit, the statute violated the state's single subject rule (known as the "Title-Object Clause" in the Michigan Constitution).[135]

Section 15 of M.C.L. 28.435 is divided into fifteen subsections, the first eight of which pertain to requirements for "federally licensed firearm dealers" to provide trigger locks and storage containers to gun buyers.[136] In stark contrast to subsections (1)–(8), subsection (9) limits the rights of localities to bring *any* civil action against a gun "producer"—which is defined much more broadly than a "federally licensed firearm dealer."[137] Subsection (9) provides: "Subject to subsections (10) to (12), a political subdivision shall not bring a civil action against *any person* who *produces* a firearm or ammunition. The authority to bring a civil action *under this section* is reserved exclusively to the state and can be brought only by the attorney general."[138]

The defendant gun manufacturers asserted—and plaintiff local government entities conceded[139]—that subsection (9) prohibited any suit against gun manufacturers brought by a locality, subject to several enumerated exceptions.[140] The plaintiffs argued, however, that there was

[133] Id. at 852.

[134] Id. at 854.

[135] Id.

[136] Mich. Comp. Laws Serv. § 28.435.15(1)–(8) (LexisNexis 2015).

[137] Id. § 28.435.15(15)(a). Subsection (15)(e) of the statute defines "produce" as "to manufacture, construct, design, formulate, develop standards for, prepare, process, assemble, inspect, test, list, certify, give a warning or instructions regarding, market, sell, advertise, package, label, distribute, or transfer." Id. § 28.435.15(15)(e).

[138] Id. § 28.435.15(9) (emphasis added).

[139] *Mayor of Detroit*, 669 N.W.2d at 855 ("Although M.C.L. § 28.435 permits political subdivisions to bring an action against producers of firearms or ammunition in certain enumerated circumstances, plaintiffs concede that if M.C.L § 28.435 is valid, it bars the claims asserted in this case." (footnote omitted)).

[140] The exceptions are for:

> A breach of contract, other contract issue, or an action based on a provision of the uniform commercial code . . . in which the political subdivision is the purchaser and owner of the firearm or ammunition.

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no logical connection between trigger lock requirements on licensed firearm dealers in subsections (1)–(8) and general immunity from local liability for firearm "producers" in subsections (9)–(13) and that, therefore, the statute violated the state's single subject rule.[141] As additional evidence of a single subject rule violation, the plaintiffs pointed out that liability for gun and ammunition *producers* and safety regulations on gun *sellers* were located in separate chapters of the Michigan code.[142]

Despite the seemingly disparate subjects contained in M.C.L. 28.435, the court remarked that the plaintiffs had "read the term object too narrowly" and held that all parts of the statute related to the broad object of "firearms regulation."[143] In justifying its holding, the court reasoned that because subsection (9) prohibited all suits by localities, it naturally included suits by localities to enforce subsections (1)–(8).[144] To this point, the court argued, "[D]elineating the entity with the authority to enforce this section [including subsections (1)–(8)] is clearly a matter germane to its implementation."[145] Instead of limiting the scope of subsection (9) to only include suits to enforce subsections (1)–(8), however, the court used the overlap between the two portions of the law

> Expressed or implied warranties arising from the purchase of a firearm or ammunition by the political subdivision or the use of a firearm or ammunition by an employee or agent of the political subdivision.
>
> A product liability, personal injury, or wrongful death action when an employee or agent or property of the political subdivision has been injured or damaged as a result of a defect in the design or manufacture of the firearm or ammunition purchased and owned by the political subdivision.

M.C.L. § 28.435.15(10). Subsection (11) lists exceptions to the exceptions in subsection (10), namely suits based on:

> A firearm's or ammunition's inherent potential to cause injury, damage, or death.
>
> Failure to warn the purchaser, transferee, or user of the firearm's or ammunition's inherent potential to cause injury, damage, or death.
>
> Failure to sell with or incorporate into the product a device or mechanism to prevent a firearm or ammunition from being discharged by an unauthorized person unless specifically provided for by contract.

Id. § 28.435.15(11).

[141] *Mayor of Detroit*, 669 N.W.2d at 860.

[142] Id. at 860–61.

[143] Id. at 861 (internal quotation marks omitted).

[144] Id. (observing that the immunity from civil liability in subsections (9)–(13) "extends to situations discussed in the act, namely providing trigger locks and firearm safety information").

[145] Id.

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to justify a broad reading of text in subsection (9) that would prohibit *all* civil suits by localities.

The Michigan court's strained analysis exemplifies judicial reluctance to enforce fully the single subject rule, even for statutes that clearly violate the rule. In this case, the presence of gun regulations on the one hand and immunity from all forms of local liability for gun producers on the other suggests the influence of logrolling on the legislative process, where gun control and gun rights advocates traded proposals in order to pass a comprehensive bill. In the following paragraphs, it will be demonstrated how use of the avoidance canon would have provided an alternative method of evaluating the statute that would have helped to effectuate the policy goals of the single subject rule.

Consider again the text in subsection (9): "[A] political subdivision shall not bring a civil action against *any person* who *produces* a firearm or ammunition."[146] "Person" is defined as an "individual, partnership, corporation, association, or other legal entity";[147] "produce" means any of the following: "manufacture, construct, design, formulate, develop standards for, prepare, process, assemble, inspect, test, list, certify, give a warning or instructions regarding, market, sell, advertise, package, label, distribute, or transfer."[148]

Therefore, a broad reading of this provision would plausibly prohibit *any* type of local civil suit against *any* gun seller *or manufacturer*. This reading would suggest the presence of two subjects: (1) *complete* immunity from local lawsuits against gun sellers *and gun manufacturers* and (2) trigger lock requirements for *gun sellers*. As a result, a broad interpretation would certainly raise a serious doubt of constitutionality under the state single subject rule. Furthermore, even taking the court at its word that the proper characterization of the statute's "subject" is "firearm regulation," complete immunity from civil actions by local agencies is hardly "germane" to this subject. For example, under the court's characterization of subsection (9), a locality could not bring an action against a firearm producer even for a violation of a local zoning law. This would seem far off from the subject of "firearm regulation" even as the court understood it. Thus, if there were a viable alternative

[146] Mich. Comp. Laws Serv. § 28.435.15(9) (LexisNexis 2015) (emphasis added).
[147] Id. § 28.435.15(15)(c).
[148] Id. § 28.435.15(15)(e).

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reading of subsection (9), the avoidance canon would counsel that the court choose the interpretation that steers clear of constitutional uncertainty.

Upon closer inspection, M.C.L. 28.435(9) could be read more narrowly. To start, the second clause of subsection (9) states, "The authority to bring a civil action *under this section* is reserved exclusively to the state and can be brought only by the attorney general."[149] As the italicized text indicates, the state is the only entity that may enforce the trigger lock requirements in Section 15. A logical implication of this is that, when the legislature prohibited local entities from suing "gun producers," it had in mind suits to enforce Section 15's trigger lock requirements, not all suits.

Second, M.C.L. 28.435(13) declares that "[s]ubsections (9) through (11) are intended only to clarify the current status of the law [and] are remedial in nature."[150] Accordingly, it is unlikely that the legislature would have intended subsection (9) to act as a wholesale limitation on local liability. Instead, a more plausible reading is that subsection (9) acts as a narrow restriction on localities' ability to enforce the statute's trigger lock requirements.

Given that a plausible alternative interpretation exists which would obviate constitutional uncertainty, the court would have been better off upholding the law but construing subsection (9) to only prohibit suits by localities to enforce the trigger lock requirements in subsections (1)–(8). The court's decision not to enforce the single subject rule in this instance arguably leaves the single subject rule toothless despite the "[c]ourt's duty to uphold the [Michigan] constitution."[151]

The court in *Mayor of Detroit* may have been reluctant to accept the single subject rule argument because of the prospect of having to strike down the entire statute, including the limitation on local liability and trigger lock requirements. Thus, the local government plaintiffs in this case might have been more persuasive if they had argued for use of the avoidance canon, which would have narrowed the scope of the statute's local liability immunity but left the core of the statute intact.

[149] Id. § 28.435.15(9) (emphasis added).
[150] Id. § 28.435.15(13).
[151] Kyser v. Township, 786 N.W.2d 543, 564 (Mich. 2010).

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E. Final Thoughts on the Costs of Enforcing the Single Subject Rule

Because of the difficulty in applying the single subject rule, its tendency to lead to arbitrary and unpredictable results, and its countermajoritarian effects, some scholars have sided with opinions such as *Mayor of Detroit* in advocating for abandoning or less strictly enforcing the rule.[152] Hasen and Matsusaka also point to empirical evidence demonstrating a strong positive correlation between aggressive judicial enforcement of the rule and partisan judging as reasons to question the rule's benefits.[153] Concerns about aggressive enforcement have recently become more salient, as there is some evidence of an uptick in single subject rule enforcement, at least in certain states.[154]

As Cooter and Gilbert note, however, opposition to the single subject rule is an academic debate.[155] The fact remains that single subject rules are cemented in constitutions nationwide, with no evidence of efforts to repeal them. If anything, there are data to suggest single subject rules are enjoying increasing popularity, as many states have recently expanded the rule's reach to incorporate ballot initiatives in addition to statutes.[156] Thus, rather than theorize about how to marginalize or discard the single subject rule, a better approach is to discover ways to properly uphold the policy goals of the single subject rule that also mitigate harmful effects associated with its enforcement.

This Note takes as a given that constitutional provisions should be enforced. With that said, approaching the single subject rule as an interpretive principle provides courts with a new method of enforcing the constitution that mitigates some of the costs that currently bedevil single subject rule jurisprudence.

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[152] See Hasen, supra note 9, at 117; Lowenstein, supra note 12, at 40–44 (identifying and criticizing aggressive application of the single subject rule in the initiative context).

[153] Matsusaka & Hasen, supra note 87, at 417 (observing that, "[w]hen enforced aggressively, judges vote to uphold initiatives that agree with their political preferences 83 percent of the time, while voting to uphold initiatives that disagree with their political preferences only 41 percent of the time" and arguing that "[a]ggressive enforcement not only raises the bar, but significantly increases the role of political preferences in judging").

[154] Cooter & Gilbert, supra note 6, at 711; Gilbert, supra note 1, at 808 & n.26.

[155] Robert D. Cooter & Michael D. Gilbert, Reply to Hasen and Matsusaka, 110 Colum. L. Rev. Sidebar 59, 59 (2010).

[156] See Cooter & Gilbert, supra note 6, at 705 & nn.78–86 (providing a brief history of how states extended their single subject rules to ballot initiatives).

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IV. BLUEPRINTS FOR THE USE OF THE AVOIDANCE CANON IN SINGLE SUBJECT ADJUDICATION

A. Slayton v. Shumway

The Arizona Supreme Court in *Slayton v. Shumway*[157] provides one of the only examples of a court's attempt to use the single subject rule as a canon of interpretation and showcases some of the benefits of this Note's proposal.[158] In *Slayton*, an en banc panel of the Arizona Supreme Court considered the constitutionality of a ballot initiative entitled the "Victim's Rights Initiative."[159] The initiative would have amended the

[157] 800 P.2d 590 (Ariz. 1990) (en banc).

[158] In addition to a few court opinions, several scholars have briefly acknowledged the usefulness of the avoidance canon in single subject jurisprudence. See Lowenstein, supra note 12, at 43 (stating that "willingness to interpret ambiguous provisions of an initiative in order to avoid a single subject violation . . . seems a desirable and, indeed, an inevitable approach" to the enforcement of single subject rules); cf. Glen Staszewski, The Bait-and-Switch in Direct Democracy, 2006 Wis. L. Rev. 17, 41 (discussing the possibility of using the single subject rule to interpret ambiguous ballot initiatives narrowly so as to avoid giving initiatives meanings voters did not intend).

[159] The full text of the initiative, excluding subsection (12), is as follows:

> Section 2.1. (a) to preserve and protect victims' rights to justice and due process, a victim of crime has a right:
>
> 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
>
> 2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
>
> 3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
>
> 4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
>
> 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
>
> 6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
>
> 7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
>
> 8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
>
> 9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
>
> 10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

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constitution to add a "victim's bill of rights."[160] The operative portion of the initiative contains eleven subsections, the first ten of which outline *procedural* protections and define rights for victims of crime. For example, Section 6 provides that crime victims have the right to confer with the prosecutor over the course of the state's case against the perpetrator and to be informed of the final disposition of the case. In a departure from the first ten subsections, the eleventh subsection requires that rules of criminal procedure and evidence protect victims' rights. It also gives rulemaking authority to the legislature, whereas previously all rulemaking authority had been in the hands of state courts.[161]

The appellant, a citizen attempting to enjoin the Secretary of State from putting the initiative on the ballot, acknowledged that the first ten subsections together formed the subject of procedural protections and rights for victims of crime.[162] Slayton argued, however, that subsection (11), which addressed rulemaking authority, was not sufficiently related to the first ten subsections. The court began by examining the language of subsection (11), which provides that a crime victim has the right "to have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights."[163]

The court found subsection (11)'s text to be subject to multiple interpretations. First, if read broadly, subsection (11) would transfer authority over "*all* rules governing criminal procedure and the admissibility of evidence in *all* criminal proceedings" from the Arizona Supreme Court to the Arizona state legislature, including for rules of criminal procedure and evidence not having to do with victims' rights.[164] Read more narrowly, however, subsection (11) only transfers rulemaking power from the state legislature to the court for rules relating

> 11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

800 P.2d app. at 597–98.

[160] *Slayton*, 800 P.2d at 591.

[161] Id. at 592 (citing Ariz. Const. art. 6, § 5(5)).

[162] Id. at 591.

[163] Id. at 591–92.

[164] Id. at 592.

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to victims' rights and, even then, only so far as necessary to protect the rights provided for in the first ten subsections.[165]

Next, the court applied the single subject rule as a substantive rule to prevent logrolling and to avoid misleading voters.[166] In doing so, it used the prevailing test in Arizona: various proposals within an initiative should be a "consistent and workable whole on the general topic," and, "logically speaking, [the different portions] should stand or fall as a whole" because the voters "supporting [each portion] would reasonably be expected to support the principle of the others."[167] After applying the single subject rule substantively, the court found that subsections (1)–(10) constituted the subject of "procedural rights of victims."[168] The court concluded that, if understood broadly, subsection (11) would constitute a second subject of substantive "separation of powers," and thus the initiative would violate the single subject rule in Arizona's constitution.[169] The court found that voters may well support the first subject but not the second and that, therefore, the initiative—construed broadly—constituted logrolling and misled voters.[170] Faced with the choice of which interpretation to adopt, the court applied the saving canon to choose the narrow interpretation that would preserve the statute's validity.[171] In the court's words: "[W]here alternate constructions are available, we should choose that which avoids constitutional difficulty."[172]

[165] Id. at 595.

[166] Id. at 593–95.

[167] Id. at 593 (citing Kerby v. Luhrs, 36 P.2d 549, 554 (Ariz. 1934)).

[168] Id. at 594.

[169] Id. ("If it transfers power to make all procedural and evidentiary rules in all criminal cases from this court to the legislature, we believe the proposal would violate the single subject rule.").

[170] Id. at 595 (observing that "informed voters might well favor the enumerated rights contained in subsections (1) through (10) yet vehemently oppose destroying the separation of powers," which would occur if subsection (11) was understood broadly).

[171] Id.

[172] Id. (citing Greyhound Parks v. Waitman, 464 P.2d 966, 969 (Ariz. 1970)). The *Slayton* court uses the phraseology of the avoidance canon, but because it determined that the broad interpretation of subsection (11) would lead to certain unconstitutionality of the initiative, the choice of the narrower construction was instead an example of the saving canon. Seventeen years later, the Arizona Supreme Court recognized the *Slayton* court's use of the single subject rule as an interpretive principle in *Arizona Together v. Brewer* but found it inapplicable because of a lack of ambiguity in the text of the initiative. See 149 P.3d 742, 745 n.4 (Ariz. 2007).

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The *Slayton* decision illustrates some of the advantages of the single subject rule when applied as a rule of interpretation. First, by interpreting subsection (11) narrowly, the court could further the single subject rule's policy goals. For example, a narrower construction of subsection (11) lessened the impact of voter surprise by bringing subsection (11) in line with the initiative's theme and title. The court's narrow reading of subsection (11) also eliminated logrolling, as voters who supported a "victim's bill of rights" would not also have to vote for a radical change in the state's separation of powers. Second, the court was able to impose a check on direct democracy by rejecting a reading of the initiative that would have fundamentally changed the balance of power in state government. The court was able to achieve all of this while leaving the initiative fully intact.[173]

Even so, the *Slayton* court fell short of overtly identifying the single subject rule as an interpretive mechanism and did not seem to recognize its own innovation. As a result, it failed to realize the full benefits of the single subject rule applied as an interpretive rule. For example, the court emphasized the wrong issues in applying the single subject rule. The court unnecessarily went down the path of determining conclusively whether subsection (11) constituted a separate subject. In doing so, it spent most of the opinion[174] applying a vague and confusing standard to determine if the initiative's parts formed a "consistent and workable whole on the general topic."[175]

Had the court employed the avoidance canon, it would not have had to decide the question of multiple subjects with certainty. Instead, it would only have had to ascertain whether there was a serious possibility that subsection (11) constituted a separate subject, thus requiring a far less protracted inquiry. Once the court made such a determination, it should have then turned its focus to the issue of whether the initiative was ambiguous. However, the court failed to analyze the ambiguity issue at all, instead implicitly assuming that the statute was subject to

[173] The initiative passed with fifty-seven percent of the vote. State of Arizona Official Canvass, General Election p. 10 (Nov. 6, 1990), https://www.azsos.gov/sites/azsos.gov/files/canvass1990ge.pdf [https://perma.cc/2ZUL-QD34].

[174] Two out of the three and a half pages of analysis in the court's opinion was devoted to a discussion of the proper single subject test and application of that test to the initiative's language. *Slayton*, 800 P.2d at 592–95.

[175] Id. at 595 (quoting Kerby v. Luhrs, 36 P.2d 549, 554 (Ariz. 1934)).

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multiple interpretations. In fact, there was considerable textual support for the narrower construction of subsection (11). Subsection (11)'s language, which states that "*these rules* be subject to amendment or repeal by the legislature,"[176] is evidence that the legislative purview would extend only to rules relating to victims' rights. Furthermore, the language at the end of subsection (11) ("to ensure the protection of these rights") limited the scope of "all rules" to only those protecting rights enumerated in subsections (1)–(10).[177]

After having determined that the statute was ambiguous, the court would have been free to construe subsection (11) narrowly to avoid the possible constitutional violation. Despite *Slayton*'s shortcomings, it successfully demonstrates the workability of the single subject rule as an interpretive tool, an encouraging sign for the viability of this Note's proposal.

B. Pohutski v. City of Allen Park

The dissent in *Pohutski v. City of Allen Park* provides another example of a use of the single subject rule as an interpretive principle.[178] The dissenting opinion advanced a narrow interpretation of a state statutory provision to avoid a possible violation of the state's single subject rule (known as the "Title-Object Clause" in the Michigan constitution).[179] The plaintiff-appellants in the case were county

[176] *Slayton*, 800 P.2d app. at 598.

[177] Id.

[178] 641 N.W.2d 219 (Mich. 2002).

[179] Id. at 238. (Kelly, J., dissenting). The Constitution of Michigan—along with thirty-nine other states—includes a "title requirement," which mandates that a bill's "object" be clearly expressed in its title. See Mich. Const. art. IV, § 24; Denning & Smith, supra note 5, at app. A. A long line of cases in Michigan (including the *Pohutski* dissent) has (usually without stating as much) used the saving and avoidance canons to construe statutes so as not to violate the title requirement. See Maki v. East Tawas, 188 N.W.2d 593, 598 (1971) (Williams, J., dissenting) (cataloguing a series of cases interpreting particular statutory terms in ways that allow the statute to conform to Michigan's title requirement); see also Wash. Fed'n of State Emps. v. State, 901 P.2d 1028, 1034 (Wash. 1995) (announcing the principle that "[w]hen the words in a title can be given two interpretations, one of which renders the act unconstitutional and the other constitutional, we adopt the constitutional interpretation" (quoting Treffry v. Taylor, 408 P.2d 269, 272 (Wash. 1965))). The dissent in *Maki* argued that the word "tort" in a Michigan sovereign immunity statute "should be construed narrowly to mean only torts caused by negligence so that it is no broader in scope than the title of the act." *Maki*, 188 N.W.2d at 597. The analogous practice of interpreting statutes to avoid

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residents whose basements had flooded with wastewater from an overflow in the municipal sewage system.[180] The Michigan Governmental Tort Liability Act ("GTLA") establishes complete governmental immunity for all local governments unless the local government activity falls within five enumerated exceptions.[181] The issue in *Pohutski* was whether Section 7 of the GTLA permitted an additional common law exception (the trespass-nuisance cause of action) to governmental immunity, which would have allowed the plaintiffs to sue the municipality for damages.[182] Section 7 states:

> Except as otherwise provided in this act, a *governmental agency* is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the *state* from tort liability as it existed before July 1, 1965, which immunity is affirmed.[183]

Both the majority and dissent agreed that the statute's "object" was to reestablish and codify a consistent and uniform form of immunity for all entities when engaged in the exercise of a governmental function.[184] "Governmental agencies" are defined in the statute to include both municipalities and the state government, whereas the statute defines the term "state" to include only state governmental entities.[185] Thus, the first clause of Section 7 establishes uniform immunity for both state and local governments. If read literally, however, the second clause would retain the common law "trespass nuisance" exception for the state but not for municipalities and, therefore, lead to inconsistent immunity law for state and local governments. This literal reading would put Section 7 "beyond

violations of the title requirement gives credence to this Note's proposal as applied to the "subject requirement" of the single subject rule.

[180] *Pohutski*, 641 N.W.2d at 224.

[181] Mich. Comp. Laws Serv. § 691.1407.7(1) (LexisNexis 2015).

[182] *Pohutski*, 641 N.W.2d at 224.

[183] M.C.L. § 691.1407.7(1) (emphasis added).

[184] *Pohutski*, 641 N.W.2d at 228–29 (signaling agreement with the dissenting opinion of *Li v. Feldt*, 456 N.W.2d 55, 61–62 (Mich. 1990) (Griffin, J., concurring in part and dissenting in part), which viewed the Act's purpose as "uniform . . . liability of all government '*when engaged in the exercise or discharge of a governmental function*'"); id. at 235 (Kelly, J., dissenting).

[185] M.C.L. § 691.1401.7(1)(a), (e), (g).

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the act's scope to allow different governmental immunity at different levels of government." It would undermine the "object" of the statute to create "uniform immunity" and potentially create a second "object"—that being to "affirm and codify the state's common-law sovereign immunity."[186]

Despite over three decades of precedent "construe[ing] the act in a way that [did] not violate the Title Object Clause,"[187] the Court insisted on the literal interpretation of Section 7 because it found that "the clear and unambiguous language of the second sentence of § 7 applies only to the state, as defined in the statute."[188] Justice Kelly's vigorous dissent, however, would have upheld the court's previous decisions interpreting the text of Section 7 to avoid a single subject rule violation.[189] Specifically, the dissent used a number of methods of statutory interpretation to read the word "state" to include both state and local governments.[190] This reading would apply the trespass-nuisance sovereign immunity exception to both state and local governments, fitting within the object of the statute to create a "uniform system of immunity" across state and local government.[191]

There are a number of takeaways from *Pohutski*: first, the dissent is right; in states that have a single subject rule, judges should read statutes to avoid single subject rule violations, not perpetuate them. Second, *Pohutski* illustrates the effectiveness of the interpretive approach for statutes with complicated statutory schemes. Finally, the case provides an example of how severance and invalidation would be particularly undesirable remedies for a single subject rule violation. As the dissenting opinion mentions, there is a strong argument to be made that

[186] *Pohutski*, 641 N.W.2d at 238 (Kelly, J., dissenting) (internal quotation marks omitted).

[187] Id. (emphasizing precedent of avoidance).

[188] Id. at 229 (majority) (utilizing a literal interpretation).

[189] Id. at 238 (Kelly, J., dissenting) (advocating for the adoption of the Michigan Supreme Court's previous interpretations of the statute, which "construed the act in a way that does not violate the Title Object Clause"). As is often the case with opinions analyzing the single subject rule, the dissent in *Pohutski* combines its discussion of the statute's compliance with the title requirement and the "one-subject" rule. Nevertheless, this opinion goes a step further than prior Michigan Supreme Court opinions, see supra note 179, which use the avoidance canon in reference to the title requirement without mentioning the issue of multiple subjects in the statute.

[190] *Pohutski*, 641 N.W.2d at 235–38 (Kelly, J., dissenting).

[191] Id. at 236.

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the word "state" in Section 7 of the GTLA was a scrivener's error.[192] As evidence for this, the dissent cited the court's decision in *Ross v. Consumer Power Co.*, where the court read the word "state" in Section 13 of the GTLA to instead apply to all governmental entities.[193] Shortly thereafter, the legislature ratified *Ross* and amended Section 13 to match the *Ross* court's interpretation.[194]

If in fact the word "state," read literally, creates a second "subject," it would be bordering on the absurd to strike down the entire statute because of the presence of a scrivener's error. Another option would be to sever the law by excising the entire second clause of Section 7 ("Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.").[195] This approach would also pose problems, however, as doing so would eliminate the common law nuisance exception for *both* state and local government, and it is speculative at best whether the legislature would have wanted to pass the law without any common law exceptions to state sovereign immunity. Had the court interpreted the word "state" in Section 7 to mean "state and local government," the trespass nuisance exception would apply across the board. The result would have been less impactful than severance on the meaning of the statute and is, therefore, the superior option.

In sum, by interpreting an arguably ambiguous statute to avoid a single subject rule violation, the dissent's view would have given force to the single subject rule while choosing a tenable interpretation of the statute that was justified by a variety of tools of statutory interpretation.[196]

[192] Id.

[193] Id. (citing 363 N.W.2d 641 (Mich. 1984)).

[194] Id.

[195] Mich. Comp. Laws Serv. § 691.1407.7(1) (LexisNexis 2015).

[196] In addition to the argument regarding the scrivener's error, the dissent put forth several arguments for its reading of the statute based on the text, purpose, and postenactment history of the law. *Pohutski*, 641 N.W.2d at 235–38.

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V. OTHER BENEFITS OF THE SAVING AND AVOIDANCE CANONS IN SINGLE SUBJECT JURISPRUDENCE

A. "De-constitutionalizing" Single Subject Rule Adjudication

Using the avoidance canon averts the unnecessary interpretation of state constitutions. Professor Nelson highlights the distinction between two related principles in statutory interpretation: avoiding constitutional questions and avoiding unconstitutionality.[197] This Note proposes that courts use the former to interpret statutes and initiatives to avoid state single subject rule violations. In the process, however, this Note's proposal also furthers the latter principle because the single subject rule is enforced—not on a constitutional basis—but instead on the basis of the *statute or initiative* being interpreted.

Avoiding constitutional questions is important because vague provisions of a constitution should not be interpreted unless absolutely necessary, so as to avoid "locking in" mistaken interpretations for future courts through the doctrine of stare decisis.[198] Erroneous interpretations of the constitution, as compared to statutes, are seen as more damaging because of the relative difficulty of amending the constitution.[199] Accordingly, many state supreme courts have recognized the principle that courts should refrain from needlessly deciding constitutional questions.[200] This principle is particularly essential in the single subject context, as single subject rules are vague and notoriously difficult to apply.[201]

[197] Nelson, supra note 100, at 331.

[198] Nelson, supra note 40, at 148 (discussing the lock-in effect).

[199] Id. (discussing the difficulty of amending the Constitution); Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003, 1036 (1994) ("If the Court renders a final, binding conclusion as to constitutional interpretation each time it speaks on a constitutional issue, the arduous task of amending the Constitution may provide the only counter to the Court's ruling.").

[200] See, e.g., Bank of Am. v. Stine, 839 A.2d 727, 733 (Md. 2003) ("[T]his Court will prefer an interpretation that allows us to avoid reaching a constitutional question."); People v. Dennany, 519 N.W.2d 128, 144 (Mich. 1994) ("It is a well-established rule of construction that this Court will avoid interpreting our constitution when a case can be decided on an alternate basis."); In re Brown, 903 A.2d 147, 151 (R.I. 2006) ("Neither this Court nor the Superior Court should decide constitutional issues unless it is absolutely necessary to do so.").

[201] See supra Section III.A.

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Avoiding constitutional questions also lessens separation of powers concerns that may arise from judicial decision making. As discussed above in the context of remedies for single subject rule violations,[202] declaring democratically enacted statutes and initiatives unconstitutional raises the well-known "countermajoritarian difficulty" and resulting friction between branches of government.[203]

Finally, the principle of avoiding constitutional questions is a prudent tool for courts, given the vulnerability of the judiciary in the state constitutional system.[204] With limited resources, the judiciary relies on the other branches of government to enforce its decrees and, therefore, must tread carefully when invoking the constitution to strike down the actions of coordinate branches.[205] The judiciary is also at risk to the extent that its jurisdiction is controlled by the legislature.[206] These last two concerns are strong regarding the single subject rule, as judges may be particularly hesitant to invoke a procedural provision to invalidate popular, high-profile legislation.

B. Increasing the Frequency of the Rule's Enforcement

In addition, the single subject rule may be used as a background rule of interpretation even in cases where no single subject rule challenge is raised. Stated differently, in any controversy over the meaning of a statute or initiative, judges may use the avoidance canon to construe statutes in ways that steer clear of single subject violations in the state constitution. This would make the rule more robust by broadening its reach to a greater number of disputes. For instance, in *Slayton v. Shumway*, if the dispute had been not whether the single subject rule had been violated, but instead about the scope or meaning of subsection (11)'s substantive rulemaking provision, the avoidance canon would have counseled the court to construe subsection (11) narrowly to sidestep a possible single subject rule violation.

[202] See supra Section III.C.
[203] Kloppenberg, supra note 199, at 1036–37.
[204] Id. at 1042–43.
[205] Id. at 1042.
[206] Id.

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C. Reducing Negative Effects of Ballot Initiatives

Using the avoidance canon to enforce the single subject rule would have an additional normative benefit: ballot initiatives would be interpreted more narrowly. At least eighteen states have extended their single subject rules to cover ballot initiatives.[207] Thus, ballot-initiatives litigation occupies a significant share of single subject rule jurisprudence.

Many have criticized ballot initiatives, alleging that they produce poorly drafted laws[208] and bad policy,[209] benefit special interests,[210] discriminate against minorities,[211] and mislead and confuse voters.[212]

[207] See Cooter & Gilbert, supra note 6, at 705.

[208] Peter Bozzo & Andrew Irvine, The Dangers of Direct Democracy, Harv. Pol. Rev. (June 1, 2010, 11:56 AM), http://harvardpolitics.com/united-states/the-dangers-of-direct-democracy/ [https://perma.cc/UW9Q-VH5S] ("Because there is often little transparency in the initiative-writing process, citizens with no legal expertise are able to draft poorly written laws, which sometimes come with unintended consequences.").

[209] The Perils of Extreme Democracy, Economist (Apr. 23, 2011), http://www.economist.com/node/18586520 [https://perma.cc/U7XC-EVUH] ("Many initiatives have either limited taxes or mandated spending, making it even harder to balance the budget. Some are so ill-thought-out that they achieve the opposite of their intent . . . .").

[210] Id. ("Rather than being the curb on elites that they were supposed to be, ballot initiatives have become a tool of special interests, with lobbyists and extremists bankrolling laws that are often bewildering in their complexity and obscure in their ramifications."); A.D. Ertukel, Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at the Center for the Study of Law and Politics, 2 J.L. & Pol. 313, 313 (1985) (noting that "[t]he initiative, intended for use by citizens' groups, is increasingly a tool of well-organized, well-financed special interests").

[211] See Bozzo & Irvine, supra note 208 ("Many critics also point to direct democracy's potential to hurt minority groups, a concern that was borne out by Proposition 8 in California, which overturned the California Supreme Court's decision allowing gay marriage."); see also Todd Donovan, Direct Democracy and Campaigns Against Minorities, 97 Minn. L. Rev. 1730, 1741 (2013) ("A number of anti-minority referendums and initiatives provide examples of popular backlash against minority gains achieved via legislatures and courts."); Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 Am. J. Pol. Sci. 245, 253–54, 253 tbl.1 (1997) (finding that ballot initiatives that harm minorities pass seventy-eight percent of the time compared to the baseline thirty-three percent passage for all ballot initiatives). For scholarly discussion of direct democracy and its effects on constitutionally protected rights, see Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503 (1990); and Glen Staszewski, Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy, 56 Vand. L. Rev. 395 (2003).

[212] Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107, 127 (1995) ("Ballot propositions are presented to voters largely in a legal vacuum, unconnected in any specific way to the surrounding legal

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Some states have responded accordingly, with restrictions on professional signature gatherers, time limitations on obtaining signatures, and executive approval requirements for proposed initiatives.[213] Professor Bruce Cain has recommended that legislatures reduce the force of ballot initiatives by prohibiting voter-approved changes to the constitution, thereby limiting initiatives to statutory changes.[214] Just this past election, Colorado voters approved a measure requiring that all future ballot initiatives amending the constitution receive fifty-five percent of the vote rather than a simple majority.[215]

Some states have also recently extended the single subject rule to ballot initiatives, partly in an effort to address some of the concerns associated with direct democracy.[216] In many instances, courts have applied the single subject rule more strictly for initiatives than for statutes.[217] However, although aggressive enforcement of the rule for ballot initiatives may better control the excesses of direct democracy, as Professor Lowenstein points out, it accentuates the rule's weaknesses, including inconsistent and arbitrary judicial decision making and judicial encroachment on popular sovereignty that results from invalidating popularly enacted laws.[218]

Given the difficulties that come with striking down popular legislation, scholars have advocated for narrow judicial interpretation of

context. Because of this lack of context, many of the interpretive issues that confront courts are outside the plausible realm of voter contemplation."); Bozzo & Irvine, supra note 208 (noting that "confusion over initiatives leads to a toss-up outcome that doesn't reflect the voters' true will"). Professor Staszewski argues that vague or ambiguous ballot initiatives are often susceptible to what he describes as a "bait-and-switch," where an initiative's proponents will attempt to change or redefine an initiative's meaning to subvert the will of the majority that enacted the law. Staszewski, supra note 158, at 19–20.

[213] See Ivan, supra note 107, at 827 (listing many such regulations on ballot initiatives in Colorado).

[214] Bozzo & Irvine, supra note 208 (interviewing Professor Cain on single subject rule reform).

[215] Office of Sec'y of State, State of Colo., 2016 Abstract of Votes Cast, at 149, 157 (2016), https://www.sos.state.co.us/pubs/elections/Results/Abstract/2016/2016BiennialAbstract.pdf [https://perma.cc/BAA2-DTLV].

[216] See Ivan, supra note 107, at 828.

[217] Lowenstein, supra note 12, at 42–44 (stating that "for the time being, the single subject rule has new teeth as applied to initiatives").

[218] Id.

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ballot initiatives as a way to reign in direct democracy.[219] None of these proposals, however, have considered the single subject rule as an interpretive mechanism for construing initiatives narrowly.[220] As *In re Initiative #55* and *Slayton* illustrate, when used as a principle of interpretation, the single subject rule—a long-standing, transsubstantive constitutional provision—has the potential to become an effective, credible, and less destructive means of curbing the excesses of direct democracy.[221] *Slayton*'s use of the saving canon enabled the court to uphold a law providing for a "Victim's Bill of Rights" that would have otherwise been invalid under the state's single subject rule.[222] In doing so, the court left the central purpose of the initiative intact while reigning in the law's potential reach, which included a fundamental shift of rulemaking power from the judicial to legislative branch. Thus, although aggressive enforcement of the single subject rule through traditional means acts as a bludgeon, the rule used as an interpretive principle acts as a scalpel—allowing a court to choose a plausible interpretation of the text that preserves the initiative's policy goals as well as its constitutionality.

CONCLUSION

Courts and scholars agree that single subject jurisprudence is in disarray. The ambiguity surrounding what is considered a "subject" can make applying the rule faithfully virtually impossible. Indeterminacy in applying the rule greatly increases the likelihood of judges either imposing their political views on the litigation or succumbing to pressure to uphold politically popular laws. So far, scholars and judges have mainly responded by formulating tests and theories that attempt to better approximate if multiple subjects exist. While these tests may eliminate indeterminacy at the margin, they largely miss the point: there is no escaping indeterminacy in single subject adjudication.

[219] For citations to a variety of proposals, see Michael D. Gilbert, Interpreting Initiatives, 97 Minn. L. Rev. 1621, 1629–30 & nn.56–68 (2013).

[220] Id.

[221] See supra Section III.B (using *In re Initiative #55* to illustrate how the single subject rule as an interpretive principle may minimize indeterminacy); supra Section IV.A (examining *Slayton* as a blueprints for the use of the avoidance canon in single subject adjudication).

[222] See 800 P.2d at 595; supra Section IV.A.

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This Note's proposal accepts that indeterminacy will exist in single subject adjudication. Thus, it abandons the search for the perfect test and instead conceptualizes the single subject rule as a principle of interpretation. Implementing the single subject rule in this way, through widely accepted canons of construction, will be familiar to judges and litigants, making the rule easy to apply and helping to bolster the credibility of single subject adjudication. Under this approach, courts are not required to determine conclusively that a statute has multiple subjects before enforcing the rule. Judges can also implement the single subject rule without striking down or severing statutes, and can even enforce the rule in cases where single subject challenges are not raised. As a result, this Note's proposal has the potential to increase the frequency with which the rule's policies are advanced. Although not a silver bullet, the single subject rule, when viewed as a principle of statutory interpretation, provides judges a more objective, less problematic way of enforcing their constitutions.

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The Single-Subject Rule: A State Constitutional Dilemma

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THE SINGLE-SUBJECT RULE: A STATE CONSTITUTIONAL DILEMMA

Richard Briffault[*]

I. INTRODUCTION

Critics of the proliferation of omnibus legislation in Congress have pointed to the constitutions of the American states as providing an alternative, and potentially superior, model for lawmaking.[1] Forty-three state constitutions include some sort of "single-subject" rule, that is, the requirement that each act of the legislature be limited to a single subject.[2] Many of these provisions date back to the second quarter of the nineteenth century, and, collectively, they have been the subject of literally thousands of court decisions.[3] Nor is the rule a relic from a bygone era; one recent study found the rule at stake in 102 cases in 2016 alone.[4] Many of these decisions have involved controversial, hot-button issues. In the last two decades, state courts

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[1] *See, e.g.*, Brannon P. Denning & Brooks R. Smith, *The Truth-in-Legislation Amendment: An Idea Whose Time has Come*, 78 TENN. L. REV. 831, 832 (2011) [hereinafter Denning & Smith, *The Truth-in-Legislation Amendment*]; Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 958, 962–63 (1999) [hereinafter Denning & Smith, *Uneasy Riders*]; M. Albert Figinski, *Maryland's Constitutional One-Subject Rule: Neither a Dead Letter nor an Undue Restriction*, 27 U. BALT. L. REV. 363, 390–91, 393–94 (1998).

[2] *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 812 (2006).

[3] *See id.* at 812, 820. Gilbert's count includes cases dealing with voter initiatives. *See id.* at 819. Twenty-four states provide for the voter initiative process, and eighteen of those states require voter initiatives to comply with a single-subject requirement. *See generally* Rachel Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (surveying the application of a voter initiative process and a single subject rule among the states). Voter initiatives pose distinctive issues with respect to the potential value of a single-subject requirement. *See* Mary-Beth Moylan, *Something for Everyone? The Future of Comprehensive Criminal Justice Initiatives After* Senate v. Jones *and* Manduley v. Superior Court, 33 MCGEORGE L. REV. 779, 781 (2002); *see also* Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1639 (2005). This Article focuses largely on cases that apply single-subject requirements to acts of state legislatures, and addresses analyses of the single-subject rule that focus on legislative enactments rather than initiatives.

[4] *See* Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1249 (2017).

have used single-subject rules to invalidate laws dealing with, *inter alia*, firearms regulation,[5] abortion,[6] tort reform,[7] immigration,[8] local minimum wage laws,[9] sex offenders,[10] enhanced criminal penalties,[11] and school vouchers.[12]

Yet, despite having long been a part of the constitutional law of most states,[13] the single-subject rule is deeply problematic. Courts and commentators have been unable to come up with a clear and consistent definition of what constitutes a "single subject."[14] Instead, a persistent theme in the single-subject jurisprudence has been the inevitable "indeterminacy" of "subject"[15] and a recognition that whether a measure consists of one subject or many will frequently be "in the eye of the beholder."[16] On the one hand, as the Michigan Supreme Court once explained, "[t]here is virtually no statute that could not be subdivided and enacted as several bills."[17] On the other hand, as an older Pennsylvania Supreme Court case put it, "no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough."[18]

In practice, the meaning and enforcement of the rule has usually turned on how deferential the court thinks it ought to be to the legislature or, conversely, how much it sees the combination of topics in a new law as reflecting the legislature's defiance of the norms of proper law-making. Over the past century and a half, state courts for the most part appear to have given a liberal interpretation to the concept of "single subject" and have rejected most single-subject

[5] *See* Unity Church v. State, 694 N.W.2d 585, 588 (Minn. Ct. App. 2005); Leach v. Commonwealth, 141 A.3d 426, 428–29 (Pa. 2016).

[6] *See* Burns v. Cline, 2016 OK 99, ¶1, 382 P.3d 1048, 1049.

[7] *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1111 (Ohio 1999); Douglas v. Cox Ret. Props, Inc., 2013 OK 37, ¶¶ 2, 12, 302 P.3d 789, 791, 794.

[8] *See* Thomas v. Henry, 2011 OK 53, ¶¶ 25, 31, 260 P.3d 1251, 1259–60, 1261.

[9] *See* Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 575–76 (Mo. 2017).

[10] *See* Commonwealth v. Neiman, 84 A.3d 603, 605–06, 613 (Pa. 2013).

[11] *See* People v. Cervantes, 723 N.E.2d 265, 266, 268–69 (Ill. 1999).

[12] *See* Simmons-Harris v. Goff, 711 N.E.2d 203, 207 (Ohio 1999).

[13] *See* Gilbert, *supra* note 2, at 812. State constitutions and state courts are a vital but understudied component of the American legal system, but even when scholars turn their attentions to state constitutionalism, they tend to focus on state analogues to federal constitutional provisions, such as those involving free speech, equality, due process, or criminal procedure, *see, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8 (2018), rather than on the legislative process restrictions that are a truly distinctive feature of state constitutionalism.

[14] *See* Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938 (1983).

[15] *See* Or. Educ. Ass'n v. Phillips, 727 P.2d 602, 612 (Or. 1986) (Linde, J., concurring).

[16] *See* Lowenstein, *supra* note 14, at 938.

[17] People v. Kevorkian, 527 N.W.2d 714, 722 (Mich. 1994).

[18] Payne v. Sch. Dist. of Borough of Coudersport, 31 A. 1072, 1074 (Pa. 1895).

challenges to state legislation.[19] Even with the uptick in findings of violations in recent decades,[20] the meaning of the rule remains murky, with the case law consisting of a mix of unpredictable "I know it when I see it" decisions.[21]

Due to the slipperiness of "subject," many analyses have focused on what are regularly said to be the primary purposes of the rule—the prevention of legislative logrolling and riders, and the promotion of a more orderly and informed legislative process—and have called for reframing the enforcement of the rule around the advancement of these goals.[22] But determining whether a law is the product of logrolling, or whether a provision should be treated as a rider, will often be difficult.[23] Moreover, it is far from clear that logrolls and riders are as pernicious as proponents of more vigorous enforcement of the single-subject rule assume.[24] So, too, the more aggressive use of the single-subject rule urged by advocates as a means of thwarting "legislative chicanery"[25] and "backroom politics"[26] could also undo the cooperation and compromise necessary to get difficult but important legislation enacted.

Part II of this Article briefly reviews the history and purposes behind the single-subject rule. Part III examines how state courts have applied the single-subject rule, with particular attention to some recent state supreme court single-subject cases interpreting the

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[19] The leading study of the first century of the single-subject is Millard Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389 (1958). Professor Ruud concluded that "the one-subject rule . . . appears as a weak and undependable arrow in [the] quiver" of anyone challenging state legislation. *Id.* at 447. Nearly sixty years later, another comprehensive study similarly concluded that "most states have . . . given little weight to their respective single subject rules." Justin W. Evans & Mark. C. Bannister, *Reanimating the States' Single Subject Jurisprudence: A New Constitutional Test*, 39 S. ILL. U. L.J. 163, 163 (2015); *see also* Porten Sullivan Corp. v. State, 568 A.2d 1111, 1118 (Md. 1990) (citing Scharf v. Tasker, 21 A. 56 (Md. 1891); Curtis v. MacTier, 80 A. 1066, 1069 (Md. 1991)) (noting only two violations in 139 years); Unity Church v. State, 694 N.W.2d 585, 592 (Minn. Ct. App. 2005) (noting that Minnesota had found only five single-subject violations in 148 years).

[20] *See* Denning & Smith, *Uneasy Riders*, *supra* note 1, at 996–97; Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 107–08 (2001).

[21] *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (finding in the context of pornography, a hardline rule could not be created and instead claimed to know it when he saw it); *see also* Denning & Smith, *Uneasy Riders*, *supra* note 1, at 996.

[22] *See, e.g.*, Ruud, *supra* note 19, at 391.

[23] *See* Boger, *supra* note 4, at 1270; Denning & Smith, *The Truth-in-Legislation Amendment*, *supra* note 1, at 835.

[24] *Contra* Denning & Smith, *Uneasy Riders*, *supra* note 1, at 971; Gilbert, *supra* note 2, at 814.

[25] *See* Denning & Smith, *The Truth-in-Legislation Amendment*, *supra* note 1, at 832.

[26] Alexander R. Knoll, Note, *Tipping Point: Missouri Single Subject Provision*, 72 MO. L. REV. 1387, 1387 (2007).

rule. Part IV focuses on arguments for reframing enforcement of the rule more tightly around its purposes, particularly the goals of preventing logrolling or riders. Part V concludes by reflecting on the significance of the failure of the rule to achieve its goal of reforming state legislative processes.

II. THE HISTORY AND PURPOSES OF THE SINGLE-SUBJECT RULE

A. History

Scholars have traced concerns about omnibus legislation and the norm of requiring laws to be limited to a single subject to the *Lex Cecilia Didia* of the Roman Republic.[27] Early instances of single-subject requirements in the American setting include a complaint by the Privy Council about the practices of the legislature of the Massachusetts Bay Colony,[28] and a 1702 directive of Queen Anne to the royal governor of the New Jersey colony against the adoption of laws "intermixing in one . . . Act" unrelated subjects.[29] The constitutions—federal and state—adopted after the Revolution did not include a single-subject requirement.[30] But that soon changed. The early nineteenth century witnessed growing popular discontent with the performance of state legislatures, including such abuses as "[l]ast-minute consideration of important measures, logrolling, mixing substantive provisions in omnibus bills, low visibility and hasty enactment of important, and sometimes corrupt, legislation, and the attachment of unrelated provisions in the amendment process . . . ."[31] In response, the states amended their constitutions to impose new constraints on their legislatures.[32] Some of these were substantive, such as limits on state spending, lending, and borrowing intended to prevent the practices that got many states into fiscal difficulties in the 1830s and 1840s.[33] Others were procedural, and were intended to promote legislative accountability and deliberation.[34] These included, *inter alia*, requirements that votes be

[27] *See, e.g.*, ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 548 (1922).

[28] *See id.* at 549–50.

[29] *See* Gilbert, *supra* note 2, at 811.

[30] *See* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 PITT. L. REV. 797, 798 (1987).

[31] *Id.*

[32] *See* City of Philadelphia v. Commonwealth, 838 A.2d 566, 588 (Pa. 2003).

[33] *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 817–18 (8th ed. 2016).

[34] *See* Williams, *supra* note 31, at 798–99.

reflected in the legislature's journal; that no bill be altered during the legislative process so as to change its legislative purpose; that bills must "age" a certain number of days before they can be voted on; that each bill have a title clearly disclosing its subject—and that each bill be limited to a single subject.[35]

Illinois was the first to adopt a single-subject requirement when it amended its constitution in 1818 to direct that bills appropriating salaries for government officials be limited to that subject.[36] Michigan in 1843 limited laws authorizing the borrowing of money or the issuance of state stock to a single object.[37] In 1844, New Jersey adopted the first general single-subject requirement.[38] Thereafter, the idea spread quickly. Today, forty-three states, including every state that entered the Union after 1844, include some version of the single-subject rule in their constitutions, almost always in the same sentence as the clear-title requirement.[39]

There are some variations across the states constitutions in the language and scope of the rule. Two states apply the requirement only to appropriations bills, and another two states limit it to bills adopting special or local laws.[40] Conversely, a few states exempt appropriations bills from the single-subject requirement,[41] and some states exclude bills "for the codification, revision or rearrangement of laws."[42] A handful of states use the term "object" rather than "subject," although that does not appear to have had any legal significance.[43] Notwithstanding these variations, some version of the single-subject requirement is widespread, with roughly three-quarters of state legislatures subject to the rule for most enactments.[44] It is probably the "most significant, and therefore most litigated procedural requirement" in state constitutions.[45] The language of the Ohio Constitution is typical: "No bill shall contain more than one subject, which shall be clearly expressed in its title."[46]

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[35] *See id.*

[36] *See* Ruud, *supra* note 19, at 389.

[37] *See id.* at 389–90.

[38] *See id.* at 390.

[39] *See, e.g.*, Michael W. Catalano, *The Single Subject Rule: A Check on Anti-Majoritarian Logrolling*, 3 EMERGING ISSUES ST. CONST. L. 77, 80 (1990).

[40] *See id.*

[41] *See* Ruud, *supra* note 19, at 416.

[42] *See, e.g.*, ILL. CONST. art IV, § 8(d).

[43] *See* Ruud, *supra* note 19, at 390.

[44] *See id.*

[45] *See* Michael J. Kasper, *Using Article IV of the Illinois Constitution to Attack Legislation Passed by the General Assembly*, 40 LOY. U. CHI. L.J. 847, 848 (2009).

[46] OHIO CONST. art. II, § 15.

B. Purposes

The purposes of the single-subject rule are briefly stated and often repeated: the prevention of logrolling and riders; orderly legislative procedure that promotes informed legislative decision-making and public accountability;[47] and, less frequently, the protection of the governor's veto power.[48] Logrolling and riders, in particular, have been most frequently cited as the "evils" against which the single-subject rule is aimed.[49] The two terms are sometimes blurred together,[50] but they refer to somewhat different forms of legislative action. "Logrolling" is used to describe what occurs when two or more separate proposals, none of which is able to command majority support, are combined so that the minorities behind each measure aggregate to a majority capable of passing the resulting bill.[51] A "rider" is a provision which could not pass on its own but is then attached to a bill considered likely to pass and so "rides" on that more popular measure to enactment.[52]

Both logrolling and riders have been sharply criticized because they lead to the adoption of measures that do not enjoy true majority

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[47] *See, e.g.*, Wirtz v. Quinn, 2011 IL 111903, ¶ 13 (quoting Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)); Ruud, *supra* note 19, at 391.

[48] *See, e.g.*, Migdal v. State, 747 A.2d 1225, 1229 (Md. 2000); Hammerschmidt v. Boone Cty., 877 S.W.2d 98, 102 (Mo. 1994); *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 8 n.11, 142 P.3d 400, 405 n.11 (citing Johnson v. Walters, 1991 OK 107, ¶ 14, 819 P.2d 694, 697); Dragich, *supra* note 20, at 115; Justin W. Evans & Mark. C. Bannister, *The Meaning and Purposes of State Constitutional Single Subject Rules: A Survey of States and the Indiana Example*, 49 VAL. U.L. REV. 87, 151–52 (2014); Figinski, *supra* note 1, at 365–66.

[49] *See, e.g.*, Stephanie Hoffer, *Of Disunity and Logrolling: Ohio's One-Subject Rule and the Very Evils it was Designed to Prevent*, 51 CLEV. ST. L. REV. 557, 558–59 (2004); Ruud, *supra* note 19, at 398 ("[L]og-rolling is the evil at which the one-subject rule is aimed . . . ."); *cf. In re* Title, Ballot Title & Submission Clause for 2005-2006 No. 74, 136 P.3d 237, 243 (Co. 2006) (Coats, J., dissenting) (first citing Catron v. Bd. of Cty. Comm'rs, 33 P. 513, 514 (Colo. 1893); then citing *In re* Breene, 24 P. 3, 3–4 (Colo. 1890); then citing *In re* Ballot Title & Submission Clause for Proposed Initiative 2001-2002 No. 43, 46 P.3d 438, 440 (Colo. 2002); and then citing *In re* Title, Ballot, Title & Submission Clause for 2003-2004 No. 32 & No. 33, 76 P.3d 460, 471 (Colo. 2003) (Coats, J., dissenting)) ("[B]oth case law and legislative history make clear that this provision must be understood as directed against two specific evils: 1) increasing voting power by combining measures that could not be carried on their individual merits, and 2) surprising voters by surreptitiously including unknown and alien subjects 'coiled up in the folds' of the proposal.").

[50] *See, e.g.*, State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 604 (Ohio 1994) (Sweeney, J., concurring in part and dissenting in part); Fent v. State, *ex rel.* Okla. Capitol Improvement Auth., 2009 OK 15, ¶ 14 n.18, 214 P.3d 799, 804 n.18; Dragich, *supra* note 20, at 161–62 (analyzing two cases in which it was hard to say whether a single-subject violation involved a logroll or a rider).

[51] *See* Commonwealth v. Neiman, 84 A.3d 603, 611 (Pa. 2013) (quoting City of Philadelphia v. Commonwealth, 838 A.2d 566, 589 (Pa. 2003)).

[52] *See* Gilbert, *supra* note 2, at 815; James Preston Schuck, *Returning the "One" to Ohio's "One-Subject" Rule*, 28 CAP. U. L. REV. 899, 902 (2000).

support within the legislature, and, to the extent that legislators accurately represent the views of their constituents, within the state as a whole.[53] Some courts have also emphasized the degree to which logrolls and riders interfere with the freedom of legislators by presenting them with the "Hobson's choice" of being "forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure that an unfavorable provision is not enacted."[54]

Beyond the prevention of logrolling and riders, many courts and commentators cite improved legislative deliberation, greater transparency, and the resulting greater accountability to the public as purposes of the single-subject rule.[55] As the Illinois Supreme Court recently explained, one reason for the single-subject rule "is to promote an orderly legislative process. 'By limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed.'"[56] The Missouri Supreme Court similarly asserted that by limiting each bill to a single subject, the rule enables bills to "be easily understood and intelligently discussed, both by legislators and the general public."[57] So, too, the Pennsylvania Supreme Court has urged that the general aim of the rule is to "place restraints on the legislative process and encourage an open, deliberative, and accountable government."[58] The intuition is that when a bill is limited to a single subject, it is easier for legislators to more fully understand the ramifications of enactment and for the public to know what their legislators are up to.[59] That can facilitate public input while the measure is pending, or voter efforts to hold legislators accountable after enactment.[60] Supporters

[53] *See* Shuck, *supra* note 52, at 901–02.

[54] *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 8, 142 P.3d 400, 405; *accord* Porten Sullivan Corp. v. State, 568 A.2d 1111, 1121 (Md. 1990) ("To avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation . . . .").

[55] *See, e.g.*, Wirtz v. Quinn, 2011 IL 111903, ¶ 13, 953 N.E.2d 899, 904–05 (quoting Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)); Kasper, *supra* note 45, at 848–49; Ruud, *supra* note 19, at 391; Schuck, *supra* note 52, at 903.

[56] *Wirtz*, 2011 IL 111903, ¶ 13, 953 N.E.2d at 905 (quoting *Johnson*, 680 N.E.2d at 1379) (citing People v. Wooters, 722 N.E.2d 1102, 1113 (Ill. 1999)).

[57] *See* Rizzo v. State, 189 S.W.3d 576, 578 (Mo. 2006) (citing Hammerschmidt v. Boone Cty., 877 S.W.2d 98, 101 (Mo. 1994)); *see also* Mo. Roundtable for Life, Inc. v. State, 396 S.W.3d 348, 351 (Mo. 2013) ("Procedural safeguards also ensure that members of the legislature and the public are aware of the subject matter of pending laws.").

[58] Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 395 (Pa. 2005) (quoting City of Philadelphia v. Commonwealth, 838 A.2d 566, 585 (Pa. 2003)).

[59] *See Mo. Roundtable for Life, Inc.*, 396 S.W.3d at 351 (citing Stroh Brewery Co. v. State, 954 S.W.2d 323, 325–26 (Mo. 1997)); Shuck, *supra* note 52, at 902.

[60] *See Wirtz*, 2011 IL 111903, ¶ 13, 953 N.E.2d at 905 (citing Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)); *City of Philadelphia*, 838 A.2d at 585.

of the rule have also expressed the hopeful assumption that it will "prevent surprise and fraud upon the people and the legislature" by barring special interest groups from hiding deals or giveaways in long and complex multi-subject measures.[61]

III. THE SINGLE-SUBJECT RULE IN THE COURTS

A. Subject

Courts have regularly recognized the intrinsic difficulty of defining "subject" for purposes of enforcing the single-subject requirement. As the Utah Supreme Court recently acknowledged, a "precise formula . . . may well be impossible to craft . . . ."[62] Other courts have agreed that "[f]or purposes of legislation, 'subjects' are not absolute existences to be discovered by some sort of *a priori* reasoning, but are the result of classification for convenience of treatment and for greater effectiveness in attaining the general purpose of the particular legislative act."[63] As Professor Daniel Hays Lowenstein has emphasized, a central problem is the level of specificity required or generality permitted in defining what constitutes a subject as

> any collection of items, no matter how diverse and comprehensive, will fall 'within' a single (broad) subject if one goes high enough up . . . and, on the other hand, the most simple and specific idea can always be broken down into parts, which may in turn plausibly be regarded as separate (narrow) subjects.[64]

Some courts have emphasized the need to take a broad approach to defining "subject." The Utah Supreme Court has emphasized that "[t]here is no constitutional restriction as to the scope or magnitude of the single subject of a legislative act."[65] The Illinois Supreme Court

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[61] Otto v. Wright Co., 910 N.W.2d 446, 456 (Minn. 2018) (quoting Johnson v. Harrison, 50 N.W. 923, 924 (Minn. 1891)); *see In re* Ballot Title and Submission Clause for 2013-2014 no. 129, 2014 CO 53, ¶ 14 (quoting *In re* Title & Ballot Title & Submission Clause for 2005-2006 No. 55, 138 P.3d 273, 276–77 (Colo. 2006)); *Stroh Brewery Co.*, 954 S.W.2d at 325 ("[T]hese constitutional limitations function in the legislative process to facilitate orderly procedure, avoid surprise, and prevent 'logrolling' . . . .").

[62] Gregory v. Shurtleff, 2013 UT 18, ¶ 42, 299 P.3d 1098, 1113.

[63] Wash. Ass'n for Substance Abuse & Violence Prevention v. State, 278 P.3d 632, 656 (Wash. 2012) (alteration in original) (quoting State *ex rel.* Wash. Toll Bridge Auth. v. Yelle, 377 P.2d 466, 470 (Wash. 1962)).

[64] *See* Lowenstein, *supra* note 14, at 940–41.

[65] *Gregory*, 2013 UT 18, ¶ 40, 299 P.3d at 1112 (alteration in original) (emphasis omitted)

agreed that "[t]he subject may be as broad as the legislature chooses,"[66] albeit not "so broad that the rule is evaded as 'a meaningful constitutional check on the legislature's actions'"[67] – perhaps not the most helpful formula. Indeed, some state courts have approved as constitutionally permissible subjects such broad topics as "land,"[68] "education,"[69] "transportation,"[70] "utilities,"[71] "state taxation,"[72] "public safety,"[73] "capital projects,"[74] and "operations of state government."[75]

On the other hand, some state high courts have rejected "any broad, expansive, approach,"[76] and have ruled out certain relatively broad topics. The Maryland Court of Appeals concluded that the purpose of "generally regulating corporations is too broad and tenuous . . . to satisfy the one-subject requirement . . . ."[77] The Pennsylvania Supreme Court has held that "municipalities" is "too broad to qualify for single-subject status"[78] and, similarly, that "refining civil remedies or relief" and "judicial remedies and sanctions" are "far too expansive" to satisfy the single-subject requirement[79]—although the same court also held that the "regulation of gaming" was sufficiently narrow as to be a constitutionally permissible subject.[80]

Some state constitutional provisions authorize acceptance of some inherently broad measures, like appropriations and budget bills,

(quoting Martineau v. Crabbe, 150 P. 301, 304 (Utah 1915)).

[66] Wirtz v. Quinn, 2011 IL 111903, ¶ 14, 953 N.E.2d 899, 905 (citing People v. Boclair, 789 N.E.2d 734, 746 (Ill. 2002); Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)).

[67] *Wirtz*, 2011 IL 111903, ¶ 14, 953 N.E.2d at 905 (quoting *Boclair*, 789 N.E.2d at 746).

[68] *See* State v. First Nat'l Bank, 660 P.2d 406, 415 (Alaska 1982).

[69] *See* Kan. Nat'l Educ. Ass'n v. State, 387 P.3d 795, 809 (Kan. 2017) (quoting Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., 941 P.2d 1321, 1347 (Kan. 1997)).

[70] *See, e.g.*, Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173, 1175 (Alaska 1985); Wass v. Anderson, 252 N.W.2d 131, 137 (Minn. 1977); C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 328 (Mo. 2000).

[71] *See* Kan. One-Call Sys. v. State, 274 P.3d 625, 632–33 (Kan. 2012).

[72] *See* N. Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 545 (Alaska 1978).

[73] *See* Townsend v. State, 767 N.W.2d 11, 13–14 (Minn. 2009).

[74] *See* Wirtz v. Quinn, 2011 IL 111903, ¶ 32 , 953 N.E.2d 899, 907 (quoting People v. Boclair, 789 N.E.2d 734, 746 (Ill. 2002)) ("[C]apital projects is a legitimate single subject . . . .").

[75] *See* Otto v. Wright Cty., 910 N.W.2d 446, 457 (Minn. 2018) ("'The operation of state government'—is not too broad to pass constitutional muster."). *But see* People v. Reedy, 708 N.E.2d 1114, 1119 (Ill. 1999) (rejecting subject of "governmental matters").

[76] *See* Fent v. State *ex rel.* Okla. Capitol Improvement Auth., 2009 OK 15, ¶ 20, 214 P.3d 799, 806.

[77] Migdal v. State, 747 A.2d 1225, 1231 (Md. 2000).

[78] City of Philadelphia v. Commonwealth, 838 A.2d 566, 589 (Pa. 2003).

[79] Commonwealth v. Neiman, 84 A.3d 603, 613 (Pa. 2013).

[80] *See* Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 396 (Pa. 2005).

codifications, and comprehensive revisions, and some courts similarly recognized that such sweeping multi-part measures can constitute a single subject.[81] However, difficulties have arisen when substantive law provisions are attached to appropriations bills[82] and also in defining what constitutes a permissible comprehensive approach. Thus, state courts have divided over whether comprehensive tort reform constitutes a single subject. The Alaska Supreme Court, which has generally accepted a broad definition of subject, upheld a single tort reform law that imposed caps on noneconomic and punitive damages, required payment of half of all punitive damages awards to the state, created a statute of repose, adopted a comparative allocation of fault between parties and nonparties, provided for a revised offer of judgment procedure, and gave hospitals partial immunity from vicarious liability for some physicians' actions.[83] The Court acknowledged that the law's provisions "concern different matters" but concluded that "they are all within the single subject of 'civil action.'"[84] The Ohio and Oklahoma Supreme Courts, however, rejected similar measures, finding, respectively, that "tort and other civil actions,"[85] and "lawsuit reform"[86] could not be sustained as constitutionally permissible single subjects of legislation.[87] Courts have similarly struggled over the significance of the length or number of sections of a bill or the number of articles or titles of the state code that the measure amends. Although longer, more complex bills are certainly more likely to be found to violate the single-subject constraint, the fact that the bill amends only a single article or title will not save it,[88] and the fact that it runs over one hundred pages, with dozens of chapters and multiple sections, need not be fatal.[89]

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[81] *See* Ruud, *supra* note 19, at 414–19, 442–43.

[82] *See, e.g.*, Unity Church v. State, 694 N.W.2d 585, 593 (Minn. Ct. App. 2005); State *ex rel.* Ohio Civil Serv. Emps. Ass'n v. State, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 18 (citing State *ex rel.* Ohio Civ. Serv. Emps. Ass'n, AFSCME, Local 11 v. State Emp't Relations Bd., 104 Ohio St. 3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 30) ("Biennial appropriations bills, which fund the state's programs and departments, necessarily address wide-ranging topics . . . ."); Ruud, *supra* note 19, at 400.

[83] *See* Evans v. State, 56 P.3d 1046, 1048 (Alaska 2002).

[84] *Id.* at 1070.

[85] State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1101 (Ohio 1999).

[86] Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 10, 302 P.3d 789, 793 (citing Campbell v. White, 856 P.2d 255, 258 (Okla. 1993)).

[87] *See Sheward*, 715 N.E.2d at 1101; *Douglas*, 2013 OK 37, ¶ 12, 302 P.3d at 794.

[88] *See, e.g.*, Commonwealth v. Neiman, 84 A.3d 603, 612–13 (Pa. 2013).

[89] *See* Wirtz v. Quinn, 2011 IL 111903, ¶ 15, 953 N.E.2d 899, 905 (citing Arangold Corp. v. Zehnder, 718 N.E.2d 191, 198 (Ill. 1999); Cutinello v. Whitley, 641 N.E.2d 360, 366 (Ill. 1994)); Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 392

Courts frequently acknowledge the lack of clarity in their single-subject jurisprudence. The Pennsylvania Supreme Court has candidly written that its cases indicate that "the line between what is constitutionally acceptable and what is not is often blurred."[90] Many of the most prominent recent cases in Pennsylvania and Ohio—two states which have witnessed considerable single-subject rule litigation—have been marked by sharp dissents,[91] with one Ohio dissenter pointing out that in one case each justice of the state's supreme court authored a separate opinion, thereby demonstrating "that there was little consensus among the justices on the rule's meaning."[92] A dissenting justice of the Colorado Supreme Court similarly lamented "an unmistakable lack of uniformity in our treatment of the single-subject requirement."[93] Even when there are no dissents, it is sometimes difficult to find consistency in a court's treatment of "subject." The Oklahoma Supreme Court, which has had a heavy docket of single-subject cases in recent years,[94] invalidated a law authorizing a single state agency to incur debt to finance three different projects,[95] and then a few years later upheld a law authorizing a different state agency to issue bonds to finance four

(Pa. 2005) (discussing the constitutionality of a bill that was 145 pages and included seven chapters and 86 sections); *Arangold Corp.*, 718 N.E.2d at 197–98 (citing *Cutinello*, 641 N.E.2d at 366; Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)) (amending over twenty separate laws); *see also* Dragich, *supra* note 20, at 144–45 ("Provisions of the bill amending chapters 198 (nursing homes) and 660 (relating to DSS itself), though found in separate parts of the code, all relate to the same subject—the regulation by DSS of care provided by nursing homes.").

[90] *Pennsylvanians Against Gambling Expansion Fund, Inc.*, 877 A.2d at 400 (quoting City of Philadelphia v. Commonwealth, 837 A.2d 591, 602 (Pa. Commw. Ct. 2003)).

[91] *See, e.g.*, State *ex rel.* Ohio Civil Serv. Emps. Ass'n, Local 11 v. State Emp. Relations Bd., 104 Ohio St. 3d 122, 2004-Ohio-6363; 818 N.E.2d 688, ¶ 60 (Lundberg Stratton, J., dissenting); *Sheward*, 715 N.E.2d at 1124 (Lundberg Stratton, J., dissenting); Simmons-Harris v. Goff, 711 N.E.2d 203, 218 (Ohio 1999) (Baird, J., dissenting in part); State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 599–600 (Ohio 1994) (Moyer, J., dissenting in part); *Neiman*, 84 A.3d at 616–17 (Castille, C.J., dissenting); Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 64 A.3d 611, 615 (Pa. 2013) (citing Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 53 A.3d 109, 124–25 (Pa. Commw. Ct. 2012) (Pellegrini, J., dissenting)); Spahn v. Zoning Bd. of Adjustment, 977 A.2d 1132, 1156 (Pa. 2009) (Saylor, J., dissenting).

[92] *State Emp. Relations Bd.*, 104 Ohio St. 3d 122, 2004-Ohio-6363; 818 N.E.2d 688, ¶ 75 (Lundberg Stratton, J., dissenting).

[93] *In re* Title, Ballot Title & Submission Clause for 2005-2006 No. 74, 136 P.3d 237, 244 (Colo. 2006) (Coats, J., dissenting).

[94] *See, e.g.*, *In re* Application of Okla. Tpk. Auth. for Approval of not to Exceed $480,000 Okla. Tpk. Sys. Second Senior Lien Revenue Bonds, Series 2016, 2016 OK 124, ¶ 8, 389 P.3d 318, 320; Burns v. Cline, 2016 OK 99, ¶ 1, 382 P.3d 1048, 1049; Fent v. Fallin, 2013 OK 107, ¶ 1, 315 P.3d 1023, 1024; Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 2, 302 P.3d 789, 791–92; Thomas v. Henry, 2011 OK 53, ¶ 2, 260 P.3d 1251, 1253 (per curiam); Nova Health Sys. v. Edmondson, 2010 OK 21, ¶ 1, 233 P.3d 380, 381; Fent v. State *ex rel.* Okla. Capitol Improvement Auth., 2009 OK 15, ¶ 1, 214 P.3d 799, 800; *In re* Initiative Petition No. 382, State Question No. 729, 2006 OK 45, ¶ 1, 142 P.3d 400, 402.

[95] *See Fent*, 2009 OK 15, ¶¶ 1, 24, 214 P.3d at 800, 807.

different projects[96]—both times without dissent. Although the second decision sought to distinguish the first by finding the common theme of turnpike construction and maintenance linked the multiple projects,[97] the tension between the decisions remains.

A. Germaneness

As the Oklahoma turnpike decision indicates, the question in many single-subject cases is not the definition of "subject" per se, but whether the different topics, sections, or parts of a bill are sufficiently closely connected that they can be treated as dealing with a single subject.[98] As the Ohio Supreme Court put it, the rule "allows a plurality of topics" even as it bars a "disunity of subjects."[99] Indeed, most single-subject disputes involve laws that, as enacted, consist of multiple provisions.[100] Courts have developed a range of tests for determining whether the multiple parts of a bill are sufficiently related so that when combined they constitute but a single subject, including whether they are "rationally related"[101] whether there is a "unifying principle,"[102] "natural and logical connection,"[103] or a "common purpose or relationship . . . between the topics;"[104] "whether they have a nexus to a common purpose;"[105] whether they "fairly relate to the same subject"[106] or "relate, directly or indirectly, to the same general subject and have a mutual connection;"[107] whether there is a "common thread"[108] or "filament"[109] linking them to each

[96] *See In re Application of Okla. Tpk. Auth.*, 2016 OK 124, ¶ 8, 389 P.3d at 320.

[97] *See id.* ¶¶ 10, 12, 389 P.3d at 321.

[98] *See In re* Application of Okla. Tpk. Auth. for Approval of not to Exceed $480,000 Okla. Tpk. Sys. Second Senior Lien Revenue Bonds, Series 2016, 2016 OK 124, ¶ 12, 389 P.3d 318, 321.

[99] State *ex rel.* Hinkle v. Franklin Cty. Bd. of Elections, 580 N.E.2d 767, 770 (Ohio 1991) (citing Comtech Sys. v. Limbach, 570 N.E.2d 1089, 1093 (Ohio 1991)).

[100] *See, e.g.*, Wirtz v. Quinn, 2011 IL 111903, ¶ 5; 953 N.E. 899, 903; Arangold Corp. v. Zehnder, 718 N.E.2d 191, 197 (Ill. 1999); Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 392 (Pa. 2005).

[101] *See* State *ex rel.* Ohio Civil Serv. Emps. Ass'n v. State, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 33.

[102] *See* McIntire v. Forbes, 909 P.2d 846, 856 (Or. 1996).

[103] People v. Cervantes, 723 N.E.2d 265, 267 (Ill. 1999) (citing *Arangold Corp.*, 718 N.E.2d at 197; People v. Reedy, 708 N.E.2d 1114, 1117 (Ill. 1999); Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)).

[104] Hoover v. Bd. of Cty. Comm'rs, 482 N.E.2d 575, 580 (Ohio 1985).

[105] Commonwealth v. Neiman, 84 A.3d 603, 612 (Pa. 2013).

[106] Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 6 (Mo. 1984).

[107] *Ex parte* Jones, 440 S.W.3d 628, 632 (Tex. Crim. App. 2014) (citing Lecroy v. Hanlon, 713 S.W.2d 335, 337 (Tex. 1986)).

[108] Beagle v. Walden, 676 N.E.2d 506, 507 (Ohio 1997).

[109] Blanch v. Suburban Hennepin Reg'l Park Dist., 449 N.W.2d 150, 155 (Minn. 1989).

other, or—from the opposite perspective—whether they are "distinct and incongruous"[110] or "dissimilar and discordant."[111] The most commonly used judicial standard is whether they are "germane" or "reasonably germane" to each other or to some general subject.[112]

Of course, as other commentators have recognized, "reasonable germaneness" is not much more precise or determinate than "subject" itself.[113] The body of law the courts have produced as they have grappled with the question of whether the different parts of a bill are germane to each other or to some overarching subject is not much more consistent than the jurisprudence concerning permissible subjects.[114]

Thus, courts have found sufficient germaneness in laws that combine a tax on motor vehicle fuels with authorization of bonds to finance highway construction;[115] add an authorization of a park district to acquire land to a bill making appropriations for state government;[116] combine an authorization of the privatization of liquor sales with funding for public safety;[117] combine provisions dealing with asbestos abatement, leaking underground storage tanks, and water well drilling under the rubric of "environmental control;"[118] combine local regulation of billboards with funding for the state transportation department;[119] add a program for the privatization of child support enforcement to a bill dealing with welfare reform;[120] add an authorization for counties to hire private accounting firms to audit their books to the state government finance omnibus bill;[121] include provisions regulating the sale of prisons to

[110] Porten Sullivan Corp. v. State, 568 A.2d 1111, 1121 (Md. 1990).

[111] Kan. Nat'l Educ. Ass'n v. State, 387 P.3d 795, 805 (Kan. 2017) (quoting Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc., 941 P.2d 1321, 1347 (Kan. 1997)).

[112] *See* Unity Church v. State, 694 N.W.2d. 585, 593 (Minn. Ct. App. 2005) (citing Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 300 (Minn. 2000)); *see also* Kastorf, *supra* note 3, at 1660 ("The 'reasonably germane' test is the most common test for compliance with the single subject rule.").

[113] *See, e.g.*, Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 710 (2010) ("'Germaneness' provides no clear guidance to the correct level of abstraction.").

[114] *See, e.g.*, People v. Cervantes, 723 N.E.2d 265, 271–72 (Ill. 1999); Wass v. Anderson, 252 N.W.2d 131, 135–36 (Minn. 1977); Cooter & Gilbert, *supra* note 113, at 710.

[115] *See Wass*, 252 N.W.2d at 135–36.

[116] *See* Blanc v. Suburban Hennepin Reg'l Park Dist., 449 N.W.2d 150, 152, 155 (Minn. 1989).

[117] *See* Wash. Ass'n for Substance Abuse v. State, 278 P.3d 632, 635, 656–59 (Wash. 2012).

[118] *See* Corvera Abatement Techs. v. Air Conservation Comm'n, 973 S.W.2d 851, 860, 862 (Mo. 1998).

[119] *See* C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 329 (Mo. 2000).

[120] *See* Md. Classified Emps. Ass'n v. State, 694 A.2d 937, 938, 944–45 (Md. 1997).

[121] *See* Otto v. Wright Cty., 910 N.W.2d 446, 457 (Minn. 2018).

private operators in the state budget bill;[122] and combine funding for emergency medical services with a prohibition on the use of tax increment financing in flood plains (on the theory that the financing restriction would reduce the need for emergency services).[123]

On the other hand, courts have rejected on single-subject grounds measures that sought to combine: regulation of long-term care with authorization of the state attorney general to enforce regulation of advertising by nursing homes;[124] multiple anti-crime and neighborhood safety provisions with provisions regulating (including but not limited to criminal punishments for fraud) private providers of public welfare services;[125] payment of prevailing wage requirements for both publicly and non-publicly financed school construction and remodeling projects added to an omnibus tax relief bill;[126] a ban on persons convicted of a felony from running for elected office in the state with a general regulation of political subdivisions including local elections;[127] changes to a state's public utilities regulatory fund with changes in the public service commission's rule-making process;[128] a provision relating to resident agents of corporations and a provision governing directors of investment companies;[129] and changes to the state's workers' compensation system with an exemption from the state's child labor laws and provision for an intentional workplace tort.[130] There may be a principle that explains the different findings of connection or germaneness across the cases, but it is not easy to discern.

B. Judicial Deference

Most courts have declared that they will take a deferential approach to the legislature, adopting a "liberal interpretation" of the

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[122] *See* State *ex rel.* Ohio Civ. Serv. Emps. Ass'n v. State, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶¶ 2, 19.

[123] *See* City of St. Charles v. State, 165 S.W.3d 149, 151–52 (Mo. 2005).

[124] *See* Mo. Health Care Ass'n v. Attorney Gen., 953 S.W.2d 617, 623 (Mo. 1997).

[125] *See* People v. Cervantes, 723 N.E.2d 265, 271–72 (Ill. 1999).

[126] *See* Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 295, 307 (Minn. 2000).

[127] *See* Rizzo v. State, 189 S.W.3d 576, 581 (Mo. 2006); *see also* Hammerschmidt v. Boone Cty. , 877 S.W.2d 98, 103 (Mo. 1994) (rejecting a bill that combined a provision allowing certain counties to adopt, by election, a county constitution with a provision generally relating to local elections); State *ex rel.* Hinkle v. Franklin Cty. Bd. of Elections, 580 N.E.2d 767, 769, 770 (Ohio 1991) (rejecting combination of provisions dealing with judicial elections and local option elections).

[128] *See* Delmarva Power & Light Co. v. Pub. Serv. Comm'n, 809 A.2d 640, 651 (Md. 2002).

[129] *See* Migdal v. State, 747 A.2d 1225, 1232 (Md. 2000).

[130] *See* State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 586 (Ohio 1994).

meaning of "subject" and of the degree of connectedness among a bill's parts necessary to satisfy the germaneness standard.[131] Reviewing the state's case law, the Pennsylvania Supreme Court observed that "[i]n more recent decisions, . . . Pennsylvania courts have become extremely deferential toward the General Assembly in [single-subject] challenges" and have upheld laws as long as "the court can fashion a single, over-arching topic to loosely relate the various subjects included in the statute under review."[132] High courts in Alaska,[133] Illinois,[134] Kansas,[135] Maryland,[136] Missouri,[137] Minnesota,[138] Ohio[139] and other states have similarly taken the position that they will strike down laws on single-subject grounds only if the violation is "clearly, plainly and palpably so," "manifestly gross and fraudulent," or shown "beyond a reasonable doubt."[140]

The case for such a liberal, deferential approach is clear. It demonstrates respect for a coordinate branch of government.[141] If few, or no laws are struck down on single-subject grounds, it

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[131] *See* Wirtz v. Quinn, 2011 IL 111903, ¶ 14, 953 N.E.2d 899, 905; People v. Olender, 854 N.E.2d 593, 599 (Ill. 2005) (citing People v. Reedy, 708 N.E.2d 1114, 1117 (Ill. 1999)); Arangold Corp. v. Zehnder, 718 N.E.2d 191, 198 (Ill. 1999) (citing Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)); Kan. Nat'l Educ. Ass'n v. State, 387 P.3d 795, 808–09 (Kan. 2017) (citing Kan. One-Call Sys. v. State, 274 P.3d 625, 633 (Kan. 2012)); Md. Classified Emps. Ass'n v. State, 694 A.2d 937, 943 (Md. 1997) (quoting Whiting-Turner Contracting Co. v. Coupard, 499 A.2d 178, 189 (Md. 1985)); Johnson v. Harrison, 50 N.W. 923, 924 (Mo. 1891).

[132] *See* City of Philadelphia v. Commonwealth, 838 A.2d 566, 587 (Pa. 2003).

[133] *See, e.g.*, Evans v. State, 56 P.3d 1046, 1069 (Alaska 2002) ("[O]nly a 'substantial and plain' violation of the one subject rule will lead us to strike down legislation on this basis.").

[134] *See Wirtz*, 2011 IL 111903, ¶¶ 14, 15, 62, 953 N.E.2d at 905, 914 (citing *Olender*, 854 N.E.2d at 599; *Arangold*, 718 N.E.2d at 198) ("[W]e construe the word 'subject' liberally in favor of upholding the legislation. . . . [L]egislation violates the single subject rule when it contains unrelated provision that by no fair interpretation have any legitimate relation to the single subject.").

[135] *See Kan. Nat'l Educ. Ass'n*, 387 P.3d at 808–09 (citing *Kan. One-Call Sys.*, 274 P.3d at 633) ("[T]he underlying policy of liberally construing the one-subject rule . . . .").

[136] *See* Porten Sullivan Corp. v. State, 568 A.2d 1111, 1118 (Md. 1990) (quoting *Coupard*, 499 A.2d at 189) ("[T]he 'general disposition of [this] Court has been to give the section a liberal construction, so as not to interfere with or impede legislative action.'") (alteration in original).

[137] *See* C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 327 (Mo. 2000) (quoting Hammerschmidt v. Boone Co., 877 S.W.2d 98, 102 (Mo. 1994)) (finding no violation of the single subject rule unless the act clearly and undoubtedly violates the rule).

[138] *See* Unity Church v. State, 694 N.W.2d. 585, 594 (Minn. Ct. App. 2005) (citing Defs. of Wildlife v. Ventura, 632 N.W.2d 707, 712 (Minn. Ct. App. 2001)) ("[B]ecause of the liberal deference given to the legislature, Minnesota courts have rarely invalidated laws for a lack of germaneness.").

[139] *See* State *ex rel.* Ohio Civ. Serv. Emps. Ass'n v. State, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 16 (citing State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1100 (Ohio 1999)) ("To accord appropriate deference to the General Assembly's law-making function, we must liberally construe the term 'subject' for purposes of the rule.").

[140] *See* Dragich, *supra* note 20, at 105–06.

[141] *See id.* at 127.

minimizes the need for the court to articulate a clear and consistent standard for determining the meaning of "subject" or "germaneness" or to rationalize the different treatment of different cases.[142] And it avoids the extremely knotty question of what to do when a law is determined to violate the rule — strike the whole law down; or sever the section or sections not germane to the other provisions, strike those down, and sustain the rest.[143] On the other hand, judicial deference, with the resulting expansive definitions of subject and germaneness threaten to undermine the single-subject principle and to render a provision of the state constitution a "dead letter."[144] If the purpose of the single-subject requirement is to reform the operations of the state legislature,[145] it may be odd to leave enforcement of the requirement to the legislature itself. Nor is it clear that enforcement of the rule would be so disrespectful of the legislature. Like other process reforms, the single-subject requirement does not limit the objects of state legislation or the goals of state policy, but only the form of the legislation used to achieve those ends. There would be no restriction on the legislature enacting separately those measures it could not enact together, and many findings of single-subject violations have been followed by just such separate enactments.[146]

In any event, nearly all the courts that have declared themselves committed to a deferential, liberal interpretation of "subject" have at one time or another struck down laws on single-subject grounds.[147]

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[142] *See* Courtney Paige Odishaw, Note, *Curbing Legislative Chaos: Executive Choice or Congressional Responsibility?*, 74 IOWA L. REV. 227, 242–44 (1988).

[143] *See State ex rel. Ohio Civ. Serv. Emps. Ass'n*, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, at ¶ 22 (quoting State *ex rel.* Hinkle v. Franklin Cty. Bd. of Elections, 580 N.E.2d 767, 770 (Ohio 1991)) ("[T]he appropriate remedy when a legislative act violates the one-subject rule is generally to sever the offending portions of the act 'to cure the defect and save the portions' of the act that do relate to a single subject"); State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 587 (Ohio 1994) (ordering severance for violating the state constitution single subject rule); Commonwealth v. Neiman, 84 A.3d 603, 615 (Pa. 2013) ("[T]he reality that discerning the 'main' purpose of a piece of legislation becomes an untenable exercise in conjecture when the legislation has metamorphosed during the legislative process to include a panoply of additional and disparate subjects."); Dragich, *supra* note 20, at 155–57; *see also* Ruud, *supra* note 19, at 398–99 (discussing the difficulty of severability).

[144] *See* Porten Sullivan Corp. v. State, 568 A.2d 1111, 1118 (Md. 1990).

[145] *See* Dragich, *supra* note 20, at 114–15.

[146] *See, e.g.*, Socorro Adams Dooley, Comment, *It's Still a Peanut Butter Cookie: A Comment on Douglas v. Cox Retirement Properties, Inc.*, 39 OKLA. CITY U.L. REV. 243, 262–63 (2014) (following the Oklahoma Supreme Court's invalidation of tort reform law on single-subject grounds, governor called a special session of the legislature which passed twenty-three separate bills which had been part of the invalid comprehensive measure). In response to a preemptive measure invalidated on single-subject grounds in *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 577 (Mo. 2017), Missouri adopted a similar preemptive measure by passing a law preempting local minimum wage laws. *See* MO. REV. STAT. § 290.528 (2018).

[147] *See, e.g.*, People v. Cervantes, 723 N.E.2d 265, 270 (Ill. 1999); People v. Reedy, 708 N.E.2d

"There must be limits"[148]—"[t]here comes a point"[149]—the courts complain, but the rule of liberal-interpretation-up-to-a-point fails to provide a very predictable or neutral principle, and contributes to concerns that application of the rule is driven by the policy or political views of the judges.[150]

C. Some Recent Cases

A brief review of recent cases—all from the current decade—from a half-dozen state supreme courts around the country may give a fuller sense of the difficulty inherent in applying the rule. Although some readers—and this author—may conclude that in some of the cases the "single-subject" question was pretty easy and that the court got it right,[151] in others the issue was far more difficult and the wisdom of the decision far more debatable.

To begin, there are at least two cases involving what seem to be easy violations of the rule. In 2016, in *Leach v. Commonwealth*, the Pennsylvania Supreme Court struck down a law that consisted of four substantive sections addressing: trespass for the purpose of unlawfully taking secondary metal[152] from a premises; theft of secondary metal as an independent offense; state police disclosure of records; and standing for individuals or organizations to challenge

1114, 1119 (Ill. 1999); Johnson v. Edgar, 680 N.E.2d 1372, 1380 (Ill. 1997)); Delmarva Power & Light Co. v. Pub. Serv. Comm'n, 809 A.2d 640, 651–52 (Md. 2002); Migdal v. State, 747 A.2d 1225, 1232 (Md. 2000); *Porten Sullivan*, 568 A.2d at 1112; Unity Church v. State, 694 N.W.2d. 585, 588, 593 (Minn. Ct. App. 2005); *Coop. Home Care*, 514 S.W.3d at 575–76; Mo. Roundtable for Life, Inc. v. State, 396 S.W.3d 348, 350 (Mo. 2013) (en banc) (per curiam); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1100 (Ohio 1999); Simmons-Harris v. Goff, 711 N.E.2d 203, 207 (Ohio 1999); Leach v. Commonwealth, 141 A.3d 426, 435 (Pa. 2016); *Neiman*, 84 A.3d at 605; Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 64 A.3d 611, 618–19 (Pa. 2013); City of Philadelphia v. Commonwealth, 838 A.2d 566, 593 (Pa. 2003);.

[148] *City of Philadelphia*, 838 A.2d at 588 (citing Payne v. Sch. Dist. of Borough of Coudersport, 31 A. 1072, 1074 (Pa. 1895)).

[149] *Sheward*, 715 N.E.2d at 1101.

[150] *See* Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEG. STUD. 333, 355 (2011) (finding that judicial ideology had a "consistent, statistically significant relationship with judges' votes" particularly in cases implicating "fundamental values"); John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399, 400 (2010); *see also* Hoffer, *supra* note 49, at 568–69 (asserting that the Ohio Supreme Court's *Sheward* decision was "as much a political shake-up as a judicial pronouncement"). *But see* Downey et al., *supra* note 3, at 596.

[151] Professor Gilbert found that student coders frequently agreed with judges' categorizations of the number of subjects in a measure. *See* Gilbert, *supra* note 150, at 342–43, 346, 352.

[152] *See* Leach v. Commonwealth, 141 A.3d 426, 428, 435 (Pa. 2016). "Secondary metal" refers to metal such as copper and aluminum or wire and cable used by utilities and transportation agencies. *Id.* at 427.

local gun regulations.[153] The provisions could be linked only if, as the legislative leaders contended, they addressed "the subject of amending the Crimes Code."[154] Such a "subject" would pass constitutional muster only at a very high level of abstraction, which conceivably might have sufficed if the law was a comprehensive revision of the criminal code, which it wasn't.[155] Similarly, in 2017, the Missouri Supreme Court held in *Cooperative Home Care, Inc. v. City of St. Louis* that a law combining "the establishment, proper governance, and operation of community improvement districts" with a prohibition on municipalities setting a minimum wage higher than that set by the state violated Missouri's single-subject rule.[156] It's not clear what "single subject" could have held these two parts together since the party defending the local minimum wage ban argued only that collateral estoppel from an earlier decision barred the city from raising the statute's invalidity as a defense,[157] and the court simply declared without analysis that the minimum wage preemption was "not connected to, related to, or germane to" the regulation of community improvement districts.[158]

On the other hand, two cases from Kansas and Utah dealing with laws broadly addressing education issues reached the seemingly reasonable conclusion that they dealt with a single subject: education.[159] The Utah law addressed a number of education issues ranging from the state's school aid formula, to the funding of charter schools, requirements regarding educational materials, teacher salaries, a number of pilot programs, and appropriations for the pilot programs, pupil transportation, classroom supplies, and arts education.[160] Not only could many of these measures have been enacted as separate laws, but in fact the bill was an amalgamation of what had originally been fourteen separate bills.[161] It is possible that some legislators supported some of these measures and not others and, as a result, had to cast votes inconsistent with their topic-by-topic preferences.[162] Nonetheless, if the single-subject rule is to

[153] *Id.* at 428.
[154] *See id.* at 431.
[155] *See id.* at 433–34.
[156] Coop. Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 577, 580 (Mo. 2017).
[157] *See id.* at 581.
[158] *See id.* at 580–81.
[159] *See* Kan. Nat'l Educ. Ass'n v. State, 387 P.3d 795, 799 (Kan. 2017); Gregory v. Shurtleff, 2013 UT 18, ¶ 42, 299 P.3d 1098, 1113.
[160] *See Gregory*, 2013 UT 18, app., 299 P.3d at 1118.
[161] *See id.* ¶ 49, 299 P.3d at 1115.
[162] *See id.* ¶ 44, 299 P.3d at 1114.

permit comprehensive approaches to legislative subjects, this would appear to be such a case. The Kansas education case, *Kansas National Education Association v. State*, arguably pushes the envelope a bit more. Adopted in response to a state supreme court decision invalidating portions of the state's public school finance laws, the challenged law "had a sweeping scope" including the appropriation of new state school aid, the cancellation of prior appropriations for non-education purposes to fund the new school aid, "substantive and technical changes to the state's public school financing statutes," appropriations and transfer of land to state universities, a tax credit for businesses that contribute to organizations that provide scholarships to low-income students, changes to high school teacher licensing requirements, "performance-based incentives for GED and career education matriculation and enrollment at state universities," and most controversially, changes to the Teacher Due Process Act to remove protections from many elementary and secondary public school teachers concerning the termination or nonrenewal of their contracts.[163] As the Court acknowledged, the law contained multiple topics affecting the operations of public schools, benefits for students, state universities, and touched many different government agencies.[164] As the lawsuit by the NEA suggests, there could easily have been opposition to the elimination of teacher due process protections from legislators who favor increased funding for schools.[165] Yet, applying the "policy of liberally construing the one-subject rule"[166] all the measures seemed germane to education and "the term 'education' is not so broad that it fails to limit the area in which the legislature may operate."[167]

Turning to some arguably closer cases, in *Wirtz v. Quinn*, the Illinois Supreme Court sustained a complex, multi-part law intended to authorize and fund a massive capital projects program.[168] Its provisions included, *inter alia*, raising and reallocating the proceeds of a range of different taxes and fees; authorizing a pilot program allowing individuals to purchase state lottery tickets on the internet, reallocating the proceeds of the state lottery, and directing a named

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[163] *See Kan. Nat'l Educ. Ass'n*, 387 P.3d at 798, 804 (citing Gannon v. State, 319 P.3d 1196, 1204 (Kan. 2014)).

[164] *See Kan. Nat'l Educ. Ass'n*, 387 P.3d at 808–09.

[165] *See id.* at 798, 804; *see also* Kan. Nat'l Educ. Ass'n v. Kansas, No. 2014-CV-789, 2015 WL 13066334, at *11 (D. Kan. June 4, 2015) (finding that legislature opted to include the teacher due process component to capture votes in favor of funding).

[166] *Kan. Nat'l Educ. Ass'n*, 387 P.3d at 808.

[167] *Id.* at 809.

[168] *See* Wirtz v. Quinn, 2011 IL 111903, ¶ 57, 953 N.E.2d 899, 913.

state university to conduct a study of the effects on Illinois families of purchasing lottery tickets; increasing the weight limits for motor vehicles and loads, and authorizing, regulating, and taxing video gaming.[169] On its face this would seem to include multiple subjects. But the Illinois court rationalized that they were all related to financing the capital program.[170] The authorization of video gaming and of the on-line purchase of lottery tickets was intended to generate funds for the capital program, and the study of the impact of the lottery on families was a response to the expansion of the lottery program.[171] The increased weight and load limits for motor vehicles was an offset to the increase in motor vehicle fees and fines for overweight vehicles—which was one of the many sources of funds for the capital program.[172] The court made a plausible case that it all hung together, although other commentators have sharply disagreed.[173] Less persuasive—to this author, at least—are two other state court decisions that found that substantive policy provisions tucked into budget bills satisfied the single-subject requirement. In 2016 in *State ex rel. Ohio Civil Service Employees Ass'n v. State*, the Ohio Supreme Court held that the inclusion in the biennial budget bill of provisions changing the law governing the terms for the privatizing of prison operations and authorizing the operation, management, and sale of five prison facilities did not violate the single-subject rule.[174] The privatization of prison operations and the sale of prison facilities would save costs and generate revenue for the state and thus fell within the subject of "budgeting for the operation of the state government."[175] But on that theory, of course, any law with state fiscal implications could be considered as part of the subject of budgeting for the operation of state government – certainly,

[169] *See id.* ¶¶ 19, 21–22, 25, 29, 953 N.E.2d at 905–07.

[170] *See id.* ¶ 57, 953 N.E.2d at 913.

[171] *See id.* ¶¶ 34, 50, 57, 953 N.E.2d at 908, 911, 913.

[172] *See id.* ¶ 34, 953 N.E.2d at 908.

[173] *See, e.g.*, Eric Block, *Broke: The Pocketbook of Illinois and the Single Subject Rule After* Wirtz v. Quinn*, 953 NE.2d 899 (Ill. 2011)*, 37 S. ILL. L.J. 237, 246 (2012) ("The Illinois Supreme Court wrongly decided *Wirtz v. Quinn*, and in doing so, the court increased uncertainty in an already uncertain area of law, undermined the principles underlying the single subject rule . . . ."); *see also* Giuliano Apadula, *State Constitutional Law—Single Subject Rule—The Illinois Supreme Court Adopts an Irrebuttable Presumption of Constitutionality for Legislation Challenged by the Single Subject Rule.* Wirtz v. Quinn*, 953 N.E.2d 899 (Ill. 2011)*, 43 RUTGERS L.J. 617, 634 (2013) ("[T]he court retreated from the well-settled single subject jurisprudence by applying the single subject rule with a level of deference sufficient to render the single subject rule a dead letter.").

[174] *See* State *ex rel.* Ohio Civ. Serv. Emps.' Ass'n v. State 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶¶ 2, 64.

[175] *Id.* ¶ 33.

an enormous subject. Similarly, in *Otto v. Wright County*, the Minnesota Supreme Court in 2018 determined that including in the State Government Omnibus Finance Act a provision enabling counties to choose to have their required annual audit performed by a CPA firm instead of by the state auditor did not violate the single-subject rule because that was "clearly germane to the subject of state government operations," which was the subject of the Act.[176] Although the county audit option could potentially reduce the workload of the state auditor, the amendment seems to be really far more about the powers and duties of counties than the operations of state government.[177]

Finally, there is the divided Oklahoma Supreme Court's decision in *Douglas v. Retirement Properties, Inc*., invalidating that state's Comprehensive Lawsuit Reform Act.[178] The majority stressed that the law contained ninety sections that included multiple amendments to the civil procedure code plus many new acts dealing with, *inter alia* emergency volunteer health practitioners, asbestos and silica claims, mandatory seat belt use, livestock activities liability, firearm manufacturers liability, and school discipline.[179] Without much analysis[180] the majority simply concluded that the multiple provisions were "unrelated" to each other and that "[m]any . . . have nothing in common."[181] By contrast, the two dissenters emphasized there was a common theme: "the legislature and the public understood the common themes and purposes embodied in the legislation; it was tort reform."[182] They also pointed out the legislature had previously enacted, without successful single-subject objection, such broad measures as the ten-article and 368-section Uniform Commercial Code, and a 78-section Evidence Code, and that the majority's treatment of the tort reform law would create "substantial difficulty" for the legislature to pass "comprehensive legislation including any uniform codes that are generally adopted

[176] Otto v. Wright City, 910 N.W.2d 446, 457 (Minn. 2018).

[177] *See id.* at 454; *cf.* Rizzo v. State, 189 S.W.3d 576, 580–81 (Mo. 2006) (invalidating a provision of a law dealing primarily with local governments that also applied to state elections).

[178] *See* Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 12, 302 P.3d 789, 794.

[179] *See id.* ¶¶ 7–9, 302 P.3d at 793.

[180] The majority devoted five paragraphs to the discussion of the law and the application of the single-subject rule to it, including one that focused solely on whether severance rather than complete invalidation was a possible remedy. *See id.* ¶¶ 7–11, 302 P.3d at 793–94 (citing Campbell v. White, 856 P.2d 255, 258 (Okla. 1993)).

[181] *See Douglas*, 2013 OK 37, ¶¶ 7, 10, 302 P.3d at 793; *see also* Dooley, *supra* note 146, at 261 (providing a critical assessment of the decision and an argument that it is inconsistent with Oklahoma single-subject precedents).

[182] *See Douglas*, 2013 OK 37, ¶ 4, 302 P.3d at 802 (Winchester, J., dissenting).

among the states."[183] In their view, the "majority opinion gives little guidance" for distinguishing between impermissibly sweeping multi-part laws and acceptable comprehensive ones.[184]

A striking feature of the dueling opinions in *Douglas* was the Oklahoma justices' focus on the anti-logrolling purpose often invoked to explain and justify the single-subject rule.[185] The majority expressly framed its analysis in light the rule's anti-logrolling purpose.[186] Without citing any specific instances of logrolling in the legislative history, the majority concluded that in a bill with so many different sections and topics, legislators were inevitably "faced with an all-or-nothing choice" which would require them to vote for provisions they did not want "to ensure the passage of favorable legislation."[187] The dissent, however, saw the range of multiple provisions in the bill as evidence of legislative compromise.[188] In any complex measure, "[i]t is likely that some of the legislators who voted in favor of the bill compromised to secure its passage."[189] But in the dissent's view that is a feature and not a bug as "[l]egislation requires some compromise."[190]

The division in *Douglas* points to the possibility of anti-logrolling and the other purposes behind the single-subject rule in providing a more workable standard than the text of the rule itself for applying the rule, as well as the difficulties in doing so.[191] That is the focus of the next Part.

IV. FROM TEXT TO PURPOSE: ANTI-LOGROLLING AND ANTI-RIDERS AS STANDARDS FOR ENFORCEMENT

Like the Oklahoma judges in *Douglas*, many courts and commentators have sought to resolve the intractable question of how to define "subject" by turning to the purposes long seen as explaining and justifying the single-subject rule: prevention of logrolling and

[183] *See id.* ¶¶ 7–8, 302 P.3d at 802–03.

[184] *See id.* ¶ 3, 302 P.3d at 802.

[185] *See id.*, ¶¶ 4, 12, 302 P.3d at 792–94 (majority opinion) (citing Nova Health Sys. v. Edmonson, 2010 OK 21, ¶ 2, 33 P.3d 380, 381 (2010)).

[186] *See Douglas*, 2013 OK 37, ¶ 4, 302 P.3d at 792 (citing *Nova Health Sys.*, 2010 OK 21, ¶ 2, 233 P.3d at 381).

[187] *See Douglas*, 2013 OK 37, ¶ 10, 302 P.3d at 793 (citing Campbell v. White, 856 P.2d 255, 260 (Okla. 1993)).

[188] *See Douglas*, 2013 OK 37, ¶ 9, 302 P.3d at 803 (Winchester, J., dissenting).

[189] *See id.* ¶ 7, 302 P.3d at 803.

[190] *See id.* ¶ 9, 302 P.3d at 803.

[191] *See id.* ¶ 4, 302 P.3d at 792 (majority opinion); *id.* ¶ 13, 18, 302 P.3d at 799–801 (Kauger, J., concurring specially) (citing *Nova Health Sys.*, 2010 OK 21, ¶ 2, 233 P.3d at 381); *Douglas*, 2013 OK 37, ¶ 1, 302 P.3d at 801 (Winchester, J., dissenting).

riders, and more generally protection of the legislative process from improper manipulations.[192] Logrolling, in particular, has long been condemned. Indeed, "[i]n the United States, at least, . . . this word has always had pejorative connotations."[193] By definition, an act put together by logrolling consists of measures which, considered individually, lacked majority support.[194] Hence, its enactment is often seen as inconsistent with majority rule. Logrolling has been particularly criticized for facilitating the passage of wasteful "Christmas tree" bills and pork-barrel legislation, that is, laws that provide concentrated benefits—typically, subsidies; tax breaks; restrictive licensing requirements; tariffs; and roads, harbors and other highly targeted infrastructure investments—to a small number of interests but impose broader costs on consumers and taxpayers.[195] The notorious Smoot-Hawley Tariff of 1930 is often cited as an example of how logrolling enables the coalition backing the law to win benefits for the special interest groups promoting the tariff, at a cost to the nation as a whole.[196] Some courts, like the Oklahoma Supreme Court and the Maryland Court of Appeals, have also emphasized the way in which such a logroll coerces legislators to vote for provisions they do not actually support or against a provision they would otherwise support because it has been combined with measures they oppose.[197]

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[192] *See* Wirtz v. Quinn, 2011 IL 111903, ¶¶ 13–14, 953 N.E.2d 899, 904 (quoting Johnson v. Edgar, 680 N.E.2d 1372, 1379 (Ill. 1997)) (first citing People v. Olender, 854 N.E.2d 593, 599 (Ill. 2005); then citing People v. Wooters, 722 N.E.2d 1102, 1113 (Ill. 1999); and then citing Arangold Corp. v. Zehnder, 718 N.E.2d 191, 197 (Ill. 1999)); Rizzo v. State, 189 S.W.3d 576, 578–79 (Mo. 2006) (citing Hammerschmidt v. Boone City, 877 S.W.2d 98, 101 (Mo. 1994)); Simmons-Harris v. Goff, 711 N.E.2d 203, 214 (Ohio 1999) (quoting State *ex rel.* Dix v. Celeste, 464 N.E.2d 153, 157 (Ohio 1984) ("[Logrolling] was the very evil the one-subject rule was designed to prevent.")); Commonwealth v. Neiman, 84 A.3d 603, 611–12 (Pa. 2013) (quoting City of Philadelphia v. Comm., 838 A.2d 566, 586 (Pa. 2003)) (citing Hosp. & Healthsystem Ass'n v. Dep't of Pub. Welfare, 888 A.2d 601, 608 (Pa. 2005)); Denning & Smith, *The Truth-in-Legislation Amendment*, *supra* note 1, at 968; Hoffer, *supra* note 39, at 558–59; Schuck, *supra* note 52, at 901 ("Scholars point to the prevention of 'logrolling' as the primary and generally recognized purpose for the single-subject clause.").

[193] William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1235 (1973).

[194] *See* Gilbert, *supra* note 2, at 808 n.29.

[195] *See, e.g.*, DENNIS C. MUELLER, PUBLIC CHOICE 51 (1979) ("[T]he examples they cite of tariff bills, tax loop-holes, and pork barrel public works, are all illustrations of bills for which a minority benefits, largely from the redistributive aspects of the bill, and the accumulative losses of the majority can be expected to be large.").

[196] See, for example, Riker & Brams, *supra* note 193, at 1235, citing the classic study by E.E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935).

[197] *See, e.g.*, Porten Sullivan Corp. v. State, 568 A.2d 1111, 1121–22 (Md. 1990); Thomas v. Henry, 2011 OK 53, ¶ 26, 260 P.3d 1251, 1260 (Okla. 2011) (citing *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 9, 142 P.3d 400, 405) ("The question is not how *similar* two provisions in a proposed law are, but whether it appears either that the proposal is misleading or that the

An early application of the single-subject rule by the Michigan Supreme Court to strike down an act that appropriated state funds for the improvement of three different state roads is a classic example of the anti-logrolling philosophy at work.[198] As Chief Justice Thomas Cooley explained, the roads were

> distinct objects of legislation, which might, with entire propriety, have been provided for by separate acts, and indeed, ought to have been, in view of the care which is taken by the Constitution to compel each distinct object of legislation to be considered separately. These objects have certainly no necessary connection, and being grouped together in one bill, legislators are not only preclude[d] from expressing by their votes their opinion upon each separately; but they are so united, as to invite a combination of interests among the friends of each, in order to secure the success of all, when, perhaps, neither could be passed separately. The evils of that species of omnibus legislation which the constitution designed to prohibit, are all invited by acts thus framed.[199]

Despite this longstanding hostility to legislation by logrolling, modern scholarship has recognized that logrolling—or, less pejoratively, vote-trading—may actually be socially desirable because it recognizes that legislators have different intensities of preference for different measures.[200] A proposal may enjoy only minority support not so much because the majority is actively hostile to it but rather because the majority is largely indifferent or only weakly opposed.[201] Logrolling allows legislators to obtain passage of the measures they more strongly support at the modest price of voting for measures they are apathetic about or only mildly oppose.[202] As a result, logrolling can make more legislators better off. To the extent legislators accurately represent the interests of their constituents, logrolling can enhance the overall well-being of the

provisions in the proposal are so unrelated that many of those voting on the law would be faced with an unpalatable all-or-nothing choice.").

[198] *See* People *ex rel.* Estes v. Denahy, 20 Mich. 349, 352 (1870).

[199] *Id.* at 351–52 (citing People *ex rel.* Drake v. Mahaney, 13 Mich. 481, 495 (1865); Davis v. Bank of Fulton, 31 Geo., 69, 71 (1860); State *ex rel.* Weir v. Cty. Judge, 2 Iowa 280, 282 (1855)).

[200] *See* Hardy Lee Wieting, Jr., *Problems in Majority Rule and the Logrolling Solution*, 76 ETHICS 85, 87–88 (1966).

[201] *See id.* at 88.

[202] *See id.*

community.[203] Moreover, logrolling may be particularly beneficial to certain legislative groups, particularly weaker parties or representatives of minority ethnic groups, that ordinarily lack the votes to get the measures they care most about passed.[204] By being able to make vote-trading deals with some members of the majority, there is at least some prospect they can advance some items of their legislative agenda.[205] Moreover, as some commentators have noted, logrolling need not involve only pork-barrel legislation but may embrace "what are truly pure public goods, e.g.[,] defense, education and the environment."[206]

To be sure, there is no guarantee that logrolling will be welfare-enhancing. The ability of a legislative minority to advance its goals through logrolling will depend on the skills, information, and resources of the legislators.[207] And the majority put together by logrolling might still impose costs on the community as a whole that are greater than the benefits to the logrolling coalition. But it is fair to say that there is no reason to assume that majorities put together by logrolling categorically impose net social costs or that they are more net costly than majorities composed of a single group.[208] It is even more unlikely that courts will be able to tell the difference.[209]

Of course, even if the prejudice against logrolling is mistaken, that alone might not matter for challenging the role of a concern about logrolling in applying the single-subject rule. The real difficulty is distinguishing improper logrolling from the deal-making and compromises that are "pervasive" in collective bodies and "normally characteristic of representative assemblies."[210] Such deal-making is often a critical means for contending groups to compromise their differences and reach a collective decision.[211] Although the Illinois Supreme Court once asserted "there is a difference between

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[203] *See* Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1301 (1990).

[204] *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution*, 24 HARV. C.R.-C.L. L. REV. 173, 217 (1989).

[205] *See id.*

[206] *See* MUELLER, *supra* note 195, at 51–52.

[207] *See* Wieting, *supra* note 200, at 93.

[208] *See, e.g.*, Riker & Brams, *supra* note 193, at 1246.

[209] *See, e.g.*, Kastorf, *supra* note 3, at 1665 ("Courts have no principled means of distinguishing between socially beneficial and harmful coalition logrolling.").

[210] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962), *reprinted in* 3 THE COLLECTED WORKS OF JAMES M. BUCHANAN 135 (1999); *cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("[L]ogrolling [is an] accepted part[] of the legislative process.").

[211] *See* Kastorf, *supra* note 3, at 1647 ("Absent [logrolling], legislatures may not have the necessary lubrication to overcome collective action problems.").

impermissible logrolling and the normal compromise which is inherent in the legislative process,"[212] it is not clear that's correct. Even a close review of the legislative history behind a bill[213] may not help as the question is less one of fact and more of interpretation and acceptance of legislative practices.

As the Utah Supreme Court explained, "the line between forbidden 'logrolling' and mere 'horse-trading' may be a fine one."[214] The Minnesota Court of Appeals went further in defending a challenged bill against the claim that it was the result of impermissible logrolling:

> If the historical nature of legislation was such that every single provision of a larger bill had to be able to pass both houses of the legislature and obtain the governor's signature on its own merits, little if any legislation would ever be signed into law. . . .
>
> The practice of bundling controversial, volatile provisions with *germane* and less-controversial laws is not impermissible logrolling. Rather, it is the nature of the democratic process . . . . [T]he negotiations and the constant give and take are historical, purely legal, and purely permissible . . . .[215]

Indeed, courts have defended the "liberal" approach to interpreting the single-subject rule as essential "to accommodate a significant range and degree of political compromise that necessarily attends the legislative process in a healthy, robust democracy."[216]

The concern that bills that result from logrolling somehow coerce legislators into voting against their preferences seems even weaker than the claim that bills composed of provisions that might not have passed on their own violates proper legislative norms.[217] Compromise necessarily involves votes at odds with one's ideal position.[218] As Professor Dan Lowenstein crisply put it: "Most choices

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[212] Wirtz v. Quinn, 2011 IL 111903, ¶ 48, 953 N.E.2d 899, 911 (citing Defs. of Wildlife v. Ventura, 632 N.W.2d 707, 713–15 (Minn. Ct. App. 2001)).

[213] The *Wirtz* court engaged in such a close review. *See Wirtz*, 2011 IL 111903, ¶¶ 39, 42–43, 47, 953 N.E.2d at 909–911.

[214] Gregory v. Shurtleff, 2013 UT 18, ¶ 51 n.27, 299 P.3d 1098, 1116 n.27.

[215] *Defs. of Wildlife*, 632 N.W.2d at 714–15.

[216] Md. Classified Emp. Ass'n v. State, 694 A.2d 937, 943 (Md. 1997).

[217] *See* Gilbert, *supra* note 3, at 837.

[218] *See* Lowenstein, *supra* note 14, at 958; Paul Kane, *The Bill to Avert a Shutdown has Few Eager to Claim Parentage*, WASH. POST (Feb. 13, 2019),

in life involve trade-offs."[219] Or as one member of Congress noted in early February 2019 in explaining his vote for the bill that prevented the recurrence of a second partial government shutdown, "When you strike a deal, you get some things you want and you get some things that you don't like."[220]

In theory, the case against riders may be stronger than the case against logrolling. By definition, a rider is attached to a bill that already enjoys majority support so that its backers should not have had to vote for the rider in order to get their measure enacted.[221] Michael Gilbert speculates that riders are more likely to result from the ability of powerful individual legislators to manipulate rules and procedures to get their particular proposals attached to a popular bill and to block efforts to strip the rider out.[222] In his view, riders are always anti-majoritarian and, by definition, leave a majority of legislators worse off as they would have preferred to vote for the bill in question without the rider.[223] He would reframe the single-subject rule exclusively around the prevention of riders.[224] Yet, in practice, it may be difficult to distinguish a rider from a logroll. As the earliest study of the single-subject rule found, determining whether a provision is a rider is a "troublesome question."[225] Before enactment, a bill's proponents may be unsure whether the measure actually enjoys majority support or is, instead, a few votes short of passage and so is willing to accept an amendment that brings along a few more votes.[226] Is such a provision a logroll or a rider?[227] Assessing the provisions of an act after enactment, a court trying to distinguish a logroll from a rider "would have to make unseemly and possibly difficult judgments about the relative popularity of various provisions

https://www.washingtonpost.com/powerpost/the-bill-to-avoid-a-shutdown-has-few-eager-to-claim-parentage/2019/02/13/b3f61658-2fd6-11e9-86ab-5d02109aeb01_story.html?utm_term=.4b937ec91c2b.

[219] Lowenstein, *supra* note 14, at 958.

[220] Kane, *supra* note 218.

[221] *See* Gilbert, *supra* note 3, at 836.

[222] *See id.* at 837.

[223] *See id.* at 840; *see also* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 923 (1987) ("Enforcement of the [single-subject] rule is particularly appropriate when substantive riders have been attached to appropriations legislation").

[224] *See* Gilbert, *supra* note 3, at 809.

[225] Ruud, *supra* note 19, at 400.

[226] *See* Kastorf, *supra* note 3, at 1646.

[227] *See* Dragich, *supra* note 20, at 161; Kastorf, *supra* note 3, at 1646; *see also* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1190 (1993) (considering the difficulties courts have distinguishing between improper riders and acceptable conditions in item veto cases).

and the motivations of the sponsors."[228] Indeed, a close assessment of Illinois's *Wirtz* decision concluded that "the attempt to distinguish between the two [logrolling and riders] may be futile."[229] The fact that a provision, subsequently folded into a bigger bill, did not pass on its own does not make it a rider.[230] And even critics of riders recognize that, like logrolls, they can be socially beneficial and make net contributions to social well-being.[231]

Several judges taking a legislative-process-focused approach to the single-subject rule have emphasized that the troublesome sections of a bill – whether logroll or rider – were added at the "last minute" or the "eleventh hour."[232] This underscores the single-subject rule's purposes of making sure that legislators are able to understand and deliberate what they are voting on and that the legislative process is sufficiently transparent so that the broader public can keep track of legislative action.[233] This emphasis on surprising late in the process additions also implies some kind of legislative chicanery that would support a judicial decision to strike down a measure. However, many state legislatures operate under legal requirements of time-limited legislative sessions.[234] Some of these are as short as twenty to thirty legislative days or sixty to ninety calendar days;[235] in four states, the legislature meets only for a limited number of days every other year.[236] Frequent amendments to pending legislation are surely a

[228] Lowenstein, *supra* note 16, at 963; *cf.* Dragich, *supra* note 20, at 161–62 (analyzing two Missouri single-subject cases and finding it difficult to decide whether the laws at issue involved logrolls or riders).

[229] Block, *supra* note 173, at 250.

[230] *See Ex parte* Jones, 440 S.W.3d 628, 634 (Tex. Crim. App. 2014); Gregory v. Shurtleff, 2013 UT 18, ¶ 42, 299 P.3d 1098, 1113; *cf.* Defs. of Wildlife v. Ventura, 632 N.W.2d 707, 714 (Minn. Ct. App. 2001) ("[T]he fact that a controversial bill could not pass as a stand-alone bill, while not irrelevant, is not conclusive proof of impermissible logrolling.").

[231] *See* Gilbert, *supra* note 3, at 839.

[232] *See* Delmarva Power & Light Co. v. Pub. Serv. Comm., 809 A.2d 640, 645–46 (Md. 2002); Porten Sullivan Corp. v. State, 568 A.2d 1111, 1114–15 (Md. 1990); State *ex rel.* Ohio AFL-CIO v. Voinovich, 631 N.E.2d 582, 601 (Ohio 1994) (Sweeney, J., dissenting in part and concurring in part); Spahn v. Zoning Bd. of Adjustment, 977 A.2d 1132, 1146 (Pa. 2009); Leach v. Commonwealth, 118 A.3d 1271, 1279 (Pa. Commw. Ct. 2015), *aff'd*, 141 A.3d 426, 430 (Pa. 2016).

[233] *See e.g.*, Ruud, *supra* note 19, at 391.

[234] *See Legislative Session Length*, NAT'L CONF. ST. LEGISLATURES (Dec. 2, 2010), http://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx (noting that thirty-nine state legislatures are under state constitutional, statutory, or other restrictions on the length of the legislative session).

[235] *Id.*

[236] *See Annual vs. Biennial Legislative Sessions,* NAT'L CONF. ST. LEGISLATURES (Oct. 19, 2011), http://www.ncsl.org/research/about-state-legislatures/annual-vs-biennial-legislative-sessions.aspx.

part of the legislative process to begin with.[237] But tight session limits put a lot of pressure to get the legislative business done in a very short period and make it even more likely that there will be a rush of amendments, combinations of previously separate measures into bigger bills, and a surge of deal-making as the end of the legislative session approaches.[238] From the perspective of an idealized, orderly and deliberative legislative process, this is surely unfortunate. But, as one Ohio Supreme Court justice observed, however "distasteful" and "ugly" the process may be, that does not make it unconstitutional.[239]

It is difficult – probably impossible – to quarrel with the goals of improved deliberation, transparency, and accountability. The real issues are whether attention to those concerns, and the logrolls and riders said to violate them, helps determine what is a "subject" and when is the single-subject rule violated. There can be logrolls and riders within a single subject, and omnibus or multi-part bills which are put together for convenience or for the comprehensive treatment of a subject.[240] Indeed, in at least some circumstances, legislative deliberation, effective law-making, transparency and public accountability may be better served by multi-part bills that comprehensively address a complex or multifaceted problem[241] than by narrower measures that address the issues piecemeal. Improper manipulations of the legislative process – if they can be judicially identified – may be evidence that a new law goes beyond a single subject, but it is not clear that even a close review of the legislative process can resolve the meaning of "subject."

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[237] *See, e.g.*, Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 395 (Pa. 2005)

[238] *See* NAT'L CONF. OF ST. LEGISLATURES, BILLS AND BILL PROCESSING 3-1 (1996), http://www.ncsl.org/documents/legismgt/ILP/96Tab3Pt1.pdf.

[239] Beagle v. Walden, 676 N.E.2d 506, 510 (Ohio 1997) (Pfeifer, J., concurring in part).

[240] *See* Gilbert, *supra* note 3, at 830; Eric S. Fish, *Severability as Conditionality*, 64 EMORY L.J. 1293, 1328 (2015).

[241] *See, e.g.*, Wirtz v. Quinn, 2011 IL 111903, ¶¶ 13–14, 953 N.E.2d 899, 904–05 (rejecting single-subject challenge to a diverse and complex enactment); State *ex rel.* Ohio Civ. Serv. Emps. Ass'n v. State, 146 Ohio St. 3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 17 (quoting State *ex rel.* Dix v. Celeste, 464 N.E.2d 153, 157 (Ohio 1984)) ("[A] large number of topics [may be combined] . . . for the purposes of bringing greater order and cohesion to the law."); Md. Classified Emps. Ass'n, Inc. v. State, 694 A.2d 937, 943 (Md. 1997); Kastorf, *supra* note 3, at 1666; *cf.* Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974) ("The provision should however, be construed with considerable breath . . . . [S]tatutes might be restricted unduly in scope and permissible subject matter, thereby multiplying and complicating the number of necessary enactment[s] and their interrelationships.").

V. CONCLUSION

The single-subject rule presents a paradox. It is "part of the fundamental structure of legislative power articulated in [the] constitution"[242] of the vast majority of states, and it reflects and seeks to promote a noble vision of deliberative, majoritarian, and accountable law-making.[243] But it has proven all but impossible to consistently implement, or even to consistently define.[244] Although some commentators have criticized the courts for excessive deference to the legislatures and have urged that more aggressive enforcement will improve legislative performance, that seems unlikely to occur.[245] The problems of subject definition and consistent application would only get worse with more aggressive enforcement efforts.[246] Nor is it clear that more aggressive enforcement would affect legislative behavior.[247] The Oklahoma Supreme Court has taken a more stringent approach than many other state courts and has frequently struck down laws on single-subject grounds but the legislature continues to pass laws the court finds objectionable, leading the court to complain of "growing weary of admonishing the Legislature for so flagrantly violating the terms of the Oklahoma Constitution."[248]

The single-subject rule's view of relatively tidy, separate topic-by-topic deliberation and enactment is in tension with the coalition-

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[242] Gregory v. Shurtleff, 2013 UT 18, ¶ 27, 299 P.3d 1098, 1108.

[243] *See, e.g.*, City of Philadelphia v. Commonwealth, 838 A.2d 566, 585 (Pa. 2003) (quoting Pennsylvania AFL-CIO *ex rel.* George v. Commonwealth, 757 A.2d 917, 923 (Pa. 2000)); Ruud, *supra* note 1, at 399.

[244] *See* Gilbert *supra* note 2, at 869.

[245] *See* Matsusaka & Hasen, *supra* note 150, at 399; Florin V. Ivan, Note, *Revising Judicial Application of the Single Subject rule to Initiative Petitions*, 66 N.Y.U. ANN. SURV. AM. L. 825, 829 (2011).

[246] *See* Matsusaka & Hasen, *supra* note 150, at 399, 416–17; Kenneth P. Miller, *Introduction Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1080 (2001).

[247] *See* Kastorf, *supra* note 3, at 1658, 1664.

[248] Nova Health Sys. v. Edmonson, 2010 OK 21, ¶ 5, 233 P.3d 380, 382. At the time of the *Nova Health* decision, the Oklahoma court had found seven violations of the rule over the preceding two decades. *See id.* ¶ 4, 233 P.3d at 382 (citing Fent v. State *ex rel.* Okla. Capital Improvement Auth., 2009 OK 15, ¶ 1, 214 P.3d 799; Weddington v. Henry, 2008 OK 102, ¶ 1, 202 P.3d 143, 144; Fent v. State *ex rel.* Office of State Fin., 2008 OK 2, ¶ 30, 184 P.3d 467; 478; *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 18, 142 P.3d 400, 409; Morgan v. Daxon, 2001 OK 104, ¶ 1, 49 P.3d 687, 687; Campbell v. White, 856 P.2d 255, 263 (Okla. 1993); Johnson v. Walters, 819 P.2d 694 (Okla. 1991)). Since then, the court has found at least four more violations. *See* Burns v. Cline, 2016 OK 99, ¶ 19, 382 P.3d 1048, 1053; Fent v. Fallin, 2013 OK 107, ¶ 7, 315 P.3d 1023, 1025; Douglas v. Cox Ret. Props, Inc., 2013 OK 37, ¶ 12, 302 P.3d 789, 794; Thomas v. Henry, 2011 OK 53, ¶¶ 31–32, 260 P.3d 1251, 1261–62 (per curiam). The court also sustained at least one law in the face of a single-subject attack. *See In re* Application of Okla. Tpk. Auth. for Approval of not to Exceed $480,000 Okla. Tpk. Sys. Second Senior Lien Revenue Bonds, Series 2016, 2016 OK 124, ¶ 12, 389 P.3d 318, 321.

building and deal-making necessary for the legislative process to work in practice.[249] Comprehensive, multi-topic legislation will often be essential, if not desirable, in order for the legislature to act at all, and a proliferation of small, piecemeal measures that would result from the strict construction of the single-subject rule would not improve legislative efficiency or, given the time limits many legislatures are under, legislative deliberation.

Having been a part of the constitutions of most states for roughly a century and a half, the single-subject rule is likely here to stay, and as a part of a state's constitution it deserves some respect if not active enforcement. It may be that the best approach to the rule is the one most states take most of the time—broad definitions of subject and deference to the legislature, with occasional invalidation of the most egregious combinations of seemingly unrelated subjects.[250] This seems more justified and more likely to occur, paradoxically, not in the large, complex omnibus measures that advocates of the rule decry, but which may be crucial for coalition-building and for comprehensive treatment of a subject, but in smaller bills, combining just a handful of laws or amendments on discrete topics, which can be claimed as single subject at only the highest level of abstraction, likely "amending the Crimes Code"[251] or "judicial remedies and sanctions."[252]

In the end, the paradox posed by the single-subject rule is probably unsolvable. More aggressive enforcement would disrupt the legislative process for uncertain gains, and probably still would not generate a consistent definition of "subject" or a predictable body of law. Complete non-enforcement would fly in the face of the requirements of state constitutions.[253] General deference with intermittent enforcement in the most egregious cases—with the meaning of "egregious" left open—is what we have now and is in tension with the rule of law values of consistency and predictability.[254] It is probably the least bad approach, but still unsatisfactory.

The purposes of the single-subject rule—majority rule,

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[249] *See* Block, *supra* note 173, at 250; Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1254 (2007).

[250] *See* Kasper, *supra* note 45 at 853; Kastorf, *supra* note 3, at 1639.

[251] Leach v. Commonwealth, 141 A.3d 426, 431 (Pa. 2016).

[252] Commonwealth v. Neiman, 84 A.3d 603, 613 (Pa. 2013)

[253] *See* Evans & Bannister, *supra* note 19, at 174 n.73; Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 MISS. L.J. 881, 909–10 (2017).

[254] *See* Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing,* 98 IOWA L. REV. 535, 546 (2013); Kasper, *supra* note 45, at 853

deliberation, transparency, orderly procedure, public accountability[255]—are surely desirable legislative process goals, if not essential to legislative legitimacy. But the experience of the single-subject rule suggests that a judicially-enforceable constitutional requirement may not be the best way to achieve those ends.

[255] *See* Block, *supra* note 173, at 238, 251; Ruud, *supra* note 19, at 391.

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The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States

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Jonathan L. Marshfield*

The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States

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I. INTRODUCTION

Eighteen states allow citizens to independently propose constitutional amendments through the initiative process.[1] In many of those states, the constitutional initiative is a powerful force in state constitutional politics.[2] Indeed, since 2000, voters have considered hundreds of initiative amendments addressing a wide range of issues, including marriage equality, taxation, environmental policy, marijuana, infrastructure, education, agriculture, religious freedom, reproductive rights, affirmative action, immigration, redistricting, and many others.[3] Initiative campaigns also attract a lot of money. In 2020, statewide campaigns reported $1.24 billion in contributions and $1.22 billion in spending.[4]

It should be unsurprising, therefore, that regulating the initiative is both important and contentious. States have developed a variety of different regulatory requirements and mechanisms, but the "single-subject" rule is an especially common device.[5] As its name suggests,

1. *See* John Dinan, *State Constitutional Developments in 2021*, *in* 53 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 10 tbl.l.5 (2021). In May 2021, the Supreme Court of Mississippi ruled that the initiative could not currently be used in compliance with the state constitution because it requires signatures from five congressional districts and Mississippi now has only four districts. *See In re* Initiative Measure No. 65 v. Watson, No. 2020-IA-01199-SCT, 2021 Miss. LEXIS 123 (Miss. May 14, 2021). Thus, there are currently only seventeen states with a functional initiative process. Moreover, it should be noted that Illinois and Massachusetts place significant limitations on the constitutional initiative. *See* Dinan, *supra* (noting that initiative can be used in Illinois only to amend the legislative article, and in Massachusetts initiatives must be approved by the legislature before going on the ballot).
2. *See generally* Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 489 (2016) (tracking relative use of constitutional initiative).
3. The Initiative & Referendum Institute keeps an exhaustive dataset of initiatives across all states beginning in 1904. INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/data.cfm [https://perma.cc/PM6W-YYN5] (last visited Mar. 6, 2022). They show that between 1904 and 2019, voters considered 2,610 initiatives and approved 1080. Not all of those were constitutional initiatives. For a survey of the many subjects addressed by the constitutional initiative, see John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAPMAN L. REV. 61, 63–74 (2016) (noting that there were 203 proposed constitutional initiatives between 2000 and 2014 and surveying their content).
4. *See Ballot Measure Campaign Finance, 2020*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure_campaign_finance,_2020 [https://perma.cc/5ZCR-9SK6] (last visited Mar. 6, 2020).
5. *See* Dinan, *supra* note 3, at 62 (noting scholarly analysis regarding regulation of initiative); *id*. at 95–107 (surveying various strategies for regulating the initiative). Of the eighteen states that have the constitutional initiative, only Arizona, Arkansas, Michigan, Mississippi, and North Dakota do not have a single-subject rule or separate vote requirement for constitutional initiatives. *See generally* Rachael Downey, Michelle Hargrove & Vanessa Locklin, *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES

the rule provides that initiatives must be limited to "one subject."[6] By limiting ballot questions to a discrete issue, the rule aims to ensure that proposals present voters with a clear and singular policy choice.[7] This in turn helps to improve transparency and enhance the legitimacy of referenda results by limiting special interest logrolling and riding.[8]

Despite these laudable objectives, the single-subject rule is widely criticized. Critiques vary, but the dominant concern is that the rule is near impossible to apply because the term "subject" is too vague and indefinite.[9] A related concern is that the rule's indeterminacy gives judges too much discretion and power as ballot gatekeepers.[10] These concerns have been well substantiated. Leading political scientists have shown, for example, that when judges work to aggressively apply the single-subject rule, the results mostly reflect their personal policy

579 (2004) (updated to reflect South Dakota's adoption of single-subject rule in 2018 and the Arizona Supreme Court's ruling that the single-subject rule for legislation did not apply to the initiative, Ariz. Chamber of Com. & Indus. v. Kiley, 399 P.3d 80, 88 (2017)). Both Arizona and North Dakota are currently considering adopting the rule. *See infra* section IV.A (discussing those efforts).

6. California's provision is typical. It provides in its entirety: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8(d); *see also* CO. CONST. art. V, § 1 (5.5) ("No measure shall be proposed by petition containing more than one subject."); FLA. CONST. art. XI, § 3 ("any such revision or amendment . . . shall embrace but one subject and matter directly connected therewith.").

7. *See* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single-Subject Rule*, 110 COLUM. L. REV. 687, 706–12 (summarizing judicial rationales for the rule and their application).

8. *See id*. at 706–12. In this context, "Logrolling occurs when two proposals each supported by a minority are combined into one ballot proposition supported by a majority, and the two minorities support the combination of policies but respectively prefer to enact one policy and not enact the other." *Id*. at 706. Riding, on the other hand, "occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second." *Id*. at 707.

9. Key critiques of the rule include: Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS 131, 163 (M. Dane Waters ed., 2001); Richard L. Hasen, *Ending Court Protection of Voters from the Initiative Process*, 116 YALE L. J. POCKET PART 117 (2006) (arguing that the single-subject rule be repealed because it is unworkable for courts); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 U.C.L.A. L. REV. 936, 940–41 (1983); Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 47 (2002).

10. *See* Campbell, *supra* note 9, at 163; Hasen, *supra* note 9.

preferences,[11] and legal scholars have long concluded that rule is too indeterminate for judicial application.[12]

In this Article, I argue that although these enforcement critiques are serious and important, there is a deeper problem with the single-subject rule that is of growing significance. My core claim is that in today's political environment, the single-subject rule is at risk of undermining rather than enhancing the initiative. Instead of protecting voters and improving transparency, the single-subject rule has the potential to shield recalcitrant legislatures and governors and undermine consolidated statewide majorities.

This happens when initiative sponsors anticipate that state government will work to undermine or evade a successful initiative.[13] In those instances (which are increasingly common), initiative sponsors often expand the initiative's scope and detail to foreclose expected countermeasures by state government.[14] An initiative intended solely to legalize medical marijuana, for example, might be expanded to create a new and independent "Medical Marijuana Commission" to foreclose obstructionist regulations.[15] In these situations, the single-subject rule can have perverse effects. To successfully corral wayward government, the initiative must include more detail and address more topics. But with each new addition, the initiative is more likely to violate the single-subject rule. In this way, the single-subject rule can undermine a popular initiative while protecting recalcitrant government.

I advance three main arguments in support of this claim. First, it is important to place the single-subject rule in proper theoretical context. The single-subject rule is not an end in and of itself. It is a tool intended to enhance the quality and potency of the constitutional initiative. And the initiative is ultimately an accountability device. It provides democratic majorities with an efficient and effective process for correcting and controlling wayward government. The single-subject

11. *See* John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010) ("The evidence suggests that . . . aggressive enforcement decisions are likely to [be] driven by the political preferences of judges."); John G. Matsusaka & Richard L. Hasen, *Some Skepticism About the 'Separable Preferences' Approach to the Single Subject Rule: A Comment on Cooter & Gilbert*, 110 COLUM. SIDEBAR 35 (2010) (summarizing findings).

12. *See* Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALBANY L. REV. 1629, 1630 (2018) (describing the rule as "deeply problematic" and summarizing legal commentary regarding rule's inconsistent application by judges).

13. I catalogue the various countermeasures used by state government to evade initiatives in section III.C.

14. I substantiate and illustrate this point in section IV.A.

15. Arkansas's 2016 medical marijuana initiative illustrates this. I discuss that initiative in section IV.A.

rule can support this endeavor by focusing voter choice on discrete issues and limiting false choices or "tricks" that might further distance government policy from popular preferences. But it can also do the opposite. It can frustrate popular efforts to correct government failures and enable government to evade popular accountability. When this happens, the single-subject rule is at risk of undermining its core purpose.

Second, in today's political environment, gerrymandered legislatures and party-loyalist governors are often at odds with statewide majorities on discrete policy issues, and they have developed sophisticated tactics for evading or undermining responsive initiatives.[16] These tactics include refusal to fund programs necessary to implement initiatives,[17] failure to create and adequately staff agencies and departments to oversee initiative programs,[18] passing legislation that effectively undermines the initiative,[19] and, of course, they often try to formally amend or repeal disfavored initiatives.[20]

Third, a predictable consequence of these evasive tactics is that initiatives have grown in scope and detail to limit government discretion and realize popular preferences.[21] Recent initiative amendments have exceeded 8,000 words[22] and included supplemental provisions creating entirely new state agencies,[23] earmarking funds,[24] setting regula-

16. *See* Part III (substantiating these claims).
17. *See* subsection III.C.1.
18. *See id*.
19. *See* subsection III.C.2.
20. *See* subsections III.C.3 & 4.
21. *See* section IV.A (surveying anecdotal examples of this expansion and also finding a systemic increase in initiative scope and detail using original data for Florida initiatives from 1980 to 2020).
22. Arkansas's 2016 medical marijuana amendment was approximately 8,575 words. *See* ARK. CONST. amend. XCVIII ("Arkansas Medical Marijuana Amendment"); *see also* Carol Goforth & Robyn Goforth, *Medical Marijuana in Arkansas: The Risks of Rushed Drafting*, 71 ARK. L. REV. 647, 649 (2019) (estimating initiative at "nearly 9,000 words and 23 substantive sections"). For a helpful summary of the content of twenty-first century initiative amendments, see Dinan, *supra* note 3, at 65–67.
23. *See, e.g.*, OR. CONST. art. XV, § 11 (initiative amendment adopted in 2000 introducing regulation for in-home caregivers and creating the Home Care Commission to ensure proper oversight); *see* VOTERS' PAMPHLET VOL. 1 (Or. Sec'y of State, Salem Or.) Nov. 2000, at 205 (explaining that amendment was in response to legislative inaction); *see also* John Dinan, *State Constitutional Developments in 2009*, *in* 42 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 8 (2010) (describing Ohio initiative amendment legalizing casinos and creating the "Ohio Casino Control Commission"); OH. CONST. art. XV, § 6 (c) (4) ("There is hereby created the Ohio casino control commission which shall license and regulate casino operators, management companies retained by such casino operators, key employees of such casino operators and such management companies, gaming-related vendors, and all gaming authorized by section 6(C), to ensure the integrity of casino gaming.").

tion-like technical parameters,[25] revising tangential criminal and tax statutes,[26] and even adjusting the constitution's amendment rules.[27] The problem, of course, is that while this strategy may be effective in corralling state government, it greatly increases the likelihood that the initiative will violate the single-subject rule.[28]

Recognizing this wrinkle with the single-subject rule has important implications. For one thing, it should inform discussion in states that might consider adopting (or eliminating) the rule.[29] Current literature analyzing the rule tends to overlook or ignore how the rule might undermine the initiative and empower recalcitrant officials. This is surely an important cost that should be weighed when considering the rule's value. Similarly, my findings should inform judicial application of the single-subject rule in states where it exists. Some courts apply the rule without regard for how the rule might unnecessarily undermine the initiative.[30] To the extent courts look to the rule's deep structure and institutional context when deciding close cases, they should more readily consider how enforcing the rule in certain cases might undermine its core purpose.

This Article has four Parts. Part II places the single-subject rule within the broader historical and theoretical context of the constitutional initiative. Part III catalogues the many tactics that state governments use for evading or undermining initiatives and explores contemporary political dynamics that fuel conflicts between state government and statewide popular majorities. Part IV demonstrates that initiative sponsors often respond to anticipated countermeasures by expanding an initiative's scope and detail, which increases the risk that it violates the single-subject rule. Finally, Part V explores some of the implications of these findings for the future of the single-subject rule.

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24. *See, e.g.*, CAL. CONST. art. XXXV (initiative amendment 2004) (legalizing stem-cell research and establishing regulatory and funding frameworks); *see* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 244–45 (2018) (describing history of this initiative).

25. *See, e.g.*, ARK. CONST. amend. XCVIII (setting precise requirements for Marijuana cultivation facilities including bookkeeping and report, the number of plants permissible, and ownership distribution requirements).

26. *See, e.g., id*. (revising criminal culpability for possession and prescribing marijuana and setting tax policy and requirements for medical marijuana).

27. *See, e.g., id*. (exempting certain provisions from default amendment rules).

28. *See* section IV.B.

29. South Dakota adopted the rule in 2018, and Arizona and North Dakota are currently considering the rule. *See* section IV.A.

30. *See* section IV.B.

II. THE SINGLE-SUBJECT RULE IN CONTEXT

A. Brief History of the Constitutional Initiative

The evolution of state constitutional amendment processes is important context for properly assessing the constitutional initiative and the single-subject rule. This is especially true because the theory underlying state constitutional amendment processes differs from the theories commonly ascribed to Article V of the Federal Constitution.[31] The Federal Constitution reflects Madison's belief that to provide stability across generations and temper impassioned majorities, a constitution should be sparse and difficult to amend.[32] State constitutions, on the other hand, have viewed constitutional amendment and specificity as critical accountability strategies that should be readily accessible to the people to correct and guide government whenever necessary.[33] Thus, under state constitutions, the most important aspect of amendment design is providING the people with an effective instrument for controlling government.[34]

This point is evident in even the earliest state constitutions.[35] Almost all eighteenth-century constitutions included a provision in their bills of rights declaring that all power is inherent in the people and that "the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish [government] in such manner as shall be . . . judged most conducive to the public weal."[36] As Alan Tarr has observed, these provisions reflected the groundbreaking theory that the amendment power existed to ensure that the people could easily and peaceably align government with "changing popular views."[37] This approach to constitutional change stood in stark contrast to British and Madisonian conceptions of constitutionalism, which emphasized the need for enduring legal constraints on govern-

31. *See generally* Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. P. SCI. REV. 657 (2016).

32. *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CH. L. REV. 1641, 1668–69 (2014).

33. *See generally* Dinan, *supra* note 24; Versteeg & Zackin, *supra* note 31; Versteeg & Zackin, *supra* note 32; Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 353 (1997).

34. *See* Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrative State*, 8 BELMONT L. REV. 342, 347–58 (2021) (summarizing the literature on this point).

35. *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PENN. L. REV. (forthcoming 2022) (manuscript at 21–24) (on file with author) (describing the early history of this perspective on state constitutionalism through the lens of early state bills of rights).

36. VA. DECL. OF RIGHTS art. 3 (1776); *see* Marshfield, *supra* note 35, n.159–66 (collecting and discussing these provisions).

37. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 75 (1998).

ment and society.[38] It also represented a break from John Locke's more extreme theory of a right-to-revolution because it envisioned constitutional change on a regular and ordinary basis.[39]

Despite this important conceptual breakthrough, early states struggled with how to implement formal constitutional change. The chief problem was that if sovereignty belonged only to the people, and constitutional reform was aimed at correcting or guiding existing government, then the people had to somehow assemble apart from existing government.[40] It was in response to this practical problem that the states devised the constitutional convention.[41] The convention was a temporary body of delegates separately elected by the people for the sole purpose of constitutional reform.[42] The genius of the convention was that it separated constitution-making from existing government institutions and focused popular input and accountability.[43] As historian Gordon Wood concluded, by the 1780s, the convention was so "firmly established" in state constitutional theory and practice "that governments formed by other means actually seemed to have no constitution at all."[44]

The constitutional convention was the primary device of state constitutional reform during most of the nineteenth century.[45] However, by the middle of the century, states began to look for more streamlined amendment processes to address the need for incremental change.[46] The most obvious approach was to authorize the legislature, as the state's lawmaking branch, to amend the constitution.[47] But this idea was deeply problematic because state legislatures were a principal object of constitutional regulation.[48] As a delegate to the Louisiana Convention of 1864 explained, "the legislature is the creature of the constitution, and when you give the creature power to destroy the creator, you adopt almost an anomaly."[49]

38. Versteeg & Zackin, *supra* note 32, at 1700.
39. *See* Tarr, *supra* note 37, at 74–75 (noting that Locke's right of revolution was predicated on "serious violations of rights or a plan to tyrannize" as necessary triggers for the "right to revolution").
40. *See id*. at 69–71.
41. *See* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 88–105 (2019) (providing a history of state constitutional convention theory).
42. *See id*. at 94.
43. *See id*.
44. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 342 (1969).
45. *See* Tarr, *supra* note 37, at 73–74; JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 41 (2009), 139–40.
46. *See* Dinan, *supra* note 45, at 32–37, 41.
47. *See* Marshfield, *supra* note 41, at 105–06.
48. *See id*.
49. DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 102 (1864).

In response to this and other concerns, the states gradually authorized legislatures to craft amendments subject to a variety of special accountability mechanisms.[50] At first, states required legislatures to approve amendments by supermajorities in successive sessions with an intervening election.[51] Over time, the referendum took hold as the preferred method for monitoring legislative involvement in constitutional change.[52] States gradually reduced legislative thresholds and replaced the intervening election with referenda.[53] At present, all states except Delaware allow legislatures to propose amendments subject to popular ratification at a referendum.[54]

During the twentieth century, legislative referral surpassed the constitutional convention as the dominant mechanism of state constitutional change.[55] It is important to note, however, that state amendment theory still retains a deep commitment to popular control over government. The legislative referral method has surely enabled legislatures as agents of constitutional change, but it also continues to empower popular control over government in several ways. First, legislative referral is frequently used to overrule state court rulings that invalidate popular legislation and executive action.[56] By allowing sitting legislatures to quickly propose an amendment in response to an unpopular court ruling, the process facilitates popular control over policy and the constitution. Second, many state constitutions include statutory-like policy proscriptions and limitations that were adopted by the people in earlier conventions but continue to exert significant influence on state government.[57] The legislative referral process allows state legislatures to present these issues to the public for reconsideration in the form of discrete referenda questions. Finally, state legislatures can use the amendment process to punt contentious issues to a referendum, which can help avoid gridlock while enhancing popular input on critical issues.[58]

The next major development following legislative referral was the constitutional initiative.[59] The initiative was the result of popular frustration during the Progressive Era with legislatures and courts that had blocked social and economic reforms.[60] The core concern was

50. *See* Marshfield, *supra* note 41, at 105–30 (providing an account of the state theory of "extra-conventional" amendment).
51. *See* Dinan, *supra* note 45, at 43.
52. *See id*. at 44–45.
53. *See id*.
54. *See* Dinan, *supra* note 1, at 8 tbl.1.4.
55. *See* Tarr, *supra* note 37, at 139–40.
56. *See* Marshfield, *supra* note 34, at 356–58.
57. *See id*.
58. *See id*.
59. *See* Dinan, *supra* note 45, at 47–48.
60. *See id*.

that the people did not have an efficient and independent method for correcting discrete government failures, especially when the legislature refused to adopt necessary constitutional reforms.[61] Exacerbating this frustration was the fact that many state legislatures were grossly malapportioned in favor of existing elites and heavily influenced by well-financed special interests.[62] As a result, statewide popular majorities frequently found themselves misaligned with government policy on pressing issues such as worker's safety, child labor, collective bargaining, corporate taxation, and welfare.[63]

Within this context, the constitutional initiative was championed as a way for the people to bypass failed government structures and realign government with popular preferences.[64] The initiative could achieve this by allowing a small group of private citizens to formulate constitutional proposals with minimal government oversight or involvement.[65] Initiative proponents also hoped that the mere presence of the initiative would create incentives for officials and courts to align with popular preferences.[66] Ultimately, the constitutional initiative was about government accountability to popular majorities. It sought to empower "the people of [a] state to hold the government within their control."[67] In 1902, Oregon became the first state to adopt the constitutional initiative.[68] Seventeen other states have adopted it since then, with Nebraska adopting it in 1912.[69]

B. The Development of the Single-Subject Rule

The single-subject rule predates the constitutional initiative.[70] Indeed, the idea originated in ancient Rome to prevent lawmakers from

61. *See id*.
62. It was not until 1962 that the Supreme Court decided Baker v. Carr, 369 U.S. 186 (1962), which required state legislatures to reapportion in compliance with federal equal protection. Before then, many states functioned under wildly unrepresentative legislatures. *See, e.g*., Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What it Has Become*, 18 FLA. COASTAL L. REV. 5 (2016) (describing the significant influence of *Baker* on representation in Florida). On the influence of elites and capital on state legislatures before and during the Progressive Era, see Tarr, *supra* note 37, at 148–53. On apportionment problems in the states during the nineteenth century, see *id*. at 102–105.
63. *See* Dinan, *supra* note 45, at 47–60.
64. *See* Marshfield, *supra* note 41, at 123 n.322, 124 n.323 (collecting primary sources from this era discussing initiative's purpose).
65. *See id*. at 124.
66. *See id*.
67. *See* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 189 (John S. Goff ed., 1991).
68. *See* Dinan, *supra* note 45, at 313 n.132.
69. *See id*. (listing states and dates of adoption).
70. *See* Cooter & Gilbert, *supra* note 7, at 704 (dating rule to 98 BC in Rome).

hiding unpopular laws among popular ones.[71] It first appeared in the United States in New Jersey's 1844 constitution as a limitation on lawmaking by the legislature.[72] By the end of the nineteenth century, thirty-nine states adopted similar rules regarding the legislative process, and by 1960, forty-three states had adopted the rule for legislation.[73] In most states, the text of the rule is sparse and largely unhelpful in ascertaining its boundaries. The Ohio rule, for example, provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title."[74]

The original intent of individual provisions is also opaque. The earliest provisions were adopted by state constitutional conventions during the nineteenth century.[75] Although we have records from many of those conventions,[76] most debates do not reflect sustained, or even nominal, consideration of the single-subject rule.[77] When early conventions did debate the provisions, they tended to focus on a set of transparency and accessibility concerns that have been largely lost, forgotten, or surpassed by technological advancements.[78] For exam-

71. *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 804, 811 (2006).

72. *See* Cooter & Gilbert, *supra* note 7, at 704; Millard H. Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389, 389–90 (1958) (noting few exceptions for specific topics before 1844).

73. Gilbert, *supra* note 71, at 822 fig.2.

74. OHIO CONST. art. II, § 15; *see also* OR. CONST. art. IV, §. 1, 2(d) ("A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.").

75. *See* Gilbert, *supra* note 71, at 822 fig.2 (tracing adoption of single-subject rules in all states).

76. By my count, we have convention debates for twenty-nine of the states where these provisions were adopted. I calculated this by cross-referencing Gilbert's data, *supra* note 71, at 822, with Dinan's tabulation of all known convention debates, Dinan, *supra* note 45, at 27.

77. *See, e.g.*, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 803 (Charles G. Guyer & Edmond C. Hardesty eds., 1958) (entire discussion before adoption was simply: "The idea is to preclude the possibility of legislation being obtained under false colors. I think that is a full explanation."); *but see id.* at 817 (exception added for general appropriation bills, which would necessarily require "a great variety of items"). As best I can tell, California adopted the rule for legislation in 1850 without any debate. *See* REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 90 (J. Ross Browne ed., 1850) (noting that the rule was "adopted without debate"). *See also* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, at 9 (William G. Bishop & William H. Attree eds., 1846) (provision adopted without debate); THE [ILLINOIS] CONSTITUTIONAL DEBATES OF 1847, at 6, 699 (Arthur Charles Cole ed., 1919) (provision adopted without debate); JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 118 (H. A. Tenney, et al. eds., 1848) (provision adopted without debate).

78. *See, e.g.*, PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 840 (Robert J. Ker ed., 1845) (discussing difficulty in finding laws if they were not limited

ple, a dominant early concern was that bundling legislation without accurate titles made finding the law difficult for ordinary citizens and even lawmakers and judges.[79] This in turn created concern about the power of lawyers in the process of managing and driving legislation.[80] The single-subject rule helped facilitate more rational and accessible cataloging of statutes so that citizens could independently find and comply with the law.[81] To be sure, early conventions were sensitive to the issue of logrolling in the legislative process,[82] but they focused on

to single subject with clear title); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849, at 127–28, 903 (R. Sutton ed., 1849) (single-subject rule and title requirement are designed to make laws easy to find and catalogue); REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN, 1850, at 147 (1850) (arcane and unclear debate about difference between "object" and "subject"); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 9, 305–07, 312 (discussing how lawyers will be unable to find laws without single-subject and title rules).

79. *See* PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 840 (Robert J. Ker ed., 1845) ("[T]he object of this section was to remedy a very serious inconvenience. The titles of our laws were generally of a very indifferent character; and the words appended, 'and for other purposes,' were intended to cover a mass of heterogeneous propositions. It was impossible to find a particular statutory provision without wading through a long list of sections, the titles so which gave at best a most imperfect idea of what followed. It was the business of a whole life to penetrate and find out our laws."); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 305 ("And it is impossible for the people to tell what is in force as law, or what has been repealed.").

80. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849, at 903 (R. Sutton ed., 1849) ("I admit that the retention of this section may militate against the interest of lawyers, but it will enable the plain, unlettered men of the commonwealth to know what are the laws under which they live. Besides this, it will aid the administrator of justice . . . .").

81. This concern is somewhat different from the modern-day transparency concern, which emphasizes openness in the lawmaking process for purpose of democratic accountability. The historic concern seems more practical and related to the need for basic information regarding the content of existing statutes in order for citizens and lawmakers to operate under law. *See* PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 840 (Robert J. Ker ed., 1845); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 9, 305–07.

82. *See* PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 56 (1942); PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 202, 550–51 (Robert J. Ker ed., 1845).

other countermeasures, such as prohibitions on special legislation[83] and procedures for general incorporation.[84]

Although the early convention debates do not reflect a robust theory of the single-subject rule, state courts steadily inferred the rule's underlying rationales as polestars for defining its scope.[85] By at least 1865, courts drew on three core purposes.[86] First, the rule aims to limit legislative logrolling. Logrolling occurs when separate proposals—each with only minority support—are combined into one proposal that then garners majority support.[87] This may be problematic because "it threatens to give legal force to proposals that individually command only minority support."[88] Second, the rule aims to limit riding.[89] Riding occurs when lawmakers attach an unpopular provision to a popular provision. This is problematic because unpopular laws may be enacted solely because of their attachment to popular laws and in conflict with majority preferences.[90] Third, the single-subject rule aims to enhance democratic transparency. By limiting legislation to a discrete issue, lawmakers and citizens can more constructively evaluate proposals and thereby register more informed and accurate preferences.[91]

As states began to adopt the statutory and constitutional initiative during the early twentieth century, they generally imported the single-subject rule from the legislative context and applied it to citizen lawmaking.[92] Here again, the convention debates reflect little independent consideration of the single-subject rule.[93] Nevertheless, courts have tended to assume that the rule exists for the same general

83. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 429 (the idea was that by limiting the legislature's ability to grant individualized privileges, there would be less trading of votes between legislatures).

84. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 317–26 (1942); *see also* Ruud, *supra* note 72, at 390.

85. For a detailed explanation of the historical development of the jurisprudence and the rule's rationales, see Gilbert, *supra* note 71, at 856–8 n.230.

86. *See id.*

87. *See id.* at 813–14.

88. *See id.* at 814.

89. *See id.* at 815–16.

90. *See id.* at 815 (explaining how this can happen: opportunity costs, political capital, delay, etc.).

91. *See id.* at 816–17. For a twentieth century convention debate articulating these rationales, see MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION, UNIVERSITY OF ALASKA, 1955–56, at 1746–47; 4 MONTANA CONSTITUTIONAL CONVENTION, 1971-1972: VERBATIM TRANSCRIPT, at 647–658.

92. *See* Cooter & Gilbert, *supra* note 7, at 705.

93. There are far fewer convention debates from this phase of state constitutional development. By my count, there are only six surviving convention debates where the initiative was adopted: Michigan in 1908, Arizona in 1911, Ohio in 1912, Massachusetts in 1918, Alaska in 1956, and Illinois in 1970. This is mostly because the initiative was adopted outside of constitutional conventions in many states.

purposes as in the legislative context.[94] Just as legislators can obtain a majority by logrolling minority votes into a multifaceted statute, initiative sponsors may also craft a ballot proposition that combines unrelated issues to aggregate minority voting blocs.[95] Initiative sponsors may also engage in riding. By surrounding unpopular provisions with popular ones, initiative sponsors may obtain enough votes for an otherwise unpopular provision.[96] Finally, courts have emphasized that transparency and singularity are especially important to ensure that citizens accurately register their preferences by voting "yes" or "no" on a ballot question.[97]

Notwithstanding these underlying rationales, courts have struggled to articulate a workable framework for applying the single-subject rule. The problem, of course, is one of abstraction. As Daniel Hays Lowenstein explains:

> [A]ny collection of items, no matter how diverse and comprehensive, will fall "within" a single (broad) subject if one goes high enough . . . and, on the other hand, the most simple and specific idea can always be broken down into parts, which may in turn plausibly be regarded as separate (narrow) subjects.[98]

Nevertheless, many courts have offered a functional definition of "subject" that draws on the rule's underlying purposes. These frameworks usually emphasize the need for relatedness between topics. The idea is that the single-subject rule does not prohibit the joining of related topics but it "bars a disunity of subjects."[99] The assumption seems to be that concerns about logrolling, riding, and transparency are greatest when unrelated topics are merged. As Richard Briffault has explained, courts have developed a variety of tests for relatedness, but the most common approach is to require topics be "reasonably germane."[100] Tests for germaneness have not, however, resolved uncertainty regarding application of the single-subject rule.[101] Courts

94. Indeed, courts have implied the rule's application to the initiative even in the absence of any positive law extending the rule to citizen lawmaking, *see, e.g.*, *In re* Initiative Petition No. 314, 625 P.2d 595, 601 (Okla. 1980), and some courts found that the rule should be more stringent in the initiative context, *see, e.g.*, Fine v. Firestone, 448 So. 2d 984, 988–89 (Fla. 1984).

95. Indeed, this happens, and courts have construed the single-subject rule to prohibit these sorts of initiatives. *See* Cooter & Gilbert, *supra* note 7, at 706 (providing examples and logrolling in initiatives and summarizing political science literature collecting other examples).

96. This also happens, and courts have construed the single-subject rule to prohibit these sorts of initiatives. *See id*. at 708.

97. *See id.* at 708–09.

98. Lowenstein, *supra* note 9, at 940–41.

99. *See* Briffault, *supra* note 12, at 1640 (quoting State *ex rel.* Hinkle v. Franklin Cnty. Bd. of Elections, 580 N.E.2d 767, 770 (Ohio. 1991)).

100. *See id.* at 1640–41.

101. *See id.* at 1639–40 (describing two cases involving similar questions but resolved differently by the same court).

continue to search for a framework or principle that will produce consistent results.[102]

Because the single-subject rule is vague and indefinite, critics of the rule emphasize that it may give courts too much power and discretion in regulating the initiative.[103] These critics note that courts apply the rule inconsistently across time and jurisdiction, which suggest that courts are not guided by a meaningful legal standard.[104] Instead, courts likely draw on their own "belief systems, values, and ideologies."[105] Leading political scientists and initiative scholars have found evidence to support this suspicion.[106] In an empirical study that examined the votes of individual judges in single-subject cases, Richard Hasen and John G. Matsusaka found that judges tend to follow partisan affiliation more than anything else when aggressively deciding single-subject cases.[107] They conclude that the single-subject rule is vulnerable to arbitrary and political decision-making.[108] As I explain below, this problem is all the more concerning if state government actively enlists the single-subject rule as tool for attacking disfavored initiatives.

C. The Single-Subject Rule's Deeper Paradox in the Initiative Context

The enforcement and conceptual discrepncies described above are problematic. But there is a deeper theoretical problem with the single-subject rule as applied in the context of the constitutional initiative. By defining the rule as mostly a ban on logrolling and riding or a formalistic test of germaneness, courts have generally neglected to imagine how a multifaceted initiative might engage in logrolling and riding but nevertheless serve the initiative's core purpose of better aligning government policy with popular preferences. I argue below that, as a matter of current affairs, this scenario increasingly occurs in various states. Here, I draw on the work of Richard Hasen, John G. Matsusaka, and Daniel Lowenstein to theorize this possibility in general terms for the purpose of placing the single-subject rule in a more complete theoretical context.[109] My core aim is to show that the single-

102. *See* Cooter & Gilbert, *supra* note 7, at 710 ("There is no workable theory of interpretation for the single subject rule.").
103. *See, e.g.*, Campbell, *supra* note 9.
104. *See* Lowenstein, *supra* note 9, at 937.
105. Hasen & Matsusaka, *supra* note 11, at 40.
106. *See id.*
107. *See* Hasen & Matsusaka, *supra* note 11.
108. *See id.*
109. These scholars have argued that logrolling in initiatives can be constructive because it can sometimes better realize voter preferences. Lowenstein, *supra* note 9, at 959; Hasen & Matsusaka, *supra* note 11, at 37. My point here is derivative of theirs. I argue that because logrolling can better realize voter preferences, it can

subject rule should be assessed and applied by reference to more than concerns about logrolling and riding or unmoored definitions of "subject." Another critical polestar is whether a multifaceted initiative is structured to realign government with popular preferences.

Consider two examples: one that overtly includes logrolling and one that expressly includes disparate subjects without logrolling.[110] First, imagine three voters and an initiative regarding marijuana policy in a state that currently outlaws all uses of marijuana. The initiative bundles two issues. Issue A legalizes marijuana for medical use. Issue B legalizes marijuana for recreational use. Voter 1 believes strongly in marijuana's medicinal properties but is mildly concerned about recreational use. Voter 2 thinks marijuana legalization is generally a bad idea but believes there are other more pressing issues facing government. Voter 3 is a libertarian who is skeptical of established medicine; she believes that marijuana should be left to personal choice and that the medical establishment will corrupt its distribution. In this scenario, the utility of passing each issue for each voter might be illustrated as follows[111]:

	Voter 1		Voter 2		Voter 3	
	Medical	Rec.	Medical	Rec.	Medical	Rec.
Adopted	100	-25	-25	-25	-25	100

In this scenario, the best aggregate outcome is for both issues to be approved because this would result in an aggregate utility of 100 (50 for adopting medical use and 50 for adopting recreational use). However, if these issues were presented to voters separately, both would fail because voters 1 and 2 would vote against recreational use and voters 2 and 3 would vote against medical use. By bundling the issues together, voters 1 and 3 are likely to approve the initiative, displace

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also help buoy the initiative's core purpose of ensuring government accountability. This means that the single-subject rule, to the extent that it is a rule intended to enhance the initiative, should not be applied as a strict prohibition on all forms of logrolling. I develop this point further in Section IV.B.

110. These examples are borrowed and modified from Hasen & Matsusaka, *supra* note 11, at 37, who use it to show how logrolling in an initiative might increase realization of voter preferences.

111. The chart could be described in narrative form as follows. Voter 1 would be benefited by 100 if marijuana was legalized for medical use and marginally harmed by -25 if it was also adopted for recreational use. Voter 2 would be marginally harmed by -25 if marijuana was legalized for medical use, and -25 if it was legalized for recreational use. Voter 3 will be marginally harmed by -25 if marijuana is legalized only for approved medical uses but benefited by 100 if legalized broadly for any. Again, this illustration is adapted from Hasen & Matsusaka, *supra* note 11, at 37.

the entrenched status quo, and more closely align state marijuana policy with aggregate welfare and preferences.

My point is not, of course, that logrolling in an initiative will always work to align policy with popular preferences. It can be harmful. However, we should acknowledge that in some scenarios logrolling the initiative can, at least in theory, operate to enhance the initiative's core purpose. Rigid application of the single-subject rule as a ban on logrolling in those cases might undermine the initiative. Recognizing this suggests that the single-subject rule should sometimes be tempered by the initiative's deeper purpose, which, after all, the single-subject rule is intended to support, rather than supplant.

Now consider a separate example that involves the bundling of disparate topics without logrolling. Imagine an initiative that includes two issues. Issue A overrides an existing law that prohibits convicted felons from voting. Issue B prohibits charging criminal defendants any court or administration fees and purges all outstanding fees. Imagine that a majority of voters are either in favor of both issues or opposed to both. Concerns about logrolling and riding are not present here because the referenda result will be the same whether the issues are presented separately or bundled.[112] However, on their face, the issues seem unrelated and would probably fail under many judicial definitions of germaneness. On the other hand, depending on the circumstances, they might be fairly viewed as a consolidated effort to restore voting rights to felons by removing both the formal prohibition and anticipated practical obstacles.[113] From this vantage point, the bundled initiative should probably survive a challenge under the single-subject rule, especially in the absence of any logrolling concerns.

I do not mean to suggest with these examples that placing the single-subject rule in a broader theoretical context will guide courts toward an organizing principle or rule of law that clarifies the single-subject rule. No court could possibly know the exact preference matrix for all voters to diagnose a logrolling problem. Nor will a court always be able to contextualize a bundled initiative by reference to clear extrinsic evidence of its purpose. My point is theoretical. These scenarios are possible when courts decide single-subject rule cases under ex-

112. One might ask why the single-single subject rule matters, then. Whether it is applied to this hypothetical or not, voters would approve both measures. The answer is partially because of the cost associated with forcing the issues to be separated. Absent a good reason under the single-subject rule to force separation of the issues, application of the rule serves only to create random (and perhaps prohibitive) barriers to using the initiative.

113. Indeed, this example is drawn from what occurred in Florida after an initiative that restored felon voting rights. *See* BRENNAN CTR. FOR JUST., *Voting Rights Restoration Efforts in Florida* (Sept. 11, 2020), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/E3K5-9CC9].

isting frameworks, which reveal that the single-subject rule can operate to undermine rather than enhance the initiative.

III. EVADING THE INITIATIVE

In this section, I argue that current structural and political conditions often result in misalignment between, on one hand, state legislatures and governors, and, on the other hand, statewide popular majorities. When this occurs in initiative states, the people often resort to the initiative to correct policy misalignment on discrete issues. But misaligned legislatures and governors fight back against these initiatives in a variety of ways. Indeed, they have developed a rather sophisticated playbook of initiative countermeasures, which I catalogue below.

A. Misaligned State Government

Today, various political and structural conditions can result in misalignment of state government with voters on discrete policy issues. Consider how governors can be caught between their state's interests and their political party's interests. Governors may, for example, face situations where they would benefit from remaining loyal to their political party at their state's expense or contrary to their constituents' preferences.[114] Governors with national political ambitions, for example, may prefer to curry favor with party leadership than side with constituents if they believe that party loyalty will secure future support.[115]

Gubernatorial decisions regarding Medicaid expansion illustrate this phenomenon. Following adoption of the Affordable Care Act, all Democratic governors expanded Medicaid, but less than half of Republican governors did so.[116] In studying the reasons for gubernatorial resistance to Medicaid expansion, Charles Barrilleaux and Carlisle Rainey found that "the level of need in the state exert[ed] little effect on governors' decisions."[117] Rather, governors' partisanship had "sub-

114. The conventional wisdom has been that a complex combination of factors (including partisanship and state economics) guide gubernatorial decisions. *See* Charles Barrilleaux & Carlisle Rainey, *The Politics of Need: Examining Governors' Decisions to Oppose the "Obamacare" Medicaid Expansion*, 14 STATE POLS. & POL'Y Q. 437, 454 (2014) (citing various sources and noting consensus on this issue for 30 years).

115. And as Miriam Seifter has shown, state governors have amassed considerable power while loosening important accountability controls. *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017).

116. *See* Jennifer M. Jensen, *Governors and Partisan Polarization in the Federal Arena*, 47 PUBLIUS: J. OF FEDERALISM 314, 318 (2017) (citing Barrilleaux & Rainey, *supra* note 114).

117. Barrilleaux & Rainey, *supra* note 114, at 449.

stantively meaningful effects on governors' decisions."[118] They conclude that "for high profile, highly politicized issues such as the Affordable Care Act, political considerations outweigh the needs of citizens and state economic conditions in gubernatorial decision making."[119]

Barrilleaux and Rainey are ambivalent about whether partisanship will play out similarly in other gubernatorial decisions. However, Jennifer Jensen has since shown that state governors are increasingly beholden to partisan interests at the expense of their state's interests and constituents.[120] Jensen's research emphasizes the active ways that governors advocate for federal policy in Washington.[121] Drawing on original interviews with governors and their Washington lobbyists, as well as the evolution and proceedings of governors' associations, Jensen argues that governors increasingly take positions by reference to party politics rather than their state's interests.[122] She explains, for example, that during the 2011 debt ceiling debate, five Republican governors went out of their way to oppose raising the debt ceiling without dramatic budget cuts.[123] Those cuts would have significantly reduced federal payments to their states and severely threatened their state budgets. Jensen suggests that these governors, which included Rick Perry, Nikki Haley, and Rick Scott, were maneuvering in anticipation of presidential bids.[124]

In addition to this detailed work by political scientists, anecdotal examples suggest that governors are increasingly misaligned with statewide popular majorities. Marijuana policy provides an especially poignant example.[125] The Republican party has long opposed marijuana legalization, and that position became entrenched within party leadership even as popular opinions have changed. There are surely various complex reasons for the party's inertia on this issue, including the historic (and romanticized) connection to Reagan's tough-on-crime and anti-drug campaigns, as well as connections to other cultural issues.[126] But regardless of the cause, Republican governors with party

118. *Id.* at 437.
119. *Id*. For similar findings regarding the creation of state healthcare exchanges, see Elizabeth Rigby, *State Resistance to "Obamacare"*, 10 THE FORUM, July 2012, at 1.
120. *See* Jensen, *supra* note 116, at 314–15.
121. *Id.* at 322.
122. *Id.*
123. *Id.* at 325.
124. *Id.*
125. *See* Phillip Smith, *Republican Reefer Reactionaries: Meet America's Worst 8 Governors on Marijuana Reform*, SALON (Feb. 22, 2020), https://www.salon.com/2020/02/22/republican-reefer-reactionaries-meet-americas-worst-8-governors-on-marijuana-reform_partner/ [https://perma.cc/F2Z5-BFC3].
126. *See* Mike DeBonis, *House Votes to Decriminalize Marijuana as GOP Resists National Shift*, WASH. POST (Dec. 4, 2020), https://www.washingtonpost.com/

loyalties, national political aspirations, or both have been reluctant to buck the party line on this issue even when voters in their states support policy change.[127] Misalignment has also occurred regarding gaming, voting rights, and redistricting, among other issues.

State legislatures are also increasingly vulnerable to misalignment with statewide majorities. Indeed, Miriam Seifter has shown that it is commonplace for state legislatures to be controlled by the political party that received less than half of the statewide votes.[128] Various factors contribute to this phenomenon, but Siefter notes that "the electoral design itself creates a skew that gives control to the minority party." This is because winner-take-all elections combined with single-member districts can result in disparities between legislative seats and statewide votes. Siefter finds that between 1968 and 2016, there were 146 elections in which the minority party won control of state senates, and 121 similar outcomes in state houses of representatives. And, as Siefter notes, "with the rise of more sophisticated gerrymandering, more complete partisan sorting, and intense geographic clustering, manufactured majorities appear unlikely to go away."[129] The result is that after any given election, millions of Americans "live under minority rule in their U.S. state legislatures."[130]

It should not be surprising, therefore, that statewide popular preferences often conflict with legislative outputs.[131] Consider a few recent examples. The story of gun control in Michigan is particularly illustrative. Since at least 2012, Michigan has experienced significant manufactured legislative majorities that favor Republicans.[132] Indeed, Democrats have never controlled the house during this period even though they always win the majority of votes.[133] Moreover, statewide popular opinion polls show strong support for certain gun control measures; especially legislation authorizing Extreme Risk Protection Orders as a strategy for reducing gun-related suicides.[134] This sup-

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powerpost/house-marijuana-republicans-election/2020/12/04/db2b00a8-35b0-11eb-8d38-6aea1adb3839_story.html [https://perma.cc/V62Q-V4KU].

127. *See* Smith, *supra* note 125.

128. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1762–67 (2021).

129. *Id.*

130. *Id.* at 1765.

131. Of course, this might be normatively desirable. One of the oft-referenced benefits of representative lawmaking is that it mediates popular preferences through a variety of public regarding filters. Moreover, misalignment can be measured in various ways. For purposes of illustration, I focus on discrete policy misalignment, but misalignment of legislative priorities is another important form.

132. *See* LIZ KENNEDY & BILLY CORRIHER, CTR. FOR AM. PROGRESS, DISTORTED DISTRICTS, DISTORTED LAWS 13–15 (Sept. 19, 2017).

133. *See id*.

134. *See* ALEX TAUSANOVITCH, CHELSEA PARSONS & RUKMANI BHATIA, CTR. FOR AM. PROGRESS, HOW PARTISAN GERRYMANDERING PREVENTS LEGISLATIVE ACTION ON

port was, to some extent bipartisan, with one poll finding that 64% of Republicans supported ERPO proposals.[135] However, despite frequent legislative proposals, Republican lawmakers have stalled legislation in committee or refused to pass it.[136] Similar scenarios have unfolded in North Carolina, Pennsylvania, Virginia, and Wisconsin.[137]

Abortion policy provides another example.[138] In the last few years, Republican legislatures have adopted restrictive abortion laws.[139] Texas's S.B. 8, which effectively bans abortions after six weeks of pregnancy, is perhaps the most well-known of these. But legislatures in Oklahoma, Arkansas, South Carolina, Idaho, Mississippi, and Arizona have also adopted significant limitations.[140] This legislation has disrupted abortion care in these states (especially Texas) and teed up the Supreme Court's reconsideration of *Roe v. Wade*. Yet, public support for these measures is far from majoritarian. Some polls in Texas, for example, have found that only 36% of Texans support S.B. 8.[141] Margins of misalignment are potentially greater in other states. In Arizona, support for broad access to abortion ranged from 69% to

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GUN VIOLENCE (2019), https://americanprogress.org/wp-content/uploads/2019/12/GerrymanderingGunControl-report-4.pdf [https://perma.cc/SP8N-2DL6].

135. *See id.*

136. Abigail Censky, *Red Flag Laws Are Stalled in Michigan as Lawmakers Return to Lansing*, WKAR PUB. MEDIA (Aug. 23, 2019), https://www.wkar.org/politics-government/2019-08-23/red-flag-laws-are-stalled-in-michigan-as-lawmakers-return-to-lansing [https://perma.cc/DNL6-YZXK].

137. *See* CTR. FOR AM. PROGRESS, *supra* note 134; Grace Segers, *What are "Red Flag" Laws, and Which States Have Implemented Them?*, CBS NEWS (Aug. 9, 2019, 10:42 AM), https://www.cbsnews.com/news/what-are-red-flag-laws-and-which-states-have-implemented-them [https://perma.cc/4K87-5PM9].

138. *See* David Daley, *How Gerrymandering Leads to Radical Abortion Laws*, NEW REPUBLIC (May 14, 2019), https://newrepublic.com/article/153901/gerrymandering-leads-radical-abortion-laws [https://perma.cc/AP8E-TLN8] ("Georgia's 'fetal heartbeat bill' never would have passed if the state legislature truly reflected the voters' political preferences.").

139. Jamila Perritt & Daniel Grossman, *State Legislation Related to Abortion Services, January 2017 to November 2020*, JAMA INTERNAL MED., May 2021, at 711–12 (finding that "35 states enacted 227 laws restricting access to abortion services.").

140. *See id.*; *see also* Ronald Brownstein, *Watch What's Happening in Red States*, ATLANTIC (June 3, 2021), https://www.theatlantic.com/politics/archive/2021/06/republican-state-legislatures-changes/619086/ [https://perma.cc/C72B-YUKQ] ("Texas, South Carolina, Idaho, and Oklahoma have passed legislation banning abortion when a fetal heartbeat is detected . . . Texas, Oklahoma, and Arkansas also passed virtually complete bans on abortion . . . Arizona approved an extremely restrictive bill that includes barring abortions for certain genetic conditions.").

141. *See* Wesley Story, *Poll: Texans Oppose Extreme Six-Week Abortion Ban*, PROGRESS TEX. (April 29, 2021), https://progresstexas.org/blog/poll-texans-oppose-extreme-six-week-abortion-ban [https://perma.cc/6JLN-9L94] (finding that only 36% of responders supported S.B. 8 and 12% were unsure).

76%.[142] In Oklahoma only 45% of voters supported restrictive abortion laws.[143] And in Florida, where restrictive legislation has been proposed, only 39% of voters support such restrictive laws.[144]

There are other examples of legislative misalignment. In North Carolina, a strong majority of voters favor Medicaid expansion under the Affordable Care Act, but the legislature has refused and even prohibited the governor from expanding Medicaid.[145] A similar situation has played out in Wisconsin.[146] In Mississippi, voters have long supported reform regarding marijuana policy, but until very recently, the legislature refused to enact popular reforms and continued to stymie proposals.[147] And, in several states, popular support for an independent redistricting commission is strong, but legislatures refuse to move in that direction.[148]

Many of these examples draw attention to how Republican state legislatures are currently misaligned with statewide popular majorities, but this is a nonpartisan phenomenon. Historically, Democrats have benefited from manufactured majorities in state legislatures more frequently than Republicans.[149]

It is also important to note that, apart from the misalignment inherent in the structure and design of state legislative elections, state legislatures have frequently been misaligned with voters because of corruption and undue influence by special interests. For example, after the Civil War, large and powerful corporations, especially rail-

142. *See* Katherine Patterson, PUB. POL'Y POLLING (Aug. 21, 2020), https://www.prochoiceamerica.org/2020/08/24/strong-majority-of-arizona-voters-support-reproductive-freedom/ [https://perma.cc/8LSQ-F8CJ]; Jeff Diamant & Aleksandra Sandstrom, *Do State Laws on Abortion Reflect Public Opinion*, PEW RSCH. CTR. (Jan. 21, 2020), https://www.pewresearch.org/fact-tank/2020/01/21/do-state-laws-on-abortion-reflect-public-opinion/ [https://perma.cc/Q7LC-AP8Y].

143. *See* Diamant & Sandstrom, *supra* note 142. For an interesting article on how gerrymandering affects abortion policy in Ohio, see Susan Tebben, *Reproductive Rights: How Gerrymandering Impacts Abortion Access*, OHIO CAP. J. (Aug. 16, 2021), https://ohiocapitaljournal.com/2021/08/16/reproductive-rights-how-gerrymandering-impacts-abortion-access/ [https://perma.cc/6SEF-9VGN].

144. *See* Diamant & Sandstrom, *supra* note 142; Rachel Treisman, *A Florida Lawmaker is Proposing A Restrictive Texas-Style Abortion Bill*, NPR (Sept. 23, 2021), https://www.npr.org/2021/09/23/1040132587/florida-abortion-restriction-bill-texas-ban [https://perma.cc/2XLD-Y5CH] (discussing proposed bill).

145. *See* Kennedy & Corriher, *supra* note 132, at 20.

146. *See id*. at 7.

147. *See Mississippi Becomes the 37th State to Legalize Medical Marijuana*, NPR (Feb. 2, 2022), https://www.npr.org/2022/02/02/1077784525/mississippi-becomes-the-37th-state-to-legalize-medical-marijuana [https://perma.cc/2J3Z-NJHR] (discussing history of attempts to legalize marijuana).

148. *See generally* Michael Li & Kelly Percival, *The Attack on Michigan's Independent Redistricting Commission*, BRENNAN CTR. FOR JUST. (Feb. 13, 2020), https://www.brennancenter.org/our-work/analysis-opinion/attack-michigans-independent-redistricting-commission [https://perma.cc/Q6WJ-NG65].

149. *See* Seifter, *supra* note 128, at 1764–65.

roads, captured many state legislatures and secured wildly equitable benefits at the public's expense.[150] And concerns about corporate influence on state legislatures persist, especially following the Supreme Court's ruling in *Citizens United*.[151]

Finally, even when the political branches align with popular preferences, state government outputs can be misaligned because of state court rulings that invalidate popular policies.[152] As noted above, this phenomenon first came into stark relief during the Progressive Era when state courts blocked popular reforms related to working conditions, collective bargaining, and social welfare programs.[153] But it persists. Emboldened by the theories of the New Judicial Federalism during the late twentieth century, state courts have invalidated popular policies regarding a host of issues, including the death penalty, criminal procedure protections, education financing, local government authority, gubernatorial veto powers, gun rights, victims' rights, abortion regulation, tort reform, marriage, and others.[154] In these instances, state government outputs and popular preferences are misaligned because, for better or worse, state courts independently enforce limits on the political branches.[155]

B. The Initiative and Policy Realignment

In the face of these misalignments, voters in initiative states have sought to use the initiative to realign state policies with popular preferences. To be sure, not all initiatives serve this purpose. The initiative is surely subject to abuse by special interests and even state officials, but it is clear that voters use the initiative to address misalignment between popular preferences and discrete state policies.[156]

Consider, for example, how voters in various states have responded to Medicaid expansion. After Medicaid expansion became available in 2014, thirty-two states adopted it by either executive action or legislation. Following this initial wave, however, several state governments

150. *See generally* Tarr *supra* note 37, at 115.
151. *See* Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 Am. Pol. Sci. 582, 595 (2014).
152. *See* Dinan, *supra* note 45, at 55–62.
153. *See also id*. (describing this occurrence); Dinan, *supra* note 24, at 206 (same).
154. *See generally* Robert F. Williams, The Law of American State Constitutions 119–31 (2009).
155. I do not mean to suggest that judicial review is not important and normatively desirable. My more simplistic point is that it come with costs regarding democratic outputs and state courts have a history of using judicial review in ways that frustrate popular majorities, which then respond through various mechanisms, including the initiative. *See generally* Kenneth P. Miller, Direct Democracy and the Courts (2009).
156. *See generally* David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution (1989).

refused to expand Medicaid despite popular support for expansion.[157] Thus, beginning with Maine in 2017, voters used the initiative to bypass state government and expand Medicaid themselves.[158] Voters in Idaho, Nebraska, Utah, Missouri, Mississippi, and Oklahoma pursued ballot measures expanding Medicaid in the face of state government opposition or inaction.[159] Voters in South Dakota have submitted an initiative for the upcoming 2022 election.[160] Only in Montana did voters reject Medicaid expansion at referendum.[161]

Medicaid is just one of many recent examples where voters used the initiative to bypass state government and better align policies with popular statewide preferences. In the most extensive study of state constitutional politics to date, John Dinan has detailed hundreds of initiatives proposed because of perceived misalignment between state government and voters on discrete policy issues.[162] These have included environmental regulation, anti-discrimination norms, limits on executive power, public finance, local government, and many more. Quantitative studies and theoretical political science literature also suggest that the initiative is used (and can be effective prophylactically) to address misalignment between state government policy and popular preferences.[163] In short, voters use the initiative to respond to

157. *See* Phillip M. Singer & Daniel B. Nelson, *Expansion by Ballot Initiative: Challenges and Future Directions in Health Policy*, 34 J. GEN. INTERN. MED. 1913 (2019).

158. *See id*. Republican Governor Paul LePage in Maine vetoed Medicaid expansion several times before the initiative was approved. *See* Patty Wight, *After Maine Voters Approve Medicaid Expansion, Governor Raises Objections*, NPR (Nov. 8, 2017), https://www.npr.org/sections/health-shots/2017/11/08/562758848/after-maine-voters-approve-medicaid-expansion-governor-raises-objections [https://perma.cc/3G54-EJG6].

159. For a summary of the status and history of Medicaid Expansion in the states, see *Where the States Stand on Medicaid Expansion*, ADVISORY BOARD (Oct. 8, 2020), https://www.advisory.com/en/daily-briefing/resources/primers/medicaidmap [https://perma.cc/JP3W-SVU5].

160. *See* Phil Galewitz, *South Dakota Voters to Decide Medicaid Expansion*, KAISER HEALTH NEWS, (Jan. 6, 2022), https://khn.org/news/article/south-dakota-medicaid-expansion-ballot-initiative/ [https://perma.cc/9MH6-7TDK].

161. And the reason was likely because of an unusual funding source in the plan. *See* Erin Brantley & Sara Rosenbaum, *Ballot Initiatives Have Brought Medicaid Eligibility To Many But Cannot Solve The Coverage Gap*, HEALTH AFFAIRS (Jun. 23, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210617.992286/full/ [https://perma.cc/FJ9R-EWZD] ("[Failing was] likely a result of the controversial nature of the funding source (a tobacco tax increase.").

162. *See generally* Dinan, *supra* note 24.

163. *See, e.g.*, John G. Matsusaka, *Popular Control of Public Policy: A Qualitative Approach*, 5 Q. J. POL. SCI. 133 (2010) (analyzing ten policy issues in state government and finding that the presence of direct democracy devices increases policy congruence between preferences of median voters and state government); Lucas Leeman & Fabio Wasserfallen, *The Democratic Effect of Direct Democracy*, 110 AM. POL. SCI. REV. 750 (2016) (theorizing that direct democracy is more effective in aligning policy with popular preferences when deviation between elite prefer-

perceived misalignment between state policies and popular preferences.

C. The Countermeasure Playbook

But this is just the beginning of the story. In general, state officials do not like to be undone by the initiative. Party-loyalist governors want to retain favor with donors and party bosses by developing a strong record on party platforms. Likewise, manufactured majorities in state legislatures want to retain control over lawmaking to further their agendas and satisfy district constituents. The result is that state officials have developed a series of sophisticated tactics for evading, undermining, and invalidating disfavored initiatives. Here, I focus on cataloguing and describing five especially common tactics and phenomena that characterize constitutional politics in initiative states. In the following Part, I show how these factors can combine with the single-subject rule to undermine the initiative.

1. Implementation Sabotage

Perhaps the most common and potent tactic for state officials unhappy with an initiative is to undermine its implementation without formally repealing or amending it. Although initiatives can include very clear policy adjustments and directives, they often are not self-executing.[164] They can be dependent on state government for implementation in a variety of ways, which can provide state government with opportunities to sabotage the initiative's effectiveness. And, if done tactfully, state government can undermine the initiative while evading meaningful popular backlash. State governments have developed a few strategies in this regard.

Failing to fund policies and programs adopted by initiative is a common tactic. Missouri's experience with stem cell research is a good

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ences and popular preferences is great; further finding empirical support for this thesis in the policies and politics of Swiss Cantons); Caroline J. Tolbert, *Direct Democracy and Institutional Realignment in the American States*, 118 POL. SC. Q. 467 (2003); Lucas Leemann, *Political Conflict and Direct Democracy: Explaining Initiative Use 1920-2011*, 21 SWISS POL. SCI. REV. 596 (2015); Daniel C. Lewis, Saundra K. Schneider & William G. Jacoby, *The Impact of Direct Democracy on State Spending Priorities*, 40 ELECTORAL STUD. 531 (2015).

164. A good example are initiatives authorizing state legislatures to establish lotteries. *See* Dinan, *supra* note 24, at 227 (noting Arkansas's 2008 amendment which eliminated a prohibition on lotteries and included a clause stating: "The General Assembly may enact laws to establish, operate, and regulate State lotteries."). The right to hunt and fish is another example. These provisions sometime embrace state regulation, which ensures a level of discretion for officials and the possibility of implementation sabotage. *See id*. at 105; Jeff O. Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 57 TENN. L. REV. 58 (2009).

example. In 2006, in response to legislative opposition to stem cell research, voters adopted an initiative that authorized it.[165] In response, state government took a variety of steps to stymie the initiative, including the withdrawal of $85 million previously awarded to the University of Missouri for the construction of a new research facility.[166] This action, along with others, shook investor confidence in Missouri as a stable jurisdiction for investing in stem cell research, causing industry to look elsewhere.[167]

Medicaid expansion provides another example. Several initiatives expanding Medicaid fail to include a specific funding mechanism for the state's share of the expansion.[168] In Missouri, the Republican-controlled legislature refused to fund Medicaid expansion, and the governor has refused to implement it without dedicated funding.[169] Thus, because the initiative deferred funding decisions to state government, the legislature and governor were able to impede the initiative by withholding funding.

Another strategy is for state government to withhold necessary oversight or implementation. Some initiatives require state agencies and departments to adopt regulations, implement programming, or provide oversight for their implementation. In those cases, governors, legislatures, and other state officials can sabotage initiatives by failing to provide the bureaucracy necessary to implement the initiative or by implementing the initiative in ways that dilute its potency.

Florida's medical marijuana amendment, adopted in 2016, provides a good example. The amendment legalized "the medical use of marijuana by a qualifying patient or caregiver."[170] The amendment was approved by more than 71% of voters, and, at more than 1,200 words, it was rather detailed.[171] However, Governor Rick Scott and the legislature opposed the initiative and took steps to undermine it.[172] Most notably, they passed "enabling" legislation that included a provision banning the smoking of marijuana for medical purposes on

165. Dinan, *supra* note 24, at 245; *see also* MO. CONST. art. III § 38(d).

166. *See* Monica Davey, *Stem Cell Amendment Changes Little in Missouri*, N.Y. TIMES (Aug. 10, 2007), https://www.nytimes.com/2007/08/10/us/10stemcell.html [https://perma.cc/H2BY-DB2M]. This occurred despite the fact that the amendment prohibits the state from withholding funds to undermine stem cell research.

167. *See id.*

168. Singer & Nelson, *supra* note 157, at 1914.

169. *See* Phil McCausland, *Missouri Governor Won't Fund Medicaid Expansion, Flouting State Constitution and Voters*, NBC NEWS (May 13, 2021), https://www.nbcnews.com/politics/politics-news/missouri-governor-won-t-fund-medicaid-expansion-flouting-state-constitution-n1267265 [https://perma.cc/U5UG-D46V].

170. FLA. CONST. art. X, § 29(a)(1).

171. It defined key terms and created clear mandates for the Department of Health and the legislature to faithfully implement legalization of medical marijuana.

172. *See* Editorial, *Rick Scott's Fight Against Smoking Medical Marijuana Could Affect Next Presidential Race*, S. FLA. SUN SENTINEL (Jun. 27, 2018), https://

the theory that the initiative did not require legalization of all methods of use.[173] The same legislation also placed significant hurdles in the way of doctors seeking to prescribe marijuana, including a requirement that they take a two-hour, five-hundred dollar course before lawfully prescribing marijuana.[174] As a result of these measures, and others, medical marijuana was significantly delayed in Florida and there were several lawsuits claiming that implementation by state government was inadequate and violated the initiative.[175]

State implementation of Victims' Rights Amendments provides another example. Beginning in the 1980s, votes in various states approved initiatives that constitutionalized the rights of crime victims "to be informed about and participate in legal proceedings."[176] These initiatives grew from concerns about how state government officials, especially prosecutors and law enforcement officers, treat victims during criminal investigations and prosecutions.[177] The amendments were intended to correct the behavior of these officials by constitutionalizing protections for crime victims, including a right to advanced notification of certain critical proceedings and limited participation rights.[178] However, in many states where these initiatives were adopted, prosecutors and law enforcement failed to implement necessary protocols, training, or bureaucracy to effectuate these guaran-

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www.sun-sentinel.com/opinion/fl-op-editorial-scott-marijuana-opposition-20180626-story.html [https://perma.cc/7UXC-3DC2].

173. The legislation legalized the medical use of marijuana as a pill, oil, edible or vape. The prohibition on smoking was ultimately repealed by the legislature in 2019. *See* S.B. 182, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/00182/?Tab=BillText [https://perma.cc/BLT5-7YSA].

174. Other forms of implementation sabotage included long delays by the department of health in issuing "medical I.D." cards required for patients to obtain medical marijuana. *See* Justine Griffin, *Smoking Medical Pot is no Longer Illegal in Florida. But How Soon Can Patients Buy It?*, TAMPA BAY TIMES (Mar. 20, 2019), https://www.tampabay.com/health/smoking-medical-pot-is-no-longer-illegal-in-florida-but-how-soon-can-patients-buy-it-20190321/ [https://perma.cc/VZX5-FQC4]. Another tactic was a requirement that licensed distributors incorporate vertical integration—"a business strategy where the same company is required to grow, process and sell the product." *See* Fla. Dep't of Health v. Florigrown, LLC, 317 So. 3d 1101 (Fla. 2021) (upholding vertical integration).

175. *See Florida Supreme Court Overturns Rulings on Medical Marijuana*, FLA. POL. REV. (June 16, 2021), http://www.floridapoliticalreview.com/florida-supreme-court-overturns-rulings-on-medical-marijuana/ [https://perma.cc/ZX5Z-JDDS]. Maine's legislature took a similar approach to an initiative statute legalizing recreational marijuana. *See* Elaine S. Povich, *Lawmakers Strike Back Against Voter-Approved Ballot Measures*, PEW (July 28, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/07/28/lawmakers-strike-back-against-voter-approved-ballot-measures [https://perma.cc/58BN-Q25R].

176. *See* Dinan, *supra* note 24, at 99.

177. *See id*.

178. *See id*.

tees.[179] State legislatures likewise failed to enact or fund necessary reforms.[180] Thus, one commentator concluded that "victims' rights largely remain 'paper promises'" because of failed implementation by state government.[181]

Finally, state government can sabotage an initiative by choosing to ignore it outright. In Maine, for example, voters approved an initiative expanding Medicaid in 2017 and the Maine Supreme Court later held that the initiative required state government to submit an expansion plan to the federal Department of Health and Human Services.[182] However, days after voters approved the initiative, Governor Paul LePage had issued a statement declaring that he would "not implement Medicaid expansion until it has been fully funded by the Legislature at the levels DHHS has calculated, and [he would] not support increasing taxes on Maine families, raiding the rainy day fund or reducing services to our elderly or disabled."[183] As a result of the Governor's brinkmanship, Medicaid was not expanded in Maine until 2019 when LePage left office and Governor Janet Mills chose to honor the 2017 initiative.[184]

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179. *See* U.S. DEP'T JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 4 (1998) ("Many victims' rights laws are not being implemented, and most states still have not enacted fundamental reform such as consultation by persecutors with victims prior to plea agreements.").

180. *Id*. at 4.

181. *See id*.; *see also* BEATTY, D., S. HOWLEY, AND D. KILPATRICK, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS, SUB-REPORT: CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS, (1997) (providing data showing that victims' rights are no implemented as of 1997).

182. *See* Me. Equal Just. Partners v. Comm'r, 193 A.3d 796 (Me. 2018); *see also Maine Supreme Court Orders Medicaid Expansion to go Forward*, MODERN HEALTHCARE (Aug. 23, 2018), https://www.modernhealthcare.com/article/20180823/NEWS/180829946/maine-supreme-court-orders-medicaid-expansion-to-go-forward [https://perma.cc/UT5F-8NX3] (detailing the court's holding).

183. *See* Statement of Governor Paul R. LePage (Nov. 8, 2017), https://www.maine.gov/tools/whatsnew/index.php?topic=gov+News&id=771214&v=article2011 [https://perma.cc/W4LN-JG5N].

184. The Maine Supreme Court did find that LePage was in violation of the amendment, but he continued to deploy effective sabotage tactics. Although he complied with the court's order by submitting an expansion plan to the federal Department of Health and Human Services, he also sent a letter to that department asking them to reject the plan. *See* Rachana Pradhan, *Maine Governor Sued for Defying Medicaid Expansion Ballot Measure*, POLITICO (May 30, 2018), https://www.politico.com/story/2018/04/30/lepage-sued-medicaid-expansion-ballot-measure-559952 [https://perma.cc/C9UZ-VDHF]; *see also* Sarah Holder, *Where it's Legal to Reverse the Vote of the People*, BLOOMBERG (Oct. 12, 2018), https://www.bloomberg.com/news/articles/2018-10-12/where-the-people-s-vote-can-be-negated-by-legislators [https://perma.cc/LE4C-QYAG] (detailing strategies used by politicians to defeat or alter citizen-initiated ballot measures).

2. Collateral Attacks

Even if an initiative is relatively self-enforcing, and as a result, largely immune from implementation sabotage by state government, state government can adopt independent policies and practices that collide with an initiative and undermine its potency. Here, the core strategy is to leverage other institutions of state government to counteract the initiative.

A prime example is how Florida's government responded to the felon voting rights amendment approved by 65% of voters in 2018.[185] The amendment was short, direct, and by most accounts self-executing.[186] It changed article VI, section 4 of the Florida Constitution to mandated that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."[187] Nevertheless, the incumbent Florida legislature and governor separately adopted a law that required convicted felons to pay all outstanding restitution, costs, fees, or fines before regaining the right to vote.[188] In this way, state government was able to deeply undermine the potency of the initiative. Indeed, by some estimates, the legislation reduced the number of re-enfranchised voters by 80%.[189]

185. *See generally* Veronica Stracqualursi & Caroline Kelly, *Florida House Passes Bill That Makes It Harder for Ex-felons to Vote*, CNN (May 3, 2019), https://www.cnn.com/2019/05/03/politics/florida-house-vote-amendment-4-felons-voting-rights/index.html [https://perma.cc/T28E-9388].

186. *See* Jones v. DeSantis, 462 F. Supp. 3d 1196, 1206 (N.D. Fla. 2020) (court referring to law as self-executing); *see also* George Bennett, *DeSantis to Act Quickly on Water, Supreme Court, Broward Sheriff*, PALM BEACH POST (Dec. 12, 2018), https://www.palmbeachpost.com/story/news/politics/2018/12/12/exclusive-desantis-to-act-quickly-on-water-supreme-court-broward-sheriff/6658926007/ [https://perma.cc/8UAL-K7ST] ("Amendment 4, approved by 64.6 percent of Florida voters to restore voting rights to most felons who have completed their sentences, should not take effect until 'implementing language' is approved by the Legislature and signed by him, DeSantis said."); Carolina Bolado, *11th Circ. Sides With Fla. In Felon Voting Rights Dispute*, LAW360 (Sept. 11, 2020), https://www.law360.com/publicpolicy/articles/1309432 [https://perma.cc/QV7E-R7XW].

187. FLA. CONST. art. VI, § 4(a). Certain felony convictions were excluded from the restoration of voting rights ("murder or a felony sexual offense.").

188. *See* S.B. 7066, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/7066/ [https://perma.cc/M2W9-6SQW]; *see also* Case Comment, *Eleventh Circuit Upholds Statute Limiting Constitutional Amendment on Felon Reenfranchisement*, 134 HARV. L. REV. 2291, 2292 (2021) (connecting the voter initiative to S.B. 7066); Advisory Op. to the Governor re Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1072, 1084 (Fla. 2020) (per curiam).

189. *See* Case Comment, *supra* note 188 at 2296. Of course, the state had argued that the initiative was never intended to enfranchise all convicted felons who were not complete with parole or their jail sentences, and that the intended effect of the statute captures the intended effect of the initiative.

Michigan's experience with legalizing stem cell research provides another example. In 1998, the Michigan legislature banned stem cell research and remained unwilling to lift the ban notwithstanding growing popular support for repeal.[190] In 2008, voters approved an initiative legalizing stem cell research to the extent "permitted under federal law."[191] However, republicans in the legislature remained opposed to stem cell research, and, in 2010, the Michigan Senate passed legislation that prohibited the sale or purchase of human embryos, imposed burdensome reporting requirements on research facilities conducting stem cell research, and imposed civil and criminal penalties for violating the law.[192] Although the bill was ultimately rejected in the house, it had a chilling effect on research and investment in Michigan and illustrates how state government can dilute initiatives by collateral attack in the form of independent legislation.[193]

3. Direct Repeal

A less subtle strategy is for state government to pursue a direct repeal of an initiative. This tactic is perhaps more common in response to initiative statutes, but it also occurs in response to initiative constitutional amendments. The key idea is that while the initiative provides citizens with a direct pathway to constitutional reform, all state constitutions also provide state legislatures with a separate pathway to constitutional amendment. Moreover, state officials can, and do, use the initiative themselves.[194] Thus, if citizens amend the constitution in a way that state government dislikes, state government can unleash a counter-amendment.[195] Under the right conditions, direct appeal can be an important tactic for evading initiatives; especially if combined with other countermeasures.

190. *See* Dinan, *supra* note 24, at 245.
191. *See id*. at 245 n.50.
192. *See* Nisha Satkunarajah, *Michigan Senate Passes Stem Cell Regulation Bill*, BIONEWS (May 4, 2010), https://www.bionews.org.uk/page_92310 [https://perma.cc/B5FZ-HQTT].
193. *See Uncertain Funding, Regulatory Changes Slow Embryonic Stem Cell Research Innovation*, STATE & HILL (Dec. 6, 2010), https://fordschool.umich.edu/news/2010/uncertain-funding-regulatory-changes-slow-embryonic-stem-cell-research-innovation [https://perma.cc/W974-E8KC].
194. *See* Seifter *supra* note 115, at 529 ("[G]overnors now regularly use the initiative to their own advantage . . . ").
195. Counter amendments can be complete repeals or partial repeals. *See, e.g.*, *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_2,_$15_Minimum_Wage_Initiative_(2020) [https://perma.cc/SE87-GJFG] (last visited Mar. 6, 2022) (referencing pending proposed counter amendment by Florida legislature to reduce minimum wage for prisoners and employees with felony convictions and employees under twenty-one in response to earlier initiative that raised the minimum wage categorically to $15 per hour. The proposal is a legislative referred constitutional amendment—Senate Joint Resolution 854—introduced by Republican Jeff Brandes).

Of course, direct repeal can be a complicated phenomenon to assess. In all states except Delaware, amendments must be ratified by a popular referendum. This means that even counter-amendments must be evaluated by voters directly. Concerns about misalignment between government policy and popular preferences are surely reduced in this context because voters have the final say on whether to repeal or affirm the prior initiative. Some initiatives are no doubt misguided, and voters may appreciate the opportunity to change course. On the other hand, state government is often uniquely situated to influence and control counter-amendments in ways that might pre-determine outcomes.[196] In any event, the initiative's efficacy as an accountability device is surely diluted if it is subject to government-orchestrated revotes whenever the government dislikes the initiative. State government officials often appreciate this, and seek to undo initiatives by pursing direct appeal.

A good example is Florida's 2000 high speed rail amendment.[197] For decades, Floridians had pressured government to construct a high-speed rail system that would connect the state's major metropolitan areas.[198] By 2000, there had been multiple legislative commissions, reports, investigations, and failed statutes.[199] The final straw in public sentiment appears to have been a conservative and incremental plan developed by the Florida Department of Transportation that would have extended ordinary rail service across the state over three, multi-year phases.[200] As a result of this plan, frustrated citizens took to the initiative and proposed a constitutional amendment that would require the government to create a high-speed rail system by a date certain.[201] The amendment was ratified by voters, and it required construction to begin by "November 1, 2003" on a "high speed ground transportation system . . . capable of speeds in excess of 120 miles per hour" and connecting "the five largest urban areas of the

196. I illustrate this below in the context of the Florida high-speed rail amendment. There, the governor was accused of using a financial impact committee to make the high-speed rail project "as politically un-charming as possible" so that voters would approve the repeal amendment. *See* Jack Lyne, *Derailed: Florida Amendment for $25B Bullet Train Bites Dust in Vote*, SITE SELECTION MAG. (Nov. 8, 2004), https://siteselection.com/ssinsider/snapshot/sf041108.htm [https://perma.cc/4MEQ-SMSC].

197. I've written about this amendment elsewhere. See Jonathan L. Marshfield, *supra* note 34, at 365–68 for context, and I draw on some of that account here.

198. *See* ALLISON L. C. DE CERRENO ET AL., HIGH SPEED RAIL PROJECTS IN THE UNITED STATES: IDENTIFYING ELEMENTS FOR SUCCESS-PART 1, MTI REPORT 05-01, at 29 (2005).

199. *Id*. at 29–30.

200. *See id*. at 37–38.

201. *See id*.

State."[202] The amendment left many details of the project to "the Legislature, the Cabinet and the Governor."[203]

By 2003, state agencies had conducted significant studies and taken various preliminary measures toward constructing the rail system.[204] The legislature had also authorized $14 million to begin the project. However, Governor Jeb Bush became a strong opponent and engaged in implementation sabotage to undermine the initiative.[205] He vetoed $5 million of the legislature's funding or the project[206] and $7.2 million in operating funds for the responsible state agency.[207] These cuts had the effect of voiding contracts with critical private contractors and brought the project to a halt.[208] Nevertheless, the Governor continued to fund the project at minimal levels on account of the clear mandate in the initiative.[209] That changed in 2004, when the Governor formalized his attack by spearheading an amendment to repeal the original initiative.[210] While the repeal campaign was underway, Governor Bush convened a financial impact committee to assess the project's cost.[211] Not surprisingly, the committee arrived at a shockingly large estimate: $40 to 51 billion.[212] Although that number was later reduced, and even rejected by the Florida Supreme Court,

202. *See id*. at 38–39 (reprinting amendment).
203. *See id*. The amendment was subsequently repealed by another initiative in 2004. *See* FL. CONST. art. X, § 19.
204. *See* DE CERRENO ET AL., *supra* note 198, at 38–44 (providing detailed history of agency and legislative action after the amendment).
205. See Noah Bierman, *Jeb Bush's War Against Florida High-Speed Rail Shows His Governing Style*, L.A. TIMES (May 10, 2015), https://www.latimes.com/nation/politics/la-na-jeb-bush-high-speed-rail-20150510-story.html [https://perma.cc/S6RL-3VQ6] for a summary of various actions taken by Governor Bush.
206. Bush's reasons for opposing the project are unclear. He expressed concerns regarding tax exemptions and problems with rider-revenue projections, but there were also rumors that personality conflicts between Jeb Bush and leadership in support of the project may have played a role in Bush's opposition. *See* DE CERRENO ET AL., *supra* note 198, at 45.
207. *See* [FLA.] HOUSE OF REPRESENTATIVES STAFF ANALYSIS: HB 215, at 5 (Mar. 26, 2004).
208. *See* Bierman, *supra* note 205.
209. *See* John Kennedy, *Governor Derails High-Speed Train*, S. FLA. SUN SENTINEL (Jun. 23, 2003), https://www.sun-sentinel.com/news/fl-xpm-2003-06-24-0306230493-story.html [https://perma.cc/3QXC-ESY2] (noting that governor complied with letter but not spirt of the initiative).
210. Interestingly, the state legislature rejected the governor's request that it propose a constitutional amendment repealing the initiative. The main concern was that voters would view the proposal as a direct affront to their declared preferences. This forced the governor to take to the initiative himself.
211. *See* Jack Lyne, *Derailed: Florida Amendment for $25B Bullet Train Bites Dust in Vote*, SITE SELECTION MAG. (Nov. 8, 2004), https://siteselection.com/ssinsider/snapshot/sf041108.htm [https://perma.cc/4MEQ-SMSC].
212. *See* Advisory Op. to the Att'y Gen. re Repeal of High Speed Rail Amend., 880 So. 2d 628 (Fla. 2004); *see also* Lyne, *supra* note 211 ("the Florida Supreme Court sent it back to the panel. Court justices said that the group shouldn't have

the high cost of the project became the tagline for the Governor's successful repeal campaign.[213]

4. Judicial Review

Courts, especially state courts, provide state government with another avenue for challenging or limiting initiatives. Unlike federal courts, which have avoided oversight of the federal amendment process under the political question doctrine,[214] state courts universally review and enforce amendment rules, including rules regulating the initiative.[215] In theory, when a court reviews an initiative, it ostensibly operates as a neutral arbiter and expositor of initiative rules.[216] State courts perform this role to promote the rule of law and ensure that citizens and government abide by the constitution. Thus, at least in theory, judicial review does not give state government an inherent advantage in evading initiatives.[217] There are, however, several practical considerations that can tilt the process in the government's favor and incentivize misaligned state government to pursue judicial review of initiative amendments. This in turn creates extra risk than an initiative will be undermined and increases the cost of pursuing initiatives.

First, state statutes and judicial doctrine afford generous standing to parties opposing an initiative.[218] In most initiative states, any citizen or voter can sue, usually by writ of mandamus, to challenge the certification of an initiative for the ballot.[219] Although some courts require petitioners to show injury, most state courts hold that all voters and taxpayers have a cognizable injury in unlawful initiatives.[220] As a result, misaligned state governments (and their donors and political parties) are often involved in challenging unwanted initiatives. In-

used the verb could. And they also ruled that the group overstepped its bounds by including the by-household cost breakdown.").

213. *See* Lyne, *supra* note 211. When the initiative was first ratified, law did not require an economic assessment for the initiative. Thus, Bush argued that voters approved the initiative without key information, and that the re-vote was appropriate because reliable economic impact information was now available and required for initiatives. This may very well be true. My point here is not that this particular initiative repeal was done to entrench misalignment but that it illustrates how that tactic can be deployed by state government.

214. *See* Coleman v. Miller, 307 U.S. 433 (1939) (applying political question doctrine to certain Article V disputes).

215. *See* Williams, *supra* note 154, at 401–09.

216. *See generally* Scott Kafker & David Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After Hollingsworth v. Perry*, 71 WASH. & LEE L. REV. 229, 259 (2014).

217. *See id*.

218. *See id*. at 259.

219. *See id*. at 259 n.157.

220. *See id*. at 260.

deed, it is not uncommon for state officials to bring challenges to initiatives.[221] In a recent example, the Governor of South Dakota directed state officials challenge a marijuana initiative after it was ratified by 54% of voters.[222] The Governor was an outspoken opponent of the initiative, and she ultimately prevailed when the Supreme Court of South Dakota found that she had standing to sue and that the initiative was invalid.[223]

Second, unlike federal courts, which are constitutionally prohibited from rendering advisory opinions, many state supreme courts are authorized to answer certified questions from state government officials. This provides state officials with a powerful tool for undermining or testing disfavored initiatives. For example, in 2019, Florida citizens gathered signatures in support of a constitutional amendment to legalize recreational marijuana.[224] After gathering sufficient signatures to qualify the initiative for the ballot, the Florida Attorney General Ashley Moody—an outspoken opponent of marijuana legalization—petitioned the Florida Supreme Court for an advisory opinion on whether the initiative satisfied the legal requirements of a clear ballot title and summary.[225] The Court held that the title and ballot summary were unclear, which effectively ended the initiative campaign

221. *See, e.g.*, Fann v. State, 493 P.3d 246 (Ariz. 2021) (lawsuit brought by Senate President and other lawmakers challenging initiative); *see also* Laura Gómez, *Despite Court Ruling, Education Advocates Say Prop. 208 Can Have a Long Life*, ARIZ. MIRROR (Aug. 26, 2021), https://www.azmirror.com/2021/08/26/despite-court-ruling-education-advocates-say-prop-208-can-have-a-long-life/ [https://perma.cc/G8AP-8SNR] (noting that lawsuit was a reflection of the fact that "the majority of Arizona voters and the legislature seems to be "'in a war, in a battle" over educating financing.).

222. Order from Kristi Noem, Governor of South Dakota, Executive Order 2021-02: Ratification of Amendment A Litigation (Jan. 8, 2021), https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.PDF [https://perma.cc/B58V-77SB] ("I directed Colonel Rick Miller to commence the Amendment A Litigation on my behalf in his official capacity.").

223. *See* Thom v. Barnett, 967 N.W.2d 261 (S.D. 2021).

224. Jeffrey Schweers, *Florida Supreme Court Strike Proposed Measure Legalizing Recreational Use of Marijuana*, TALLAHASSEE DEMOCRAT (Apr. 22, 2021), https://www.tallahassee.com/story/news/local/state/2021/04/22/florida-supreme-court-strikes-down-adult-use-marijuana-proposal/7335039002/ [https://perma.cc/M7YY-Y6KK].

225. *See id*. (providing that the Attorney General petitioned the court a month after signatures); *In re* Advisory Op. to the Att'y Gen., 315 So. 3d 1176 (Fla 2021). On Attorney General's opposition to marijuana see, Jim Saunders, *Legalize Marijuana Supporters Fire Back at Florida AG Ashley Moody's Objections*, S. FLA. SUN SENTINEL (Jan. 21, 2020), https://www.sun-sentinel.com/news/politics/os-ne-recreational-marijuana-supporters-fire-back-20200121-5ej32l5cqzbufdvef65qjcho54-story.html [https://perma.cc/B7VX-P8R4]; Jim Saunders, *Attorney General Ashley Moody Says Florida Supreme Court Should Decide Marijuana Amendment Issue,* S. FLA. SUN SENTINEL (Mar. 23, 2020), https://www.sun-sentinel.com/news/politics/fl-ne-nsf-ashley-moody-marijuana-ruling-voters-20200323-mpz42kg755dybb6sanddl7c3se-story.html [https://perma.cc/Q7TG-WTLP]. Under Florida law, the

and prevented a popular referendum on the issue.[226] Florida's Governor pursued a similar tactic regarding the felon voting initiative. The Governor requested a ruling on whether legislation limiting the initiative was constitutional, and the Court issued an advisory opinion upholding the legislation because the language of the initiative was broad enough to accommodate the legislation.

Third, and perhaps most importantly, there is often little direct financial cost to state government and the potential for a windfall gain.[227] Many cases challenging initiatives begin when private parties challenge pre-election decisions by state government regarding certification of an initiative for the ballot. In those instances, state government is obligated to defend the decisions of its officials, which means that it finances (with taxpayer money) the case against the initiative. An attorney general may, for example, refuse to certify an initiative for some procedural violation, causing the initiative's proponents to sue the official for improperly applying initiative rules.[228] That lawsuit triggers the state's obligation to defend the case against the initiative. In those situations, litigation presents a low risk, high reward scenario for misaligned state government. If a court rules against the initiative, state policy remains intact and government has neutralized a threatening initiative. If the court rules in favor of the initiative, taxpayers finance the state's losing case.[229] These dynamics are most common in cases where the state is a defendant, but they can also play out in instances where state officials are plaintiffs.[230]

Attorney General is required to seek opinion from the Supreme Court. *See* Downey, et al., *supra* note 5, at 589–90.

226. *See* Kirby Wilson, *Florida Marijuana Legalization Dealt Blow by Florida Supreme Court*, TAMPA BAY TIMES (Apr. 22, 2021), https://www.tampabay.com/news/florida-politics/2021/04/22/florida-marijuana-legalization-effort-dealt-blow-by-florida-supreme-court/ [https://perma.cc/D7T8-8D42].

227. *See generally* Betsy Z. Russell, *State Asked to Pay $152K for Winning Side's Fees, After Losing Initiatives Lawsuit*, IDAHO PRESS (Sept. 6, 2021), https://www.ktvb.com/article/news/politics/elections/state-initiatives-lawsuit-fee-idaho-press/277-9634c2ca-50a0-489b-9b4f-75f843561e2f [https://perma.cc/J398-N7EX] (legislature unlawfully limited initiative then hired outside firm and attorney general to defend law against attack).

228. *See e.g.*, David Ramsey, *Attorney General Rutledge Rejects Full Marijuana Legalization Ballot Initiative*, ARK. TIMES (Apr. 24, 2018) https://arktimes.com/arkansas-blog/2018/04/24/attorney-general-rutledge-rejects-full-marijuana-legalization-ballot-initiative [https://perma.cc/E4YA-CKTJ].

229. There are, of course, political consequences to frivolously rejecting initiatives.

230. Stephen Groves, *Pot Advocates Cry Foul on Noem Using State Funds for Lawsuit*, A.P. NEWS (Mar. 5, 2021), https://apnews.com/article/constitutions-lawsuits-marijuana-kristi-noem-courts-68002b0c64417a4c92be4a558051c58d [https://perma.cc/MQX4-YDHE] (describing how South Dakota governor sued after initiative was ratified and financed litigation through taxpayer money).

5. Reform of the Initiative Itself

State governments may also seek to undermine and evade initiatives by making the initiative process more difficult and costly to use.[231] This tactic can work to undermine the initiative in at least two ways. First, state government may use this tactic preemptively to reduce the number of initiatives going forward.[232] This would, in general, make it more difficult for citizens to correct government policy and empower state government with greater policy independence.[233] Second, state government may combine this tactic with other countermeasures as part of a multifaceted effort to evade a particular initiative and maintain control over that policy issue. For example, a state may pass legislation that undermines an initiative, obtain a ruling from a state court upholding that legislation, and then change the initiative process so that a responsive initiative is much more difficult. In this way, state government can entrench its power over a particular policy issue.

Florida's experience with the felon voting initiative illustrates this. As noted above, voters approved an initiative amendment in November 2018 that re-enfranchised felons who had completed their "terms of sentence." In June 2019, the governor signed legislation that defined "terms of sentence" to include various court costs, fees, and restitution.[234] That legislation significantly reduced the number of felons who would qualify for re-enfranchisement under the initiative. Nevertheless, in an advisory opinion requested by the Governor, the Florida Supreme Court upheld the legislation. Importantly, in June 2019, the same month that the Governor signed the felon-voting rights legislation, he also signed legislation that made the initiative process signifi-

231. See John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives*, 101 NEB. L. REV. 40 (2022).

232. This might include initiatives that are currently being circulated by citizens. *See, e.g.*, H.B. 5, 2019 Leg., Reg. Sess. (Fla. 2019) which affected efforts underway to qualify initiatives for minimum wage, etc., for 2020 ballot. *See* Lloyd Dunkelberger, *If You're Collecting Signatures for a 2020 Florida Ballot Campaign, You're Probably Nervous Right Now*, FLA. PHOENIX (Jun. 5, 2019), https://floridaphoenix.com/2019/06/05/if-youre-collecting-signatures-for-a-2020-florida-ballot-campaign-youre-probably-nervous-right-now/ [https://perma.cc/58SH-Y3LG].

233. *See* Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES, https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html [https://perma.cc/6XX2-WU5U] (quoting ACLU lawyers as saying: "With every successful initiative or every big effort that the Legislature doesn't approve of, there is a new law to make it more costly, more burdensome, to propose an initiative."); *id*. (describing South Dakota attempt to raise ratification threshold from 50% to 60% in advance of anticipated referendum on Medicaid expansion).

234. *See* FLA. STAT. § 98.0751 (2021).

cantly more difficult.[235] House Bill 5 imposed various new restrictions and requirements on the initiative that were explicitly intended to make it more difficult to qualify an initiative for the ballot.[236] As a result, state government significant limited the original felon voting rights initiative and has now further insulated its policies from subsequent initiatives.

Initiatives in South Dakota regarding marijuana and Medicaid expansion provide further examples. In 2020, voters approved an initiative amendment that legalized marijuana over opposition from Republican Governor Kristi Noem.[237] After the referendum, Governor Noem issued an executive order directing state officials to challenge the amendment in court.[238] In November 2021, the South Dakota Supreme Court invalidated the amendment as offending the state constitution's single-subject rule.[239] During this time, citizens were separately gathering signatures for an initiative to expand Medicaid, another policy opposed by Governor Noem and Republican legislators.

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235. *See* H.B. 5, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/00005/?Tab=BillText [https://perma.cc/77SV-DXBQ]; *see also* Jim Saunders, *Gov. DeSantis Signs HB5, 'Eviscerating' the Democratic Process in Florida*, ORLANDO WEEKLY (Jun. 9, 2019), https://www.orlandoweekly.com/Blogs/archives/2019/06/09/gov-desantis-signs-hb5-eviscerating-the-democratic-process-in-florida [https://perma.cc/A3GV-CLH4] (explaining how H.B. 5 made the process more difficult).

236. Indeed, it appears that the law effectively ended an ongoing initiative campaign to expand Medicaid. *See* Alexandria Glorioso, *Medicaid Expansion Won't Be on 2020 Ballot*, POLITICO (Aug. 8, 2019), https://www.politico.com/states/florida/story/2019/08/08/medicaid-expansion-wont-be-on-2020-ballot-1136863 [https://perma.cc/PKG9-N2FP] (attributing the initiative's failure to qualify for the ballot to H.B. 5); *see also* Jim Saunders, *DeSantis Signs Controversial Law Adding Restrictions On Ballot Initiative Petitions*, WJCT NEWS (Jun. 10, 2019), https://news.wjct.org/first-coast/2019-06-10/desantis-signs-controversial-law-adding-restrictions-on-ballot-initiative-petitions [https://perma.cc/X4H6-ATZ2]; Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES, https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html [https://perma.cc/Q35J-2XME] (referring to H.B. 5 and other recent changes to the initiative process: "Recently, the Legislature cut in half the time period in which signatures must be submitted before they expire; banned the practice of paying signature collectors on a per-signature basis; required those gathering signatures to use a separate piece of paper for each signature; and required every signature to be verified, banning a much cheaper 'random sampling' process.").

237. *See* A.J. Herrington, *Marijuana Next Target of GOP Bids to Overturn Elections*, FORBES (Jan. 11, 2021), https://www.forbes.com/sites/ajherrington/2021/01/11/marijuana-next-target-of-gop-bids-to-overturn-elections/?sh=1b015ef41790 [https://perma.cc/HMN5-9DZR].

238. *See* Order from Kristi Noem, Governor of South Dakota, Executive Order 2021-02: Ratification of Amendment A Litigation (Jan. 8, 2021), https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.PDF [https://perma.cc/XZW6-6VC2]; Herrington, *supra* note 237 (explaining executive order).

239. *See* Thom v. Barnett, 967 N.W.2d 261 (S.D. 2021).

That initiative qualified for the November 2022 ballot. However, when it became clear that the Medicaid initiative would qualify, the state legislature introduced a resolution raising the threshold for initiative amendments from 50%-plus-one to 60%.[240] If that resolution is approved by primary voters in June 2022, it would make Medicaid expansion and marijuana reform more difficult and further entrench state government policy from voters.

IV. TODAY'S SINGLE-SUBJECT RULE PROBLEM

It is within this environment of misalignment and countermeasures that initiative sponsors now operate. On one hand, the initiative is especially relevant and popular today because of incongruence between majority preferences and government policy. On the other hand, the initiative can be hard to execute successfully because sponsors must anticipate and navigate likely countermeasures. The result is that initiative sponsors are often under pressure to expand the scope and detail of initiatives to neutralize anticipated countermeasures, which makes it more likely that the initiative will violate the single-subject rule. In this section, I develop and support these two claims.

A. Anticipating Countermeasures

When initiative sponsors set out to draft an initiative, they must now account for how state government may work to undermine it. This exercise will often put pressure on sponsors to enlarge the initiative's scope and detail to minimize state government discretion and thereby limit evasive tactics.

Consider, for example, an initiative amendment designed to undo legislation that allows retailers to sell handguns without first doing background checks. If that initiative is short and general (e.g., "No firearm shall be sold and delivered to a purchaser until after the seller receives a background check approving the transfer"), it is susceptible to various forms implementation sabotage by hostile state government. State government could adopt legislation defining "background check" to include only nominal review. It might carve out firearm

240. Legislators were very clear that the change was directed at defeating the Medicaid amendment. In fact, the legislature moved the referenda for the threshold change from the November 2022 election to the June 2022 primaries to ensure that the Medicaid amendment would be subject to the higher threshold. *See* Cory A. Heidelberger, *Dakotans for Health Suing to Refer HJR 5003 Primary Vote to a General Election Vote*, DAKOTA FREE PRESS (Mar. 22, 2021), https://dakotafreepress.com/2021/03/22/dakotans-for-health-suing-to-refer-hjr-5003-primary-vote-to-a-general-election-vote/ [https://perma.cc/XR2L-5H73]; Epstein & Corasaniti, *supra* note 233 ("State Senator Lee Schoenbeck, a Republican, said in March that he specifically wanted to block Medicaid expansion.").

"swaps" or "trade-ins" from the definition of "transfer." It might adopt legislation that imposes only nominal penalties for violations. It might fail to appoint an agency or officer to monitor and enforce compliance or fatally underfund a designated agency. The legislature might also launch a collateral attack by adopting "privacy" legislation that prohibits the gathering and dissemination of certain types of personal information, thus gutting the value of background checks. Moreover, state government might delay implementation of the initiative until legislators and the governor can negotiate solutions on all these issues. And if those negotiations fail, state government might try to use the evidence collected during legislative sessions to build a campaign in favor of repeal.[241]

With this in mind, initiative sponsors might look to preempt these tactics in the text of the initiative itself.[242] They could provide rules or guidelines defining the required background checks. They could create a scheme for investigating and adjudicating violations. They could create an agency to administer the background checks or designate an existing agency. They might also declare the initiative to be self-enforcing and attempt to insulate it from further legislative tinkering by setting a higher threshold for subsequently legislative amendments. Finally, they might anticipate judicial review of the initiative and add a severability scheme. While these additions would surely limit the tactics available to evasive state government actors, they would also expand the scope and detail of the initiative's text.

This sort of scenario might seem far-fetched, but it happens. In Florida, for example, it is now commonplace for initiatives to include explicit language declaring that "the provisions of this section are self-implementing and are immediately in effect upon adoption."[243] Other initiatives have relied on legislative implementation but set specific dates for adoption of the legislation and dictated terms and policies.[244] In California, initiative amendments anticipate judicial review and in-

241. There are, of course, myriad other ways that state government might work to undermine such a general initiative.

242. *See, e.g.*, *Firearm Purchase Background Check*, FLA. DIV. OF ELECTIONS, https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_1903_EN.pdf [https://perma.cc/DT26-T3VY] (requiring background checks but also defining "transfer," "background check," establishing specific penalties for violations, and declaring that the initiative "is self-executing, and no legislative implementation is required.").

243. *See also Oklahoma State Question 793, Right of Optometrists and Opticians to Practice in a Retail Mercantile Establishment*, OKLA. SEC'Y OF ST., https://www.sos.ok.gov/documents/questions/793.pdf [https://perma.cc/A3G4-QZFD] ("This section shall become effective upon adoption, and laws in conflict with this section shall be deemed null and void.").

244. *See, e.g.*, *Firearm Purchase Background Check*, *supra* note 242.

clude severability language stating that "any provision held invalid shall be severable from the remaining portions of this section."[245]

Other initiatives anticipate particular implementation problems or collateral attacks. A 1999 California initiative sought to increase funding for public education. To do this, the initiative imposed a new sales tax and directed revenue from that tax into a new agency that it created and defined. The initiative detailed how the agency was to appropriate the revenue, and in anticipation of legislative interference, also stated that the state legislature "shall have no power to transfer or control any funding created by this tax measure."[246] A 2017 Oklahoma initiative amendment sought to undo legislation prohibiting optometrists and opticians from practicing in a retail mercantile establishment.[247] In addition to a general provision legalizing optical care within retail stores, the initiative also anticipated particular collateral attacks and implementation sabotage. It went on to say that "no law shall require an optometric office located within a retail mercantile establishment to have an entrance opening on a public street" and that no law may prohibit optometric offices from selling "optical goods."[248] The initiative also included detailed definitions of key terms and a list of permissible legislation.[249]

Other examples abound, but the 2016 medical marijuana amendment in Arkansas is especially illustrative. The amendment was the result of long-standing efforts to legalize medical marijuana in the face of widespread opposition from state government.[250] In 2016, when it was ratified by 53% of voters, at least three different state officials or departments publicly opposed the initiative, including the governor, the Republican caucus that controlled the legislature, and the state Department of Health. Within this context, the initiative's author and chief sponsor, David Couch, was highly strategic in his drafting of the initiative.[251] Indeed, he operated against the backdrop

245. *See Civil Rights. Taxes for Higher Education. Initiative Constitutional Amendment*, U.C. HASTINGS SCHOLARSHIP REPOSITORY, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2024&context=ca_ballot_inits [https://perma.cc/7Q6D-BW2M].

246. *Id*.

247. *See Oklahoma State Question 793, Right of Optometrists and Opticians to Practice in a Retail Mercantile Establishment*, *supra* note 243.

248. *Id*.

249. *Id*.

250. Goforth & Goforth, *supra* note 22, at 653 n.29 (noting that governor, health department, and long list of government officials opposed medical marijuana). Moreover, the contemporary movement to legalize medical marijuana in Arkansas began in 2012 with a statewide initiative that was narrowly defeated. In 2014, an initiative measure was again proposed and key proponents withdrew support and focused instead on the 2016 election.

251. *See* Matthew Mershon, *Provision in Medical Marijuana Law Allows Arkansas Communities to Vote Themselves Dry*, KATV (Jan. 13, 2017), https://katv.com/

of state officials and courts having squashed several other medical marijuana initiative attempts.[252] As a result, the initiative was incredibly detailed and broad in scope.

The final amendment was more than 8,500 words, which is longer than the entire United States Constitution with all twenty-seven amendments. The amendment has twenty-three major sections, including a definition section that defines twenty different terms. It has regulation-like detail regarding the permissible cultivation of marijuana plants, requirements for proscribing physicians, conditions for use by patients, a scheme for allowing qualified caregivers to assist patients with obtaining and using marijuana, and rules for dispensaries.[253] In anticipation of implementation sabotage by state government, the amendment imposes specific new mandates on the state Department of Health and the Alcoholic Beverage Control Division, and sets specific deadlines for agency compliance.[254] The amendment also creates a new Medical Marijuana Commission that administer licensing for cultivation and dispensary facilities and requires that the state provide staff and resources for the commission.[255] The amendment also addresses taxation and funding for medical marijuana. It anticipates judicial review of the amendment with a severability provision. Finally, in anticipation of direct repeal, the amendment explicitly excludes certain provisions from amendment by the legislature and requires a supermajority for any legislative changes to remaining sections.[256]

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news/local/provision-in-medical-marijuana-law-allows-arkansas-communities-to-vote-themselves-dry [https://perma.cc/2WVQ-8JNL]; *see also* Olivia Paschal, *How to Change Policy Without Politicians*, THE ATLANTIC (May 18, 2019), https://www.theatlantic.com/politics/archive/2019/05/arkansas-direct-democracy-ballot-measures/589513/ [https://perma.cc/C9S6-W5XE] (describing several initiatives drafted by Couch).

252. *See* Danielle Kloap, *Marijuana Amendment Ballot Wording Rejected*, ARK. DEMOCRAT GAZETTE (May 1, 2015), https://www.arkansasonline.com/news/2015/may/01/rutledge-rejects-title-marijuana-amendment/?page=1 [https://perma.cc/TD8P-2N92]; Brian Fanney, *Some Arkansas Cities Say They Aren't Ready for New Medical Marijuana Laws*, ARK. DEMOCRAT GAZETTE (July 30, 2017), https://www.arkansasonline.com//news/2017/jul/30/local-bans-a-medical-marijuana-snag-201/ [https://perma.cc/G75E-B47W].

253. It is hard to overstate the level of detail contained in the amendment. It seems to have addressed every possible attack from state government and was designed so that state government could not avoid it.

254. *See* ARK. CONST. amend. XCVIII.

255. *See id*. § 19(a)(1).

256. Fears of implementation sabotage by legislation were apparently well founded. In the first session after voters ratified the amendment, the legislature adopted 24 different laws making changes to the amendment. It also considered, but rejected, several other laws that were clearly intended to attack or undermine the initiative. *See New Arkansas Marijuana Laws Include Restrictions, But No Reversal of November Vote*, KATV (Apr. 24, 2017), https://katv.com/news/local/new-arkansas-marijuana-laws-include-restrictions-but-no-reversal-of-november-vote

There have certainly been problems with realizing the Arkansas medical marijuana initiative.[257] Some of those problems stem from the rigidity created by the amendment's detail and scope.[258] Some commentators have understandingly decried the initiative as an example of rushed drafting and the product of voter ignorance regarding complicated policy initiatives.[259] However, the initiative's successes should not be minimized, and its problems must be measured against its achievements. The initiative successfully introduced medical marijuana into a very conservative state against near total state government opposition.[260] To be sure, the initiative may have been suboptimal in legalizing medical marijuana, but it is hard to imagine another approach that would corral state government and force policy change under the conditions in Arkansas. For example, it may have been unwise from the standpoint of public policy and government administration to constitutionalize the number of dispensaries and cultivation facilities.[261] The growth or decline of the market will surely require flexibility in setting those numbers. On the other hand, by deeply entrenching a random but set number of facilities, the amendment reduced government discretion and preempted various countermeasures. It forced the government to move towards licensing facilities to grow and distribute marijuana, which was the initiative's primary goal. The amendment may have been an inefficient instrument for legalizing medical marijuana when compared to well-functioning and supportive representative government, but it was very effective at making medical marijuana a reality in Arkansas in the face of recalcitrant and obstructionist state government.[262]

This trend towards greater detail and broader scope may also be observable by studying the texts of initiatives over time. A full analysis is beyond the scope of this article, but an exploratory analysis of initiatives from Florida seems to confirm the trend. In 1980, the first year for which the Florida Division of Elections provides full-text copies of all initiative proposals, there were nine initiatives with an aver-

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[https://perma.cc/TV6J-FMY3] (describing law that would make the amendment ineffectual until marijuana was legal under federal law).

257. *See generally* Goforth & Goforth, *supra* note 22 (providing critical perspective on amendment and collecting list of perceived problems with implementation); *see also* David Conrads, *Medical Marijuana: in Arkansas, it's a Hit*, ARK. MONEY & POL. (June 16, 2021), https://www.armoneyandpolitics.com/medical-marijuana-in-arkansas-its-a-hit/ [https://perma.cc/EMA2-6JQU] (stating that implementation of the initiative was "beset by legal problems from the start.").

258. *See* Goforth & Goforth, *supra* note 22, at 695.

259. *See id*.

260. *See* Conrads, supra note 257 (summarizing current state of police and industry).

261. *See* Goforth & Goforth, *supra* note 22, at 695.

262. *See* Conrads, supra note 257 (noting that the initiative was slow in getting implemented but "it has exceeded our expectations on a variety of levels.").

age of 135 words.[263] In 2020, there were fifteen initiatives with an average of 161 words—a 20% increase. More tellingly, the median increased from 90 to 183 words—a 103% increase. A similar trend is observable regarding the level of detail in each initiative. There was a 23% increase in the average level of detail from 1980 to 2020.

In short, as policy incongruence grows between state government and popular majorities, initiatives seem to be growing in detail and scope as a way of addressing anticipated countermeasures by state government.

B. The Single-Subject Rule Paradox in Practice

The growth in initiative detail and scope naturally raises the specter of the single-subject rule. As initiative sponsors work to corral evasive state government through detailed and broad initiatives, they increase the risk that the initiative violates the single-subject rule. This is especially true in jurisdictions that strictly apply the rule. In those jurisdictions, initiative sponsors may be forced to choose between diluting an initiative's effectiveness to comply with the single-subject rule or drafting an effective initiative that will likely be declared invalid for addressing too many subjects.[264]

Consider the Florida Supreme Court, which tends to view the rule as a strict prohibition on logrolling.[265] In 1998, the state Attorney General requested an advisory opinion from the Court regarding an initiative amendment designed to protect the "right of every natural person to the free, full and absolute choice in the selection of health care providers."[266] To accomplish this, the amendment specifically prohibited any legislation that might limit choice in healthcare providers and also prohibited private contracts that would do the same.[267] The initiative was clearly structured to ensure that in light of long-standing legislative acquiescence, insurance companies could not cir-

263. *See Initiative/Amendments/Revisions Database*, FLA. DIV. ELECTIONS, https://dos.elections.myflorida.com/initiatives/ [https://perma.cc/V2GZ-3DPS] (last visited Mar. 5, 2022).

264. Of course, sponsors could split up initiatives into separate measures. But this can be cost prohibitive and indirectly works to undermine the initiative's purpose in certain cases.

265. The court also applies the single-subject rule as a protection against unfiltered majority rule regarding constitutional issues. *See* Fine v. Firestone, 448 So.2d 984, 989 (Fla. 1984).

266. Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998); *see also* Glen D. Wieland, *The Right to Choose Your Health Care Provider*, FLA. BAR J. (Apr. 1997), https://www.floridabar.org/the-florida-bar-journal/the-right-to-choose-your-health-care-provider/ [https://perma.cc/T9DN-DPRU] (setting forth the text of the proposal and summarizing its intended effects).

267. It accomplished this with the simple phrase: "shall not be denied or limited by law or contract."

cumvent the initiative by unregulated private agreements.[268] The initiative was also in direct response to inaction by the legislature on this issue, which had allowed insurance companies to limited patient choice by agreement.[269]

In applying the single-subject rule to the initiative, the Florida Supreme Court said:

> The proposed amendment combines two distinct subjects by banning limitations on health care provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit health care provider choice. The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the health care provider issue in an 'all or nothing' manner. Thus, the proposed amendment has a prohibited logrolling effect and fails the single-subject requirement.[270]

In other words, by slightly expanding the scope and detail of the initiative to neutralize anticipated countermeasures, the initiative sponsors ran afoul of the single-subject rule. The court's application of the rule meant that the sponsors had to either water down the initiative and risk it being ineffectual, or have it declared entirely invalid under the court's single-subject jurisprudence.[271]

Single-subject jurisprudence in Colorado provides another example. The Colorado Supreme Court has recognized that some long and detailed initiatives may nevertheless address only one subject if they involve comprehensive schemes to implement a unifying policy change.[272] Nevertheless, the court has applied this principle rigidly and often been unwilling to endorse connections within an initiative designed to enhance the initiative's efficacy. In 2007, for example, the Court rejected an initiative that sought to introduce the public trust doctrine and establish an agency necessary for the doctrine's imple-

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268. *See* Wieland, *supra* note 266 (noting that the purpose was primarily to control insurance companies and that it had 70% support).

269. *See id*. (noting that before initiative there was at least one legislation session where more than twelve bills were introduced to address the issue but none were passed).

270. Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998). In subsequent cases, the court has remained committed to this approach while also developing a parallel "function of government" test. In 2000, the court rejected an initiative that was designed to prohibit affirmative action by state government. *See Advisory Op. to the Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888 (2000). The initiative identified five prohibited classifications (race, sex, color, ethnicity, and national origin) and prohibited the state from providing preferential treatment based on those classifications in public education, employment, or contracting. The court held that by combining classifications and subjects of regulation, the initiative combined numerous subjects into one initiative.

271. Indeed, there examples where sponsors have split up initiatives to account for the single-subject rule and the have still been rejected. *See* Miller, *supra* note 155, at 121–22.

272. Kemper v. Hamilton (*In re* Ballot Title), 172 P.3d 871, 874 (Colo. 2007).

mentation and oversight.[273] The initiative's sponsor was a longtime advocate of the public trust doctrine for regulating Colorado water rights, but he faced strong opposition from existing landowners. The initiative was clearly designed to ensure that the public trust doctrine was implemented and enforced by constitutionalizing a dedicated agency for its administration. However, the Court reasoned that adopting a substantive standard for agency administration was a separate issue from creating an agency. In dissent, three justices observed that there was an obvious connection between creating a new agency and providing the standard for agency decision-making.[274]

My point here is not that these cases represent efforts by state courts to protect recalcitrant state government. Rather, my point is that the single-subject rule can have that effect when rigidly applied without regard to the initiative's underlying purpose and the nature of contemporary state constitutional politics. To be sure, multifaceted initiatives sometimes reflect nefarious efforts to trick voters into adopting an unwanted policy, and the single-subject rule was surely designed to protect against this.[275] But multifaceted initiatives can also reflect thoughtful efforts to neutralize anticipated countermeasures by state government and help empower voters to realign state policy with popular preferences. Courts that fail to account for this in their analysis risk applying the single-subject rule in ways that undermine the initiative's core purpose.

V. IMPLICATIONS

All of this suggests that the single-subject rule should be carefully assessed. The rule has many virtues, but its costs involve more than generic rule-of-law concerns about inconsistent or biased judicial application. The single-subject rule increasingly works to shield recalcitrant state government from popular majorities. This cost, which goes to the very core of the initiative, deserves more attention by courts, scholars, officials, and voters. In this section, I suggest a few instances where this consideration might be relevant and helpful. In short, some states are actively considering whether to adopt the single-subject

273. *See id*. at 875–76.

274. *See id*. at 879 (Eid, J., dissenting); *see also* Howes v. Brown, 235 P.3d 1071, 1077, 1080 (Colo. 2010) (finding that Initiative #91 contained multiple subjects where its "broad statement of purpose—'to protect and preserve the waters of this state'—[did] not properly unite' the initiative's provision creating and implementing a tax on beverage containers, primarily benefiting the state's basin roundtables and the interbasin compact committee, with its provision limiting "the power of the General Assembly to exercise legislative supervision over the" aforementioned entities).

275. *See In re* Title, Ballot Title, Submission Clause for 2011-2012 No. 45, 274 P.3d 576, 580 (describing initiative as containing a policy "coiled up in the folds of a complex initiative.").

rule as a constraint on the initiative. The rule's capacity to empower recalcitrant state officials should be central to those deliberations, especially if the rule is being promoted by incumbent state officials. Second, courts should explicitly recognize how countermeasures by state governments place pressure on initiative sponsors under the single-subject rule. Incorporating this concern into single-subject rule jurisprudence would more properly conceptualize the rule as a tool to enhance the initiative rather than a self-justifying prohibition on logrolling.

A. Reassessing the Single-Subject Rule

Do initiative states really need the single-subject rule? If we assume that logrolling and voter confusion are the dominant threats to the initiative, then the single-subject rule may be worthwhile.[276] Its value would have to be assessed by accounting for errors and inconsistencies in its application, which are high with such a vague rule, but the rule may nevertheless make to protect against voter confusion and harmful logrolling. However, in this article, I have advanced two arguments that warrant reconsideration of this simplistic assessment of the single-subject rule.

First, under certain conditions, logrolling can enhance, rather than undermine, the initiative. A carefully crafted initiative might coble together citizen voting blocs in ways that result in better alignment with majoritarian preferences. Thus, it is not clear that prohibiting logrolling protects or enhances the initiative's underlying purpose. Stated differently, one of the costs associated with the single-subject rule is that it might bar some appropriate initiatives. When this cost is added to the rule-of-law concerns about inconsistent judicial application, the benefits of adopting the rule seem less compelling.

Second, the single-subject rule can work to undermine the initiative, which is a significant cost that deserves more consideration. This happens when initiative sponsors anticipate that state government will work to evade a disfavored initiative. To neutralize those evasive tactics, initiative sponsors are often forced to expand the initiative's scope and detail, which makes it more likely to violate the single-subject rule. In those scenarios, the single-subject rule can provide recalcitrant state officials with a significant advantage because initiative sponsors must pick between crafting a simple initiative that is easy to evade or a robust initiative that is easy to challenge under the single-subject rule. In either scenario, the initiative's core purpose of allowing citizens to realign government policy is frustrated. This is a

276. California's history with the rule suggests an admirable purpose for its adoption and highlights how the rule can be adopted from desire to enhance the initiative. *See* Lowenstein, *supra* note 9, at 959 (discussing history).

significant cost that should be considered when evaluating the single-subject rule.

This perspective on the single-subject rule is relevant to ongoing discussions in several states where the single-subject rule is under consideration. Of the eighteen states that allow for constitutional amendment by initiative, Arizona, Arkansas, Michigan, Mississippi, and North Dakota do not have an explicit single-subject rule for initiative amendments.[277] In Nevada, Ohio, and Illinois, it appears that courts infer a single-subject rule for initiative amendments based on explicit language applying a similar rule in other contexts.[278] In both Arizona and North Dakota, groups have recently proposed adopting the single-subject rule for initiatives,[279] and South Dakota adopted the rule in 2018.

What is striking about recent campaigns to adopt the single-subject rule is that they are driven largely by incumbent state officials with clear interests in limiting the initiative. In South Dakota, for example, the proposal to adopt the single-subject rule was the product of a task force created by the state legislature following a record number of initiatives in 2016 targeting state policies.[280] The rule was ultimately adopted by the legislature as a proposed constitutional amendment, and not an initiative-proposed amendment. Although the proposal had broad-based support from incumbent state officials and legislators, it was opposed by many grassroots groups.[281] However, debates regarding the amendment did not draw out how the rule could, and very likely would, benefit incumbent state officials.[282] To

277. *See generally* Downey, *supra* note 5 (surveying all states); Campbell *supra* note 9, at 137. South Dakota adopted the single-subject rule in 2018. *See* H.R.J. Res. 1006, 93d Sess., 2018 Legis. Assemb. (S.D. 2018) (submitting to the voters a proposed amendment to add a single subject rule to Article XXIII, Section 1 of South Dakota's Constitution); S.D. CONST. art. XXIII, § 1.

278. *See generally* Downey, *supra* note 5.

279. *See* Tiffany Stecker, *Impeding Citizen-Driven Initiatives Is Latest Election Law Fight*, BLOOMBERG GOV'T (Jan. 24, 2022), https://about.bgov.com/news/impeding-citizen-driven-initiatives-is-latest-election-law-fight/ [https://perma.cc/99JZ-WV2M].

280. *See* Dirk Lammers, *2018 Legislators Chip Away at Initiated Measure Process*, CAP. J. (Sept. 24, 2019), https://www.capjournal.com/news/legislators-chip-away-at-initiated-measure-process/article_d258a640-3308-11e8-be49-9f9bb2167c9b.html [https://perma.cc/MB3X-D2KW].

281. *See id.*; OFF. OF SEC'Y OF STATE SHANTEL KREBS, SOUTH DAKOTA 2018 BALLOT QUESTION (2018) (listing arguments for and against the initiative).

282. The South Dakota ballot pamphlet does offer an insightful assessment of adding the single-subject rule. *See* OFF. OF SEC'Y OF STATE SHANTEL KREBS, SOUTH DAKOTA 2018 BALLOT QUESTION, supra note 281. The pamphlet notes that "citizen initiated constitutional amendments often contain multiple subjects to achieve the desired effect." *Id.* The pamphlet also noted how the rule could impose higher costs on multi-subject initiatives, but it did not draw out how the rule might operate to further entrench incumbent policies. *Id.* The debates in Colorado in 1994 are similar. *See* LEGIS. COUNCIL COLO. GEN. ASSEMB., AN ANALYSIS OF 1994 BAL-

be sure, opponents emphasized the increased costs to initiative sponsors associated with the single-subject rule, but there seems to have been very little appreciation for how the single-subject rule can be weaponized by incumbent state officials seeking to entrench policies under attack from statewide popular majorities.

In Arizona, the push to adopt the single-subject rule is a direct response to a failed attempt to upend a 2016 initiative raising the minimum wage and creating a right to paid sick leave. Fifty-eight percent of Arizona voters approved that initiative following legislative opposition, and even hostility, towards raising the minimum wage.[283] After the initiative was approved, various groups sued to challenge the initiative as violating the single-subject rule.[284] When the case appeared before the Arizona Supreme Court, the sitting House Speaker-elect, Senate President-elect, and Governor's office of Strategic Planning & Budgeting filed an amicus brief joining the position that the initiative violated the single-subject rule. The Court upheld the initiative, in part, because the Arizona constitution did not include an explicit single-subject rule applicable to the initiative.[285] However, following the ruling, there was a campaign by the Arizona legislature to adopt an explicit single-subject rule.[286] The legislature passed a resolution to adopt the rule, along party lines, and the proposal will be considered by voters in November 2022.[287] The development of the issue in Arizona suggests that state officials can view the single-subject rule as working in their favor, but this point has not been centered in the

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LOT PROPOSALS 2–4 (1994). That said, the Colorado pamphlet does make the very important and astute observation that:

> The proposal gives increased authority to the ballot title setting board whose judgments could interfere with the initiative process. Two of the board's three members would be able to keep ideas that they considered unacceptable from becoming law by their interpretation of the single subject rule. If part of a proposal is not included in the ballot title, that part is declared invalid, giving the board further control over the content of the initiative.

Id. at 4.

283. *See Hell Yes! The 2016 Tucson Weekly Endorsements*, TUCSON WEEKLY (Oct. 20, 2016), https://www.tucsonweekly.com/tucson/hell-yes-the-2016-tucson-weekly-endorsements/Content?oid=7311156 [https://perma.cc/HAG5-3HQP] ("[I]t's a safe bet that state lawmakers are not going to make the effort to raise the minimum wage themselves. (Far too many of our Republican lawmakers don't believe in a minimum wage, period.) In fact, in this last session, lawmakers made it impossible for cities and towns to increase minimum wages in their own jurisdictions.").

284. *See* Ariz. Chamber of Com. & Indus. v. Kiley, 399 P.3d 80, 83 (2017).

285. *See id*. at 88–89.

286. *See* Ryan Byrne, *Arizona Voters to Decide Single-Subject Rule Amendment for Citizen-Initiated Ballot Measures*, BALLOTPEDIA NEWS (July 2, 2021), https://news.ballotpedia.org/2021/07/02/arizona-voters-to-decide-single-subject-rule-amendment-for-citizen-initiated-ballot-measures/ [https://perma.cc/DAT6-8GAZ].

287. *Id*.

public debates regarding the rule.[288] My modest claim here is that it should receive more focused consideration as voters weigh whether to adopt, or perhaps repeal, the single subject rule.

B. Broadening Single-Subject Rule Jurisprudence

Courts apply the single-subject rule to the initiative with varying degrees of coherence and rigor.[289] Indeed, as Anne Campbell has shown, courts have deviated from their own standards of review and precedential applications of the rule dramatically across time.[290] This variation is likely the result of the rule's indeterminacy, which courts generally seek to remedy by drawing on the rule's underlying purposes or by offering conceptual definitions of "single subject" that are more susceptible to consistent application. The prevailing view among scholars is that these approaches have generally failed and that single-subject rule jurisprudence lacks coherence and predictability.[291] A few scholars have offered their own theories of the rule designed to address these problems.[292] But many have suggested that the best approach for courts is to apply the rule liberally so that voters rather than courts determine the fate of complicated initiatives.[293]

In this section, I add to the list of arguments offered in favor of judicial restraint regarding the single-subject rule. I do not portend to offer a general jurisprudential theory of the single-subject rule. Nor do I presume to know where courts should draw the line when enforcing the rule. My more modest point is that when courts approach these cases, they should directly consider the degree to which the single-subject rule may be working to empower recalcitrant officials and undermine the core purpose of the initiative. In some cases, it may be appropriate for courts to temper the single-subject rule out of concern for how a strict application of the rule would allow state government to evade an otherwise legitimate initiative. This inquiry will not be a panacea for problems with the single-subject rule. In fact, it may further complicate the analysis and in some cases may even be beyond the judicial pale. However, in other cases, it may be a useful inquiry to help courts reach results more consistent with the purpose of the initiative and state constitutional theory. I offer two arguments in support of this claim.

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288. *See generally* Tiffany Stecker, *Impeding Citizen-Driven Initiatives Is Latest Election Law Fight*, BLOOMBERG GOV'T (Jan. 24, 2022), https://about.bgov.com/news/impeding-citizen-driven-initiatives-is-latest-election-law-fight/ [https://perma.cc/99JZ-WV2M] (noting that Arizona reforms to initiative reflect growing tension between state officials and initiative activists).
289. *See* Campbell, *supra* note 9, at 150–61.
290. *Id.* at 156–61.
291. *See generally* Briffault, *supra* note 12.
292. *See, e.g.*, Cooter & Gilbert, *supra* note 7, at 720–26.
293. *See, e.g.*, Hasen, *supra* note 9, at 116–17.

1. Ordinary Structural Reasoning Supports a Liberal Application of the Single-Subject Rule

When courts apply constitutional provisions, they rely on various sources of constitutional meaning, such as text, history, and precedent. But courts also engage in "structural" reasoning. This form of constitutional analysis, most famously articulated by Charles L. Black, Jr., holds that judges can resolve constitutional disputes by drawing inferences from the relationships between institutions created by the constitution—such as the legislature, the executive, federalism, local government, democracy, and citizenship.[294] Judges do this by testing a proposed constitutional rule against an uncontroversial structural principle.

Another related modality of structural argument is "interpretive holism."[295] This method of constitutional construction emphasizes that constitutional provisions should be construed in view of their context within the constitution as a whole.[296] Judges should examine a constitution's "patterns, premises, layout and logic, assumptions and animating principles."[297] By looking at the constitution holistically, judges can identify "overarching" constitutional patterns that may help resolve constitutional disputes.

These structural forms of constitutional argumentation do not "supplant" other methods of constitutional construction. Instead, they operate in tandem with other techniques to provide a more complete toolkit for judges to resolve constitutional disputes.[298]

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294. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); *see also* Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 834–35 (2004) (describing the structural method).

295. *See* Dorf, *supra* note 291, at 835–36.

296. *See id*.

297. Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 n.3 (1999).

298. Dorf, *supra* note 291, at 841 (describing Black's position on this issue); *see also* BLACK, *supra* note 291, at 31 ("There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."). The most famous example of structural reasoning is from McCulloch v. Maryland, 17 U.S. 316 (1819). In concluding that the state of Maryland did not have authority to tax a federal bank, Chief Justice Marshall looked to how the constitution organized the relationships between citizens, states, and the federal government. *Id.* at 396–98. He concluded a government's taxing authority is derived from representation. The state of Maryland could constitutionally tax its citizens because those citizens had representation in the Maryland legislatures. *Id.* However, the state of Maryland could not tax a federal bank because that tax amounted to a tax on all

State courts are well versed in structural argumentation, and they use it often to resolve state constitutional disputes. For example, as I have argued elsewhere, state courts have relied on the structure of state constitutional amendment rules to determine the proper scope of judicial review. State courts also have a long and sophisticated history of engaging in structural reasoning when faced with questions regarding the scope of state judicial power.[299] Additionally, state courts are deft at using interpretive holism to help guide their constitutional rulings. In *Vreeland v. Bryne*, for example, the New Jersey Supreme Court explained its interpretation of the New Jersey Constitution:

> In considering the meaning of this Article, an important principle of constitutional interpretation should not be overlooked. Not all constitutional provisions are of equal majesty. Justice Holmes once referred to the "great ordinances of the Constitution." . . . The task of interpreting most if not all of these "great ordinances" is an evolving and on-going process . . . The "great ordinances" are flexible pronouncements constantly evolving responsively to the felt needs of the times.
>
> But there are other articles in the Constitution of a different and less exalted quality. Such provisions generally set forth—rather simply—those details of governmental administration . . .
>
> Such constitutional provisions as these. . . should receive entirely different treatment.[300]

The argument I make here is simply that state courts should engage in structural reasoning when construing the single-subject rule. To be sure, courts should look to the rule's text, history, and purposes. But as noted above, the text and history of the single-subject rule in the initiative context is often unhelpful, vague, or indeterminate. Moreover, the conventional policies associated with the rule, logrolling and voter awareness, are rationales supplied by courts to overcome the rule's indeterminate text and history. My claim here is that courts should explicitly place the rule within its broader institutional and constitutional context. At a minimum, this would require connecting the rule to the initiative's core purpose of enhancing government accountability. When viewed in context, the single-subject rule is clearly not a freestanding constitutional principle. It is derivative of the initiative, and absent any evidence from text or history to the contrary, courts should construe the rule in ways that enhance the initiative's goals. This presumption is also consistent with the fact that within many state constitutions, the initiative is a core principle deeply connected to how states have institutionalized popular sovereignty. In many initiative states, the initiative is a core collective right of the people that reflects great trust in voters and great distrust of government officials. The single-subject rule, on the other hand, often ap-

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Americans, including many people who had no representation in the Maryland Legislature. *Id.*

299. *See* Williams, *supra* note 154, at 288–98.

300. Vreeland v. Bryne, 370 A.2d 825, 831–32 (N.J. 1977).

pears as a somewhat mysterious and haphazard tag designed to protect the initiative from perversion. In other words, most state constitutions elevate the initiative and its underlying policies above a standalone commitment to the single-subject rule to be applied by state officials and courts.[301]

Thus, to the extent courts are asked to decide a difficult case under the single-subject rule, they should be cautious to apply the rule in ways that enhance the initiative rather than strictly applying the rule as a categorical ban on logrolling or multifaceted initiatives. The polestar for single-subject rule jurisprudence in difficult cases should be how the ruling will impact the efficacy of the initiative as an accountability device. Sometimes this analysis might suggest a rather rigid application of the rule. Other times, it might support a more liberal application. In any event, concerns about logrolling and voter capacity should be viewed through the lens of the initiative and not as strict, self-justifying constitutional principles.

2. This Analysis is Well Within the Judicial Pale in at Least Some Cases

My argument above raises its own challenges. For one thing, it is not immediately clear that courts are well-equipped to assess how a proposed amendment aligns with the underlying purposes of the initiative. To be sure, there are likely many situations where a court would be unable to determine if a particular initiative could operate as an effective accountability device. This is especially true if the initiative is complex and includes multiple issues that might confuse voters or engage in logrolling. In some cases, my proposal is surely unhelpful, and courts must draw on other forms of constitutional reasoning to decide cases.

However, there are other cases where courts would be well-equipped to apply the single-subject rule through the lens of the initiative's underlying purposes. Legislative history is, of course, well within the judicial pale. Courts frequently look to statements by legislators, especially bill sponsors, committee reports, floor debates, and amendments to statutory language when resolving statutory ambiguities. My proposal would require courts to engage in something analogous to determine an initiative's historical predicate and overall purpose. Initiatives are different from statutes in that they do not generate the same formal record of their history. However, there is often evidence of the sponsor's purposes and clear indications of the histori-

301. Florida's single-subject rule jurisprudence directly contradicts this view through an interesting form of structural argument. *See In re* Advisory Op. to the Att'y Gen.-Save Our Everglades Tr. Fund, 636 So. 2d 1336, 1339 (Fla. 1994) (describing the single-subject rule as constraint on direct democracy in favor of representative law making).

cal predicate for the initiative. If a multifaceted initiative can be explained by its history, and that history suggests that the initiative expanded its scope to some reasonable degree because of obstructionist measures by state government and not harmful logrolling or voter deception, then courts should liberally apply the single-subject rule and allow voters to consider the initiative.

Consider for example, the difference between how the Florida and California Supreme Courts approach the single-subject rule. As noted above, in 1998 the Florida Supreme Court held that an initiative designed to ensure all patients the right to choose their medical providers violated the single-subject rule because it prohibited restraints on choice via legislation and via private agreement.[302] The court reasoned that this constituted impermissible logrolling because some voters may approve of the legislative ban but not the ban on private agreements.[303] The court made this argument in the abstract without any suggestion that it was an actual policy divide among voters.[304] More importantly, the court failed to mention or analyze the lengthy history included in the sponsor's brief that shed much light on the initiative's purpose and structure.[305] The brief explained that the state legislature had failed to act on this issue and that state regulators—enabled by loose legislation—continued to rubber-stamp private insurance agreements that limited patient choice.[306] The initiative was structured to limit legislation and private agreement because the problem it was addressing involved legislation, regulators, and private insurers. On these facts, it is hard to see how the court's strict application of the rule was justified if the rule is placed in proper context.

By contrast, in 1979, the California Supreme Court considered whether a lengthy and complex campaign finance and lobbying initiative violated the single-subject rule.[307] The court found that the initiative did not violate the single subject rule.[308] In response to claims that the initiative involved impermissible logrolling and would result in voter confusion, the court explained:

> Although the initiative measure before us is wordy and complex, there is little reason to expect that claimed voter confusion could be eliminated or substantially reduced by dividing the measure into four or ten separate proposi-

302. Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998).
303. *Id*. To access all briefs for the case, see *Florida Supreme Court Briefs and Opinions*, FLA. ST. UNIV. COLL. L., http://library.law.fsu.edu/Digital-Collections/fl-supct/dockets/90160/90160.html [https://perma.cc/P6HC-EU3N] (last visited Mar. 4, 2022).
304. *Advisory Op. re Health Care*, 705 So. 2d at 566.
305. *Id.* at 565.
306. Brief of Respondent at 2–5, Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998) (No. 90,160).
307. Fair Pol. Pracs. Comm'n v. Super. Ct., 599 P.2d 46, 47 (Cal. 1979).
308. *Id.* at 51.

> tions. Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne.
>
> Nor does the possibility that some voters might vote for the measure while objecting to some parts warrant rejection of the reasonably germane test. Such risk is inherent in any initiative containing than one sentence or even an "and" in a single sentence unless the provisions are redundant. . . .
>
> The enactment of laws whether by the Legislature or by the voters in the last analysis always presents the issue whether on balance the proposed act's benefits exceed its shortcomings.[309]

Thus, the California Supreme Court held that the initiative complied with the single-subject rule because there was no principled basis for excluding it in that particular case without undermining the initiative.[310] This approach, I argue, represents a more coherent and accurate approach to the single-subject rule that places the rule in proper context. Moreover, as the California Supreme Court has illustrated, it is well within the judicial pale to conduct this analysis.

VI. CONCLUSION

The single-subject rule may be at an important crossroads. Historically, the rule has been understood as an important protection against abuse and misuse of the initiative. Proponents of the rule emphasize that the initiative is easy to manipulate through logrolling, riding, and voter confusion. These rationales have sustained the rule despite growing concern that it is too vague and indefinite for predictable judicial application. Nevertheless, as political science literature has documented and clarified enforcement problems with the single-subject rule, the rule has attracted new supporters.

In this article, I have argued that the single-subject rule is increasingly vulnerable to a deeper problem. When state governments are misaligned with popular majorities on discrete policies, they have become increasingly bold in efforts evade disfavored initiatives. As a result, initiative sponsors have had to broaden the scope and specificity of initiatives to reduce opportunities for government evasion. But this has increased the vulnerability of many initiatives to challenge under the single-subject rule. Thus, the rule runs the risk of undermining rather than enhancing the initiative. This new phenomenon deserves more focused study and recognition by courts, which should temper the rule in cases where it would obviously undermine the initiative and shield recalcitrant officials.

309. Fair Pol. Prac. Comm'n v. Sup. Ct., 599 P.2d 46, 50–51 (Cal. 1979).
310. *Id.* at 51.