

NOTE

CONSTITUTIONAL AVOIDANCE: THE SINGLE SUBJECT RULE AS AN INTERPRETIVE PRINCIPLE

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

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

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result from severing or invalidating popularly enacted statutes and initiatives.

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INTRODUCTION

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

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

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

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

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

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

² Fla. Const. art. III, § 6.

³ See *infra* notes 25–33 and accompanying text.

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

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

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

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

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

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

⁷ Gilbert, *supra* note 1, at 807.

⁸ See *infra* Section III.C.

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

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

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

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

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

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

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

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

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

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

¹⁶ See *infra* Section III.A.

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

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

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

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

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

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

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

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

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

I. BACKGROUND ON THE SINGLE SUBJECT RULE

A. History and Purpose

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

²¹ Denning & Smith, *supra* note 5, at app. B.

²² Gilbert, *supra* note 1, at 822 fig.2.

²³ *Id.*

²⁴ Michael D. Gilbert, Does Law Matter? Theory and Evidence from Single-Subject Adjudication, 40 *J. Legal Stud.* 333, 338 (2011).

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

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

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

²⁶ Gilbert, *supra* note 1, at 808.

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

²⁸ Gilbert, *supra* note 1, at 814.

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

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

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

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

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

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

³² Gilbert, *supra* note 1, at 837.

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

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

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

³⁶ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

³⁷ *Burns*, 382 P.3d at 1052.

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

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

A. Ambiguity in Law: Interpretation and the Canons

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

³⁸ *Id.* at 1051–52.

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

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

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

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

⁴³ See *id.* at 81.

which instructs courts to give words in a statute their ordinary or “plain” meaning in the English language.⁴⁴

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

B. Background on the Saving and Avoidance Canons

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

⁴⁴ Id. at 83.

⁴⁵ Id. at 82.

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

⁴⁷ Nelson, *supra* note 40, at 81–83.

⁴⁸ Id. at 108–10.

⁴⁹ Id. at 109–13.

⁵⁰ Id. at 138.

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

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

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

⁵² Nelson, *supra* note 40, at 138.

⁵³ *Id.*

⁵⁴ *Id.* at 139.

⁵⁵ *Id.*

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

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

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

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

⁵⁷ *Crowell*, 285 U.S. at 62.

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

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

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

⁶¹ Nelson, *supra* note 40, at 148.

⁶² *Id.* at 147.

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

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

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

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

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

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

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

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

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

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

C. Application of the Canons to the Single Subject Rule

In single subject rule jurisprudence, the saving and avoidance canons would apply when the following conditions are present: (1) a statute or ballot initiative is ambiguous, meaning that the textual analysis results in at least two plausible interpretations of the statute;⁷⁰ (2) one interpretation suggests the presence of multiple subjects and thus renders the statute unconstitutional or possibly unconstitutional, while the other interpretation would point to the statute having only one subject and thus being clearly constitutional; and (3) depending on whether the first interpretation is clearly unconstitutional or only possibly unconstitutional, the court would apply the saving or avoidance canon, respectively, to choose the interpretation that is clearly constitutional.

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

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

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

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

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

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

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

III. CHALLENGES IN SINGLE SUBJECT RULE ADJUDICATION

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

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

⁷¹ See Lowenstein, *supra* note 12, at 47–48 (examining the difficulty in defining a “subject”).

⁷² Cooter & Gilbert, *supra* note 6, at 709.

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

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

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

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

⁷⁵ *Burns*, 382 P.3d at 1051.

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

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

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

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

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

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

A. Difficulty in Administering the Rule and Arbitrary Decision Making

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

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

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

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

⁸⁴ Gilbert, *supra* note 24, at 339.

⁸⁵ Minger, *supra* note 11, at 902.

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

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

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

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

⁸⁸ Matsusaka & Hasen, *supra* note 87, at 402.

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

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

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

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

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

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

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

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

B. Minimizing Indeterminacy: In re Initiative #55

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

⁹⁵ See, e.g., Evans & Bannister, *supra* note 14, at 164.

⁹⁶ Cooter & Gilbert, *supra* note 6, at 691.

⁹⁷ *Id.* at 692 (emphasis omitted).

⁹⁸ *Id.*

⁹⁹ *Id.* at 693.

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

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

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

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

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

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

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

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

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

¹⁰⁴ Id. at 280.

¹⁰⁵ Id. at 282.

¹⁰⁶ Id.

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

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

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

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

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

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

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

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

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

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

C. High Costs of Enforcement and Limited Remedial Options

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

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

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

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

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

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

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

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

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

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

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

¹¹⁶ *Id.*

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

¹¹⁸ *Id.* at 867.

¹¹⁹ Nelson, *supra* note 40, at 143.

¹²⁰ Gilbert, *supra* note 1, at 829.

¹²¹ *Id.*

¹²² *Id.*

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

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

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

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

¹²³ *Id.* at 868.

¹²⁴ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The defendant gun manufacturers asserted—and plaintiff local government entities conceded¹³⁹—that subsection (9) prohibited any suit against gun manufacturers brought by a locality, subject to several enumerated exceptions.¹⁴⁰ The plaintiffs argued, however, that there was

¹³³ Id. at 852.

¹³⁴ Id. at 854.

¹³⁵ Id.

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

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

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

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

¹⁴⁰ The exceptions are for:

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

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

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

Expressed or implied warranties arising from the purchase of a firearm or ammunition by the political subdivision or the use of a firearm or ammunition by an employee or agent of the political subdivision.

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

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

A firearm’s or ammunition’s inherent potential to cause injury, damage, or death.

Failure to warn the purchaser, transferee, or user of the firearm’s or ammunition’s inherent potential to cause injury, damage, or death.

Failure to sell with or incorporate into the product a device or mechanism to prevent a firearm or ammunition from being discharged by an unauthorized person unless specifically provided for by contract.

Id. § 28.435.15(11).

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

¹⁴² Id. at 860–61.

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

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

¹⁴⁵ Id.

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

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

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

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

¹⁴⁶ Mich. Comp. Laws Serv. § 28.435.15(9) (LexisNexis 2015) (emphasis added).

¹⁴⁷ Id. § 28.435.15(15)(c).

¹⁴⁸ Id. § 28.435.15(15)(e).

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

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

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

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

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

¹⁴⁹ Id. § 28.435.15(9) (emphasis added).

¹⁵⁰ Id. § 28.435.15(13).

¹⁵¹ *Kyser v. Township*, 786 N.W.2d 543, 564 (Mich. 2010).

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

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

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

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

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

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

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

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

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

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

A. *Slayton v. Shumway*

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

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

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

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

Section 2.1. (a) to preserve and protect victims' rights to justice and due process, a victim of crime has a right:

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

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

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

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

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

800 P.2d app. at 597–98.

¹⁶⁰ *Slayton*, 800 P.2d at 591.

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

¹⁶² *Id.* at 591.

¹⁶³ *Id.* at 591–92.

¹⁶⁴ *Id.* at 592.

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

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

¹⁶⁵ Id. at 595.

¹⁶⁶ Id. at 593–95.

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

¹⁶⁸ Id. at 594.

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

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

¹⁷¹ Id.

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

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

Even so, the *Slayton* court fell short of overtly identifying the single subject rule as an interpretive mechanism and did not seem to recognize its own innovation. As a result, it failed to realize the full benefits of the single subject rule applied as an interpretive rule. For example, the court emphasized the wrong issues in applying the single subject rule. The court unnecessarily went down the path of determining conclusively whether subsection (11) constituted a separate subject. In doing so, it spent most of the opinion¹⁷⁴ applying a vague and confusing standard to determine if the initiative's parts formed a "consistent and workable whole on the general topic."¹⁷⁵

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

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

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

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

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

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

B. *Pohutski v. City of Allen Park*

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

¹⁷⁶ *Slayton*, 800 P.2d app. at 598.

¹⁷⁷ *Id.*

¹⁷⁸ 641 N.W.2d 219 (Mich. 2002).

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

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

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

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

violations of the title requirement gives credence to this Note’s proposal as applied to the “subject requirement” of the single subject rule.

¹⁸⁰ *Pohutski*, 641 N.W.2d at 224.

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

¹⁸² *Pohutski*, 641 N.W.2d at 224.

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

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

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

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

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

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

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

¹⁸⁷ *Id.* (emphasizing precedent of avoidance).

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

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

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

¹⁹¹ *Id.* at 236.

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

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

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

¹⁹² *Id.*

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

¹⁹⁴ *Id.*

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

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

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

A. “De-constitutionalizing” Single Subject Rule Adjudication

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

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

¹⁹⁷ Nelson, *supra* note 100, at 331.

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

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

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

²⁰¹ See *supra* Section III.A.

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

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

B. Increasing the Frequency of the Rule’s Enforcement

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

²⁰² See supra Section III.C.

²⁰³ Kloppenberg, supra note 199, at 1036–37.

²⁰⁴ Id. at 1042–43.

²⁰⁵ Id. at 1042.

²⁰⁶ Id.

C. Reducing Negative Effects of Ballot Initiatives

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

Many have criticized ballot initiatives, alleging that they produce poorly drafted laws²⁰⁸ and bad policy,²⁰⁹ benefit special interests,²¹⁰ discriminate against minorities,²¹¹ and mislead and confuse voters.²¹²

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

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

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

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

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

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

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

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

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

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

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

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

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

²¹⁶ See Ivan, *supra* note 107, at 828.

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

²¹⁸ *Id.*

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

CONCLUSION

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

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

²²⁰ *Id.*

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

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

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