Chaos, Direct Democracy, and the Single Subject Rule

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INTRODUCTION

Direct democracy affords citizens an opportunity to shape law and policy firsthand, to express their preferences in raw form rather than funneling and diluting them through representatives. This sense of purity is appealing, as is the potential to use direct democracy to sidestep deadlocked legislatures and combat the influence of special interests.[1] But these virtues do not come without vice. Direct democracy has been accused of handing authority to uninformed voters and offering interest groups a second mechanism for enacting self-serving laws.[2] It has also been charged with hatching unsustainable fiscal policies,[3] hindering legislative flexibility,[4] and undermining the protections for discrete minorities that are built into the system of checks and balances.[5]

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[1] *See, e.g.,* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1348 (1985) (book review) (reciting the standard argument that direct democracy offers citizens a chance to break interest groups' "stranglehold" on the legislative process). In theory, direct democratic procedures also can foster civic virtue and check voter malaise. *See id.*

[2] *See* Bill Jones, *Initiative and Reform*, *in* THE BATTLE OVER CITIZEN LAWMAKING 223 (M. Dane Waters ed., 2001).

[3] *See generally* PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE (1999).

[4] *Id.*

[5] *See generally* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

Most importantly for this paper, direct democracy has been denounced for precluding deliberation.[6]

Deliberation is a complicated concept, and we are concerned with just one perspective on it—the capacity of individuals to bargain across legal issues and reach compromises. We are not interested in civic republican views of deliberation, for example, which aspire to achieve universal agreement on the substance of the law and the public good.[7] Nor are we concerned with "procedural" interpretations of deliberation that emphasize the personal characteristics necessary for lawmakers to have fruitful discussions.[8] Whether deliberation of these sorts is achievable through direct democracy is largely irrelevant to our argument. We are interested solely in the capacity to compromise and the framework, if any, under which political bargaining is conducted.

Deliberation as we have defined it is largely unavailable in the direct democracy context.[9] Hundreds of thousands of scattered citizens cannot bargain with one another over the substance of the law, compromising on one issue in exchange for support on a second issue. The transaction costs of bargaining are prohibitively high. This is due both to the sheer number of citizens and the absence of a bargaining framework. Legislatures have committee systems, political parties, and rules of procedure to lend structure to an otherwise unruly process of compromise. Direct democracy lacks these mechanisms.

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[6] *See, e.g., id.* at 224; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1526-27 (1990); Henry M. Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427, 430-31 (1911-1912) (presenting an early discussion of this problem).

[7] *See* Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI-KENT L. REV. 707, 738-44, 750 (1991) (reviewing the civic republican view of deliberation and concluding that plebiscites are not necessarily inconsistent with it).

[8] *See id.* 744-51.

[9] *But see* Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 969 (1988) ("[T]he argument that plebiscites lack devices for compromise seems fundamentally flawed."). Gillette's definition of compromise differs from mine. In a future draft of this paper we will address his ideas more thoroughly.

The inability to bargain raises two fundamental drawbacks of direct democracy, neither of which has been adequately addressed. The first is the problem of cycling When individual preferences across multiple issues are aggregated under a majority rule system, it is difficult to achieve a stable outcome—the collective preferences are intransitive.[10] The threat of cycling in the legislative context has been the focus of a raft of scholarship, and the conclusions are generally sanguine. Cycling can be overcome through institutional structures, including agenda setting by well-placed legislators,[11] and it can also be resolved with a successful political bargain.[12] Direct democracy lacks these characteristics. There is no agenda setter—initiatives can generally be proposed on any topic at any time—and the transaction costs of bargaining are prohibitive. Thus, cycling poses a genuine risk to direct democracy.[13]

The second pitfall of direct democracy is its vulnerability to riders. Riders are unpopular measures that get attached to popular measures and "ride" them through the lawmaking process.[14] Representative bodies have tools for reducing the threat of riders: riders can be excised with amendments, or representatives can simply refuse to pass bills

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[10] *See generally* DENNIS C. MUELLER, PUBLIC CHOICE III 79-114 (2003).
[11] *See id.* at 112-15.
[12] *See id.* at 118-120; *see also* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 53-54, 58-60 (2000) (positing that when the transaction costs of bargaining are zero, politicians will bargain to stable, efficient outcomes).
[13] A few scholars have discussed general problems with preference aggregation in the direct democracy context. *See, e.g.,* JOHN HASKELL, DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT? DISPELLING THE POPULIST MYTH 121-46 (2001); Eule, *supra* note 5, at 1519-21; Gillette, *supra* note 8, at 933. As far as we can tell, only one paper has directly addressed the risk of cycling in direct democracy. *See* Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005). That paper presupposes that the single subject rule constrains all initiatives to a single dimension of choice, and therefore cycling will only arise when voters have double-peaked preferences. We will show that the rule does not constrain initiatives in this way; application of the rule is lackadaisical in many places, and initiatives spanning multiple dimensions of choice often reach the ballot. We will also develop an approach to single subject adjudication that could prevent this from happening.
[14] *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. (forthcoming 2006).

containing riders.[15] These tools are largely unavailable in the direct democracy context. Initiatives amount to take-it-or-leave-it offers to the citizenry; there is no opportunity for amendment or revision.[16] Likewise, citizens cannot flippantly vote against an initiative that contains a rider. When legislators vote down a popular bill because it includes a rider, the bill is likely to reappear on the agenda in modified form. Political pressure may lead the proponents of the rider to relent. By contrast, when an initiative is voted down because of a rider, it may never reappear on the ballot. If the sponsors of the initiative were motivated in large part by the rider, they will have no incentive to propose a new initiative without it.[17] In the direct democracy context, voters may have to accept a relatively large number of riders to pass laws they favor.

While the risks posed by cycling and riders seem substantial, they do not doom direct democracy. Rather, they call for a reexamination of an overlooked but essential restriction on direct democratic processes: the single subject rule. Nearly every state constitution that authorizes direct democracy has a single subject rule.[18] As the name implies, the rule aims to confine initiatives and referenda to a single subject.[19] Judges apply the rule, and they usually construe the word "subject" very broadly. "Essentially, the courts will abide by any subject that is one quantum more specific than 'doing good.'"[20] As a result, the rule in most jurisdictions is toothless.

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[15] For these reasons, legislation is less vulnerable to riders, but it certainly is not immune to them. *See id.*
[16] This is a longstanding criticism of direct democracy. *See, e.g.,* Campbell, *supra* note 5, at 430-31.
[17] *See* Gillette, *supra* note 8, at 976 (noting that free riding and collective action problems may discourage people from undertaking plebiscitary campaigns that genuinely aim to further the public interest).
[18] For a state-by-state overview of single subject rules in the direct democracy context, see Rachael Downey et el., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004).
[19] *See id.*
[20] Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV 1165, 1208 (1998). *But see* Daniel H. Lowenstein, *Initiatives and the New Single Subject*

Optimal enforcement of the single subject rule would be stricter and could improve direct democracy by preventing cycling and riders. When voters make decisions along a single dimension of choice, the median voter theorem predicts that their collective decision will usually be stable and will reflect the preferred outcome of the median voter.[21] The single subject rule could be used to restrict initiatives to a single dimension of choice and induce stability in most cases.[22] Moreover, the rule could be used to reduce the prevalence of riders.[23] Defining "subjects" based on the political nature of initiative components and not their relationship to a substantive topic would allow for the identification and removal of riders

Achieving optimal enforcement requires the single subject rule to be reconceived. Subjects are not logical, they are political. They cannot be gleaned from *a priori* reasoning but rather voters' preferences and strategies. Viewing the rule through this lens allows for a new approach to enforcement. To develop this new approach, we will use the tools of social choice. We will show that voters are making decisions along multiple dimensions of choice—and thus subject to cycling—when they are making implicit tradeoffs among the various provisions of an initiative or referendum. We will also show that a rider is present when a component of an initiative or referendum would not receive popular support on its own. Based on these insights, we will propose a new test for resolving single subject disputes. In a world of perfect information, the test would

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Rule, 1 ELECTION L.J. 35 (2002) (describing several states' relatively strict enforcement of the single subject rule in recent years).

[21] *See* MUELLER, *supra* note 9, at 85-86, 114-17 (explaining that the median voter theorem predicts a stable equilibrium when voters' preferences are single-peaked and they make decisions on single dimensions of choice).

[22] When voters have double-peaked preferences, the cycling problem may persist. *See id.*; Kousser & McCubbins, *supra* note 13.

[23] Eliminating riders in legislatures is one of the goals of the single subject rule, and presumably it aims to serve that same function in the direct democracy context. However, detecting riders under current single subject rule jurisprudence is practically impossible. *See infra* Parts I.B.2, II.B.

prevent cycling, preclude riders, and improve political transparency, which is another important purpose of the rule. Even with limited information, the test would provide judges with a framework for applying the rule and mitigating the shortcomings of direct democracy.

This paper proceeds in three parts. Part I provides background on direct democracy, including its forms and frequency. We then examine the history, traditional purposes, and judicial enforcement of the single subject rule. Part II reexamines the purposes of the single subject rule using the insights of social choice. Here we develop the notions of cycling and riders in the direct democracy context. We show that the rule should be used to stop "logrolling"—not because the practice is inherently bad, but because it opens the door to cycling. We then explain why riders pose a grave risk in direct democratic procedures. Part III articulates a new approach to single subject jurisprudence that would lend coherence to the rule and significantly reduce the problems identified in Part II.

I. BACKGROUND ON DIRECT DEMOCRACY AND THE SINGLE SUBJECT RULE

Many scholars have recounted the history of direct democracy,[24] and this paper is no place to retrace their steps. What we will cover are some basic definitions that will become essential as the paper proceeds. We will also review the frequency with which direct democratic procedures are used in the United States and some of the issues that

[24] *See, e.g.,* STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA (2003); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 1-59 (1989); LAURA TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM, AND RECALL PROCESS (1977). For an overview of the long history and frequent usage of direct democracy in Switzerland, see GREGORY A. FOSSEDAL, DIRECT DEMOCRACY IN SWITZERLAND (2002).

they address. We will then turn to the history, purposes, and application of the single subject rule.

The aim of this Part is twofold: to illustrate the prominent role that direct democracy plays in American law and policy, and to make clear that the single subject rule is, at present, an inconsistent and ineffective check on direct democratic procedures.

A. The Forms, Frequency, and Content of Direct Democracy

Direct democracy comes in many forms in the United States and operates at both state and local levels.[25] For our purposes, it is sufficient to divide the universe of direct democracy into two broad categories: initiatives and referenda.[26] Initiatives are laws or constitutional amendments that originate among the citizenry.[27] Individual citizens or private groups propose them, collect enough signatures to qualify them for the ballot, and then, along with all other voters in the relevant jurisdiction, vote on them. The initiative process completely sidesteps representative bodies such as legislatures and city councils. Referenda concern laws or constitutional amendments that are enacted by a representative body and then presented to the citizens for approval or rejection.[28] Importantly, referenda are the product of legislative processes.

[25] The United States does not have a national initiative. *See* Initiative & Referendum Institute, *at* http://www.iandrinstitute.org/National%20I&R.htm (March 20, 2005).
[26] The recall is another major category of direct democracy. It is irrelevant to this paper and will not be discussed.
[27] For a brief overview of the various initiative processes in the United States, see http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm.
[28] *See id.*

Twenty four American states have some form of the initiative process, and almost all of them have a version of the referendum.[29] The numbers are higher at the local level: over half of all American cities have an initiative process, and 70 percent of the national population lives in these locations.[30] Nearly all American cities have the referendum.[31]

The frequency with which direct democratic procedures are used has varied over time. A complete, accurate picture of these frequencies is unavailable, but there are partial data. Table 1 reports aggregate information on the use of statewide initiatives since direct democracy first spread to the states at the beginning of the 20th century. The total number of proposed initiatives is listed, as is the number of initiatives accepted, the number rejected, and the percentage of initiatives that passed.

Table 1: Initiative usage by decade: 1901-2005[32]

Decade	Number of statewide initiatives proposed	Number of initiatives approved	Number of initiatives defeated	Percentage passed
1901-1910	56	25	31	45%
1911-1920	293	116	177	40%
1921-1930	172	40	132	23%
1931-1940	269	106	163	39%
1941-1950	145	58	87	40%
1951-1960	114	45	69	39%
1961-1970	87	37	50	43%
1971-1980	201	85	116	42%
1981-1990	271	115	156	42%
1991-2000	389	189	200	49%
2001-2005*	143	74	69	52%
Totals	**2140**	**890**	**1250**	**42%**

*Data for 2001-2005 are estimates.

[29] *See id.*
[30] *See id.*; TRACY M. GORDON, THE LOCAL INITIATIVE IN CALIFORNIA 3 (2004) (citing John M. Matsusaka, *The Initiative and Referendum in American Cities: Basic Patterns*, *in* THE INITIATIVE AND REFERENDUM ALMANAC: A COMPREHENSIVE GUIDE TO CITIZEN LAWMAKING AROUND THE WORLD (M. Dane Waters ed., 2003).
[31] *See* http://www.iandrinstitute.org/Local%20I&R.htm.
[32] Source: http://www.iandrinstitute.org.

In total, 2,140 statewide initiatives have been proposed, and 890 of them became law. These figures received a substantial boost in recent decades; there was a clear upward trend in the absolute number of initiatives proposed and passed from the 1960s to 2000. Note that these figures are limited to statewide initiatives and therefore dramatically underestimate the total use of direct democracy. Neither referenda nor local initiatives are included.[33]

The substance of the laws addressed through direct democracy may be more insightful than their frequency. Over the past few decades, Californians have passed controversial measures that drastically cut property taxes,[34] ended racial preferences,[35] and, most recently, established an institute to regulate and fund stem cell research.[36] In 2000, Colorado passed initiatives addressing medical marijuana, background checks for gun ownership, and educational funding.[37] During the nationwide election in November 2004, citizens of 11 states passed measures banning same-sex marriage.[38]

Across the country, direct democratic processes are used often to address profound issues of individual rights and public policy. That the laws passed through these processes are vulnerable to many problems, including cycling and riders, is disconcerting.

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[33] Data on local initiatives are sparse but suggestive; it appears that local initiatives are common in many places. One recent study found that approximately 730 local initiatives were circulated for signatures in California between 1990 and 2000. Roughly 75 percent of those made it onto the local ballot, and of those, approximately 45 percent were passed. *See* GORDON, *supra* note ___, at 19-20.

[34] *See* JIM SCHULTZ, THE INITIATIVE COOKBOOK: RECIPES & STORIES FROM CALIFORNIA'S BALLOT WARS 3 (1998).

[35] *See id.*

[36] *See* http://www.smartvoter.org/2004/11/02/ca/state/prop/71/.

[37] *See* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Colorado.pdf.

[38] *See* http://www.washingtonpost.com/wp-dyn/articles/A23672-2004Nov3.html.

B. A Sketch of the History and Purposes of the Single Subject Rule[39]

Direct democracy is subject to a host of regulations, and prominent among them in many jurisdictions is the single subject rule. Enforced by judges, the rule forbids initiatives or referenda from embracing more than one subject. This check on direct democracy is an outgrowth of the single subject rule for legislation, which has a venerable history. It originated in ancient Rome, where crafty lawmakers learned to carry an unpopular provision by "harnessing it up with one more favored."[40] To prevent this nefarious practice, the Romans in 98 B.C. forbade laws consisting of unrelated provisions.[41] Similar misbehavior plagued colonial America. In 1695, the Committee of the Privy Council complained that diverse acts in Massachusetts were "joined together under ye same title," making it impossible to vacate unpopular provisions without also invalidating favorable ones.[42] In 1702, Queen Anne tried to check this practice, instructing Lord Cornbury of New Jersey to avoid "intermixing in one and the same Act[ ] such things as have no proper relation to one another."[43]

After the Revolution, a single subject requirement for bills pertaining to government salaries materialized in the Illinois Constitution in 1818.[44] The first general single subject rule appeared in New Jersey in 1844, followed by Louisiana and Texas in

[39] Parts of this section and the next one are based on material in Gilbert, *supra* note 13.
[40] ROBERT LUCE, LEGISLATIVE PROCEDURE 548 (1922).
[41] *Id.*
[42] *See id.* at 549 (citing E. I. MILLER, THE LEGISLATURE OF THE PROVINCE OF VIRGINIA 111 (1908)) (internal quotations omitted).
[43] ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 75 (1990) (internal citation omitted). Very similar language was enshrined in New Jersey's constitution in 1844. *See* N.J. CONST. art. IV, § 7, p. 4 ("To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one subject ….).
[44] *See* Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389 (1958).

1845, and New York in 1846.[45] By the end of the 20th century, some version of the rule had been adopted in forty three states.[46] The provision in the Nebraska constitution is typical: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."[47] As this quotation suggests, single subject rules almost universally include a title provision.[48]

Throughout the 20th century, eighteen states extended their legislative single subject rules to the direct democracy context.[49] Californians adopted a constitutional amendment to that effect in 1948, and Colorado followed in 1994.[50] Courts in a half dozen states have implied the existence of the rule, even though it is not provided for in the state constitutions.[51] The purposes of the single subject rule for direct democracy are essentially identical to those for the legislative version of the rule: to prevent logrolling and riding and to improve transparency.[52]

1. Preventing Logrolling is the Principal Purpose of the Rule

The "primary and universally recognized purpose of the one-subject rule is to prevent logrolling."[53] This is true in both the legislative and direct democracy arenas.[54]

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[45] *See* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, app. A (1999).
[46] *Id.* at 963.
[47] NEB. CONST. art. III, § 14.
[48] Only two states, Illinois and Indiana, have legislative single subject rules but not title requirements. *See* Denning & Smith, *supra* note 43, at app. A.
[49] *See* Downey et al., *supra* note 17.
[50] Fair Political Practices Comm'n v. Superior Court of LA County, 599 P.2d 46 (Cal. 1979); Outcelt v. Bruce, 959 P.2d 822 (Colo. 1998).
[51] *See* Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING, *supra* note 3, at 138.
[52] In Florida, the rule has a fourth purpose: to protect the state constitution from "cataclysmic" changes. *See id.* at 135. Missourian courts assign a similar, additional purpose to the rule. *See id.*
[53] Ruud, *supra* note 42, at 391.
[54] *See* Campbell, *supra* note 49, at 133-34. For direct democracy cases that identify logrolling as the target of the single subject rule, see, e.g., In re Voluntary Universal Pre-Kindergarten Education, 824 So.2d 161,

Logrolling typicallyoccurs when se parate propositions that command minority support are combined into one proposal that commands majority support.[55] The situation could run as follows. Propositions A, B, and C are unpopular; each favors a special interest and is supported by only twenty percent of eligible voters. Standing alone, none of these provisions could become law. When combined into a single initiative, however, the propositions could collectively garner the support of sixty percent of voters, assuming that the citizens who favor each provision are not so opposed to the other two that they would vote against an initiative that combined them. Although neither A nor B nor C has majority backing, all three become law.

In this situation, citizens have effectively traded votes. Those who support A have agreed to vote for B and C so long as those supporting B and C vote for A. Of course, the vote trading is implicit. Once initiatives and referenda reach the ballot, their contents are fixed, and transaction costs are too high for citizens to strike explicit political bargains. Nevertheless, the effects are the same. All supporters of the initiative are involved in a bargain; they are getting a measure they like in exchange fortheir votes on measures they dislike.

Courts disdain logrolling because it requires voters to decide more than one issue with a single vote and threatens to give legal force to proposals that command only minority support. The single subject rule aims to stop logrolling by preventing the "approval of incoherent initiative measures that are little more than 'grabbags' of various provisions."[56]

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165 (Fla. 2002); Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 830 (Mo. 1990); Washington v. Broadway, 942 P.2d 363, 367 (1997).

[55] *See* Gilbert, *supra* note 13.

[56] Raven v. Deukmejian, 801 P.2d 1077 (1990) (Mosk, J., concurring and dissenting).

2. Eliminating Riders is a Second Purpose of the Rule

The single subject rule also aims to stamp out riding. Most courts do not explicitly recognize this purpose, but it is often implicit in their opinions.[57] Riding takes places when an unpopular measure gets attached to a popular one and "rides" it through the lawmaking process.[58] To illustrate, imagine that a popular initiative, A, would command 80 percent support if placed on the ballot. Recognizing this fact, the citizens sponsoring A attach to it an unpopular rider, B, which favors special interests. The combined initiative, AB, is then submitted to the electorate. Because the initiative process precludes amendments, citizens must approve B in order to get A.[59] Thus, A and B may pass together, albeit with less than 80 percent of the vote.

Riding is often characterized as a species of logrolling, but the two are analytically distinct.[60] Logrolling is tantamount to vote trading. Minority blocs agree, explicitly or implicitly, to vote for one another's proposals. But for the bargain, no measures would pass. Riding, on the other hand, does not result from exchange but rather manipulations of procedure. The sponsors of an initiative can simply add a rider to their primary proposal. A majority may then vote implicitly for the rider in order to enact the primary proposal, but they will receive nothing in exchange for that vote. The primary proposal would have passed even without the rider—indeed, it would have been even more popular on its own.

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[57] *See, e.g.,* Washington Assoc. of Neighborhood Stores v. Washington, 70 P.3d 920, 924 (2003) (noting that one of the purposes of the single subject rule is to prevent the "pushing through" of unpopular provisions by attaching them to "popular or necessary" provisions).
[58] *See* Gilbert, *supra* note 13.
[59] This assumes that A will not reappear on the ballot by itself if AB is rejected. There are reasons to think this assumption is accurate. *See supra* note 16 and accompanying text. Regardless, citizens may not be so strategic that they consider this possibility.
[60] *See* Gilbert, *supra* note 13*; see also* Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 957-63(1983).

To the judicial eye, riding has the same effect as logrolling: it forces citizens to decide multiple issues with a single vote and allows for the passage of measures that would not receive majority support on their own. The single subject rule seeks to curb this practice.

3. TheSingle Subject Rule Aims to Improve Transparency

A third purpose of the single subject rule is to simplify the lawmaking process. In theory, limiting initiatives and referenda to a single subject makes it easier for citizens to understand and scrutinize their contents.[61] The title requirement embedded in most single subject rules furthers this goal. Requiring that initiatives and referenda have titles that reflect their contents prevents citizens from being surprised or defrauded.[62] The title provision can also help courts to identify logrolling and riding. For example, the use of an excessively general or incomplete title that does not identify important provisions may be evidence of these practices.[63]

C. The Single Subject Rule in Action

Having discussed the history and traditional purposes of the single subject rule, we will now turn to its application. We will not delve into individual cases and their twists and turns. Rather, we will take a broad brush approach and explore four themes

[61] *See* Campbell, *supra* note 49, at 133-35.
[62] *See id.; see also, e.g.,* Wyoming Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 290 (1994) (stating that the single subject rule prevents "the fraud or surprise that could result if provisions contained in the body of the bill were not reflected in a general way in the title itself"). At least one court has placed particular importance on the title requirement because it believes that some voters cast their ballots based solely on a measure's title. *See* Amalgamated Transit Union Local 587 v. Washington, 11 P.3d 762, 786 (2000).
[63] *Cf.* California Trial Lawyers Assoc. v. Eu, 200 Cal. App. 3d 351, 361 (1988) ("[T]he title and various descriptions of the initiative's contents give no clue that [the provisions of section 8] are buried within.").

that characterize the whole of single subject adjudication: the rule's ambiguity; courts' deferential approach to enforcement; symmetrical enforcement in the indirect and direct democracy cases; and the dearth of critical analysis.

Courts and commentators alike are frustrated by the ambiguity of the single subject rule. This ambiguity stems from the difficulty associated with defining a "subject."[64] As the word itself implies, a subject cannot objectively be defined—it depends on context.[65] Logic and doctrine do not help courts determine whether the context in which an initiative was drafted justifies the inclusion of various provisions. Moreover, any conglomeration of issues can reasonably be classified under a single subject if that subject is sufficiently broad.[66] "Legal reform," for example, is broad enough to capture almost any combination of disparate provisions. To circumvent these problems, judges have developed a number of "tests" to determine compliance with the rule. A court may ask, for instance, whether all provisions of an initiative are "germane" to one another and to the initiative's overriding purpose.[67] Such tests simply rephrase the original problem: whether provisions are germane to one another or represent a single subject are similar inquiries.[68] Despite 150 years of life in legislatures and, more recently, the direct democracy context, the rule remains nebulous.

In part because of this ambiguity, enforcement of the single subject rule tends to be lax.[69] Courts condone initiatives that embrace disconcertingly broad subjects[70] simply

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[64] *See, e.g.,* Oregon Education Assoc. v. Phillips, 727 P.2d 602, 611-12 (1986) (Linde, J., concurring) (discussing the indeterminacy of the word "subject"); Korte v. Bayless, 16 P.3d 200, 205 (2001) ("Taken to a sufficient degree of generality, nearly any group of provisions could claim some relationship.").
[65] *See* Lowenstein, *supra* note 83, at 938-42.
[66] *See id.*
[67] *See, e.g.,* California Assoc. of Retail Tobacconists v. California, 109 Cal. App. 4th 792, 809 (2003).
[68] *See* Gilbert, *supra* note 13.
[69] This has changed in a handful of states in recent years. *See generally* Lowenstein, *supra* note 19.

because they are not sure what else to do. In the words of the Alaska Supreme Court, "it is not at all clear that there are workable stricter standards."[71] Of course, even if there were functional, stricter standards, courtsmay still be hesitant to enforce the rule. Invalidating an initiative raises the classic countermajoritarian difficulty. What right do unelected judges have to undo the express will of the people? In the face of such questions, judges usually back off. This may be because they honestly believe in a "solemn duty" to defer to the "sovereign people's initiative power."[72] Or it may be because judges act strategically. Judges in the "highest courts of all but two of the states that permit initiatives" are elected, so it is not surprising that they adopt a ginger approach to the rule.[73]

Lax enforcement of the rule is not limited to the direct democracy context; most courts apply an equally liberal standard to legislation. This is due to the similar language of the two rules in most states, the difficulty inherent in formulating different tests, and the general desire for consistency, especially when judges are infringing on legislative authority.[74] A handful of states apply stricter standards to initiatives than to legislation. Florida and Montana have openly embraced stricter standards of review.[75] A few other states ostensibly maintain the same standard but apply the rule more strictly to initiatives.[76]

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[70] *See, e.g.,* Buchanan v. Kirkpatrick, 615 S.W.2d 6, 14 (1981) (concluding that all provisions in the contested constitutional amendment were "'properly connected'" to the subject of "limiting taxes and governmental expenditures within Missouri").
[71] Yute Air Alaska Inc. v. McAlpine, 698 P.2d 1173, 1180 (1985).
[72] Brosnahan v. Brown, 32 Cal. 3d 236, 241 (1982) (internal citation omitted).
[73] Jones, *supra* note 3, at 200.
[74] *See* Campbell, *supra* note 49, at 153-56.
[75] *See id.* at 156-58.
[76] *See id.*

When courts do enforce the rule and invalidate a measure, they often do so without explaining the basis for their decision.

> Many courts that uphold diverse legislation as long as the subjects contained in a particular bill are "reasonably germane" … or as long as the court can discern a "rational unity" among them, do so without unpacking or defining those phrases. Indeed, the opinions often convey a sense of the judicial unwillingness to develop a meaningful standard for challenges to legislation…. Though it is overstated, there is some truth to … [the] observation that no criteria for subject-title requirements has [sic] been developed by judicial action.[77]

Although this quote was made in reference to single subject adjudication of legislative acts, it is applicable to the direct democracy cases as well. Analysis in these cases is cursory.[78] Reading them leaves one with the distinct impression that the decisions are the product of judicial caprice.

II. PUBLIC CHOICE AND THE PURPOSES OF THE SINGLE SUBJECT RULE

While the last Part provided a general overview of the single subject rule and its application, this Part will bear down on its fundamental purposes. Courts and commentators assume that the single subject rule serves the same purposes in the legislative and direct democracy contexts.[79] They believe that the same problems that plague lawmaking by representative bodies are likely to plague lawmaking by citizens,

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[77] Denning & Smith, *supra* note 43, at 995-96 (internal quotations omitted).

[78] *See, e.g.,* United Gamefowl Breeders Assoc. of Missouri v. Nixon, 19 S.W.3d 137, 140 (2000) (stating without explanation that the subject of the proposition in question "is clear" and that the contested provision falls under it).

[79] *See, e.g.,* In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 # 43, 46 P.3d 438 (Colo. 2002) ("[T]he constitutional single-subject requirement for bills was designed to prevent … inappropriate or misleading practices … and the intent of the general assembly in referring to the people [a single subject provision for initiatives] was to protect initiated measures … from similar practices ….").

and the rule can help resolve these problems in both arenas. This perspective explains why most states apply the rule with equal force to legislation and direct democracy.

This perspective is wrong. Representative and direct democratic procedures are different, and they give rise to different problems. To clarify these differences we will use the tools of public choice theory.[80] We will reexamine the purposes of the single subject rule and show that they are not fully understood. Logrolling does pose a risk to direct democracy—not because it is inherently bad, as most courts perceive, but because it dramatically increases the risk of cycling. This concern is mutedn legislatures. Likewise, the rule can be used to stop riding, but doing so requires stricter application in the direct democracy context—initiatives are much more likely than legislation to suffer from riders. Finally, the rule can be used to improve transparency. Unlike legislation, initiatives are easier to understand when they are limited to a single issue.

A. Logrolling, Cycling, and Direct Democracy

Logrolling is tantamount to vote trading.[81] To ensure that an unpopular measure receives enough votes for passage, supporters of the measure must bargain with non-supporters. Explicit vote trading occurs if the supporters convince others to vote for the measure in exchange for their votes on a different provision. Of course, that different provision may never come up for a vote, or the supporters may renege on their promise. Thus, non-supporters may prefer to give and receive simultaneously by adding a provision they favor to the supporter's measure. The resulting two-part proposal is a

[80] *See* COOTER, *supra* note 11, at 7; DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION, 7 (1991).
[81] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 132 (1962).

logroll,[82] and the vote trading is implicit. Neither side actually swaps votes but rather agrees tacitly to endorse the joint proposal. In this way, each party benefits from the other's backing, receiving its preferred provision and tolerating the other side's measure.

Logrolling is possible with referenda. Because they are relatively few in number and operate within a bargaining framework, legislators can compromise across issues and present a logrolled measure to the electorate. By contrast, logrolling of this sort is not possible with initiatives. Supporters of an initiative cannot explicitly trade votes with non-supporters; each side consists of thousands of scattered citizens, and the transaction costs of bargaining among them are prohibitive.[83] This moves the logrolling back a step. The voters themselves do not bargain across issues, but the individuals who propose an initiative might, either by cooperating with the proponents of another initiative or simply combining two or more of their own proposals. In this way, they assemble packages of proposals and present them to the public. If none of the separate components of a package commands majority support on its own, but the aggregation of support for the separate components of the package leads to enough votes for passage, an implicit logroll has taken place.

Whether vote trading is socially beneficial is an empirical question. On the one hand, logrolling allows voters to register the intensity of their preferences. They can "sell" their votes on issues about which they are indifferent and "buy" votes on issues

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[82] The non-supporters will attach a measure that could not muster majority support on its own; there is no need to bargain to ensure passage of popular measures. Thus, neither part of the two-part initiative could pass on its own, but the combined initiative will receive majority support. This scenario satisfies the requirements for logrolling. *See supra* Part I.B.1. A sufficient number of supporters will disfavor the non-supporter's measure. Otherwise the non-supporters' measure would command majority support on its own, and again, there would be no incentive to bargain.

[83] *See* Gillette, *supra* note 8, at 967 ("[T]he inability of the electorate to 'dicker … for support now in exchange for your support on something else later' undermines the 'legitimacy' of plebiscites") (quoting Frank Michelman, *Political Markets and Community Self-Determination: Competing Models of Local Government Legitimacy*, 53 IND. L.J. 145, 182 (1977-1978)).

about which they care passionately. This leaves participants in a logroll better off. The problem is that logrolling harms those parties who are not privy to the bargain. They are subjected to all of the provisions of the logroll, which must leave them worse off than the status quo—otherwise, they would have voted for the package. The social value of logrolling turns on the relative gains to the traders and losses to the non-traders.[84]

Elsewhere one of us has argued that logrolling among legislators is, on average, likely to produce beneficial outcomes or outcomes that cause so little harm that judicial efforts to stop the practice are not cost justified.[85] (For the sake of brevity, we have not restated these arguments here.) Therefore, courts should not use the single subject rule to prevent legislative logrolling; this purpose is misguided. Likewise, courts should not use the rule to prohibit logrolling in referenda. Referenda result from legislative processes. The same arguments that support logrolling in regular legislation support logrolling in referenda.

Logrolling in initiatives, on the other hand, should be banned. As an initial matter, one might argue that such logrolling will tend to be socially harmful. Proponents of initiatives may be less likely than legislators to negotiate public-minded deals. And unlike legislators, they are not engaged in repeat play with third parties who are harmed by a particular bargain.[86] We plan to address these arguments more fully in a longer version of the paper. More importantly for present purposes, logrolling in initiatives is harmful because it is likely to lead to cycling.

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[84] *See* MUELLER, *supra* note 9, at 106.
[85] *See* Gilbert, *supra* note 13.
[86] *See* Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 667-68 (1994).

Cycling is, in theory, a common problem when three or more individuals vote across multiple issues in a system of majority rule.[87] It is a core theme of public choice literature and has been analyzed from a variety of angles.[88] The fundamental problem with cycling is that it prevents stable outcomes. Individuals cannot collectively rank policies or states of the world from best to worst. They run in circles, and progress is impossible.[89]

Logrolling significantly magnifies the likelihood of cycling; indeed, the existence of the former implies the risk of the latter.[90] To see why, consider the following example. Assume that three voters are making decisions across three dimensions of choice, A, B, and C. The dimensions are unrelated to each other—A, for example, might be about school funding, while B is about police funding, etc. The status quo, which is indicated with an "SQ," reflects the combination of policies currently in force, A_0, B_0, C_0. There are separate proposals to move from A_0 to A_1, B_0 to B_1, and C_0 to C_1. Each voter passionately supports one of these proposals and mildly opposes the other two. These preferences are summarized in Table 2. Utility reflects the pleasure (or, when negative, displeasure) that each voter would experience if the corresponding policy were enacted.

[87] *See* MUELLER, *supra* note 9, at 84-92.
[88] *See id.* at 84.
[89] *See* COOTER, *supra* note 11, at 41-43.
[90] *See* MUELLER, *supra* note 9, at 108.

Table 2

Voter 1		**Voter 2**		**Voter 3**	
Policy	Utility	Policy	Utility	Policy	Utility
A_1	10	B_1	10	C_1	10
SQ (A_0, B_0, C_0)	0	SQ (A_0, B_0, C_0)	0	SQ (A_0, B_0, C_0)	0
B_1	-2	C_1	-2	A_1	-2
C_1	-3	A_1	-3	B_1	-3

If the proposals are individually paired against the status quo, none will receive majority support. This is because two of the three voters prefer the status quo to any single alternative. To illustrate, the proposal to move to B_1 will receive support from Voter 2 but not from Voters 1 and 3. These outcomes are stable and do not affect aggregate utility. This observation is generalized by the median voter theorem. When voters make decisions along a single dimension of choice—for example, school funding or police funding, but not both together—the policy that most satisfies the median voter will be the dominant, stable outcome.[91] When votes for A_0 vs. A_1, B_0 vs. B_1, and C_0 vs. C_1 are cast separately, the median voter in each case prefers the status quo.[92]

[91] *See* COOTER, *supra* note 11, at 25-27. The Median Voter Rule presupposes that voters have "single-peaked" preferences—for example, each voter most supports some ideal level of school funding, and moving away from that level by increasing or decreasing funds makes her less happy. In practice, some voters have "multi-peaked" preferences. For example, a yuppie might most prefer a high level of school funding, lose utility when funding is decreased to a medium level, but then gain utility if funding falls to a low level (perhaps because when school funding is low, taxes are low, and the yuppie can send his children to private school). When preferences are multi-peaked, cycling can occur, even when individuals are making decisions along a single dimension of choice. *See id.* Thus, restricting decision-making to a single dimension of choice does not eliminate cycling. But it does make it significantly less likely.

[92] To be clear, the median voter is the one in the middle of the spectrum of preferences. To illustrate, Voter 1 is the median voter with respect to policy B_1—one voter (2) likes B_1 more, and one voter (3) likes B_1 less. Voter 1 prefers the status quo to B_1, and so the status quo will defeat B_1 under majority rule.

If voters can logroll, then they can simultaneously make decisions along multiple dimensions of choice. In this circumstance, there typically is no median voter.[93] Thus, the stabilizing effects described by the median voter rule vanish, and cycling is likely to result. Consider Table 3, which incorporates all possible logrolls between the voters.

Table 3

Voter 1		**Voter 2**		**Voter 3**	
Policy	Utility	Policy	Utility	Policy	Utility
A	10	B	10	C	10
A+B	8	B+C	8	A+C	8
A+C	7	A+B	7	B+C	7
A+B+C	5	A+B+C	5	A+B+C	5
X	0	X	0	X	0
B	-2	C	-2	A	-2
C	-3	A	-3	B	-3
B+C	-5	A+C	-5	A+B	-5

Now there is potential for bargaining—and cycling. Recognizing that A_1 (the proposal on school funding) will not pass on its own, Voter 1 may propose a logroll with Voter 2, offering to vote for B_1 (police funding) if Voter 2 votes for A_1. When pitted against the status quo, this proposal, A_1B_1, would receive favorable votes from 1 and 2 and yield 8 and 7 utility, respectively. A_1B_1 would leave Voter 3 worse off: he would move from zero utility at the status quo to -5 utility at A_1B_1. Thus, 3 might propose to

[93] *See id.*

logroll B_1 and C_1. Voter 2 would prefer B_1C_1 to A_1B_1; he would receive 8 utility rather than 7. Likewise, 3 would prefer B_1C_1 to A_1B_1; he would receive 7 utility rather than -5. So B_1C_1 would defeat A_1B_1 in majority rule voting. Not to be deterred, Voter 1 could propose to logroll A_1 and C_1. He would prefer A_1C_1 to B_1C_1; he would move from -5 utility to 7. Similarly, Voter 3 would prefer A_1C_1 to B_1C_1; he would move from 7 utility to 8. So A_1C_1 would defeat B_1C_1. In response to this arrangement, Voter 2 may re-propose A_1B_1; he would prefer that to A_1C_1, as would Voter 1. Now we have come full circle. A_1B_1 defeats A_1C_1, which defeats B_1C_1, which defeats A_1B_1. There is no stable outcome. When these voters cast their ballots, cycling will result.

If these voters are legislators, they can probably solve the cycling problem. Functioning legislatures have agenda-setting mechanisms. Agenda setting with a rule of no reintroduction can induce stability.[94] For example, if A_1B_1 was paired against the status quo first, and then the winner of that was paired against A_1C_1, and then the winner of that was paired against B_1C_1, B_1C_1 would be the overall winner.[95] If proposals cannot be reintroduced once they are defeated, then B_1C_1 would constitute a stable outcome. Likewise, if bargaining costs are low—which they may be among small groups of legislators who are repeat players and who can punish one another for self-serving behavior—they can strike a stable, optimal bargain.[96] In this case, the optimal logroll would package measures A_1, B_1, and C_1 into one.[97] That combination, $A_1B_1C_1$, would

[94] *See id.* at 43-46; MUELLER, *supra* note 9, at 112-14.
[95] AB defeats the status quo in the first round, AB defeats AC in the second round, and BC defeats AB in the third round.
[96] Cooter's political Coase theorem predicts that when the transaction costs of bargaining are zero, legislators will bargain to the most efficient outcome, which in this case would be ABC. *See* COOTER, *supra* note 11, at 53. How that surplus would be distributed is unclear; the legislators could settle on any of a literally infinite number of combinations. *See id.*
[97] We did not include the logroll $A_1B_1C_1$ in the cycling example in the previous paragraph. Doing so would not have changed the result, as A_1B_1, B_1C_1, and A_1C_1 would each defeat $A_1B_1C_1$ in pairwise voting. If,

generate the largest possible aggregate utility, 15. $A_1B_1C_1$ would be a stable outcome regardless of whether it represented regular legislation or a referendum.

If these voters are not legislators but rather three among thousands of citizens considering an initiative, they almost certainly cannot solve the cycling problem. Initiatives operate without agenda setters. Some states forbid initiatives from addressing certain topics, and other states have rules that prevent defeated initiatives from being reintroduced for a certain period. But in general, initiatives can be offered on any issue at any time. They are not limited by rules of procedure and other structures that can induce a stable equilibrium.[98] Similarly, citizens cannot bargain with one another over the contents of initiatives. The transaction costs of doing so are prohibitively high. The sponsors of initiatives cannot bargain to efficient, stable outcomes either. The obvious reason for this is that they do not control voting outcomes; they may be able to strike a bargain among themselves, but there is no reason to suppose that voters will support that bargain when it is put up for a vote. More subtly, initiative sponsors, unlike legislators, do not have easy access to all sponsors of potential policy changes. There is no clearinghouse for the universe of realizable initiatives. The sponsors of A_1 and B_1, for example, may find one another and propose an initiative A_1B_1, which passes. But shortly thereafter, the sponsors of B_1 may discover initiative C_1, and initiative B_1C_1 would defeat

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however, bargaining costs are low enough to allow for side payments, this would not be the case. The legislators would not leave any surplus on the table. Voters 1 and 2 would not, for example, pass AB (thus creating 10 in aggregate surplus) when they could pass ABC (thus creating 15). They would pass ABC, and side payments from voter 3 to 1 and 2 would make it worth their while. Voter 3 might pay 1 and 2 the equivalent of 4 utility each. This would leave 1 and 2 with 9 utility each, and 3 would have -3. This outcome would be preferable to all parties than the payoffs from AB. Of course, side payment arrangements like this cannot be reached unless bargaining costs are low.

[98] *See* MUELLER, *supra* note 9, at 115-20 (discussing agenda setting and the concept of structure-induced equilibrium more generally).

A_1B_1, starting the cycle. For these reasons, cycling poses a genuine threat to direct democracy.

To summarize, the purpose of this section was to analyze the prohibition on logrolling in the direct democracy context. We have shown that logrolling does not pose a significant threat to referenda. Like standard legislation, referenda are the product of legislative processes. There are sound reasons to think that such logrolling will tend to be stable and perhaps socially beneficial. By contrast, logrolling does threaten initiatives. Explicit logrolling among citizens is impossible. Implicit logrolling orchestrated by initiative sponsors may tend to be socially harmful and, more importantly, is subject to cycling. Therefore, the prohibition on logrolling is well-placed with respect to initiatives.

B. Riders and Initiatives: The Problem OfTake -It-Or-Leave-It Offers

Riding occurs when an unpopular measure get attached to a popular one and "rides" it through the lawmaking process. Commentators generally characterize riding as a species of logrolling,[99] which may lead one to believe that the same insights offered in the last section apply. This is not the case. Unlike logrolling, riding does not make cycling more or less likely.[100] And unlike logrolling, riding does not benefit a majority of voters. It makes a majority worse off.

The reason that riders harm a majority can be understood using the concept of exchange. By definition, logrolling consists of exchange. When measures A and B are logrolled, the supporters of A vote for the combined bill because they benefit from the

[99] *See supra* note 59 and accompanying text.
[100] Riding does increase instability in the sense that any measure passed with a rider is always susceptible to being supplanted by that same measure without the rider. Otherwise, it has no effect on the likelihood of cycling. Attaching an unpopular measure, D, to the logrolls in the previous section would lead to identical cycling behavior.

bargain—they receive votes in favor of A. For a logroll to pass, a majority of voters must participate in it, and they would not participate if they did not benefit from doing so. In contrast, riding does not involve an exchange. Assume A_1 would command majority support, an unpopular measure, B_1, gets attached as a rider, and the combined proposal, A_1B_1, passes. The supporters of A_1 implicitly cast a vote for B_1, but they neither like B_1 nor gained anything in exchange for their support of it. There was no bargain, and A_1's supporters would be better off without the rider.

This example is concretized in Table 4. The proposals and utility figures represent the preferences of a majority of voters. Again, "SQ" refers to the status quo.

Table 4

Preferences of a Majority of Voters	
Policy	Utility
A_1	10
$A_1 + B_1$	2
SQ (A_0, B_0)	0
B_1	-8

The majority would be most satisfied with policy A_1. If B_1 is attached to A_1, the majority would still prefer the combined measure to the status quo. However, this outcome is clearly sub-optimal. The rider forces the majority to accept its second choice when its first choice would otherwise be available. For this reason, riding is likely to be socially harmful.[101]

[101] A situation could arise in which the gains that a minority receives from attaching a rider outweigh the losses to the majority that suffers from the rider. In that case, riding would be socially beneficial. This

This discussion illustrates the dangers of riders, but it rests on three assumptions: that riders can be attached to a popular measure without an exchange; that riders cannot then be removed; and that voters will approve a measure that is sub-optimal. These assumptions are reasonable in the direct democracy context.

The sponsors of an initiative can simply tack on a rider. They do not have to clear this with anyone or otherwise participate in any mutually beneficial exchange. Doing so requires a bit of strategy. They must first identify an initiative that will receive majority support on its own. They must then attach a rider that is not so unpopular that it will prevent the collection of signatures or, once the combined initiative is on the ballot, lead a majority to vote against it. These hurdles are tangible but not insurmountable. With referenda, attaching riders is a bit harder. Only well-placed veto players can attach riders, and certain features of the legislative process—including repeat play among politicians and the threat of retaliation—may discourage them from doing so.[102] Still, it is possible.[103]

Riders cannot be removed from initiatives. No mechanisms exist for excising them before an initiative is certified or after it is placed on the ballot. Thus, initiatives amount to take-it-or-leave-it offers to the citizenry. Similarly, riders cannot be removed from referenda once they are put before the electorate. However, referenda do not reach the ballot until after they pass through the legislative process. This process offers devices

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outcome seems unlikely in practice, and more importantly, allowing even socially beneficial riding to take place sets a dangerous precedent. *See generally* Gilbert, *supra* note 13.

[102] Elsewhere one of us has developed this argument in much greater depth. *See id.* In the interest of brevity we refrain from doing so again here.

[103] In November 2004, a dramatic example of riding unfolded in the U.S. Senate when an unknown lawmaker or staffer "slipped a provision into an omnibus spending bill that would have allowed two committee chairmen to view the tax returns of any American." Senate Majority Leader Bill Frist said "he did not know who was responsible for inserting the language." *See* http://www.cnn.com/2004/ALLPOLITICS/11/21/tax.provision/index.html.

—including amendments—for removing riders and incentives to prevent them from getting attached in the first place.[104] This process reduces the threat of riders, though it does not eliminate it.[105]

When presented with a popular measure, A_1, that contains a rider, B_1, voters are likely to approve the combined provision even though it is sub-optimal. This is especially true with respect to initiatives. Strategic voters will recognize that initiative $_1$A may never reach the ballot again. The discouraged sponsors of the initiative may not re-propose A_1 by itself if the combination of A_1 and B_1 fails. Indeed, the initiative sponsors may be interested *solely* in B_1, in which case rejecting A_1B_1 ensures that A_1 will not reappear on another ballot anytime soon. Thus, rational voters will begrudgingly support A_1B_1 when given the chance. Voters who do not think strategically will vote for A_1B_1 simply because it is (slightly) superior to the status quo. The logic is similar for referenda, although not as strong. Because legislators are politically accountable, they have a strong incentive to re-propose popular legislation without a rider if the initial legislation with the rider fails. In any event, voters will often pass measures that contain riders even when the result is sub-optimal.

As this section has shown, riders tend to be socially harmful, and they pose a threat to direct democratic procedures, especially initiatives. These conclusions are not entirely original. Judges and commentators have long assumed that riders are undesirable,[106] and some have intuited that the absence of deliberation in direct

[104] *See* Gilbert, *supra* note 13.
[105] *See id.*
[106] *See supra* Part I.B.2. Explicit recognition of riders is rare, but close scrutiny of opinions shows that judges are aware of them. *Id.*

democracy magnifies their threat.[107] What is original is the following: (1) riders pose a more substantial risk than logrolling—an individual instance of the former makes a majority of voters worse off, while an individual instance of the latter makes a majority better off; (2) riders result from manipulations of process, and the take-it-or-leave-it character of initiatives is more vulnerable to riders than the referenda or regular legislative process; (3) because riders do not result from political exchange, they can be distinguished from logrolls based on voting patters. This observation is crucial to the approach to single subject adjudication that we offer in Part III.

C. Political Transparency and Direct Democracy

The third purpose of the single subject rule is to improve political transparency. The theory is straightforward: confining acts to a single subject and requiring that they bear accurate titles will make it easier for citizens to grasp the contents of a proposed measure. This is turn will lead to more informed voting and superior laws.[108] In general, public choice theory mirrors these insights. It does, however, challenge the traditional approach in one regard. When two or more measures are logrolled, voting separately on each measure could *diminish* transparency by clouding the underlying bargain.

To illustrate this insight, consider the following example. Assume that San Franciscans strongly support a proposed business practice, A, and mildly approve of another practice, B. Bills that would legalize these practices are pending in the legislature, but only B will pass on its own merits. The legislator representing San

[107] *See, e.g.,* WILLIAM N. ESKRIDGE, JR., & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 336-37 (2d ed. 1995) (discussing the all-or-nothing character of initiatives and the potential for that to generate untoward drafting practices).
[108] *See supra* Part I.B.3.

Francisco guarantees that A will pass by trading her vote on measure B, ensuring its defeat. If bills A and B are voted on separately, San Franciscans will disapprove of their legislator's voting record. They will see that she voted against measure B, which they favor. On the other hand, if the bills can be combined—perhaps into one act that legalizes A and forbids B—citizens are more likely to perceive the underlying bargain. With a combined bill, the legislator can more credibly justify her actions, and citizens can more easily perceive her intentions.[109]

This argument has implications for direct democracy. With regard to referenda, which originate in legislatures and may be the product of logrolling, strict enforcement of the single subject rule may be counterproductive for transparency. Forcing citizens to cast separate votes on separate pieces of a logroll could obfuscate the underlying bargain. It would be harder for them to interpret their representative's voting record. By contrast, initiatives are not the product of logrolling by politically accountable officials; there is no voting record to preserve. Thus, restricting the scope of initiatives should tend to enhance political transparency.

III. A NEW FRAMEWORK FOR SINGLE SUBJECT ADJUDICATION

Despite centuries of life and hundreds of applications to direct democratic processes, the single subject rule remains incoherent. As discussed in Part I, application of the rule is inconsistent and obscure. Judges tend to be overly deferential and, when they do use the rule, they fail to explain their decisions. As discussed in Part II, the very purposes of the rule are misunderstood. Preventing logrolling is important—not because logrolling is inherently bad but because it drastically increases the risk of cycling. Riding

[109] This example was developed from ideas in COOTER, *supra* note 11, at 64.

is a corrosive practice that is distinct from logrolling and poses a grave risk in the initiative process. Improving transparency is a sensible ambition, but rigidly confining referenda to a single subject may be counterproductive in this regard.

Cycling, riding, and political opaqueness are socially deleterious outcomes, and they present profound threats to direct democracy. Fortunately, the single subject rule can be used to counter them. To do so, the rule must be reconceived. Subjects are not logical, they are political. They should be defined by the preferences of voters, not doctrinal reasoning. In this Part, we will develop a new approach to single subject adjudication that takes this insight into account. Our aim is to provide an analytical framework that will simplify and lend consistency to the adjudication of single subject disputes and simultaneously solve the problems discussed above.

A. When Faced With a Single Subject Dispute, Courts Should Begin by Distinguishing Between Initiatives and Referenda

As illustrated throughout the paper, initiatives and referenda are the product of very different processes. Initiatives originate among citizens, while referenda come from legislatures. Legislatures have agenda setting mechanisms and serve as arenas for political bargaining, both of which lend stability to legislation and prevent cycling. Likewise, legislators have relatively strong incentives not to attach riders to popular bills—doing so invites political retaliation. Riders that do materialize may be amended out before a referendum is placed on the ballot. Finally, referenda that result from logrolling may be more transparent to citizens if the components of the logroll are presented in a single bill. Factoring the logroll into separate measures may cloud the underlying bargain.

For all of these reasons, the single subject rule should be applied relatively leniently to referenda. Indeed, the rule should be applied in the same manner as the single subject rule for regular legislation. In a separate paper, one of us has developed a framework for applying the rule to legislation,[110] and courts should use that same framework with respect to referenda. In brief, that paper advocates that courts adopt a presumption in favor of logrolling, since logrolling will tend to be socially beneficial.[111] Courts should invalidate laws that contain riders, and we provide a test for identifying them. Finally, we propose that courts review legislation for comprehensibility. In particular, they must ensure that the titles of bills give reasonable notice of their contents.

If courts are faced with an initiative rather than a referendum, they should apply the test thatwe describe in the following pages. This test is different from the test for legislation in several regards. We will point out these differences as we proceed.

By developing a separate test for initiatives, we join the minority of states and commentators who advocate using different single subject standards for direct and indirect democracy.[112] As far as we can tell, we are the only ones arguing for harsher enforcement of the rulefor initiatives than referenda .

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[110] *See* Gilbert, *supra* note 13.
[111] To be clear, this is a normative argument. Observers of the political process disagree on whether logrolling is beneficial on the whole. In another paper, one of us claims that it is, and this is backed up with original arguments. For other pro-logrolling arguments, see Gillette, *supra* note 88, at 657-64.
[112] *See supra* notes 74, 75 and accompanying text.

B. Courts Should Invalidate Initiatives that Resulted From Logrolling and Sever Initiatives that Contain Riders

The single subject rule should be used to strike down initiatives that are the product of logrolling.[113] This is not because logrolling is always harmful—again, the effects of logrolling vary by case.[114] Rather, the prohibition is based on the insight that logrolling magnifies the likelihood of cycling, and cycling is equivalent to chaos. Voters spin their wheels, the law is always in flux, and progress is impossible.[115] Legislators can restrain themselves from engaging in cycling behavior, but private citizens cannot. The courts must do it for them.

By prohibiting logrolling, courts can force citizens to vote on single dimensions of choice. As discussed, voting along single dimensions of choice usually leads to stable outcomes.[116] This is superior to voting along multiple dimensions of choice, which is what happens when individuals logroll.[117] Voting along multiple dimensions is practically guaranteed to induce cycling.

In addition to forbidding logrolls, courts should condemn initiatives that contain riders. Riders leave a majority of voters in a sub-optimal position, preventing the achievement of a superior social outcome. However, initiatives with riders should not be struck down in their entirety.[118] Rather, the riders should be severed and struck down

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[113] This is the first difference between the single subject test for legislation and riders. The test for legislation condones logrolling. *See* Gilbert, *supra* note 13.
[114] There are good reasons to suppose that logrolling in the initiative context will tend to be harmful. *See supra* note 88 and accompanying text.
[115] In a longer version of this paper, we will examine the history of initiatives in California and elsewhere and identify patterns that indicate cycling behavior. Such empirical evidence would obviously buttress our claim. Unfortunately, cycling is hard to observe. When voting runs in circles, one can never be sure if cycling is at work or if voters have simply changed their preferences.
[116] *See supra* text at 19-23.
[117] *See id.*
[118] This is the second difference between the tests for legislation and initiatives. *See* Gilbert, *supra* note 13.

while the popular provisions are left standing.[119] This approach would move a majority of voters to their most preferred outcome. It would also save the transaction costs associated with re-proposing the popular parts of the initiative from scratch.

Courts cannot strike down logrolls or sever riders unless they can first identify them. To do this, judges need a more sophisticated approach than the traditional single subject tests. We provide one here.

Consider first a world in which courts have perfect information about citizens' voting preferences. This is unrealistic, and we will relax it in a moment. For now, it provides a useful baseline. Armed with such information, courts could follow these steps to identify logrolls and riders. First, they would separate an initiative into its functionally related components.[120] A functionally related component is one whose provisions all rely on one another to be effective. To illustrate, if a measure A collects revenues for expenditure on a measure B, the measures have a functional relationship and collectively should be treated as one component of the initiative. A measure C that is topically related to A and B but can be substantially effective without them would be a separate component. Once all of the functionally related components were identified, a court would ask this question about each one: if this component were removed and voted upon separately and in isolation, would it pass? If the answer is no, the component is either part of a logroll or a rider, and the initiative violates the single subject rule.

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[119] While uncommon, courts sometimes cure single subject violations by severing the offending provisions of the law at issue. *See, e.g.,* Simpson v. Tobin, 367 N.W.2d 757, 768 (S.D. 1985) ("Unconstitutional provisions . . . may be extracted and the remainder left intact."). Some states explicitly authorize this practice in their constitutions, at least with respect to statutes. *See, e.g.,* ARIZ. CONST. art. 4, pt. 2, § 13 ("[I]f any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be embraced in the title.").

[120] This notion of functional relationships is drawn from a judicial test proposed by Justice Manuel of the California Supreme Court. *See* Schmitz v. Younger, 577 P.2d 652, 656 (Cal. 1978) (Manuel, J., dissenting).

The intuition behind this test runs as follows. There are three types of provisions in any initiative that receives majority support: genuinely popular ones, provisions that are being implicitlylog rolled, and riders. A genuinely popular provision would receive majority support if it were voted upon separately. So the test wouldnever mistakenly implicate a popular measure.

By contrast, a logrolled measure would not receive majority support if it were voted upon separately and in isolation. The individual components of a logroll always lack majority backing; that is why their proponents are forced to bargain in the first place. Of course, if the participants to the logroll were faithful and knew that the other components of the logroll would be voted on later, then the individual component may still pass. Among faithful actors, it is irrelevant whether the components of a logroll are voted upon simultaneously or at different times. The test accounts for this by presupposing that voters would have no opportunity to vote on the other components of the initiative—the components would be voted on in isolation. With this restriction, a component that is part of a logroll would never receive majority support. Likewise, more voters oppose riders than favor them. If a rider were voted upon separately, it would not receive majority support.[121]

[121] An example will clarify this test. Assume that 100 citizens are faced with three unrelated measures, A, B, and C. A is supported by 80 citizens. B and C are each supported by 40 citizens, and B's supporters would gladly enact C in order to get B and vice versa. Now assume that A, B, and C are logrolled by the 10 sponsors of an initiative, and ABC together command 80 votes. Now imagine that those 10 sponsors are actually indifferent to A, B, and C, but they are very interested in D, a rider, which they tack onto ABC. ABCD passes with 55 votes. If A were removed and voted upon separately, it would still receive 80 votes. It is a genuinely popular provision. If B were removed and voted upon separately, and if citizens assumed they would have no opportunity to vote on A, C, or D, B would only command 40 votes. The original supporters of B would still vote for it, but those who only supported B as a way to get C would not. The same would hold for C. D would also fail to receive majority support. Only the 10 sponsors would vote for it as a standalone measure. It only passed in the first place because, despite their disdain for it, a sufficient number of supporters of ABC felt that ABCD was superior to nothing. The test would accurately identify B, C, and D as being either logrolled components or riders.

This test would allow courts to filter individually popular provisions from unpopular ones. Initiatives consisting of the former would be upheld, and initiatives that consisted entirely of the latter would be struck down as logrolls. Initiatives that contained both popular and unpopular provisions would be severed; the popular parts would be preserved, and the unpopular ones invalidated as riders [122] This would greatly reduce the threat of cycling and eliminate deleterious riders.

Applying this test is considerably more difficult than articulating it. In the real world, courts lack information about how citizens would have voted if a given initiative were divided into separate components. Still, the test has practical merit. It provides an analytical framework for thinking about the single subject rule; currently judges are uncertain about how to conceptualize it. And courts need not be absolutely accurate in every case. As long as they can identify some logrolls and riders without incurring too many costs—by, for example, striking down popular measures—then judicial review is worthwhile. We believe they can glean enough information to do so.

First, courts could consider the "legislative history" of the initiative at issue. If, for example, components of the initiative had previously been proposed as individual initiatives and defeated, this would be evidence of logrolling or riding. It would suggest that the individual components could not pass on their own merits.[123] Courts could also examine the records of the initiative's sponsors. Any haggling over the components of the initiative could be evidence of logrolling, especially if that haggling was between

[122] In theory, an initiative could contain both individually popular measures and measures that resulted from a logroll. In that case, the logrolled components should be struck down, and the popular components should survive. As with severing riders, this approach would save the transaction costs of re-proposing the popular components from scratch.

[123] An appellate court in California used similar logic to strike down an initiative on single subject grounds. The court found that the five parts of the initiative at issue had been introduced separately and rejected in the state legislature. This was considered evidence of logrolling. *See* Chemical Specialties Manuf. Assoc. v. Deukmejian, 227 Cal. App. 3d 663, 672 (1991).

multiple sponsors who joined forces. Finally, courts could review voting records, political affiliation, and even poll data to hypothesize how citizens would vote on the separate components.[124] If judges made clear that all of this information would be relevant, the parties to a single subject dispute would have a strong incentive to produce it. Thus, judges would have tangible—if biased—data to base their decision on.

Notwithstanding these sources of information, courts would occasionally make mistakes. Some popular provisions would be struck down, and some logrolls and riders would be upheld. However, there is no reason to suppose that courts would make more mistakes under this framework than under the traditional approach. To the extent they do make mistakes, and insofar as they adopt this framework and make clear what sorts of information they value, initiative sponsors would have an incentive to maintain better records. They could keep meticulous archives explaining the decision to package multiple components in a single initiative. For example, poll data and other evidence that each of the components was individually popular before they were packaged together would strengthen their case.

Careful application of the test we propose could significantly improve the quality of direct democracy. By restricting cycling and riding, it would make a majority of voters and society as a whole better off.

C. Courts Should Ensure that the Contents of Initiatives are Comprehensible

Once an initiative has been screened for logrolls and riders, it must pass one final test: courts must examine it for clarity. In particular, courts must consider whether the

[124] For an example of a court using many of the tools identified in this paragraph to predict confidently how legislators would have voted on a particular bill, see Porten Sullivan Corp. v. Maryland, 568 A.2d 1111 (1990).

title of the initiative accurately describes its contents. If they find that an initiative's title is inadequate, it is safe to assume that most citizens would come to the same conclusion.

In light of the test for logrolling and riders, this "clarity check" may seem odd. In theory, initiatives would only get to this stage if each of their components were popular. And to be popular, it must be the case that the components are widely understood: citizens cannot meaningfully support a measure if they are unaware of its contents. This is correct, and in a world of perfect information, the clarity check would be redundant. No initiative could be genuinely popular but also incomprehensible.

However, in the real world where information is scarce and courts make errors, the clarity check is important. In a given single subject dispute, the evidence may suggest that an initiative is popular. But that evidence may be misleading—it could be that the content suggested by the title is popular, but the actual content is not. There is a feedback loop between the transparency of an initiative and its popularity. The easier the initiative is to understand, the easier it will be for courts to gauge its popularity. The easier it is to gauge popularity, the easier it will be for courts to filter out logrolls and riders. To achieve this outcome, courts should be diligent in their efforts to ensure that initiatives bear clear titles. Striking down a few initiatives on these grounds will give sponsors of future initiatives an incentive to present the public with transparent proposals.

CONCLUSION

Direct democracy's appeal lies in its capacity to involve citizens firsthand in shaping law and policy. But this strength is also a weakness, at least with respect to initiatives. Unlike legislators, citizens cannot compromise with one another. They are

too numerous and geographically dispersed, and they lack a procedural framework in which to negotiate. As a result, laws passed through the initiative process are subject to cycling, which wastes resources and stifles social progress. Moreover, initiatives are vulnerable to riders. Without the disciplining effects of political accountability and repeat play, the sponsors of initiatives can attach riders to popular measures. Without an amendment process, riders cannot be removed.

These shortcomings of direct democracy can be cured with the single subject rule. Doing so requires the rule to be reconceived. Courts must abandon their efforts to define subjects based on doctrinal arguments and logic. They must embrace a vision of subjects that is premised on politics.

Based on this approach, we have offered a new test for identifying single subject violations. With perfect information, the test would screen out all logrolls and riders and thus limit cycling. It would also prevent a majority of citizens from being forced to accept a second-best outcome when, but for a rider, a superior outcome would be available. Even with imperfect information, the test provides a sensible framework for analyzing single subject disputes. Courts can use this framework to lend consistency to their adjudication and improve the quality of direct democratic procedures.