A Theory of Direct Democracy and the Single Subject Rule

Robert D. Cooter
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Michael D. Gilbert

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A THEORY OF DIRECT DEMOCRACY AND THE SINGLE SUBJECT RULE

Robert D. Cooter*
Michael D. Gilbert**

Citizens in many states use direct democracy to make laws on everything from soda bottles and horse meat to affirmative action and same-sex marriage. Does direct democracy save citizens from corrupt legislators, or does it enfeeble competent representatives and empower an ignorant crowd? These ideological extremes often collide in court over a state constitutional provision—the single subject rule—that limits ballot initiatives to one "subject." Opponents can invalidate an initiative by convincing a court that it contains two subjects (say, marriage and domestic partnerships), while proponents can prevail by showing that it contains only one (say, same-sex unions). Despite hundreds of cases, judges and scholars have been unable to define a "subject" with precision. The result is inconsistent case outcomes, accusations of judicial activism, and calls to repeal the single subject rule.

Logic and language cannot yield a precise definition of "subject." Instead, the definition must flow from citizens' preferences and the democratic political process. Separability of issues in the minds of most voters implies an obligation to separate on the ballot, and inseparability implies permission to combine on the ballot. When a plaintiff contends that an initiative contains two subjects, the court should ask whether the majority of voters' support for the first component hinges on whether the second becomes law. If the answer is "no," then most voters can make their choice on each component separately. Consequently, the court should find that the initiative contains two subjects. Conversely, if the answer is "yes," then most voters need to decide on both components simultaneously, and the court should find that the initiative contains one subject. The democratic process test increases citizens'...
choices, just as direct democracy was designed to do, and preserves the legisla-
ture's exclusive power to bundle issues and roll logs.

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"We have the initiative and referendum . . . ; do not disturb them. If defects are discovered, correct them and perfect the
machinery. Make it possible for the people to have what they want."1

INTRODUCTION

Direct democracy empowers the majority of citizens and enfeebles
special interests that hold sway over state legislatures. Or so thought the
Populists and Progressives who spread direct democracy in the American
states early in the twentieth century.2 Since then, voters have passed

1. 1 Journal of the Nebraska Constitutional Convention 326 (1919) (quoting William
Jennings Bryan).

2. See, e.g., David B. Magleby, Direct Legislation: Voting on Ballot Propositions in
and that "core of the Progressive ideology was the belief that direct democracy is
preferable to government by politicians and legislatures"); David D. Schmidt, Citizen
Lawmakers: The Ballot Initiative Revolution 5-10 (1989) (detailing early American history
of citizen initiatives); Kenneth P. Miller, Madison's Revenge: Judicial Review of Direct
thousands of ballot propositions at the state and local levels, including controversial measures on affirmative action, stem cell research, eminent domain, and same-sex marriage. From January through October 2008, nearly $140 million was spent to promote or defeat ballot propositions in California alone. Across the nation, direct democracy enjoys widespread public support, and its usage has spiked in recent decades. In short, direct democracy is a major, expanding, and controversial part of American government.

Direct democracy and representative government differ fundamentally in this respect: Direct democracy encumbers political bargaining, while representative government facilitates it. Hundreds of thousands of scattered citizens cannot effectively bargain with each other over public policies, yielding on one issue in exchange for support on another. By contrast, legislators can bargain and compromise with one another by taking advantage of their small numbers, as well as committees, agendas, procedural rules, and political parties. In the language of economics, the transaction costs of bargaining are much higher in direct democracy than in representative government. Consequently, political bargaining usually produces better results in the legislature than in the initiative process.

The “single subject” rule attempts to mitigate this problem. The constitutions of nearly all states with direct democracy contain a single subject rule, which limits ballot propositions to one “subject.” The primary purpose of the rule is to eliminate logrolling—the combining of multiple measures, none of which would pass on its own, into an omnibus proposition that receives majority support. The rule also aims to elimi-
nate riders, unpopular measures that slip through the lawmaking process on the backs of popular measures. Logrolling is a manifestation of, and riding a by-product of, political bargaining. By targeting these practices, the single subject rule codifies the insight that because political bargaining tends to produce better results in legislatures than in initiatives, it should be directed into the former by forbidding it in the latter.

The single subject rule merely states that ballot propositions must be limited to "one subject." It does not elaborate on how to distinguish one subject from another. This raises a problem described by a member of the Supreme Court of California: "[A]lmost any two . . . measures may be considered part of the same subject if that subject is defined with sufficient abstraction." To illustrate, a recent proposition in Georgia banning same-sex marriage and same-sex civil unions may have one subject (same-sex relationships) or two (marriage and civil unions) depending on how abstractly it is framed. Because of this problem, the rule often fails to generate clear and determinate outcomes. What looks like a single subject to one judge might appear to be multiple subjects to another. Courts and scholars have failed to develop a workable theory of interpretation for the single subject rule.

In addition to yielding erratic results, the single subject rule is criticized for permitting judges to smuggle their personal views into court. Justice Coats of the Supreme Court of Colorado has stated that it is impossible for judges "to apply a standard as amorphous as the . . . single-subject requirement . . . without conforming it to their own policy preferences." Former Colorado Governor Richard Lamm called the single subject rule an "arbitrary weapon wielded by an increasingly politicized judiciary." Professor Richard Hasen, who advocates repeal of the rule,

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11. See, e.g., Cal. Const. art. 2, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors . . . ."); supra note 8 and accompanying text.


has questioned whether "justices' views of the merits of . . . initiatives . . . affect[,] their decisions" in single subject cases.\(^{16}\)

Notwithstanding these critiques, judges continue to entertain single subject claims in high-profile disputes. For example, in June 2006, the Supreme Court of Colorado used the rule to throw out a divisive immigration initiative.\(^{17}\) The initiative would have prohibited government from providing "non-emergency services" to unauthorized aliens.\(^{18}\) According to the justices, the proposition had two subjects: lowering taxpayer expenditures and denying unauthorized immigrants access to services.\(^{19}\) The decision generated bitter criticism. Colorado Governor Bill Owens called the court "arrogant" and threatened to convene a special session of the legislature to overturn its decision.\(^{20}\) Former Governor Lamm labeled the decision an exercise of "raw, naked, arbitrary political power."\(^{21}\)

This case is not unique. The single subject rule is widespread,\(^{22}\) and hundreds of cases have been litigated nationwide in the last few decades.\(^{23}\) Some courts apply the rule aggressively and inject themselves deep into the lawmaking process.\(^{24}\)

To generate determinate outcomes and depoliticize adjudication, the single subject rule needs a new theory of interpretation that solves the problem of abstraction. Grammar, semantics, and linguistic conventions do not compel a judge to choose one level of abstraction over another. Judges must abandon their efforts to define "subjects" using logic and intuition alone and must turn instead to the democratic process.

We propose a democratic process theory of the single subject rule. Rather than focusing on logical conceptions of subject matter, our theory focuses on voters' ability to make independent judgments about the pol-

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17. In re Title, 138 P.3d at 275.
18. Id.
19. To be precise, the court stated that the proposal had two "purposes," and that these could not be considered part of the same subject. Id. at 280–82.
20. Editorial, Court's Ballot Ruling Needs a Second Look, Denver Post, June 14, 2006, at 6B.
21. Lamm, supra note 15, at 7B.
23. See Gilbert, Single Subject, supra note 8, at 818–22 (presenting data on frequency of single subject adjudication).
icy proposals at issue. If a ballot proposition challenged on single subject grounds contains two policy proposals, the question under our theory is: Can most voters decide how to vote on one proposal without knowing whether the other proposal will become law? If the answer is no, then a sound democratic process must allow voters to vote on the two proposals at once—otherwise they cannot meaningfully convey their preferences. Under such circumstances, courts should decide that the two proposals together comprise one subject and allow citizens to vote on them as a package. If the answer to the question is yes—meaning that most voters can decide how to vote on one proposal without knowing whether the other will become law—then courts should decide that the two proposals are separate subjects and that the proposition violates the rule.

To illustrate, imagine a ballot proposition that spends money on schools and funds the expenditure with a new tax. A plaintiff claims that these two provisions are separate subjects in violation of the single subject rule. A court applying the democratic process theory would ask, “Do most voters believe they need to know whether the tax will take effect in order to decide whether they favor or oppose the expenditures on schools?” If the answer is “Yes,” then the court should find that the proposition concerns a single subject. If the answer is “No,” then the court should find that the proposition concerns more than one subject.

We use a technical term to name our key concept: When a citizen can decide whether she supports one policy proposal without knowing whether the other will become law, she has “sufficiently separable” preferences over those proposals. Separation is “sufficient” for the citizen to know how to vote when the issues are presented separately from each other; otherwise she has insufficiently separable preferences. Our rule is: A court should separate proposals on the ballot if most voters have sufficiently separable preferences for them, and it should permit proposals to be combined on the ballot if most voters have insufficiently separable preferences for them. In the body of this Article and in the Appendix, we rigorously define this concept and prove some propositions about it.25

Our democratic process theory could help courts to accomplish the single subject rule’s important purposes. We will explain intuitively, and prove mathematically, that our interpretation of the rule prevents logroll-

25. For now we illustrate with a homely example: Suppose a restaurant patron is considering what breakfast to order. If she wants eggs no matter what and bacon no matter what, then she has sufficiently separable preferences and will order each regardless of whether the other is available. If she only wants biscuits if they come with gravy, then she has insufficiently separable preferences and will only order one if she is certain to get the other. If she hates the combination of eggs and gravy, then she has insufficiently separable preferences and will only order one if she is certain the plate will not contain the other. Applying our concept to breakfast menus, this patron can be asked whether she wants eggs without providing information on bacon, but she must know the gravy situation before ordering biscuits or eggs.
By preventing these activities, courts can channel political bargaining into legislatures, where it can produce better results.

Furthermore, by separating issues on the ballot as voters separate them in their minds, our theory could increase voters' choices. When presented with two policy proposals, A and B, voters must determine whether they support A, B, the combination of both, or the status quo. If A and B are packaged, voters have only two choices: the package or the status quo. This limited choice may not pose a problem for legislators, who can deliberate and compromise and save transaction costs by voting only on the consensus choice. In contrast, the limited choice does pose a problem for voters in direct democracy, who cannot deliberate and compromise. By permitting voters who can separate A and B in their minds to vote on A and B separately, our theory gives voters the full range of choices: They can support A, B, both, or the status quo. More choices further the aim of direct democracy by empowering the majority.

The single subject rule has another purpose that we have not mentioned: increasing transparency in lawmaking. One of the chief criticisms of direct democracy is that voters are incapable of making informed decisions about vague or complicated propositions, especially when interest groups support or oppose those propositions with deceptive advertisements. A good democratic process separates or combines policy proposals according to voters' needs for information. It does not distract voters with irrelevant information. Our interpretation of the single subject rule combines policy proposals that voters need to scrutinize simultaneously and separates proposals that voters can scrutinize in isolation. Besides preventing logrolling and riding, our interpretation also helps to empower the majority by increasing transparency.

Our interpretation of the single subject rule should help to depoliticize adjudication. Most voters either have sufficiently separable preferences over the provisions of a challenged ballot proposition or they do not. The question has an objective answer. In many cases, the facts needed to answer the question will be readily available. In some cases, however, the facts will be difficult to obtain, and the parties to the dispute will face difficult problems of proof. In either circumstance, resolution of the case will turn on evidence, not judges' values.

Being rooted in the longstanding and widely recognized purposes of the single subject rule, our theory of interpretation does not break radically with court practice. Rather, our theory is consistent with—and, indeed, a clarification of—existing law and jurisprudence. Consequently, the theory can be applied without constitutional revision.

26. For the mathematical proofs, see the Appendix infra.
27. See Campbell, supra note 9, at 133–34 (describing informational purpose of single subject rule and noting this purpose is widely cited by courts).
28. See, e.g., Glen Staszewski, The Bait-And-Switch in Direct Democracy, 2006 Wis. L. Rev. 17, 32–39 (describing structural features of initiative process that make it possible to mislead voters and produce "collateral consequences" they do not intend).
This Article proceeds in six parts. Part I provides background on the history and types of direct democracy. Part II develops our theory of political bargaining in direct democracy. Part III examines the single subject rule, including its history and purposes. It also describes contemporary single subject jurisprudence and its shortcomings. Part IV develops our democratic process theory of the rule. Part V describes how to apply our theory in single subject challenges to initiatives. Part VI briefly discusses the application of our theory to referenda.

I. BACKGROUND ON DIRECT DEMOCRACY

The corrupting influence of big business, special interests, and party bosses on state legislation led Populists and Progressives to call for sweeping governmental reforms at the turn of the twentieth century. Their advocacy led to the adoption of a multitude of direct democratic procedures at state and local levels. We define the direct democratic procedures analyzed in this Article, review the frequency with which they are used in the United States, and examine issues they address. We show that direct democracy plays a prominent role in American governance, and that therefore efforts to improve it are merited.

Direct democracy comes in many forms in the United States and operates at both state and local levels. We divide this universe into two categories: initiatives and referenda. We define initiatives to be statutes or constitutional amendments that originate among the citizenry. Individual citizens or private groups propose them, collect enough signatures to qualify them for the ballot, and then, along with all other voters in the relevant jurisdiction, vote on them. The initiative process sidesteps representative bodies such as legislatures and city councils. We define referenda, on the other hand, to be statutes or constitutional amendments that a representative body refers to the citizens for approval or rejection. Depending on the state, legislators can refer a bill to the people voluntarily, because the state constitution requires it, or because a sufficient

29. See Miller, Madison’s Revenge, supra note 2, at 22–29 (describing role of Populists and Progressives in rise of direct democracy).


32. This Article does not address the recall, which is another category of direct democracy. See Tallian, supra note 30, at 15, 26, 39, 50 (providing examples of recalls).
number of citizens demand that they do so. Importantly, referenda result from legislative processes.

The initiative process operates in twenty-four American states, and almost all states have a version of the referendum. At the local level, over half of all American cities, covering about seventy percent of the national population, are estimated to have an initiative process. Nearly all American cities have the referendum.

Usage of direct democracy has varied over time. Table 1 lists the total number of statewide initiatives proposed, the number of initiatives accepted, the number rejected, and the percentage of initiatives that passed between 1904 and 2008.

In total, citizens voted on 2,306 statewide initiatives through 2008 and approved 936 of them. These figures received a substantial boost in recent decades, as the absolute number of initiatives proposed and passed trended upwards from the 1960s to 2000. These figures are limited to statewide initiatives—they exclude referenda and local initiatives—and therefore underestimate the total use of direct democracy.


35. See Renner, supra note 34 (noting “nearly 90 percent” of American cities “report having some form of referendum procedure”).

36. Data on local initiatives are sparse but suggestive. One study found that approximately 750 local initiatives were circulated for signatures in California between 1990 and 2000. Roughly seventy-five percent of those made it onto the local ballot, and of those, approximately forty-five percent passed. Gordon, supra note 34, at 19-20.
<table>
<thead>
<tr>
<th>Decade</th>
<th>Number of statewide initiatives proposed</th>
<th>Number of initiatives approved</th>
<th>Number of initiatives defeated</th>
<th>Percentage passed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1904-1910</td>
<td>56</td>
<td>25</td>
<td>31</td>
<td>45%</td>
</tr>
<tr>
<td>1911-1920</td>
<td>291</td>
<td>110</td>
<td>181</td>
<td>38%</td>
</tr>
<tr>
<td>1921-1930</td>
<td>174</td>
<td>40</td>
<td>134</td>
<td>23%</td>
</tr>
<tr>
<td>1931-1940</td>
<td>268</td>
<td>106</td>
<td>162</td>
<td>40%</td>
</tr>
<tr>
<td>1941-1950</td>
<td>148</td>
<td>58</td>
<td>90</td>
<td>39%</td>
</tr>
<tr>
<td>1951-1960</td>
<td>114</td>
<td>45</td>
<td>69</td>
<td>39%</td>
</tr>
<tr>
<td>1961-1970</td>
<td>88</td>
<td>37</td>
<td>51</td>
<td>42%</td>
</tr>
<tr>
<td>1971-1980</td>
<td>208</td>
<td>86</td>
<td>122</td>
<td>41%</td>
</tr>
<tr>
<td>1981-1990</td>
<td>275</td>
<td>117</td>
<td>158</td>
<td>43%</td>
</tr>
<tr>
<td>1991-2000</td>
<td>389</td>
<td>188</td>
<td>201</td>
<td>48%</td>
</tr>
<tr>
<td>2001-2008</td>
<td>295</td>
<td>124</td>
<td>171</td>
<td>42%</td>
</tr>
<tr>
<td>Totals</td>
<td>2306</td>
<td>936</td>
<td>1370</td>
<td>41%</td>
</tr>
</tbody>
</table>

The issues addressed through direct democracy are as notable as the frequency of its use. Across the country, ballot propositions tackle profound issues of individual rights and public policy. In recent decades, Californians passed controversial measures that drastically cut property taxes, ended racial preferences, protected the environment, and funded stem cell research. In 2000, Colorado voted on propositions addressing abortion, medical marijuana, gun ownership, and education funding. Between 1998 and 2008, citizens in nearly thirty states passed measures banning same-sex marriage, including California, where the measure at issue, Proposition 8, prompted demonstrations and an ongoing legal battle.

39. Id. at 3.
40. See Hal Snyder, Gill-net Ban to Come in Gradual Increments, Orange County Reg., Nov. 18, 1990, at C21 (discussing ban on gill-net fishing).
43. See Monica Davey, Liberals Find Rays of Hope on Ballot Measures, N.Y. Times, Nov. 9, 2006, at P16 (noting Arizona voters’ rejection of constitutional amendment to define marriage as between man and woman was first such rejection in twenty-eight attempts since 1998).
Kelo v. City of New London, 45 eight states in 2006 passed propositions restricting eminent domain. 46

In this Article, we focus on initiatives, as they lie at the heart of direct democracy and generate the vast majority of single subject litigation. 47 In Part VI, we briefly consider the application of our democratic process theory to referenda.

II. THEORY OF DIRECT DEMOCRACY VERSUS REPRESENTATIVE GOVERNMENT

Before describing our theory of single subject interpretation, we explain why the rule is justified—that is, why political bargaining in direct democracy should be forbidden. To do this, we develop a theory of the relationship between direct democracy and representative government. We show that representative government facilitates political bargaining while the initiative process suppresses it. Political bargains orchestrated through the initiative process are likely to be socially harmful and should be repudiated, regardless of whether citizens approved them.

According to James Madison in The Federalist No. 10, an advantage of representative government is that it can “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country.”48 One way the representative body can refine and enlarge the public views is by engaging in deliberation and compromise.

Several features of representative government facilitate deliberation and compromise. First, representatives are “limited to a certain number, in order to guard against the confusion of a multitude.”49 A small group of individuals can share information and bargain among themselves in a way that thousands of individuals cannot. In addition, representatives in the United States benefit from rich institutional frameworks that promote bargaining. Legislative committees divide the universe of public policy into manageable units. Representatives sit on those committees that ad-

49. Id.
dress the policy areas most important to their constituents. To pass
laws, they must bargain among themselves and with members of other
committees. Committees generally have exclusive jurisdiction over their
policy domains, and this makes political bargains durable by preventing
non-committee members from unwinding agreements. Committees
also provide technical information to non-committee members, reducing
the information demands of policymaking and compromise. Subcommittees
serve these same purposes on finer levels. Political parties facilitate bargaining by helping to align legislators’ interests and to
provide insurance that political deals will be honored.

In addition, detailed rules of procedure lend structure to the process
of compromise. Representatives debate bills in public hearings and offer amendments. Conference committees reconcile differences between
competing bills that pass in both legislative chambers. Throughout this
process, interested parties examine drafts of bills and insist on modifications in exchange for their support. These procedures provide multiple opportunities for legislators to bargain.

The advantage of political bargaining is clear: It permits legislators
to achieve their preferred outcomes on issues about which they care
deply. In exchange, they accept undesirable outcomes on issues about
which they care minimally. As with all voluntary agreements, legislators
will not accept a bargain unless they expect it to benefit them. When

50. See Barry R. Weingast & William J. Marshall, The Industrial Organization of
Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets, 96 J. Pol. Econ.
132, 151 (1988) ("[L]egislators opt for committees relevant to their constituents’ interests . . . ").
51. See id. at 152 (arguing committees "institutionalize trades over influence so as to
give their members greater control over policies with [sic] their jurisdiction").
52. See Keith Krehbiel, Information and Legislative Organization 73–75 (1991)
discussing informational efficiency effects of specialization through committees).
53. See Gary W. Cox & Matthew D. McCubbins, Legislative Leviathan: Party
Government in the House 83–135 (Univ. of Cal. Press 1993) (discussing party organization
in legislature as solution to “collective dilemmas that entail electoral inefficiencies”
(emphasis omitted)).
54. For an example of such procedural rules, see generally Paul Mason, Mason’s
Legislatures, this manual is used in “[s]eveny of the 99 legislative chambers in the United
States.” Nat’l Conference of State Legislatures, Using Mason’s Manual of Legislative
Procedure: The Advantages of Legislative Bodies, at http://www.ncsl.org/Legislatures
Elections/OrganizationProcedureFacilities/MasonsManualforLegislativeBodies/tabid/
55. For the seminal exposition of this idea, see James M. Buchanan & Gordon
logrolling).
56. In theory, legislators could benefit from the bargains in which they participate but
suffer even greater harm from the bargains from which they are excluded. In the extreme,
all legislators would have an incentive to bargain even though the aggregate effect of all
bargains would make every legislator worse off. See William H. Riker & Steven J. Brams,
The Paradox of Vote Trading, 67 Am. Pol. Sci. Rev. 1235, 1236 (1973) (demonstrating that
“while each trade is individually advantageous to the traders, the sum of the trades is
legislators properly represent their constituents, political bargains benefit ordinary citizens as well.

Unfortunately, legislators do not always act in the best interest of their constituents. As Madison noted, "[m]en of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people."57

Political bargaining heightens this risk because of its opaqueness. Citizens must be able to punish their representatives—primarily by voting them out of office—for failing to pursue their interests. This requires citizens to monitor their representatives' activities, especially their voting records. Political bargaining obscures voting records. Legislators engaged in political bargains sometimes vote in favor of bills their constituents do not like. But constituents cannot tell whether the votes were part of a political deal that delivered substantial benefits, or simply bad choices. Consequently, it is difficult for citizens to track the fidelity of their representatives or to determine when special interests capture them.

When legislatures produce bad policies and citizens cannot blame individual representatives, direct democracy may provide a corrective. Through direct democracy, citizens can preempt representative government and the bargains that corrupt legislators strike. They can do this de jure by overriding existing legislative bargains and amending state constitutions in ways that limit the scope of future political deals. And they can do this de facto by giving initiatives that pass the imprimatur of popular support, which legislators hesitate to contradict. At its best, direct democracy can empower democratic majorities, weaken special interests, and enhance political transparency.

While direct democracy can suppress legislators' bargains, it cannot replace them with political bargains that come directly from the people. This is because the initiative process suffers from the "confusion of a multitude:" Tens of thousands of citizens cannot negotiate with one another, lending support on one proposal in exchange for others' support on a second proposal. There are no committees to conduct hearings, gain expertise, and reach agreements. There are no political parties to align interests and ensure that political bargains are carried through. There are no rules of procedure that allow for modification, amendment, or disadvantageous to everybody, including the traders themselves”). There are reasons to believe that such outcomes are unlikely to occur in practice. See Robert D. Cooter, The Strategic Constitution 53-54 (2000) (arguing political bargaining produces efficient outcomes assuming zero transaction costs, and forms of political organization such as “[t]he formation of parties, the creation of legislative committees, and the control of the legislative agenda” reduce transaction costs of political bargaining); Gilbert, Single Subject, supra note 8, at 835, 851-53 (arguing if logrolling systematically made all legislators worse off, legislators would cooperate to eliminate it).

57. The Federalist No. 10, supra note 48, at 62 (James Madison).
other manifestations of compromise. In short, direct democracy, and
the initiative process in particular, offers no forum for political bargain-
ing, so transaction costs are prohibitively high.

Despite this difficulty, the sponsors of an initiative may nevertheless
attempt to logroll. A sponsor may favor two provisions that could not
pass on their own and combine them in hopes of securing majority sup-
port for the aggregate proposition. Such a proposition would not be an
explicit bargain in the sense that anyone haggled over its contents. But if
approved, many voters would accept one provision they dislike to get an-
other provision they favor, making it an implicit bargain.

Implicit bargains in initiatives are likely to be socially harmful for
several reasons. A bargain does more harm than good when the losers
(the minority that votes against the proposal) lose more than the winners
(the majority that votes in favor of the proposal) win. Such outcomes are
relatively likely in direct democracy. This is because no matter how much
harm a proposition inflicts on minority interests, that minority cannot
bargain with members of the majority and convince them not to pass it.

There is no forum for such bargaining to take place.

Bargains can be socially harmful in another way: They can be unsta-
ble. Social choice theorists have shown that aggregating individuals’ pref-
erences across multiple policy issues can produce collective choices that
run in circles. To illustrate, imagine three policy proposals: A, B, and

58. This is a longstanding criticism of direct democracy. See, e.g., Magleby, supra
note 2, at 29–30 (listing criticisms of direct democracy, including complex ballots,
“frivolous” measures, lack of voter expertise, and lack of mechanisms for compromise);
John Ferejohn, Reforming the Initiative Process, in Constitutional Reform in California
313, 313–25 (Bruce E. Cain & Roger G. Noll eds., 1995) (listing criticisms of direct
democracy and offering reform solutions).

‘dicker . . . for support now in exchange for your support on something else later’
undermines the ‘legitimacy’ of plebiscites.” (quoting Frank I. Michelman, Political Markets
and Community Self-Determination: Competing Judicial Models of Local Government

60. See Derrick A. Bell, Jr., The Referendum: Democracy’s Barrier to Racial Equality,
54 Wash. L. Rev. 1, 13–22 (1978) (arguing direct democracy is likely to impose high costs
on minorities); Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503,
1551–54 (1990) (same); Clayton P. Gillette, Expropriation and Institutional Design in
initiatives, unlike legislators, are not engaged in repeat play with third parties harmed by
particular bargains).

All ballot propositions, whether logrolled or not, are subject to this criticism.
However, logrolls are more likely to be harmful to the minority that opposes them than
non-logrolls. The former necessarily have multiple parts. Citizens who vote against a
proposition with multiple parts do so because they oppose at least one and possibly all of
those parts. When multiple provisions harm a minority, the sum of that harm is likely to be
greater than the harm caused to a minority by one, stand-alone provision.

61. See, e.g., David H. Koehler, Vote Trading and the Voting Paradox: A Proof of
in which “an endless sequence” of vote trading can occur “under conditions of individual
C. A unique block of voters comprising one-third of the electorate supports each proposal. As a result, neither A nor B nor C would pass on its own. If bargaining is permitted, combinations of A, B, and C can be packaged into a single ballot measure and submitted to the electorate. For example, the supporters of A and B may recognize that their favored provisions will not pass individually but will pass if joined in a single measure, AB, that will be approved by both groups. The three blocks of voters are assumed to have the following preference orderings over combinations of A, B, and C.62

- Block 1: AB > AC > BC
- Block 2: BC > AB > AC
- Block 3: AC > BC > AB

When these preferences are aggregated under a system of majority rule, they run in a circle.63 If voters approve AB, it is immediately subject to defeat by BC, which can be defeated by AC, which can be defeated by the original measure, AB. There is no stable outcome. As voters’ preferences diverge and political bargains embrace more policy issues (D, E, etc.), cycling becomes more certain.64 Unstable bargains, at least in theory, are more apt to occur in direct democracy than in representative govern-

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62. The following table lists each block of voters’ complete preference orderings and utility for every possible combination of policies. It shows that A, B, and C have only minority support on their own, but bargaining generates policies (AB, AC, BC, ABC) that a majority prefers to the status quo.

<table>
<thead>
<tr>
<th>Voters in Block 1</th>
<th>Voters in Block 2</th>
<th>Voters in Block 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy</td>
<td>Utility</td>
<td>Policy</td>
</tr>
<tr>
<td>A</td>
<td>10</td>
<td>B</td>
</tr>
<tr>
<td>AB</td>
<td>8</td>
<td>BC</td>
</tr>
<tr>
<td>AC</td>
<td>7</td>
<td>AB</td>
</tr>
<tr>
<td>ABC</td>
<td>5</td>
<td>ABC</td>
</tr>
<tr>
<td>Status quo</td>
<td>0</td>
<td>Status quo</td>
</tr>
<tr>
<td>B</td>
<td>-2</td>
<td>C</td>
</tr>
<tr>
<td>C</td>
<td>-3</td>
<td>A</td>
</tr>
<tr>
<td>BC</td>
<td>-5</td>
<td>AC</td>
</tr>
</tbody>
</table>

63. Blocks 1 and 2 prefer AB to AC; blocks 1 and 3 prefer AC to BC; blocks 2 and 3 prefer BC to AB.

64. See William H. Riker, Liberalism Against Populism 119–23 (1982) ("[A]s the number of voters and alternatives increases, so do the number of profiles without a Condorcet winner."). Even if no political bargaining takes place and citizens cast separate votes on standalone issues, cycling can still occur if citizens have “double-peaked preferences.” Cooter, supra note 56, at 37-41. In such circumstances, a representative body that can induce stability with institutions and political bargaining should resolve the policy issue.
ment. This is because legislators have institutions that can induce stability, such as agenda-setting mechanisms and closed rules. The initiative process lacks these devices.

Even if political bargains implemented through initiatives do not cycle in practice, they may be socially harmful in another sense: They reflect the preferences of a random majority. A primary purpose of direct democracy is to ascertain the will of the people. But "majority will" has no meaning when aggregate preferences run in circles. This is because there are multiple majorities. In the last example, blocks 1 and 2 preferred AB to AC and formed one majority; blocks 1 and 3 preferred AC to BC and formed a second majority; and blocks 2 and 3 preferred BC to AB and formed a third majority. These different majorities have different wills. If a political bargain passes and remains stable, it is neverthe-

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65. Legislatures have agenda setters who can prevent cycling. See, e.g., Cooter, supra note 56, at 43–46 ("[C]ontrol of the legislative agenda avoids intransitivities by giving the agenda-setter the power to choose among intransitive alternatives."); Mueller, supra note 61, at 112–14 (arguing agenda setters have significant power to bring about victory for own preferred outcome). For example, a legislative leader could limit the choice to a vote between AB and the status quo, which AB would win. Assuming the leader approves of this outcome, she could refuse to permit additional votes on these issues, making AB a stable logroll, at least until her views change. Likewise, if the transaction costs of political bargaining are low, legislators could strike a stable bargain. See Cooter, supra note 56, at 53 (applying Coase Theorem to political bargaining). Because they interact repeatedly and can punish each other for disloyalty through future votes, committee assignments, and other mechanisms, legislators have an incentive to remain faithful to their deals once struck. This preempts cycling.

66. The initiative process operates without designated agenda setters. Some states forbid initiatives from addressing some topics, and other states have rules that prevent initiatives from being repealed or amended for a certain period. See Philip L. Dubois & Floyd Feeney, Lawmaking by Initiative: Issues, Options, and Comparisons 78–85 (1998) (surveying legal limits imposed by states on initiative process). But in general, initiatives can be offered by anyone on any issue at any time. They are not limited by rules of procedure and other structures that can induce equilibrium. Similarly, citizens cannot negotiate stable bargains with one another. Citizens are not engaged in repeat play with one another, and they do not see one another's voting records. They cannot punish one another for being unfaithful. In short, they have no institutions with which to prevent majorities from coalescing around one bargain, unraveling, and coalescing around another in a cycle.

67. We know of no systematic effort to identify examples of cycling in direct democracy, but anecdotes are suggestive. See Thad Kousser & Mathew D. McCubbins, Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy, 78 S. Cal. L. Rev. 949, 965 (2005) (identifying voting patterns in Oregon and Massachusetts that could be interpreted to exhibit cyclical behavior). Cycling might be particularly difficult to observe in direct democracy because of the time element. Unlike legislators, citizens do not cast votes, learn the outcomes of those votes, and then vote again in rapid succession. Months or years pass between elections, and several elections would be required for an entire cycle to be observed. Voters' preferences may not be stable for such long periods, so outcomes that appear circular may reflect changing preferences, not cycling.

68. Cf. Richard J. Ellis, Democratic Delusions: The Initiative Process in America 141 (2002) ("If an initiative contains two or more distinct questions, it becomes virtually impossible to determine what the majority meant to say in approving or rejecting an initiative.").
less objectionable because it is arbitrary.\footnote{Thomas Stratmann, Logrolling, in Perspectives on Public Choice: A Handbook 322, 340 (Dennis C. Mueller ed., 1997) ("[E]ven if no cycle is observed and coalitions are stable, the fact that a potential for a cycle exists implies that the outcome of the collective decision is arbitrary." (citing Riker & Brams, supra note 56, at 1236)).}

For “majority will” to have meaning in direct democracy, ballot propositions must not be combined. Instead, individual measures like A, B, and C must rise and fall on their own merits.\footnote{Forbidding logrolling in direct democracy would tend to limit ballot proposals to a single dimension of policy choice. This would in turn animate the median voter theorem. See generally Duncan Black, The Theory of Committees and Elections (1958); Anthony Downs, An Economic Theory of Democracy (1957). When the median voter theorem applies, “majority will” is a concrete concept. With respect to each issue, a majority prefers one specific policy (the ideal point of the median voter) to every alternative. The “will of the people” is clear and consistent: Move policy to that ideal point and leave it there.}

To summarize our theory, representative government facilitates political bargaining, which can generate beneficial social policies. But that same bargaining obscures voting records and can lead to infidelity by legislators. In that circumstance, direct democracy may provide a corrective. Direct democracy can suppress corrupt legislative logrolls and riders. However, without a bargaining forum, bargains implemented through the initiative process may be socially harmful. Therefore, only initiatives that command majority support on their own merits, not omnibus initiatives, should replace legislative logrolls.

Note that our theory frames initiatives as substitutes for legislation, whereas initiatives can also substitute for court decisions. For example, the Supreme Court of California held that the equal protection clause in the state constitution protects same-sex marriage.\footnote{In re Marriage Cases, 183 P.3d 384, 400–02 (Cal. 2008).} Voters in California responded by passing Proposition 8, which amended the state constitution and made same-sex marriage illegal. In this Article, we cannot develop an account of the relationship between lawmaking by initiatives and court decisions, but we will note two of its features.

First, the power to amend the constitution by initiative decreases the discretionary powers of courts to interpret it. Courts may interpret state constitutions more consistently with popular attitudes in order to avoid repeal of their decisions by initiative. By doing so, the court avoids futile lawmaking. More popular decisions by courts may also increase their esteem among citizens, thus reducing their “democratic deficit.”

Second, initiatives amending a state constitution must conform to the federal Constitution and therefore cannot override judicial decisions interpreting the federal Constitution or federal law. For example, the federal Constitution does not allow a state initiative to “declare[e] that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government.”\footnote{Romer v. Evans, 517 U.S. 620, 633 (1996).} The federal constraint on
initiatives thus reduces the potential threat of initiatives to individual liberty and equality. An examination of the scope and importance of federal restraints on state initiatives is, however, beyond the scope of this Article.

III. THE SINGLE SUBJECT RULE AND ITS SHORTCOMINGS

This Part provides background on the single subject rule. We begin by reviewing the history of the rule and the political purposes that it aims to achieve. We then discuss important issues in single subject adjudication, including the disjunction between the rule's wording and its purposes and the absence of a workable theory of interpretation. Our goal is to show that the rule is consistent with our theory of direct democracy but difficult to apply. This makes single subject adjudication controversial, and it shows why judges would benefit from a new framework for applying the rule.

A. A Brief History of the Rule

The single subject rule for ballot propositions grows from the single subject rule for legislation, which has a venerable history. It dates to ancient Rome, where crafty lawmakers learned to carry an unpopular provision by "harnessing it up with one more favored." To prevent this practice, the Romans in 98 B.C. forbade laws consisting of unrelated provisions. Similar misbehavior plagued colonial America. In 1695, the Committee of the Privy Council complained that diverse acts in Massachusetts were "joined together under ye same title," making it impossible to vacate unpopular provisions without also invalidating favorable ones. In 1702, Queen Anne tried to check this practice, instructing Lord Cornbury of New Jersey to avoid "intermixing in one and the same Act[ ] such things as have no proper relation to one another." New Jersey enshrined this language in its 1844 single subject rule, the nation's first.

73. Robert Luce, Legislative Procedure 548 (1922).
74. Id.
75. Id. at 549 (citing E.I. Miller, The Legislature of the Province of Virginia 111 (1908)) (internal quotations omitted).
77. See N.J. Const. art. IV, § 7, ¶ 4 ("To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object . . ."); Ruud, supra note 9, at 390 (discussing New Jersey's single subject rule). One limited single subject rule predates New Jersey's general provision. A single subject requirement for bills pertaining to government salaries materialized in the Illinois Constitution in 1818. Ruud, supra note 9, at 389 ("[T]he first effort to deal with the problem [of the omnibus bill] through constitutional means was a provision in the Illinois constitution . . . in 1818. It limited bills appropriating salaries for members of the legislature and for officers of the government to that subject.").
Taking New Jersey's lead, Louisiana and Texas adopted single subject rules in 1845, and New York and Iowa followed in 1846. By 1960, forty-three states had adopted some version of the rule. The provision in the Nebraska Constitution is typical: "No bill shall contain more than one subject, and the subject shall be clearly expressed in the title." As this quotation suggests, single subject rules almost universally include a title provision.

Throughout the twentieth century, eighteen states extended their legislative single subject rules (which also applied to referenda) to the initiative context. Californians adopted a constitutional amendment to that effect in 1948. This was passed in response to a "ham and eggs" initiative that addressed, among other things, pensions, gambling, reapportionment, oleomargarine, and surface mining. Colorado adopted the rule by constitutional amendment as recently as 1994. Courts in other states have inferred the applicability of the rule to initiatives, even though their state constitutions do not explicitly provide for this.

Historically, most courts have understood the single subject rule to apply with equal force in the initiative and legislative settings. This is likely due to the similar (if not identical) language of the two rules in most states, the difficulty inherent in formulating different tests, and the desire for consistency. A handful of states apply stricter standards to initiatives than to legislation. Florida and Montana have openly embraced stricter standards of review. A few other states ostensibly maintain the same standard but in practice apply the rule more harshly to initiatives.

78. Gilbert, Single Subject, supra note 8, at 822 fig.2.
79. See id.
82. See Downey, Hargrove & Locklin, supra note 22, at 579–627 (describing initiative process rules in each state).
84. Lowenstein, California Initiatives, supra note 10, at 949–50.
86. See Campbell, supra note 9, at 138 (listing states with implied single subject requirements).
87. See Lowenstein, New Single Subject Rule, supra note 24, at 35 ("In most states, courts used the same deferential standards to apply the single subject rule to initiatives that they had long used to apply the rule to laws enacted by the legislature."); see also Campbell, supra note 9, at 153–56 (describing standards of review in Alaska, California, Ohio, Oklahoma, and Oregon). For an argument that the rule should be interpreted more leniently in the legislative setting, see Gilbert, Single Subject, supra note 8, at 809.
88. See Campbell, supra note 9, at 156–58 (describing Florida and Montana standards).
89. See id. at 156–61 (describing practice in Colorado, Missouri, and Washington to apply rule more strictly to initiatives).
B. Purposes of the Single Subject Rule

Three purposes motivate the single subject rule: preventing logrolling, preventing riding, and improving political transparency.

1. Preventing Logrolling. — Logrolling occurs when two proposals each supported by a minority are combined into one ballot proposition supported by a majority, and the two minorities support the combination of policies but respectively prefer to enact one policy and not enact the other.\(^\text{90}\) An example can be drawn from the analysis in Part II. Provisions A and B are unpopular; only one-third of voters supports each. Standing alone, neither could become law. When combined into a single ballot proposition, however, the proposals collectively garner the support of a majority. Although supporters of A support the joint proposal, they would prefer to enact A alone and not to enact B. Similarly, the supporters of B support the joint proposal, even though they would prefer to enact B alone.

Despite the single subject rule, multifaceted ballot propositions are common, which suggests that logrolling occurs in direct democracy. To illustrate, consider Proposition 21, the Gang Violence and Juvenile Crime Prevention Initiative passed by Californians in 2000.\(^\text{91}\) The initiative filled fifty pages and addressed gang-related crimes ranging from murder to vandalism, the Three Strikes Law, and the juvenile justice system.\(^\text{92}\) Another example comes from Proposition 140, which Californians passed in 1990.\(^\text{93}\) That measure imposed term limits on state legislators and other constitutional officers, cut the legislature’s budget by thirty-eight percent, and restricted legislators’ pension plans.\(^\text{94}\) These propositions embrace multiple, disparate policy provisions and may be the product of logrolling. Political scientists Shaun Bowler and Todd Donovan have identified other more explicit efforts to logroll in the initiative process.\(^\text{95}\)

Courts disdain logrolling because it requires voters to decide more than one issue with a single vote and threatens to give legal force to policies that command only minority support.\(^\text{96}\) The single subject rule aims

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90. For direct democracy cases that identify logrolling as the target of the single subject rule, see, e.g., In re Voluntary Universal Pre-Kindergarten Educ., 824 So. 2d 161, 165 (Fla. 2002); Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 830 (Mo. 1990); State v. Broadaway, 942 P.2d 363, 367 (Wash. 1997).
91. See Manduley v. Superior Court, 41 P.3d 3, 8 (Cal. 2002).
94. See id.; Lowenstein, New Single Subject Rule, supra note 24, at 39.
96. See, e.g., Loontier v. Robinson, 670 N.W.2d 301, 314-15 (Neb. 2003) (Wright, J., concurring) (stating single subject rule prevents groups from combining proposals that,
to stop logrolling by preventing the “approval of incoherent initiative measures that are little more than ‘grabbags’ of various provisions.”

This is consistent with our theory of direct democracy. Legislatures can fashion compromises, but citizens and the sponsors of ballot propositions cannot. We understand the single subject rule to codify our argument that direct democracy cannot accommodate political bargaining.

2. Preventing Riding. — A second purpose of the single subject rule is to prevent riding. Riding occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second. To clarify by example, assume that voters face two policy proposals, A and B. A majority supports A and opposes B, and they like the former more than they dislike the latter. Table 2 illustrates this scenario. The majority’s most preferred outcome is passage of A alone. The second most favorable outcome is passage of A and B. The status quo—passage of neither—represents most voters’ third choice. The worst outcome is passage of B alone.

Table 2: Riding in Direct Democracy

<table>
<thead>
<tr>
<th>Preferences of a Majority of Voters</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
</tr>
<tr>
<td>A and B</td>
</tr>
<tr>
<td>Status quo</td>
</tr>
<tr>
<td>B</td>
</tr>
</tbody>
</table>

If the sponsors of A also support B, they can combine the two and submit the multipart measure for a vote. No one may amend propositions once they are placed on the ballot, so opponents cannot excise the rider. Because a majority would prefer passing both A and B to maintaining the status quo, they would approve the combined proposition. Nevertheless, presence of the rider, B, forces the majority to accept its second standing alone, would not gather majority support into measures that would gather majority support).  


98. Riding is often characterized as a species of logrolling, but the two are analytically distinct. Logrolling is tantamount to political bargaining. But for the bargain, nothing would pass. Riding, on the other hand, does not result from exchange but rather manipulations of procedure. Irrespective of the rider, something will pass. See generally Gilbert, Single Subject, supra note 8, at 836–44 (distinguishing riding and logrolling).

99. Sincere voters will vote in favor of the proposition that combines A and B because they prefer it to the status quo, and we assume that voters in direct democracy are sincere. See infra note 134. Some voters might like to eliminate B with another ballot proposition in a subsequent election. However, collective action problems may prevent this. In general, when the transaction costs of placing a proposition on the ballot are high, riders pose a greater risk because they are harder to remove with a subsequent proposition.
choice (since its first choice would be to pass A alone). In general, every instance of riding moves a majority down its list of preferences.  

Anecdotes of riding abound. In 1998, Oregon voters confronted Measure 62, a union-backed initiative that addressed campaign finance. Among other things, the measure required that campaigns disclose significant donations and that advertisements indicate who paid for them. Many of the regulations in the measure already were state law. Unions included these provisions merely to “sugarcoat and disguise the poison pill buried in the middle,” a provision granting unions the power to use dues for political purposes. Voters overwhelmingly approved the measure. Two years before that, Oregonians approved Measure 40, a victims’ rights proposition that included several proposals, including an allowance for eleven-to-one jury verdicts in murder trials. The Oregon Supreme Court invalidated the measure, and the sponsors responded by dividing it into seven separate proposals and presenting them to the public. Three of the proposals, including the jury provision, “were comfortably defeated.” Those proposals were probably riders in the initial omnibus measure.

Riding resembles logrolling in this respect: It forces citizens to decide multiple issues with a single vote and allows for the passage of measures that would not receive majority support on their own. The single subject rule seeks to curb this practice.

3. Improving Political Transparency. — The third purpose of the single subject rule is to simplify the lawmaking process and improve political

100. Gilbert, Single Subject, supra note 8, at 836–40. A situation could arise in which the welfare gains from attaching a rider outweigh the welfare losses produced by the rider. For example, the welfare gains that a minority receives from attaching a rider may outweigh the welfare losses imposed by the rider on the majority. Id. at 839. In that case, riding would be socially beneficial. We are skeptical, however, that such outcomes are the norm. In any case, riders that command only minority support should not be enacted through direct democracy, a majoritarian institution, as this would give the imprimatur of legitimacy that majority support provides to a policy supported only by a minority.

101. Ellis, supra note 68, at 103.

102. Id.

103. Id.

104. Id.

105. Id. at 104.

106. Id. at 145.

107. The initiative violated Oregon’s “separate-vote” rule. Id. For the full decision, see Armatta v. Kitzhaber, 959 P.2d 49, 51 (Or. 1998) (holding Measure 40 did “not comply with the requirements for adopting a constitutional amendment”).

108. Ellis, supra note 68, at 145–46.

109. Id. at 146.

110. For other examples of riding in direct democracy, see Dubois & Feehery, supra note 66, at 143–44 (describing “trojan [sic] horses” in California elections); Ellis, supra note 68, at 145 (describing Nevada Supreme Court’s separation of ballot initiative into two questions, only one of which passed).
transparency. In theory, limiting initiatives and referenda to a single subject makes it easier for citizens to understand and scrutinize their contents. The title requirement embedded in most single subject rules advances this goal. Requiring that ballot propositions have complete and accurate titles should prevent citizens from being surprised or defrauded.

C. Application of the Single Subject Rule

Having discussed the history and purposes of the single subject rule, we turn to its application. We explore three themes in single subject adjudication: the disjunction between the rule’s wording and its purposes; the absence of a workable theory of interpretation for the rule; and the trend toward stricter enforcement.

As described, the single subject rule aims to achieve three political purposes: preventing logrolling, preventing riding, and improving transparency. However, the wording of the rule itself says nothing about these purposes. State constitutions simply require that ballot propositions be confined to “one subject” or something similar. This places judges in a bind: How does one define the contours of a “subject?”

Sometimes common sense can resolve a dispute over whether a proposition constitutes a single subject. For example, a proposition addressing the death penalty and spotted owls would clearly violate the rule. Much of the time, however, the logical approach fails due to an abstraction problem. Almost any conglomeration of issues plausibly can be classified under a single subject if that subject is defined with sufficient abstraction.

We use a case to illustrate the point.

As mentioned, Californians in 2000 passed Proposition 21, the Gang Violence and Juvenile Crime Prevention Initiative. The lengthy measure made changes to criminal penalties for gang-related crimes ranging from murder to vandalism; amended California’s Three Strikes Law, which affects the sentencing of repeat offenders; and reformed the juvenile justice system. Petitioners challenged Proposition 21 on single

111. See Campbell, supra note 9, at 133 (“[S]ingle subject rules seek . . . to make it easier for both legislators and voters to inform themselves about policy changes being proposed.”).
112. See id. at 133 (describing “informational purposes” underlying different states’ single subject rules).
113. See id. (describing how “in the United States the title [to an act] has been made a matter of primary importance”); see also, e.g., Wyo. Nat’l Abortion Rights Action League v. Karpan, 881 P.2d 281, 290 (Wyo. 1994) (stating single subject rule prevents “the fraud or surprise that could result if provisions contained in the body of a bill were not reflected in a general way in the title itself”).
114. See, e.g., supra notes 11 and 77; supra note 80 and accompanying text.
115. For an excellent discussion, see Lowenstein, California Initiatives, supra note 10, at 938–42.
117. Id. at 27–29.
subject grounds, claiming that it embraced the three subjects just outlined: "gang violence, the sentencing of repeat offenders, and juvenile crime."118 The Supreme Court of California, however, concluded that Proposition 21 embraced just one, broader subject: "the problem of violent crime committed by juveniles and gangs."119

The problem in this case, and the problem with single subject adjudication in general, is that both positions are correct. As a matter of logic, one can situate the contents of the initiative under the single, highly abstract subject “the problem of violent crime.” Likewise, one can subdivide the initiative into the three relatively narrow subjects of juveniles, gangs, and repeat offenders. In single subject rule cases, “it is impossible to conceive of a measure that could not be broken down into parts, which could in turn be regarded as separate subjects.”120 Whether this initiative, or whether any ballot proposition, violates the single subject rule is purely a question of the level of abstraction at which judges believe they should frame the subject. Although the Supreme Court of California in this case sided with respondents, a different court could have drawn the subject more narrowly and reached a different conclusion.

In an effort to circumvent the abstraction problem, judges have developed a number of “tests” to determine compliance with the single subject rule. For instance, a court may ask whether all provisions of a ballot proposition are “germane” to one another and to the proposition’s overriding purpose.121 These tests simply rephrase the original problem without adding much to its solution. “Germaneness” provides no clear guidance to the correct level of abstraction. Despite 150 years of litigation in the legislative setting and, more recently, the initiative context, the abstraction problem remains unmanageable. There is no workable theory of interpretation for the single subject rule.

Judges are aware of this dilemma. Consider this statement by a member of the Supreme Court of Florida:

[The single subject rule] requires an initiative to contain a logical and natural “oneness of purpose.” . . . However, the erratic nature of our own case law . . . shows just how vague and malleable this “oneness” standard is. What may be “oneness” to one person might seem a crazy quilt of disparate topics to another. “Oneness,” like beauty, is in the eye of the beholder; and our

118. Id. at 28.
119. Id. at 29.
120. Lowenstein, California Initiatives, supra note 10, at 942.
121. See, e.g., Cal. Ass’n of Retail Tobacconists v. State, 135 Cal. Rptr. 2d 224, 236–37 (Ct. App. 2003) (concluding that “provisions [of proposition at issue] are reasonably germane to [their] goal and are sufficiently functionally related to one another to satisfy the single-subject rule”).
conception of [it] thus has changed every time new members have come onto this Court.\textsuperscript{122}

In a similar vein, Justice Hans Linde of the Oregon Supreme Court questioned "whether characterizing the 'one subject' of a measure is a usable legal test . . . or whether it simply compels endless conceptual manipulation, controversy, and litigation."\textsuperscript{123} Justice Coats of the Supreme Court of Colorado stated that "[e]ven a cursory review of this court's . . . jurisprudence reveals an unmistakable lack of uniformity in our treatment of the single-subject requirement."\textsuperscript{124} In another case he wrote that his colleagues "understand[ ] the term 'subject' to be so elastic as to give this court unfettered discretion to either approve or disapprove virtually any popularly-initiated ballot measure at will."\textsuperscript{125}

Traditionally, the intractability of the single subject rule has led to lax enforcement. Courts have condoned ballot propositions that embrace broad subjects,\textsuperscript{126} perhaps simply because they do not know what else to do. In the words of the Alaska Supreme Court, "it is not at all clear that there are workable stricter standards."\textsuperscript{127} Analysis in many cases is cursory.\textsuperscript{128}

In recent years, however, this trend has begun to change. Courts across the nation have used the rule to strike down immigration measures, gay marriage bans, reapportionment schemes, and other hot-button provisions.\textsuperscript{129} Despite this surge, the rule remains nebulous. The lack of clear definition has led to accusations of judicial activism. It has also prompted demands for reform, including this call from Justice Linde:

The indeterminacy of the term "subject" . . . cannot be overcome by synonyms, paraphrases, and tautological formulas. It can either be replaced or supplemented by a formula that sets

\begin{itemize}
\item \textsuperscript{122} In re Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225, 231 (Fla. 1991) (advisory opinion) (Kogan, J., concurring in part and dissenting in part) (citation omitted).
\item \textsuperscript{123} Or. Educ. Ass'n v. Phillips, 727 P.2d 602, 612 (Or. 1986) (en banc) (Linde, J., concurring).
\item \textsuperscript{124} In re Title, Ballot Title and Submission Clause for 2005-2006 No. 74, 136 P.3d 237, 244 (Colo. 2006) (Coats, J., dissenting).
\item \textsuperscript{125} In re Title and Ballot Title and Submission Clause for 2005-2006 No. 55, 138 P.3d 273, 283 (Colo. 2006) (Coats, J., dissenting).
\item \textsuperscript{126} See, e.g., Buchanan v. Kirkpatrick, 615 S.W.2d 6, 14 (Mo. 1981) (en banc) (concluding all provisions in contested proposition were "properly connected" to subject of "limiting taxes and governmental expenditures within Missouri").
\item \textsuperscript{127} Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173, 1180 (Alaska 1985).
\item \textsuperscript{128} See, e.g., United Gamefowl Breeders Ass'n of Mo. v. Nixon, 19 S.W.3d 137, 140 (Mo. 2000) (en banc) (stating without explanation that subject of proposition in question "is clear" and contested provision falls under it).
\end{itemize}
out some concrete goals or operational directives, or measures will be left to continual case-by-case decisions under standards so meaningless that it is difficult to avoid ad hoc . . . reactions to the merits of individual measures. 130

One final issue deserves attention: the connection between the logic of singularity and the purposes of the rule. The hope is that confining ballot propositions to a single, logical subject will achieve political purposes. 131 As a California court put it, “if proposed legislation concedes to a single subject, logrolling and confusion are not an issue.” 132 But this is patently untrue. Logrolling can take place within a measure that embraces one logical subject. For example, two individually unpopular environmental reforms could be cobbled together and passed under the heading “environmental regulation.” An unpopular rider, say, a corporate tax break, could be combined with a popular tax hike and passed under the heading of “business taxation.” Conversely, two individually popular and transparent measures that address different topics could be combined into a single ballot proposition, passed, and then struck down on single subject grounds even though there was no logrolling, riding, or opaqueness. As these examples make clear, efforts to achieve the rule’s political purposes by a logical definition of singularity are not only fruitless. They distract courts from the actual purposes of the rule.

IV. A DEMOCRATIC PROCESS THEORY OF THE SINGLE SUBJECT RULE

In this Part, we develop a new theory of interpretation for the single subject rule. The theory rests on the claim that “subjects” cannot be defined with logic and should instead be framed in light of voters’ preferences and the democratic process. This approach permits success in identifying the number of subjects where traditional efforts fail.

We begin by articulating our precise definition of a “subject.” We then explain why our definition is more concrete than what judges have developed but still consistent with their intuitions. We also explain why conceptualizing subjects in this light would achieve the important purposes of the rule.

A. Subjects and Sufficiently Separable Preferences

For purposes of single subject jurisprudence, our democratic process theory posits that “subject” means a set of policy proposals over which a majority of voters have insufficiently separable preferences. 133 To give

131. Cf. In re Title, Ballot Title & Submission Clause for 2005–2006 No. 74, 136 P.3d 237, 244 (Colo. 2006) (Coats, J., dissenting) (“The majority makes no attempt to relate its finding of multiple subjects to these purposes [of the rule].”).
133. This definition differs from, but does not supersede, the definition of “subject” provided in Gilbert, Single Subject, supra note 8, at 858 (“A bill can be said to embrace but
meaning to this phrase, “insufficiently separable preferences,” we first explain its opposite, “sufficiently separable preferences.” A voter has sufficiently separable preferences for two policy proposals when she can decide how to vote on each without knowing whether the other will become law.134

The clearest case of sufficient separability occurs when a voter understands the proposals to be completely independent. To illustrate, imagine two policy proposals, one that would implement no-fault insurance for car accidents and another that would permit politicians who receive contributions from interest groups to participate in governmental decisions affecting those groups.135 Most voters probably have sufficiently separable preferences for these proposals. Their vote on the first is unaffected by whether the second becomes law and vice versa.

Short of being completely independent, a voter also has sufficiently separable preferences for two policy proposals when those proposals are only weakly conjoined. Proposals are weakly conjoined when they weakly complement or weakly substitute for one another. Two proposals weakly complement each other when passage of the first increases a voter’s support for the second, but not by so much that her vote on the second depends on whether the first passes. Likewise, two proposals weakly substitute for each other when passage of the first diminishes a voter’s sup-

134. Translating preferences into votes requires an assumption about voters’ behavior, which we describe in Appendix A and reproduce here: Voters vote simultaneously rather than sequentially on ballot propositions, and they discount future elections because they cannot forecast the agenda. Consequently, we assume that voters vote sincerely, by which we mean that they vote for every proposition that yields at least as much utility as the status quo if it wins.

This assumption permits us to express the concept of separability using the language of game theory. A voter has a weakly dominant strategy for voting on a policy proposal when always voting the same way—for or against—yields a payoff at least as great as the payoff from voting any other way, regardless of whether other proposals pass or fail. The voter does not have a weakly dominant strategy if her optimal vote on one proposal hinges on whether other proposals pass or fail. If a voter votes sincerely and has a weakly dominant strategy for voting on each of two policy proposals, then she has sufficiently separable preferences for them. Otherwise her preferences for the proposals are insufficiently separable. Under our definition of “subject,” if a majority of voters have a weakly dominant strategy for voting on each of two proposals, those proposals are separate subjects. If a majority of voters do not have a weakly dominant strategy for voting on both proposals, the proposals together constitute one subject.

135. We base this example on the proposition at issue in California Trial Lawyers Ass’n v. Eu, which the California Court of Appeals found to violate the single subject rule. 245 Cal. Rptr. 916, 922 (Ct. App. 1988).
port for the second, but not by so much that her vote on the second depends on whether the first passes.

To illustrate, imagine two proposals, one of which would ban pesticide X and the other of which would ban pesticide Y.136 If growers can easily switch between X and Y, then passing only one proposal would slightly decrease pesticide use, and passing both proposals would dramatically decrease pesticide use. An environmentalist might support each proposal on its own, but either one would be more attractive to her if the other one also passed. As defined above, this environmentalist has “sufficiently separable preferences” for the proposals.

Now we turn from sufficiently to insufficiently separable preferences. A voter has insufficiently separable preferences for two policy proposals when she cannot decide how to vote on one without knowing whether the other will become law. This occurs in two circumstances: when the proposals are strong complements, such that the voter only votes for one if she is certain also to get the other; and when the proposals are strong substitutes, such that the voter only votes for one if she is certain not to get the other.

We illustrate insufficiently separable preferences over proposals that strongly substitute for each other: Imagine two proposals, one that would reduce property tax rates and another that would leave property tax rates unchanged but exempt half of the value of every home from taxation.137 If a voter wants to reduce property taxes but believes that passing both measures would have disastrous consequences for the state budget, that voter has insufficiently separable preferences over these proposals. She cannot decide how to vote on one without knowing whether the other will pass.

For simplicity, we henceforth refer to sufficiently separable preferences as “separable” preferences and insufficiently separable preferences as “inseparable” preferences.

According to the democratic process theory, the single subject rule aims to separate policy proposals over which most voters have separable preferences and unite policy proposals over which most voters have inseparable preferences. Citizens can express their support for or opposition

136. We base this example on “Big Green,” an omnibus environmental protection measure on California’s November 1990 ballot. See Beatrice Motamedi, Ag Initiatives Worry Farmers: Industry Could Lose Billions, S.F. Chron., Oct. 8, 1990, at C1 (describing the measure, including its prohibitions on pesticides). The measure failed. Tony Knight, Big Green Goes Down as Big Loser, L.A. Daily News, Nov. 7, 1990, at N1. Had it passed, a single subject challenge inevitably would have followed. See Elliot Diringer, Farmers’ Group Files Challenge to “Big Green”, S.F. Chron., July 18, 1990, at A9 (“In a petition . . . the Central California Farmers Association asks that the wide-ranging initiative be declared unconstitutional because it addresses more than one subject.”).

to proposals over which they have separable preferences by voting on them in isolation. Combining such proposals violates the single subject rule. Conversely, voters cannot express their support for or opposition to proposals over which they have inseparable preferences by voting on them in isolation. Therefore, a sound democratic process permits citizens to consider such proposals simultaneously, and combining them does not violate the single subject rule.

To be clear, the type of inseparable preferences that voters have is irrelevant for our analysis. Some voters may have inseparable preferences for two policy proposals because they understand them to be strong complements, while some other voters may have inseparable preferences for the same proposals because they understand them to be strong substitutes. As long as those voters together constitute a majority, then most voters cannot vote on the proposals in isolation. Therefore, under our theory, courts should permit the proposals to be combined by finding no violation of the single subject rule.

Our theory is majoritarian. Whether policy proposals should be separated or combined turns on the preferences of the majority of voters, however slight that majority may be. We adopt this position for two reasons, one abstract and one specific. The abstract reason is that direct democracy is a majoritarian institution. It would be incongruent to adapt its procedures to suit the preferences of the minority rather than the majority of voters. The specific reason is that whether a majority, however small, has separable or inseparable preferences determines whether the primary targets of the single subject rule, logrolling and riding, can occur. Therefore, a judge only needs to know the preferences of the majority to prevent these practices. We discuss this in depth below.\footnote{See infra Parts IV.B–C.}

In addition to being normative, our theory of the single subject rule is also descriptive: It clarifies existing jurisprudence by explaining in a precise way what judges are already trying to accomplish with the rule. We support this assertion with examples. In trying to articulate their test for single subject compliance, California courts state that all of the provisions of a challenged ballot proposition must be "reasonably germane" to one another.\footnote{Cal. Ass’n of Retail Tobacconists v. State, 135 Cal. Rptr. 2d 224, 237 (Ct. App. 2003) (internal citations, quotations, and emphasis omitted).} If most voters have inseparable preferences over the proposals contained in a ballot measure—and therefore cannot decide whether they support one proposal without knowing whether the other will become law—then surely the proposals qualify as "reasonably germane."

Likewise, the Supreme Court of Colorado has interpreted that state’s single subject rule to forbid initiatives from embracing "disconnected and incongruous measures that have no necessary or proper connection."\footnote{Jones v. Polhill, 46 P.3d 438, 440 (Colo. 2002) (en banc) (internal citations and quotations omitted).}
If most voters have inseparable preferences over two measures, the measures are connected and congruous. Similarly, Washington courts call for "rational unity" among a measure's provisions.\footnote{141} Arizona courts look for a "consistent and workable whole . . . [that] should stand or fall as a whole."\footnote{142} Judges in Missouri require that "provisions [be] properly connected with a central purpose."\footnote{143} All of these formulations as well as those of other states are consistent with the claim that the rule distinguishes between separable and inseparable preferences.

Because of this consistency, we do not understand our theory to depart from longstanding single subject jurisprudence. Nor do we understand our theory to require judges to "second guess" elections or otherwise interfere with politics to a greater degree than under the traditional approach to the rule. Rather, we understand our theory to clarify existing precedents by providing a concrete analytical framework for understanding and applying the rule. Because it clarifies rather than supplants existing precedents, we believe our theory could be applied immediately and without constitutional revision.

We note that the democratic process theory and the traditional, logical approach will yield the same result in some cases. This is because people with separable preferences toward two topics tend to think of them as logically distinct. Without reference to our underlying theory, however, this natural tendency can lead to wrong conclusions. Consider, for example, a recent ballot proposition in Alaska that would have implemented public financing for election campaigns and funded the program with a tax on oil companies' profits.\footnote{144} Using the logical approach, a state judge found that "no . . . connection exists" between the provisions, and the proposition represents a "substantial and plain violation of the single-subject rule."\footnote{145} However, a judge applying the democratic process theory may have reached a different conclusion. The two provisions would have been insufficiently separable if most voters did not want public financing without guaranteeing this source of revenue to pay for it. In such a case, the democratic process theory would require that the proposition be upheld as a single subject.

The democratic process theory offers several advantages over the logical approach to defining "subjects," one of which is its concreteness. As discussed, the logical approach suffers from the abstraction problem. Any combination of measures can be considered a single subject if that...
subject is defined with sufficient abstraction. By contrast, the democratic process theory produces objective answers. Whether most voters have separable or inseparable preferences over the components of a challenged ballot proposition is a question of fact. Making this determination may sometimes be difficult. We address the issue of proof in Part V. In any event, case outcomes will turn on evidence rather than caprice or, worse yet, judges’ political views.

The democratic process theory has another important advantage: It would achieve the rule’s political purposes in a way that the logical approach cannot.

B. Separable Preferences and Logrolling

Applying the democratic process theory would prevent logrolling, the primary target of the single subject rule. This is because two policy proposals can be logrolled into a single ballot proposition only if most voters have separable preferences for them.\(^{146}\) Therefore, declaring that all ballot propositions embracing such proposals violate the single subject rule would prevent logrolling. We prove this mathematically in the Appendix. Here we describe the intuition.

Imagine two policy proposals, A and B. Suppose a minority block of voters supports A, a separate minority block of voters supports B, and together the two minority blocks constitute a majority that would support the package of A and B. Further, suppose that each block of voters would be happiest if just their own favored proposal passed. If A and B are packaged, that constitutes a logroll and it will pass. If most voters have separable preferences for A and B, however, the combined proposal cannot survive single subject scrutiny under our test. Thus the rule would prevent the logroll, just as it is intended to do. The proposals would have to be presented to voters individually, and they would fail.\(^{147}\) Since the two measures fail in direct democracy, their supporters would have to look to the legislature, which is the proper place to negotiate political bargains.

What if most voters have inseparable preferences for A and B? Under the democratic process theory, sponsors could combine these proposals and submit them to voters as a package without violating the single subject rule. This does not constitute logrolling or riding. Inseparable preferences imply that the proposals are either strong complements or strong substitutes. If A and B are strong complements, then most voters favor both or neither. Therefore, combining them is not logrolling—

\(^{146}\) This is formalized as Proposition 1 in the Appendix: A necessary condition for logrolling over \(x'\) and \(y'\) is that a majority of voters have sufficiently separable preferences over \(x'\) and \(y'\).

\(^{147}\) In contrast, legislators could agree to logroll two proposals, A and B. Rather than combine both proposals into one bill, AB, participants in the logroll could agree to vote in favor of A and B separately. This cannot take place in direct democracy, as thousands of citizens cannot coordinate their votes.
voters who support the combination do not accept something they dislike to get something they favor. Conversely, if A and B are strong substitutes, then voters only want A if they do not get B. In that case, the combination of A and B would not receive majority support, and logrolling cannot occur.

C. Separable Preferences and Riding

Another important purpose of the single subject rule is to eliminate riding, and our democratic process approach to the rule would achieve that goal. One proposal cannot ride on another unless most voters have separable preferences for them. Therefore, declaring that all ballot propositions embracing such proposals violate the single subject rule would prevent riding. We prove this in the Appendix. Here we describe the intuition.

Suppose that policy proposals A and B address the same topic—say, environmental protection—and that A would pass on its own, B would not, and the proposals would pass if combined. In addition, suppose that, while most voters support the combination of policies, they would prefer to enact A alone rather than both proposals, and they would prefer to enact neither proposal rather than B alone. In short, B is a rider. Traditional single subject jurisprudence would permit the package AB to be presented to voters because A and B address the same narrow subject. By contrast, if most voters have separable preferences for A and B, then our approach would force them to be decoupled. Standing on its own, the rider, B, would not pass.

What if most voters have inseparable preferences for A and B? Our theory would permit these proposals to be combined and submitted to voters as a package. However, B could not then be a rider. If B is a complement, then it does not reduce support among the majority for A but rather increases it. This makes the majority better off, which means that B cannot be a rider, because riders by definition make the majority worse off. Conversely, if A and B are strong substitutes, then voters only want A if they do not get B. In that case, the combination of A and B would not receive majority support, and riding could not occur.

148. This is formalized as Proposition 2 in the Appendix: A necessary condition for y to ride on x is that a majority of voters have sufficiently separable preferences over x and y.

149. The potential for collective action problems to prevent individuals from incurring the costs associated with placing a socially beneficial, majority-supported proposal on the ballot may be seen as a reason to reject this purpose of the single subject rule and condone riders. Riders could be understood as a reward for those sponsors who undertake the costs necessary to qualify a proposal that benefits a majority of voters. We reject this reasoning. While collective action problems may pose a dilemma for direct democracy, the solution does not lie in permitting sponsors to identify proposals that will receive majority support and load them with special interest riders until the value of the omnibus package to most voters is just greater than the status quo.
D. Separable Preferences and Political Transparency

Another purpose of the single subject rule is to improve political transparency, and the democratic process theory would help to achieve this goal. It would unite and divide policy proposals based upon citizens' needs for information when casting votes.

The logical approach and the democratic process theory have the same implications for transparency when they both yield the same outcome, i.e., when they both produce a finding of one subject or when they both produce a finding of multiple subjects. The question is whether our theory performs better when they yield different outcomes.

Consider a ballot proposition containing two proposals. Suppose most voters have inseparable preferences for those proposals (one subject under the democratic process theory), and suppose further that the proposals plausibly encompass different logical subjects (two subjects under the logical approach). For example, the first proposal could ban same-sex marriage and the second could ban same-sex civil unions. Under the logical approach, these proposals would have to be separated, frustrating voters. Citizens who want to ban same-sex marriage only if civil unions are not banned would not know how to vote. The democratic process theory would permit these proposals to be presented as a package, resolving the information problem. The citizens we described, who by assumption constitute a majority, would know exactly how to vote on the package: Either they support it or they do not. In other words, the majority of citizens could clearly express their preferences in a way that they could not under traditional single subject jurisprudence. And they could do so without logrolling or riders.

Now consider another ballot proposition composed of two proposals. Suppose most voters have separable preferences for the proposals (two subjects under the democratic process theory), and suppose further that the proposals are closely related topically (one subject under the logical approach). For example, the first proposal could address curricular requirements in public high schools and the second could address curricular requirements in public universities. Traditional single subject jurisprudence would permit the proposition to stand. This would distract most voters with extraneous information. They do not need to know whether the first proposal will become law to express their preferences on the second and vice versa. The democratic process theory would decouple the proposals, and voters could consider each in isolation. This would make it easier for them to understand the proposals and to express their support for, or opposition to, each one.

E. Separable Preferences and Majoritarianism

Direct democracy and the single subject rule seek to empower democratic majorities. The logical approach to the rule, however, can actually weaken democratic majorities—not only by condoning socially harmful
logrolls and riders, but also by facilitating the simultaneous passage of two or more proposals that are attractive in isolation but that combine to make a majority worse off. In other words, the logical approach can facilitate the passage of strong substitutes. The democratic process theory can help to prevent this.

Suppose three voters make decisions on two proposals. Voters 1 and 2 want either proposal to pass but not both. Voter 3 wants both to pass. If Voter 1 votes "yes" on the first proposal, Voter 2 votes "yes" on the second, and Voter 3 votes "yes" on both, both proposals pass, even though a majority—Voters 1 and 2—dislike this outcome. Direct democracy fails to empower the majority when it implements policies that a majority opposes.\(^1\)

The traditional approach to the single subject rule can exacerbate this problem. If the two proposals in the example are not logically germane to one another, they must be proposed separately. This raises the possibility that both will pass, thereby harming the majority. By contrast, the democratic process approach could mitigate this problem. Because a majority of voters have inseparable preferences over the proposals, they could be combined. Voters 1 and 2 would vote against the joint proposition, retaining the status quo. Retaining the status quo is superior to moving a majority down their list of preferences.\(^2\)

V. APPLYING THE DEMOCRATIC PROCESS THEORY

Having described our theory of the single subject rule and its virtues, we turn now to its application. When a plaintiff identifies two or more policy proposals in a single initiative and argues that together they embrace separate subjects in violation of the rule, judges must ask the following question: Do a majority of voters have separable preferences for these proposals? If yes, then there is a single subject violation. Otherwise there is not.\(^3\)

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150. See Dean Lacy & Emerson M.S. Niou, A Problem With Referendums, 12 J. Theoretical Pol. 5, 6–8, 10–16 (2000) (demonstrating direct democracy may produce "perversion of majority rule" when "voters have nonseparable preferences for issues on a referendum").

151. The democratic process approach to the single subject rule cannot resolve this dilemma. The rule cannot be used to force sponsors to combine proposals over which most voters have inseparable preferences. They may prefer to propose such measures separately. Similarly, proposals over which most voters have inseparable preferences may originate with different sponsors. Unless those sponsors coordinate their behavior, their proposals will be submitted for separate votes. Still, interpreting the single subject rule in accordance with our theory could mitigate the problem.

152. Preferences that are not sufficiently separable come in different configurations. With respect to two proposals, some voters may want either to pass but not both, or they may want both to pass but not either one individually. So long as a majority of voters do not have sufficiently separable preferences for two proposals in any configuration, then those proposals together constitute a single subject.
A. Identifying Separable Preferences

How can courts determine whether most voters have separable preferences for the challenged proposals? They can insist that litigants provide relevant political information. One of the problems with traditional single subject jurisprudence is that the law does not require parties to supply courts with any concrete information on logrolling, riding, or political opaqueness. In general, parties can simply dream up an explanation for why the subparts of a challenged measure do or do not embrace one logical subject. This makes it too easy to pursue a single subject challenge and too difficult for judges to resolve these cases. Requiring litigants to provide data would filter out weak cases and give courts a suitable basis for making decisions.

Poll data would be valuable information for litigants. A poll showing that majority support for one policy proposal depends on whether the other proposal becomes law would imply that most voters have inseparable preferences. More generally, polls showing that voters understand two policy proposals to be complements or substitutes would imply that they are inseparable to a majority. Note that judges themselves would not be required to gather data on citizens' preferences. They would simply evaluate others' data, a routine component of adjudication.

Of course, litigants could also appeal to judges' intuitions and common sense. A tax measure and the spending measure that it exclusively funds often will be inseparable to most voters. In contrast, a pollution measure and a library funding measure are probably separable to most voters.

Having considered the evidence, judges must then make a decision: Did plaintiffs prove by a preponderance of the evidence that a majority of voters have separable preferences over the challenged proposals in the ballot proposition? If so, then there is a single subject violation. If not, there is no violation.

An advantage of the democratic process approach is that single subject disputes can be resolved objectively. Most voters have separable preferences for the challenged policy proposals or they do not. Often litigants will produce clear evidence, or at least clear intuitions, and judges

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153. Collecting poll data is a routine component of initiative campaigns. See Schultz, supra note 38, at 15-18 (noting importance of public opinion research to initiative campaigns).

154. In theory, voters may recognize that their responses to poll questions could have implications for future single subject adjudication. Therefore, they may give insincere responses, undermining the usefulness of the poll. In practice, it seems unlikely that enough voters will behave this way to warrant concern. Most voters probably do not know about the single subject rule, let alone know how courts interpret it and, therefore, what response to a poll question would promote their personal policy agendas. The individuals conducting the polls could falsify poll results, but they would risk their reputations as pollsters (and therefore their future employment prospects) and, depending on how the evidence is introduced in court, may face sanctions for producing false evidence.
will identify correct case outcomes. Sometimes litigants will not be able to produce clear evidence, and judges may struggle to perceive the correct outcome. Regardless, resolution of most cases will turn more on evidence than on judges' values.

B. Timing of Litigation and Remedies

Upon identifying a single subject violation, courts should take different actions depending upon the timing of litigation. If litigation takes place before citizens have voted, the court should invalidate the offending ballot proposition in its entirety. To prevent logrolling and riding, proposition sponsors need an incentive not to engage in this behavior. If they understand that the costs incurred in placing a proposition on the ballot will be wasted if they combine proposals over which most voters have separable preferences, they will be less likely to do so.

If litigation takes place after voters approved the challenged proposition, judges have a choice. First, they can invalidate an offending proposition in its entirety. By completely frustrating the sponsor of the proposition, this option provides the strongest deterrent to combining separable proposals. The disadvantage of this approach is twofold: It throws away the public money spent to administer the vote and the time of thousands or even millions of voters. In addition, invalidation may delay or prevent citizens from enjoying a popular policy.

Judges' second option is to sever, upholding individually popular proposals and striking down the rest. This approach only weakly deters the sponsors of the proposition from combining separable proposals. But it saves public money and voters' time and quickly advances popular measures.

Severing can be an attractive option. Suppose that an initiative contains two proposals that are separable to most voters but individually popular; they are not part of a logroll, and neither proposal is a rider. If the proposition is struck down, citizens are deprived of two policy changes that a majority supports. If the proposals are re-proposed separately, much time and money will be wasted to produce the same outcome: Both proposals will pass. Similarly, suppose that an initiative contains a popular proposal and a rider. If judges strike down the entire proposition, citizens lose the proposal that most of them favor.

155. Some states only permit single subject challenges to be raised before the proposition has been voted on, while others only permit challenges after the election, and still other states permit either. Dubois & Feeney, supra note 66, at 43–45 (describing “pre-election judicial review” in various states); Campbell, supra note 9, at 139–47 (discussing when states allow single subject challenges and repercussions of differing schemes).

156. See, e.g., Ariz. Const. art. IV, pt. 2, § 13 (requiring some single subject violations to be remedied by severing).

157. If the sponsors of the initiative were interested primarily in the rider, they will not re-propose just the popular proposal. Given collective action problems, no one else
In circumstances like this, judges could cure the single subject violation by severing and invalidating unpopular, separable proposals and letting popular ones stand. Many courts in single subject disputes already engage in a practice like this, determining which subject in a challenged proposition is "dominant" or of "greater dignity" and striking down the provisions that do not relate to it.\footnote{158} Severing can save significant time and transaction costs.

Courts need a test to sever unpopular proposals in a principled manner. We propose the following method. Upon finding that two policy proposals in an initiative are separable to most voters, judges must ask this question about each one: If this were voted on individually, would it receive majority support? If the answer is yes, then the proposal should be permitted to stand. If the answer is no, it should be severed and struck down.

The intuition behind this test runs as follows. If most voters have separable preferences for the different policy proposals in a proposition, and if the proposition garners majority support, then each of the proposals in the proposition falls into one of three categories: popular on its own merits; part of an implicit logroll; or a rider. A popular proposal would receive majority support if it were voted upon separately. By contrast, a logrolled provision would not. The individual components of a logroll always lack majority support, which is why their proponents are forced to bargain. Likewise, more voters oppose riders than favor them. Therefore, severing proposals that would not pass on their own would preserve individually popular measures and eliminate logrolling and riding.\footnote{159}

There is always an objectively correct answer to the question whether a majority would support an individual, severed proposal. To answer this question, litigants would have to present evidence to the court. The burden of proof could run as follows: Once the opponents of an initiative may do so either. Even if the popular proposal is re-proposed, it could be years before it appears on the ballot.

\footnote{158} Ruud, supra note 9, at 399.

\footnote{159} An example will clarify this test. Assume that 100 citizens are faced with three measures, A, B, and C, and they have separable preferences for them. A is supported by 80 citizens. B and C are each supported by 40 non-overlapping citizens, and B's supporters would gladly enact C in order to get B and vice versa. Now assume that A, B, and C are logrolled into one proposition, ABC, and that the omnibus proposition would receive majority support. Now assume that a rider, D, is attached to ABC. ABCD is presented to voters and passes. Because most voters have separable preferences for the components of the proposition, ABCD violates the single subject rule. If A were removed and voted upon separately, it would still receive 80 votes. If B were removed and voted upon separately, it would only command 40 votes. The original supporters of B would still vote for it, but those who only supported B as a way to get C would not, since in direct democracy there is no way to coordinate their votes. The same would hold for C. D would also fail to receive majority support. The test would accurately identify B, C, and D as being either logrolled provisions or riders and invalidate them. It would retain A, the independently popular provision.
show by a preponderance of the evidence that it contains separable proposals, the proponents would have a chance to cure the single subject violation by proving that some or all of the proposals would receive majority support on their own. Sometimes proponents will be able to provide convincing evidence of this, and other times they will face difficult problems of proof. As with the initial single subject determination, resolution will turn on evidence, not judges' values.

The following decision tree summarizes our prescriptions for applying the single subject rule. According to Figure 1, if an initiative is challenged before the citizens have voted on it, the initiative should be validated if the challenged components of it are inseparable, and invalidated if the challenged components of it are separable. If an initiative is challenged after the citizens have passed it, the challenged components that would enjoy majority support individually should be severed from the other components and validated. If a majority would not support any of the individual challenged components, the proposition should be invalidated.

**Figure 1: Judicial Decision Tree for Single Subject Rule**

<table>
<thead>
<tr>
<th>Pre-election single subject challenge?</th>
<th>Election</th>
<th>Post-election single subject challenge?</th>
<th>Initiative becomes law</th>
</tr>
</thead>
<tbody>
<tr>
<td>no</td>
<td>yes</td>
<td>defeated</td>
<td>court finding</td>
</tr>
<tr>
<td>Initiate qualifies for ballot</td>
<td>no</td>
<td>invalidate</td>
<td>validate</td>
</tr>
<tr>
<td></td>
<td>yes</td>
<td>validate</td>
<td></td>
</tr>
<tr>
<td></td>
<td>separat</td>
<td>invalidate</td>
<td></td>
</tr>
<tr>
<td></td>
<td>insepara</td>
<td>validate</td>
<td></td>
</tr>
</tbody>
</table>

**VI. Referenda and the Democratic Process Theory**

We have focused on initiatives because they are at the heart of direct democracy, they tend to produce the most controversial propositions, and they are the target of the vast majority of single subject challenges. In this Part, we briefly consider the implications of our theory for referenda. Referenda differ significantly from initiatives, and a full discussion of this issue is best reserved for a separate paper. Consequently, our conclusions are tentative.

We begin with statutory referenda. As with ordinary legislation, representatives can take advantage of their small numbers and institutional framework to craft political bargains and present them to voters. Such bargains are not vulnerable to the same critiques as initiative logrolls. Thus, because statutory referenda originate within legislatures that provide a forum for bargaining, they are less likely to be socially harmful.
This argument is important to political philosophy. One of the virtues of representative government is that it permits legislators to deliberate and compromise in a way that regular citizens cannot. If such compromise—which often manifests as logrolling—is forbidden, then representative government simply mimics the initiative process, with politicians registering their preferences on an issue-by-issue basis. This is inconsistent with the spirit of representative government.

For these reasons, we tentatively conclude that the single subject rule should not be used to forbid logrolling in statutory referenda. Legislators should be permitted to strike political bargains and refer them to the people for validation. This empowers democratic majorities by permitting citizens to examine and pass judgment on the bargains their representatives strike.160

We turn now to constitutional referenda. Should legislators be permitted to logroll in a proposition that, if approved by voters, would alter the state constitution? Legislative bargains are not guaranteed to be high quality. In the statutory context, the risk is justified by the potential upside of political bargaining and the mandate of representative government to compromise. In the constitutional setting, however, the calculus may cut the other way. State constitutions are intended to be more entrenched and enduring than statutes. Constitutional amendments arguably should have majority support on their own merits. Such amendments are more likely to endure than logrolled proposals that, while part of a bargain that benefits a majority, are individually unpopular and may cease to be desirable over time.

The view that constitutional referenda should be reviewed more stringently than statutory referenda is supported by existing legal doctrines. Several states have a "separate vote" requirement that applies only to constitutional amendments, including those proposed by legislators.161 Some states have interpreted this requirement to be more restrictive than the single subject rule.162 The separate vote rule could be understood to forbid constitutional amendments that are the product of political bargaining, irrespective of whether they originate among the citizenry or in legislatures. Likewise, some states forbid constitutional "revisions" from being carried out through direct democracy.163 One could plausibly in-

160. One of us has written separately on the application of the single subject rule to ordinary legislation. See Gilbert, Single Subject, supra note 8, at 809 ("Logrolling] always leaves a majority of legislators better off, though it may cause severe harm to a minority... [R]iding always leaves a majority of legislators worse off, though it may yield a significant benefit to a minority."). The framework provided in that paper, which exempts logrolling from the practices forbidden by the single subject rule, could also be used for statutory referenda.

161. See Miller, Courts as Watchdogs, supra note 24, at 1081–83 (providing examples showing "several initiative states" are moving in this direction).

162. See id. (discussing Oregon and Montana separate vote requirements).

163. See, e.g., Strauss v. Horton, 207 P.3d 48, 110 (Cal. 2009) (holding Proposition 8, which provides that "[o]nly marriage between a man and a woman is valid" in California,
interpret the term "revision" to mean bargain. The prohibition on revisions would then stand for the proposition that constitutional bargains should not be implemented through ordinary referenda but rather through constitutional conventions.

**Conclusion**

Direct democracy's appeal lies in its capacity to involve citizens first-hand in shaping law and policy. To infuse adjudication with this spirit, courts must shift their efforts to define what is or is not a single subject from a logical approach to one that relies on the democratic process. The direct democratic process only works when citizens can make choices among the alternatives they face. We have defined a "subject" according to voters' ability to separate issues when deciding them. Issues that can be separated in the minds of most voters should be separated in ballot initiatives. Issues that cannot be separated in the minds of most voters may be combined in initiatives. This test provides a concrete, coherent framework for courts to improve the quality of direct democracy. It also assigns the tasks to direct and representative democracy that each performs best. Along with its strengths, direct democracy has a weakness. Unlike legislators, citizens cannot compromise with one another. They are too numerous and geographically dispersed, and they lack a bargaining forum in which to negotiate. As a result, political bargaining should produce better outcomes in the legislature than in initiatives. Under our interpretation, the single subject rule blocks bargains in initiatives and confines them to the legislature where they belong.
This Appendix proves that courts can prevent logrolling and riding by finding a single subject violation whenever a ballot proposition contains two policy proposals that are sufficiently separable from one another in the preferences of a majority of voters. One proposal is sufficiently separable from another for a voter if his decision to vote for it or against it does not change when the other proposal passes or fails.

**Variables**

\( x \) and \( y \) are policy dimensions.  
\( x^i \in x \) and \( y^k \in y \) are arbitrary policies on each dimension.  
\( x^0 \in x \) and \( y^0 \in y \) are the status quo policies.  
\( x^i \in x \) and \( y^i \in y \) are new policy proposals. \( x^0 \neq x^i \) and \( y^0 \neq y^i \)  
\( b^{jk} \in (x \cup y) \) is a ballot proposition, where \( b^{j,0} = (x^i, y^0) \), \( b^{0,i} = (x^0, y^i) \), etc.  
\( u_i \) is voter \( i \)'s utility, where \( u_i = u_i (x^i, y^k) \).  
\( x^*_i \in x \) and \( y^*_i \in y \) are voter \( i \)'s ideal policies:  

\[
   u_i (x^*_i, y^*_i) = \arg \max_{x^j, y^k} u_i (x^j, y^k)  
\]

\( v^{jk}_i \) indicates how voter \( i \) votes in the contest between \( b^{jk} \) and \( (x^0, y^0) \), where  

\[
   v^{jk}_i = 1 \text{ indicates a vote for } b^{jk} \text{ and } v^{jk}_i = 0 \text{ indicates a vote against } b^{jk}  
\]

\[
   V^{jk} = \sum_{i=1}^{N} v^{jk}_i  
\]

**Collective Choice Assumptions**

**Majority rule:**  
Assuming an odd number of voters \( N \),  
if \( V^{jk} > N/2 \), then \( b^{jk} \) wins and replaces \( (x^0, y^0) \);  
otherwise \( b^{jk} \) loses and does not replace \( (x^0, y^0) \).

**Restriction on Domain of Propositions:**  
The single subject rule concerns separating or combining policy proposals in ballot propositions. Therefore, we will compare the separated propositions, \( b^{1,0} \) and \( b^{0,1} \), with the combined proposition, \( b^{1,1} \). These propositions propose a change from the status quo, \( b^{0,0} \). The domain of voter choice is thus restricted to \( \{b^{1,0}, b^{0,1}, b^{1,1}, b^{0,0}\} \).

**Sincere Voting:**  
Voters vote simultaneously rather than sequentially on ballot propositions, and they discount future elections because they cannot forecast the agenda. Consequently, we assume that voters vote sincerely, by which we mean that they vote for every proposition that yields at least as much utility as the status quo if it wins.  
If \( u_i (x^i, y^k) \geq u_i (x^0, y^0) \), then \( v^{jk}_i = 1 \), where
Defining Sufficiently Separable Preferences

Voter $i$ has sufficiently separable preferences over $x^i$ and $y^i$ when he always prefers $x^i$ to $x^0$, or vice versa, regardless of the value of $y$, and when he always prefers $y^i$ to $y^0$, or vice versa, regardless of the value of $x$.

We specify conditions under which voter $i$ has sufficiently separable preferences. Expressions (13) and (14) imply that voter $i$ always prefers $x^i$ to $x^0$, and (15) and (16) imply that voter $i$ always prefers $y^i$ to $y^0$.

\begin{align*}
\text{(13)} & \quad u_i(x^i, y^i) \geq u_i(x^0, y^0) \\
\text{(14)} & \quad u_i(x^i, y^1) \geq u_i(x^0, y^1) \\
\text{(15)} & \quad u_i(x^2, y^i) \geq u_i(x^0, y^i) \\
\text{(16)} & \quad u_i(x^i, y^1) \geq u_i(x^i, y^0)
\end{align*}

Negating the weak inequalities in (13) and (14), or in (15) and (16), or in all four expressions implies that voter $i$ still has sufficiently separable preferences over $x^i$ and $y^i$.

Comment

With sufficient separability as defined by (13)–(16), voter $i$'s utility is at least as high when voting for $x^i$ and $y^i$ as when voting against them. This fact implies that voting for $x^i$ and $y^i$ is a “weakly dominant strategy” with sincere voting in the restricted domain of choice.

Illustration

We illustrate sufficiently separable preferences using a weighted Euclidean utility function common in political science. The variable $a$ is the weight attached to the $x$ dimension, $b$ is the weight attached to the $y$ dimension, and $c$ is the weight attached to the interaction between the $x$ and $y$ dimensions.\textsuperscript{164}

\begin{equation}
\begin{aligned}
u_i(x^i, y^i) &= -[a(x^i - x^0)^2 + b(y^i - y^0)^2 + c(x^i - x^0)(y^i - y^0)] \\
&= \left[a(x^i - x^0)^2 - (x^1 - x^0)^2ight] \\
&\quad + \left[b(y^i - y^0)^2 - (y^i - y^0)^2ight] \\
&\quad + \left[c(x^i - x^0)(y^i - y^0) - c(x^1 - x^0)(y^i - y^0)ight]
\end{aligned}
\end{equation}

Voter $i$ has sufficiently separable preferences when the absolute value of $c$ is small relative to $a$ and $b$.\textsuperscript{165}

\textsuperscript{164} If $c = 0$, then voter $i$ has separable preferences as defined by economists. If $c \neq 0$, then voter $i$ has nonseparable preferences as defined by economists. If his preferences are nonseparable, then he understands $x^i$ and $y^i$ to be substitutes or complements. The text discusses substitutes and complements, even though the proof does not require this. When utility satisfies (17), economists have a simple definition:

If $c > 0$ in (17), then $x^i$ and $y^i$ are substitutes;
if $c < 0$ in (17), then $x^i$ and $y^i$ are complements.

\textsuperscript{165} It is straightforward to show that “sufficient separability” as defined in (13) and (14) implies that the value of $c$ in the Euclidean utility function satisfies:

\[a(x^0 - x^i)^2 - (x^1 - x^0)^2 \geq c\]
Defining Logrolling

Logrolling over \( x' \) and \( y' \) occurs when neither of these policy proposals would pass on its own (expressions 18 and 19), and two minority blocks that together constitute a majority (expression 20) support the combination of policies (expression 21) but respectively prefer to enact one proposal rather than both and neither proposal rather than the other (expressions 22 and 23). In notation, six conditions are necessary for logrolling to occur:

\[
\begin{align*}
V^{1,0} &< N/2 \quad (18) \\
V^{0,1} &< N/2 \quad (19) \\
\text{For } l \text{ and } m \text{ voters, } & \begin{cases} 
l < N/2 \\
m < N/2 \\
l + m > N/2 
\end{cases} \quad (20) \\
\text{For } l \text{ and } m \text{ voters, } & u(x', y') > (x^0, y^0) \\
\text{For } l \text{ voters, } & u(x', y') > u(x^l, y') \text{ and } u(x^0, y^0) > u(x^0, y') \\
\text{For } m \text{ voters, } & u(x', y') > u(x^l, y') \text{ and } u(x^0, y^0) > u(x', y^0). 
\end{align*}
\]

Comment

(20) and (21) imply that \( x' \) and \( y' \) pass when combined

\[
V^{1,1} > N/2. \quad (24)
\]

Proposition 1: A necessary condition for logrolling over \( x' \) and \( y' \) is that a majority of voters have sufficiently separable preferences over \( x' \) and \( y' \).

Proof:

(21) and (22) imply (13) and (14) and (15) and (16) with strong inequalities.

\[
\alpha \frac{(x^0 - x^*_i)^2 - (x^l - x^*_i)^2}{(y^l - y^*_i)(x^l - x^0)} \geq c
\]

For these equations we assume that \((y^0 - y_1)(x_1 - x^0)\) and \((y^l - y_i)(x_1 - x^0)\) are positive. If either is negative, the relevant inequality changes direction, but this does not affect the analysis.

A similar expression applies for (15) and (16).

Comment: If voter \( i \) does not have sufficiently separable preferences over \( x' \) and \( y' \), then these policy proposals are either strong substitutes, in which case he only supports one if he is certain not to get the other, or strong complements, in which case he only supports one if he is certain also to get the other.
(21) and (23) imply (13) and (14) and (15) and (16) with strong inequalities.

(20) implies that $1 + m > N/2$. QED.

**Defining Riding**

$y'$ rides on $x'$ when $x'$ would pass on its own (expression 25), $y'$ would not pass on its own (expression 19), the proposals pass when combined (expression 24), and a majority supports the combination of policies (expression 26) but prefers to enact $x'$ rather than both proposals and neither proposal rather than $y'$ (expression 27). In notation, five conditions are necessary for $y'$ to ride on $x'$:

$$V^{1,0} > N/2$$  \hspace{1cm} (25)
$$V^{0,1} < N/2$$  \hspace{1cm} (19)
$$V^{1,1} > N/2$$  \hspace{1cm} (24)

For $q > N/2$ voters,

$$u (x', y') > u (x^0, y^0)$$  \hspace{1cm} (26)

For $q > N/2$ voters,

$$u (x', y^0) > u (x^1, y')$$ and $$u (x^0, y^0) > u (x^0, y').$$  \hspace{1cm} (27)

Remark: equivalent conditions are necessary for $x'$ to ride on $y'$.

**Proposition 2**: A necessary condition for $y'$ to ride on $x'$ is that a majority of voters have sufficiently separable preferences over $x'$ and $y'$.

Proof:

(26) and (27) imply (13) and (14) and (15) and (16) with strong inequalities.

(26) and (27) imply that $q > N/2$. QED.

Remark: the equivalent proposition is true if $x'$ is the rider.

**Policy Prescription**:

To prevent logrolling and riding, courts should find a single subject violation whenever a ballot proposition contains two policy proposals that are sufficiently separable from one another in the preferences of a majority of voters, where sufficiently separable means that a voter's decision to vote for or against one proposal does not change if the other proposal passes or fails. This follows from propositions 1 and 2.