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Ending Court Protection of Voters from the Initiative Process

When journalists write their stories about state ballot propositions in the 2006 election, they likely will focus on South Dakota's abortion rights referendum,[1] Michigan's affirmative action measure,[2] or the variety of eminent domain measures[3] reacting to the Supreme Court's *Kelo* decision.[4] But there's also a story about measures that courts have *kept off* the ballot in a misguided effort to protect voters from making hard or bad choices. In this short essay, I argue that states should repeal their "single subject" rules because judicial enforcement leads to arbitrary, perhaps result-oriented decisions that don't benefit voters.

By one count, at least thirteen of the twenty-two states allowing initiated statutes and eleven of the eighteen states allowing initiated constitutional amendments provide that no initiated measure presented to the voters shall contain more than a "single subject."[5] A court determining that an initiated measure contains more than one subject will often remove it from the ballot or declare the measure void if it has already been enacted; some courts consider the less drastic step of severing the measure, and placing only part of it before voters.[6]

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1. OFFICE OF SEC'Y OF STATE, 2006 SOUTH DAKOTA BALLOT QUESTIONS PAMPHLET 12 (2006).
2. MICH. DEP'T OF STATE, STATE PROPOSALS 5-7 (2006).
3. *See Fall Ballot Measures 2006*, BALLOTWATCH, Oct. 2006, at 1, *available at* http://www.iandrinstitute.org/BW%202006-3%20(October%20update).pdf (noting thirteen states with such measures on 2006 ballot).
4. Kelo v. City of New London, 545 U.S. 469 (2005).
5. Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 36 (2002) (citing PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE 127-28 (1998)).
6. *See, e.g.*, Nevadans for the Prot. of Prop. Rights v. Heller, 141 P.3d 1235, 1245-46 (Nev. 2006).

What is a single subject? Courts usually require that two combined measures be "reasonably germane" to one another, or, more strictly, that all the parts of the initiative be "functionally related" to one another. This narrow definition of "subject" is necessary because if initiative proponents could place any proposal under a broad subject—say, "public policy"—then the single-subject rule would be rendered nugatory. Therefore, as Dan Lowenstein has ably demonstrated, courts applying the single-subject rule will limit the generality of the applicable subject.[7]

Single-subject litigation during the 2006 election season shows that the requirement is a failure. Consider two proposed initiatives and ask yourself if either, or both, violate the single-subject rule:

Initiative A shifts responsibility for drawing state legislative and congressional districts from the state legislature to a redistricting commission. The commission must draw single-member districts, changing current practice which allows multi-member districts for the state legislature.

Initiative B limits marriage to one man and one woman. It also prevents localities from adopting "civil unions" for non-married couples that would give those in such unions any of the rights of married couples.

In two opinions issued on the same day in March 2006, the Florida Supreme Court struck down *Initiative A* and upheld *Initiative B* against single-subject challenges.[8] As to the redistricting measure, the court ruled that federal redistricting and state redistricting are separate subjects, and both differ from the use of single-member districts.[9] As to the marriage proposal, the court held that both parts of the measure dealt with the subject of marriage.[10]

It is not hard to imagine other courts reaching different conclusions. Indeed, some have. A California court upheld an election reform measure much more disparate than the Florida redistricting measure against a single-subject challenge.[11] A state court in Georgia struck down a measure very similar to *Initiative B* on grounds that same-sex marriage and civil unions are separate subjects[12] (a decision later reversed by the Georgia Supreme Court).[13]

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7. Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938-42 (1983).

8. Advisory Opinion to the Attorney Gen. Re: Indep. Nonpartisan Comm'n To Apportion Legislative and Cong. Dists. Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) [hereinafter *Redistricting Case*]; Advisory Opinion to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229 (Fla. 2006).

9. *See Redistricting Case*, 926 So.2d at 1225-26.

10. *See id*.

11. Fair Political Practices Comm'n v. Superior Court, 599 P.2d 46, 47-48 (Cal. 1979).

12. O'Kelley v. Perdue, No. 2004CV93494, 2006 WL 1350171 (Ga. Super. Ct. May 16, 2006), *rev'd*, 632 S.E.2d 110 (Ga. 2006).

We'll never know the extent to which the Florida justices' views of the merits of the proposed initiatives (or fear of the wrath of voters after removing a popular measure from the ballot) consciously or subconsciously affected their decisions. But there's a danger of such effects given the relative standardlessness of the single-subject test—especially in cases involving hot-button issues like same-sex marriage bans.

Florida is not alone. The Colorado Supreme Court opinion removing a measure that would deny non-emergency services to illegal aliens[14] and the Oklahoma Supreme Court opinion blocking an eminent domain measure[15] show the same standardlessness. The Colorado opinion is especially troubling in suggesting that a single-subject violation occurs when a measure has multiple *purposes*.

Perhaps society should tolerate the rather arbitrary nature of single-subject decisions if the rule serves an important public purpose. But it doesn't. Single-subject proponents have offered at least three justifications for the rule, none of which is tenable. First, proponents argue, the rule might prevent the voter confusion that ostensibly might result when an initiated measure combines different subjects. But the rule is not well designed to prevent voter confusion; it both allows confusing measures on single subjects and bars simple measures on disparate subjects.

Second, the rule is said to limit certain kinds of logrolling—whereby initiative drafters combine disparate measures for strategic purposes. One variety of this logrolling is said to occur when drafters combine a popular measure with an unpopular one in the hopes that the unpopular measure will ride the support for the popular one. Opponents of the marriage measures, for example, argue that the ban on civil unions rides the coattails of support for a gay marriage ban. Voters must ratify the unpopular measure as the price of obtaining the popular measure. The other variety of logrolling is said to occur when drafters combine two relatively unpopular measures in the hopes that there will be enough support for each individual component for the combined initiative to pass.

The logrolling argument is not compelling. Consider this hypothetical rider attempt concocted by a Nevada Supreme Court justice: "[A] group might attempt to appeal to a majority of Nevadans by proposing . . . to adopt more stringent registration requirements for sexual offenders . . . . But then, the

13. Perdue v. O'Kelley, 632 S.E.2d 110, 113 (Ga. 2006).

14. Title and Ballot Title and Submission Clause for 2005-2006 #55 v. Lamm, 138 P.3d 273 (Colo. 2006).

15. *In re* Initiative Petition No. 382, State Question No. 729, 142 P.3d 400 (Okla. 2006).

group might also place somewhere in their petition a provision abolishing the death penalty."[16]

This example shows a judge who does not understand the reality of modern election campaigns. Imagine the radio ad that opposition campaign consultants would write: with ominous music in the background, the announcer exclaims, "Supporters of Proposition *X* claim this measure cracks down on sex offenders, but the fine print abolishes the death penalty for mass murderers. If you're tough on crime, vote 'No' on Proposition *X*."

Voters may be lazy, but they are not stupid. Opponents of the measure will have every incentive to highlight the hidden unpopular component, and voters will hear about it; many will vote no. Voters will be inherently suspicious too of measures combining wildly different subjects, and if such measures do pass, it is not evident that they would cause significant social harm.

As for the take-it-or-leave it point**,** voters are not children. They are adults who know how to make difficult choices, and who know that life often involves a series of tradeoffs. Voters should have the chance to vote on those tradeoffs.[17] Indeed, logrolling in some circumstances improves voter choice. For example, voters may not want a redistricting commission *unless* it must draw single-member districts.

Finally, single-subject advocates defend the rule by claiming that any obstruction to the initiative process is good. The single-subject rule, however, might not work evenly to hamper the initiative process. My supposition, which I hope to explore empirically in a future article, is that the single-subject rule works unevenly: it tends to block initiatives judges dislike, and, in states with an elected judiciary, to keep on the ballot initiatives that are likely to command popular support. If opponents want to make initiatives harder to pass across the board, they would be better off doing something like adopting Florida's Amendment 3, which would raise the threshold for passage of initiated constitutional amendments from fifty percent to sixty percent.[18]

Ultimately, the problem with the single-subject rule is not the courts, which by law must enforce the provision. As a partial measure, courts should certainly try to follow Lowenstein's advice to apply the rule non-aggressively to favor placing more initiatives on the ballot.[19] The real solution is to repeal state single-subject requirements. I would advise doing so through an initiated

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16. *Nevadans for the Prot. of Prop. Rights*, 141 P.3d at 1254 (Hardesty, J., concurring and dissenting).

17. *See* Richard L. Hasen, *What Choice is "All or Nothing?,"* L.A. TIMES, Sept. 2, 2006.

18. *See* Joni James, *Crimping Citizens Initiative, or Not?*, ST. PETERSBURG TIMES, Oct. 9, 2006.

19. Lowenstein, *supra* note 5, at 44-48.

constitutional amendment that repeals the requirement and does absolutely nothing else.

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