

## REVISING JUDICIAL APPLICATION OF THE SINGLE SUBJECT RULE TO INITIATIVE PETITIONS

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The idea that an impartial branch of government protects the rule of law is appealing to many—so much so that the requirement of judicial impartiality is enshrined in our federal Constitution.<sup>1</sup> While both federal and state courts may be vulnerable to accusations of judicial activism tainted by partisan politics,<sup>2</sup> state courts are seen as more susceptible to political pressure.<sup>3</sup> Few situations are as sensitive as cases in which state courts invalidate action by political branches.<sup>4</sup> It stands to reason, then, that when state courts invalidate citizen-initiated ballot petitions in states that recognize the people's right to legislate directly, the judiciary would be highly susceptible to charges of partisanism. The charges might intensify when amorphous doctrines such as the single subject rule and equally amorphous jurisprudence combine to strike down popular initiatives before they appear on the ballot.

This Note answers critics and supporters of the single subject rule by exploring in depth the single subject jurisprudence in one state: Colorado. The Note examines the case law through the lens of four different hypotheses and tries to determine whether initia-

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1. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 86 (2009).

2. See Erwin Chemerinsky, *The Meaning of Bush v. Gore: Thoughts on Professor Amar's Analysis*, 61 FLA. L. REV. 969 (2009) (discussing political pressure in federal court); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1886 (2001) (discussing political pressure in state courts).

3. Hershkoff, *supra* note 2, at 1886.

4. See, e.g., Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN. ST. L. REV. 217, 227–34 (2009) (listing high-profile examples of controversies following state court invalidation of political branch action).

tive petitions challenged on single subject grounds are struck down or upheld based on a consistent, intelligible interpretive framework—or whether other considerations account for case outcomes. The Note also suggests methodological enhancements—applicable to all states with similar rules—that would serve to dispel the perception that courts are subject-matter vetogates, while still enabling them to perform the important function of checking direct democracy.<sup>5</sup>

## I. INTRODUCTION

Rousseau once wrote, “If there were a people of gods, it would govern itself democratically. A government so perfect is not suited to men.”<sup>6</sup> As if to disprove his thesis and demonstrate that a nation of brave men and women *can* have political heaven on Earth, the great experiment that is our nation blended republicanism and democracy to reach a delicate balance.<sup>7</sup> Maintaining the balance has not been easy, however: waves of populist fervor often sought to place more power in the hands of the people, giving rise to waves of counter-populism and staunch resistance from status quo power players.<sup>8</sup> For example, when some states began granting their citizens the right to petition for changes to state laws and constitutions via ballot initiatives, many prominent scholars, politicians, and practitioners of law winced noticeably.<sup>9</sup> They saw direct democracy as a threat to stable governance in the States; as one attorney framed it, the problem was that, henceforth, “[a]ny malcontent could initiate an amendment to the [state] constitution.”<sup>10</sup> In response to the backlash, the same state governments that had given soon began to

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5. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1549 (1990) (citing processual concerns that suggest judiciary must play some role in reviewing direct democracy measures).

6. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 114 (Maurice Cranston trans., Penguin Books 1963) (1762).

7. See Gary Thompson & Paul Wilkinson, *Set the Default to Open: Plessy’s Meaning in the Twenty-First Century and How Technology Puts the Individual Back at the Center of Life, Liberty and Government*, 14 TEX. REV. L. & POL. 48, 73 (2009) (examining balance between citizen and government); Eule, *supra* note 5, at 1548–49.

8. See Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1039–45 (2001) (discussing resistance to Progressives and Populists in attempting to initiate direct democracy in California). See generally Henry M. Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427 (1912).

9. See, e.g., Campbell, *supra* note 8, at 427 (exemplifying one strand of academic reaction to direct democracy).

10. *Id.* at 430.

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take away political power from the masses—or, at the least, to make it more difficult for individual malcontents to undermine the established political order. State legislators and executives devised many restrictions: annual or biennial ballots,<sup>11</sup> signature-gathering requirements,<sup>12</sup> restrictions on signature gatherers,<sup>13</sup> short timeframes for obtaining signatures,<sup>14</sup> executive review of petition qualification,<sup>15</sup> executive preparation of impact statements whose data may be difficult to refute,<sup>16</sup> and the like. But the more critical development—and the aspect that forms this Note’s focus—is the fact that politically agnostic courts began entering the “political thicket,”<sup>17</sup> not merely to enforce the other branches’ rules but also, arguably, to fashion rules of their own.

A. *The emergence of courts as referees of direct democracy*

Before the crackdown on popular-democracy power across the states intensified, the state judiciary typically performed its review of ballot measures at procedural margins: it determined whether petition processes were followed appropriately, whether executive officials abused discretion in invalidating petitions or in allowing them to move forward, and whether petition titles and explanations prepared by the state were accurate.<sup>18</sup> The majority of petitions appeared to survive such deferential scrutiny. But such deference was, in the case of many states, short-lived.

As if sensing that courts were on their side, and seizing popular dissatisfaction with state legislatures, the malcontents about whom we were warned eventually built enough popular momentum through patchworked deals to wage an attack on legislative agendas across several states. From the “ham and eggs”<sup>19</sup> California Bill of Rights, a logrolled initiative that comprised subjects as diverse as “pensions, taxes, right to vote for Indians, gambling, oleomarga-

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11. See, e.g., Miller, *supra* note 8, at 1068.

12. *Id.* at 1061–63.

13. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 187–89 (1999).

14. *Id.* at 188.

15. Miller, *supra* note 8, at 1071–72.

16. See *Developments in State Constitutional Law: 2001*, 33 RUTGERS L.J. 1593, 1602 (2002).

17. “Courts ought not to enter [the] political thicket.” Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J., plurality opinion).

18. Without a single subject rule to prompt review of an initiative’s substance, courts were likely limited to reviewing other less substantial aspects of a petition.

19. FRANK A. PINNER ET AL., OLD AGE AND POLITICAL BEHAVIOR: A CASE STUDY 4 (Brian Quinn ed., Arno Press 1980) (1959).

rine, the health professions, reapportionment of the State Senate, fish and game, and surface mining,"<sup>20</sup> to the Taxpayer Bill of Rights (TABOR) in Colorado,<sup>21</sup> citizens across initiative states made their voices heard, often preserving them in state constitutions. In one sense, this popular empowerment was a sign of a vibrant democracy. But in a deeper sense, the movement was disruptive to the stable structure of state government; not as disruptive as the Dorr Rebellion was for Rhode Island,<sup>22</sup> but an unsettling rattling nonetheless. One by one, legislatures realized that the power of popular initiative needed stronger checks, and state constitutions were amended to require petitions to conform to a single subject.

The single subject rule may be a descendant of the Roman prohibition on omnibus legislation,<sup>23</sup> and is used in many states to formalistically limit the scope and scale of legislative bills.<sup>24</sup> Expansion of the rule to initiative petitions forced—or, perhaps, enabled—courts to play a more active role in the battle between popular will as expressed through initiatives on the one hand and popular will as expressed through the people's elected representatives on the other. In applying the new rule, courts began to examine the content of ballot initiatives.<sup>25</sup> And thus the brief era of near-plenary popular power came to a close, and the age of channeled policy began.

The troubling part was that the channeling was being performed by the judiciary, an institution outwardly dedicated to fairness and partisan agnosticism.<sup>26</sup> Moreover, the rule's application was often clothed in objectivity, despite appearances that subjective judgments were at work, causing legal scholars to question judicial

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20. Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936, 949–50 (1983).

21. See COLO. CONST. art. X, § 20.

22. For a detailed history of the Dorr Rebellion, see generally MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM, 1833–1849* (1973).

23. ALLAN CHESTER JOHNSON ET AL., *ANCIENT ROMAN STATUTES* 45–46 n.37 (Clyde Pharr ed., 2003).

24. See Michael D. Gilbert, *Single Subject Rules and Public Choice Theory* 1–4 (bepress Legal Series Paper 816, 2005), available at <http://law.bepress.com/expresso/eps/816/> (listing cases in which single subject challenges have resulted in limiting potential ballot initiatives).

25. E.g., *infra* Part II.

26. Jonathan H. Steinberg, *Congressional Redistricting, Served Two Ways*, 6 ELECTION L.J. 322, 328 n.44 (2007) (book review).

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transparency if not judicial integrity.<sup>27</sup> The single subject rule is, like most legal rules, seemingly neutral on its face:<sup>28</sup> an initiative that contains multiple unrelated themes cannot stand.<sup>29</sup> However, critics allege that the term “single subject” is ambiguous and that courts have full reign to strike down measures they dislike.<sup>30</sup> Some frame the problem as being only “aggressive” application by courts, along with the resulting trample upon popular sovereignty.<sup>31</sup> But aggressiveness can hardly be a problem for the courts if, in fact, the single subject rule was meant to be a check on popular power. As long as the aggressive rule is applied in a transparent, consistent fashion by the judiciary, its consistent outcomes will be visible to the people for what they are, and the rule can always be changed by the people through initiative if it fails to meet the majority’s need. If left to stand, an aggressive rule can create a predictable, albeit narrow, mold within which petition sponsors can channel their measures with confidence. In other words, to those whose main concern is judicial transparency and integrity, aggressiveness is not the problem: inconsistency or political subjectivity is.

*B. Charting the course of in-depth research*

And so begins the first task of this Note, accomplished in Part II: to analyze whether the single subject rule has led to a clear, consistent, and predictable jurisprudence, or if it has turned courts into judicial vetogates<sup>32</sup> for initiatives with certain subject matter. The Note thus analyzes the entire fifteen-year history of single subject initiative jurisprudence in one state: Colorado.<sup>33</sup> The re-

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27. John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule* 2–3 (Loyola–LA Legal Studies Paper No. 2010–4), available at <http://ssrn.com/abstract=1549824>.

28. See Lowenstein, *supra* note 20, at 938–42 (laying out schema to determine what constitutes a “subject”).

29. *Id.*

30. Gilbert, *supra* note 24, at 4.

31. Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 36–39 (2002).

32. The use of the term “judicial vetogate” is an application of William Eskridge’s concept of “legislative vetogates” to the judicial sphere. William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

33. Colorado was selected on account of several factors. The state adopted a single subject rule for petitions in 1994, COLO. REV. STAT. § 1-40-106.5(1)(b) (2010), relatively recently compared to other states. This makes for a body of jurisprudence that is both sufficiently meaningful and reasonably sized for a thorough analysis. Moreover, the measure that extended single subject to initiatives received broad popular support—a 65% approval rate. *Ballot History, Year 1994, Ballot Number: A*, COLO. GEN ASSEMBLY, <http://www.leg.state.co.us/lcs/ballothistory.nsf/> (last

search<sup>34</sup> concludes that, at least in Colorado, the single subject rule has become a judicial vetogate for initiative petitions.<sup>35</sup> The outcome in a single subject challenge appears to be more a function of the petition's substantive content than an impartial application of a robust jurisprudential framework. While outcomes may have served the common good, the Note argues that the absence of a well-defined interpretive framework opens courts to charges of discretionary power plays or, worse, political partisanship—charges that any court whose claim to legitimacy is its objectivity must dispel.

Part III accomplishes the second task: offering suggestions for reshaping the single subject interpretive framework so that it is more transparent and more closely tailored to the practical interests that animate the rule. The Note asserts that the single subject rule is a countermajoritarian check aimed to limit the scale of the burden imposed on a state and its citizens via initiatives, not a drafting device meant to prevent logrolling or fraud on the voters. Accordingly, the key proposal is adoption of a tiered-scrutiny model that begins with a deferential stance toward initiatives and increases the level of scrutiny proportional to the level of burden that an initiative aims to foist upon the state's traditional powers as sovereign or upon the liberties of its citizens. It should be noted that Part III's suggestions are applicable to any state that allows direct democracy, not just to Colorado.

## II.

### SINGLE SUBJECT APPLICATION IN COLORADO

#### A. *Brief primer on the initiative petition process in Colorado*

Different devices exist for giving citizens a voice in the passage of statutes and constitutional amendments: initiative, citizen-initi-

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visited Dec. 30, 2010). Third, Colorado is one of only four single subject states that does not carve out specific subjects for special treatment, nor are any subjects exempt from the single subject rule; therefore, the analysis is not tainted by unnecessary complications. COLO. CONST. art. V § 1(5.5); NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE 17–19 (2002), [http://www.ncsl.org/Documents/legismgt/irtaskfc/IandR\\_Report.pdf](http://www.ncsl.org/Documents/legismgt/irtaskfc/IandR_Report.pdf). Finally, Colorado's single subject jurisprudence appears to be relatively unstructured, thereby allowing for the multiple-hypothesis testing that is a highlight of this Note.

34. This primary research has been performed by the Author, and involved reviewing every case featuring single subject challenges to initiative petitions. The research statistics are summarized in the Appendix, and key cases are discussed in Part II.

35. *See infra* Part II.

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ated referendum, and legislative-initiated referendum.<sup>36</sup> The initiative is a means for citizens to pass statutes or changes to their state constitutions by putting proposals on the ballot. If a majority of voters accept the initiative, the proposed measure becomes law. Initiatives are of two types: direct and indirect.<sup>37</sup> Since Colorado law only permits the former, the term initiative in this Note refers only to direct initiative. Moreover, Colorado's single subject requirement extends only to initiatives, thereby obviating the need to examine referenda.<sup>38</sup>

Citizens must follow a set of time-sensitive steps in order put an initiative petition<sup>39</sup> on the state ballot.<sup>40</sup> Some steps will be summarized herein because they are instrumental to subsequent discussion, and other steps are omitted for clarity. As a starting point, the proponent (i.e., petition sponsor) submits the petition's text to two government departments: the Legislative Council and the Office of Legislative Legal Services.<sup>41</sup> These departments consult with any other state executive agency they deem appropriate, and prepare comments regarding the substantive content, drafting style, and formatting of the initiative.<sup>42</sup> The heads of the above-mentioned departments deliver their comments to the petition proponent at a public meeting.<sup>43</sup> Upon revising the petition to conform to said comments, the proponent submits the revised text to the Secretary of State.<sup>44</sup> The Secretary then forwards the petition draft to the Title Board (Board), comprising the Secretary, the Attorney General, and a representative from the Office of Legislative Legal Services.<sup>45</sup>

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36. The political recall, whereby citizens can remove public officials from office, is also a direct-democracy device; however, it does not involve the passage of laws and therefore is not germane to this Note's discussion.

37. A direct initiative is put before the people, whereas an indirect initiative is submitted to legislators, who choose whether to pass the law themselves or to put the measure on the popular ballot.

38. As an informational note, the citizen-initiated referendum is a means for citizens to require that the legislature put a proposed bill up for vote to the public before the bill can become law. By contrast, the legislative-initiated referendum involves a legislature voluntarily submitting a bill to a public vote; some constitutions go so far as requiring the legislature to do so for certain types of legislation.

39. The terms "petition" and "measure" will be used interchangeably with "initiative" in this Note, though they can be used to describe referenda as well, in direct-democracy parlance.

40. Colorado law allows initiatives at the local level as well, but the focus of this Note is on statewide petitions.

41. COLO. REV. STAT. § 1-40-105(1) (2010).

42. *Id.*

43. *Id.*

44. *Id.* § 1-40-105(4).

45. *Id.* § 1-40-106(1).

The Board takes one of two actions: (1) it approves the petition and creates—or sets—a title and submission clause<sup>46</sup> for the petition; or (2) it refuses to set the title and submission clause because the petition is legally deficient, such as would occur if the Board deems the petition to contain multiple subjects, misleading or unclear language, or other deficiencies.<sup>47</sup> The Board's decision is communicated in a public meeting, where opponents of the petition are likely in attendance.<sup>48</sup> Once the Board approves the petition by setting the title and submission clause, the proponent must gather sufficient signatures to qualify the petition for placement on the ballot.<sup>49</sup> The Colorado Constitution calls for signatures from a minimum of 5% of the number of citizens who voted in the last election for Secretary of State.<sup>50</sup> Once the petition qualifies, it is placed on the ballot and must be proclaimed by the governor as law if more than 50% of the votes cast approve it; the governor has no veto power over initiatives.<sup>51</sup>

As noted above, the Board announces its decision in a public meeting. This allows those who disagree with the Board's decision—be they citizens who oppose the initiative (in case of approval), or the petition proponent (in case of refusal)—to object before the Board.<sup>52</sup> If the Board does not change its decision, the objectors may request rehearing by the Board and later file for judicial review before the Supreme Court of Colorado.<sup>53</sup> If an objector seeks judicial review, work on the petition—including the gathering of signatures—is suspended until the court makes a ruling as to the validity of the Board's action.<sup>54</sup> This essentially sounds the death knell for most initiatives because, even when the court finds in favor of the Board, the time it takes to hear the case and render a decision diminishes the proponent's remaining time to qualify the petition.<sup>55</sup> The inference is that few challenged petitions qualify for the ballot in the year in which they are challenged.

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46. The submission clause is the prefatory text that introduces the initiative to voters.

47. COLO. REV. STAT. § 1-40-106(1), (3)(b); § 1-40-106.5(3).

48. *Id.* § 1-40-106(1), (3)(b); § 1-40-107.

49. *Id.* § 1-40-109.

50. COLO. CONST. art. V, § 1(2).

51. *Id.* art. V, § 1(4).

52. COLO. REV. STAT. § 1-40-106(1), (3)(b); § 1-40-107.

53. *Id.* § 1-40-107.

54. *Id.* § 1-40-107(4).

55. Answer Brief of Respondents at 3–4, *In re* Proposed Initiative for 1997–98 No. 30, 959 P.2d 822 (Colo. 1998) (No. 97SA319).

*B. Introducing the single subject challenge*

Between the introduction of the single subject rule in 1994<sup>56</sup> and December 31, 2009, 104 petitions were brought before the Colorado Supreme Court under challenges related to petition language, title language, single subject violations, and related issues.<sup>57</sup> Eighty-five percent of the petitions were challenged on single subject grounds.<sup>58</sup> Of the 88 single subject challenges before it, the court found a rule violation 56% of the time.<sup>59</sup> These statistics raise two significant questions: (1) “Why are so many petitions being challenged in court?”; and (2) “Why does the court invalidate a significant percentage of the petitions?”

This part of the Note evaluates four hypotheses to determine an answer to both questions.<sup>60</sup> The first hypothesis postulates that a significant number of initiative proponents and opponents misunderstand the law with regard to what the single subject rule requires. The second alternative is that the law is clear, but a significant number of initiative proponents attempt to pull the wool over voters’ eyes through cunning drafting and are caught in time by overeager watchdogs. The third explanation is that the single subject rule has no real legal meaning: it is simply a delay tactic used by opponents to knock out a petition from a given year’s ballot, and the court uses a randomizing strategy to decide which initiatives win the lottery. Finally, it is also possible that, rather than using a process of randomization, the courts have become subject-matter vetogates, rejecting initiatives based on their substantive content.

A fifth distinct hypothesis may also exist, namely that initiative sponsors know the law, yet draft non-compliant initiatives, fully expecting that the measures will not withstand review. Such a possibility can be dealt with swiftly, on account of the presence or absence of two key telltale signs: invalidation of the measure by the Title Board (the first line of defense for invalidation), and an upholding of the Board’s decision by the court with little or no commentary or analysis. Out of all single subject challenges, none of them fit this

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56. COLO. REV. STAT. § 1-40-106.5(1)(b).

57. Some cases consolidated complaints related to separate petitions. Research reveals a total of 72 separate Colorado Supreme Court opinions.

58. Many of the other challenges, 68%, also raised other issues in addition to single subject violations.

59. *See infra* Appendix.

60. While hybrid explanations may exist, this Note will analyze each hypothesis independently. Readers may draw their own conclusions about whether a combination of factors provide a better explanation for the statistics.

pattern. While there are three petitions where the court summarily upheld the decision of the Board without giving a formal legal analysis (i.e., without opinion), the Board had approved—rather than invalidated—the measure in every case.<sup>61</sup> As such, the fifth hypothesis appears to be a mirage. We are left, then, with evaluating the first four.

C. *Hypothesis #1:*

*Many initiative proponents and opponents do not understand the law*

Misunderstanding the law can result from two causes: (1) the law itself is not clear; or (2) proponents and opponents are not able to grasp the law as defined.<sup>62</sup> The second cause can be eliminated as a strong contender, at least in Colorado. Even if initiative proponents are not sufficiently skilled in the arcane practices of legal interpretation, there is another actor who has the adequate skills to grasp the law: the Title Board.<sup>63</sup> As mentioned earlier, the Board consists of the Secretary of State, the Attorney General, and a representative from the Office of Legislative Legal Services—which means that at least two, if not all three, Board members have routine engagement with election law and state law in general. Moreover, even if initiative opponents are not sufficiently skilled and simply challenge petitions in court just in case, the court would defer to the Board a significant percentage of the time. Given that the court disagrees with the Board's legal decision, this can only mean—at least in the context of this hypothesis—that the law itself is unclear. I test this assertion by analyzing individual single subject cases and trying to tease out clear rules of decision.

In reviewing Colorado's case law, certain tests appear as a running thread throughout judicial opinions: "single purpose," "central theme," "connection among provisions," "necessary connection between provisions and theme," and the like.<sup>64</sup> However, many of these tests appear to be only restatements of the phrase "subject," and do not provide a clear, prescriptive model for reaching a legal conclusion. Moreover, the tests appear to be used selectively: one

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61. *In re* Proposed Initiative No. 97, 962 P.2d 973 (Colo. 1998) (en banc) (per curiam); *In re* Proposed Initiative No. 112, 962 P.2d 255 (Colo. 1998) (en banc) (per curiam); *In re* Proposed Initiative No. 80, 961 P.2d 1120 (Colo. 1998) (en banc) (per curiam).

62. Without delving into the complex debate about what "law" is, this Note adopts a positivist definition of law: "law," here, is the text of constitutions or statutes, along with the judiciary's explicit rules derived from interpreting said texts.

63. See *supra* Part II.A.

64. E.g., *In re* Proposed Initiative for "Public Rights in Waters II" (*Public Rights in Waters II*), 898 P.2d 1076 (Colo. 1995) (en banc).

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set of tests is applied to one fact pattern but is omitted from another where it would be equally applicable.<sup>65</sup> This Section aims to rationalize the case law by identifying the different factors or elements that comprise the jurisprudential framework, their application, and their boundaries. Since this framework is not explicitly stated in case law, it is only one means of rationalization; other alternatives may exist.

## 1. A plain meaning baseline

As with most matters of legal interpretation, we begin with the text of the Colorado Constitution.<sup>66</sup> Article V sets forth the single subject requirement as follows: “No measure shall be proposed by petition containing more than one subject.”<sup>67</sup> The dictionary defines “subject” as “material or essential substance.”<sup>68</sup> Colorado’s statutes, passed at the time of the referendum, further clarify the dual purpose of the rule: (1) to prevent misleading or defrauding voters; and (2) to prevent patchwork legislation, whereby “incongruous subjects” are sown together into the same measure.<sup>69</sup> The latter practice has two well-known variants: logrolling, whereby measures that each enjoy less-than-majority support are combined into a proposal that garners majority vote; and riding, whereby unattractive features are piled on top of proposals that already enjoy majority support, thereby gaining otherwise unattainable electoral victory.<sup>70</sup>

Accordingly, an initial, plain language definition might read thus: “A measure contains a single subject if the essential substance of the measure represents one theme, and the measure does not join incongruous provisions for purposes of logrolling, riding, or otherwise misleading or defrauding voters.”

The first in a trio of single subject cases, *Suits Against Nongovernmental Employers*,<sup>71</sup> seems in line with the above definition, though the case does not go to great lengths to develop a formalis-

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65. *E.g.*, *infra* Part II.D.3.

66. COLO. CONST. art. V § 1(5.5); *see* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 901 (2001) (noting, in another context, that methodologically “[p]roper constitutional interpretation begins with the text of the Constitution itself”).

67. COLO. CONST. art. V § 1(5.5).

68. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2275 (1993).

69. COLO. REV. STAT. § 1-40-106.5(1)(e) (2010).

70. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 706–09 (2010).

71. *In re* Proposed Initiated Constitutional Amendment “Concerning Suits Against Nongovernmental Employers Who Knowingly and Recklessly Maintain An

tic rule and deals with the single subject test only in an indirect manner. The initiative at issue in the case allowed employees to sue employers who “knowingly or recklessly maintain[ed] an unsafe work environment.”<sup>72</sup> The measure also had a remittitur provision, whereby awards in such lawsuits were reduced by workers’ compensation benefits received by the plaintiff.<sup>73</sup> The challenge against the initiative alleged that the title of the measure did not comply with single subject requirements.<sup>74</sup> After a verbatim restatement of constitutional and statutory provisions governing the single subject rule, the court concluded that the measure’s title met single subject requirements because, inter alia, it expressed the “central features” and “true intent” of the measure.<sup>75</sup> No discussion was entertained about why the “central features” were deemed to comprise only a single subject, or whether the “true intent” was in any way drafted in a misleading fashion.<sup>76</sup> Such succinct yet opaque rationale was, perhaps, a foreshadowing of things to come. This said, at least one useful jurisprudential outcome did result from this decision: the court adjured the Title Board to apply to initiatives the single subject jurisprudence that the court had developed for legislative bills.<sup>77</sup> The outcome in the case implies that the Board had done so successfully here.<sup>78</sup>

2. The necessary connection test: disaggregating potentially interdependent provisions

(a) Public Rights in Waters II

The second single subject challenge, decided on the same day as the foregoing case, clarified matters to some extent but also raised important analytical questions. The case was called *In re Proposed Initiative for “Public Rights in Waters II” (Public Rights in Waters II)*.<sup>79</sup> The Colorado Supreme Court dealt with the single subject

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Unsafe Work Environment” (*Suits Against Nongovernmental Employers*), 898 P.2d 1071 (Colo. 1995) (en banc).

72. *Id.* at 1075. At the time of the petition, suits were prevented by the state’s Workers’ Compensation laws.

73. *Id.* at 1074.

74. *Id.*

75. *Id.*

76. *Id.* at 1074–75.

77. *Id.* at 1074.

78. Colorado’s single subject jurisprudence with respect to legislative bills may merit a separate, independent Note. This Note eschews discussion of the legislative dimension. A fruitful discussion occurs in Gilbert, *supra* note 24.

79. *In re Proposed Initiative for “Public Rights in Waters II” (Public Rights in Waters II)*, 898 P.2d 1076 (Colo. 1995) (en banc).

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rule head on, finding multiple subjects in what appeared, at least to the Title Board, to be related provisions.<sup>80</sup>

The case involved a petition that established a public trust for natural streams (a provision sympathetic to the public interest) and revised the election scheme for water-conservation and water-conservancy districts at the local level to make them more accountable to the people (and thereby more likely to implement a public trust doctrine that favored voters).<sup>81</sup> The court, borrowing from its single subject jurisprudence on legislative bills, declared that an initiative contains multiple subjects when it has “at least two distinct and separate purposes which are not dependent upon or connected with each other.”<sup>82</sup> The court held that the present petition consisted of two purposes: (1) the establishment of a statewide public trust and (2) “election and boundary rules for water conservancy and conservation districts.”<sup>83</sup> The fact that there were two purposes did not appear to be dispositive, however; the fatal flaw was that the two purposes were disconnected.<sup>84</sup> Since the local districts had “little or no power over the . . . development of a *statewide* public trust doctrine,” and since public trust powers would have vested in the state (not the local districts), the two provisions were not “*necessarily* connected”; therefore, they were deemed to be separate subjects.<sup>85</sup>

To better understand the extent to which the connection between local districts and the state was not necessarily present, a brief summary of the responsibilities of each is in order. A public trust would require the state to ensure that non-navigable waters that belong to the trust are used for the benefit of the public rather than solely for private interests.<sup>86</sup> Public interest concerns could well include conservationist considerations, such as preserving water levels for generations, protecting fish and wildlife species inhabiting the water, and other similar concerns.<sup>87</sup> They could also involve recreational use considerations, such as allowing citizens to fish or swim in non-navigable rivers and streams, even if these streams flow across private lands—as long as citizens’ entry point onto the stream does not involve trespass.<sup>88</sup> The Colorado Water Conservation Board is

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80. *Id.*

81. *Id.* at 1077 n.1.

82. *Id.* at 1078–79.

83. *Id.* at 1080.

84. *See id.*

85. *Id.* (emphasis added).

86. *See* JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION, 14–15 (2009).

87. *See id.*

88. *See id.*

the state's main agency for managing water, water uses, and water-related development.<sup>89</sup> Conservancy and conservation districts also have a part to play in managing water levels, though not much involvement—other than, perhaps, educational—in regulating recreational use.<sup>90</sup> Water conservancy districts are subunits of the state government tasked with providing a water supply for their respective service areas, including buying/selling water and building “water resource projects.”<sup>91</sup> In contrast, a water conservation district is part policy organization, part planning group, and part special projects entity that helps plan apportionment of natural water streams in the state.<sup>92</sup>

To the layperson, it may appear that once the Water Conservation Board establishes policies declaring a public trust for a set of streams, water conservation districts would plan apportionment such that more water is conserved, and conservancy districts would limit the amount of irrigation water they supply to agricultural entities. The extent to which these local districts would go to implement trust policy depends on the directors who manage the districts—directors who are nominated by local judges.<sup>93</sup> If the directors were instead elected by the people—which is the change sought by the present initiative—the districts might well adopt more public-interest-leaning policies. There is always the possibility, of course, that business interests could capture a majority of elected directors, and that election would not necessarily result in more public-friendly policies. In fact, elections may well have the opposite effect, whereby local districts could fight the public-trust state policy through their captured elected directors. Accordingly, changing the electoral scheme does not necessarily implement the state's public trust policy.

Though logical, the above explanation is not only too subtle, but also puts the court in the position of evaluating social dynamics and predicting what is more or less likely to happen. Moreover, the fact that the court seemingly places the disconnectedness of this measure on par with that of a legislative statute which contained 46 separate provisions—provisions as disparate as creating a “commis-

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89. *Mission & Strategic Plan*, COLO. WATER CONSERVATION BD., <http://cwcb.state.co.us/Home/Mission/> (last visited Dec. 31, 2010).

90. See *Background*, SAN JUAN WATER CONSERVANCY DIST., <http://www.sjwcd.org/Background.html> (last visited Dec. 31, 2009); *About Us*, COLO. RIVER DIST., [http://www.crwcd.org/page\\_1](http://www.crwcd.org/page_1) (last visited Dec. 31, 2010).

91. *E.g.*, SAN JUAN WATER CONSERVANCY DIST., *supra* note 90.

92. See COLO. RIVER DIST., *supra* note 90.

93. Ed Quillen, Editorial, *Public Vote a 'Trend' for Water Districts*, DENVER POST, Apr. 1, 2001, <http://extras.denverpost.com/opinion/persp0401b.htm>.

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sion on information management in the department of administration,” charging inmates for medical visits, reducing contributions by public employers to retirement funds, and the like<sup>94</sup>—reinforces the idea that subtle or potential disconnectedness is not what the court had in mind.

An alternative explanation is that changes to the director-election mechanism can stand independently of a public trust doctrine: neither provision is required in order to implement the other, even though one may enhance the other’s effectiveness. This interpretation could well address logrolling concerns—concerns that were highlighted by the court as animating the passage of the single subject rule.<sup>95</sup> However, for logrolling to be a possibility, there generally must exist two or more distinct camps of voters, neither of which would vote for the other camp’s proposal if submitted standalone.<sup>96</sup> In this petition, one camp might be election reformers whose sole interest is to revise the selection scheme for district directors from judge-appointed to voter-elected. The other camp could be environmentalists who care about aspirational ideas such as public resource trusts, but are not moved by the political means of implementing them.<sup>97</sup> The court did not speculate about the existence of multiple interest groups, nor did it make a finding that two or more distinct voting blocs exist—though such a finding is not required since a single subject is an issue of law, not of fact. Perhaps we must presume that the existence of multiple logical subjects necessarily implies multiple distinct voting blocs. Or perhaps the single subject rule is a prophylactic device that strikes down anything that raises even the remotest possibility of logrolling.

Another possibility is that the petition was not really about a strong public trust after all: public trust provisions could have simply been a rider on top of a more popular call for reforming district elections. (The reverse could also have been the case.) Unlike the rather lengthy logrolling discussion, however, there was not even one mention of riding. As such, we may be safe in assuming that riding was not a material consideration for the court.

(b) Petition Procedures

The necessary connection test introduced in *Public Rights in Waters II* left several important questions open. How independent

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94. *In re Proposed Initiative for “Public Rights in Waters II (Public Rights in Waters II)*, 898 P.2d 1076, 1079 (Colo. 1995) (en banc).

95. *Id.* at 1079.

96. See *infra* Part III.A.2 (discussing aspects of logrolling in more detail).

97. *Id.*

must the provisions be in order for a court to determine that they are not necessarily connected? And how would the court treat independent provisions that are nonetheless guaranteed to enhance each other (there was no such guarantee for the elections provision in *Public Rights in Waters II*)? Some answers are provided in a companion case, *In re Proposed Initiative on Petition Procedures (Petition Procedures)*,<sup>98</sup> decided on the same day.

In *Petition Procedures*, the court struck down a measure that changed the processes involved in initiatives, citizen-initiated referenda, and recall petitions.<sup>99</sup> The fact that the provisions were all aimed at strengthening the staying power of direct democracy (i.e., citizen-initiated petition measures) was not sufficient to satisfy single subject requirements. The court held that the measure comprised multiple subjects, including the “retroactive creation of substantive fundamental rights” in the matters contained within constitutional petitions,<sup>100</sup> the requirement that courts treat the term “shall” as a “mandatory command” in petition cases,<sup>101</sup> the requirement that challenges to initiatives on single subject grounds be entertained only if a unanimous court deems “beyond a reasonable doubt” that the petition contains multiple subjects,<sup>102</sup> and others.<sup>103</sup> The court also noted that the three mechanisms of direct democracy—initiative, referendum, and recall—are addressed by separate sections of the state constitution, implying that “placement” may have influenced its determination.<sup>104</sup>

One could well interpret the court as saying that two or more purposes are not necessarily connected if at least one purpose does not necessarily require one or more of the others. For example, unlike *Suits Against Nongovernmental Employers*—where the remittur provision necessarily required a right to sue, a right provided only by the petition’s suit provision—each of the rights and commands in this case can stand on their own, without requiring the existence of the others. Besides clarifying the “necessary connection” test, this interpretation also answers the two questions left open in *Public Rights in Waters II*. Unlike *Public Rights in Waters II*, where multiple voting blocs could theoretically be imagined, it is highly unlikely

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98. *In re Proposed Initiative on Petition Procedures (Petition Procedures)*, 900 P.2d 104 (Colo. 1995) (en banc).

99. *Id.* at 109–11.

100. *Id.* at 109.

101. *Id.*

102. *Id.*

103. *Id.* at 109–11.

104. *Id.*

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that separate voter blocs exist for each provision of the present petition; the same people who want to see one provision pass would want the others to pass as well.<sup>105</sup> Moreover, if one of the purposes of the present petition is to strengthen direct democracy, each provision is guaranteed to do so, even if implemented as part of another purpose—unlike the risk from *Public Rights in Waters II*, whereby electing directors could backfire on implementing an aggressive public trust. These observations suggest refining the definition of “necessarily connected” as follows: (1) exclude any consideration as to whether logrolling could have occurred, and focus strictly on textual analysis; and (2) do not evaluate whether fulfilling one purpose is guaranteed to further the goals of another: as long as two or more purposes’ provisions can stand independently, they represent different subjects.

Notwithstanding the above, *Petition Procedures* is also amenable to another interpretation: namely that two or more purposes are not necessarily connected if their provisions relate to multiple objects. Two variants of this exist, the first of which is an object-dependent subject determination. Since the present petition affects the procedures (including rights, processes, and judicial interpretations) for initiatives, referendum, and recall, we may say that each set of procedural changes—even if syntactically similar—represent three distinct logical processes: procedures for initiative, procedures for referendum, and procedures for recall. Each set of processes can stand by itself, and there are rational reasons for allowing initiative processes to be different from referendum or from recall processes. In referendum cases, for example, the bill to be voted on has been drafted by expert lawmakers, and underwent lengthy deliberations (unlike initiatives). In recall petitions, as another example, there are no textual subtleties or other drafting concerns that can mislead voters.

The second variant of the multiple-object relationship is the single object test.<sup>106</sup> To summarize, such a test would deem any measure that acts on multiple objects as violating the single subject rule when independent purposes are at play. Applying this test here, we see three purposes: changing initiative procedures, changing referendum procedures, and changing recall procedures. Since each purpose can be fulfilled without requiring the other, three

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105. Statistical evidence about voter preferences in this scenario does not exist. Nonetheless, the Author believes that the conclusion is reasonable based on the interrelatedness of the provisions and general knowledge about voter policy preferences with respect to petition procedures.

106. See *infra* Part III.

separate subjects exist. There may well be separate voting blocs who only care about initiatives, or referenda, or recalls—which means that logrolling may well have occurred. Which interpretation is more likely correct is answered months later in a case with similar facts: *In re Proposed Initiative on Petitions (Petitions)*.<sup>107</sup>

(c) Petitions

*Petitions* contained a host of procedures, rights, requirements, and commands with regard to initiative and referendum (but not recall) petitions.<sup>108</sup> The court appeared to apply the necessary connection test used to strike the *Petition Procedures* measure, but reached a result opposite to the latter despite similar facts.<sup>109</sup>

In reaching its result, the court distinguished between major and minor provisions, declaring that “*minor* provisions necessary to effectuate the purpose of the measure” do not represent different subjects.<sup>110</sup> Though *Petitions* included most of the same provisions as *Petition Procedures*, two were missing: the establishment of retroactive fundamental rights, and the requirement that single subject violations be found only if a unanimous court so decides.<sup>111</sup> Accordingly, one or both of these provisions might well have been major, and therefore subject to the stricter necessarily connected test. We can only surmise.

The above appears to foreclose the object-dependent subject determination theory discussed above with regard to *Petition Procedures*. In other words, since initiative and referendum were involved in *Petitions* as well, the idea that procedures for initiative are logically independent of procedures for referendum or recall may have no merit. Moreover, since objectors did not raise the object argument, and the court hinted that “initiative and referendum . . . are commonly associated with each other and reflect a common interest,”<sup>112</sup> we have only adumbrations with regard to the result under a *single-object* test, if such a test were even recognized. For example, would *Petitions* have come out differently had recall also been included? The court’s hint that initiative and referendum “are com-

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107. *In re Proposed Initiative on Petitions (Petitions)*, 907 P.2d 586 (Colo. 1995) (en banc).

108. *Id.* at 593–94.

109. *Id.* at 590.

110. *Id.*

111. *Compare Petitions*, 907 P.2d at 593–94, with *In re Proposed Initiative on Petition Procedures (Petition Procedures)*, 900 P.2d 104, 109–11 (Colo. 1995) (en banc).

112. *Petitions*, 907 P.2d at 591 n.3.

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monly associated”<sup>113</sup> implies an affirmative answer. If so, however, the court would have to recognize at least one form of the single object test.

2. Declining, and later adopting, a single object test

A single object test was raised as a possible interpretation in *Petition Procedures*. While *Petitions* may have later foreclosed one variant of such a test (i.e., object-dependent subject), the second was left open by the fact that the court may well have treated initiative and referendum as a composite/single object in said case.<sup>114</sup> The ambiguity appeared to be resolved in *In re Amend Tabor No. 32 (Amend Tabor 32)*,<sup>115</sup> where the court declined to adopt a single-object test.<sup>116</sup>

On December 18, 1995, the Colorado Supreme Court decided, in *Amend Tabor 32*, that an initiative which provided a tax credit did not violate the single subject rule, even though the credit pertained to six separate, unrelated state and local taxes.<sup>117</sup> Since the initiative involved only one \$60 tax credit, the fact that it could be applied to six disparate and unconnected taxes—such as telecommunications taxes, personal property taxes for business, state income taxes, vehicle taxes, levies spent on courts or social services, and abatements levies—was not enough to cause conceptual issues.<sup>118</sup> Unlike the objects that the *Petitions* court noted were “commonly associated with each other” (i.e., initiative and referendum),<sup>119</sup> one cannot reasonably argue that the six disparate tax objects were commonly associated in people’s mind—unless the broad subject of “taxes” is a sufficient basis for common association. But if “water” was not a sufficient basis of association in *Public Rights in Waters II*,<sup>120</sup> one must question why “taxes” would be. Moreover, the taxes here were assessed at either state or local levels, so one could not even reframe the connection as “state taxes” or “local taxes,” even if reframing would have resulted in a more cohesive

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113. *Id.*

114. *Id.*

115. *See* 908 P.2d 125 (Colo. 1995) (en banc).

116. *See id.*

117. *Id.* at 129. The initiative also called for the state to transfer funds to local governments in the amount of the revenue shortfall. *Id.* Said provision is not relevant in the analysis of the present petition, but will be mentioned for comparison purposes in subsequent comments.

118. *Id.*

119. *Petitions*, 907 P.2d at 591 n.3.

120. *In re Proposed Initiative for “Public Rights in Waters II” (Public Rights in Waters II)*, 898 P.2d 1076, 1080 (Colo. 1995) (en banc).

connection. Therefore, *Amend Tabor 32* must stand for the propositions that subject and object are not conflated, and that the court declined the invitation to adopt a single object test. Instead, the court applied its necessary connection jurisprudence as refined in *Petitions*: the subject here was “tax credit,” and all of the provisions were necessary, or plainly adapted, to effectuate the purpose of providing said credit.

Notwithstanding the above, one is left to wonder whether the single subject rule thus framed wards off the evils it was intended to dispel, with logrolling<sup>121</sup> being chief among them. Though *Petition Procedures* is clear about the absence of logrolling not being a defense to multiple subjects, it did not address whether a measure can be deemed to contain a single subject even if had been (or could have reasonably been) logrolled. In *Amend Tabor 32*, the possibility exists that proponents logrolled different types of taxes into one measure in order to accumulate votes. For example, suppose there are six groups of voters, each paying \$10 in different types of taxes. They all know that an initiative to reduce their respective tax categories would not win a popular vote. So they band together and enact a tax credit that comprises all of their situations. To sweeten the deal even more and attract voters for whom \$10 would have been too little, they raise the credit from \$10 to \$60. This hypothetical has all of the signs of traditional logrolling, yet the court does not engage in such speculation.

In addition to practical considerations, the court’s decision also raises a logical inconsistency: when two measures call for nearly identical terms but are drafted differently, should they result in different single subject outcomes? For example, what if instead of calling for a \$60 credit for six types of taxes, the measure had called for six \$10 credits—one for each type of tax? Would that constitute a multiple subject situation? It most likely would, under the rule thus developed: each \$10 credit, likely a major provision, can stand on its own and is not necessarily connected with the others. Though there may be one distinction between the two (i.e., the credit for any given tax is higher in the \$60 scenario), is it a distinction without a difference?

The foregoing raises the question as to whether the original intent behind the single subject rule has given way to wooden applications of a linguistic principle. Some of the Justices on the court

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121. See *infra* Part III.A.2.

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raised this issue in dissents,<sup>122</sup> and later the idea received a warm welcome from the majority of the court, as the sections on subject specificity and hidden subjects discuss.<sup>123</sup> It also appears that the court realized the difficulty posed by declining to adopt—or at least allow for some semblance of—a single object test. And nearly ten years later, it began to change course.

The court appeared to erase, or at least fuzz, the distinction between subject and object in *In re Proposed Initiative for 2005–2006 No. 74 (Initiative No. 74)*.<sup>124</sup> The initiative put a ten-year expiration date on new fiscal measures voted on by the people, measures such as higher taxes, new public debt that exceeded a certain threshold, and suspension of spending limits.<sup>125</sup> (The Taxpayer Bill of Rights requires such fiscal measures to be submitted to popular referendum.) The court held that each type of program to which the sunset provision applied represented a separate subject.<sup>126</sup> The decision appears to be a reversal of the course charted in *Amend Tabor 32*. Now, the objects on which the subject of the restriction acted (the subject being “sunsetting fiscal measures”) would, if many, serve to deem the initiative as covering multiple subjects—provided that the multiple objects could stand alone.

### 3. Subject specificity

One issue raised by foregoing cases is the issue of subject specificity: how atomic must a subject be in order to be considered unitary? The issue received a healthy dose of attention from Justice Howard Kirshbaum in a dissent to the opinion *In re Proposed Initiative on Parental Rights (Parental Rights)*<sup>127</sup> in 1996. The initiative called for recognizing parents’ inalienable rights to “direct and control the upbringing, education, values, and discipline of their children.”<sup>128</sup> The majority held that the initiative satisfied the single subject requirement because the unifying theme was the right of parents to “direct and control the upbringing, education, values, and discipline of their children.”<sup>129</sup> Since *Amend Tabor 32* had rejected an object test, the result is in line with precedent at that time.

122. *In re Proposed Initiative on Parental Rights (Parental Rights)*, 913 P.2d 1127, 1137–40 (Colo. 1996) (en banc) (Kirshbaum, J., dissenting).

123. See *infra* Part II.C.4, 6.

124. *In re Proposed Initiative for 2005–2006 No. 74 (Initiative No. 74)*, 136 P.3d 237 (Colo. 2006).

125. *Id.* at 238, 242.

126. *Id.* at 242.

127. *Parental Rights*, 913 P.2d at 1137–40 (Kirshbaum, J., dissenting).

128. *Id.* at 1132–33 (majority opinion).

129. *Id.* at 1131.

However, the apparent grouping of disparate aspects of childrearing into one subject prompts one to inquire as to the granularity that a proper subject should have.

After reframing the subject as the “general relationship of parent and child,”<sup>130</sup> Justice Kirshbaum contends in his dissent that “parental rights” is too broad of a subject to withstand single subject scrutiny; he would rather disaggregate and treat education, discipline, values, and upbringing as separate subjects.<sup>131</sup> Justice Kirshbaum distinguishes *Petitions* on the ground that “petitions,” albeit aggregating initiated and referred petitions, represent a “clearly defined” subject, whereas broad concepts such as “parental rights” are too vague and confusing for voters.<sup>132</sup> He argues for a test to address specificity, though a “clearly defined” test hardly offers substantial clarity because of its subjectivity. The majority declined to adopt such a test, but future jurisprudence nonetheless inched in this direction.

Less than two months after *Parental Rights*, the court declared, in *In re Proposed Initiative 1996–4 (Repeal Tabor)*,<sup>133</sup> that “[g]rouping the provisions of a proposed initiative under a *broad* concept that potentially misleads voters will not satisfy the single subject requirement.”<sup>134</sup> The concept in question was the Taxpayer Bill of Rights (TABOR), which encompassed diverse topics such as spending limits; revenue limits; and elections for new taxes, revenue limit adjustments, and spending limit adjustments.<sup>135</sup> The *Repeal Tabor* holding does not appear to be a great departure from *Public Rights in Waters II*, where a broad concept such as “water” was too broad to be a unifying theme.<sup>136</sup> But it does represent a new issue for the court to address in light of *Parental Rights*: namely, where to draw the *specificity* line. Justice Kirshbaum’s invitation to adopt a “clearly defined” specificity test (which, incidentally, may have served to uphold the measure since TABOR is clearly defined in article X, section 20 of the Colorado Constitution)<sup>137</sup> was implicitly rejected in favor of an encompassing principle test:<sup>138</sup> that an initiative consists of multiple

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130. *Id.* at 1137–40 (Kirshbaum, J., dissenting).

131. *Id.*

132. *Id.*

133. *In re Proposed Initiative 1996–4 (Repeal Tabor)*, 916 P.2d 528, 532 (Colo. 1996) (en banc) (emphasis added).

134. *Id.*

135. COLO. CONST. art. X, § 20.

136. *In re Proposed Initiative for “Public Rights in Waters II” (Public Rights in Waters II)*, 898 P.2d 1076, 1080 (Colo. 1995) (en banc).

137. COLO. CONST. art. X, § 20.

138. *Repeal Tabor*, 916 P.2d at 533.

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subjects if its provisions are “disconnected from any *encompassing principle*.”<sup>139</sup> While “encompassing principle” might simply be a synonym for “subject” rather than a descriptive phrase, it was sufficient for the court to find that the principle, or subject, advanced here was “limiting government spending,” and that it was too general—akin to “water” in *Public Rights in Waters II*—to qualify as a single subject.<sup>140</sup>

The weakness of the encompassing principle test is very visible in the controversial case *In re Proposed Initiative for 2005–2006 No. 55 (Initiative 55)*.<sup>141</sup> *Initiative 55* restricted the provision of non-emergency services by the state of Colorado to only “citizens of and aliens lawfully present in the United States,” unless federal law required otherwise in specific situations.<sup>142</sup> It appears that the encompassing principle of “government services to unlawful aliens” was unsatisfactory; the court ruled that the category “government services” is too broad of a subject area.<sup>143</sup> Instead, the category should be disaggregated until one arrives at a “cohesive purpose” for which services, or groups of services, are provided.<sup>144</sup> The court wasted no time disaggregating services into two sub-categories: (1) those “benefit[ing] individual welfare,” achieved by “medical and social services”; and (2) those “facilitat[ing] economic transactions,” achieved by “administrative services.”<sup>145</sup>

We are left to wonder why the court stopped at this level of specificity and did not drill further. One possibility is that the court simply chose to stop as soon as it found multiple subjects. Another is that all of Colorado’s government services comprise only two “cohesive purposes” with regard to individuals: medical/social and administrative. If the latter were the case, then a future petition targeted at eliminating “government services that benefit individual welfare for illegal aliens” might pass a single subject challenge, whereas if the former applies then the court might well drill down to the next level of specificity should such a petition come before it. Alas, a clearer test for specificity has not made its way into the jurisprudence.

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139. *Id.* (emphasis added).

140. *Id.*

141. *In re Proposed Initiative for 2005–2006 No. 55 (Initiative 55)*, 138 P.3d 273 (Colo. 2006) (en banc).

142. *Id.* at 282.

143. *Id.*

144. *Id.* at 280.

145. *Id.* at 277.

#### 4. The effects test and hidden purposes

The idea that crafty initiative proponents would surreptitiously insert subtle provisions in petitions to implement hidden agendas was identified by the legislature as a motivating factor for the single subject rule.<sup>146</sup> Though the issue had been lurking in the background since *Public Rights in Waters II*, early single subject tests were not able to root out the subtlest of the subtle. For example, the court in *Petitions* allowed a measure that introduced changes to processes for initiative and referendum petitions.<sup>147</sup> The measure also made initiative and referendum mandatory for all districts as a constitutional matter.<sup>148</sup> Prior to *Petitions*, citizens had initiative and referendum constitutional rights only at the level of the state, city, town, and municipality.<sup>149</sup> The hunch that municipality would cover counties is incorrect, as the Colorado Supreme Court confirmed in a separate case unrelated to *Petitions*.<sup>150</sup> Therefore, prior to *Petitions*, there was no constitutional right to initiative at the county level—and yet the generic term “district” (used in the *Petitions* measure) encompassed all types of local government.<sup>151</sup> Though the *Petitions* court did not highlight the inconsistency, the measure could well have been aimed at introducing mandatory initiative and referendum to counties in addition to changing existing processes for state, city, town, and municipality petitions. As discussed earlier, the *Petitions* court upheld the measure. Consequently, the problem of hidden purposes remained in the shadows until it emerged two years later in two key cases: *In re Proposed Initiative for 1997–98 No. 30 (Initiative No. 30)*<sup>152</sup> and *In re Proposed Initiative for 1997–98 Nos. 84 & 85 (Initiatives 84 & 85)*.<sup>153</sup> The device for locating hidden purposes was the effects test, a variant of the object test rejected in *Amend Tabor 32*.

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146. See COLO. REV. STAT. § 1-40-106.5(1)(e)(II) (2009) (noting that single subject is intended to, *inter alia*, “prevent surprise . . . from being practiced upon voters”).

147. *In re Proposed Initiative on Petitions (Petitions)*, 907 P.2d 586, 593–94 (Colo. 1995) (en banc).

148. *Id.*

149. COLO. CONST. art. V, § 1(9).

150. See *Board of County Comm’rs v. County Road Users Ass’n*, 11 P.3d 432, 436 (Colo. 2000) (declaring that article V, section 1(9) of the Colorado Constitution “does not include counties, and this court has not recognized any constitutional initiative powers reserved to the people over countywide legislation”).

151. *Petitions*, 907 P.2d at 593.

152. *In re Proposed Initiative for 1997–98 No. 30 (Initiative No. 30)*, 959 P.2d 822 (Colo. 1998) (en banc).

153. *In re Proposed Initiative for 1997–98 Nos. 84 & 85 (Initiatives 84 & 85)*, 961 P.2d 456 (Colo. 1998) (en banc).

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## (a) Hidden effects: Initiative 30 and Initiatives 84 &amp; 85

The facts in *Initiative 30* are almost indistinguishable from *Amend Tabor 32*. Just like the latter, *Initiative 30* applied a tax cut to a group of unrelated taxes, and called for the state to transfer funds to local governments in the amount of the revenue shortfall (i.e., to replace revenue).<sup>154</sup> The problem, however, was that a couple of the taxes to which the cut was applied would not benefit from full state replacement of revenue, on account of a subtlety in the measure's language as interpreted in concert with existing state law.<sup>155</sup> The context is as follows. The Taxpayer Bill of Rights required year-over-year tax-rate increases that exceeded a certain adjustment index to be submitted to voters for approval via referendum measures.<sup>156</sup> The measures were not required to state fixed maximum tax rates or fixed dollar ceilings.<sup>157</sup> When *Initiative 30* came along, it applied certain cuts to certain types of taxes, except taxes that had been increased via measures that listed fixed tax rates and fixed dollar ceilings.<sup>158</sup> Moreover, it provided for state replacement of lost local revenue from said cuts, but only to the extent of the revenue collectible by localities without the need for special referendum measures.<sup>159</sup> Together, the petition's measures served to annul, *inter alia*, many of the local non-standard tax increases from the past several years<sup>160</sup>—almost as subtle as *Petitions*, but a subtlety to which the court did not look kindly.

Rather than retaining the measure's subject as "tax cuts"—with the subtle provision representing a bigger-than-expected tax cut—the court concluded that two subjects were present: (1) tax cuts; and (2) imposing new criteria for tax-increase measures that had already been passed by voters.<sup>161</sup> This reframing raises the question whether the outcome would have been different if the new criteria had been merely prospective. One argument for the affirmative would point out that there are no prospective limitations per se: local governments can always choose to draft their special tax measures such that they are not affected by this provision. A counterargument would be that strong-arming the government into limiting its future revenue-raising measures through implicit con-

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154. *Initiative No. 30*, 959 P.2d at 823.

155. *Id.*

156. COLO. CONST. art. 10 § 20(4), (8).

157. *Id.*

158. *Initiative 30*, 959 P.2d at 826–27.

159. *Id.*

160. *Id.*

161. *See id.* at 826.

straints represents a subterfuge that should be deemed a separate, independent purpose from tax cuts.

The hidden purpose test took a more expanded meaning in a case decided just a couple of months later: *Initiatives 84 & 85*.<sup>162</sup> This pair of measures proposed a set of cuts in state and local taxes on utilities, vehicles, real property, and income;<sup>163</sup> they also had a standard revenue-replacement provision, just like *Initiative 30* (and others).<sup>164</sup> Unlike *Initiative 30*, there was no hidden effect on account of subtle criteria because the state was required by the initiative's text to replace revenue lost by the locality on account of the tax cuts. There was, however, another secondary effect: the state would likely have to cut spending for state programs in order to make up for localities' shortfall.<sup>165</sup> Per existing TABOR provisions, the state could not simply raise new taxes without obtaining voter approval, a move that was unlikely to succeed given citizens' feelings about taxes at the time.<sup>166</sup> Without raising taxes, the state could not meet its revenue replacement mandate under *Initiatives 84 & 85*, which meant one thing: the state would have to cut funding for state programs.<sup>167</sup> Given this parallel effect, the initiatives were struck down for comprising two subjects: (1) cutting state and local taxes; and (2) cutting state programs to make up for localities' revenue shortfall.<sup>168</sup> Apparently, if left on the ballot, voters would have been confused, all the while thinking that lowering taxes meant that the state could continue to spend as before on all state programs.<sup>169</sup>

(b) Direct and logical effects are permitted: Initiative 258(A)

The effects test was somewhat narrowed in 2000, in a case called *In re Proposed Initiative No. 258(A) (Initiative 258(A))*.<sup>170</sup> The measure called for English-only instruction for students in public

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162. *In re Proposed Initiative for 1997–98 Nos. 84 & 85*, 961 P.2d 456, 461–63 (Colo. 1998) (en banc).

163. *Id.*

164. *Id.*

165. *Id.* at 460. To raise taxes beyond a standard index that adjusts for inflation and population growth, state law requires voter approval. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See id.* at 460–61 (indicating that voters would have been “surprised” to learn that tax cuts actually meant reduction in amount of money spent on state programs).

170. *In re Proposed Initiative for 1999–2000 No. 258(A) (Initiative 258(A))*, 4 P.3d 1094 (Colo. 2000) (en banc).

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schools, with exceptions for bilingual education programs (subject to parental waiver) and foreign-language classes.<sup>171</sup> The measure also explicitly stated that schools are not required to provide bilingual programs, thereby leaving open the possibility that some schools would phase out such initiatives.<sup>172</sup> This possibility might seem similar to the effect in *Initiatives 84 & 85*, whereby the state might have to cut some of its spending as part of the measure.<sup>173</sup> There is a difference, however, between automatic effects and permissive effects, even if both are hidden. In *Initiatives 84 & 85*, the state would have to cut spending if it could not obtain new tax increases, whereas schools in *Initiative 258(A)* did not have to phase out their bilingual programs—they simply had the option to do so. Rather than adopt a permissive effects test as the rationale for upholding the measure, the court formulated a different rule: effects that “follow[ ] *directly and logically* from the central focus of [the initiative]” are “logical[ly] incident” to the measure, and do not constitute a separate subject.<sup>174</sup> One might well ask whether this rule would have resulted in a different outcome in *Initiatives 84 & 85*.

## (c) Uncertain effects: Initiatives 25–27

One scenario that had not been squarely addressed so far is the uncertain effects case, where the court cannot determine the likely effects of a measure. Prior to the outright adoption of an effects test, the court did not appear troubled by measures whose effects were uncertain. For example, in the case *In re Proposed Initiative 1996–6 (Public Rights In Waters III)*,<sup>175</sup> the court upheld the measure calling for a “strong public trust doctrine” despite the fact that the “precise meaning” of such a doctrine—and, implicitly, the precise effects of the doctrine—were not defined by the initiative.<sup>176</sup>

Approximately three years later, the court adopted a more rigorous approach vis-à-vis uncertain effects, beginning with *In re Proposed Initiative for 1999–2000 Nos. 25, 26, & 27 (Initiatives 25–27)*.<sup>177</sup>

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171. *Id.* at 1097.

172. *Id.*

173. *In re Proposed Initiative for 1997–98 No. 30 (Initiative 30)*, 959 P.2d 822, 823, 826–27 (Colo. 1998) (en banc).

174. *Initiative 258(A)*, 4 P.3d at 1097 (emphasis added).

175. *In re Proposed Initiative 1996–6 (Public Rights in Waters III)*, 917 P.2d 1277 (Colo. 1996) (en banc).

176. *Public Rights in Waters III*, 917 P.2d, at 1281.

177. *In re Proposed Initiative 1999–2000 Nos. 25, 26, & 27 (Initiatives 25–27)*, 974 P.2d 458 (Colo. 1999) (en banc).

Here, the court was faced with proposed tax cuts.<sup>178</sup> Like other prior tax cut measures that were deemed to comprise multiple subjects, these initiatives called for state replacement of local revenue.<sup>179</sup> But unlike those measures, the replacement here was conditional: it would only occur after the state revenue exceeded a certain threshold figure, thereby making the actual effect on the state indeterminable *ex ante*.<sup>180</sup> The court blocked the measures and ordered the Title Board to determine the precise effect on state spending.<sup>181</sup>

If *Initiatives 25–27* does not represent an evolution of the jurisprudence, but rather should be read in concert with *Public Rights in Waters III*, the uncertainty itself is not dispositive: the critical issue is the government's control of the outcome. In *Public Rights in Waters III*, the legislature would have to define—and thereby control—the effects of the public trust doctrine. By contrast, the legislature's hands would be bound in *Initiatives 25–27*; it could not avoid unpleasant effects on state expenditures if revenue exceeded the threshold. Accordingly, we cannot be certain whether uncertain effects necessarily invalidate a measure.

#### 5. Procedure-vs.-substance test

Another subtle distinction that the court has drawn is between provisions that pertain to procedure versus those that relate to substance. Even if both types of provisions relate to a single logical theme that might otherwise be deemed a single subject (e.g., petitions in *Petitions*), the measure is nonetheless deemed to relate to separate subjects if procedure and substance are mixed. The case in point is *In re Proposed Initiative 2001–02 Nos. 43 & 45 (Initiatives 43 & 45)*.<sup>182</sup> *Initiatives 43 & 45* involved changes to initiated and referred petitions.<sup>183</sup> In addition to the types of procedural changes found acceptable in *Petitions*,<sup>184</sup> *Initiatives 43 & 45* also added two provisions: a presumption that measures which change one section of the constitution are a single subject unless the court had previously ruled otherwise; and a prohibition on referred petitions for

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178. *Id.* at 459–60.

179. *Id.*

180. *Id.*

181. *Id.* at 466.

182. *In re Proposed Initiative 2001–02 Nos. 43 & 45 (Initiatives 43 & 45)*, 46 P.3d 438 (Colo. 2002) (en banc).

183. *Id.* at 444–45.

184. *In re Proposed Initiative on Petitions (Petitions)*, 907 P.2d 586, 593–94 (Colo. 1995) (en banc).

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zoning issues.<sup>185</sup> One might expect the measure to sail through, since the subject formulated by the court in *Petitions* was “petitions,”<sup>186</sup> not “petition procedures.” However, the court drew a subject distinction between petition procedures and substantive content.<sup>187</sup> The lesson: since the measure affected the procedure of the initiative process and the substantial law, there were two subjects.

## 6. Exhortative statements

Initiatives, or parts of initiatives, do not necessarily create binding law: they can also request the legislature to do something—a formal means of petitioning the government to redress grievances. How should measures containing these types of provisions be handled? The court had the opportunity to rule on this issue in *In re Proposed Initiative on Parental Choice in Education (Parental Choice in Education)*.<sup>188</sup> The measure’s goal was to enact a school voucher program, and the majority of provisions were aimed to that end.<sup>189</sup> One provision, however, called on the legislature to improve the quality of public schools, and read thus: “The General Assembly is encouraged to repeal those laws and/or regulations that are determined to be impediments to the ability of public schools to provide a quality of education equal to or greater than that provided in non-public schools.”<sup>190</sup> One could well argue that this provision can stand by itself, and is not necessarily related to implementing a voucher program. However, the provision, even if enacted, does not represent binding law: it is merely an exhortative statement. The General Assembly can well decline the invitation without legal repercussions. Such a statement should not be allowed to invalidate an otherwise-valid petition, especially since it is related to the very reason why some citizens would opt for private schools. Accordingly, the court declined the invitation to strike down the measure.<sup>191</sup> Though one might question whether such exhortative statements are a means of soft logrolling, the court does not appear concerned.

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185. *Initiatives 43 & 45*, 46 P.3d at 444–45.

186. *Petitions*, 907 P.2d at 590.

187. *Initiatives 43 & 45*, 46 P.3d at 444–45.

188. *In re Proposed Initiative on Parental Choice in Education (Parental Choice in Education)*, 917 P.2d 292 (Colo. 1996) (en banc).

189. *Id.* at 294–95.

190. *Id.* at 295.

191. *Id.*

## 7. Conclusion

Even if the interpretive layer offered by the foregoing comments appears to create a predictable framework, two further observations may lessen the strength of such a conclusion. First, it appears that the tests are applied selectively rather than consistently. Second, an analysis of the single subject cases reveals that in at least 50% of the petitions, the court announced refinements of the rules applied previously. Accordingly, one may be unsurprised if petition proponents claim difficulty in determining whether their measures will stand up to judicial scrutiny. But even if proponents are not well versed in the law, there is a gatekeeper who is: the Title Board. The fact that even the experienced Title Board has difficulty getting it right is unsettling, even though we acknowledge that reasonable people can disagree over legal interpretation.

The interpretive layer provided in this section could well be off the mark with regard to the court's intended methods for interpreting single subjects. As such, there is a strong probability that "single subject" is a term of art rather than a descriptive phrase. Under the case law, it appears that anything can be reframed as comprising multiple subjects, depending on how fine of a specificity line we draw<sup>192</sup> or on the level of scrutiny with which we examine the effects of a measure.<sup>193</sup> Since there is no clearly articulable test for specificity or effect, we are left with the solution of recognizing single subjects when we see them. This might work for a limited time while jurisprudence stabilizes, but becomes somewhat disingenuous if the rules keep evolving ad infinitum; after all, the single subject doctrine had been evolving for over one-hundred years with respect to legislative bills before it was merged into the interpretive space for initiatives.<sup>194</sup>

Since the purely formalistic avenue for rationalizing single subject jurisprudence is unfulfilling, other hypotheses should be evaluated.

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192. See *supra* Part II.C.4.

193. See *supra* Part II.C.5.

194. One of the early cases involving single subject challenges to legislative statutes was *People ex rel. Thomas v. Goddard*, 7 P. 301 (Colo. 1885), a full 104 years before Coloradoans extended single subject to initiatives. The Colorado Supreme Court had merged its legislative single subject jurisprudence into that of the newly-established initiative single subject jurisprudence. See *In re Proposed Initiative "Public Rights In Waters II"* (*Public Rights in Waters II*), 898 P.2d 1076, 1078-79 (Colo. 1995) (en banc).

*D. Hypothesis #2:**The single subject rule as a trap for cunning initiative sponsors*

Rather than see the single subject rule as strictly analytical, perhaps it is a means of ferreting out clever initiatives that try to pull the wool over voters' eyes. In reviewing some of the cases above, one might agree that the initiatives contained subtleties that were rightly caught. There are several difficulties with this hypothesis as an exclusive explanation, however. The most important one is that subtleties in drafting that result in broader-than-expected effects have not consistently caused the court to find that an initiative contained multiple subjects, even after the effects test was adopted in 1998.

Take, for example, *In re Proposed Initiative for 1999–2000 No. 255 (Initiative 255)*, a measure that required background checks at gun shows.<sup>195</sup> The provisions seemed straightforward, yet few voters would realize—as the challengers did—that unlicensed gun sellers would likely stop selling their wares at such events because federal law would work to prevent them from obtaining background checks via the means prescribed by the measure.<sup>196</sup> Even if such an outcome were favored on policy grounds, this would not render the measure's effect any less subtle. The measure was upheld notwithstanding the aforementioned subtlety due to the court's decision to “not interpret [a measure's] language or predict its application if it is adopted.”<sup>197</sup>

Another example is *In re Proposed Initiative for 2005–2006 No. 73 (Initiative 73)*, a measure that aimed to stop pay-to-play contributions to tax and debt elections.<sup>198</sup> The measure stated that if a district provides any benefit—including employment, contracts, or other transfer payments in return for services—to an individual who contributed more than \$500 to support a tax and debt election, the tax or debt authorized by the election would be canceled.<sup>199</sup> While the idea of preventing corruption is very appealing, this measure's provisions could, inter alia, prevent existing government employees from making substantive contributions to tax or debt elections. For example, teachers who believe that additional government spending on schools serves the community might not

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195. *In re Proposed Initiative for 1999–2000 No. 255 (Initiative 255)*, 4 P.3d 485, 495 (Colo. 2000) (en banc).

196. *Id.*

197. *Id.*

198. *In re Proposed Initiative for 2005–2006 No. 73 (Initiative 73)*, 135 P.3d 736, 739 (Colo. 2006) (en banc).

199. *Id.* at 741–42.

be able to substantially support a tax or debt election to that effect. Moreover, the measure makes the benefit prohibition effective for the entire duration of the tax or debt program passed by the election. For multi-year programs, this might force districts to not hire individuals who contributed to the program's election years earlier. Or, as Justice Gregory Hobbs stated in his dissent, the measure would also "prevent districts from awarding a public contract to the lowest bidder because that individual or entity has contributed more than five hundred dollars to an issue committee."<sup>200</sup> These effects are subtle, and yet the court deemed the measure to contain a single subject.<sup>201</sup>

Several other examples exist of uncaught subtlety, but they need not be discussed in detail; this Section is not meant to contain an exhaustive account. Instead, the cases cited above raise sufficient doubts about the notion that the single subject rule is a sieve that catches all cunning initiative drafters. The very fact that some appear to slip through the cracks prompts us to examine other hypotheses.

*E. Hypothesis #3:  
Randomization perspective of the single subject rule*

A third hypothesis is that in hard cases, where it is difficult to determine whether a petition contains multiple subjects and precedent is not squarely on point, the court may choose an outcome by using tie-breakers that are not directly related to the merits, thereby resulting in controlled randomization. Such suggestions have been made in other contexts.<sup>202</sup> This Note casts doubt on a randomization hypothesis as applied to Colorado's single subject cases by presenting two sets of statistics.<sup>203</sup>

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200. *Id.* at 742 (Hobbs, J., dissenting).

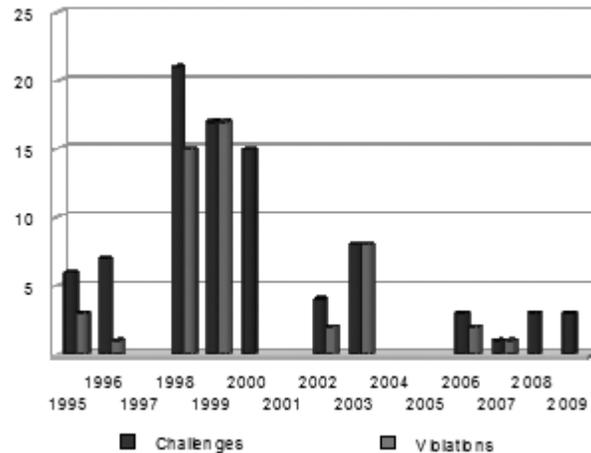
201. *Id.* at 739.

202. Adam M. Samaha, *Originalism's Expiration Date*, 30 *CARDOZO L. REV.* 1295, 1354–63 (raising the possibility, admittedly unorthodox, that originalism as an interpretive basis serves a randomizing function).

203. The statistics were compiled as part of this Note's research.

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Figure 1. Single subject challenges vs violations, 1995-2009



The first is a count of the number of single subject challenges brought since the rule was introduced, compared with the number of violations found; this relationship is depicted in Figure 1. I analyze the graph in light of two assumptions. First, it is assumed that the Title Board<sup>204</sup> weeded out initiatives that clearly contained multiple subjects. Therefore, if a petition was left standing, was later challenged in court, and the court did not summarily dismiss the challenge without comment, then the case may fairly be characterized as a hard case that required in-depth analysis from the court.<sup>205</sup> Second, if all challenges were hard cases, then a purely random decision theory may be expected to result in a 50% violation rate, whereby 50% of petitions are deemed to violate the single subject rule. Fifty percent is not necessarily an arbitrary figure. Binomial probability distribution theory suggests that, in a random toss of a coin (a two-state variable), heads will result in half of the tosses after a certain number of trials.<sup>206</sup> One may assume the principle to result in violations being found in half of the cases during any given year if decisions were reached randomly. That said, the number of single subject challenges brought in a given year do not meet the requirements of a normal statistical sample,<sup>207</sup> and there-

204. *See supra* Part II.A.

205. Of all cases challenged on single subject grounds, only four were dismissed summarily without comment; this occurred in 1998. *See infra* Appendix.

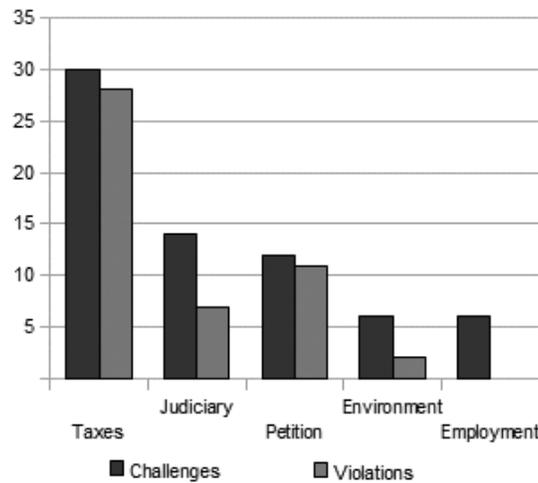
206. *See* JAY L. DEVORE, *PROBABILITY AND STATISTICS FOR ENGINEERING AND THE SCIENCES* 108–13 (7th ed. 2008).

207. *Id.*

fore reference to binomial distributions may be misplaced. Nonetheless, the 50% figure provides a convenient theoretical pivot point for what one might expect if judicial decisions in these cases were purely random.

When Figure 1 is viewed with the foregoing assumptions in mind, the hypothesis that cases are decided randomly shows signs of weakness. Out of eleven years that featured single subject challenges, the 50% ratio was met on only two occasions: in 1995 and in 2002. Moreover, the figures show a significant skewing toward either ends of the violation/no-violation spectrum. While one may not be able to draw firm conclusions from this analysis, Figure 1 at least serves to raise doubts about the viability of a pure-randomization hypothesis.

Figure 2. Single subject challenges vs violations in the top 5 theme categories, 1995-2009



Since the first diagram is inconclusive, we now turn to a different cross-section of the data. The second set of statistics, depicted in Figure 2, categorizes every petition by theme and presents the challenges-vs.-violations data with regard to the top five themes, which account for 78% of the cases. A couple of assumptions merit clarification. First, if the subject matter of petitions were irrelevant—as this Note assumes would be the case in a pure-randomization hypothesis—we might expect to see roughly the same percentage of

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violations across the different themes. Second, we may expect to also see no correlative policy trend among themes.

A brief review of Figure 2 suggests that the data do not conform to the foregoing assumptions. Other than petitions involving the judiciary (e.g., measures that would either enhance or restrict the judicial power through term limits, judicial qualifications, and the like), all other categories appear to be heavily skewed toward either a finding of violation (e.g., taxation- and petition-related initiatives) or finding of no-violation (e.g., environment- and employment-related initiatives). Moreover, the data appear to show that, with some exceptions, the petitions that were deemed to not violate the single subject rule represented policy positions that favored the environment, labor, and taxation—and disfavored drastic changes to the process of direct democracy.<sup>208</sup>

Similar to the Section prior, this Section is not meant to contain an exhaustive analysis of the pure-randomization theory. The author believes that the data do not support a randomization hypothesis in this case, and the explanation above—albeit brief—directly addresses the point. Because the above observations raise sufficient doubt about the viability of a pure-randomization hypothesis, we must turn to another explanation.

*F. Hypothesis #4:*

*The single subject rule as a judicial vetogate for certain subject matter*

A final alternative this Note explores is that, rather than the single subject rule representing an analytical device aimed to stop logrolling or fraud on the voters, it either is or has become a judicial subject-matter vetogate. Unlike traditional legislative politics, where vetogates are institutional devices that typically involve intentional conduct by political actors,<sup>209</sup> the judicial vetogate need not involve judicial activism. A perfectly valid alternative to activism is the possibility that some subjects are intrinsically complex so as to not be amenable to meaningful initiative petitions. In other words, these types of subjects could never be narrow enough to pass judicial scrutiny—not in any form that would attract meaningful interest from the voting public. This Note does not attempt to assign a reason for why court decisions come out more favorably for some subjects as opposed to others; instead, identifying the existence of a vetogate is sufficient for suggesting a solution.

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208. See *supra* Figure 2 in conjunction with the Appendix and the cases cited therein.

209. Eskridge, *supra* note 32, at 1442–43.

Figure 2 above serves as a starting point for substantiating the judicial vetogate claim. Since subjects appear to be difficult to define, this Note has instead organized single subject challenges by theme. The top five themes, in descending order by initiative count, are: taxes (30), judiciary (14), direct democracy (represented by the term “petition”) (12), environment (6), and employment (6). As the chart shows, measures related to taxes (predominantly tax cuts) and direct democracy (predominantly enhancing direct democracy) are likely to be invalidated, whereas those related to the environment and employment are upheld, at least on single subject grounds. Measures related to the judiciary are evenly split, however.

Having established an apparent pattern, the next issue to explore is why petitions on certain subjects tend to fare more (or less) favorably than others. Given that several possible explanations had been ruled out earlier in the Note, we may be left to explain the statistics by inferring that the rejected petitions were disliked by the court on substantive grounds. Recent research by Professors John Matsusaka and Richard Hasen goes even further, suggesting that judges’ partisan policy preferences affect single subject outcomes, especially in states that apply the single subject rule “aggressively,” such as Colorado.<sup>210</sup> The research concludes that “in aggressive states, judges upheld initiatives they *disagreed* with only 42.1 percent of the time,” while they “uph[eld] initiatives they *agreed* with 83.2 percent of the time.”<sup>211</sup> “Disagreement” in this context means a mismatch between the ideological label attached to an initiative (e.g., conservative or liberal/progressive) and the political affiliation of judges (e.g., Republican or Democrat).<sup>212</sup> Matsusaka and Hasen do not appear to argue that judges’ partisan motivations are driven by political ambition; in fact, they maintain that a re-election motivation may not satisfactorily explain the data.<sup>213</sup> Instead, they contend that judges’ underlying ideological beliefs on social policy are doing the work.<sup>214</sup>

There are reasons to agree with such a conclusion. As this Note’s research suggests with regard to Colorado, initiatives in cer-

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210. Matsusaka & Hasen, *supra* note 27, at 2. Matsusaka and Hasen characterize Colorado as a state with “aggressive” application of the single subject rule. *Id.* at 26.

211. *Id.* at 27 (emphasis added).

212. *Id.* at 23–24, 36.

213. “The voting behavior of judges is not reliably different when an election is close than when it is distant.” *Id.* at 25.

214. *Id.* at 22.

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tain categories have a higher likelihood of being upheld than others: pro-labor and pro-environment initiatives were upheld more frequently than initiatives seeking to decrease taxes, for example.<sup>215</sup> Moreover, if a subject-matter judicial vetogate exists—as this Note argues is the case—it might be intuitively obvious to conclude that the vetogate opens or closes based on judges' policy preferences. Finally, in other legal subject areas with flexible standards or wide judicial discretion, judges' legal pronouncements have long been suspected of being influenced by such extra-legal factors as justice, morality, and good public policy.<sup>216</sup> Political ideology may be yet another extra-legal factor that is added to the mix.

However, there are also reasons to stop short of completely embracing the conclusion of the Matsusaka and Hasen study—at least on the facts presented by the study thus far—on both theoretical and practical grounds. Methodologically, the categorization of certain initiatives as “conservative,” “liberal” or “other” appears too stereotypical for comfort—and sometimes also counterintuitive. For example, the subject “initiative procedures” is listed by the study in the “other” category, along with “medical insurance,” “term limits,” “smoking prevention,” “tobacco education,” and “campaign finance, disclosure.”<sup>217</sup> To some, most or all of the aforementioned causes might be liberal or progressive in nature, and not labeling them as such may have affected statistical outcomes. Moreover, the authors themselves highlight the fact that the classification of some of the subjects tagged as “conservative” or “liberal” may be disputed.<sup>218</sup> Second, we are not told, as a descriptive matter, why political ideology has been assumed to take precedence over other extra-legal considerations such as justice, morality, or the common good in a judge's hierarchy of internal decisionmaking.<sup>219</sup> In other words, the study's statistics may well be explained by extra-legal factors other than social policy views. Finally, we may wish to stop short of asserting that, in a battle between social-policy views of the people and the judiciary, the latter typically wins. After all, the same judges who pass on single subject matters also have regular cases on their dockets. Accordingly, the shadow cast over the former cases may well extend over the latter, thereby challenging judicial integrity wholesale. When alternative explanations may exist, and when

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215. See *supra* Part II.C; *infra* Appendix.

216. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 19–57 (2008).

217. Matsusaka and Hasen, *supra* note 27, at 36.

218. *Id.*

219. See, e.g., RICHARD A. POSNER, *supra* note 216.

the statistics themselves may be questioned, we may not necessarily want to assume the worst.

In addition to the theoretical reasons cited above, practical considerations may also counsel stopping short of designating political ideology as the exclusive motivation behind the judicial veto-gate effect. For starters, many initiatives are multi-faceted insofar as extra-legal considerations are concerned. It suffices to review only a couple of cases in Colorado in order to illustrate the point. For example, we can look at *Suits Against Nongovernmental Employers*, an initiative that allowed employees to sue employers despite workers' compensation laws.<sup>220</sup> It was proposed by a litigator who specialized in workers' compensation and personal injury cases,<sup>221</sup> and was challenged before the Colorado Supreme Court by a former Republican state representative turned "reform[er] [of] Colorado's workers' compensation laws," who became head of the Colorado Department of Labor and Employment soon after the above-mentioned case.<sup>222</sup> We might be prompted to make several inquiries, none of which may be solely dispositive of the outcome: whether the court was composed predominantly of Justices nominated by Democratic governors whose policy was pro labor;<sup>223</sup> whether allowing such lawsuits enhances the power of the legal profession and the courts; whether Colorado's workers' compensation laws at the time had a disparate impact on minorities; whether workers' com-

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220. *In re Proposed Initiated Constitutional Amendment "Concerning Suits Against Nongovernmental Employers Who Knowingly and Recklessly Maintain An Unsafe Work Environment"* (*Suits Against Nongovernmental Employers*), 898 P.2d 1071 (Colo. 1995) (en banc).

221. Initiative proponents were Neil D. O'Toole—of Dallas, Holland & O'Toole, P.C.—and Sharyn E. O'Toole. *Suits Against Nongovernmental Employers*, 898 P.2d at 1071. Neil O'Toole's experience includes "Workers' Compensation" and "Personal Injury." *Curriculum Vitae of Neil D. O'Toole*, LAW OFFICE OF O'TOOLE & SBARBARO, PC, [http://www.otoole-sbarbaro.com/ndo\\_cv.php](http://www.otoole-sbarbaro.com/ndo_cv.php) (last visited Dec. 31, 2010).

222. Vickie Armstrong is listed as the objector in *Suits Against Nongovernmental Employers*. *Suits Against Nongovernmental Employers*, 898 P.2d at 1071. In 1998, Armstrong was appointed by Colorado's Republican governor-elect as Executive Director of the Colorado Department of Labor and Employment. Press Release, Governor-elect Owens Transition Office, Owens Names Vickie Armstrong to Lead Labor Department (Dec. 23, 1998), [http://www.state.co.us/owenspress/transition\\_releases.htm#12/23](http://www.state.co.us/owenspress/transition_releases.htm#12/23). The press release hails Armstrong as leading "the fight to reform Colorado's workers' compensation laws." *Id.*

223. A list of justices present on the Colorado Supreme Court is available at <http://www.state.co.us/courts/sctlib/1995.htm>. Justices Anthony Vollack, Howard Kirshbaum, Luis Rovira, were appointed by Democrat governor Richard Lamm. Justices Mary Mullarkey, were appointed by Democrat governor Roy Romer. Justice William Erickson was appointed by Republican governor John Arthur Love.

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pensation laws were just when they deprived workers of plenary damages as determined by a court of law when they suffered injury as a result of negligent employer behavior; and the like.

We can also evaluate a more cited case, such as *Public Rights in Waters II*, where the measure would have prospectively changed property rights in non-navigable water streams, a disruption to Colorado's long-held property rights scheme.<sup>224</sup> Even before joining the Union, Colorado had adopted the prior appropriations doctrine for managing rights with regard to use of non-navigable waterways,<sup>225</sup> and the Colorado Supreme Court repeatedly declined to permit public interest concerns to interfere with private appropriations of water.<sup>226</sup> The court also declined to allow public access to non-navigable waters, unlike courts of other prior-appropriation states who built recreational use exceptions into their appropriations doctrines.<sup>227</sup> Legislative policies evidenced by state statutes support a similar view of water rights, weighed toward private appropriation.<sup>228</sup> A public trust would mark a significant shift in policy: it would not only allow public use (e.g., fishing, hunting, bathing, swimming, and recreation) of non-navigable waters, but also may require the state to ensure that waters are used for the benefit of the public rather than solely for private interests.<sup>229</sup> Such public-interest concerns could well involve conservationist considerations, such as preserving water levels and protecting wildlife species inhabiting the waters. One may also surmise that conflicts between conservationist and private interests, especially with regard to irrigation, could have negatively affected the state's agricultural economy. Perhaps the court believed that such wide-ranging policy changes should not be made via citizen initiatives or that such policies were detrimental to the interests of the people as a whole. Or perhaps such considerations had no bearing on the outcome. The latter thought might be supported by the court's ruling in a subsequent case that involved strictly the subject of a public trust.<sup>230</sup> In said case, the court upheld the petition, though the issuance of the decision in June<sup>231</sup> posed difficulties for qualifying the initiative on

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224. *In re Proposed Initiative for "Public Rights in Waters II"* (*Public Rights in Waters II*), 898 P.2d 1076 (Colo. 1995) (en banc).

225. *See generally* Wyoming v. Colorado, 259 U.S. 419 (1922).

226. *See* People v. Emmert, 597 P.2d 1025, 1028–30 (Colo. 1979) (en banc).

227. *Id.*

228. *Id.*

229. *See* JOHNSON, *supra* note 86.

230. *In re Proposed Initiative 1996–6* (*Public Rights in Waters III*), 917 P.2d 1277 (Colo. 1996) (en banc).

231. *Id.*

the ballot; consequently, the measure was not put before the voters that year.

But *Public Rights in Waters II* was not just about a public trust: the measure would also have changed how directors for water conservation and conservancy boards are selected.<sup>232</sup> At the time of the measure—and even now—the directors for water districts were not elected, unlike directors of other special utility districts. Instead, they were appointed by local judges.<sup>233</sup> Local citizens can request elections, but they must amass signatures equal to ten percent of the registered voters in the district.<sup>234</sup> To better understand the policy implications of switching to an election scheme permanently, we might ask several questions: whether local judges' power to appoint directors of water conservation and conservancy districts is an important status symbol for the judiciary; whether judges see appointment as a chore or as a privilege; whether the elected directors share the policy preferences, if any, of their appointing judges; whether an election model would result in directors who are more friendly to private appropriation interests rather than less; and the like. Again, one, many, or none of these considerations may have affected the outcome here.

While the aspects discussed above are somewhat teleological (i.e., highlighting conflicts with the purposes/ends of an initiative), there are also deontological considerations that may well influence single subject decisions. For example, instead of concluding that judges voted down a tax-reducing initiative because they disagreed with low taxes on ideological grounds, we may as well conclude that they rejected the initiative because of the means through which the petition sought to reduce taxes. For example, decreasing local taxes while forcing the state to replace revenue in a way that automatically cuts state spending is an improper means of cutting taxes because it burdens a state's sovereign discretion in spending for the general welfare. Equally invalid are petitions that force judges to automatically reach a specific result in single subject cases based on a formula. We have seen other courts, namely federal courts, react negatively to such incursions into their inherent powers of adopting appropriate rules of decision.<sup>235</sup>

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232. *In re Proposed Initiative for "Public Rights in Waters II"* (*Public Rights in Waters II*), 898 P.2d 1076, 1079 (Colo. 1995) (en banc).

233. Quillen, *supra* note 93.

234. *Id.*

235. See, e.g., *United States v. Klein*, 80 U.S. 128 (1871) (resisting Congressional attempts to prescribe rule of decision for federal courts in case involving legal significance of Presidential pardons).

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In sum, given the multi-faceted nature of every initiative, explaining single subject outcome statistics solely in terms of policy differences may be little more than polarized speculation. Over the past two decades, the United States has seen increased political polarization, at least in the political branches of our government—polarization that may have had deleterious effects for public governance.<sup>236</sup> We may well ask whether extending the polarizing shadow over courts—whose legitimacy may be rooted in fairness and political impartiality—is in society’s interest. It may suffice to raise the inference that a subject-matter vetogate exists and seek to redress it through various solutions rather than speculate further as to judges’ possible animating rationales.

G. *Final thoughts on Colorado’s case law*

In retrospect, the court may well have gotten it right in every case; had the court not stepped in, voters could have been fooled into adopting laws they did not wish. But just like “I know it when I see it” was not a workable jurisprudential test for the United States Supreme Court in obscenity cases,<sup>237</sup> it does not appear sufficient as a legal test in cases of direct democracy—a domain that the Colorado Supreme Court deemed a fundamental right<sup>238</sup> for Colorado citizens. Not only is the lack of a coherent test fuel for the fire of realists who allege that judges simply do what they wish,<sup>239</sup> it places the court in the undesirable position of being perceived as stifling the sovereign voice of the people. Moreover, it would also be ironic that voters, in an attempt to avoid confusing initiatives, had adopted a single subject provision that has turned out to be so confusing to implement.

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236. Richard H. Pildes, *Why the Center Does Not Hold in American Democracy: Persons, History, Institutions* (NYU Sch. of Law Pub. Law Research Paper No. 10–47, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1646989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646989) (noting that level of political polarization has increased in past two decades, at least in political branches of federal government).

237. Justice Potter Stewart’s concurring opinion in *Jacobellis v. Ohio* famously stated, with regard to the definition of obscenity, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity] . . . [b]ut I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

238. *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994) (en banc).

239. E.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

### III. SOLUTIONS

Though this Note's research is focused on Colorado, the solutions suggested in this part may well apply to many or all states that use single subject rules to check citizen initiatives. Before delving into solutions, the Note examines the traditional animating causes behind the single subject rule—i.e., fraud upon voters and patchwork legislation—in a critical light, and concludes that the traditional reasons may not fully justify the single subject rule as applied. The Note also posits that the rule is actually—or should be, normatively—a countermajoritarian check that regulates the level of burden that is foisted upon the state and its citizens via initiative. Based on this reframing of the rule, the Note evaluates two interpretive reforms: a well-defined, consistently applied prophylactic model, and a partially deferential tiered-scrutiny model. The latter model is more desirable because it balances republican and democratic ideals. The Note also mentions briefly two process solutions: an evidentiary model and a revision of the ballot. Because the latter ideas would likely require legislative changes at the state level, they are outside the scope of this Note's focus on interpretative theory, and are therefore discussed only summarily.

#### A. *The evils of fraud upon voters and patchwork legislation*

The two concepts of fraud upon voters and patchwork legislation are related, in that both involve the majority voting for something they do not want, but are analytically distinct: there can exist patchworked measures that are not fraudulent, fraudulent measures that have not been logrolled, and measures that contain hidden provisions so as not to detract significant numbers of voters. This Section will briefly evaluate what each term means, as well as identify the aspects that most need protection by a court, as a normative matter.

##### 1. Fraud upon voters

Voters can be misled through affirmative statements that turn out to be false or through omissions. With regard to initiatives, however, affirmative misstatements pose less of a problem, for reasons discussed herein.

It might be said that fraud is perpetrated upon voters through affirmative misstatements when a measure's clearly stated provisions have an effect that the voters do not want—e.g., the tax cut that reduces taxes and also has the effect of reducing state spend-

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ing, with the latter being undesired. Such an assertion is not analytically satisfying, because voters who do not want something need not vote for it;<sup>240</sup> in the end, this is a choice for voters, not courts. Moreover, the fact that voters do not like an outcome *ex post*, once a measure has been implemented, does not necessarily mean that they did not want the measure *ex ante*, at the time it was enacted. Invalidating a proposed measure simply because voters might not want the results (and do not currently realize their future discontent) turns the court into a paternalistic seer—a role that it might not be well equipped to fulfill. But even if it were, it is difficult to see how limiting a measure to a single subject would increase the likelihood that voters will like—and, therefore, want—the effects of the measure.

The more practical interpretation of fraud upon voters, then, is where a measure turns out to have an effect the voters did not expect. But even this description is too broad, because *ex ante* and *ex post* expectations are different, and the latter cannot normatively serve as a basis for single subject invalidation. Voters are not omniscient, and neither are judges; therefore, one cannot judge a measure by the possibility that the *ex post* effect could be different from the stated effect. Some measures could conceivably cause unexpected results not because the provisions themselves were unclear but because they were not implemented appropriately, or because another supervening cause changed the game. If a single subject rule were to protect against suboptimal implementation or supervening events, courts would again be in the position of paternalistic seers. Therefore, the only unexpected effect that is left to be protected in cases of affirmative misstatements is where the measure asserts that the law works in a certain way and, as a consequence of such operation, it will deliver a certain set of outcomes. But such situations are less problematic than they seem. Since initiatives create or change law, the supposed misstatement about the operation of a law should, in fact, serve to change the law so that it works the way in which it has been framed. This is, after all, what the voters understood the future to be. Courts can always give effect to voters' wishes and interpret enacted provisions in concert with the promised effects, achieving as much of the latter as possible. For the reasons mentioned above, affirmative misstatements do not appear to provide a compelling case for judicial protection.

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240. See Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463, 469 (2004) (noting that some voters reject initiatives "when information is lacking or when worries about general state conditions are greatest").

The second means of misleading voters, omissions, present a much stronger need for *ex ante* intervention. In reviewing a certain provision that is less than forthcoming about details, a voter might well make incorrect assumptions about substantive and procedural aspects, leading to unreasonable conclusions about the resulting effects of the measure. Since no affirmative statements are made, the law does not change to match any given voter's assumptions. Guarding against omissions may protect voters who are not knowledgeable about the law or who know the text of the law but misinterpret it. But this realization is only the beginning of the inquiry.

The next question that arises is, "When is an omission, in this context, a material omission?" For example, is there fraud upon voters if, despite the omission and incorrect assumptions by voters, the measure still has the effect that a reasonable voter wants it to have? In an omission context, it is difficult to determine what a reasonable voter wants, because different voters have diverse reasons for approving a measure. For example, some citizens who want higher taxes may desire an increase in social programs, defense programs, or infrastructure-building programs. Others might desire higher taxes so that government may employ more of its citizens, regardless of what programs are enacted. Still others might intend higher taxes to narrow the gap between rich and poor. The fact that a measure results in higher taxes does not necessarily mean that the effect voters wanted has been achieved. The same holds true for a mirror-opposite provision: cutting taxes. Some might want lower taxes so that they may keep more of their income. Others might simply want to direct some of their tax cut dollars to different activities than those funded by the government. Still others may want to cut certain taxes because they believe the government should not be in a certain business, but might be fine with raising taxes, as a compensating measure, for other areas they support. Therefore, a reduction in certain taxes does not necessarily effectuate the policy causes voters may have thought they were supporting.

According to the observations above, asserting that an omission is material if it can reasonably lead to a different outcome may seem to not account for the diverse outcome expectations of voters. However, outcome is relevant. For example, assume a scenario where every outcome desired by every approving voter materializes. In such a case, omissions are irrelevant—at least from a substantive perspective—because every voter realized the result he wanted. Since single subject analyses are conducted prior to any measure taking effect, however, we must develop a definition of outcome-oriented materiality that can be applied *ex ante*. Such a definition

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might read thus: “An omission is material if it leads a voter to *reasonably expect* a larger or smaller *set* of *probable* outcomes from the measure as compared to the set expected if the omission had not existed.”

The above definition does not treat as material those omissions that do not change the probable set of outcomes, because even laws drafted with the utmost precision may conceivably be interpreted differently by different, equally competent legal scholars. In fact, we see this variability take place in state and federal appellate courts across the nation whenever judgments are not unanimous—especially in close cases where one judge’s vote determines the outcome. Therefore, even the most competent voter need not (and, if the above assumption is correct, cannot) understand the exact effect at which the law aims: only the range of probable effects can reasonably be understood. It is up to the voter, then, to determine whether to take the risk and approve a measure whose effects would fall in said range. As long as the omission did not hide the set of reasonably probable effects, it should not be material.

We might ask whether a measure violates the materiality rule above if it implies, by omission, a larger set of outcomes than will reasonably occur. One may argue that since voters approved a broader set of outcomes and no voter can be certain about which outcomes will be effected during implementation (as long as all of them are reasonably probable), voters cannot complain if the actual outcome set is narrower. For this argument to hold, further refinement of the term “outcome set” is needed. An outcome set is a group of one or more outcomes, and an outcome is a combination of a bundle of benefits and their attending costs. For example, a \$25 tax cut (benefit) and a resulting reduction in educational programs (cost) represent a simple outcome. A complex measure has many outcome combinations, some of them complex; it is likely that voters do not analyze all combinations systematically. However, as long as voters understand that any of those outcomes are fair game, where is the complaint?

Voters, like all decisionmakers, base their decisions not only on the knowledge that a certain outcome might win, but also on the probability that a certain outcome will win. This is one reason why the materiality definition proposed by this Note includes only reasonably probable outcomes, not all possible outcomes. In a reasonably probable scenario, every outcome has roughly the same chance of taking effect. When voters approve a larger outcome set, some of them could well be rooting for the outcomes that turned out to be falsely implied, even though they realize that other outcomes have

an equal probability of selection. Due to the omission, however, some outcomes actually had a 0% probability of selection while others had a higher probability on account of the smaller element set. As a result, some voters were misled into approving an outcome set that was rigged: some voters' choices were never going to materialize as a result of the omission. Given such false expectations, the omission should be deemed material in this case.

An inverse question also arises: "Do omissions that cause a larger-than-expected outcome set violate the materiality rule?" This analysis is much more straightforward. Since some of the outcomes present in the larger set could have been considered undesirable by voters who voted for the smaller set, the omission deprived such voters of the opportunity to vote against the measure. Consequently, the omission is material.

Finally, it is important to distinguish the concepts "voter confusion" and "fraud upon voters." Though omission of material information can be confusing, voters can just as easily be confused by correct affirmative statements that appear to conflict with other correct statements. Voters can also be confused by correct, non-conflicting statements that are nonetheless complex and cognitively difficult to process, such as complex processes, formulas, and the like.<sup>241</sup> That said, one should question whether invalidation of a measure by courts is the best remedy for voter confusion that arises from conflicting or complex statements. Voters can always reject a measure if they believe that the language does not allow them to form a reasonable set of expectations about the measure's outcomes.<sup>242</sup> Therefore, initiative drafters are (or should be) intrinsically motivated to write provisions so that they are neither conflicting nor overly complex. Moreover, unlike in the case of omissions, in which voters may not realize that information has been omitted, voters are aware of the potential conflict or the cognitive difficulty they experience while reading confusing affirmative provisions. As such, voters should decide whether to take the risk of approving the measure, or instead reject it and maintain the status quo. By taking away voters' freedom to choose, a court is not only treading the separation-of-powers line, but is also discounting the ability of voters to make decisions. As several studies have observed, voters may be more competent than critics of direct democracy contend; for example, voters sometimes use extra-textual information, such as knowledge about a measure's supporters, to decide

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241. *See generally id.* at 467–469 (noting that voters can be confused by complex propositions, such as proposed initiatives that regulate insurance industry).

242. *Id.* at 469.

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whether to vote for a complex measure.<sup>243</sup> Accordingly, as long as voter confusion is not due to a material omission, a court need not interfere.

The counterargument with regard to conflicting and complex provisions is that voters may well take the risk, misinterpret the provisions, and enact a law that creates outcomes they did not expect. It naturally follows that someone should protect voters from such a possibility. Perhaps this is so, but then voters or the legislature should explicitly empower the courts to do this. When empowerment has been extended only to single subject regulation—not to clear language regulation<sup>244</sup>—voters and their representatives may well have wanted to reserve to the people the right to deal with situations such as the one mentioned above. When courts reframe single subject *sua sponte* and extend its reach beyond language clarity, they might be seen by some to engage in self-empowerment.

The preceding answer is not fulfilling in cases where voter risk-taking on interpretation could result in significant unexpected burdens on the state and its people: there are some risks that we may not trust the demos to take, even if it wanted to—risks that lead to discrimination, for example. But legislators arguably misinterpret provisions all the time—and yet no one suggests using the single subject rule for bills to strike down proposals that result in significant unexpected burdens. Why should the single subject rule operate differently where the legislators are average voters instead of professional politicians? Since one can never be certain about how many politicians base their votes for a bill based on a personal review of its text, we need not compare the cognitive aptitude of the average voter and the politician; in the eyes of the law, they are equally capable legislators.<sup>245</sup> The difference instead lies in the institutional practices surrounding legislative bills versus petitions. When legislators realize that they have misunderstood certain provisions, they can attempt to amend the law and clarify it with much greater ease than initiative petitioners.<sup>246</sup> As discussed at the beginning of this Note, many roadblocks stand in the way of petitioners making amendments. Given this process disparity, courts may be

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243. *Id.* at 467–70.

244. As an aside, Colorado voters had enacted a form of the clear language rule, but the discussion in this part of the Note is state-agnostic and contained to the single subject theme.

245. See Lupia & Matsusaka, *supra* note 238, at 467–70 (noting that voters for ballot initiatives often successfully use extra-textual cues—such as political signals and interest-group preferences—to decide how to cast their vote).

246. Whether legislators can obtain majority support for such changes post-enactment is another story.

justified in imposing—*sua sponte* if need be—a clear language rule for initiative measures whose effects are substantial. The Note adopts this view in the solution proposed below in Part III.B.2.

## 2. Patchwork legislation

Another evil that the single subject rule professedly combats is patchwork legislation. The most prevalent form of this is logrolling, a practice whereby multiple measures that are each popular with a separate minority voter group—minority here meaning popular minority—are combined into one petition that gains majority support through aggregation.<sup>247</sup> A second, analytically distinct practice is riding, whereby an unpopular measure is combined with an overwhelmingly popular measure in order to pass.<sup>248</sup> Protecting voters from both of these bad practices is said to be virtuous because it allows passage only of measures that gain majority support independently.<sup>249</sup> Any claim to virtuosity deserves a closer look. What exactly are we trying to avoid and why?

This Note argues that the goal of preventing patchwork legislation should be solely to avoid costs imposed by one group of citizens over another. The terms shall be used as follows in this context. Costs refers to both fiscal burdens as well as psychic burdens imposed by regulating behavior or otherwise limiting freedom. A popular minority is any group whose preferences with regard to a unitary, single subject measure are the opposite of the popular majority.

Logrolling and riding will be examined in turn. Two variants of logrolling exist. The first involves two (or more) completely unrelated measures that are merged into one.<sup>250</sup> A hypothetical scenario is illustrative. Assume two measures, X and Y. Each measure is supported by a separate popular-minority group; for the sake of simplicity, let us assume that each group represents 26% of the population. Let us also assume the worst-case scenario: if each group brought its measure independently, the measure would receive 26% yes votes (representing the sponsor group) and 74% no votes (representing everyone else). The no votes may be dominated by a wide range of factors, including political animosity and ignorance. But in a world where voters are rational, self-interested actors, the strongest motivator might well be self-interest: the nays receive no benefit from the measure while having to bear some or

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247. Cooter & Gilbert, *supra* note 70, at 706.

248. *Id.* at 707 & n.99.

249. *Id.* at 714–718.

250. *Id.* at 706, 713.

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all of the costs. Let us also assume that the two groups decide to compromise—which often happens in a pluralistic society—by merging measures. Together, the two groups represent an ad hoc majority of 52%, and by voting for the measure can obtain the benefits of their respective provisions while shouldering only part of the burden (if any). The remaining 48% of the population is left to shoulder much of the burden without receiving any benefit (worst-case scenario). Does this hypothetical present a problem in which courts should interfere?

One answer is that the hypothetical cannot be meaningfully distinguished from the scenario where a unitary measure that conforms to the single subject rule passes by a 52% yes vote. The latter measure can also result in 48% of the population shouldering much of the burden without receiving any benefit.<sup>251</sup> Is there a significant difference? If not, then both single subject and multi-subject measures can suffer from the same substantive evil: namely, unbalanced apportionment of benefits and costs among the population.

One may imagine that in the second hypothetical, the cost may well be less than if the two disparate measures had been combined. However, the costs are measure-specific, and there is no necessary connection between the number of subjects and the resulting costs. Moreover, the second hypothetical benefits the same percentage of people as the first, albeit through one set of provisions instead of two. In a situation where the per capita benefit, regardless of measure, is fueled by one unit of cost, the cost may well be similar in both situations since the magnitude of the benefit (population-wise) is the same. Granted, these are hypothetical situations with theoretical measurements, which means that real life might well be different. Nonetheless, they serve to point out that logrolling in the abstract is not necessarily the evil that it may be painted as being.

Another type of logrolling is micro-logrolling, whereby initiative proponents add implementation details to a single subject measure in order to accumulate voter support.<sup>252</sup> Unlike macro-logrolling, which involves disparate measures, this one simply piles enhancements onto a single subject proposal to make it more attractive. Take, for example, the \$60 tax credit found by the Colorado Supreme Court in *Amend Tabor 32* to have satisfied the single

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251. Granted, there are often trickle-down benefits from any measure in real life, but this does not distinguish the two scenarios: both can have trickle-down benefits to the nays.

252. See Cooter & Gilbert, *supra* note 70, at 712 (“Logrolling can take place within a measure that embraces one logical subject.”).

subject requirement.<sup>253</sup> The credit was applied to six different taxes.<sup>254</sup> One could argue, as the Note did earlier, that a ten-dollar (or even a 60-dollar) credit applied to one type of tax may not have gathered sufficient support, since the individuals who would have qualified for one type of tax may not have been numerous. Hence, initiative proponents may well have simply ratcheted up the number of taxes (and, perhaps, even the credit amount) until they reached figures they believed were attractive to a majority. There appears to be no analytical difference between this type of logrolling and the kind mentioned earlier in this section provided that both turn minority measures into majority ones.

Riding is a different type of problem. A rider provision is never needed to compromise, because the provision on which it rides has enough majority support by itself.<sup>255</sup> However, some riders may, in fact, be a form of implementing the common good; not all riders are detestable. Assume, for example, the hypothetical where two proposals, X and Y, are supported by 70% and 30% of the population, respectively. In the combined measure XY, Y is the rider; X would pass independent of Y. Assuming that the combined measure passes with close to 100% vote, it represents a desire of the majority to ensure that everyone gets a benefit, not just the supporters of X. In this sense, riders have the potential of bringing society together and, in a way, compensate Y supporters for carrying part of the burden for X (which they would have carried anyway even without receiving any benefits). Automatic exclusion of riders, therefore, can lead to a polarized society: a negative outcome if one's goal is to avoid the tyranny of the majority.

There is also at least one scenario that, while it might appear to represent logrolling or riding, it is neither: a multiple subject measure in which most voters have inseparable preferences for all subjects.<sup>256</sup> Assume, for example, a measure containing two disparate provisions: R and S. (We will call the measure RS, for simplicity). Let us also assume that the same voting bloc who prefers R also prefers S, and that bloc represents 60% of the population. We may also assume that a separate voting bloc, accounting for 20%, prefers only measure S, but would nonetheless vote for RS. Even if the votes of RS would rise to 80%, RS would pass regardless of whether the separate 20% bloc supports it or not; as such, combining the mea-

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253. *In re Amend Tabor No. 32 (Amend Tabor 32)*, 908 P.2d 125 (Colo. 1995) (en banc).

254. *Id.* at 131.

255. Cooter & Gilbert, *supra* note 70, at 707 n.99.

256. *Id.* at 717.

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asures was done for purposes of efficiency, not passage. Therefore, RS is not a logrolled measure. Moreover, neither R nor S is a rider, because each has the support of 60% of the population. A purely analytical single subject test may treat RS as presumptively logrolled, whereas a test that permits evidence to be brought with regard to support levels for any given provision might be better tailored to separate such situations. This Note recommends such a test below in Part III.C.1.

As a final thought, perhaps the problem with logrolling and riding is not the majoritarian aspect, or the costs upon those who do not receive benefits, but rather the enormity of the burden on the population as a whole from logrolled measures. In Colorado, for example, the single subject rule was passed after TABOR was enacted under a process unrestricted by said rule. TABOR changed procedural and substantive aspects of both state revenue and state spending activities. Given the significant change foisted upon state government through such a comprehensive measure, the operative lesson that gave birth to the single subject rule<sup>257</sup> appeared to be “Never let another measure effect this scale of change upon the polity as a whole,” not “Never let an ad-hoc majority burden everyone else.” Therefore, we may reasonably conclude that what the people are trying to do when enacting single subject rules is to prevent large-scale burdens from being foisted upon the state and its people via initiative. The tiered scrutiny model proposed in Part III.B.2 satisfies this goal more directly than other models.

Having discussed the concerns that a state should address through judicial review of initiatives as a normative matter, we turn now to evaluating several solutions.

*B. Interpretive frameworks*

1. The prophylactic model

One’s instinct might well suggest that narrowly drawn measures will typically impose limited burdens on the state and its denizens; therefore, the ideal model might be one that aggressively and consistently screens out all but the narrowest measures. To attain its prophylactic effect, the model will necessarily need to be over-inclusive, and cannot draw the fine-grained distinctions discussed in above. Borrowing from the interpretative layer applied to Colorado’s case law, as well as some of the earlier discussion on judicial protection, the model calls for several elements/prongs to

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257. Ironically, the single subject rule locked in TABOR and made it un-repealable by a single initiative, but that is another story.

be met in order for a measure to be deemed as comprising a single subject:

1. *fine-grained subject specificity*—the level of acceptable specificity depends on what a reasonable voter deems to be the lowest-level subject that logically results from the measure.<sup>258</sup>
2. *necessary connection*—each of the provisions of the measure must have a necessary connection with the central theme of the measure and with each other.<sup>259</sup>
3. *single object*—the measure must affect only one object; an object represents the logical target which the provisions of a measure aim to affect.<sup>260</sup>
4. *related effects*—provisions that cause multiple unrelated effects on a single object are presumptively dealing with multiple subjects.<sup>261</sup>
5. *procedure vs. substance*—provisions that deal with the procedure of a central theme are presumptively dealing with a separate subject than those dealing with substantive aspects of the same theme.<sup>262</sup>
6. *material omissions*—any measure that omits information which leads a voter to reasonably expect a larger or smaller set of probable outcomes is presumptively dealing with multiple subjects.<sup>263</sup>
7. *clear statement test*—a measure must be stated in clear language that can be understood by a lay person; otherwise, the measure will be invalidated as a prudential matter.<sup>264</sup>
8. *exhortative statements*—must be only loosely related to the central theme.<sup>265</sup>

The difficulty with such a rule is manifold. First, if single subject was meant to be a scalpel that excised only initiatives that were logrolled or those that defrauded or misled voters, then the rule as devised above would be more of a chainsaw. It fails to differentiate between simple measures that cause clearly understood changes to a variety of government functions, and multi-faceted measures that are difficult for average voters to grasp but nonetheless change only one narrow aspect of government operation. Second, the rule thus

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258. *See supra* Part II.C.4.

259. *See supra* Part II.C.2.

260. *See supra* Part II.C.3.

261. *See supra* Part II.C.5.

262. *See supra* Part II.C.6.

263. *See supra* Part II.C.5.a.

264. *See supra* Part II.C.5.

265. *See supra* Part II.C.7.

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defined would prevent comprehensive measures with broad effects from being passed by initiative, regardless of what band(s) in the political spectrum proponents may occupy. Third, such a rule would also place courts in the sensitive position of stifling the voice of the people (rather than channeling said voice), thereby raising separation-of-powers and democratic concerns. In states with direct democracy, the people are essentially a fourth branch of government with legislative power; stepping too far over the line to limit popular legislation may have significant repercussions even for apolitical courts.

In its defense, the model is clear and, if applied consistently, would not suffer from the perception that courts act as judicial vetogates for policy. If the people wish to change it, they may do so through their legislature, a branch toward which a court may offer greater deference. A transparent and consistent model would be, after all, easy to understand and easy to change if desired.

## 2. Tiered scrutiny model

The uniform model described above can be much improved by a tiered scrutiny framework. The latter would vary the level of judicial scrutiny of a measure proportionally with the burdens the measure seeks to foist upon the state and its people. Unlike the prophylactic model, tiered scrutiny recognizes—as the Colorado Supreme Court recognized—that the people’s right of initiative is a “fundamental right.”<sup>266</sup> As with other fundamental rights—most notably those present in the federal constitution—the right of initiative should be neither absolute nor erased by overly deferential or overly oppressive judicial tests. Instead, the burdens imposed on the right must be weighed in light of the burdens the right itself imposes on other fundamental rights of the people.

### (a) Rational Scrutiny

The court should give the greatest deference to measures that are entirely hortatory; impose minimal burdens on citizens’ non-fundamental rights; impose minimal burdens on functions of state or local government that are not traditional functions of government; or create new non-fundamental rights for citizens. Under this level of deference, measures are presumed to contain a single subject unless their provisions relate to multiple themes that are not logically related. The themes can be construed broadly (i.e., no

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266. *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994) (en banc).

specificity requirement), which means that most measures would pass this level of scrutiny.

The rationale for applying this level of scrutiny in the situations above is that the costs of a measure that meets the above criteria are typically minimal. If the goal of the single subject rule is to prevent substantial cost from being foisted upon the people and their government via initiative, as postulated by Part III.A, then the goal is not defeated by this approach. Instead, the societal benefit of allowing the people to shape the environment in which they live without roadblocks from courts would outweigh the minimal burdens that may be imposed if the measure passes.

(b) Intermediate Scrutiny

Intermediate scrutiny should be applied to measures that: impose minimal burdens on fundamental rights of citizens; impose substantial burdens on non-fundamental rights of citizens; impose minimal burdens on traditional functions of state or local government; or introduce new fundamental rights for the people.

Given that such measures begin to ratchet up costs for the people as a whole and for their government, a variety of checks—borrowing from the arsenal highlighted in the prophylactic measure—can ensure that the costs are not out of line with the common good. The costs here are burdens on people's non-fundamental rights and, to a lesser extent, the minimal burdens on fundamental rights and the state. Clear expectations are critical to ensuring that voters understand what they would be taking on. Therefore, a clear statement test should be adopted as a prudential matter. An effects test may also be employed to further the same purpose: multiple unrelated effects on the same object—where object is defined by the right or state function being burdened—may be deemed to constitute different subjects. Furthermore, the necessary connection test should also be applied, whereby multiple provisions must be necessarily related to the main theme of the measure and to each other. This test would ensure that the burden is reasonably narrow, localized, and clear. If a measure meets these tests, its burdens will likely be limited, and voters should be permitted to organize for or against it at the polls.

(c) Strict Scrutiny

The strictest scrutiny should apply to measures that: impose substantial burdens on fundamental rights of citizens; impose substantial burdens on a traditional function of state or local government; or represent an overhaul of the state constitution. The full

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array of tests described in the prophylactic model should be applied here<sup>267</sup> in order to ensure that only a narrow set of fairly localized majoritarian measures are put before the voters. Otherwise, the state risks a significant disruption in operation and stability—a disruption that might have much greater negative effect on the majority than the benefit gained by passing such a measure. Given its power, the strict scrutiny test should be reserved for the largest of burdens; otherwise, the same criticisms may be lodged against it as apply to the prophylactic model.

(d) The value of an interpretive model

However satisfying an interpretive model might seem from a formalistic perspective, why should we assume that it will eliminate the judicial vetogate effect? Perhaps if courts simply adopted a generally deferential stance toward petition initiatives, the “judicial vetogate” effect would disappear, or at least be less pronounced. Such an approach is proposed in a recent study by Professors Matsusaka and Hasen.<sup>268</sup> The study suggests that judges in states with restrained enforcement of the single subject rule (i.e., deferential toward initiatives) are less likely to strike down initiatives due to partisan leanings.<sup>269</sup> Accordingly, the study suggests that “the most effective way to promote objectivity may be to adopt a restrained approach rather than to seek additional interpretive ‘tests’ that operationalize the concept of a single subject.”<sup>270</sup> The suggestion of deference appears appealing, especially if we assume that judges are unconstrained by restrictive interpretive frameworks.<sup>271</sup> The tiered scrutiny model is compatible with the Matsusaka/Hasen pure deference theory at the first tier (i.e., rational scrutiny). However, the two models may be in tension as the weight of an initiative’s burden on a state’s functions or its citizens’ liberties increases. Hence, the question is whether the tiered scrutiny model offers any advantages at this heightened level of burden, as opposed to the pure deference theory.

In addressing the question, this Note makes two assumptions about the pure deference theory. First, the theory would uphold an

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267. See *supra* Part III.B.1.

268. Matsusaka & Hasen, *supra* note 27, at 4; see also *supra* Part II.D.

269. Matsusaka & Hasen, *supra* note 27, at 4.

270. *Id.* at 5.

271. See Daryl Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment* (2010) (unpublished working paper), available at [http://ssrn.com/abstract\\_id=1577749](http://ssrn.com/abstract_id=1577749) (addressing question of why constitutional rules would have staying power in light of fact that they can be “reinterpreted” if different substantive results were desired in certain situations).

initiative that significantly burdens the state or its citizens, as long as the initiative does not make the mistake of blatantly aggregating clearly disparate subjects.<sup>272</sup> Second, we cannot rely on popular majorities to reject burdensome initiatives, even though many initiatives that are allowed on the ballot are not eventually approved by voters. Therefore, if the court is deferential, a burdensome initiative may well become law.

Before continuing, it is worthwhile to acknowledge that distinguishing between minimal, reasonable, and heavy burdens is no easy feat. The Supreme Court of the United States has itself wrestled with the issue in election contexts.<sup>273</sup> Though there is no bright-line rule for evaluating burdens, courts can establish a variety of *per se*, evidentiary, and presumptive rules that simplify the process somewhat.

Assuming that burden can be reasonably defined, the pure deference theory's failure to distinguish between heavy and reasonable burdens is problematic. The first challenge is that a deferential approach may drain the single subject requirement of independent vitality. Inasmuch as a state's citizens passed such a provision to tie themselves and their followers to the mast in the future and limit the scale of change brought about in a single initiative, deference may well serve to loosen the ropes. Second, a deferential approach may relegate courts to the role of rubber stamping popular petitions rather than engaging in meaningful judicial review of popular legislation. Our Founding Fathers realized the risks inherent in unchecked majorities,<sup>274</sup> and aimed to protect against such threats by establishing certain countermajoritarian devices, including judicial review.<sup>275</sup> Inasmuch as we extend their wisdom from the federal to

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272. California and Washington, cited by Matsusaka and Hasen as having a "deferential" approach to single subject challenges, uphold initiatives 94% and 91% of the time, respectively. Matsusaka & Hasen, *supra* note 27, at 19. Since the study does not discuss the substantive content of the initiatives that were struck down under the deferential approach—and does not suggest using "burden" as a differentiating factor—we may be justified in assuming that deference may serve to uphold a burdensome initiative.

273. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Burdick v. Takushi*, 504 U.S. 428 (1992).

274. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure." *THE FEDERALIST* NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

275. *See id.* ("There are but two methods of providing against this evil[, one of which involves] . . . comprehending in the society so many separate descriptions of

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the state context—a move that may not be unreasonable in light of the Guarantee Clause<sup>276</sup>—we can understand the single subject rule to be a countermajoritarian check rather than simply a drafting device. A purely deferential application of this rule may serve to annul such a check, thereby potentially leaving the door open to the same risks at the state level that Madison envisioned federally, resulting in significant harm to popular minorities.<sup>277</sup>

Aside from protecting minority rights, we may also ask whether courts should protect the majority from its own folly in cases where governors and legislatures are legally prohibited from interfering with popular will. For example, the chief justice of the California Supreme Court, Ronald M. George, criticized the state's direct-democracy process in 2009, blaming it for "rendering [California's] state government dysfunctional."<sup>278</sup> Justice George criticized the effects of the initiative and referendum process on civil rights as well as on the state's ability to function in the face of economic challenges.<sup>279</sup> Perhaps suggesting that the courts should protect the majority from itself gives the court much more authority than it should have, especially since the majority can easily reverse itself during the next ballot cycle. However, we may ask whether a stable legal order, which is within the province of the courts, deserves protection from the whims of popular legislative will. The pure deference theory's silence on the foregoing issues does not necessarily make the model undesirable; it simply causes us to hesitate before embracing it uncritically.

In contrast, a tiered interpretive model that increases judicial scrutiny proportionally to the societal burden of an initiative enables courts to play a prudential countermajoritarian function while enhancing legitimacy through transparency and notice.<sup>280</sup> While an interpretive model can, in theory, be molded by partisan judges to fit a desired policy outcome in every case, we cannot say with cer-

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citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.”).

276. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).

277. See Cooter & Gilbert, *supra* note 70, at 700 (noting that in initiative context, “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”).

278. Jennifer Steinhauer, *Lead Judge Denounces State's Glut of Measures*, N.Y. TIMES, Oct. 10, 2009, at A23.

279. *Id.*

280. See Claire R. Kelly, *Institutional Alliances and Derivative Legitimacy*, 29 MICH. J. INT'L L. 605, 609 (2008) (discussing legitimacy in non-judicial context).

tainty that such a model is toothless or useless. At a minimum, it can increase the political and legitimacy costs of jurisprudential sleight of hand due to the more transparent nature of a structured interpretive model,<sup>281</sup> thereby limiting deviations from prior applications of the model to cases that are worth the cost. Moreover, since many state judges are either elected or subject to a retention vote, a track record of manipulating a legal rule illegitimately—a record that is more clearly perceived when the legal rule has a well-defined formalistic structure—may have some moderating effect. Furthermore, a clear rule provides notice to petition sponsors, conceivably increasing the likelihood that initiatives will be crafted so that they have a predictable chance of at least getting on the ballot. Finally, if rejection of an initiative is unavoidable, a clearly defined interpretive rule will shift this undesirable task to political branches (such as the Title Board in the case of Colorado) and away from politically impartial courts.<sup>282</sup> This will, at a minimum, protect the legitimacy of courts against charges of political partisanship. In sum, while an interpretive solution is by no means perfect, it may be more desirable than a purely deferential approach.

### C. *Process solutions*

An interpretive model is not the exclusive method for fulfilling the precepts of the single subject rule. In fact, solutions that incorporate statistical evidence or that allow for alternative ballot structures might enhance the interpretive exercise or replace a purely analytical model wholesale. Two such solutions are briefly mentioned below.

#### 1. Evidentiary model

Unlike an analytical model that is based on textual analysis, an evidentiary approach uses actual voter behavior to inform courts whether a given petition violates the single subject rule. Under this model, objectors to a petition must establish by a preponderance of the evidence that the measure is guilty of the evils the objector

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281. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1991) (plurality opinion) (“A decision to overrule [precedent would be done] at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”).

282. In Colorado, the Title Board is supposed to not place a measure on the ballot if the measure violates the single subject rule. Other states likely have a similar procedure. If the single subject jurisprudence featured a clearer test, the Board may be forced to perform the “dirty work of invalidating violative initiatives, rather than such work being handed off to the courts.

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claims—evils such as logrolling, riding, voter confusion, and fraud upon voters. Evidence can consist of polling data, historical statistics from other states, and past ballot results in the state. Petition proponents can bring their own evidence to persuade the court otherwise. Given that different types of scenarios exist that might only appear to be impermissible—but upon closer inspection are not, as discussed in Part III.A above—evidence would help the court make a decision that better comports with reality.

An extension of this model could well involve putting questions of fact to a jury, especially for claims involving fraud on the voters. Since the issue in such claims is whether voters are misled as to the effects of a measure, what better mechanism to determine the views of the average voter than a jury.

## 2. Revising the ballot

Another way to resolve challenging measures is to shift the last word from the court to voters. A court may identify the different subjects in a convoluted measure, for example, or prompt a petition supporter to clarify the text in a certain fashion. Once that happens, voters can be allowed to vote for each separate subject or provision of the measure rather than require voting at the petition level. Whichever provisions or subjects obtain a majority vote are enacted, and the rest are not. This approach is the functional equivalent of separating one petition into mini-petitions that meet the single subject test. A methodology is still needed to define how to parcel out the provisions; this Note suggests that either the tiered scrutiny model or the evidentiary model could serve this purpose.

One might observe that revising the ballot will not necessarily address the issue of burdens imposed by petitions: voters may well vote the costliest mini-petitions into law. Like the evidentiary model, revising the ballot aims to faithfully implement the underlying formalistic evils—such as logrolling and fraud upon voters, but not burdensome initiatives—that the single subject rule facially aims to eliminate.<sup>283</sup> When presented with mini-petitions, voters will at least realize that they can choose how much change to effect.

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283. This Note does not presume to decree with certainty that only one policy motivates the single subject rule in every jurisdiction. Accordingly, the Note presents different solutions that are more closely hewn to meet different policy interests.

#### IV. CONCLUSION

Unlike other issues where people take to the streets in protest of judicial restrictions on citizen rights, there have not been too many riots, tea parties, or marches against judicial application of nebulous single subject rules. Moreover, petitions are making it to the ballot in nearly every state that permits direct democracy; although many are rejected, some are approved. Even after the single subject rule was adopted in Colorado, for example, measures have been approved by voters on such controversial topics as campaign finance, the minimum wage, marriage, corruption, medical marijuana, school funding, abortion, term limits, and the environment.<sup>284</sup> What's more, citizens in little more than half of U.S. states do not even have the means to pass laws or constitutional amendments through initiative, and yet they still survive and flourish.<sup>285</sup> Accordingly, one may counsel leaving well enough alone: citizens are passing some measures, the judiciary and statutory restrictions keep things under control, and all is well. Why should anything change?

Many may have said the same about other aspects of jurisprudence. No one was marching asking for expanded rights for criminal defendants, even though everyone knew that many states' practices had a disparate oppressive impact on racial and ethnic minorities. There were no tea parties demanding "One person, one vote," though it may have been apparent that districting practices were keeping incumbents in power despite their falling out of touch with voters' needs.<sup>286</sup> There were no riots before the passage of the right of initiative in the 24 states that have it. Yet each and every improvement to the legal and political system mentioned above became, over time, ensconced in fundamental jurisprudence as a mechanism to empower citizens.

Revising the application of the single subject rule, though less momentous than the aforementioned examples, serves important societal functions. In a nation where partisan politics has resulted in increased polarization,<sup>287</sup> political frustration can arise in states where both the executive and legislative branches are captured by

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284. *Colorado Ballot Issue History (By Year)*, COLO. GEN ASSEMBLY, <http://www.leg.state.co.us/lcs/ballothistory.nsf/> (last visited Jan 1, 2010).

285. Twenty-six states do not have initiative processes. See INITIATIVE AND REFERENDUM INST., INITIATIVE USE (2009), <http://www.iandrinstitute.org/IRI%20Initiative%20Use%20%281904-2008%29.pdf>.

286. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

287. Pildes, *supra* note 234.

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one political party. Allowing losing party members to leverage the initiative process without undue interference from courts restores some of the political balance and gives concerned citizens the ability to pursue policy goals refused by the legislature. Moreover, clearly articulated rules allow citizens to plan and coordinate their grassroots movements with reasonable certainty. Unclear rules, on the other hand, may demoralize citizens and diminish political participation. They also position the judiciary as yet another government roadblock that stifles the voice of the people. Furthermore, balanced and consistently applied rules also increase judicial legitimacy,<sup>288</sup> promoting the courts as fair, apolitical adjudicators of issues that are, by their nature, political. They also allow people to fully realize the political rights their states have recognized, especially people who do not have sufficient economic resources to influence state legislatures—the same insular minorities that *Carolene Products*<sup>289</sup> brought to our attention. Finally, inasmuch as initiatives aim to unclog legislative roadblocks and lessen political corruption, limiting initiatives through obfuscated or oppressive rules fails to succeed in either respect, while at the same time furthering the notion that courts are simply kowtowing to the interests of the legislature.

In the end, this Note does not advocate leaving laws, constitutions, and the good of the people as a whole to the unfettered will of voters who can change the dynamics of a state through an undeliberated push of the button—or press of a stylus—every year or two. As Jean-Jacques Rousseau noted about popular majorities, “*The people is never corrupted, but it is often misled, and only then does it seem to will what is bad.*”<sup>290</sup> Limiting substantial burdens on people’s rights or on the government’s ability to fulfill its traditional responsibilities is part of America’s venerable political tradition of trying to avoid the tyranny of the majority. In a nation that believes in separation of powers as a means to a stable society, popular legislative power—when appropriately channeled—may serve to further the common good and correct the machinery of representative government. In the end, however, it is representative government—with all of its institutional machinery, compensating measures, and expertise—that is the most resilient means of coordinating across large masses: the means guaranteed by our Constitution to the states. Direct democracy, however valuable, can only be a pressure

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288. See *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1991) (plurality opinion).

289. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

290. ROUSSEAU, *supra* note 6, at 72.

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valve. This Note thus ends as it began, with Rousseau's admonition that "if there were a nation of gods, it would govern itself democratically. A government so perfect is not suited to men."<sup>291</sup>

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291. *Id.* at 114.

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APPENDIX A:  
COLORADO'S CASE LAW ON INITIATIVES, 1995-2009

BALLOTED	INIT.#	CASE	REPORTER	YR	DATE	THEME	Struck down Initiative	No explanation	Single subject	Misleading initiative	Misleading title/summary	Catchphrase	Conflicting titles	Board jurisdiction	Procedural	Inadequate impact stmt
1995		In re Title, Ballot Title and Submission Clause, and Summary for Proposed Initiated Constitutional Amendment Concerning Suits Against Nongovernmental Employers Who Knowingly and Recklessly Maintain an Unsafe Work Environment. (en banc)	898 P.2d 1071	1995	06/30/1995	Employment	0									
1995		In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Board Pertaining to a Proposed Initiative Public Rights in Waters II (en banc)	898 P.2d 1075	1995	06/30/1995	Environment	1		1							
1995		In re Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Petition for an Amendment to Constitution of State Adding Section 2 to Article VII (Petition Procedures) (en banc)	900 P.2d 104	1995	06/30/1995	Petition	1		1	1						
1995		In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to Constitution of State of Colo. Adding Subsection (10) to Sec. 20 of Art. X (Amend Labor 25). (en banc)	900 P.2d 121	1995	07/19/1995	Taxes	1		1							
1995		In re Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Petition for an Amendment to the Constitution of State of Colo. Adding Section 2 to Article VII (Petitions) (en banc)	907 P.2d 586	1995	12/04/1995	Petition	0				1					

C = Challenges; V = Violations

Year	Description	908 P.2d 125	1995 12/18/1995	Taxes	0	1	0	1	0	1	0	1	0	1	0
1995	In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Paragraph (d) Subsection (8) of Section 20 of Article X (Amend Labor No.32) (en banc)	908 P.2d 125	1995 12/18/1995	Taxes	0	1	0	1	0	1	0	1	0	1	0
1996	In re Title, Ballot Title and Submission Clause, and Summary Adopted November 1, 1995, By Title Bd. Pertaining to a Proposed Initiative on Trespass-Streams with Flowing Water (en banc)	910 P.2d 21	1996 01/22/1996	<i>encl single-subject issue</i>	0	1	0	1	0	1	0	1	0	1	0
1996	In re Proposed Ballot Initiative on Parental Rights (en banc)	913 P.2d 1127	1996 04/01/1996	Children	0	1	0	1	0	1	0	1	0	1	0
1996	I In re Proposed Initiative Bingo-Raffle Licenses (I) (en banc)	915 P.2d 1320	1996 04/29/1996	Gambling	0	1	0	1	0	1	0	1	0	1	0
	II														
1996	In re Proposed Initiative 1996-4 (en banc)	916 P.2d 528	1996 05/13/1996	Gambling Taxes	1	1	1	1	1	1	1	1	1	1	1
1996	In re Title, Ballot, Title and Submission Clause, and Summary Pertaining to Proposed Initiative on Parental Choice in Educ. (en banc)	917 P.2d 292	1996 05/28/1996	Children	0	1	0	1	0	1	0	1	0	1	0
1996	In re Title, Ballot Title and Submission Clause, and Summary for Proposed Initiated Constitutional Amendment 1996-3 Adopted on April 3, 1996, and Motion for Rehearing Denied on April 17, 1996 (en banc) (per curiam)	917 P.2d 1274	1996 06/10/1996	<i>encl single-subject issue</i>	0	TIE						1	0		
1996	In re Title, Ballot Title, Submission Clause, and Summary Adopted March 20, 1996, By the Title Bd. Pertaining to Proposed Initiative 1996-6 (en banc)	917 P.2d 1277	1996 06/10/1996	Environment	0	1	0	1	0	1	0	1	0	1	0
1996	In re Title, Ballot Title, Submission Clause, and Summary for Proposed Constitutional Amendment Concerning 1996-15 (en banc) (per curiam)	918 P.2d 225	1996 06/17/1996	<i>encl single-subject issue</i>	0							1	0		
1996	In re Title, Ballot Title, Submission Clause, and Summary Adopted Apr. 17, 1996 by Title Setting Bd. Pertaining to a Proposed Initiative Statute Proposed by Apple and Meeker (1996-17) (en banc)	920 P.2d 798	1996 06/24/1996	Environment	1	1	0	1	0	1	0	1	0	1	0











