# SINGLE-SUBJECT RULES AND THE NATURE OF STATE JUDICIAL POWER

CHAD M. OLDFATHER*

Many state constitutions include "single-subject" rules, which require legislation, ballot initiatives, and/or constitutional amendments to encompass only one subject. These rules are intended to facilitate informed decision-making by making it clear to voters what they are voting on, as well as to prohibit practices that leverage one measure's popularity to assist with the passage of another, such as logrolling and the inclusion of riders. Courts have struggled to enforce these rules, however, due largely to the inherent slipperiness of "subject" as a concept. Commentators have in turn questioned judicial intervention based largely on doubts about whether the rules can be implemented in a principled and consistent manner. This Essay focuses not on the nature of the rules but rather on the nature of the power wielded by the courts that implement them. It contends that objections to judicial enforcement of single-subject rules have implicitly assumed the federal judicial power as the standard against which to assess the practice, when in fact state judicial power—as to which, for one thing, the "countermajoritarian difficulty" often does not exist—may differ in ways that open the door to more aggressive judicial review. That posture may be especially appropriate for issues involving the political process, which is the case with single-subject rules. To be sure, as critics have suggested, aggressive review will often be ideologically inflected. In the context of single-subject challenges, ideology's influence is likely to be significant primarily in states with a closely divided government, and the fact of the close divide may make aggressive enforcement of single-subject rules less troubling than first meets the eye.



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* Professor, Marquette University Law School. Many thanks to participants at the 2024 Public Law in the States Conference, hosted by the State Democracy Research Initiative at the University of Wisconsin Law School, and in particular to Sharon Brett and Derek Clinger, for their comments on an earlier draft.

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## INTRODUCTION

Laws, a common comparison has it, are like sausages. However good the end product may be, the processes of making them are best left unseen.[1] Ingredients are combined and compromises reached in often unappetizing ways. Unnecessary or even harmful items get included, sometimes because they are overlooked, sometimes by design.

In lawmaking, as in sausage, the blend is often the point. A comprehensive revision of a criminal code, for example, will necessarily include a wide array of provisions relating to both substance and procedure that are carefully crafted to work together. Little of it would work, or at least work as well, were it not part of the entire amalgamation. Sometimes, though, things are combined out of convenience. "Logrolling" happens: One minority of legislators feels strongly about the passage of a certain provision, another minority about a different provision. Neither would clearly secure enough votes to pass on its own, but in combination there are enough legislators who strongly favor one provision and do not strongly disfavor the other to secure passage of both of them packaged together.[2] Or a provision sneaks in as a "rider," something unlikely to pass on its own, but not objectionable enough to prevent it from riding the coattails of the legislation to which it gets attached.[3]

Both processes at least occasionally result in a strange fusion of ingredients. One sausage purveyor offers, among its more than 130 flavors, bratwurst made with banana cream pie, lasagna, cherry Kool-Aid, s'mores, and gummy bears.[4] Likewise, in 2016, the Ohio Legislature enacted Senate Bill 331, a law that began as a bill regulating the sale of dogs by pet stores and that grew, by the time it was enacted into law, to cover "micro wireless facilities in the public way," local minimum wage laws, the ability of private employers "to establish policies concerning location and hours of work, scheduling, and fringe benefits," bestiality, and residency requirements for humane society agents.[5] The gummy bear brats were the result of a joke and turned out,

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1. The insight is usually attributed to Otto von Bismarck, but credit may instead be due to John Godfrey Saxe. Fred R. Shapiro, *Quote...Misquote*, N.Y. TIMES MAG., July 21, 2008, at MM16, https://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html.

2. Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1634 (2018–19).

3. *Id.*

4. *See* GRUNDHOFER'S OLD-FASHION MEATS, https://grundhofersmeatmarket.com/brats/ [https://perma.cc/UEL9-9ZAR].

5. *See City of Toledo v. State*, 2018-Ohio-4534, ¶ 4, 123 N.E.3d 343, 345–46 (Ct. App.).

according to their maker, to be surprisingly delicious.[6] Laws such as Ohio's are likely to be described by their makers as products of necessity, and while they invite jokes, they often result in citizens aggrieved by the likelihood that at least some of the provisions would not have passed were they required to stand on their own.[7]

Often those citizens have grounds for challenge. Many state constitutions include "single-subject" rules that require legislation, ballot initiatives, and constitutional amendments to encompass only one subject.[8] The rules are meant to enhance democracy by facilitating informed decision-making.[9] Those who vote, whether at the ballot box or as a member of a legislature, will be better positioned to know what they are voting on if proposed legislation relates only to one subject—the "pet store bill" rather than the "pet store, micro wireless, minimum wage, bestiality, etc. bill." The rules further aim to prohibit the leveraging of one measure's popularity, whether in general or with a subset of the population, to assist with the passage of another.[10] No legislator wants to have to campaign for reelection while open to the charge that they voted against laws increasing the consequences of bestiality, and it is not difficult to imagine that the inclusion of such a provision would lead legislators to vote in favor of provisions they would not support otherwise.

Ohio's Senate Bill 331 presents an extreme—though hardly unusual—example. It is difficult to find a thread less general than "law" that runs through all of its provisions. But the question is often more difficult. Suppose Senate Bill 331 dealt only with pet stores, bestiality, and humane society agents. Is each of those its own subject, or might the law be described as concerning the protection of animals? Courts have struggled to enforce single-subject rules, and the root difficulty stems from the inherent slipperiness of "subject" as a concept.[11] Should, say, proposed legislation amending a vehicular manslaughter statute be regarded as about vehicular manslaughter, homicide, or criminal law? Could it be paired with tweaks to the law concerning intentional murder, theft, or the general requirements for attempt crimes? There is no obvious

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6. GRUNDHOFER'S OLD-FASHION MEATS, *supra* note 4.

7. *See, e.g.*, Kelly Thompson, *Breeding the Law: A Quick and Dirty Breakdown of Senate Bill 331*, TOL. CITY PAPER (June 27, 2017) https://toledocitypaper.com/feature/breeding-the-law-senate-bill-331/ [https://perma.cc/CNR5-JFB8].

8. Briffault, *supra* note 2, at 1629.

9. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 816 (2006).

10. Briffault, *supra* note 2, at 1635.

11. *See* Gilbert, *supra* note 9, at 824–26.

answer. What results is often either confusion or judicial deference to a legislature's choices.[12]

Past commentary tends toward skepticism about whether single-subject rules provide a net benefit and whether they can be implemented in a principled and consistent manner. This Essay approaches the topic via a shift in focus. Rather than attending primarily to the rules themselves, it centers the courts that must implement them and the nature of the power these courts wield. Among its core observations is one familiar in the academic literature but rarely acknowledged in caselaw, namely that "judicial power" is not some fixed and immutable thing. This power undoubtedly has outer bounds, but within those bounds there is considerable room for variation, and each manifestation of the judicial power—each court—is a product of its own unique legal and institutional setting. The contours of state judicial power differ from those of federal judicial power, and a court's power in one state will not be identical to that of its counterparts in another. In particular, the power wielded by elected judiciaries is, in operation and perhaps by design, different from that of those which are appointed. These differences should matter, especially when it comes to courts' supervision of the political process, as is at stake in the implementation of single-subject rules. They do not help to provide greater clarity to or otherwise refine the doctrinal tests used to implement single-subject rules. But they do provide some assurance that even relatively aggressive application of the rules is less problematic than past commentary has suggested, even where the results cannot be captured in crisp doctrinal terms.

## I. SINGLE-SUBJECT RULES: AN OVERVIEW

Single-subject rules—which as their name suggests, are requirements that an enactment embrace only one topic—are a pervasive feature of state constitutions.[13] They apply, in various combinations depending on the state, to ordinary legislation, ballot initiatives, and constitutional amendments. Stated generally, their aim is to ensure that those asked to vote on a proposed enactment, be they legislators or citizens, are confronted with a discrete change or addition to the law which they can consider on its own terms and then approve or disapprove. More specifically, the purposes of a single-subject rule (as applied to legislation) include "the prevention of logrolling and riders; orderly legislative procedure that promotes informed legislative decision-making and public accountability; and, less frequently, the protection of

12. *See id.* at 823–28.

13. Briffault, *supra* note 2, at 1629.

the governor's veto power."[14] The result, in theory, is more transparent and informed lawmaking that reflects the majority's preferences. The rule has a long pedigree, dating back to ancient Rome, and began to appear in American state constitutions in the 1840s.[15]

### *A. Legislation*

Most states apply the rule to legislation.[16] Often the application is general. The Minnesota Constitution, for example, provides: "No law shall embrace more than one subject, which shall be expressed in its title."[17] But there are gradations. The Louisiana Constitution uses a different formulation and identifies exceptions: "Every bill, except the general appropriation bill and bills for the enactment, rearrangement, codification, or revision of a system of laws, shall be confined to one object."[18] And some apply only in limited circumstances. In New York and Wisconsin, for example, the legislative single-subject rule applies only in the case of a "private or local bill,"[19] and in Arkansas it applies only to appropriations bills.[20] These rules are typically paired with a requirement that a bill's subject be expressed in its title and often provide for the voiding of any portion that is not embraced by the title.[21]

### *B. Initiatives*

Twenty-four states have an initiative process by which voters can directly propose either ordinary laws or, in the case of eighteen of them, constitutional amendments.[22] Of these, thirteen have single-subject rules in their state constitutions, while another three apply the requirement by

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14. *Id.* at 1634.

15. *See* Gilbert, *supra* note 9, at 811–12.

16. For a comprehensive survey, see Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 app. A at 1005–23.

17. MINN. CONST. art. IV, § 17.

18. LA. CONST. art. III, § 15(A).

19. N.Y. CONST. art. III, § 15; WIS. CONST. art. IV, § 18.

20. ARK. CONST. art. 5, § 30.

21. *E.g.*, CAL. CONST. art. IV, § 9.

22. For a comprehensive survey as of 2004, see generally Rachael Downey, Michelle Hargrove & Vanessa Locklin, *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004). For a current list, see *States with Initiative or Referendum*, BALLOTPEDIA, https://www.ballotpedia.org/states_with_initiative_or_referendum [https://perma.cc/CTW4-3V75].

statute.[23] The California Constitution, for example, provides: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[24] Initiatives in Oregon, whether they concern ordinary laws or constitutional amendments, "shall embrace one subject only and matters properly connected therewith."[25] Such provisions often vest the state's secretary of state with the responsibility and power to ensure that an initiative complies with the single-subject requirement.[26]

### *C. Amendments*

There are, finally, states that do not allow for constitutional amendment by initiative but do have separate-vote requirements, which in practice means that proposed amendments must embrace only a single subject. The Hawaii Constitution, for example, provides that "each amendment shall be submitted in the form of a question embracing but one subject."[27] Many do not speak directly in terms of a single subject, though the implication is the same. In Wisconsin, for example, only the Legislature can develop constitutional amendments for submission to the people, and the Wisconsin Constitution requires "that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."[28] This, the Wisconsin Supreme Court has held, requires an inquiry into whether "the propositions submitted . . . relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other."[29]

### *D. Difficulties in Application*

As explored further below, there are reasons to conclude that single-subject rules ought to be implemented differently in the three contexts in which they apply. The institutional actors are different, and the concerns the rule aims to address present themselves differently. For

23. *Single-Subject Rule for Ballot Initiatives*, BALLOTPEDIA, https://www.ballotpedia.org/single-subject_rule_for_ballot_initiatives [https://perma.cc/CQS2-XB7S].

24. CAL. CONST. art. II, § 8(d).

25. OR. CONST. art. IV, § 1(2)(d).

26. *See, e.g.*, *Or. Educ. Ass'n. v. Roberts*, 721 P.2d 833, 835 (Or. 1986).

27. HAW. CONST. art. XVII, § 2.

28. WIS. CONST. art. XII, § 1.

29. *Wis. Just. Initiative v. Wis. Elections Comm'n*, 2023 WI 38, ¶ 62, 990 N.W.2d 122, 143 (2023) (quoting *State ex rel. Hudd v. Timme*, 11 N.W. 785, 791 (Wis. 1882)).

one example, voters presented with a "yes" or "no" choice on an initiative or amendment lack legislators' ability to bargain with or otherwise voice their concerns to those responsible for its drafting. Yet in a general sense the rules require the same thing—that lawmaking occur in distinct units, defined by subject, with the success of any specific unit untethered to the success of any other. As a first cut, then, it might seem appropriate to treat them as a category, because they all present a common, core difficulty.

The difficulty is this: "Subject" is a thoroughly amorphous concept. Take, as an example, the very last case I argued in practice.[30] Our clients were a set of environmental groups challenging legislation that, among other things, enacted a wolf-management plan for the State of Minnesota in the wake of the timber wolf's removal from the federal endangered species list.[31] The Minnesota Constitution states: "No law shall embrace more than one subject, which shall be embraced in the title."[32] The legislation's title began with: "An act relating to natural resources," and continued by listing the dog's breakfast of items within the enactment.[33] In addition to "providing for wolf management," the Act modified "duties of citizen oversight committees," "certain license fees," "use of lighted fishing lures," "disposition of payments in lieu of sales tax for lottery tickets," and more.[34] The opening phrase of course discloses the Legislature's strategy—this is an act relating to "natural resources," and all of what is included relates in some way to natural resources.[35] Our argument in response was, in effect, that wolf management is its own subject, one that is distinct from all the others included within this legislation, and that it therefore ought to have been considered on its own.[36] But "natural resources" and "wolf management" do not exhaust the possibilities. One can imagine defining the subject even more broadly—as by, for example, following the lead of civil codes, which categorize laws as relating to "persons"[37] or "things"[38]—or more narrowly—as by focusing on specific components of the wolf-management plan. There is no accepted standard by which to determine which characterization is appropriate.

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30. I argued the summary judgment motion at the trial court; one of my colleagues argued the appeal. *Defs. of Wildlife v. Ventura*, 632 N.W.2d 707, 709 (Minn. Ct. App. 2001).

31. *Id.* at 709–11.

32. MINN. CONST. art. IV, § 17.

33. *Defs. of Wildlife*, 632 N.W.2d at 710.

34. *Id.*

35. *Id.*

36. *Id.* at 710–11.

37. LA. CIV. CODE ANN. art. 24–399 (2024).

38. LA. CIV. CODE ANN. art. 448–76 (2024).

Scholarly commentary reflects this. As Michael Gilbert puts it, most scholars "agree that, despite its benign intent, [the single-subject rule] suffers from a fundamental flaw: no one can define a 'subject.'"[39] Richard Briffault observes that "a persistent theme in the single-subject jurisprudence has been the inevitable 'indeterminacy' of 'subject' and a recognition that whether a measure consists of one subject or many will frequently be 'in the eye of the beholder.'"[40]

One approach to the problem is to pivot from a formalistic focus on the definition of "subject" to a functionalist analysis rooted in the purposes of the rule. Brannon Denning and Brooks Smith characterize this as the predominant approach, at least in the context of legislation:

> Most courts measure the act against the purposes of the constitutional provision: to curb logrolling and to prevent the public or other legislators from being misled about the nature of the legislation. This purposive approach has, in many cases, led to the single subject requirement being collapsed into the title requirement so that as long as the multiple subjects are expressed in the title, there is no violation.[41]

Even applied functionally, the rule is an imperfect proxy for achieving fully transparent, informed, and desirable lawmaking. In some respects, it is overinclusive.[42] Logrolls will often be beneficial.[43] Legislators who are strongly in favor of provision A and only mildly opposed to provision B can join with those whose preferences are the reverse to get both measures passed, leaving both groups more satisfied than if neither passed. In other respects, it is underinclusive.[44] Logrolls and riders can exist within the scope of a narrowly defined subject—such as the particulars of a wolf-management plan, where legislators might trade votes over different components of the plan or attach a provision that is itself broadly unpopular to a larger package that is nonetheless destined to pass. What's more, effective legislation sometimes requires a broad approach, such as with comprehensive revisions of a criminal code.

With neither formalism nor functionalism able to provide clear guidance, structural considerations often carry the day. Courts faced with single-subject challenges to legislation or legislatively generated

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39. Gilbert, *supra* note 9, at 806–07.

40. Briffault, *supra* note 2, at 1630 (first quoting *Or. Educ. Ass'n v. Phillips*, 727 P.2d 602, 612 (1986); and then quoting Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938 (1983)).

41. Denning & Smith, *supra* note 16, at 994.

42. *See* Gilbert, *supra* note 9, at 830.

43. *Id.* at 831–36.

44. *Id.* at 830.

constitutional amendments confront a request to review the work of a coordinate branch of government. Challenges to initiatives or amendments entail a request that a court strike down a law or amendment approved by a majority of voters.[45] Both present situations where courts are often instinctively deferential. Briffault concludes that "the meaning and enforcement of the rule has usually turned on how deferential the court thinks it ought to be to the legislature or, conversely, how much it sees the combination of topics in a new law as reflecting the legislature's defiance of the norms of proper law-making."[46]

As an example of a deferential approach, consider the court's response to my clients' challenge to the law that included the wolf-management plan. The court opened by invoking its strong, general presumption that laws passed by the Legislature are constitutional.[47] It then characterized the single-subject rule's purpose as "to ensure that the legislature separately reviews and considers each law, thereby diminishing the possibility that matters that are *wholly unrelated* with a law's subject are not included with the primary law."[48] The court explained that this, too, entails deference to the Legislature, and that as a result successful single-subject challenges are rare.[49] All that is required to hold the various components of an enactment together as a single subject is a "mere filament" of commonality.[50] In applying that deferential framework, the court observed that the bill "spans less than ten pages; the title includes the phrases 'natural resources' and 'providing for wolf management' by name; and covers only seven topics . . . ."[51] (The court did not pause to explain how "topics" differ from "subjects.") This, then, was not a "garbage bill" or one containing "an overly broad range of subjects *wholly unrelated* to each other."[52] As a consequence, it violated neither the single-subject rule nor a related prohibition on logrolling.[53]

The court's application of the existing legal framework, it should be noted, was entirely consistent with how that framework had generally been applied. We understood that we were fighting an uphill battle. Yet

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45. Taylor A. Hatridge, Comment, *Begging the Question: Judicial Review of Ballot Questions for Referred State Constitutional Amendments in Wisconsin*, 2023 WIS. L. REV. 1409, 1435.

46. Briffault, *supra* note 2, at 1630.

47. *Defs. of Wildlife v. Ventura*, 632 N.W.2d 707, 711 (Minn. Ct. App. 2001).

48. *Id.*

49. *Id.* at 711–12.

50. *Id.* (quoting *Blanch v. Suburban Hennepin Reg'l Park Dist.*, 449 N.W.2d 150, 155 (Minn. 1989)).

51. *Id.* at 713.

52. *Id.*

53. *Id.*

it provides a good illustration of the pathologies of the rule. Minnesota courts approached the problem of defining "subject" by adopting a regime of great deference to the Minnesota Legislature's categorizations. A bill may embrace multiple topics (not subjects), so long as they are not wholly unrelated, meaning they are connected by at least a mere filament. Determining precisely when those thresholds are crossed presents a question no easier than pinning down the contours of "subject." Deference as a solution does not eliminate the problem but instead pushes it to the margins.

Not all courts have taken such a highly deferential approach, and generalization is difficult. In all, Briffault concludes, "the meaning of the rule remains murky, with the caselaw consisting of a mix of unpredictable 'I know it when I see it' decisions."[54] He finds that state of affairs unsatisfactory and "in tension with the rule of law."[55] But he also concedes it may be the best we can do.[56]

## II. STATE JUDICIAL POWER AND SINGLE-SUBJECT RULES

It may well be correct to suggest that, when it comes to the application of single-subject rules, "I know it when I see it" is the best we can do. But that may not be as unsatisfactory as most commentators suggest. The proper conception of state judicial power may provide space for such an approach, especially given the nature of the issue raised in single-subject cases and the practical circumstances in which the rules are applied.

### *A. State Judicial Power*

Much of what drives these difficulties in application is anxiety about the exercise of judicial power. Courts are reluctant to strike down laws passed by the "political" branches, or by the people themselves, absent a clearly articulable basis for doing so. Much of federal constitutional law, and thus much of the debate over the nature of federal judicial power, concerns struggles over the "countermajoritarian difficulty"—Alexander Bickel's term for the puzzle presented by federal judicial review, namely that it entails giving unelected judges and justices the power to strike down laws passed by the people's elected representatives.[57] The resulting wariness has set the tone more broadly.

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54. Briffault, *supra* note 2, at 1631.

55. *Id.* at 1659.

56. *Id.*

57. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

Although change is underway, for a long time the profession has been accustomed to thinking of "constitutional law" as federal constitutional law and "the judicial power" as being embodied in the federal model.[58]

Consistent with this thinking, state courts are often unreflective about the nature of their power and the ways in which it might or should differ from that of the federal judiciary. As Jessica Bulman-Pozen and Miriam Seifter observe, "state courts liberally import practices, doctrinal frameworks, and rhetoric from the pages of the *U.S. Reports* when deciding state constitutional rights claims."[59] The Wisconsin Supreme Court, for example, concluded that challenges to election maps grounded in claims of extreme partisan gerrymandering presented nonjusticiable political questions[60] and did so via an analysis that involved little more than simply invoking the Supreme Court's holding to that effect in *Rucho v. Common Cause*.[61] Nothing in the court's discussion acknowledged the possibility of any meaningful differences between state and federal judicial power.

But that can't be right, and, on reflection, the point is obvious: "State courts are not simply 'little' versions of the federal courts."[62] As Helen Hershkoff has demonstrated, the bounds of judicial authority are context-dependent: "Where a regime draws the law/politics boundary depends on a complex set of assumptions about the capacities and legitimacies of different institutional actors to behave in particular ways and to promote particular normative goals."[63] The differences are extensive—most state judges are elected, state court systems have general jurisdiction, and these courts have a range of non-adjudicatory responsibilities not shared by federal courts.[64] What's more, because judicial power often functions as a counterweight to legislative and executive power, its nature depends on the particular powers and responsibilities assigned to those branches. These, too, differ from the federal model, and there is no reason why any given state's mix of

58. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 7–8 (2018).

59. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1881 (2023) [hereinafter Bulman-Pozen & Seifter, *Rights and Proportionality*].

60. *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶¶ 4, 8, 967 N.W.2d 469, 474–75.

61. 139 S. Ct. 2484 (2019); *Johnson*, 2021 WI 87, ¶ 3, 967 N.W.2d at 473.

62. ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 322 (2d. ed. 2023).

63. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1840 (2001).

64. WILLIAMS & FRIEDMAN, *supra* note 62, at 335–38; *see also* Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719 (2021).

legislative, executive, and judicial power should match up with either the federal model or any other state's. State constitutions might even be a fundamentally different type of document than the Federal Constitution, which could have implications for their interpretation and application.[65] All of these differences will vary from one state to the next. Generalization is possible, but it must be hedged.

The facile assumption that the judicial power is a fixed concept, uniform across all contexts is not only theoretically misguided but also fails to account for reality. That is evident not only from the institutional differences just outlined, but also from the behavior of the courts themselves. For example, Stefanie Lindquist found that elected judges are more likely to strike down legislation and overrule precedent than their counterparts whose retention in office depends on a legislature or governor.[66] And as Adrian Vermeule has cataloged, in deciding separation-of-powers cases involving claimed encroachments on the judicial power, state courts have ranged well beyond federal conceptions of the power and, in his estimation, "articulate conceptions of judicial authority that sweep beyond any defensible conception of judicial power."[67] Regardless of whether one accepts his ultimate judgment, this much seems clear: Both in theory and reality, judicial power is a contextually variable concept.[68]

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The basic fact that state judicial power is different from, and in some senses greater than, federal judicial power itself has no necessary implication for the resolution of single-subject disputes. There is no single-subject requirement under the Federal Constitution, and there is therefore no ready-made body of federal law for state courts to import. The implications of the differences between the two sets of courts are more atmospheric. Recognizing that it is insufficient simply to assume that state courts are little versions of federal courts, and that the contours

65. *See* Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 799–802 (2011) (providing an overview of the "somewhat odd debate in the United States about what might be termed the ontological status of . . . state constitutions").

66. Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61, 71 (2017).

67. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 360.

68. To say that is not to deny that there are likely outer limits on what counts as a proper exercise of judicial power. For example, in *Moore v. Harper*, the Supreme Court suggested that in reviewing state laws concerning federal elections, "state courts may not transgress the ordinary bounds of judicial review." 143 S. Ct. 2065, 2089 (2023).

of their role is a function of the specific circumstances in which a given court operates, raises the possibility that state courts might do different things or deploy familiar concepts in novel ways, all the while staying within the bounds of what can properly be called the judicial power. The next two sections focus on two aspects of such an approach, considering first the applicability of arguments derived from political process theory to the resolution of single-subject claims and second the possibility that a more aggressive assertion of judicial power via single-subject adjudication may not have undesirable consequences to the extent commentators have generally assumed. My aim is not to advocate for any specific approach, but instead to bolster the more general point that state courts ought not feel so reluctant about exercising their power in this context.

### *B. Political Process Theory and Single-Subject Rules*

Single-subject rules are rules about process, and more than that, about the political process. Regardless of whether one thinks they provide a net benefit overall, their presence places a constraint on the mechanisms of representative and/or direct democracy, and it does so on the grounds that constraint is necessary to promote transparent and informed decision-making. In that sense, they implicate a facet of judicial review highlighted by John Hart Ely's political process theory. Ely argued for a for a conception of the judicial role centered around the identification of situations in which the political process is malfunctioning and asserted that "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[69] In a sense, of course, to say this is merely to restate the problem in a different vocabulary. To know whether the process is malfunctioning vis-à-vis a single-subject rule requires that we know what a "subject" is, and we are back where we began with what might amount to a functionalist account of the sort courts have already implemented. But Ely's more general conception of malfunctioning can help. He identifies two types: The first involves situations where in-groups use their power to entrench themselves; the second where majorities "systematically disadvantag[e] some minority out of simple hostility or a prejudiced refusal to recognize

69. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102–03, 117 (1980).

commonalities of interest."[70] Single-subject rules guard against these, albeit imperfectly.[71]

These malfunctions are especially worth taking seriously in the state constitutional context. Bulman-Pozen and Seifter have persuasively argued that state constitutions reflect a "democracy principle"—a commitment to popular sovereignty exercised through majority rule and political equality for all members of the electorate.[72] They further contend that state courts should approach state constitutions with a different mindset than that with which their federal counterparts approach the Federal Constitution. They argue that it is not appropriate for state courts to engage in the clause-bound interpretivism that is the norm in the federal context, but rather to treat state constitutions in a more holistic way, excavating and giving doctrinal life to these larger thematic commitments.[73] The application of Ely's insights seems suited to, or at least consistent with, the task. If majority rule is at the heart of state constitutions, then comparatively aggressive enforcement of a rule expressly designed to facilitate a certain vision of majority rule seems justified and appropriate.

As Jane Schacter has observed, political process theory has gained very little traction in state courts, a development she ties primarily to the terms of service for state court judges.[74] Schacter argues these judges' terms make them less inclined to protect "discrete and insular minorities"[75] on the grounds that whoever decides whether the judges will continue in office—be it the voters, the governor, or the legislature—will be less inclined to retain them "if they are perceived to be unduly solicitous of unpopular or subordinated groups."[76] Descriptively, this is probably true, and one can imagine the observation holding with respect to structural questions as well. Judges will be unlikely to strike down procedural shortcuts or separation-of-powers arrangements that work to

70. *Id.* at 103.

71. Ely briefly noted the connection between single-subject rules and accountability. *Id.* at 240 n.75. Denning and Smith, in arguing for the adoption of a single-subject rule for federal legislation, draw upon Ely's theory in making their case. Denning & Smith, *supra* note 16, at 978–81.

72. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 864 (2021).

73. Bulman-Pozen & Seifter, *Rights and Proportionality*, *supra* note 59, at 1882–84.

74. Jane S. Schacter, *Glimpses of Representation-Reinforcement in State Courts*, 36 CONST. COMM. 349, 352 (2021).

75. The phrase of course comes from footnote 4 in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), which Ely utilized to develop his theory. *See* ELY, *supra* note 69, at 75–77.

76. Schacter, *supra* note 74, at 352.

the benefit of a governor or legislature on whom they depend for continued service in office.

Appointed judges will be shaped by politics more generally, too. They are unlikely to be appointed in the first place if their views do not match those of the prevailing majority. And while such alignment at the time of appointment does not guarantee that it will continue—majority views shift over time, such that judges' views may fall out of step if they enjoy a long tenure in office[77]—other soft sources of discipline, such as the media and judges' salient personal and professional audiences,[78] operate to constrain and update their views in ways that, at least in the aggregate, seem likely to reflect the majority's preferences.

But things may be different for elected judges deciding questions of constitutional structure and process. For one thing, such questions simply are not likely to be as salient to voters as, say, votes in cases involving the rights of criminal defendants. For another, the story such judges can tell on the campaign trail seems generally palatable: "I voted to ensure that the government functions as it should." However, that may not always be a sufficient counter when one's opponent draws the electorate's attention to a vote to strike down popular legislation on what can readily be characterized as "a technicality." The same pressures that push legislators from voting against laws like Ohio's bestiality-infused legal sausage will sometimes operate on judges, too. Nor will a pro-democracy explanation soothe the voter whose favored initiative was struck down. But if we accept that judicial decisions are often ideologically inflected, if not ideologically driven, then it will be relatively uncommon for an elected judge to conclude that a popular law, however enacted, encompassed more than one subject, simply because the judge is likely to regard the law as desirable.

To develop the point further: One of the concerns frequently voiced about elected judiciaries is that they will be even more inadequate to the task of protecting minority rights than are appointed judges. Most state court judges are elected, often by the same majorities that elected the legislatures that will have passed laws infringing on those minority rights. As a result, those elected judges may be less inclined to perceive such laws as infringements and less inclined to strike the laws down even if

77. The gap between the views held by the "Four Horsemen" on the *Lochner*-era Supreme Court and the significant political majorities that supported the New Deal is likely the most dramatic example. *See* Keith W. Rizzardi, *From Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference*, 12 MICH. J. ENV'T & ADMIN. L. 63, 68 (2022).

78. *See generally* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).

they do, for fear that doing so will imperil their chances of reelection.[79] In other words, elected judges are subject to the same general political pressures that operate on their appointed counterparts. But the fact of having to face the electorate directly adds to the effect. And there is plenty of evidence to support the conclusion that the simple pressures of electoral politics exert their force. For example, several studies have shown that judges' behavior and decision-making change as elections draw near.[80]

An implication of this finding is that judicial protection of rights is likely to have the most bite in situations where the judiciary and the majority that enacted a law are misaligned. This can happen, as just suggested, where appointed judges reflect the preferences of past majorities. It can also happen in the case of elected judiciaries in states where the electorate is closely divided and where judicial elections are in name or effect partisan affairs. In such states, the distribution of control of the three branches may frequently shift, producing occasional situations in which legislative and judicial majorities are out of step. In some states, supreme court justices are selected out of specific districts rather than through statewide elections, which provides another opportunity for misalignment.[81] Note that this will not always be the case. And, as Miriam Seifter points out, state legislatures are sometimes countermajoritarian.[82] If a statewide political minority has managed to gerrymander itself into a legislative majority, there may be instances where the legislature is more (or less) inclined than the judiciary to protect certain minority interests.

Things might be expected to play out somewhat differently with respect to matters of constitutional structure, such as procedural restrictions on the legislative process. The resolution of structural claims does not necessarily, or even often, have direct implications for minority rights. In the abstract, at least, the questions presented by single-subject claims are not tied to majoritarian overreach but are (often) instead products of the manipulation of the process by politically powerful minorities. The judiciary's role is to protect the majority's participatory rights.

All of this suggests the possibility of a solid theoretical basis for a more aggressive judicial posture when it comes to single-subject rules.

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79. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

80. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 210 (2017).

81. *See, e.g.*, ILL. CONST. art. VI, § 2 ("The State is divided into five Judicial Districts for the selection of Supreme and Appellate Court Judges.")

82. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

Again, part of the general logic behind deferential review of constitutional issues is grounded in the legislature's democratic pedigree. If we accept that constitutional requirements often have fuzzy edges, and that legislatures take their oaths to comply with those requirements seriously, then in a regime committed to democratic rule it makes sense for an unelected judiciary to grant interpretive leeway to legislatures and therefore to reserve the power to strike down legislative acts for situations where the violation is clear. But that does not hold, or at least not as strongly, when the nature of the violation involves departures from the process by which democratic rule is to take place. The case for deference further weakens when the judiciary is elected and therefore not countermajoritarian. Indeed, a large part of the story of why we have elected judiciaries is that they stem from a desire to make judiciaries independent of legislatures.[83] Judges who do not depend on legislatures for their continuation in office will feel less compelled to bless what the legislature has done and ought to be more inclined to wield their democratically conferred power to police the processes of democratic lawmaking. Just how much more empowered elected judges can properly regard themselves as being is open to debate,[84] but Stefanie Lindquist goes so far as to assert that "where states have chosen to elect their judiciaries, it may be presumed that the electorate has essentially rejected the principle of legislative supremacy."[85]

### *C. The Consequences of Aggressive Enforcement*

As suggested above, the answers to questions about how these ideas apply in operation depend on the institutional arrangements, histories, and traditions of each state. This is true when considering the judicial power in the abstract and, in the case of single-subject rules, will depend on additional contextual features. What makes sense for ordinary legislation may not for initiatives, simply because legislators have a very different relationship to an enactment (including the ability to negotiate over and shape its language) than do voters presented with a finished product. For both initiatives and constitutional amendments, it may matter who drafted and reviewed the language put before the voters. Where, for example, the legislature controls the process of drafting amendments and ballot questions, there is a distinct possibility of

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83. *See generally* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

84. *See* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2083–86 (2010); *see generally* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012).

85. Lindquist, *supra* note 66, at 70 n.31 (citing Shugerman, *supra* note 83).

self-dealing. This is so both in the general sense that a legislature putting a measure before voters will have an incentive to characterize it in a way that facilitates its passage and in the more specific, and serious, sense that some constitutional amendments will shift the state's balance of power toward the legislature. Again, this Essay seeks not to solve these issues in a comprehensive or specific way, but rather to make the more general points that aggressive judicial review in single-subject cases will often be appropriate, and that situational features properly factor into the analysis.

As a final component, let us consider single-subject rules in operation. As discussed above, courts and commentators alike consistently express the concern that "subject" is a malleable term.[86] This is not a unique problem. It is instead a manifestation of the familiar "levels of generality" problem that arises throughout constitutional law.[87] "A source thought relevant to developing a constitutional norm might best be characterized as relatively abstract or concrete, and also relatively broad or narrow, as well as relatively dynamic or static."[88] Here, as elsewhere, a considerable degree of manipulability is baked into the system. The concern, then, is that because "the law" provides inadequate constraint, judges will be influenced by ideology and other non-legal factors. Their conclusion that a given law does or does not satisfy a single-subject requirement will be driven by whether they think the law is good policy rather than by any true concern about process.

This concern seems overstated. Underdeterminacy is not the same as indeterminacy,[89] and the manipulability of "subject" is not unbounded. There is, without question, a substantial "I know it when I see it" element to the analysis. But the eyes through which any given jurist views a single-subject challenge will have been shaped by their immersion in the language and culture as well as by legal training and acculturation.[90] We, as legal professionals, naturally come to place problems in doctrinal boxes. We perceive not just tort or contract issues, but instead situations involving contributory negligence or estoppel. These may not be natural categories so much as they are artifacts of line-drawing which can be

86. *See supra* Section I.D.

87. Adam M. Samaha, *Levels of Generality, Constitutional Comedy, and Legal Design*, 2013 U. ILL. L. REV. 1733, 1735 (observing that levels-of-generality "characterizations apply to all conventional sources of constitutional argument").

88. *Id.* at 1736.

89. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

90. For a survey of ways in which acculturation and other soft forces influence legal decision-making, see CHAD M. OLDFATHER, JUDGES, JUDGING, AND JUDGMENT: CHARACTER, WISDOM, AND HUMILITY IN A POLARIZED WORLD (forthcoming Dec. 2024) (manuscript at 112–44) (on file with author).

traced back through decisions made by the West Publishing Company and Christopher Columbus Langdell's early efforts to systematize the law.[91] Yet they shape our thoughts and processes of pattern recognition just the same. Our training enables us to manipulate those categories, but it does not entirely free us from the constraints they impose. It may be difficult to craft precise rules or taxonomies that clearly explain or predict all cases, but that seems unremarkable given the variability in the contexts out of which challenges arise.

This is not to deny that ideology can play a role. A considerable amount of research supports the idea that judges' decisions and their ideology are correlated, even when both things are crudely measured.[92] There is no reason to think that decision-making in single-subject cases would be immune. Indeed, John Matsusaka and Rick Hasen studied the application of single-subject rules to initiatives in 154 cases decided between 1997 and 2006.[93] They found that in states in which the applicable standard called for courts to be restrained in their review of single-subject challenges—that is, to be deferential to the categorization choices made by the drafters of the initiatives—ideology had a comparatively small effect on decisions.[94] Judges voted to reject challenges to initiatives compatible with their ideological preferences 81% of the time, as contrasted with 88% of the time when the challenged initiative was incompatible with a judge's preference.[95] The effect was more dramatic in states in which the legal framework provided for more aggressive judicial review; in those states, judges rejected challenges 83% of the time in the case of ideologically compatible initiatives but only 41% of the time for ideologically incompatible initiatives.[96] Judges appear to have allowed their assessments of the substance of a law to color their interpretation of the process by which it was enacted. A regime allowing for aggressive review, it appears, will also be a regime allowing for overenforcement.

This initially appears problematic. Matsusaka and Hasen conclude that it "undermines the rule of law," generates uncertainty concerning how the standard will be applied, and thereby deters the initiative process.[97] These concerns are real and substantial, but there may be a counternarrative, especially if—and this is unquestionably speculative in

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91. *Id.* at 81–86.

92. *Id.* at 35–40.

93. John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single-Subject Rule*, 9 ELECTION L.J. 399, 400 (2010).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 417–18.

nature—a similar dynamic applies in the application of the single-subject rule to legislation.

The point this Essay highlights is this: Ideological influences in the application of the single-subject rule are likely to be consequential—in the sense of courts striking down laws that should be upheld—only in situations in which the electorate is evenly divided. Where it is not—in states where there is effectively an ideological monoculture—the dynamic is unlikely to manifest itself. In those states neither initiatives nor regular legislation are likely to result in the passage of laws that a majority of judges or justices on a state court will find ideologically distasteful. Single-subject violations may occur just as frequently, in some abstract sense, but the principle by which they are resolved—not formally but in effect—will be "no harm, no foul." Only in closely divided states is it likely to be the case that a court will confront a challenge to a law that runs counter to the majority's ideological preferences.

In this latter case, there are two possible explanations for what Matsusaka and Hasen found. One is that there might actually be more violations of single-subject requirements. Proponents of laws or amendments might be more tempted to press the limits of the single-subject requirement based on a perception that doing so will facilitate the passage of a law or amendment that, due to close political divisions, would be less likely to pass if it were not part of a package. This is precisely the concern with logrolling that typically appears first in the list of justifications for single-subject rules.

The second possibility is that the courts will act in ways that amount to overenforcement. In other words, assuming we can hypothesize some ideal level of enforcement—some single right answer to the question of whether a given amendment or enactment encompasses more than one subject[98]—courts that are ideologically hostile may be going too far, in the sense that they are validating single-subject challenges more often than required under that ideal by being too aggressive in their application of doctrine. But that may in at least some circumstances be less undesirable than first meets the eye.[99] In passing legislation that a majority of a state supreme court finds so ideologically unpalatable that it is willing to strike it down, a legislature will almost by definition be pushing the boundaries of what the electorate desires. In those situations,

98. As noted above, this is surely not true as a descriptive matter. One can also reasonably question whether it would be normatively desirable even were it possible. Law sometimes by design calls for judges to incorporate their values into the application of a standard. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt To Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1948, 1966 (2009).

99. In spirit, though not in its particulars, the claim echoes Suzanna Sherry, *A Summary of Why We Need More Judicial Activism*, 16 GREEN BAG 2D. 449 (2013).

judicial review would function as an additional check, something in the nature of a junior supermajority requirement. Legislation for which there is sufficient majority support would be delayed but not denied, since it could simply be repackaged and passed in an appropriate form. Of course, the shifting of coalitions and majorities would likely mean some legislation that would have made it through if properly presented to the initial legislature will not when considered by the next. Some of this legislation would be valuable, and we might well lament its failure. But some of it will be undesirable, and we will celebrate its defeat. There is no ex ante reason to think that either possibility will occur more frequently than the other.

## CONCLUSION

The core problem that past commentators have identified with single-subject rules is real: "Subject" is not a concept that lends itself to the development of clear decision rules. This Essay has argued that this is less troubling than those commentators have suggested. The nature of state judicial power is such that its comparatively aggressive exercise will at least sometimes be appropriate, and enforcement of procedural constraints on the lawmaking process represents such an occasion. What's more, the concerns attendant to the application of inherently amorphous standards such as "single-subject" rules—primarily that judicial decisions will be driven by ideology rather than law—are most likely to manifest themselves in states with a divided political culture. If that is correct, then a court striking down a law on single-subject grounds will in the best cases be acting as an agent of majoritarianism, and in the worst cases will be, in effect, imposing a mild supermajority requirement on the lawmaking process. None of this is to suggest that I favor naked partisanship or other reckless invocations of judicial power. I have written at length about the need for judges to practice intellectual humility.[100] Part of engaging in that practice involves the avoidance of reaching easy conclusions, including about the nature of state judicial power—especially too quickly assuming it is simply a facsimile of federal judicial power—or the consequences of exercising it. The correct, or at least better, answers to single-subject questions require careful analysis of the extent of a given state's judicial power and the appropriateness of its exercise in the particular circumstances in which the questions arise. But the fact that those answers cannot be algorithmically produced, and that they entail the exercise of judgment that might sometimes be

100. *See generally* OLDFATHER, *supra* note 90.

influenced by factors that we typically think of as not properly legal, may be less troubling than first appears.