

**THE POLITICS OF PLEBISCITES:
THE INITIATIVE PROCESS AND OKLAHOMA'S
SINGLE SUBJECT RULE**

KENNETH S. HICKS
Rogers State University

This essay examines recent efforts to effect charter reform in the city of Tulsa through the lens of the single-subject rule which is a constitutional feature of thirteen states that places certain constraints on the use of direct democracy as it relates to the use of the initiative process. The essay explores the jurisprudence of a single-subject challenge to a citizen petition from a group known as Save Our Tulsa, and then explores the broader literature on the single-subject rule, noting that challenges of vagueness that provides incentives for judicial activism. The essay concludes with a discussion of Cooter and Gilbert's "democratic process theory" as a potential remedy, and offers a hypothetical discussion of how judges could apply and interpret the theory to single-subject challenges in the future.

INTRODUCTION

Many of the states that allow citizens to directly propose legislation through the initiative process also have constitutional provisions restricting the content of such proposals. Described as "single subject rules," such prohibitions are primarily designed to prevent misleading

proposals from being placed before voters (James, 2010).¹ There are many critics, however, who view these provisions as constraining rather than enhancing democracy. This essay begins with a single subject rule² challenge to an initiative petition filed in the City of Tulsa, and moves then to a discussion of the origins and purposes of SSRs. From there, drawing on Cooter and Gilbert's "democratic process theory," the essay will conclude with a discussion of how a more nuanced interpretation of the SSR would have interpreted the facts of the Tulsa case.

Tulsa's Troubled Charter History

The City of Tulsa, Oklahoma had a commission system of government for more than eighty years. Reform efforts began in earnest in the 1940's, as the city's governance began to be seen as increasingly dysfunctional (Pearson, 2011). Subsequently, there were proposals placed before voters in 1954, 1959, 1969, and 1973, with a great deal of discussion led by community leaders, stakeholders, and widely dispersed discussion among the interested sectors of the city. Each of these proposed charter changes failed at the polls, although in some instances by a razor-thin margins (1968), while in other instances proposed changes failed spectacularly (1973) (Pearson, 2011).

On February 14, 1989, the citizens of Tulsa overwhelmingly supported a petition initiative to replace what was widely perceived as a dysfunctional city commission system with a mayor-council form of municipal government. The 1989 Charter created a "strong mayor" system. In such a system the mayor is elected to a four-year term by city-wide vote, is independent of the council, possesses extensive appointive and administrative authority, and can veto council ordinances and resolutions.³ In contrast to a "council-manager" or commission systems, the 1989 Charter extended very little statutory

¹ These provisions (at least in theory) may impose constraints on the legislative process as well. See Gilbert (2006), "Single Subject Rules and the Legislative Process," *University of Pittsburgh Law Review* 803, pp. 804-870.

² For brevity's sake, the single subject rule will be abbreviated as SSR

³ To date, only Mayor Susan Savage (1992-2002) has won more than one term as Tulsa mayor under the 1989 charter.

authority to the nine-member city council. This has resulted in repeated efforts by the Tulsa City Council to strengthen its powers, usually through proposals designed to weaken the mayor's statutory authority (Averill, 2011).

Notwithstanding the city council's efforts, some interests in Tulsa have sought to lend the Tulsa mayor an even stronger hand. For example, a 2005 petition drive was organized to add three at-large members to the Tulsa City Council. That petition effort was widely criticized and was subsequently withdrawn at the request of then-Tulsa Mayor Bill LaFortune (Bledsoe 2011, 10). Consequently, reform efforts have created fairly clear battle-lines, with some political elites favoring the city council's preference for a weakened mayor, while other political interests appear to favor an even stronger mayoral institution.

In 2010 a group known as "Save Our Tulsa" began a petition campaign to alter the City of Tulsa Charter, which succeeded in securing the requisite number of signatures to appear on the November 2012 ballot. Petition 2010-01 contemplated a number of consequential changes to the Tulsa city charter, including:

- Adding the mayor as a statutory member of the Tulsa City Council, with tie-breaking powers, making the mayor the presiding officer of the council;
- Adding three at-large City Council members elected from three "super districts," and elected by all the voters of Tulsa;
- Giving the mayor authority to designate a member of the Council as "Vice Chairman;"
- Having all city elections coincide with state and federal elections; and,
- Requiring candidates for city offices to compete in nonpartisan elections, which would be scheduled to coincide with federal elections.

The overall effect of the Save Our Tulsa petition would be to strengthen the mayor's executive and administrative authority and

add to the mayor's legislative powers, while inserting the mayor into a still-weaker council leavened with three "super-councilors."⁴

Petition 2010-1 was immediately challenged on SSR grounds.⁵ The Protestant's and Proponent's briefs advocating their respective positions regarding Oklahoma's SSR jurisprudence are illustrative of the difficulties of interpreting the rule.

First, Oklahoma's case law regarding the SSR is somewhat mixed, but it tends to follow California's relatively lax interpretation of the SSR. Both sides in the Tulsa dispute were able to advance reasonable arguments for accepting *and* rejecting the SSR challenge to the petition. The challenger's brief relied extensively on the Oklahoma Supreme Court's reasoning in *In re Initiative Petition No. 314*, 1980 OK 174, arguing that changes to a state or city charter represent a "constitutional moment," which should trigger a higher standard of scrutiny.

In re Initiative Petition No. 314 revolved around the constitutionality of State Question 550, which included a repackaging of a proposal that had been rejected two years earlier.⁶ Petition No. 314 included myriad proposals, such as permitting franchising agreements between brewers and wholesalers, repealing a statutory ban on "open saloons," eliminating restrictions on issuing licenses to retail package stores or wholesale distributors.⁷ The Court held that the proposed initiative did not pass either the more restrictive "rational relationship" test advocated by the challengers or the more

⁴ Interestingly, the Tulsa City Council is collecting signatures for a rival petition that would shift from a strong mayor-council to a council-city manager system of government. The council petition would also include the mayor in the council, but would effectively divest the mayor of administrative and executive authority. The city council appears determined to get this petition on the November ballot, where a majority Tulsans could, paradoxically, vote in support of both petitions.

⁵ Full disclosure: the author acted as a consultant for the opposition's lead council.

⁶ The Oklahoma Constitution Article 5, § 6 holds that any "measure rejected by the people, through the powers of the initiative and referendum, cannot be again proposed by the initiative within three years thereafter by less than twenty-five per centum of the legal voters."

⁷ In all, there were twenty-one provisions to Initiative Petition No. 314.

permissive “germaneness” test supported by the Proponents. To the Proponents’ complaint that upholding the SSR challenge would undermine the “sanctity of the initiative process,” the Court replied that “we take this opportunity to point out that [the sanctity of the initiative process] may only be preserved by requiring the people to submit lawful initiatives.”⁸ Critics of the SSR like Lowenstein, Matsusaka, or Hasen might observe that the Oklahoma Supreme Court’s decision was primarily a political decision, a ruling motivated by the perception that Petition No. 550 amounted to a massive giveaway to out-of-state wholesalers. Likewise, a defender of the SSR might reply that avoiding such a ruling would be equally fraught with political implications, many of them hostile to Oklahoma’s economic interests.

In re Initiative Petition No. 314 also contained the most stringent “functionally-related” test for determining an SSR violation, which the protesters argued is the appropriate standard for constitutional issues. Under that standard, a set of proposals would be considered one subject “if all its measures are ‘so interrelated and interdependent that they form an interlocking package [with] a common underlying purpose’” (Bledsoe, 2011, p. 4).⁹

Advocates for Petition 2010-01 emphasized the initiative as a “sacred right of the people,” and cited an impressive array of case law to support their claim that Initiative Petition No. 2010-1 only addressed a single issue.¹⁰ Their brief contended that the petition did not violate the log-rolling ban implicit in Oklahoma Constitution’s SSR because the initiative clearly informed voters of the initiative’s proposed effect:

⁸ 625 P.2nd 602 ¶ 82.

⁹ Protestant’s brief also notes that in *Rupe v. Shaw*, 1955 OK 223 that the Oklahoma Supreme Court has applied the “germaneness” test to “amendments by article,” which I take to refer to changes to statutory law, as opposed to constitutional changes to state constitutions or municipal charters.

¹⁰ Proponents cited fourteen cases in which the Court upheld the validity of municipal or state initiatives against SSR challenges.

When a voter approaches the polling booth, he or she will be faced with one single consideration – whether to vote in favor of the re-structuring of the Council as proposed by the Proponents. If a voter disagrees with the contents of the proposal, or the methods by which the Proponents seek to accomplish the re-structuring, he or she is free to vote against the proposal, and the proposal will “fall as a whole.” However, in the end, only one provision will be submitted to the voter for consideration – whether the restructured City Council as outline in the proposal should be put in place (Howard, Schuller, Dailey, & Watson 2011, 12).

Moreover, in oral argument, the lead counsel for the proponents argued that the importance of direct democracy was such that citizens should not be shielded from difficult choices.¹¹

Proponent’s brief also contended that breaking the proposal into constituent parts would invite confusion, noting that “if an isolated amendment to the City Charter was approved that allowed the Mayor to break tie votes on the City Council, and if no other changes to the City Charter were implemented, considerable confusion would result if the Mayor appeared at a Council meeting asserting his title as the statutory tie-breaker when the Council is currently comprised of nine members, numerically incapable of producing a tie” (Howard, Schuller, Dailey, & Watson, 13).

In this instance, the Tulsa County Court essentially adopted the “germaneness” language proffered by the petition’s advocates, and explicitly avoided asserting the court’s role in adjudicating political conflicts. The absence of a controlling precedent was evident in the Court’s opinion, which noted that “it is not common that both sides, as here, argue the same cases with completely opposite results...” (Nightingale 2011, 3). The Court also recognized the balancing act implicit in such adjudications: to weigh the need to preserve the initiative process from arbitrary abridgement versus the SSR’s purpose in preventing logrolling and/or riding:

¹¹ Oliver S. Howard, OBA No. 4403 of the firm Gable & Gotwals, lead counsel for proponents.

The role of the Court in ruling today is not to deliberate on the wisdom of the proposed petition and not to determine that because some voters would like to vote on one portion in one way and another portion another way, that is not for this Court to rule on” (Nightingale, 2011, p. 4).¹² The principal rationale that the Court cited in support of the proponents was the argument that breaking up the petition would be more likely to invite confusion than the attempt “to explain to the voters that those [proposals] are joined together in order to accomplish one common or, as the proponents used, *germane* concept of how the council should be restructured” (Italics added) (Nightingale 2011, 5).

This case illustrates several of the problems inherent in the initiative process, and the numerous challenges facing jurists adjudicating SSR challenges to initiatives. First, direct democracy procedures are fully as vulnerable to manipulation as are political institutions, but often lack the deliberative component necessary to expose the motivations of powerful interests.¹³ Second, further legal challenges are likely if the Tulsa City Council successfully places an alternative proposed change of the Tulsa Charter, which would involve an even more dramatic shift from a “mayor-council” to a “council-manager” system similar to Oklahoma City’s current charter. In the event that both initiatives succeed in securing majority support, the courts would necessarily be forced to adjudicate the outcome. Whether an objective standard exists to determine which petition should be enforced is an open question. Third, the question of what constitutes a “single subject” does not present an obvious or uncontroversial answer, which demands a closer examination of the history of the single subject rule.

BACKGROUND ON THE SINGLE SUBJECT RULE

Legislatures have a long and storied history of manipulating the legislative process to the advantage of narrow interests. For example,

¹² That statement could be interpreted as *prima facie* evidence of the Court’s willingness to abrogate the SSR.

¹³ The question of whether “social media” will provide a remedy to this problem is an interesting possibility about which there is little substantive research.

in ancient Rome legislators learned the trick of “harnessing [unpopular proposals] up with one more favored” (Gilbert 2006, 811). Such tactics, commonly known as log-rolling¹⁴, became more common in legislatures in Europe and the North American colonies. The experience of legislature capture provoked reformers in the late nineteenth and early twentieth century to advocate direct democracy, of which the initiative is one variety (Gilbert 2006, 815).¹⁵

Unfortunately, direct democracy is as vulnerable to manipulation by the powerful as are legislatures. Ellis notes that well-financed interests can thwart the popular will by packing initiative proposals with multiple and potentially contradictory proposals in the hopes of securing passage of an otherwise undesirable proposal. As one election law scholar has observed, if “an initiative contains two or more distinct questions, it becomes virtually impossible to determine what the majority meant to say in approving or rejecting an initiative” (Ellis R. J. 2002, 141). The result is that “Direct democracy encumbers political bargaining, while representative government facilitates it” (Cooter & Gilbert 2010, 689). As a consequence, “direct democracy” – because it lacks a deliberative component – is often neither direct nor particularly democratic.

Requiring legislative proposals to cover only one subject in the United States was first offered in 1818 in Illinois, and was narrowly tailored to legislation related to government salaries (Gilbert, 2006, 812). These sorts of provisions became popular among the states during the progressive era. According to Gilbert, by “1959, some version of the rule had been adopted in forty-three states. The

¹⁴ Gilbert distinguishes between logrolling and “riding,” which are instances that emerge from “manipulations of committee power and procedural rules.” In other words, where log-rolling is an organic feature of legislative bargaining, riding occurs when legislators are able to use their influence within the committee process to attach provisions to an otherwise popular piece of legislation. As Gilbert notes, “judges find the results of riding and logrolling equally undesirable,” and the SSR is one possible remedy. See Gilbert 2006, 815-816.

¹⁵ The three basic varieties of plebiscites in American politics at the state level are initiatives, where citizens use a petition process to place proposals on the ballot for approval, referenda, where the state legislature places an issue before the state’s voters for an up-or-down vote, and recall, which is essentially a citizen-driven impeachment process. For a discussion of direct democracy, see Bowman and Kearney 2011, 93-98.

provision in the Nebraska Constitution is typical: 'No bill shall contain more than one subject, and the subject shall be clearly expressed in the title'"(812). Jurisprudence in most states quickly extended this logic to the initiative process (Cooter & Gilbert 2010, 689).

As a state born in the midst of the progressive era, Oklahoma's constitution was a model of the "new thinking" emblematic of that period. Scales and Goble (1982, 25) observe that "the document included most of the instruments of direct democracy that spoke to the delegates' faith in popular government." As a consequence, the Oklahoma Constitution was an expression "of the naïve faith of the progressive era that 'the cure for the evils of democracy is more democracy'" (Scales & Goble 1982, 25). Unfortunately, election scholars have provided ample evidence suggesting that unconstrained political processes—whether direct or indirect—are vulnerable to manipulation.¹⁶

The authors of Oklahoma's Constitution also included an SSR provision as protection against the manipulation of the initiative process. Article Twenty-Four § 1 of the Oklahoma Constitution contains similar language to the Nebraska single subject provision:

No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than one general subject and the voters shall vote separately for or against each proposal submitted; provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition.

Michael Gilbert, an election law scholar at the University of Virginia notes that the SSR serves (at least) three basic purposes. First, the rule prevents logrolling; where disparate groups conjoin otherwise separate proposals in hopes of securing a majority of support from voters. Second, SSRs enjoin riding, which is a similar phenomenon to logrolling in which the initiative process is manipulated by attaching an unpopular proposal to a more popular proposal in order to secure

¹⁶ See, for example, Riker (1982).

passage.¹⁷ Third, SSR's improve political transparency by simplifying the nature of proposals that can be placed before the electorate for a vote (Gilbert 2006, 813-818).

Application of the SSR raises a number of practical questions. The first question is the status of the SSR within a state's jurisprudence; some states legal cultures view the single subject rule as a useful and legitimate mechanism for challenging initiatives, while in other states' jurisprudence the idea of direct democracy as a "sacrosanct right of the people" enjoys such status that state SSR's are virtually unused.¹⁸ Second, the question has arisen in different states over whether a single subject provision even applies to initiatives in general, or (in this instance) to initiatives originating from municipal governments. For example, Ellis (2002, 142) notes that Washington state did not apply the SSR of its constitution to municipal petitions until 1995.

A third question relates to the willingness of state judges and supreme courts to invoke the SSR in striking down initiatives. Ellis states that, until recently, "state courts have...approached single-subject provisions with tremendous trepidation" (2002, 142). In many states, judges are elected to their offices or are subject to periodic judicial retention elections where alienating powerful interests can provoke well-funded ouster campaigns (Sulzeberger, 2010).¹⁹

Fourth, the application of the rule seems to go through periods where it is applied quite aggressively, and periods where SSR challenges decline in use. Gilbert investigated the fourteen states with both an SSR and an initiative process, and he noted three separate periods where single subject challenges varied considerably. For example, in the decade from 1910-1919, challenges were relatively

¹⁷ While some legislative process scholars view riding as a variant of logrolling, Gilbert goes to some lengths to argue that riding is distinctive, and is more problematic when applied to initiatives. See Gilbert (2006), pp. 836-844.

¹⁸ There are fourteen states that have both initiatives and single subject rules: Alaska, Arizona, California, Florida, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Washington, and Wyoming. See Matsusaka and Hasen (2010).

¹⁹ For a discussion of the rise of campaign spending on judicial campaigns, see Sample, Jones, and Weiss, "The New Politics of Judicial Elections (2006).

moderate, with roughly 800 cases tried. In another period – the 1960’s – single subject challenges were relatively modest, despite the fact that more states had adopted SSRs, and only 302 cases were tried. By comparison, during “the years from 2000 to 2005, an astonishing 1,010 cases were litigated” (Gilbert 2006, 820).²⁰

Gilbert’s investigation of the total number of single subject challenges in the fourteen states offers insight into frequency of SSR challenges in Oklahoma. His Westlaw search of SSR litigation of states from year of adoption of an SSR through 2005 suggests that Oklahoma is not an outlier, at least where crude frequency of challenges is concerned.

State ²¹	Number of Challenges
Alaska	20
Arizona	83
California	329
Florida	906
Missouri	334
Montana	76
Nebraska	201
Nevada	61
Ohio	212
Oklahoma	222
Oregon	168
Washington	271
Wyoming	43

²⁰ Theories explaining the proliferation of SSR challenges note the concomitant rise in initiative petitions employed, especially in states like California, where the legal community has generally adopted “relaxed” interpretations of the SSR. For a critical perspective on California’s use of petitions and the SSR, see Minger (1991) and Ellis (2002). For a more favorable view of the role of initiatives in the democratic process, see Schultz (1998).

²¹ See Gilbert (2006), Figure 2: Single Subject Rules by State Year of Adoption and Number of Cases, p. 822.

Of the thirteen states that Gilbert included in the study, the average number of SSR challenges was one hundred and fifty-six, with Oklahoma at slightly above the median number of challenges. Looking at the frequency of challenges, Alaska, Arizona, Montana, Nevada, and Wyoming can be described as “low challenge states,” whether as a simple function of low population or state jurisprudential views that discourage single subject challenges. California, Missouri, Nebraska, Ohio, Oklahoma, Oregon, and Washington could be described as “moderate challenge states,” where single subject challenges occur fairly frequently, and are viewed within the legal culture as an acceptable legal tactic. Florida is clearly and unambiguously a “high challenge state,” where the legal culture’s interpretation of the SSR appears to encourage frequent challenges of legislation and initiative petitions on single subject grounds.²²

Breaking down the use of initiatives and SSR challenges by decade, Cooter and Gilbert note an overall increase in the use of initiatives in the 1990s. The table under-predicts the total resort to plebiscites because they do not include referenda or local initiatives, but does offer evidence that the resort to plebiscitary mechanisms have increased in recent years. Moreover, as Cooter and Gilbert (2006, 9) note, many states have seen direct democracy used to promote controversial measures as a means of leveraging turnout of narrow but passionate supporters (e.g., ending racial preferences, banning same-sex marriage, “English Only” requirements).

While no research has been conducted to establish a criterion for establishing a hierarchy of most strict to least strict enforcement of the single subject rule, Matsusaka and Hasen (2009) have analyzed single subject enforcement in five states, and determined that California and Washington have a “restrained approach” to single

²² Gilbert notes some methodological problems with his search, which included regular legislation and initiatives. His search tended to produce some duplicative results (some cases were litigated both before appellate and state supreme courts). However, he also notes that “courts in California, Oregon, and elsewhere have begun to aggressively review initiatives for compliance with the rule. See Gilbert, 2006, pp. 819-820. By his count, there were approximately 105 single subject cases were litigated between 2001 and 2005 that applied to the fourteen state’s initiative processes (Gilbert 2006, 820, note 91).

subject challenges, while Colorado, Florida and Oregon have an “aggressive approach” to enforcement of single subject challenges.

Decade	Number of statewide initiatives proposed	Number of initiatives approved	Number of initiative 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	29%
2001-2005	143	74	69	52%
Totals	2140	890	1250	42%

The consensus among election lawyers and scholars is that Florida is by far the most aggressive in enforcing the single subject rule. According to Ellis (2002, 143) the Florida Supreme Court “has advanced a rationale for a stricter interpretation of the single-subject rule for initiatives that rests, in part, on the difference between the initiative and legislative processes. In contrast, California judges have historically been more permissive in allowing challenged initiatives to

²³ This table is reproduced from Cooter and Gilbert (2006, 8). The authors note that the table was “compiled from data provided in Initiative & Referendum Inst., Initiative Use, at [http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(1904-2008\)](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(1904-2008)).”

be presented to voters. In recent years, however, they have begun interpreting the rule more aggressively, which has provoked criticism from that California judges' interpretation of the SSR has become "politicized" (Matsusaka & Hasen, 2009).

STRONG VERSUS WEAK INTERPRETATIONS OF THE SSR

A brief discussion of two interpretations of the single subject rule will illustrate the range of opinion on the interpretation of the SSR. While California jurists have generally adopted very narrow interpretations of the SSR – allowing most initiatives to go before voters -- Florida's courts have adopted by far the broadest and most stringent interpretation of the rule. These contrasting views express the range of possible interpretations of the SSR, and the challenges confronting judges, who must interpret and apply the rule. This section will conclude by describing Cooter and Gilbert's "democratic process theory" as a more workable alternative.

California courts from 1949 until 1990 rarely struck proposed initiatives from the ballot. Some election scholars have suggested that the resulting explosion of initiative petition over past fifteen years is a product of this jurisprudence (Minger 1991, 883). The California judge's narrow interpretation of the single subject rule centers on its standard for what constitutes a "subject," and the criterion used to assess whether subjects are sufficiently related to constitute a single subject. In *Perry v. Jordan* (1949) the California supreme court held that an initiative proposal to repeal Article XXV of the state's Constitution was not in violation of the SSR, reasoning that it "is not to receive a narrow or technical construction in all cases, but is to be construed literally to uphold proper legislation, all parts of which are reasonably germane."²⁴ Likewise, in *Raven v. Deukmejian* (1990), the California Supreme Court established that multiple measures could be viewed as a single subject provided that all its provisions are "reasonably germane" to each other or to a single subject or purpose" (Minger 1991, 903). This accommodating standard has generally permitted judges to accept as "germane" numerous

²⁴ Quoted in Lowenstein, p. 4.

complex provisions of an initiative that were only vaguely related to one another.

Ellis notes that while single subject challenges have been relatively frequent in California, until recently judges had consistently declined to strike down compound initiatives.

Among the California initiatives that survived single-subject challenges was the twenty-thousand-word Political Reform Act of 1974, which contained no fewer than eight separate elements: (1) establishing a Fair Political Practices Commission; (2) mandating disclosure of candidate contributions, (3) limiting candidate spending, (4) regulating lobbyists, (5) enacting conflict-of-interest rules, (6) adopting rules regarding arguments summaries in the voters' pamphlet, (7) fixing the ballot position of candidates, and (8) detailing the enforcement provisions and penalties (Ellis R. J. 2002, 142).

This holding aptly illustrates a central problem with application of the SSR; as Cooter and Gilbert note, "Whether [an initiative], or whether any ballot proposition violates the single subject rule is purely a question of the level of abstraction at which judges believe they should frame the subject" (Cooter & Gilbert 2010a, 710). A workable hypothesis might posit that as more politically controversial issues find their way onto the ballot via initiatives, judges will experience greater incentives to strike them down using a more aggressive interpretation of the SSR, particularly when their political sensibilities place them at odds with an initiative's proponents, or alternatively supporting initiatives that are more congenial to their ideological preferences. The resulting accordion-like nature of SSR interpretations in various states' jurisprudence could have two results: on the one hand, raising questions about the utility of the SSR itself; or, on the other hand, raising questions about the kinds of issues that are appropriate subjects for direct democracy.

In contrast to California's narrow standard, Florida courts have interpreted the SSR in a sweepingly broad and uniquely aggressive manner. Under Florida jurisprudence, there are important differences between legislative proposals—which work their way through the legislative process and are subject to negotiation, bargains, public

hearings, and compromises—and initiatives, which are typically the products of small, well-funded groupings of interests. This difference has led Florida judges to open-ended interpretations of SSRs in relation to initiatives. According to Matsusaka and Hasen, Florida jurisprudence requires “that all parts of an initiative have a zen-like ‘logical and natural oneness of purpose’ in order to steer clear of a single subject violation” (Matsusaka & Hasen 2009, 8).

The Florida Supreme Court’s decision in *In re Advisory Opinion*, 632 So.2d 1018 (1994) illustrates Florida’s aggressive jurisprudence regarding the SSR. The Court struck down a proposed constitutional initiative amendment designed to prohibit antidiscrimination laws “based on characteristics other than ‘race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status’” (Ellis R. J. 2002, 42). The initiative’s proponents contended that the proposal dealt with a single topic: discrimination. The Florida Supreme Court, however, reasoned that the initiative put Florida voters in the position of giving “yes/no” answers to ten separate questions, and that requiring voters to determine which classifications they most cared about “defies the purpose of the single-subject limitation” (42). The notion that each criterion of discrimination would constitute a separate subject might strain the credulity of even the most fervent supporter of the SSR.

The central challenge involved with SSR enforcement is the difficulty inherent in objectively identifying what constitutes a subject. Proponents and opponents alike express concern regarding the challenges judges confront in crafting a judicial rule that fairly and objectively delineates the nature of a single subject that can be consistently applied in an apolitical manner. The absence of a workable theory of subject interpretation means that case law fails to provide adequate guidance for adjudication of SSR challenges (Cooter & Gilbert 2010a, 710). Some election law scholars have concluded that the task is futile, and advocate either amending state constitutions to eliminate the SSR (Lowenstein, 1983) or adopting a California-like “reasonably germane” standard that effectively guts the rule (Matsusaka and Hasen, 2010). Others argue for the SSR’s continued utility, and contend that a more nuanced application of the rule would preserve its utility while avoiding unnecessarily politicizing election law.

A Middle Path

Cooter and Gilbert’s “democratic process test” offers a compromise between draconian and lax enforcement. Acknowledging that “[l]ogic and language cannot yield a precise definition of ‘subject,’” they believe that the SSR nevertheless merits preservation (Cooter & Gilbert 2010a, 687). First, the authors note that direct democracy cannot replicate the deliberative process because initiatives suffer from the “confusion of a multitude”:

Tens of thousands of citizens cannot negotiate with one another, lending support on one proposal in exchange for others’ support on a second proposal. There are no committees to conduct hearings, gain expertise, and reach agreements. There are no political parties to align interests and ensure that political bargains are carried through. There are no rules of procedure that allow for modification, amendment, or other manifestations of compromise. In short, direct democracy, and the initiative process in particular, offers no forum for political bargaining, so transaction costs are prohibitively high (Cooter & Gilbert 2010a, 699-700).

The problem with the unrestrained use of the initiatives process is not merely that socially harmful cycling and bargaining can occur, but that politics carried out by initiative can be profoundly destabilizing, allowing powerful interests to endlessly recreate “random majorities” that weakens a state’s political institutions, political parties and ultimately its entire state governance (Cooter & Gilbert 2010a, 702).

Under Cooter and Gilbert’s democratic process test, only initiatives that can command durable majorities should survive an SSR challenge. Adoption of this test would involve determining whether or not an initiative that contained multiple components includes provisions “over which a majority of voters have *insufficiently separable preferences*” (italics added) (Cooter & Gilbert 2010a, 712). The idea of “separable preferences” clearly has a range of possible applications. For example, an initiative that contained proposals to ban same-sex marriage and mandate “English Only” in official government contracts could easily be construed as “sufficiently separable” because even voters who support both proposals would acknowledge

their essentially separate nature.²⁵ Carefully applied, the democratic process test would enable judges to determine whether a majority of a state or municipality has separable or inseparable preferences, and hence employs a majoritarian threshold for determining whether an initiative violates a state's SSR.

The "separable preferences" standard in many ways mirrors the kinds of "zero-sum/positive-sum" calculations familiar to most political scientists. Where voters have separable preferences for two proposals, the logrolled nature of such a combination would mean that each proposal would fail separately unless packaged together. In contrast, instances where voters have inseparable interests for two proposals – in other words, strong majorities support both proposals – would survive an SSR challenge (717).

Another advantage of the "separable preferences" standard is that it would provide a more effective check on riding. The authors offer the following logical argument:

Suppose that policy proposals A and B address the same topic – say, environmental protection – and that A would pass on its own, B would not, and the proposals would pass if combined. In addition, suppose that, while most voters support the combination of policies, they would prefer to enact A alone rather than both proposals, and they would prefer to enact neither proposal rather than B alone. In short, B is a rider. Traditional single subject jurisprudence would permit the package of AB to be presented to voters because A and B address the same narrow subject. By contrast, if most voters have separable preferences for A and B, then our approach would force them to be decoupled. Standing on its own, the rider, B, would not pass (718).

Conversely, if voters expressed inseparable preferences for A and B, then under the democratic process test B would be judged as a complimentary proposal and the package would be cleared to be placed on the ballot.

²⁵ Cooter and Gilbert argue that a voter would have sufficiently separable preferences for two proposals that are "only weakly conjoined," which would suggest that they only tangentially compliment or substitute for one another (p. 713).

In application, the democratic process approach would have judges place the burden of proof on SSR challengers to substantiate that the proposals in question have separable interests. While judges would not be burdened with gathering polling data on citizens' preferences, they could place that burden on the litigating parties. A downside of this requirement is the vast potential for manipulation of polling results from both Protestants and Proponents. The expense of polling could also exacerbate the advantages of well-funded and well-lawyered interests in advancing their interests through initiatives backed by sophisticated-yet-inaccurate polling. Nevertheless, polling data would in many instances be a marked improvement in the standard of evidence for typical SSR challenges. At the present time, it is often the case that "parties can simply dream up an explanation for why the subparts of a challenged measure do or do not embrace one logical subject" (721). Additionally, creating an incentive to generate dispositive evidence of separable/inseparable preferences through polling data may have the serendipitous effect of increasing the financial burdens of SSR challenges, which the authors suggest would help to weed out weak cases while at the same time providing a more objective criterion for adjudication (721).

A final issue related to democratic process theory is the status of initiative-driven changes to a state constitution or basic alterations of municipal charters. Cooter and Gilbert believe that a heightened SSR standard should apply to constitutional referenda, since "constitutions are intended to be more entrenched and enduring than statutes. Constitutional amendments arguably should have majority support on their own merits" (725). They also observe that some states²⁶ forbid constitutional "revisions" by plebiscite. Applying the SSR more broadly to significant alterations of either state constitutions or municipal charters would be in keeping with general American jurisprudence. Changes affecting an entire state or a whole municipality should be able to command at least majority support without recourse to bargaining.

In summary, the interpretation and application of the SSR varies widely among those states which both admit initiatives and have constitutional single subject provisions. Lax application of the rule

²⁶ The only state mentioned is California.

guts its effectiveness in preventing the initiative process from supplanting state political institutions. For instance, some critics believe it contributes to the problems plaguing states like California (Minger, 1991), which is experiencing a witches' brew of structural governance and budgetary crises (Mitchell, 2011). Excessively rigorous application of the SSR could result in state courts clogged with SSR litigation, as appears to be the case in Florida. Cooter and Gilbert's democratic process test allows judges the discretion to objectively apply a criterion for determining whether multiple subjects violate the spirit of a state's SSR without unduly involving judges in political decisions.²⁷

The Democratic Process Test in Action

How would a judge following the democratic process test previewed above have ruled in this matter? Such an adjudication would be probably be more complicated, with the judge issuing a number of findings before rendering a verdict on whether a petition's violates a state's SSR:

The determination that municipal charter revisions rise to the level of "constitutional" issues triggers strict scrutiny. A judge evaluating an initiative petition asking voters to contemplate multiple issues related to a municipal charter would need to establish the scope of the contemplated changes, and consider whether the changes constitute a fundamental revision of the nature of the city government. Confronted with an SSR-challenged initiative, a judge following the democratic process test would need to ask the following:

- Are the proposed changes "multiple" in character (e.g. involve more than one change of the municipal charter)?
- Do the proposed changes fundamentally alter the nature of legislative, executive, and/or administrative authority of the existing municipal institutions?

²⁷ Critics like Lowenstein and Matsusaka/Hasen argue that any standard more rigorous than the "reasonably germane" standard threatens to "politicize" judges, which may be interpreted to mean that judges would be invited to express their political preferences through rulings. It is important to note, however, that allowing initiatives to proceed is equally fraught with political implications, especially in contexts where judges may perceive themselves to be vulnerable to challenge in states judicial elections. See Sample, Jones, and Weiss (2006).

- Do the proposed changes significantly affect the nature and quality of citizens' participation in municipal elections?

If the answer to two or more of these questions is yes, then the judge would find that the issues addressed in the petition are constitutional in nature, which would trigger a heightened standard of evidence regarding the SSR.

The judge requires evidence of "separable interests" from the opponents. Given the muddled nature of the case law surrounding SSR, a judge applying the democratic process test would task the challengers with establishing clear and compelling evidence of "separable interests." The burden of producing survey evidence of separable interests is significant, and would likely create an effective barrier to frivolous challenges.

In the instance of the SSR challenge to the City of Tulsa Initiative Petition No. 2010-1, the gravamen of the case would have revolved around the challenger's ability to establish compelling evidence of separable interests. For example, if credible polling data demonstrated that, say, 75% of respondents supported with the proposal to make the mayor a member of the city council, but only 38% approved of the proposal to add the three at-large city council members, then the judge would be able to objectively find evidence of separable interests. If, on the other hand, polling data demonstrated that 78% of respondents supported the proposal to make the mayor a member of the city council, while 59% supported the proposition to add the three at-large city council members, the judge might rule that a majority supports both proposals; therefore, in the absence of compelling evidence of either logrolling or riding, the SSR challenge would have been rejected.²⁸

Upon a finding of separable proposals, proponents would be given a chance to offer a remedy. At this stage, proponents would have the opportunity to develop survey data supporting a claim of "inseparable interests." Given malleability of polling techniques, both sides would be able to make an

²⁸ Whether a judge would be compelled to adopt a majoritarian standard, or whether a 19-point difference in support could be held to be evidence of separable interests, would likely be up to the judge. In my view, the correct interpretation of the democratic process test would require a 50%+1 threshold; if all measures reach that level of support, then the judge should reject the SSR challenge.

affirmative case to supports their claim. However, in this phase the Court would also have recourse to expert witnesses to evaluate the challenger's and proponent's methodologies, and identify which side's polling more reliably reflect voters' preferences.

The timing of litigation and possible remedies. Whenever possible, judges following the democratic process rule would attempt to adjudicate SSR challenges prior to the ballot being placed before citizens for a vote. Routinely allowing challenged initiatives to proceed to a vote (as California jurisprudence currently allows) would create incentives for initiative proponents to engage in the kinds of behaviors proscribed by the SSR. In the event that an initiative is allowed on the ballot prior to a ruling, a judge following the democratic process test may have the option of "severing" those elements of an initiative that are held to be in violation of the state's SSR. Severing, according to Cooter and Gilbert, may in some instances "public money and voters' time and quickly advances popular measures" (Cooter & Gilbert 2010a, 722).

CONCLUSION

Proponents' lead council for *In Re City of Tulsa Initiative Petition No. 2010-01* stated in oral argument that citizen's should not be shielded from making tough decisions. That sentiment might strike an advocate of single subject rule as a direct refutation of SSR's reasoning, which is that citizens cannot deliberate, but can only express preferences, through plebiscites. As it relates to the initiative process, the primary value of the single subject rule lies in its ability to constrain the scope of what can be brought before citizens for consideration. As this essay notes, allowing interest groups to circumvent the institutions of representative democracy to address constitutional changes invites corruption to enter the political process through the back door rather than the front door.

This essay also contends that revisions of city charters, like amendments to state constitutions, should not be made too amenable to revisions *via* direct democracy: the basic rules controlling governance in a municipality should be as firmly entrenched as those governing state and federal constitutions. Fundamental alterations to city charters would be best effected by charter conventions, with delegates gathering

in a forum to debate the myriad issues that are central to municipal governance.

Finally, the most often deployed criticism of an enhanced interpretation of the single subject rule is the fear that it will “politicize” judges. Certainly, judicial activism comes at a high price, but there are serious political consequences that flow from judges shrinking from applying the rule. The test proposed by Cooter and Gilbert, while not without flaws, creates a flexible and pragmatic mechanism that is responsive to the sentiments of majorities, while providing a more objective – and hence less politically charged -- basis for determining whether initiative proposals violate the central concern motivating SSRs, which is to avoid the manipulation of direct democracy in the service of narrow and powerful interests that too often prove harmful to the broader community.

REFERENCES

- 1907 Oklahoma Constitutional Convention. (1907). *Constitution of the State of Oklahoma*. Eufala, Oklahoma: State of Oklahoma .
- Averill, D. (2011, May 22). Charter change process should be more deliberative. *Tulsa World*.
- Averill, D. (2011, May 15). Councilors have long chafed under lack of authority. *Tulsa World*, p. Editorial.
- Bledsoe, D. G. (2011). *Protesters' Brief in Support of Protest to City of Tulsa Initiative Petition No. 2010-01 Regarding the Single Subject Issue*. Tulsa, Oklahoma: District Court of Tulsa Country, State of Oklahoma.
- Bowler, S., Donovan, T., & Tolbert, C. J. (1998). *Citizens as Legislators: Direct Democracy in the United States*. Columbus, OH: Ohio State University Press.
- Bowman, A. O., & Kearney, R. C. (2011). *State and Local Government*. Boston, MA: Wadsworth, Cengage Learning. .
- Cooter, R. D., & Gilbert, M. D. (2006). Chaos, Direct Democracy, and the Single Subject Rule. *Law and Economics Workshop, Berkeley Program in Law and Economics* (pp. 1-40). Berkeley, CA: University of California.
- Cooter, R. D., & Gilbert, M. D. (2010). A Theory of Direct Democracy and the Single Subject Rule. *Columbia Law Review* 110, 687-729.
- Cooter, R. D., & Gilbert, M. D. (2010). Reply to Hasen and Matsusaka. *Columbia Law Review Sidebar*, 59-62.
- Ellis, R. (2002). *Democratic Delusions: The Initiative Process in America*. Lawrence, KS: University of Kansas Press.
- Ellis, R. J. (2002). *Democratic Delusions: The Initiative Process in America*. Lawrence, KS: University Press of Kansas.
- Gilbert, M. D. (2006). Single-Subject Rules and the Legislative Process. *University of Pittsburgh Law Review* 67, 812-870.
- Gildersleeve, J. (2007). Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment? *Columbia Law Review* 107, 1437-1481.

- Hasen, R. L. (2000). Parties Take the Initiative (And Vice Versa). *Columbia Law Review* 100, 731-752.
- Hasen, R. L., & Matsusaka, J. G. (2010). Some Skepticism About the "Separable Preferences" Approach to the Single Subject Rule: A Comment on Cooter & Gilbert. *Columbia Law Review Sidebar*, 35-41.
- Haskell, J. (2001). *Direct Democracy or Representative Government*. Boulder, CO: Westview Press.
- Howard, O. S., Schuller, S. A., Dailey, E. K., & Watson, B. M. (2011). *Proponents/Petitioners' Brief Addressing the Opponents' Unfounded Allegation that the Initiative Petition at Issue Impermissibly Contains Multiple Unrelated Subjects*. Tulsa, Oklahoma: District Court of Tulsa County, State of Oklahoma.
- James, S. D. (2010, February 19). Okla. Strikes Down Law That Would Have 'Undressed' Women. *ABC News*, p. 1.
- Lassek, P. J. (2011, June 02). Judge rules petition to change Council does not violate 'single-subject' rule. *Tulsa World*.
- Lowenstein, D. H. (1983). California Initiatives and the Single-Subject Rule. *UCLA Law Review*, 1-35.
- Matsusaka, J. G., & Hasen, R. L. (2009). *Aggressive Enforcement of the Single Subject Rule*. Los Angeles, CA: University of Southern California, Gould School of Law.
- McCuan, D., Bowler, S., Donovan, T., & Fernandez, K. (1998). California's Corporate Warriors: Campaign Professionals and the Initiative Process. In S. Bowler, T. Donovan, & C. J. Tolbert, *Citizens as Legislators: Direct Democracy in the United States* (pp. 55-79). Columbus, OH: Ohio State University Press.
- Minger, M. (1991). Putting the 'Single' Back in the Single-Subject Rule: A Proposal for Initiative Reform in California. *UC Davis Law Review* 24, No. 3, 879-930.
- Mitchell, D. J. (2011). *California Governance and Budgets*. Los Angeles, CA: UCLA Ziman Center for Real Estate.

- Nightingale, R. B. (2011). *Transcript of Excerpt of Proceedings Before the Honorable Rebecca Brett Nightingale District Judge*. Tulsa, Oklahoma: District Court of Tulsa County, State of Oklahoma.
- Pearson, J. (2011, September 11). Previous charter-change attempts featured lots of debate. *Tulsa World*.
- Riker, W. H. (1982). *Liberalism Against Populism*. San Francisco: W.H. Freeman & Company.
- Sample, J., Weiss, R., & Jones, L. (2006). *The New Politics of Judicial Elections 2006*. Washington, D.C.: Justice at Stake Campaign.
- Scales, J. R., & Goble, D. (1982). *Oklahoma Politics: A History*. Norman, OK: University of Oklahoma Press.
- Schultz, J. (1998). *The Initiative Cookbook: Recipes and Stories from California's Ballot Wars*. San Francisco: Democracy Center.
- Sims, R. (1980). *Majority Opinion: In Re Initiative Petition No 314, State Question No. 550*. Oklahoma City, OK: Supreme Court of Oklahoma.
- Sulzeberger, A. G. (2010, November 03). In Iowa, Voters Oust Judges Over Marriage Issue. *The New York Times*, pp. 1-3.
- Tolbert, C. J., Lowenstein, D. H., & Donovan, T. (1998). Election Law and Rules for Using Initiatives. In S. Bowler, T. Donovan, & C. J. Tolbert, *Citizens as Legislators: Direct Democracy in the United States* (pp. 27-54). Columbus, OH: Ohio State University Press.