

COMMENTS

LOGROLLING GETS LOGROLLED: SAME-SEX MARRIAGE, DIRECT DEMOCRACY, AND THE SINGLE SUBJECT RULE

INTRODUCTION

During the 2004 election, Georgia was one of eleven states to allow voters to weigh in on whether its state constitution should exclude gays and lesbians from marriage.¹ The drafters of the Georgia proposal, like those of Arkansas, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, and Utah, went further than simply adopting a restrictive definition of marriage.² The proposed amendment also restricted couples in civil unions from obtaining any of the benefits of marriage, banned state courts from recognizing the judgments of other states, and carved out an exception to the Georgia court system's subject matter jurisdiction.³

The language of the proposed amendment posed an intractable problem for a significant minority of Georgia voters who supported restricting the definition of marriage but opposed excluding same-sex couples from all of the benefits afforded by civil unions.⁴ These voters faced the difficult choice of either voting to adopt a provision they intensely opposed, or voting against a provision they strongly desired.⁵ The Georgia constitution contains a provision—the single subject rule—designed to prevent this type of harm, but it proved impotent to enjoin the state from placing the initiative on the ballot.⁶

¹ See Bob Keefe, *States Address Stem Cells, Gay Marriage*, ATLANTA J.-CONST., Nov. 4, 2004, at A9.

² See Joan Vennochi, *Was Gay Marriage Kerry's Undoing?*, BOSTON GLOBE, Nov. 4, 2004, at A15.

³ See Sonji Jacobs, *Gay Marriage Ban Headed to Court*, ATLANTA J.-CONST., Nov. 3, 2004, at EX14.

⁴ See Jim Galloway, *'Marriage' Matters to Voters; Amendment Support Drops When It's Called Gay 'Union'*, ATLANTA J.-CONST., Oct. 17, 2004, at E1.

⁵ See *O'Kelley v. Cox*, 604 S.E.2d 773, 777 (Ga. 2004) (Sears, J., dissenting).

⁶ See Bill Rankin, *Gay Marriage Ban Goes Back to Court*, ATLANTA J.-CONST., Jan. 15, 2005, at C1.

Single subject rules limit bills, referendums, and initiatives to one subject.⁷ Forty-two state constitutions have a single subject rule governing legislation.⁸ Most states that employ direct democracy⁹ have a similar rule governing some aspects of direct legislation.¹⁰ Because courts first addressed the single subject rule in the legislative context before applying it to direct democracy, they tended to adopt the tests for initiatives and referendums directly from their legislative analogues.¹¹

Several scholars have addressed single subject rules, discussing their origin,¹² purpose,¹³ and interpretation.¹⁴ Many discussions involve a normative component, arguing for policy options ranging from broad interpretation of the rule,¹⁵ to adopting a stricter test for compliance,¹⁶ to applying the rule to the U.S. Congress.¹⁷

⁷ See Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 389 (1958).

⁸ See Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 app. A at 1023 (1999). For a sample single subject rule governing legislation, see, for example, OHIO CONST. art. II, § 15(D) (“No bill shall contain more than one subject, which shall be clearly expressed in its title.”).

⁹ Direct democracy is a form of government in which the people as a whole make policy decisions, for example by voting on ballot propositions. DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES I* (1984).

¹⁰ “Direct legislation is the process by which voters directly decide issues of public policy by voting on ballot propositions.” *Id.* For a sample single subject rule governing constitutional initiatives, see GA. CONST. art. 10, § 1, para. 2 (“When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately . . .”). 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 app. I at 165–66 (2001) (listing states with single subject rule governing aspects of direct democracy).

¹¹ See Gerald F. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones*, 41 SANTA CLARA L. REV. 999, 1011–20 (2001); see, e.g., *Perry v. Jordan*, 207 P.2d 47, 49–50 (Cal. 1949). Florida may be the exception to this trend. See *Fine v. Firestone*, 448 So. 2d 984, 988–89 (Fla. 1984).

¹² See, e.g., ROBERT LUCE, *LEGISLATIVE PROCEDURE* 548 (1922).

¹³ See, e.g., Ruud, *supra* note 7, at 389.

¹⁴ See, e.g., Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938 (1983).

¹⁵ *Id.*

¹⁶ See, e.g., 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, 895–96 (1991).

¹⁷ See, e.g., Denning & Smith, *supra* note 8.

Meanwhile, an even larger body of literature contrasts representative and direct democracy.¹⁸ While scholars disagree as to the purpose,¹⁹ effect,²⁰ and efficacy²¹ of plebiscites²² as an alternative to legislative bodies, they universally note significant differences between the operations of these two mechanisms of governance. It is thus significant that most literature reviewing application of the single subject rule only cursorily addresses the differing role the rule plays in the representative and direct democracy contexts.²³

This Comment uses the conflict over same-sex marriage to explain how structural differences between direct and representative democracy alter the effect of strict enforcement of the single subject rule. Part I describes the Georgia same-sex marriage amendment and demonstrates how the single subject rule has failed to achieve its historic purposes of preventing logrolling and reducing voter confusion. Georgia's experience will facilitate this Comment's examination of the single subject rule by serving as a recurring example of how logrolling and voter confusion operate in direct democracy.

Part II reviews the historical development and purpose of both single subject rules and direct democracy. The fact that states adopted single subject rules prior to the spread of direct democracy helps to explain why courts applied their tests for legislative compliance with the single subject rule to initiatives and referenda.

Part III analyzes the limitations of the analogy between representative and direct democracy. First, it argues that while logrolling produces a balance of benefits and costs in the legislature, logrolling predominantly incurs costs in direct democracy. Second, this Part examines the heightened possibility of voter confusion in plebiscites. Third, it considers how structural differences between representative and direct democracy alter the role of the single subject

¹⁸ See, e.g., Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

¹⁹ See, e.g., Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999).

²⁰ See, e.g., Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237 (1999).

²¹ See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

²² Plebiscites are mechanisms, such as initiatives and referenda, which allow for direct democracy without requiring a gathering of all decisionmakers simultaneously. See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 932 (1988).

²³ See, e.g., Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government*, 80 VA. L. REV. 625, 657-70 (1994); Minger, *supra* note 16, at 899.

rule. Each inquiry suggests that an effective test for compliance with the single subject rule in the legislature may prove insufficient for direct democracy.

Part IV considers the effectiveness of the predominant test for compliance with the single subject rule—the reasonable germaneness test—which imposes a lax requirement of relatedness on drafters of legislation. It finds that the reasonable germaneness test performs well in the legislative context, but that direct democracy requires a stricter test more faithful to the historical goals of the single subject rule.

I. THE GEORGIA SAME-SEX MARRIAGE AMENDMENT

The single subject rule, applied in direct democracy, fails to serve its historical purpose. Georgia's same-sex marriage amendment demonstrates how interest groups can use popular initiatives to ensure the passage of controversial provisions.²⁴ Although the drafters of the initiative engaged in logrolling and voter confusion, the Supreme Court of Georgia chose not to intervene in the election.²⁵ Understanding Georgia's experience will therefore help to inform this Comment's subsequent discussion of how the single subject rule operates in direct democracy.²⁶

On March 31, 2004, the Georgia General Assembly passed Senate Resolution 595, which proposed a Constitutional Amendment providing that:

(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction. The courts of this state shall have no

²⁴ See *infra* note 154 and accompanying text. Because referenda maintain some of the characteristics of representative democracy, the analysis in this Comment maps more readily onto initiatives. See, e.g., *id.* Note, however, that the amendment's opponents' failure to offer a counterproposal in the legislature is tied to the fact that the amendment was directly democratic. Black caucus members (mistakenly) believed that sending the amendment to a vote would help Democratic turnout in the election. See Jim Tharpe, *Gay Marriage Ban Amendment Passes*, ATLANTA J.-CONST., Apr. 1, 2004, at A1.

²⁵ See *O'Kelley v. Cox*, 604 S.E.2d 773, 773 (Ga. 2004).

²⁶ Although this Comment only discusses *O'Kelley*, opponents of same-sex marriage laws have filed similar litigation in other states as well. See, e.g., *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005).

jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.²⁷

The ballot language provided for a yes/no vote on the following question:

Shall the Constitution be amended so as to provide that this state shall recognize as marriage only the union of man and woman?²⁸

The Georgia Constitution's single subject rule states that "[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately."²⁹ The state's supreme court has offered two reasons for this rule. First, it seeks to prevent logrolling, defined as the practice of combining two or more dissimilar subjects into a single act to force simultaneous passage of the varied provisions.³⁰ The court wrote that "the obvious purpose" of the single subject rule is "to prevent combinations by which different and distinct matters of proposed legislation are presented as one measure, whereby each of them gains strength and support which it would not have if it were presented solely upon its own merits and voted upon separately."³¹

Second, Georgia courts cite the reduction of voter confusion as a justification for the single subject rule.³² Georgia's heightened concern over voter confusion stems from the notorious Yazoo Act passed by the state legislature in 1795.³³ The bill contained a deceptive title, duping legislators into directing the sale of a vast portion of Georgia's public land to a group of private companies.³⁴ When the public discovered the sham, the resulting outrage led General James Jackson to demand that Georgia include a provision in its state constitution requiring that every bill contain a clear title accurately reflecting the subject matter of the legislation.³⁵ The court has since read this concern into the single subject rule as well.³⁶

²⁷ Sonji Jacobs, *War of Words on Amendment*, ATLANTA J.-CONST., Sept. 11, 2004, at F1.

²⁸ *DeKalb Voters Guide 2004*, ATLANTA J.-CONST., Oct. 28, 2004, at JB4.

²⁹ GA. CONST. art. 10, § 1, para. 2.

³⁰ 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 17.01, at 2 (5th ed. 1992).

³¹ *Carter v. Burson*, 198 S.E.2d 151, 156 (Ga. 1973).

³² *Id.* at 157.

³³ C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC 1–20 (1966).

³⁴ Ruud, *supra* note 7, at 391–92.

³⁵ See *Giddings v. San Antonio*, 47 Tex. 548, 555–56 (1877).

³⁶ *Id.*

The drafters of the Georgia marriage amendment employed both logrolling and voter confusion. The amendment employs logrolling because many citizens of Georgia support one major component of the amendment, but oppose others. Polling data demonstrates that Georgians overwhelmingly support restricting the definition of marriage, but are split evenly over civil unions.³⁷ National polling data shows a similarly wide divergence on the two issues.³⁸ For example, a CBS News/New York Times Poll indicated that while twenty-three percent of Americans support legal marriage for gay couples and forty-one percent oppose any legal recognition of a gay couple's relationship, more than one-third of all citizens fall in between those two extremes. This centrist group supports allowing gay couples to form civil unions but opposes their legal right to marry.³⁹

Thus, combining marriage and civil benefits in a single referendum constitutes logrolling.⁴⁰ The Georgia Supreme Court described the undesirability of this forced choice in one of its earliest single subject rule decisions, writing that “[n]o voter should be compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves, or, in order to vote against the proposition which he desires to defeat, to vote also against one which commends itself to the approval of his judgment.”⁴¹

The wording of the amendment and accompanying ballot question also encouraged voter confusion.⁴² The drafters of the amendment referred only to the marriage restriction, the most popular component of the proposed amendment.⁴³ Voters who have not carefully read and analyzed the text of the proposition were therefore unlikely to be aware of the provisions they were most likely to oppose.⁴⁴

³⁷ See Galloway, *supra* note 4.

³⁸ See, e.g., CBS News/New York Times Poll (Feb. 24, 2005), available at <http://pollingreport.com/civil.htm>.

³⁹ *Id.*

⁴⁰ In fact, this split in opinion over the issues of legal marriage and civil union may be outcome determinative in a referendum. See, e.g., CNN/USA Today/Gallup Poll (Mar. 5–7, 2004), available at <http://pollingreport.com/civil2.htm>.

⁴¹ *Rea v. City of La Fayette*, 61 S.E. 707, 708 (Ga. 1908).

⁴² See Sonji Jacobs, *War of Words Over Gay Marriage*, ATLANTA J.-CONST., Oct. 21, 2004, at C1.

⁴³ See, e.g., *Undercofler v. Hospital Auth. of Forsyth County*, 145 S.E.2d 487, 490 (Ga. 1965).

⁴⁴ See Jacobs, *supra* note 42.

Judged according to the historical purposes of the single subject rule, the marriage amendment as drafted should have failed judicial review.⁴⁵ However, the Supreme Court of Georgia has analogized the single subject rule governing constitutional amendments to the parallel requirement for legislative enactments.⁴⁶ This analogy places two large hurdles in front of any attempt to challenge the marriage amendment on single subject grounds.

First, because legislation cannot be challenged prior to enactment, the court has held that challenges to referenda may occur only after successful enactment of the proposal.⁴⁷ Therefore, when opponents of the amendment sought to enjoin it from being placed on the ballot, the court found the dispute not yet justiciable.⁴⁸

Second, because the court historically grants the state legislature broad deference on procedural matters, the legislative single subject rule is rarely enforceable.⁴⁹ Georgia courts follow the reasonable germaneness test, under which all parts of a proposed constitutional amendment must be germane to the accomplishment of a single objective.⁵⁰ Like most states which apply the reasonable germaneness test, Georgia broadly defines the objective of the legislation and has a lax conception of germaneness.⁵¹

The effect of this lax test is that challenges based on the single subject rule are rarely effective.⁵² Even though the drafters of the marriage amendment engaged in both logrolling and voter confusion, any judicial challenge to the amendment nonetheless faces an uphill battle.⁵³

⁴⁵ See *supra* note 31 and accompanying text.

⁴⁶ See, e.g., *Hammond v. Clark*, 71 S.E. 479, 485–86 (Ga. 1911).

⁴⁷ See *Gaskins v. Dorsey*, 104 S.E. 433, 433–34 (Ga. 1920).

⁴⁸ See *O’Kelley v. Cox*, 604 S.E.2d 773, 773 (Ga. 2004).

⁴⁹ See *infra* notes 161–71 and accompanying text, and notes 223–29.

⁵⁰ *Carter v. Burson*, 198 S.E.2d 151, 156 (Ga. 1973).

⁵¹ See, e.g., *Welborne v. State*, 40 S.E. 857, 869 (Ga. 1902).

⁵² The Georgia court has not struck down any constitutional amendments on single subject grounds. However, this fact might overstate the laxness of the reasonable germaneness test somewhat, since most previous challenges presented weak cases of logrolling. For example, in *Carter*, 198 S.E.2d at 155–56, the petitioner challenged an amendment that eliminated the position of state treasurer and removed references to the treasurer from several other constitutional provisions. While the provisions touched on multiple subjects, there was no reason a voter would want to eliminate the position of state treasurer but keep responsibilities vested in that office. *Id.* at 156.

⁵³ In Louisiana, opponents of the same-sex marriage amendment successfully invoked the single subject rule before the district court then lost on appeal before the Supreme Court of Louisiana. See *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715, 716, 737 (La. 2005).

II. HISTORY AND PURPOSE OF THE SINGLE SUBJECT RULE

The goal of the single subject rule is to prevent logrolling and voter confusion. This Part describes the rule's origin, purpose, and application to direct democracy. The judicial test for compliance in direct democracy is based on a historical quirk. Because most states adopted a legislative single subject rule a half century before the spread of direct democracy, courts tended to borrow their tests for legislative compliance in crafting a test for initiatives and referenda.⁵⁴

A. *The Rise of the Single Subject Rule*

Concern for crafting single subject questions dates to the Roman enactment of *Lex Cæcilia Didia* in 98 B.C., which prohibited *lex satuta*, or laws containing unrelated provisions.⁵⁵ The earliest recorded laws took the form of short, detached sentences similar to the Ten Commandments.⁵⁶ As society grew more complex, politicians quickly became adept at enacting dubious proposals by tying them to popular ideas, thereby compelling the people either to vote for something they did not support or to reject something they desired.⁵⁷

This practice resurfaced in early colonial America in both Virginia and Massachusetts.⁵⁸ As early as 1695, the Committee of the Privy Council complained that diverse acts in Massachusetts were “joined together under ye same title, whereby it has been necessary for the repealing of such of them as have not been thought fit to be confirmed to vacate such others as have been comprehended under such titles.”⁵⁹ The bundling of issues continued throughout the nascent United States.⁶⁰ In 1844, New Jersey, concerned that its legislators would not stamp out the practice on their own, enacted the first

⁵⁴ See PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE* 9–11 (1998); JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING* 2–6 (1999). Although the practice of direct democracy is ancient, it was relatively unknown among the founders in 1787, and the Federalists abhorred it. Eule, *supra* note 18, at 1522–25.

⁵⁵ See LUCE, *supra* note 12, at 548; Michael W. Catalano, *The Single Subject Rule: A Check on Anti-Majoritarian Logrolling*, 3 *EMERGING ISSUES ST. CONST. L.* 77, 79 (1990); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 *HARV. L. REV.* 149, 160 n.36 (1928).

⁵⁶ See LUCE, *supra* note 12, at 548.

⁵⁷ *Id.*

⁵⁸ See *id.* at 549.

⁵⁹ *Id.*

⁶⁰ See Catalano, *supra* note 55, at 77.

constitutionally-inscribed general single subject rule.⁶¹ The idea quickly spread to most other states.⁶² Currently, forty-two state constitutions contain such a provision.⁶³

B. Preventing Logrolling and Confusion

Early court cases interpreting single subject restrictions identified two purposes of such rules: 1) the prevention of logrolling,⁶⁴ and 2) the reduction of voter confusion and deception.⁶⁵ Logrolling is generally defined as the practice of combining two or more dissimilar subjects into a single act to force simultaneous passage of the varied provisions.⁶⁶ Voter confusion, meanwhile, refers to a mismatch between voters' perception of what an initiative does and that measure's actual effect.⁶⁷

1. Prevention of Logrolling

State courts frequently invoke the logrolling rationale. The Illinois Supreme Court wrote that combining issues is “not pursuant to the law” and “is manifestly unfair. . . . [U]ntil the naked single question shall be fairly presented to those voters, they ought not to be bound, or injuriously affected, by any such jockeying management and log-rolling.”⁶⁸ The court concluded that “[s]uch maneuvering should be condemned everywhere, as unfair and unjust, and we so regard it.”⁶⁹ The Iowa Supreme Court noted that whether voters ultimately choose to endorse the provision of which they disapprove to enact the one they favor or vote against the provision they support to prevent the passage of an offensive proposal, “[i]n either case there is an evil.”⁷⁰

⁶¹ N.J. CONST. art. IV, § 7, para. 4 (1844). Illinois had included a limited single subject rule governing the appropriation of legislative salaries in its 1818 constitution. See Ruud, *supra* note 7, at 389.

⁶² See Ruud, *supra* note 7, at 390.

⁶³ See Denning & Smith, *supra* note 8, at 1005–23.

⁶⁴ See, e.g., *Bd. of Supervisors v. Miss. and Wabash R.R. Co.*, 21 Ill. 337, 373 (1859); *McMillan v. Boyles County Judge*, 3 Iowa 311, 321 (1856); *State v. Cassidy*, 22 Minn. 312, 322 (1875). But see Lowenstein, *supra* note 14, at 963 (asserting that “[a]nti-complexity and anti-logrolling are rationales that have been made up by lawyers and judges, who naturally seek a guide to interpretation by viewing the rule as a means to some other end.”). Several thousand years of history seem to belie Lowenstein's interpretation. See generally LUCE, *supra* note 12, at 548–49.

⁶⁵ See, e.g., *Cassidy*, 22 Minn. at 322.

⁶⁶ SINGER, *supra* note 30.

⁶⁷ MAGLEBY, *supra* note 9, at 140.

⁶⁸ *Wabash*, 21 Ill. 337 at 373.

⁶⁹ *Id.*

⁷⁰ *McMillan v. Boyles County Judge*, 3 Iowa 311, 321 (1856).

2. *Reduction of Voter Confusion*

Courts also cite reduction of voter confusion as a purpose behind single subject provisions.⁷¹ In Georgia, concern over voter confusion stems from the state's experience with the deceptively-titled Yazoo Act of 1795, which duped legislators into the sale of a vast portion of public land to private companies.⁷² As single subject rules began to spread across the country, proponents of the measure adopted confusion⁷³ as an additional rationale supporting the rule's ratification.⁷⁴

C. *Application to Direct Democracy*

The modern initiative postdates the single subject rule. While direct democracy's historical antecedents are as ancient as those of the single subject rule,⁷⁵ the spread of plebiscites actually occurred a half century after most states had adopted single subject rules governing legislation.⁷⁶ With the exception of the New England town meeting, most states developed direct democracy as an outgrowth of agrarian discontent following the Civil War.⁷⁷ Populists, who believed that the grassroots citizenry made decisions superior to those made by legislatures, succeeded in adopting a constitutional amendment permitting direct democracy in South Dakota in 1898, in Utah in 1900, and in Oregon in 1902.⁷⁸

As the Populist movement waned at the turn of the century, the Progressive movement continued the push for direct democracy, believing that direct legislation could break the control of state legislatures by corporate interests.⁷⁹ By 1918, nineteen states, primarily western, adopted the initiative process.⁸⁰

⁷¹ See, e.g., *State v. Cassidy*, 22 Minn. 321, 322 (1875).

⁷² See *supra* note 33 and accompanying text.

⁷³ This etymology suggests that "confusion" in the context of single subject rules may capture some element of deceit. See *infra* note 172–82 and accompanying text.

⁷⁴ See Ruud, *supra* note 7, at 390.

⁷⁵ DUBOIS & FEENEY, *supra* note 54, at 7; HARLAN HAHN & SHELDON KAMIENIECKI, REFERENDUM VOTING: SOCIAL STATUS AND POLICY PREFERENCES 8 (1987); DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3–4 (1989); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 112–13 (1995).

⁷⁶ See ZIMMERMAN, *supra* note 54, at 2–6.

⁷⁷ See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 43–44 (1989); DUBOIS & FEENEY, *supra* note 54, at 8, 10.

⁷⁸ See Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in CITIZENS AS LEGISLATORS 1, 3 (Shaun Bowler et al. eds., 1998).

⁷⁹ See DUBOIS & FEENEY, *supra* note 54, at 10.

⁸⁰ ZIMMERMAN, *supra* note 54, at 6.

Currently, twenty-four states have some form of the initiative.⁸¹ Most of these states have a single subject rule governing direct legislation.⁸²

The direct democracy movement produced three forms of direct legislation: the referendum, the direct initiative, and the indirect initiative.⁸³ In a referendum, the legislature first tentatively enacts a law, and then submits it to the voters for approval.⁸⁴ In a direct initiative, an interest group proposes a constitutional amendments or statute via petition. The proposal is then submitted directly to the voters for approval.⁸⁵ An indirect initiative is first submitted to the legislature, and only in the case of inaction is referred to the voters.⁸⁶

Until the late 1970s, most states used the direct legislative process sparingly.⁸⁷ However, the popularity of direct democracy has exploded over the past few decades, due in part to increased media coverage of initiatives and the advent of a professional initiative industry.⁸⁸

III. THE FAILURE OF THE LEGISLATIVE ANALOGUE

The analogy between direct and representative democracy is flawed. This Part examines the substantial limitations inherent in employing an identical test in both direct and representative democracy. It uses the Georgia marriage amendment as an example to inform this discussion.

Section A argues that current scholarly conceptions of logrolling are too narrow. Logrolling can produce compromise among competing interest groups by institutionalizing cooperation or it can encourage extremism by presenting an opportunity for interest groups to rack up policy victories.⁸⁹ While the

⁸¹ See Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 49 (1995).

⁸² See Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579, 579 (2004).

⁸³ See MAGLEBY, *supra* note 9, at 35–36.

⁸⁴ JOSEPH F. ZIMMERMAN, *THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY* 1 (2001).

⁸⁵ MAGLEBY, *supra* note 9, at 35.

⁸⁶ *Id.*

⁸⁷ Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 243–62 (1975).

⁸⁸ See RICH BRAUNSTEIN, *INITIATIVE AND REFERENDUM VOTING* 8–9 (2004).

⁸⁹ Absent a mechanism encouraging moderation, such as the opportunity to offer counterproposals, the proponent of a popular initiative has no incentive to yield concessions. See ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 273 (6th ed. 1998).

legislative process is conducive to cooperative logrolling, direct democracy presents an opportunity for extremism.

Section B argues that voter confusion is more damaging in direct democracy than in the legislature. While legislators either carefully inform themselves as to the contents of a bill or defer to colleagues to determine their vote, citizens need to understand enough about the contents of each initiative to locate cues on how to cast their ballots.

Section C considers how structural components of representative and direct democracy implicate the stringency with which the single subject rule ought to be applied. While representative democracy stresses the need to enact comprehensive proposals, direct democracy rests on the notion that accurately gauging mass preference will produce sound policy. Moreover, individual voters can claim a cognizable injury from a single subject rule violation, but legislators have no competing claim.

A. *A Deeper Look at Logrolling*

Legalizing logrolling can either promote or inhibit cooperation. Logrolling often refers to “uniting minorities with different interests” around a single act “when the particular provisions could not pass on their own separate merits.”⁹⁰ Yet a single interest group can logroll as well, affixing additional provisions to a popular proposal to accrue legislative victories.⁹¹ This latter possibility is critical to evaluating logrolling in direct democracy, where the content of an initiative is determined solely by its proponent.⁹² Courts have fashioned a test for the legislative single subject rule designed to redress the worst forms of cooperative logrolling. However, single party logrolling poses a greater danger to direct democracy.⁹³ This difference ought to affect the manner in which the single subject rule is applied in each context.

1. *Reconsidering Logrolling Taxonomy*

Scholars traditionally delineate between only two types of logrolling.⁹⁴ “Coalition” logrolling occurs when proponents of a measure combine disparate provisions, encouraging minority factions to unify around passage of the

⁹⁰ State *ex rel. Martin v. Zimmerman*, 289 N.W. 662, 664 (Wis. 1940).

⁹¹ See *infra* note 102–05 and accompanying text.

⁹² See Gillette, *supra* note 23, at 668–69.

⁹³ See *infra* note 139–57 and accompanying text.

⁹⁴ See, e.g., Lowenstein, *supra* note 14, at 958.

overall measure.⁹⁵ By contrast, in “rider” logrolling, a proponent of an unpopular provision buries it within an extremely complex or popular measure.⁹⁶ While “coalition” logrolling is relatively straightforward, “rider” logrolling should be further subdivided into two subclasses.

Treating “rider” logrolling as a single taxonomy is problematic because it obscures an important mechanism for bundling minority interests with popular provisions. A rider is a clause or provision appended to a legislative bill, usually to achieve a distinct objective.⁹⁷ Typically, the primary proponent of the bill will not add a rider on his or her own accord.⁹⁸ Either the bill’s proponent adds the rider at the behest of an interest group in return for that group’s support, or the interest group is able independently to affix the rider to the bill.⁹⁹ Presumably with popular legislation, the latter scenario is the case.¹⁰⁰ The proponent of the bill has no incentive to bargain because the primary legislation’s popularity is sufficient to secure its passage.¹⁰¹ Thus the concern with rider logrolling is that a dissimilar, unpopular piece of legislation might sneak into the larger bill.¹⁰²

Riders are not, however, the only means by which popular legislation presents opportunities for logrolling. The author of a proposal, secure in the knowledge that the popularity of the provision will ensure its enactment, can include similar but more extreme¹⁰³ measures in the initial proposal which will

⁹⁵ Minger, *supra* note 16, at 885.

⁹⁶ See Ruud, *supra* note 7, at 391.

⁹⁷ Black’s Law Dictionary defines a rider simply as “[a]n attachment to some document, such as a legislative bill . . . that amends or supplements the document.” BLACK’S LAW DICTIONARY 1322 (7th ed. 1999). Other definitions capture the term’s connotation of unrelatedness. See, e.g., P.H. COLLIN, DICTIONARY OF THE LAW 324 (3d ed. 2000). There is an inherent circularity in defining riders for purposes of the single subject rule. Compare BARRON’S LAW DICTIONARY 451 (5th ed. 2003) (“In the legislative process, a provision in a bill that is not germane to the main purpose of the law.”), with *infra* note 219–26 and accompanying text (discussing the reasonable germane test).

⁹⁸ See GLEN S. KRUTZ, HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS 61–63 (2001). An exception is a rider attached to an appropriations bill to stay an executive veto. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING 65–66 (2d ed. 2000).

⁹⁹ See CQ Press, *Rider*, in D.R. TARR & A. O’CONNOR, CONGRESS A TO Z (1999), available at <http://library.cqpress.com/congress/cr140800>. This Comment does not analyze riders designed solely to kill legislation, because failed legislation need not survive a challenge under the single subject rule.

¹⁰⁰ Politicians can maximize benefits by minimizing the size of winning coalitions. See DAVIDSON & OLESZEK, *supra* note 89, at 273. This strategy assumes a bill that is assured of passage, otherwise legislators will tend to hedge their bets by broadening their coalition. *Id.*

¹⁰¹ See Gillette, *supra* note 23, at 669.

¹⁰² See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 250 (2d ed. 1995).

¹⁰³ This Comment does not use “extreme” as a pejorative, but rather to indicate distance from center.

ride the coattails of the more popular provision to victory.¹⁰⁴ These measures may be marked by differing levels of popular support, but not by wholly dissimilar subjects.¹⁰⁵

“Coattails” logrolling is thus distinct from coalition and rider logrolling, which require multiple legislators with differing interests. The proponent of the popular legislation is not coaxed or persuaded into adding the less popular provision to gain additional votes.¹⁰⁶ Rather, the legislator proposing the bill recognizes that current support for the popular provision is so strong that he or she can rack up additional victories on otherwise difficult-to-pass legislation at no additional cost to himself or herself.¹⁰⁷ Thus while coalition logrolling requires moderation and negotiation, coattails logrolling encourages extremism.

2. *Logrolling in Representative and Direct Democracy*

a. *Logrolling in the Legislature*

Legislative logrolling can produce either benefits or costs. Rider logrolling is often harmful.¹⁰⁸ As with the Yazoo Act, some legislators may be unaware that an associate has snuck a confusing provision into a bill, and thus be deceived into supporting a provision they actually oppose.¹⁰⁹ Perhaps more likely, the proponent of a piece of legislation may become concerned that he or she is a few votes shy of assuring the legislation’s passage, and therefore agree to attach a provision that provides a significant benefit to a small group of legislators who would otherwise not support the initiative.¹¹⁰ In such a case, even a fastidious legislator may get trapped into voting for the attached proviso. Thus, the prospect of rider legislation provides a normative basis for strict enforcement of the single subject rule in the legislative context.

Thus a good policy supported by only one percent of voters is extreme, while a bad policy enjoying universal support is not. Direct democracy relies on the premise that following the aggregate will of the majority generally produces good policy, and thus maintains a presumption against extreme proposals. *See infra* note 196 and accompanying text.

¹⁰⁴ *Cf.* KRUTZ, *supra* note 98, at 2 (describing riders to omnibus bills with popular core provisions).

¹⁰⁵ The Georgia marriage amendment is one such example. *See supra* note 37 and accompanying text.

¹⁰⁶ *See infra* note 122.

¹⁰⁷ *Cf.* KRUTZ, *supra* note 98, at 2.

¹⁰⁸ *See, e.g.,* Lowenstein, *supra* note 14, at 961–63.

¹⁰⁹ *See supra* notes 33–34 and accompanying text.

¹¹⁰ *See* LEWIS G. IRWIN, A CHILL IN THE HOUSE: ACTOR PERSPECTIVES ON CHANGE AND CONTINUITY IN THE PURSUIT OF LEGISLATIVE SUCCESS 159–61 (2002).

However, public choice theory¹¹¹ may augur in favor of allowing coalition logrolling. Overall political satisfaction is usually maximized when each group receives the legislation it most intensely desires.¹¹² Although each provision of a compound bill may reflect minority preferences, the groups favoring them may have intense preferences for those policies.¹¹³ Thus, coalition logrolling allows groups to express the intensity of their preferences through willingness to trade votes.¹¹⁴ The cobbling together of minority proposals may therefore improve the overall satisfaction of the majority.¹¹⁵ Absent this mechanism, legislatures may not have the necessary lubrication to overcome collective action problems.¹¹⁶

Of course, satisfying intense preferences does not always increase group utility.¹¹⁷ For example, each legislator in a coalition could strongly prefer a spending measure that provides exclusive benefits to his or her constituency.¹¹⁸ Enacting all of these measures may result in a deficit. Yet, while there may be strong majority opposition to deficit spending, each individual legislator will be unwilling to part with his or her sacred cow.¹¹⁹ Ideally, a well-designed legislative single subject rule would allow some coalition building on policy matters, while limiting legislators' abilities to cobble together disparate spending proposals.¹²⁰

Coattails logrolling, unlike coalition logrolling, is unlikely to occur in the legislature.¹²¹ Although coattails logrolling presents an opportunity for

¹¹¹ "Public choice theory" is the application of economic principles to political science. DENNIS C. MUELLER, *PUBLIC CHOICE 1* (1979).

¹¹² See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 133 (1962); Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 *YALE L.J.* 105, 192 (1992).

¹¹³ Gillette, *supra* note 23, at 635–36.

¹¹⁴ See BUCHANAN & TULLOCK, *supra* note 112, at 131–45; Richard L. Hasen, *Vote Buying*, 88 *CAL. L. REV.* 1323, 1338–40 (2000).

¹¹⁵ See Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 *CHI.-KENT L. REV.* 707, 727–28 (1991).

¹¹⁶ See, e.g., TOMMY NEAL, *LAWMAKING AND THE LEGISLATIVE PROCESS* 129–32 (1996) (examining implementation of the Violent Crime Control and Law Enforcement Act).

¹¹⁷ See II DENNIS C. MUELLER, *PUBLIC CHOICE* 83–84 (1989); David P. Baron, *Majoritarian Incentives, Pork Barrel Programs, and Procedural Control*, 35 *AM. J. POL. SCI.* 57, 58, 60–63 (1991).

¹¹⁸ See William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 *AM. POL. SCI. REV.* 1235, 1240 (1973).

¹¹⁹ See Jay H. Topkis, *How Bad is Congress?*, 62 *POL. SCI. Q.* 531, 549 (1947).

¹²⁰ Moreover, assembling a logroll may itself be costly, decreasing net social benefit through waste. See Gordon Tullock, *The Costs of Special Privilege*, in *PERSPECTIVES ON POSITIVE POLITICAL ECONOMY* 195, 207–09 (James E. Alt & Kenneth A. Shepsle eds., 1990).

¹²¹ Most logrolling in the legislature is driven by the necessity of bargaining, an element absent in

extremism, the legislative process naturally counteracts some of its ill effects. If coattails logrolling is possible, the author of a popular bill has an incentive to add as many self-interested provisions that garner only minority support as the popular provision can carry to victory.¹²² However, if the legislative body is operating under an open rule,¹²³ the possibility of another legislator offering a counterproposal serves to temper the actions of the author of the original bill.¹²⁴ Unlike rider and coalition logrolling, which bring additional votes to a proposal, coattails logrolling decreases support for an initiative.¹²⁵ Because the coattails provisions each garner only minority support, a competing bill which contains only the popular provision should garner greater support than the original legislation, preventing coattails logrolling.¹²⁶

coattails logrolling. See DAVIDSON & OLESZEK, *supra* note 89, at 270–74.

¹²² By contrast, in coalition logrolling there is a disincentive to add any additional provisions beyond those needed to generate a winning coalition. See WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 32 (1962).

¹²³ An open rule permits all parties to offer any amendment to a bill. See Vijay Krishna & John Morgan, *Asymmetric Information and Legislative Rules*, 95 AM. POL. SCI. REV. 435, 437 (2001). Even where a legislature as a whole is operating under a closed rule, the unpopular provision may be severed in committee before receiving a floor vote, or pressure from colleagues may cause the proponent of the rider to relent.

¹²⁴ See Baron, *supra* note 117, at 59. Some legislatures, such as the U.S. Congress, vest substantial power in standing committees. See Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 85 (1987). Although this system limits the ability of many legislators to present counterproposals, the committee itself relies on majority rule, and hence the same incentives apply to members of the committee as to members of the legislature as a whole.

¹²⁵ Adding an extreme provision to a popular bill should tend to alienate some supporters. In most cases, that loss will not be compensated for, since proponents of the extreme provision were already likely to vote for the popular bill.

¹²⁶ This analysis assumes that the addition of the minority provision is driven solely by an attempt at coattails logrolling. If the minority provision simultaneously represents an attempt at rider logrolling—e.g., it wins the support of multiple legislators who oppose the popular provision—then it is possible that the original bill will garner more support than the counterproposal. As discussed below, however, such logrolling would likely be excluded by the germaneness test, because the minority provision would have to be substantially different than the popular provision for a group of legislators to support the more extreme provision but oppose the moderate version. For example, in the same-sex marriage context, few, if any, legislators would oppose defining marriage as between a man and a woman but support banning same-sex couples from any of the privileges arising out of marriage. More likely, simultaneous logrolling would arise if the proponents of the legislation happen to support an unpopular provision that a handful of opponents of the popular provision intensely desire. Thus, such an effort would be excluded by the germaneness test unless the provision coincidentally relates to the subject of the popular provision. See *infra* notes 220–38 and accompanying text.

b. Logrolling in the Direct Democracy

Strategies change in direct democracy. Cooperation is more difficult, making coalition and rider logrolling rare.¹²⁷ Coattails logrolling, meanwhile, provides an effective means of obtaining victory.

A critical distinction between representative and direct democracy is that in direct democracy there are no repeat players.¹²⁸ Legislators interact with one another regularly over their careers, encouraging cooperation.¹²⁹ By contrast, initiatives and referendums are one-shot, winner-take-all transactions in which a large number of voters cast ballots anonymously.¹³⁰

The absence of institutional structures is dually stifling for coalition building. First, the lack of regular interaction makes it difficult for minority interest groups to launch joint initiatives.¹³¹ It is theoretically possible for multiple disparate interest groups to pool resources, draft a joint initiative, and simultaneously push for an initiative's inclusion on the ballot, but there is no evidence that such cooperation actually occurs in direct democracy.¹³² Generally, only the drafter of an initiative has input into the measure.¹³³

Second, proponents of initiatives cannot engage in vote trading.¹³⁴ While a legislator can exchange a current vote for a pledge of future support, similar dealings are meaningless in direct democracy.¹³⁵ An effective vote trading system for an initiative would require the exchange of thousands or millions of individual voters' votes, and secret ballots would make defection risk-free.¹³⁶

¹²⁷ See Gillette, *supra* note 23, at 661.

¹²⁸ See MAGLEBY, *supra* note 9, at 184.

¹²⁹ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 47–62 (1991); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 106 (1991); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 *N.Y.U. L. REV.* 1, 9 (1991).

¹³⁰ See Gillette, *supra* note 23, at 661.

¹³¹ *Id.*

¹³² See Jay Mathews, *New Forces Take Political Initiative*, *WASH. POST*, July 3, 1984, at A1 (stating that the initiative “offer[s] opportunit[ies] galore to individuals and entrepreneurs, but handicap[s] labor unions, political parties and other groups that seek to bring disparate parts of society into some compromise”).

¹³³ See *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984) (“[O]pportunity for input in the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes.”).

¹³⁴ See John G. Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 103 *J. Pol. Econ.* 587, 589 (1995).

¹³⁵ See DAVIDSON & OLESZEK, *supra* note 89, at 270.

¹³⁶ See Gillette, *supra* note 23, at 667–68.

Similarly, there is a reduced risk of rider logrolling in direct democracy. Since the proponent of the initiative is acting alone, rather than as part of a legislative body, there is no one to insist on the addition of a rider. Moreover, once the initiative has qualified for the ballot, no modification of the text is possible.¹³⁷ There is no period of debate and maneuvering in direct democracy comparable to the legislative process.¹³⁸

Coattails logrolling, however, is unchecked in direct democracy.¹³⁹ The proponent of a popular provision, secure in the knowledge that his or her initiative will become law, has every incentive to accrue additional victories by attaching less popular provisions.¹⁴⁰ The Georgia marriage amendment is one example of such behavior.¹⁴¹ Because proponents of the amendment expected the marriage restriction to pass with ease, they had no incentive to put the ban on civil unions to a separate vote and risk its narrow defeat.¹⁴²

The effectiveness of the primary weapon against coattails logrolling in the legislature—the counterproposal—is substantially weakened in direct democracy. In the legislature, the ability to propose a competing initiative is a costless feature of a repeat-player system.¹⁴³ In direct democracy, voters may not vote on alternative bills or amend proposed legislation.¹⁴⁴ Introducing a competing proposal requires qualifying an alternative initiative for the ballot. This procedure is both extremely costly¹⁴⁵ and time consuming.¹⁴⁶ Further, initiatives must be submitted at a set date in advance of the election, which

¹³⁷ The proponent of the initiative theoretically could qualify a new initiative for the ballot, but such a process is extremely costly to do once, let alone twice. See MAGLEBY, *supra* note 9, at 64–68, 76. Further, if state law did not allow the initial proposal to be withdrawn, the proponent would be stuck with duplicative, confusing measures on the ballot.

¹³⁸ MAGLEBY, *supra* note 9, at 122. Theoretically, the proponent of an initiative that is not assured of passage in its own right might include a rider to secure the support of a discrete minority. There are many practical limitations on such a strategy. In addition to the problem of jeopardizing group support discussed *infra* at notes 156–57 and in the accompanying text, it is much easier in the legislature than in direct democracy to calculate the precise number of votes needed to secure passage of a measure, and to identify individuals who might constitute swing votes. Moreover, since a rider would only be useful in a close election, its inclusion might offend as many voters as it would bring on board.

¹³⁹ Cf. Matsusaka, *supra* note 134, at 589 (describing how agenda control nullifies some logrolling and vote trading).

¹⁴⁰ See *supra* note 89.

¹⁴¹ See *supra* notes 24–53 and accompanying text.

¹⁴² See *supra* note 37 and accompanying text.

¹⁴³ See David P. Baron, *A Noncooperative Theory of Legislative Coalitions*, 33 AM. J. POL. SCI. 1048, 1049 (1989).

¹⁴⁴ MAGLEBY, *supra* note 9, at 183.

¹⁴⁵ See *id.* at 64–68, 76.

¹⁴⁶ See Donovan & Bowler, *supra* note 78, at 7–9.

frustrates opponents of an initiative by giving them a very short time to raise a large sum of money and to coordinate a comprehensive signature campaign.¹⁴⁷

Time and cost restrictions on proffering counterproposals makes defeating two pernicious types of coattails logrolling particularly difficult. First, an industry group or corporation can tailor a popular initiative so as to accrue significant benefits.¹⁴⁸ The initiative process is often dominated by special interests.¹⁴⁹ For example, the Philip Morris tobacco company led the campaign for statewide smoking restrictions in California as a means of agenda-setting.¹⁵⁰ Such provisions will decrease group utility where the benefit to the trade association is smaller than the net cost to society.¹⁵¹

However, organizing a counter-initiative poses an intractable collective action problem. While the members of the trade association may pocket profits well in excess of the cost of proposing the initiative, the cost will be borne equally by each taxpayer.¹⁵² Thus no citizen will have a sufficient incentive to donate a substantial sum of money to a campaign to put a counter-initiative on the ballot.¹⁵³

¹⁴⁷ See MAGLEBY, *supra* note 9, at 64–68, 76. However, direct democracy does not eliminate all counterproposals. For example, in a single California election in 1988, five separate initiatives addressing automobile insurance appeared on the same ballot. See Arthur Lupia, *Shortcuts Versus Encyclopedias Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 64 (1994). Increasingly, counterproposals are being used by well-financed initiative opponents. See Susan A. Banducci, *Direct Legislation: When Is It Used and When Does It Pass?*, in *CITIZENS AS LEGISLATORS* 109, 109–10, 121 (Shaun Bowler et al. eds., 1998).

¹⁴⁸ See MAGLEBY, *supra* note 9, at 182. Recently opponents of direct legislation have begun to use counterproposals more frequently. Rapid qualification of a counterproposal requires employing petition management firms capable of collecting sufficient signatures. While grassroots activists and industry lobbyists may both employ paid signature collectors, groups that can quickly acquire the resources necessary to purchase signatures are presumably at a comparative advantage. See Donovan & Bowler, *supra* note 78, at 10.

¹⁴⁹ See David McCuan et al., *California's Political Warriors: Campaign Professionals and the Initiative Process*, in *CITIZENS AS LEGISLATORS*, *supra* note 147, at 55, 77.

¹⁵⁰ See Robert Pear, *Debate on Whose Voice Is Heard in Initiatives*, N.Y. TIMES, Nov. 7, 1994, at B11.

¹⁵¹ See FARBER & FRICKEY, *supra* note 129, at 33–37.

¹⁵² For example, if an industry subsidy will impoverish California by \$20 million, each citizen should only expect to lose \$0.57. Thus a rational voter is unlikely to make even a modest (\$10–20) donation to a campaign to defeat the provision.

¹⁵³ Inherent advantages held by opponents of initiatives may temper the success of this method of logrolling. See Todd Donovan et al., *Contending Players and Strategies: Opposition Advantages in Initiative Campaigns*, in *CITIZENS AS LEGISLATORS*, *supra* note 147, at 80, 96–99. However, so long as concentrated interest groups have a unique ability to minimize coattails logrolling not shared by their opponents, the aggregate affect of direct legislation will be to favor the narrow interests of such groups. See *id.* at 100. Moreover, mobilizing opposition may itself become more difficult when an initiative contains logrolled provisions. See Gillette, *supra* note 23, at 669.

Second, minority groups may be uniquely hurt. Direct democracy is often hostile to minority interests.¹⁵⁴ Groups designed to protect minorities tend to be small and under-funded, and thus unable to raise enough money to propose counter-initiatives.¹⁵⁵ Moreover, pushing a counter-initiative may be politically impossible. For example, the extremity of a same-sex marriage initiative which bans all civil benefits might be tempered by a counterproposal which solely limits the definition of a marriage to the union of a man and a woman. However, a gay rights group such as Lambda Legal Defense Fund cannot feasibly call upon its members to donate money to a campaign to place a same-sex marriage ban on the statewide ballot.¹⁵⁶ Because voters who care deeply about the same-sex marriage issue tend to support either complete equality for gays and lesbians or a full restriction on civil benefits,¹⁵⁷ introducing a counter-initiative depends impossibly on the successful mobilization of the least interested segment of the population.

B. Voter Confusion

Preventing voter confusion is the second major rationale invoked by courts in support of the single subject rule.¹⁵⁸ Multiple subject legislation causes confusion by distorting heuristic cues. Neither legislators nor citizens critically analyze the text of every piece of legislation on which they cast a vote.¹⁵⁹ Yet, voters can still effectively participate in direct democracy by relying on external cues to inform their vote.¹⁶⁰ Multiple subject legislation therefore

¹⁵⁴ See, e.g., DAVID G. LAWRENCE, CALIFORNIA: THE POLITICS OF DIVERSITY (2000); MAGLEBY, *supra* note 9, at 182; William E. Adams, Jr., *Is it Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures*, 34 WILLAMETTE L. REV. 449 (1998); Bell, *supra* note 21; Eule, *supra* note 18, at 1548–73; Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 719–31 (1994); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399 (1999). *But see* Donovan & Bowler, *supra* note 78, at 17 (characterizing critics of direct democracy as focusing too narrowly on high-profile initiatives); Mark Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 N.Y.U. ANN. SURV. AM. L. 373, 380.

¹⁵⁵ See RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 54 (2002).

¹⁵⁶ Even assuming that Lambda Legal could convince major donors to support a restrictive definition of marriage as a means of minimizing losses, its mission statement commits the organization “to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV.” Lambda Legal Defense Fund, About Lambda Legal, <http://www.lambdalegal.org/cgi-bin/iowa/about/index.html> (last visited Dec. 29, 2005) (emphasis added).

¹⁵⁷ Ellen Goodman, *Talking 'bout an Evolution*, PITTSBURGH POST-GAZETTE, Feb. 18, 2004, at A21.

¹⁵⁸ See *supra* note 32 and accompanying text.

¹⁵⁹ See *infra* note 176 and accompanying text.

¹⁶⁰ See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through*

poses a serious problem for direct democracy, by distorting the accuracy of those voter cues.

The single subject rule seeks to prevent confusion by making direct legislation less misleading.¹⁶¹ State high courts transferred the voter confusion rationale from case law interpreting clear title and ballot question requirements, which sought to prevent the duping of legislators into unknowingly supporting unpopular provisions.¹⁶² Thus, in the context of single subject rules, courts looked to whether the differing nature of individual provisions and the clarity of the ballot language combined to mislead legislators or voters.¹⁶³

There are several reasons that individual citizens may be more susceptible to confusion than are legislators.¹⁶⁴ First, legislators have greater experience with and understanding of the political process than do lay voters, making legislators more likely to recognize attempts at deception.¹⁶⁵ Second, elected representatives devote more time to considering issues of policy and have available additional resources to inform their decisions.¹⁶⁶ By contrast, voters may spend only a few minutes reviewing the initiatives on an upcoming ballot.¹⁶⁷ Many voters are, in fact, encountering an initiative for the first time when they enter the polling booth.¹⁶⁸ Third, even interest groups with scant resources can afford to contact elected representatives on an individual basis, whereas such groups may have little or no financial ability to communicate with the mass electorate.¹⁶⁹ Fourth, some confusion unintentionally occurs during drafting.¹⁷⁰ The legislature, unlike direct democracy, has built in deliberative structures to redress flaws in legislation drafting.¹⁷¹

Heuristic Cues and "Disclosure Plus," 50 UCLA L. REV. 1141 (2003); Schacter, *supra* note 75, at 139–44.

¹⁶¹ See, e.g., *State v. Canova*, 94 So. 2d 181, 184 (Fla. 1957).

¹⁶² See discussion of the Yazoo land scandal, *supra* notes 33–34 and accompanying text.

¹⁶³ See, e.g., *Canova*, 94 So. 2d at 182.

¹⁶⁴ See MAGLEBY, *supra* note 9, at 198; Raymond E. Wolfinger & Fred I. Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 767 (1968). But see Larry M. Bartels, *Uninformed Voters: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194 (1996).

¹⁶⁵ See MAGLEBY, *supra* note 9, at 187.

¹⁶⁶ See Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 501 (1998) (quoting Schacter, *supra* note 75, at 127–128).

¹⁶⁷ See Kang, *supra* note 160, at 1143.

¹⁶⁸ MAGLEBY, *supra* note 9, at 187.

¹⁶⁹ Cf. Schacter, *supra* note 75, at 135–36.

¹⁷⁰ MAGLEBY, *supra* note 9, at 186–87.

¹⁷¹ *Id.*

Critics of the single subject rule suggest that it is ill-suited to avoid confusion.¹⁷² Professor Lowenstein, for example, argues that the rule is both over- and under-inclusive, barring some simple initiatives and permitting “others that are hopelessly complex.”¹⁷³ Treating the single subject rule as designed to reduce complexity allows its opponents to create an easily vanquished strawman.¹⁷⁴ Unquestionably, a proposal dealing briefly with several discrete subjects may be short, straightforward, and understandable, while legislation comprehensively addressing a single subject may be long and contain exceedingly confusing language.¹⁷⁵

However, this cursory conflation of confusion and complexity glosses over the uniquely misleading nature of multiple subject legislation. Neither legislators nor citizens critically analyze the text of every piece of legislation on which they cast a vote.¹⁷⁶ Instead, each group looks to titles and ballot questions for cues as to the contents and scope of the measure.¹⁷⁷ Voters may use a number of external cues, such as party affiliation, interest group opinion, or media coverage to inform their vote.¹⁷⁸ If a bill contains multiple subjects, then the accompanying descriptions may not alert the voter to the entire contents of the measure, increasing the odds that the proponent of the legislation, intentionally or otherwise, fails to inform the voter about a provision critical to that voter’s interests.¹⁷⁹

This concern is conceptually distinct from complexity.¹⁸⁰ Consider, for example, a moderate voter who trusts the Republican Party on economic issues

¹⁷² See, e.g., David Kader et al., *The Arizona Supreme Court: Its 2000–2001 Decisions*, 34 ARIZ. ST. L.J. 369, 418 n.417 (2002).

¹⁷³ See, e.g., Lowenstein, *supra* note 14, at 954–55.

¹⁷⁴ *Id.* (“[I]f one supposes that the primary purpose of the single-subject rule is to avoid complexity, what are the implications for the rule’s application?”).

¹⁷⁵ Of course, a short statement with multiple meanings may be far more complex than a longer statement with just one. Most riddles provide an example of a short but tricky statement. For example, which weighs more, a pound of gold or a pound of feathers? The gut reaction may be to say gold, which is denser. The more cautious observer might sense the trick and say that they weigh the same—the question states that there is a pound of each. It is only the rare person with both an interest in measurements and too much time on his or her hands who will correctly answer feathers. Gold is measured on the Troy standard, which only has twelve ounces to a pound.

¹⁷⁶ See Schacter, *supra* note 75, at 139–44.

¹⁷⁷ See MAGLEBY, *supra* note 9, at 122.

¹⁷⁸ See Kang, *supra* note 160; Schacter, *supra* note 75, at 132–34.

¹⁷⁹ For example, in the Georgia case, the ballot question referred solely to marriage, while the full text limited civil unions. See *supra* notes 27–28 and accompanying text.

¹⁸⁰ Complexity, of course, may still be a problem for direct democracy in its own right. See, e.g., MAGLEBY, *supra* note 9, at 142–44. But see Kang, *supra* note 160, at 1153–55.

but trusts the Democratic Party on social issues. If an interest group places an initiative on the ballot dealing exclusively with restructuring the state income tax system, the voter can read the ballot title, question, and summary, determine that it addresses income tax, and then look to the Republican Party for guidance on how to vote. This method will allow voters to vote as they intend regardless of how “hopelessly complex” the initiative is.¹⁸¹ By contrast, if the initiative also bans tax revenue from funding sex education programs that promote condom use, the voter may not notice this unique provision from reading the title and summary, and thus be unaware of a need to consider the Democratic Party’s position on the initiative.¹⁸²

The Georgia same-sex marriage amendment provides an example. A narrowly framed ballot question and the inclusion of multiple subjects worked in tandem to mislead voters.¹⁸³ The question on the ballot in Georgia referred exclusively to marriage, while the actual amendment banned civil unions. Georgia voters who rely on the ballot question to cue themselves as to the contents of the proposed amendment, therefore, would mistakenly believe that the amendment solely addressed the topic of same-sex marriage.¹⁸⁴ Those voters, if they support restricting the definition of marriage, would thus vote “yes” on the proposed amendment, even if they vehemently opposed provisions limiting civil unions and divesting courts of jurisdiction to hear claims by same-sex couples.¹⁸⁵

C. Structures of Democracy

Representative and direct democracy are structurally distinct. These differences ought to inform an analysis of the effectiveness of the single subject rule. First, there is a greater need for omnibus legislation in the legislature than in direct democracy. Second, while representative democracy

¹⁸¹ Lowenstein, *supra* note 14, at 955.

¹⁸² The single subject rule is not the only means to redress this situation. One alternative is to require stricter enforcement of procedural requirements on ballot titles and descriptions. However, strengthening these requirements only aggravates the problem of crafting judicially manageable standards. *See infra* notes 231–234 and accompanying text. If defining the scope of a subject is arbitrary and difficult, overseeing the crafting of ballot descriptions is even more so. Moreover, the court would still need to define the subjects contained within the legislation in order to require their inclusion in the bill’s description.

¹⁸³ *See supra* notes 37–39 and accompanying text.

¹⁸⁴ *See supra* notes 42–44 and accompanying text.

¹⁸⁵ This fact makes the confusion caused by multiple subjects more damaging than confusion borne out of complexity. If voters mistakenly believe that they are only voting on the popular provision, they will cast a “yes” vote. If voters simply cannot understand the proposition, they may simply vote “no.” MAGLEBY, *supra* note 9, at 142.

is premised on bargaining, direct democracy requires an accurate snapshot of majority preference. Third, citizens engaging in the franchise suffer a cognizable injury when their vote is logrolled, while legislators do not.

1. *The Role of Omnibus Proposals*

Concern over strict enforcement of the single subject rule in the legislature is bolstered by legitimate concerns over unnecessary hamstringing of the legislature. First, state legislatures need some ability to enact omnibus legislation.¹⁸⁶ For example, in a state with an amateur legislature, enacting each item in a comprehensive crime bill separately might envelop the entire legislative session, grinding politics to a standstill. Second, as a matter of prudence, some provisions should stand or fall together.¹⁸⁷ For example, a provision authorizing a city's police department to hire additional personnel ought to be tied to a provision ensuring funding for such a measure. Otherwise, some legislators may decide to support the hiring of personnel only to later deny the city the funding to pay its newly-hired officers.¹⁸⁸

Direct democracy, by contrast, does not depend on omnibus legislation. Direct legislation is a supplement to, not a replacement for, representative government.¹⁸⁹ Initiatives are designed to check the legislature by allowing for broad policy and structural change rather than detailed statutory enactments.¹⁹⁰ Further, there is a reduced value to omnibus legislation in direct democracy. Comprehensive bills provide an important means of overcoming collective action problems in the legislature.¹⁹¹ However, the absence of regular

¹⁸⁶ See, e.g., NEAL, *supra* note 116, at 129–32 (demonstrating the importance of omnibus legislation in implementing the Violent Crime Control and Law Enforcement Act). The denotation and connotation of the term “omnibus” are, unfortunately, nearly opposite of one another. An omnibus is a printed anthology of works on a *related* subject. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1227 (4th ed. 2000). However, as an adjective used to describe legislation, “omnibus” has often taken on a pejorative connotation implying *unrelated* subjects. See, e.g., Ruud, *supra* note 7, at 389 (“provisions on heterogeneous matters”). The reference here is to the denotation. One way to think about a properly functioning single subject rule is that it would allow for legislation that is limited in its scope but exhaustive in treatment. Thus, it would allow omnibus legislation but sever the pejorative connotation. See also *Co-ordinated Transp. v. Barrett*, 106 N.E.2d 510, 513 (Ill. 1952), *aff'd*, 344 U.S. 583 (1953).

¹⁸⁷ See ESKRIDGE & FRICKEY, *supra* note 102, at 252–53 (explaining why some states exempt appropriations from single subject rules); see also *Flanders v. Morris*, 558 P.2d 769, 773 (Wash. 1977) (adopting a policy of “greater latitude” for appropriations bills).

¹⁸⁸ See, e.g., Jennifer Vigil, *County Freed From Funding Mandate*, S.D. UNION-TRIB., July 10, 2004, at B2 (describing California's failure to fund mandatory mental health programs).

¹⁸⁹ See Garrett, *supra* note 19, at 1846.

¹⁹⁰ *Id.*

¹⁹¹ See *supra* notes 111–114 and accompanying text.

interaction between players in direct democracy means that omnibus legislation provides no comparable benefit for initiatives or referenda.¹⁹²

2. *Assessing Majority Preferences*

History demonstrates that direct democracy is thwarted by tactics that distort barometers of mass preference.¹⁹³ Logrolling and voter confusion are thus uniquely substantial roadblocks for an effective system of direct democracy.¹⁹⁴ Though the clamor for greater governmental responsiveness that led to direct democracy's spread during the late nineteenth and early twentieth centuries came from multiple corners, Populist and Progressive advocates were unified in their belief that direct legislation better reflects the mass will of the people than does representative democracy.¹⁹⁵

The premise of direct democracy is that unmediated access to majority preference most accurately gauges popular will.¹⁹⁶ Under this conception of democracy, any coattails logrolling which successfully carries a minority interest to victory distorts the effectiveness of direct democracy, because a similar initiative, stripped of the unpopular provision, could have garnered greater majority support.¹⁹⁷ Meanwhile, the unpopular legislation, standing alone, would not have received majority support. The enacted legislation thus represents a less accurate gauge of popular will than if voters were allowed to consider the merits of each provision separately.¹⁹⁸ Voter confusion similarly decreases the accuracy of the process by causing voters to mistakenly cast ballots that do not accurately reflect their beliefs.¹⁹⁹

¹⁹² See *supra* notes 127–130 and accompanying text.

¹⁹³ Donovan & Bowler, *supra* note 78, at 1–2.

¹⁹⁴ Cf. MAGLEBY, *supra* note 9, at 22 (discussing the Progressivist assumption that voters will fully inform themselves about local politics).

¹⁹⁵ See the discussion of the development of direct democracy, *supra* notes 55–60 and accompanying text. See also Donovan & Bowler, *supra* note 78, at 1–2.

¹⁹⁶ At first glance this statement may appear to be a truism. For an argument that it is not, see Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998). See also Lynn A. Baker, *Preferences, Priorities, and Plebiscites*, 13 J. CONTEMP. LEGAL ISSUES 317 (2004).

¹⁹⁷ By contrast, coalition logrolling may increase aggregate support for a measure, and thus remain faithful to the premise of direct democracy. As noted in *supra* note 130 and accompanying text, however, coalition logrolling is unlikely to occur in direct democracy.

¹⁹⁸ This argument applies with substantially less force in representative democracy, where legislators are expected to engage in cooperation. Nonetheless, some courts have held that a legislator has a responsibility not to logroll. See, e.g., *State ex rel. Callaghan v. Maitland*, 246 S.W. 267, 272 (Mo. 1922).

¹⁹⁹ MAGLEBY, *supra* note 9, at 4.

While this observation suggests that strict enforcement of the single subject rule necessarily improves directly democratic outcomes, there is a practical limit to the benefits provided by tighter enforcement. As Professor Lowenstein notes, “[m]ost choices in life involve trade-offs, and there is no reason to expect voting on initiatives to be any different.”²⁰⁰ The single subject rule cannot end all of the calculated choice involved in casting a ballot, and thus should not be interpreted so narrowly as to make drafting an initiative impossible. Lowenstein therefore aptly flags a slippery slope in judicial interpretation of the logrolling rationale.²⁰¹

However, there are two sides of the hill. Just as taking the individual choice argument too far destroys the initiative process by turning the drafting process into a logistical nightmare, excessively narrowing the choices before the individual voter destroys the presumption behind direct democracy.²⁰² Absent the premise that unpacking issues for individual voters is beneficial, no conceptual reason exists to prefer direct democracy over a representative system.²⁰³ Evaluating a complex bill containing multiple unrelated provisions involves the same trade-offs as choosing between two imperfect candidates for political office.²⁰⁴ Because states that allow for direct democracy have made a conscious choice to transfer additional power to the voters, courts should consider this structure in affording differing levels of deference to drafters of bills and to drafters of direct legislation.

If this argument from structure cannot provide specific and judicially manageable standards, it can offer countenance against the most frequently invoked rationale for providing deference in the direct legislation context. Courts and scholars repeatedly justify giving drafters of initiatives broad deference under the guise of preserving the people’s right to engage in direct democracy.²⁰⁵ This argument is disingenuous, setting up a false dilemma where a procedural rule lacking a philosophical underpinning is weighed on one side of a scale versus “the right . . . to the initiative” on the other.²⁰⁶

²⁰⁰ Lowenstein, *supra* note 14, at 958.

²⁰¹ *See id.* at 957–58.

²⁰² *Cf.* MAGLEBY, *supra* note 9, at 3–4.

²⁰³ *Id.*

²⁰⁴ Indeed, unless the need to maximize individual choice is seen as a driving force of direct democracy, even the democratic election of an omnipotent monarch can be characterized as directly democratic, albeit involving a diverse set of tradeoffs.

²⁰⁵ *See* Schacter, *supra* note 75, at 129.

²⁰⁶ Lowenstein, *supra* note 14, at 956.

On the contrary, when courts and scholars assert that the right of the people to engage in direct democracy weighs in favor of deference to the proponent of an initiative, they are placing freedom of choice on the wrong side of the balancing equation.²⁰⁷ Because the relevant measure of the “directness” of direct democracy is the amount of choice granted to individual voters, not the level of flexibility to engage in agenda setting granted to the authors of initiatives, the single subject rule should be seen as an effort to preserve, not restrict, the right to the initiative.²⁰⁸ A strict single subject rule, regularly enforced, would not stop initiatives. It would instead create an incentive for proponents to employ language that affords the individual voter greater choice. The question for courts is how far the single subject rule can push drafters of direct legislation into providing meaningful choice without making direct democracy logistically impossible.

3. *Voters and Coercive Harm*

Lax enforcement of the single subject rule harms voters, but not legislators. An important distinction between single subject rules as applied to legislation and as applied to plebiscites rests in the nature of the injury caused by the violation in each context. The legislative single subject rule is exclusively outcome oriented, seeking to improve the results of the legislative process by limiting the power of interest groups to engage in coalition and rider logrolling.²⁰⁹ By contrast, the single subject rule in direct democracy recognizes a process-oriented harm.²¹⁰ State high courts have likened the forced choice imposed by logrolling as “something closely akin to coercion.”²¹¹ Citizens, upon entering the voting booth, are forced into a Hobson’s choice between their deeply held opinions regarding one subject of an initiative and their strong convictions regarding the other provisions.²¹²

There is no analogous injury in the legislative context.²¹³ First, representatives choose to buy into a legislative system which relies on political

²⁰⁷ See Schacter, *supra* note 75, at 129 (noting flaws in prioritizing drafters’ interpretations).

²⁰⁸ See MAGLEBY, *supra* note 9, at 4 (discussing the distortive effect of segregating agenda setting from voting).

²⁰⁹ See Gillette, *supra* note 23, at 640–41.

²¹⁰ See, e.g., *Carter v. Burson*, 198 S.E.2d 151, 156 (Ga. 1973).

²¹¹ *Rea v. City of La Fayette*, 61 S.E. 707, 708 (Ga. 1908).

²¹² See *id.*

²¹³ However, some case law suggests that a governor, in exercising the veto, suffers a harm. See, e.g., *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. 1994) (preventing “the legislature from forcing the governor into a take-it-or-leave-it choice when a bill addresses one subject in an odious manner and

maneuvering when they run for office.²¹⁴ Second, elected officials are performing a job function when they cast votes, not exercising the franchise.²¹⁵

Treating the rule similarly in each context produces perverse outcomes. For example, in *O'Kelley v. Cox*,²¹⁶ the Georgia Supreme Court determined that it could not review the marriage amendment for compliance with the single subject rule until after the election, because there is no analogous preenactment judicial review for bills passed in the legislature. Yet the court did not distinguish its prior claim that coercion and harm may accrue at the ballot box.²¹⁷ The analogy between representative and direct democracy therefore resulted in a nonsensical situation in which an equitable remedy can only become available after a judicially-cognizable injury has become irreversible.²¹⁸

IV. CRAFTING A BETTER APPROACH

A rule that is good for the legislature may be bad for direct democracy. Part III identified the ways in which the single subject rule functions differently in direct democracy than it does in the legislature. An effective judicial test for compliance with the single subject rule ought to be cognizant of the differences between the two contexts. This Part suggests that the current test works sufficiently well for the legislature, but that state courts need a better approach when analyzing the mechanisms of direct democracy.

A. *The Reasonable Germaneness Test*

The “reasonably germane” test is the most common test for compliance with the single subject rule.²¹⁹ Under this approach, a bill “does not violate the single subject requirement if, despite its varied collateral effects, all of its parts are ‘reasonably germane’ to each other, and to the general purpose or object of

another subject in a way the governor finds meritorious”).

²¹⁴ See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996).

²¹⁵ An attempt to apply a voting rights case to a legislator’s vote on pending legislation would likely fail as nonjusticiable. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²¹⁶ 604 S.E.2d 773 (Ga. 2004).

²¹⁷ See, e.g., *Rea v. City of La Fayette*, 61 S.E. 707, 708 (Ga. 1908).

²¹⁸ See *O'Kelley*, 604 S.E.2d at 778–79 (Sears, J., dissenting).

²¹⁹ See, e.g., *Perry v. Jordan*, 207 P.2d 47, 50 (Ca. 1949). The precise terminology used in this type of test varies across the states. See, e.g., *State ex rel. Test v. Steinwedel*, 180 N.E. 865, 868 (Ind. 1932) (“reasonable basis”).

the initiative.”²²⁰ It is sometimes phrased as requiring that each provision of a measure share a “general purpose” or “objective,”²²¹ or as comprising a “workable whole.”²²²

The test imposes a lax standard on drafters of legislation.²²³ “Germane” is a weak term, simply requiring relevance.²²⁴ Courts, originally concerned with unnecessarily hampering the legislature, have thus insisted on giving great deference to the drafter in applying this test.²²⁵ This level of deference has transferred, along with the reasonable germaneness test, to judicial interpretation of direct legislation.²²⁶

The reasonable germaneness approach is odd because it does not test compliance with the single subject rule per se, but rather degrees of noncompliance.²²⁷ Instead of assigning a subject to a bill, and then determining whether each provision comports to that subject, the courts seem to first presume that each provision addresses a different subject and then consider whether the violation is unconstitutionally egregious.²²⁸ Thus a bill may in fact embrace more than one subject, so long as a “common purpose” or relationship exists between the subjects.²²⁹

This judicial reticence towards a more straightforward test for enforcement of the single subject rule stems from the difficulty in establishing manageable standards for defining the scope of a subject.²³⁰ Judges can categorize the subject of a particular provision so broadly as to eliminate any potential rule violation or so narrowly as to ensure multiple subjects.²³¹ It is difficult to affix

²²⁰ *Legislature of Ca. v. Eu*, 816 P.2d 1309, 1320 (Ca. 1991) (emphasis omitted) (quoting *Brosnahan v. Brown*, 651 P.2d 274, 279 (Cal. 1982)).

²²¹ *See, e.g., Brosnahan v. Brown*, 651 P.2d 274, 279 (Cal. 1982).

²²² *See, e.g., Regner v. Bayless*, 16 P.3d 209, 210 (Ariz. 2001).

²²³ *Minger, supra* note 16, at 908–09. However, some states with historically weak single subject restrictions have begun to enforce the rule more vigorously. *See Martha J. Dragich, supra* note 10, at 107–09 (2001); Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 *ELECTION L.J.* 35, 35–36 (2002).

²²⁴ *BLACK’S LAW DICTIONARY* 695 (7th ed. 1999) (defining *germane* as *pertinent*); *WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY* 514 (1988) (defining *germane* as *relevant*).

²²⁵ *See, e.g., Evans v. Superior Court*, 8 P.2d 467, 468–69 (Cal. 1932).

²²⁶ *See, e.g., Perry v. Jordan*, 207 P.2d 47, 50 (Cal. 1949) (applying *Evans* to initiatives).

²²⁷ *See Douglas C. Michael, Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 *CAL. L. REV.* 1216, 123233 (1983).

²²⁸ *See, e.g., Raven v. Deukmejian*, 801 P.2d 1077, 1084 (Ca. 1990) (finding that the subjects of the provisions are “somewhat disparate” but still permissible).

²²⁹ *Ohio ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1099 (Ohio 1999).

²³⁰ Caroline J. Tolbert et al., *Election Law and Rules for Using Initiatives*, in *CITIZENS AS LEGISLATORS*, *supra* note 147, at 27, 41–43.

²³¹ *See Lowenstein, supra* note 224, at 47–48. This concern initially led the Ohio courts to rule that its

certain limits on the scope of a subject.²³² Thus, state high courts may be concerned about placing too much discretion in the hands of individual judges, and therefore opt instead for a deferential test.²³³

Because proponents of legislation will always choose to categorize their proposal as containing a single subject, the reasonable germaneness test saps the single subject rule of much of its strength.²³⁴ As previously discussed, the ability of proponents of legislation to frequently dodge the single subject rule may pose a minimal risk in the legislature,²³⁵ where other mechanisms check extremist legislation.²³⁶ However, the cost of nonenforcement in direct

single subject rule is “directory” rather than “mandatory.” *Pim v. Nicholson*, 6 Ohio St. 177, 179 (Ohio 1856). Though *Pim* has never been overturned, the court has since recognized the enforceability of the provision. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 215 (Ohio 1999).

²³² Defining the scope of categories is itself problematic, since any item fits into a circle of overlapping categories limited by a radius of generality. Suppose, for example, you see a picture of Cain, my neighbor’s American Staffordshire terrier. How would you categorize the creature in the picture? American Staffordshire? A terrier? A dog? Mammal? Animal? Life form? Professor Lowenstein mistakenly claims that “subject” cannot be defined by any “objective demarcation of the human mind.” Lowenstein, *supra* note 14, at 938–39. In fact, there is evidence to suggest that categorization is innate. For the classic reference, see Eleanor Rosch et al., *Basic Objects in Natural Categories*, 8 COGNITIVE PSYCH. 382 (1976). For a more complete discussion of categorization, see LAWRENCE W. BARSALOU, COGNITIVE PSYCHOLOGY: AN OVERVIEW FOR COGNITIVE SCIENTISTS 15–51 (1992). In the dog example, the universality of the response by three-year-olds upon seeing Cain (“Doggie!”) hints at an innate human ability to define levels of generality. Professor Lowenstein cites to W.V.O. Quine for the notion that there is no ontological validity to classes. Lowenstein, *supra* note 14, at 939 n.17. Yet the ontological status of classes is unrelated to humankind’s capacity to draw demarcations between those classes. Most people know the difference between a horse and a unicorn, despite the latter’s dubious ontological status.

Given the dearth of toddlers on the bench, the possibility of innate categorization alone may not provide much help in crafting a judicially manageable standard. Thus, Lowenstein still presents an important difficulty for *judicial* interpretation of the single subject rule. However, Lowenstein accepts Quine’s view of the extreme usefulness of classes. *Id.* This conception of classes as functional tools suggests that the exclusive means for defining a subject ought to be based on the purpose for which classification is sought. As noted, the express purpose of the single subject rule is to reduce logrolling and voter confusion. See *supra* notes 30, 32 and accompanying text. Therefore, the various interpretive tests should be judged according to how successfully they achieve such ends.

²³³ Note that while the reasonable germaneness test may be deferential, it does not solve the problem of judicially manageable standards. Courts use terms such as “rational” and “reasonable” to define the bounds of legislative discretion. See, e.g., *Raven*, 801 P.2d at 1084. (upholding legislation because the provisions reflect “a consistent theme.”) These nebulous terms reduce the incidence of cases finding a violation of the single subject rule, but make those few cases that do find a violation unpredictable. Tolbert et al., *supra* note 230, at 41–43.

²³⁴ See, e.g., *Brosnahan v. Brown*, 651 P.2d 274, 280–81 (Cal. 1982) (citing the preamble of an initiative to determine the scope of its subject).

²³⁵ See *supra* note 49–51 and accompanying text.

²³⁶ See *supra* notes 121–22 and accompanying text.

legislation, where few checks exist on agenda setting by the proponents of initiatives, may be much higher.²³⁷

B. *Staying the Course in the Legislature*

Reasonable germaneness provides a suitable test for legislative compliance with the single subject rule. Because logrolling in the legislature can produce benefits as well as costs, an effective rule should eliminate some or all of the most abusive cases of logrolling while allowing for sufficient cooperation to overcome collective action problems. The reasonable germaneness test achieves this end.

1. *Legislative Deception*

The single subject rule, especially when combined with a clear title rule, provides some assurance that legislators are not deceived by riders.²³⁸ The rule does not ensure an informed legislature.²³⁹ Legislators rarely have the time or resources to inform themselves in detail about the contents of every piece of legislation that comes before them.²⁴⁰ Legislators with limited time will carefully read only those bills in which they have a particular interest or expertise, and will rely on advice from peers,²⁴¹ lobbyists,²⁴² their group,²⁴³ or their party²⁴⁴ to decide votes on issues with which they are unfamiliar.²⁴⁵

However, this division of the legislative workload along interest and expertise lines allows the germaneness test to serve as a check against deception.²⁴⁶ So long as each bill contains provisions reasonably germane to a

²³⁷ See *supra* notes 108–10 and accompanying text, and notes 148–57.

²³⁸ See *infra* notes 250–52 and accompanying text

²³⁹ See W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Law*, 44 STAN. L. REV. 383, 404–05 (1992).

²⁴⁰ *Id.* To note one famous example, few legislators had an opportunity to read the 342 page USA PATRIOT Act before voting on it. See David Cole, *On the Road with Ashcroft*, NATION, Sept. 22, 2003, at 22.

²⁴¹ See DAVIDSON & OLESZEK, *supra* note 89, at 270.

²⁴² See GLENN R. PARKER, CONGRESS AND THE RENT-SEEKING SOCIETY 21–22 (1996).

²⁴³ See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 10–16 (1971).

²⁴⁴ See David R. Mayhew, *Clinton, the 103d Congress, and Unified Party Control: What Are the Lessons?*, in POLITICIANS AND PARTY POLITICS 259, 280–81 (John G. Geer ed., 1998).

²⁴⁵ See generally Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1206–09 (2003) (employing the concept of a “regulatory prism” to describe the array of legislative players).

²⁴⁶ Legislators will scrutinize bills in their area of expertise, then defer to colleagues on other issues. See DAVIDSON & OLESZEK, *supra* note 88, at 273. Thus to avoid confusion, legislators simply need to accurately

single subject, legislators know which bills they need to read.²⁴⁷ Thus, a legislator with a background as a school principal can safely scrutinize all of the bills pertaining to education without fearing that the fiftieth page of an omnibus crime bill will close a local elementary school.

Moreover, it is not clear whether stricter enforcement of the single subject rule could further decrease the risk of deception. While a system of division of labor is arguably inferior to a system in which each legislator thoroughly informs himself or herself about each bill,²⁴⁸ the latter system is improbable.²⁴⁹ Meanwhile, while a very strict test for compliance with the single subject rule would make each bill shorter and more easily digestible, it would proportionally increase the total number of bills a legislator has to sift through. This effect would at least counteract the benefit of shorter bills, and possibly increase the odds that an individual piece of legislation hostile to a legislator's interests goes unnoticed.

2. Preventing Riders

The germaneness test cannot eliminate rider logrolling, but may make it substantially more difficult. While the test prevents a legislator from attaching a wholly unrelated provision to a bill, riders may still occur where the subject of the initial proposal and the rider are similar. This fact initially appears to substantially weaken the strength of the test, because any legislator interested in securing passage of a rider ought to be able to find a bill that is reasonably germane to the subject of the rider.²⁵⁰ However, not all bills are suitable for a particular legislator's rider. The author of the original legislation must have an incentive to cooperate with the proponent of the rider.²⁵¹ This motive first requires that the vote of the proponent of the rider be essential to securing passage of the original legislation.²⁵² Second, it requires that the proponent can credibly threaten to vote against the primary legislation. Because a typical

identify which bills to read.

²⁴⁷ *Id.*

²⁴⁸ Given that legislators have a finite amount of time, a system in which legislators develop a comparative advantage in their areas of expertise and then defer to colleagues for guidance on other subjects may produce better policy overall.

²⁴⁹ *Cf.* Schacter, *supra* note 75, at 139–44.

²⁵⁰ State legislatures typically introduce thousands of bills per legislative session. See Bill Sizemore, *Ballot Measures Work*, USA TODAY, Oct. 23, 2000, at 28A.

²⁵¹ See *supra* note 101 and accompanying text.

²⁵² Norms of reciprocity may also allow for cooperation on relatively inoffensive riders even where the proponent of the popular initiative does not extract an immediate benefit. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 5 (1984).

legislative body considers bills on a wide array of topics, the odds that any particular bill to which a legislator can effectively attach a rider will pertain to the same subject as the rider are thus relatively small.

3. *Limiting Coalition Logrolling*

It is impossible to neatly separate valuable efforts at coalition building from logrolling that decreases group utility. However, the reasonable germaneness test may place a disproportionate burden on self-interested legislators, and thus be preferable under public choice theory. Legislators cannot always choose their pet projects. Suppose, for example, a legislator represents a wine-producing county. The single subject rule minimizes the value of her cooperating with a legislator from an industrial community, because obtaining a subsidy for a factory is of no interest to her constituency. Since the two legislators can no longer cooperate on unrelated subjects, they have no common ground for bargaining.

By contrast, because interest groups may have concerns which cut across a wide swath of areas of political regulation, disagreement on policy outcomes is not fatal to cooperation. For example, if a feminist advocacy group and a libertarian advocacy group each push for reform in several of the same policy areas, they can regularly engage in cooperation under a reasonable germaneness test even if their substantive policy preferences frequently differ. Regardless of the topic of the bill, both parties will likely have policy preferences over which to bargain.

The germaneness test certainly cannot prevent all instances of self-interested provisions that decrease group utility. For example, each legislator supporting an omnibus crime bill may insist that a locality in his or her home district receive funding for additional police officers. However, it is unlikely that even the most stringent test for compliance with the single subject rule would prevent applying the same provision to multiple municipalities.²⁵³ Courts have no principled means of distinguishing between socially beneficial and harmful coalition logrolling. Moreover, legislators cooperating to enact particularly delirious proposals may spread those proposals over several bills

²⁵³ Florida currently applies the strictest single subject rule, requiring a “logical and natural oneness of purpose” for initiatives. Advisory Opinion to the Attorney General—Limited Political Terms in Certain Offices, 592 So. 2d 225, 227 (Fla. 1991) (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)). Even under this test, it is hard to imagine a court distinguishing between increasing funding for one police precinct and increasing funding for three.

to avoid application of the rule.²⁵⁴ Thus, a stricter test may reduce beneficial coalition building without a corresponding decrease in the incidence of provisions which decrease group utility, making the reasonably germane test the best of many imperfect options.²⁵⁵

4. *Reducing Coattails Logrolling*

The reasonable germaneness test is not an effective means of reducing coattails logrolling. Despite their differing levels of popularity, an extreme position on a subject and a moderate position on a subject are germane to the same subject. As the same-sex marriage debate demonstrates, it is easy to characterize a ban on marriage and a ban on civil unions as both pertaining to the rights of homosexuals to obtain the benefits arising out of marriage.²⁵⁶ The concern that individual voters might be logrolled or misled is not a component of the test. However, because coattails logrolling is not prevalent in the legislative context, the inability of the reasonable germaneness test to prevent it is immaterial to crafting a test for representative democracy.²⁵⁷

5. *Avoiding Over-enforcement*

The reasonable germaneness test preserves the ability of state legislatures to implement broad policy initiatives.²⁵⁸ The test eliminates omnibus bills only in the most pejorative sense—that of a massive bill containing an amalgam of rent-seeking provisions—but still allows the legislature to deal comprehensively with a single topic, such as crime or education, without spending an entire session conducting votes on line-items.²⁵⁹ Overall, while the reasonable germaneness test is imperfect at eliminating logrolling, it does a reasonably good job. A more restrictive test might be only slightly more effective, while bringing with it undesirable effects on the legislative process.

²⁵⁴ Cf. Gillette, *supra* note 23, at 663–64.

²⁵⁵ Even if the incidence of negative coalition logrolling continued to decline, the proportion of beneficial logrolling excluded by the rule would increase as the test approached maximum stringency. *See id.* at 640–42.

²⁵⁶ *See supra* notes 37–44 and accompanying text.

²⁵⁷ *See supra* note 121 and accompanying text.

²⁵⁸ Cf. Lowenstein, *supra* note 14, at 957, 965 (arguing that the reasonable germaneness standard allows for broad-based initiatives).

²⁵⁹ *Id.*; *see also supra* note 222.

C. Establishing a Purpose Driven Test for Direct Democracy

The reasonable germaneness test is an ineffective solution for direct democracy. The lack of coalition building in direct democracy, combined with the reduced importance of omnibus proposals, undermines the two strongest arguments against strict enforcement of the single subject rule.

Simultaneously, several factors weigh in favor of a stronger rule for direct legislation: (1) the prevalence of coattails logrolling allows narrow interest groups to out compete broader constituencies and pushes drafters of initiatives towards opportunistic extremism;²⁶⁰ (2) voter confusion is more likely in direct democracy than in the legislature;²⁶¹ (3) both logrolling and voter confusion are hostile to the structure of direct democracy, while representative government reserves a greater role for gamesmanship;²⁶² and (4) state courts recognize a coercive harm to individual voters facing the type of Hobson's choice presented by logrolling.²⁶³

The reasonable germaneness test is ill-suited to address these concerns. First, the exceedingly permissive nature of the test runs contrary to the arguments counseling strict enforcement of the rule.²⁶⁴ Second, even tightening the parameters of the test will not redress the harms of coattails logrolling. The danger of coattails logrolling stems not from the wholly disparate nature of the legislation's provisions, but from creating an incentive for the drafters of the initiative to push extreme versions of popular measures.²⁶⁵ Thus, in the case of Georgia's marriage amendment, the wording of the initiative allows for substantial logrolling, despite that the general relatedness of the varied provisions is sufficient to protect the text from invalidation under the reasonable germaneness test.²⁶⁶

Because state courts have recognized a harm to the coercive nature of logrolling, one alternative to reasonable germaneness is to establish a test that seeks to determine whether voters are facing such a Hobson's choice. The most serious problem with such an approach lies in determining the threshold of coercion necessary to invalidate proposed legislation. A plaintiff's affidavit

²⁶⁰ See *supra* notes 148–53 and 106–07 and accompanying text.

²⁶¹ See *supra* notes 164–71 and accompanying text.

²⁶² See *supra* notes 186–208 and accompanying text.

²⁶³ See *supra* note 209–18 and accompanying text.

²⁶⁴ See *supra* note 235–37 and accompanying text.

²⁶⁵ See *supra* notes 106–07 and accompanying text.

²⁶⁶ See *supra* notes 29–53 and accompanying text.

asserting a desire to vote for one provision but not the other cannot alone be sufficient. It is easy to imagine that at least one voter in any state-wide election can assert a good faith desire to enact only part of an initiative, making direct democracy impossible.

Meanwhile, a standard which invalidated legislation only upon showing that the unpopular provision could not have been enacted absent logrolling is appealing, but may create an impossible factual inquiry for courts.²⁶⁷ Moreover, courts would need to tailor the test to eliminate outlier cases such as where initiating a construction project would garner majority support, but paying for that project would not.

A more administrable solution is for courts to restructure their application of the reasonable germaneness test. First, courts should discontinue the backwards approach of presuming that provisions address different subjects and then determining whether such a violation is reasonable.²⁶⁸ This method places control of framing the issue for the court in the hands of the provision's drafters, an odd alignment given that the problem of coattails logrolling arises precisely because direct democracy segregates agenda setters from voters.²⁶⁹ Instead, courts should assign subjects to provisions as a first step, allowing the constitutional inquiry to end at whether those subjects match one another.

Second, courts should explicitly consider the historical purpose behind the single subject rule in defining the scope of a provision's subject. As critics of the single subject rule point out, the definition of a subject is contextual.²⁷⁰ How items are classified depends inextricably on the purpose of that classification.²⁷¹ However, this criticism suggests its own solution. Courts should define a provision's subject in reference to the purpose of such categorization: the elimination of logrolling and voter confusion.

Finally, courts should abandon the language of broad deference which they copied from the legislative context. Part of this process may be choosing a new name for their test. "Actual germaneness" is one possibility.

²⁶⁷ For example, one method would be to design a factual inquiry similar to that employed in legislative reapportionment cases. See *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986). The problem is that while the *Gingles* test uses historical election results, a test for compliance with the single subject rule would depend on projected voter trends or polling data.

²⁶⁸ See *supra* note 227–29 and accompanying text.

²⁶⁹ See *Eule*, *supra* note 18, at 1522–25.

²⁷⁰ See *supra* note 232.

²⁷¹ For example, a botanist classifies a tomato as a fruit, while a chef does not.

CONCLUSION

The suggestions outlined in Part IV do not remove all of the play in applying the single subject rule, but few, if any, judicial tests are unambiguous. A better long term solution may require legislative action. As long as proponents of initiatives and referenda maintain control over the process of drafting and framing direct legislation, they will have an incentive to use any means necessary—including logrolling and confusion—to achieve political gains. Thus, structural reforms such as nonpartisan drafting commissions and precertification screenings may represent a more complete solution than the single subject rule.²⁷² Absent such reforms, however, state high courts should seek to interpret the rule to more faithfully effectuate its stated purpose.

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²⁷² See DUBOIS & FEENEY, *supra* note 54, at 113–18.

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