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The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States

Jonathan L. Marshfield
University of Florida Levin College of Law

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* Associate Professor of Law, University of Florida Levin College of Law. I am very grateful for support from the University of Nebraska College of Law and the University of Florida Levin College of Law in completing this article.

I. INTRODUCTION

Eighteen states allow citizens to independently propose constitutional amendments through the initiative process.[1] In many of those states, the constitutional initiative is a powerful force in state constitutional politics.[2] Indeed, since 2000, voters have considered hundreds of initiative amendments addressing a wide range of issues, including marriage equality, taxation, environmental policy, marijuana, infrastructure, education, agriculture, religious freedom, reproductive rights, affirmative action, immigration, redistricting, and many others.[3] Initiative campaigns also attract a lot of money. In 2020, statewide campaigns reported $1.24 billion in contributions and $1.22 billion in spending.[4]

It should be unsurprising, therefore, that regulating the initiative is both important and contentious. States have developed a variety of different regulatory requirements and mechanisms, but the "single-subject" rule is an especially common device.[5] As its name suggests,

1. *See* John Dinan, *State Constitutional Developments in 2021*, *in* 53 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 10 tbl.l.5 (2021). In May 2021, the Supreme Court of Mississippi ruled that the initiative could not currently be used in compliance with the state constitution because it requires signatures from five congressional districts and Mississippi now has only four districts. *See In re* Initiative Measure No. 65 v. Watson, No. 2020-IA-01199-SCT, 2021 Miss. LEXIS 123 (Miss. May 14, 2021). Thus, there are currently only seventeen states with a functional initiative process. Moreover, it should be noted that Illinois and Massachusetts place significant limitations on the constitutional initiative. *See* Dinan, *supra* (noting that initiative can be used in Illinois only to amend the legislative article, and in Massachusetts initiatives must be approved by the legislature before going on the ballot).
2. *See generally* Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 489 (2016) (tracking relative use of constitutional initiative).
3. The Initiative & Referendum Institute keeps an exhaustive dataset of initiatives across all states beginning in 1904. INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/data.cfm [https://perma.cc/PM6W-YYN5] (last visited Mar. 6, 2022). They show that between 1904 and 2019, voters considered 2,610 initiatives and approved 1080. Not all of those were constitutional initiatives. For a survey of the many subjects addressed by the constitutional initiative, see John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAPMAN L. REV. 61, 63–74 (2016) (noting that there were 203 proposed constitutional initiatives between 2000 and 2014 and surveying their content).
4. *See Ballot Measure Campaign Finance, 2020*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure_campaign_finance,_2020 [https://perma.cc/5ZCR-9SK6] (last visited Mar. 6, 2020).
5. *See* Dinan, *supra* note 3, at 62 (noting scholarly analysis regarding regulation of initiative); *id*. at 95–107 (surveying various strategies for regulating the initiative). Of the eighteen states that have the constitutional initiative, only Arizona, Arkansas, Michigan, Mississippi, and North Dakota do not have a single-subject rule or separate vote requirement for constitutional initiatives. *See generally* Rachael Downey, Michelle Hargrove & Vanessa Locklin, *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES

the rule provides that initiatives must be limited to "one subject."[6] By limiting ballot questions to a discrete issue, the rule aims to ensure that proposals present voters with a clear and singular policy choice.[7] This in turn helps to improve transparency and enhance the legitimacy of referenda results by limiting special interest logrolling and riding.[8]

Despite these laudable objectives, the single-subject rule is widely criticized. Critiques vary, but the dominant concern is that the rule is near impossible to apply because the term "subject" is too vague and indefinite.[9] A related concern is that the rule's indeterminacy gives judges too much discretion and power as ballot gatekeepers.[10] These concerns have been well substantiated. Leading political scientists have shown, for example, that when judges work to aggressively apply the single-subject rule, the results mostly reflect their personal policy

579 (2004) (updated to reflect South Dakota's adoption of single-subject rule in 2018 and the Arizona Supreme Court's ruling that the single-subject rule for legislation did not apply to the initiative, Ariz. Chamber of Com. & Indus. v. Kiley, 399 P.3d 80, 88 (2017)). Both Arizona and North Dakota are currently considering adopting the rule. *See infra* section IV.A (discussing those efforts).

6. California's provision is typical. It provides in its entirety: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." CAL. CONST. art. II, § 8(d); *see also* CO. CONST. art. V, § 1 (5.5) ("No measure shall be proposed by petition containing more than one subject."); FLA. CONST. art. XI, § 3 ("any such revision or amendment . . . shall embrace but one subject and matter directly connected therewith.").

7. *See* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single-Subject Rule*, 110 COLUM. L. REV. 687, 706–12 (summarizing judicial rationales for the rule and their application).

8. *See id*. at 706–12. In this context, "Logrolling occurs when two proposals each supported by a minority are combined into one ballot proposition supported by a majority, and the two minorities support the combination of policies but respectively prefer to enact one policy and not enact the other." *Id*. at 706. Riding, on the other hand, "occurs when a proposal commanding majority support is combined with a proposal commanding minority support, and a majority supports the combination, even though it would prefer to enact the first proposal and not enact the second." *Id*. at 707.

9. Key critiques of the rule include: Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING: A COLLECTION OF ESSAYS 131, 163 (M. Dane Waters ed., 2001); Richard L. Hasen, *Ending Court Protection of Voters from the Initiative Process*, 116 YALE L. J. POCKET PART 117 (2006) (arguing that the single-subject rule be repealed because it is unworkable for courts); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 U.C.L.A. L. REV. 936, 940–41 (1983); Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 47 (2002).

10. *See* Campbell, *supra* note 9, at 163; Hasen, *supra* note 9.

preferences,[11] and legal scholars have long concluded that rule is too indeterminate for judicial application.[12]

In this Article, I argue that although these enforcement critiques are serious and important, there is a deeper problem with the single-subject rule that is of growing significance. My core claim is that in today's political environment, the single-subject rule is at risk of undermining rather than enhancing the initiative. Instead of protecting voters and improving transparency, the single-subject rule has the potential to shield recalcitrant legislatures and governors and undermine consolidated statewide majorities.

This happens when initiative sponsors anticipate that state government will work to undermine or evade a successful initiative.[13] In those instances (which are increasingly common), initiative sponsors often expand the initiative's scope and detail to foreclose expected countermeasures by state government.[14] An initiative intended solely to legalize medical marijuana, for example, might be expanded to create a new and independent "Medical Marijuana Commission" to foreclose obstructionist regulations.[15] In these situations, the single-subject rule can have perverse effects. To successfully corral wayward government, the initiative must include more detail and address more topics. But with each new addition, the initiative is more likely to violate the single-subject rule. In this way, the single-subject rule can undermine a popular initiative while protecting recalcitrant government.

I advance three main arguments in support of this claim. First, it is important to place the single-subject rule in proper theoretical context. The single-subject rule is not an end in and of itself. It is a tool intended to enhance the quality and potency of the constitutional initiative. And the initiative is ultimately an accountability device. It provides democratic majorities with an efficient and effective process for correcting and controlling wayward government. The single-subject

11. *See* John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010) ("The evidence suggests that . . . aggressive enforcement decisions are likely to [be] driven by the political preferences of judges."); John G. Matsusaka & Richard L. Hasen, *Some Skepticism About the 'Separable Preferences' Approach to the Single Subject Rule: A Comment on Cooter & Gilbert*, 110 COLUM. SIDEBAR 35 (2010) (summarizing findings).

12. *See* Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALBANY L. REV. 1629, 1630 (2018) (describing the rule as "deeply problematic" and summarizing legal commentary regarding rule's inconsistent application by judges).

13. I catalogue the various countermeasures used by state government to evade initiatives in section III.C.

14. I substantiate and illustrate this point in section IV.A.

15. Arkansas's 2016 medical marijuana initiative illustrates this. I discuss that initiative in section IV.A.

rule can support this endeavor by focusing voter choice on discrete issues and limiting false choices or "tricks" that might further distance government policy from popular preferences. But it can also do the opposite. It can frustrate popular efforts to correct government failures and enable government to evade popular accountability. When this happens, the single-subject rule is at risk of undermining its core purpose.

Second, in today's political environment, gerrymandered legislatures and party-loyalist governors are often at odds with statewide majorities on discrete policy issues, and they have developed sophisticated tactics for evading or undermining responsive initiatives.[16] These tactics include refusal to fund programs necessary to implement initiatives,[17] failure to create and adequately staff agencies and departments to oversee initiative programs,[18] passing legislation that effectively undermines the initiative,[19] and, of course, they often try to formally amend or repeal disfavored initiatives.[20]

Third, a predictable consequence of these evasive tactics is that initiatives have grown in scope and detail to limit government discretion and realize popular preferences.[21] Recent initiative amendments have exceeded 8,000 words[22] and included supplemental provisions creating entirely new state agencies,[23] earmarking funds,[24] setting regula-

16. *See* Part III (substantiating these claims).
17. *See* subsection III.C.1.
18. *See id*.
19. *See* subsection III.C.2.
20. *See* subsections III.C.3 & 4.
21. *See* section IV.A (surveying anecdotal examples of this expansion and also finding a systemic increase in initiative scope and detail using original data for Florida initiatives from 1980 to 2020).
22. Arkansas's 2016 medical marijuana amendment was approximately 8,575 words. *See* ARK. CONST. amend. XCVIII ("Arkansas Medical Marijuana Amendment"); *see also* Carol Goforth & Robyn Goforth, *Medical Marijuana in Arkansas: The Risks of Rushed Drafting*, 71 ARK. L. REV. 647, 649 (2019) (estimating initiative at "nearly 9,000 words and 23 substantive sections"). For a helpful summary of the content of twenty-first century initiative amendments, see Dinan, *supra* note 3, at 65–67.
23. *See, e.g.*, OR. CONST. art. XV, § 11 (initiative amendment adopted in 2000 introducing regulation for in-home caregivers and creating the Home Care Commission to ensure proper oversight); *see* VOTERS' PAMPHLET VOL. 1 (Or. Sec'y of State, Salem Or.) Nov. 2000, at 205 (explaining that amendment was in response to legislative inaction); *see also* John Dinan, *State Constitutional Developments in 2009*, *in* 42 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 8 (2010) (describing Ohio initiative amendment legalizing casinos and creating the "Ohio Casino Control Commission"); OH. CONST. art. XV, § 6 (c) (4) ("There is hereby created the Ohio casino control commission which shall license and regulate casino operators, management companies retained by such casino operators, key employees of such casino operators and such management companies, gaming-related vendors, and all gaming authorized by section 6(C), to ensure the integrity of casino gaming.").

tion-like technical parameters,[25] revising tangential criminal and tax statutes,[26] and even adjusting the constitution's amendment rules.[27] The problem, of course, is that while this strategy may be effective in corralling state government, it greatly increases the likelihood that the initiative will violate the single-subject rule.[28]

Recognizing this wrinkle with the single-subject rule has important implications. For one thing, it should inform discussion in states that might consider adopting (or eliminating) the rule.[29] Current literature analyzing the rule tends to overlook or ignore how the rule might undermine the initiative and empower recalcitrant officials. This is surely an important cost that should be weighed when considering the rule's value. Similarly, my findings should inform judicial application of the single-subject rule in states where it exists. Some courts apply the rule without regard for how the rule might unnecessarily undermine the initiative.[30] To the extent courts look to the rule's deep structure and institutional context when deciding close cases, they should more readily consider how enforcing the rule in certain cases might undermine its core purpose.

This Article has four Parts. Part II places the single-subject rule within the broader historical and theoretical context of the constitutional initiative. Part III catalogues the many tactics that state governments use for evading or undermining initiatives and explores contemporary political dynamics that fuel conflicts between state government and statewide popular majorities. Part IV demonstrates that initiative sponsors often respond to anticipated countermeasures by expanding an initiative's scope and detail, which increases the risk that it violates the single-subject rule. Finally, Part V explores some of the implications of these findings for the future of the single-subject rule.

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24. *See, e.g.*, CAL. CONST. art. XXXV (initiative amendment 2004) (legalizing stem-cell research and establishing regulatory and funding frameworks); *see* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 244–45 (2018) (describing history of this initiative).

25. *See, e.g.*, ARK. CONST. amend. XCVIII (setting precise requirements for Marijuana cultivation facilities including bookkeeping and report, the number of plants permissible, and ownership distribution requirements).

26. *See, e.g., id*. (revising criminal culpability for possession and prescribing marijuana and setting tax policy and requirements for medical marijuana).

27. *See, e.g., id*. (exempting certain provisions from default amendment rules).

28. *See* section IV.B.

29. South Dakota adopted the rule in 2018, and Arizona and North Dakota are currently considering the rule. *See* section IV.A.

30. *See* section IV.B.

II. THE SINGLE-SUBJECT RULE IN CONTEXT

A. Brief History of the Constitutional Initiative

The evolution of state constitutional amendment processes is important context for properly assessing the constitutional initiative and the single-subject rule. This is especially true because the theory underlying state constitutional amendment processes differs from the theories commonly ascribed to Article V of the Federal Constitution.[31] The Federal Constitution reflects Madison's belief that to provide stability across generations and temper impassioned majorities, a constitution should be sparse and difficult to amend.[32] State constitutions, on the other hand, have viewed constitutional amendment and specificity as critical accountability strategies that should be readily accessible to the people to correct and guide government whenever necessary.[33] Thus, under state constitutions, the most important aspect of amendment design is providING the people with an effective instrument for controlling government.[34]

This point is evident in even the earliest state constitutions.[35] Almost all eighteenth-century constitutions included a provision in their bills of rights declaring that all power is inherent in the people and that "the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish [government] in such manner as shall be . . . judged most conducive to the public weal."[36] As Alan Tarr has observed, these provisions reflected the groundbreaking theory that the amendment power existed to ensure that the people could easily and peaceably align government with "changing popular views."[37] This approach to constitutional change stood in stark contrast to British and Madisonian conceptions of constitutionalism, which emphasized the need for enduring legal constraints on govern-

31. *See generally* Mila Versteeg & Emily Zackin, *Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. P. SCI. REV. 657 (2016).

32. *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CH. L. REV. 1641, 1668–69 (2014).

33. *See generally* Dinan, *supra* note 24; Versteeg & Zackin, *supra* note 31; Versteeg & Zackin, *supra* note 32; Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 353 (1997).

34. *See* Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrative State*, 8 BELMONT L. REV. 342, 347–58 (2021) (summarizing the literature on this point).

35. *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PENN. L. REV. (forthcoming 2022) (manuscript at 21–24) (on file with author) (describing the early history of this perspective on state constitutionalism through the lens of early state bills of rights).

36. VA. DECL. OF RIGHTS art. 3 (1776); *see* Marshfield, *supra* note 35, n.159–66 (collecting and discussing these provisions).

37. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 75 (1998).

ment and society.[38] It also represented a break from John Locke's more extreme theory of a right-to-revolution because it envisioned constitutional change on a regular and ordinary basis.[39]

Despite this important conceptual breakthrough, early states struggled with how to implement formal constitutional change. The chief problem was that if sovereignty belonged only to the people, and constitutional reform was aimed at correcting or guiding existing government, then the people had to somehow assemble apart from existing government.[40] It was in response to this practical problem that the states devised the constitutional convention.[41] The convention was a temporary body of delegates separately elected by the people for the sole purpose of constitutional reform.[42] The genius of the convention was that it separated constitution-making from existing government institutions and focused popular input and accountability.[43] As historian Gordon Wood concluded, by the 1780s, the convention was so "firmly established" in state constitutional theory and practice "that governments formed by other means actually seemed to have no constitution at all."[44]

The constitutional convention was the primary device of state constitutional reform during most of the nineteenth century.[45] However, by the middle of the century, states began to look for more streamlined amendment processes to address the need for incremental change.[46] The most obvious approach was to authorize the legislature, as the state's lawmaking branch, to amend the constitution.[47] But this idea was deeply problematic because state legislatures were a principal object of constitutional regulation.[48] As a delegate to the Louisiana Convention of 1864 explained, "the legislature is the creature of the constitution, and when you give the creature power to destroy the creator, you adopt almost an anomaly."[49]

38. Versteeg & Zackin, *supra* note 32, at 1700.
39. *See* Tarr, *supra* note 37, at 74–75 (noting that Locke's right of revolution was predicated on "serious violations of rights or a plan to tyrannize" as necessary triggers for the "right to revolution").
40. *See id*. at 69–71.
41. *See* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 88–105 (2019) (providing a history of state constitutional convention theory).
42. *See id*. at 94.
43. *See id*.
44. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 342 (1969).
45. *See* Tarr, *supra* note 37, at 73–74; JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 41 (2009), 139–40.
46. *See* Dinan, *supra* note 45, at 32–37, 41.
47. *See* Marshfield, *supra* note 41, at 105–06.
48. *See id*.
49. DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 102 (1864).

In response to this and other concerns, the states gradually authorized legislatures to craft amendments subject to a variety of special accountability mechanisms.[50] At first, states required legislatures to approve amendments by supermajorities in successive sessions with an intervening election.[51] Over time, the referendum took hold as the preferred method for monitoring legislative involvement in constitutional change.[52] States gradually reduced legislative thresholds and replaced the intervening election with referenda.[53] At present, all states except Delaware allow legislatures to propose amendments subject to popular ratification at a referendum.[54]

During the twentieth century, legislative referral surpassed the constitutional convention as the dominant mechanism of state constitutional change.[55] It is important to note, however, that state amendment theory still retains a deep commitment to popular control over government. The legislative referral method has surely enabled legislatures as agents of constitutional change, but it also continues to empower popular control over government in several ways. First, legislative referral is frequently used to overrule state court rulings that invalidate popular legislation and executive action.[56] By allowing sitting legislatures to quickly propose an amendment in response to an unpopular court ruling, the process facilitates popular control over policy and the constitution. Second, many state constitutions include statutory-like policy proscriptions and limitations that were adopted by the people in earlier conventions but continue to exert significant influence on state government.[57] The legislative referral process allows state legislatures to present these issues to the public for reconsideration in the form of discrete referenda questions. Finally, state legislatures can use the amendment process to punt contentious issues to a referendum, which can help avoid gridlock while enhancing popular input on critical issues.[58]

The next major development following legislative referral was the constitutional initiative.[59] The initiative was the result of popular frustration during the Progressive Era with legislatures and courts that had blocked social and economic reforms.[60] The core concern was

50. *See* Marshfield, *supra* note 41, at 105–30 (providing an account of the state theory of "extra-conventional" amendment).
51. *See* Dinan, *supra* note 45, at 43.
52. *See id*. at 44–45.
53. *See id*.
54. *See* Dinan, *supra* note 1, at 8 tbl.1.4.
55. *See* Tarr, *supra* note 37, at 139–40.
56. *See* Marshfield, *supra* note 34, at 356–58.
57. *See id*.
58. *See id*.
59. *See* Dinan, *supra* note 45, at 47–48.
60. *See id*.

that the people did not have an efficient and independent method for correcting discrete government failures, especially when the legislature refused to adopt necessary constitutional reforms.[61] Exacerbating this frustration was the fact that many state legislatures were grossly malapportioned in favor of existing elites and heavily influenced by well-financed special interests.[62] As a result, statewide popular majorities frequently found themselves misaligned with government policy on pressing issues such as worker's safety, child labor, collective bargaining, corporate taxation, and welfare.[63]

Within this context, the constitutional initiative was championed as a way for the people to bypass failed government structures and realign government with popular preferences.[64] The initiative could achieve this by allowing a small group of private citizens to formulate constitutional proposals with minimal government oversight or involvement.[65] Initiative proponents also hoped that the mere presence of the initiative would create incentives for officials and courts to align with popular preferences.[66] Ultimately, the constitutional initiative was about government accountability to popular majorities. It sought to empower "the people of [a] state to hold the government within their control."[67] In 1902, Oregon became the first state to adopt the constitutional initiative.[68] Seventeen other states have adopted it since then, with Nebraska adopting it in 1912.[69]

B. The Development of the Single-Subject Rule

The single-subject rule predates the constitutional initiative.[70] Indeed, the idea originated in ancient Rome to prevent lawmakers from

61. *See id*.
62. It was not until 1962 that the Supreme Court decided Baker v. Carr, 369 U.S. 186 (1962), which required state legislatures to reapportion in compliance with federal equal protection. Before then, many states functioned under wildly unrepresentative legislatures. *See, e.g*., Mary E. Adkins, *The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What it Has Become*, 18 FLA. COASTAL L. REV. 5 (2016) (describing the significant influence of *Baker* on representation in Florida). On the influence of elites and capital on state legislatures before and during the Progressive Era, see Tarr, *supra* note 37, at 148–53. On apportionment problems in the states during the nineteenth century, see *id*. at 102–105.
63. *See* Dinan, *supra* note 45, at 47–60.
64. *See* Marshfield, *supra* note 41, at 123 n.322, 124 n.323 (collecting primary sources from this era discussing initiative's purpose).
65. *See id*. at 124.
66. *See id*.
67. *See* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 189 (John S. Goff ed., 1991).
68. *See* Dinan, *supra* note 45, at 313 n.132.
69. *See id*. (listing states and dates of adoption).
70. *See* Cooter & Gilbert, *supra* note 7, at 704 (dating rule to 98 BC in Rome).

hiding unpopular laws among popular ones.[71] It first appeared in the United States in New Jersey's 1844 constitution as a limitation on lawmaking by the legislature.[72] By the end of the nineteenth century, thirty-nine states adopted similar rules regarding the legislative process, and by 1960, forty-three states had adopted the rule for legislation.[73] In most states, the text of the rule is sparse and largely unhelpful in ascertaining its boundaries. The Ohio rule, for example, provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title."[74]

The original intent of individual provisions is also opaque. The earliest provisions were adopted by state constitutional conventions during the nineteenth century.[75] Although we have records from many of those conventions,[76] most debates do not reflect sustained, or even nominal, consideration of the single-subject rule.[77] When early conventions did debate the provisions, they tended to focus on a set of transparency and accessibility concerns that have been largely lost, forgotten, or surpassed by technological advancements.[78] For exam-

71. *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 804, 811 (2006).

72. *See* Cooter & Gilbert, *supra* note 7, at 704; Millard H. Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389, 389–90 (1958) (noting few exceptions for specific topics before 1844).

73. Gilbert, *supra* note 71, at 822 fig.2.

74. OHIO CONST. art. II, § 15; *see also* OR. CONST. art. IV, §. 1, 2(d) ("A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.").

75. *See* Gilbert, *supra* note 71, at 822 fig.2 (tracing adoption of single-subject rules in all states).

76. By my count, we have convention debates for twenty-nine of the states where these provisions were adopted. I calculated this by cross-referencing Gilbert's data, *supra* note 71, at 822, with Dinan's tabulation of all known convention debates, Dinan, *supra* note 45, at 27.

77. *See, e.g.*, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 803 (Charles G. Guyer & Edmond C. Hardesty eds., 1958) (entire discussion before adoption was simply: "The idea is to preclude the possibility of legislation being obtained under false colors. I think that is a full explanation."); *but see id.* at 817 (exception added for general appropriation bills, which would necessarily require "a great variety of items"). As best I can tell, California adopted the rule for legislation in 1850 without any debate. *See* REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 90 (J. Ross Browne ed., 1850) (noting that the rule was "adopted without debate"). *See also* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, at 9 (William G. Bishop & William H. Attree eds., 1846) (provision adopted without debate); THE [ILLINOIS] CONSTITUTIONAL DEBATES OF 1847, at 6, 699 (Arthur Charles Cole ed., 1919) (provision adopted without debate); JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 118 (H. A. Tenney, et al. eds., 1848) (provision adopted without debate).

78. *See, e.g.*, PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 840 (Robert J. Ker ed., 1845) (discussing difficulty in finding laws if they were not limited

ple, a dominant early concern was that bundling legislation without accurate titles made finding the law difficult for ordinary citizens and even lawmakers and judges.[79] This in turn created concern about the power of lawyers in the process of managing and driving legislation.[80] The single-subject rule helped facilitate more rational and accessible cataloging of statutes so that citizens could independently find and comply with the law.[81] To be sure, early conventions were sensitive to the issue of logrolling in the legislative process,[82] but they focused on

to single subject with clear title); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849, at 127–28, 903 (R. Sutton ed., 1849) (single-subject rule and title requirement are designed to make laws easy to find and catalogue); REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN, 1850, at 147 (1850) (arcane and unclear debate about difference between "object" and "subject"); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 9, 305–07, 312 (discussing how lawyers will be unable to find laws without single-subject and title rules).

79. *See* PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 840 (Robert J. Ker ed., 1845) ("[T]he object of this section was to remedy a very serious inconvenience. The titles of our laws were generally of a very indifferent character; and the words appended, 'and for other purposes,' were intended to cover a mass of heterogeneous propositions. It was impossible to find a particular statutory provision without wading through a long list of sections, the titles so which gave at best a most imperfect idea of what followed. It was the business of a whole life to penetrate and find out our laws."); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 305 ("And it is impossible for the people to tell what is in force as law, or what has been repealed.").

80. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849, at 903 (R. Sutton ed., 1849) ("I admit that the retention of this section may militate against the interest of lawyers, but it will enable the plain, unlettered men of the commonwealth to know what are the laws under which they live. Besides this, it will aid the administrator of justice . . . .").

81. This concern is somewhat different from the modern-day transparency concern, which emphasizes openness in the lawmaking process for purpose of democratic accountability. The historic concern seems more practical and related to the need for basic information regarding the content of existing statutes in order for citizens and lawmakers to operate under law. *See* PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 840 (Robert J. Ker ed., 1845); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 9, 305–07.

82. *See* PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 56 (1942); PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 202, 550–51 (Robert J. Ker ed., 1845).

other countermeasures, such as prohibitions on special legislation[83] and procedures for general incorporation.[84]

Although the early convention debates do not reflect a robust theory of the single-subject rule, state courts steadily inferred the rule's underlying rationales as polestars for defining its scope.[85] By at least 1865, courts drew on three core purposes.[86] First, the rule aims to limit legislative logrolling. Logrolling occurs when separate proposals—each with only minority support—are combined into one proposal that then garners majority support.[87] This may be problematic because "it threatens to give legal force to proposals that individually command only minority support."[88] Second, the rule aims to limit riding.[89] Riding occurs when lawmakers attach an unpopular provision to a popular provision. This is problematic because unpopular laws may be enacted solely because of their attachment to popular laws and in conflict with majority preferences.[90] Third, the single-subject rule aims to enhance democratic transparency. By limiting legislation to a discrete issue, lawmakers and citizens can more constructively evaluate proposals and thereby register more informed and accurate preferences.[91]

As states began to adopt the statutory and constitutional initiative during the early twentieth century, they generally imported the single-subject rule from the legislative context and applied it to citizen lawmaking.[92] Here again, the convention debates reflect little independent consideration of the single-subject rule.[93] Nevertheless, courts have tended to assume that the rule exists for the same general

83. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 429 (the idea was that by limiting the legislature's ability to grant individualized privileges, there would be less trading of votes between legislatures).

84. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 317–26 (1942); *see also* Ruud, *supra* note 72, at 390.

85. For a detailed explanation of the historical development of the jurisprudence and the rule's rationales, see Gilbert, *supra* note 71, at 856–8 n.230.

86. *See id.*

87. *See id.* at 813–14.

88. *See id.* at 814.

89. *See id.* at 815–16.

90. *See id.* at 815 (explaining how this can happen: opportunity costs, political capital, delay, etc.).

91. *See id.* at 816–17. For a twentieth century convention debate articulating these rationales, see MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION, UNIVERSITY OF ALASKA, 1955–56, at 1746–47; 4 MONTANA CONSTITUTIONAL CONVENTION, 1971-1972: VERBATIM TRANSCRIPT, at 647–658.

92. *See* Cooter & Gilbert, *supra* note 7, at 705.

93. There are far fewer convention debates from this phase of state constitutional development. By my count, there are only six surviving convention debates where the initiative was adopted: Michigan in 1908, Arizona in 1911, Ohio in 1912, Massachusetts in 1918, Alaska in 1956, and Illinois in 1970. This is mostly because the initiative was adopted outside of constitutional conventions in many states.

purposes as in the legislative context.[94] Just as legislators can obtain a majority by logrolling minority votes into a multifaceted statute, initiative sponsors may also craft a ballot proposition that combines unrelated issues to aggregate minority voting blocs.[95] Initiative sponsors may also engage in riding. By surrounding unpopular provisions with popular ones, initiative sponsors may obtain enough votes for an otherwise unpopular provision.[96] Finally, courts have emphasized that transparency and singularity are especially important to ensure that citizens accurately register their preferences by voting "yes" or "no" on a ballot question.[97]

Notwithstanding these underlying rationales, courts have struggled to articulate a workable framework for applying the single-subject rule. The problem, of course, is one of abstraction. As Daniel Hays Lowenstein explains:

> [A]ny collection of items, no matter how diverse and comprehensive, will fall "within" a single (broad) subject if one goes high enough . . . and, on the other hand, the most simple and specific idea can always be broken down into parts, which may in turn plausibly be regarded as separate (narrow) subjects.[98]

Nevertheless, many courts have offered a functional definition of "subject" that draws on the rule's underlying purposes. These frameworks usually emphasize the need for relatedness between topics. The idea is that the single-subject rule does not prohibit the joining of related topics but it "bars a disunity of subjects."[99] The assumption seems to be that concerns about logrolling, riding, and transparency are greatest when unrelated topics are merged. As Richard Briffault has explained, courts have developed a variety of tests for relatedness, but the most common approach is to require topics be "reasonably germane."[100] Tests for germaneness have not, however, resolved uncertainty regarding application of the single-subject rule.[101] Courts

94. Indeed, courts have implied the rule's application to the initiative even in the absence of any positive law extending the rule to citizen lawmaking, *see, e.g.*, *In re* Initiative Petition No. 314, 625 P.2d 595, 601 (Okla. 1980), and some courts found that the rule should be more stringent in the initiative context, *see, e.g.*, Fine v. Firestone, 448 So. 2d 984, 988–89 (Fla. 1984).

95. Indeed, this happens, and courts have construed the single-subject rule to prohibit these sorts of initiatives. *See* Cooter & Gilbert, *supra* note 7, at 706 (providing examples and logrolling in initiatives and summarizing political science literature collecting other examples).

96. This also happens, and courts have construed the single-subject rule to prohibit these sorts of initiatives. *See id*. at 708.

97. *See id.* at 708–09.

98. Lowenstein, *supra* note 9, at 940–41.

99. *See* Briffault, *supra* note 12, at 1640 (quoting State *ex rel.* Hinkle v. Franklin Cnty. Bd. of Elections, 580 N.E.2d 767, 770 (Ohio. 1991)).

100. *See id.* at 1640–41.

101. *See id.* at 1639–40 (describing two cases involving similar questions but resolved differently by the same court).

continue to search for a framework or principle that will produce consistent results.[102]

Because the single-subject rule is vague and indefinite, critics of the rule emphasize that it may give courts too much power and discretion in regulating the initiative.[103] These critics note that courts apply the rule inconsistently across time and jurisdiction, which suggest that courts are not guided by a meaningful legal standard.[104] Instead, courts likely draw on their own "belief systems, values, and ideologies."[105] Leading political scientists and initiative scholars have found evidence to support this suspicion.[106] In an empirical study that examined the votes of individual judges in single-subject cases, Richard Hasen and John G. Matsusaka found that judges tend to follow partisan affiliation more than anything else when aggressively deciding single-subject cases.[107] They conclude that the single-subject rule is vulnerable to arbitrary and political decision-making.[108] As I explain below, this problem is all the more concerning if state government actively enlists the single-subject rule as tool for attacking disfavored initiatives.

C. The Single-Subject Rule's Deeper Paradox in the Initiative Context

The enforcement and conceptual discrepncies described above are problematic. But there is a deeper theoretical problem with the single-subject rule as applied in the context of the constitutional initiative. By defining the rule as mostly a ban on logrolling and riding or a formalistic test of germaneness, courts have generally neglected to imagine how a multifaceted initiative might engage in logrolling and riding but nevertheless serve the initiative's core purpose of better aligning government policy with popular preferences. I argue below that, as a matter of current affairs, this scenario increasingly occurs in various states. Here, I draw on the work of Richard Hasen, John G. Matsusaka, and Daniel Lowenstein to theorize this possibility in general terms for the purpose of placing the single-subject rule in a more complete theoretical context.[109] My core aim is to show that the single-

102. *See* Cooter & Gilbert, *supra* note 7, at 710 ("There is no workable theory of interpretation for the single subject rule.").
103. *See, e.g.*, Campbell, *supra* note 9.
104. *See* Lowenstein, *supra* note 9, at 937.
105. Hasen & Matsusaka, *supra* note 11, at 40.
106. *See id.*
107. *See* Hasen & Matsusaka, *supra* note 11.
108. *See id.*
109. These scholars have argued that logrolling in initiatives can be constructive because it can sometimes better realize voter preferences. Lowenstein, *supra* note 9, at 959; Hasen & Matsusaka, *supra* note 11, at 37. My point here is derivative of theirs. I argue that because logrolling can better realize voter preferences, it can

subject rule should be assessed and applied by reference to more than concerns about logrolling and riding or unmoored definitions of "subject." Another critical polestar is whether a multifaceted initiative is structured to realign government with popular preferences.

Consider two examples: one that overtly includes logrolling and one that expressly includes disparate subjects without logrolling.[110] First, imagine three voters and an initiative regarding marijuana policy in a state that currently outlaws all uses of marijuana. The initiative bundles two issues. Issue A legalizes marijuana for medical use. Issue B legalizes marijuana for recreational use. Voter 1 believes strongly in marijuana's medicinal properties but is mildly concerned about recreational use. Voter 2 thinks marijuana legalization is generally a bad idea but believes there are other more pressing issues facing government. Voter 3 is a libertarian who is skeptical of established medicine; she believes that marijuana should be left to personal choice and that the medical establishment will corrupt its distribution. In this scenario, the utility of passing each issue for each voter might be illustrated as follows[111]:

	Voter 1		Voter 2		Voter 3	
	Medical	Rec.	Medical	Rec.	Medical	Rec.
Adopted	100	-25	-25	-25	-25	100

In this scenario, the best aggregate outcome is for both issues to be approved because this would result in an aggregate utility of 100 (50 for adopting medical use and 50 for adopting recreational use). However, if these issues were presented to voters separately, both would fail because voters 1 and 2 would vote against recreational use and voters 2 and 3 would vote against medical use. By bundling the issues together, voters 1 and 3 are likely to approve the initiative, displace

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also help buoy the initiative's core purpose of ensuring government accountability. This means that the single-subject rule, to the extent that it is a rule intended to enhance the initiative, should not be applied as a strict prohibition on all forms of logrolling. I develop this point further in Section IV.B.

110. These examples are borrowed and modified from Hasen & Matsusaka, *supra* note 11, at 37, who use it to show how logrolling in an initiative might increase realization of voter preferences.

111. The chart could be described in narrative form as follows. Voter 1 would be benefited by 100 if marijuana was legalized for medical use and marginally harmed by -25 if it was also adopted for recreational use. Voter 2 would be marginally harmed by -25 if marijuana was legalized for medical use, and -25 if it was legalized for recreational use. Voter 3 will be marginally harmed by -25 if marijuana is legalized only for approved medical uses but benefited by 100 if legalized broadly for any. Again, this illustration is adapted from Hasen & Matsusaka, *supra* note 11, at 37.

the entrenched status quo, and more closely align state marijuana policy with aggregate welfare and preferences.

My point is not, of course, that logrolling in an initiative will always work to align policy with popular preferences. It can be harmful. However, we should acknowledge that in some scenarios logrolling the initiative can, at least in theory, operate to enhance the initiative's core purpose. Rigid application of the single-subject rule as a ban on logrolling in those cases might undermine the initiative. Recognizing this suggests that the single-subject rule should sometimes be tempered by the initiative's deeper purpose, which, after all, the single-subject rule is intended to support, rather than supplant.

Now consider a separate example that involves the bundling of disparate topics without logrolling. Imagine an initiative that includes two issues. Issue A overrides an existing law that prohibits convicted felons from voting. Issue B prohibits charging criminal defendants any court or administration fees and purges all outstanding fees. Imagine that a majority of voters are either in favor of both issues or opposed to both. Concerns about logrolling and riding are not present here because the referenda result will be the same whether the issues are presented separately or bundled.[112] However, on their face, the issues seem unrelated and would probably fail under many judicial definitions of germaneness. On the other hand, depending on the circumstances, they might be fairly viewed as a consolidated effort to restore voting rights to felons by removing both the formal prohibition and anticipated practical obstacles.[113] From this vantage point, the bundled initiative should probably survive a challenge under the single-subject rule, especially in the absence of any logrolling concerns.

I do not mean to suggest with these examples that placing the single-subject rule in a broader theoretical context will guide courts toward an organizing principle or rule of law that clarifies the single-subject rule. No court could possibly know the exact preference matrix for all voters to diagnose a logrolling problem. Nor will a court always be able to contextualize a bundled initiative by reference to clear extrinsic evidence of its purpose. My point is theoretical. These scenarios are possible when courts decide single-subject rule cases under ex-

112. One might ask why the single-single subject rule matters, then. Whether it is applied to this hypothetical or not, voters would approve both measures. The answer is partially because of the cost associated with forcing the issues to be separated. Absent a good reason under the single-subject rule to force separation of the issues, application of the rule serves only to create random (and perhaps prohibitive) barriers to using the initiative.

113. Indeed, this example is drawn from what occurred in Florida after an initiative that restored felon voting rights. *See* BRENNAN CTR. FOR JUST., *Voting Rights Restoration Efforts in Florida* (Sept. 11, 2020), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/E3K5-9CC9].

isting frameworks, which reveal that the single-subject rule can operate to undermine rather than enhance the initiative.

III. EVADING THE INITIATIVE

In this section, I argue that current structural and political conditions often result in misalignment between, on one hand, state legislatures and governors, and, on the other hand, statewide popular majorities. When this occurs in initiative states, the people often resort to the initiative to correct policy misalignment on discrete issues. But misaligned legislatures and governors fight back against these initiatives in a variety of ways. Indeed, they have developed a rather sophisticated playbook of initiative countermeasures, which I catalogue below.

A. Misaligned State Government

Today, various political and structural conditions can result in misalignment of state government with voters on discrete policy issues. Consider how governors can be caught between their state's interests and their political party's interests. Governors may, for example, face situations where they would benefit from remaining loyal to their political party at their state's expense or contrary to their constituents' preferences.[114] Governors with national political ambitions, for example, may prefer to curry favor with party leadership than side with constituents if they believe that party loyalty will secure future support.[115]

Gubernatorial decisions regarding Medicaid expansion illustrate this phenomenon. Following adoption of the Affordable Care Act, all Democratic governors expanded Medicaid, but less than half of Republican governors did so.[116] In studying the reasons for gubernatorial resistance to Medicaid expansion, Charles Barrilleaux and Carlisle Rainey found that "the level of need in the state exert[ed] little effect on governors' decisions."[117] Rather, governors' partisanship had "sub-

114. The conventional wisdom has been that a complex combination of factors (including partisanship and state economics) guide gubernatorial decisions. *See* Charles Barrilleaux & Carlisle Rainey, *The Politics of Need: Examining Governors' Decisions to Oppose the "Obamacare" Medicaid Expansion*, 14 STATE POLS. & POL'Y Q. 437, 454 (2014) (citing various sources and noting consensus on this issue for 30 years).

115. And as Miriam Seifter has shown, state governors have amassed considerable power while loosening important accountability controls. *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017).

116. *See* Jennifer M. Jensen, *Governors and Partisan Polarization in the Federal Arena*, 47 PUBLIUS: J. OF FEDERALISM 314, 318 (2017) (citing Barrilleaux & Rainey, *supra* note 114).

117. Barrilleaux & Rainey, *supra* note 114, at 449.

stantively meaningful effects on governors' decisions."[118] They conclude that "for high profile, highly politicized issues such as the Affordable Care Act, political considerations outweigh the needs of citizens and state economic conditions in gubernatorial decision making."[119]

Barrilleaux and Rainey are ambivalent about whether partisanship will play out similarly in other gubernatorial decisions. However, Jennifer Jensen has since shown that state governors are increasingly beholden to partisan interests at the expense of their state's interests and constituents.[120] Jensen's research emphasizes the active ways that governors advocate for federal policy in Washington.[121] Drawing on original interviews with governors and their Washington lobbyists, as well as the evolution and proceedings of governors' associations, Jensen argues that governors increasingly take positions by reference to party politics rather than their state's interests.[122] She explains, for example, that during the 2011 debt ceiling debate, five Republican governors went out of their way to oppose raising the debt ceiling without dramatic budget cuts.[123] Those cuts would have significantly reduced federal payments to their states and severely threatened their state budgets. Jensen suggests that these governors, which included Rick Perry, Nikki Haley, and Rick Scott, were maneuvering in anticipation of presidential bids.[124]

In addition to this detailed work by political scientists, anecdotal examples suggest that governors are increasingly misaligned with statewide popular majorities. Marijuana policy provides an especially poignant example.[125] The Republican party has long opposed marijuana legalization, and that position became entrenched within party leadership even as popular opinions have changed. There are surely various complex reasons for the party's inertia on this issue, including the historic (and romanticized) connection to Reagan's tough-on-crime and anti-drug campaigns, as well as connections to other cultural issues.[126] But regardless of the cause, Republican governors with party

118. *Id.* at 437.
119. *Id*. For similar findings regarding the creation of state healthcare exchanges, see Elizabeth Rigby, *State Resistance to "Obamacare"*, 10 THE FORUM, July 2012, at 1.
120. *See* Jensen, *supra* note 116, at 314–15.
121. *Id.* at 322.
122. *Id.*
123. *Id.* at 325.
124. *Id.*
125. *See* Phillip Smith, *Republican Reefer Reactionaries: Meet America's Worst 8 Governors on Marijuana Reform*, SALON (Feb. 22, 2020), https://www.salon.com/2020/02/22/republican-reefer-reactionaries-meet-americas-worst-8-governors-on-marijuana-reform_partner/ [https://perma.cc/F2Z5-BFC3].
126. *See* Mike DeBonis, *House Votes to Decriminalize Marijuana as GOP Resists National Shift*, WASH. POST (Dec. 4, 2020), https://www.washingtonpost.com/

loyalties, national political aspirations, or both have been reluctant to buck the party line on this issue even when voters in their states support policy change.[127] Misalignment has also occurred regarding gaming, voting rights, and redistricting, among other issues.

State legislatures are also increasingly vulnerable to misalignment with statewide majorities. Indeed, Miriam Seifter has shown that it is commonplace for state legislatures to be controlled by the political party that received less than half of the statewide votes.[128] Various factors contribute to this phenomenon, but Siefter notes that "the electoral design itself creates a skew that gives control to the minority party." This is because winner-take-all elections combined with single-member districts can result in disparities between legislative seats and statewide votes. Siefter finds that between 1968 and 2016, there were 146 elections in which the minority party won control of state senates, and 121 similar outcomes in state houses of representatives. And, as Siefter notes, "with the rise of more sophisticated gerrymandering, more complete partisan sorting, and intense geographic clustering, manufactured majorities appear unlikely to go away."[129] The result is that after any given election, millions of Americans "live under minority rule in their U.S. state legislatures."[130]

It should not be surprising, therefore, that statewide popular preferences often conflict with legislative outputs.[131] Consider a few recent examples. The story of gun control in Michigan is particularly illustrative. Since at least 2012, Michigan has experienced significant manufactured legislative majorities that favor Republicans.[132] Indeed, Democrats have never controlled the house during this period even though they always win the majority of votes.[133] Moreover, statewide popular opinion polls show strong support for certain gun control measures; especially legislation authorizing Extreme Risk Protection Orders as a strategy for reducing gun-related suicides.[134] This sup-

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powerpost/house-marijuana-republicans-election/2020/12/04/db2b00a8-35b0-11eb-8d38-6aea1adb3839_story.html [https://perma.cc/V62Q-V4KU].

127. *See* Smith, *supra* note 125.

128. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1762–67 (2021).

129. *Id.*

130. *Id.* at 1765.

131. Of course, this might be normatively desirable. One of the oft-referenced benefits of representative lawmaking is that it mediates popular preferences through a variety of public regarding filters. Moreover, misalignment can be measured in various ways. For purposes of illustration, I focus on discrete policy misalignment, but misalignment of legislative priorities is another important form.

132. *See* LIZ KENNEDY & BILLY CORRIHER, CTR. FOR AM. PROGRESS, DISTORTED DISTRICTS, DISTORTED LAWS 13–15 (Sept. 19, 2017).

133. *See id*.

134. *See* ALEX TAUSANOVITCH, CHELSEA PARSONS & RUKMANI BHATIA, CTR. FOR AM. PROGRESS, HOW PARTISAN GERRYMANDERING PREVENTS LEGISLATIVE ACTION ON

port was, to some extent bipartisan, with one poll finding that 64% of Republicans supported ERPO proposals.[135] However, despite frequent legislative proposals, Republican lawmakers have stalled legislation in committee or refused to pass it.[136] Similar scenarios have unfolded in North Carolina, Pennsylvania, Virginia, and Wisconsin.[137]

Abortion policy provides another example.[138] In the last few years, Republican legislatures have adopted restrictive abortion laws.[139] Texas's S.B. 8, which effectively bans abortions after six weeks of pregnancy, is perhaps the most well-known of these. But legislatures in Oklahoma, Arkansas, South Carolina, Idaho, Mississippi, and Arizona have also adopted significant limitations.[140] This legislation has disrupted abortion care in these states (especially Texas) and teed up the Supreme Court's reconsideration of *Roe v. Wade*. Yet, public support for these measures is far from majoritarian. Some polls in Texas, for example, have found that only 36% of Texans support S.B. 8.[141] Margins of misalignment are potentially greater in other states. In Arizona, support for broad access to abortion ranged from 69% to

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GUN VIOLENCE (2019), https://americanprogress.org/wp-content/uploads/2019/12/GerrymanderingGunControl-report-4.pdf [https://perma.cc/SP8N-2DL6].

135. *See id.*

136. Abigail Censky, *Red Flag Laws Are Stalled in Michigan as Lawmakers Return to Lansing*, WKAR PUB. MEDIA (Aug. 23, 2019), https://www.wkar.org/politics-government/2019-08-23/red-flag-laws-are-stalled-in-michigan-as-lawmakers-return-to-lansing [https://perma.cc/DNL6-YZXK].

137. *See* CTR. FOR AM. PROGRESS, *supra* note 134; Grace Segers, *What are "Red Flag" Laws, and Which States Have Implemented Them?*, CBS NEWS (Aug. 9, 2019, 10:42 AM), https://www.cbsnews.com/news/what-are-red-flag-laws-and-which-states-have-implemented-them [https://perma.cc/4K87-5PM9].

138. *See* David Daley, *How Gerrymandering Leads to Radical Abortion Laws*, NEW REPUBLIC (May 14, 2019), https://newrepublic.com/article/153901/gerrymandering-leads-radical-abortion-laws [https://perma.cc/AP8E-TLN8] ("Georgia's 'fetal heartbeat bill' never would have passed if the state legislature truly reflected the voters' political preferences.").

139. Jamila Perritt & Daniel Grossman, *State Legislation Related to Abortion Services, January 2017 to November 2020*, JAMA INTERNAL MED., May 2021, at 711–12 (finding that "35 states enacted 227 laws restricting access to abortion services.").

140. *See id.*; *see also* Ronald Brownstein, *Watch What's Happening in Red States*, ATLANTIC (June 3, 2021), https://www.theatlantic.com/politics/archive/2021/06/republican-state-legislatures-changes/619086/ [https://perma.cc/C72B-YUKQ] ("Texas, South Carolina, Idaho, and Oklahoma have passed legislation banning abortion when a fetal heartbeat is detected . . . Texas, Oklahoma, and Arkansas also passed virtually complete bans on abortion . . . Arizona approved an extremely restrictive bill that includes barring abortions for certain genetic conditions.").

141. *See* Wesley Story, *Poll: Texans Oppose Extreme Six-Week Abortion Ban*, PROGRESS TEX. (April 29, 2021), https://progresstexas.org/blog/poll-texans-oppose-extreme-six-week-abortion-ban [https://perma.cc/6JLN-9L94] (finding that only 36% of responders supported S.B. 8 and 12% were unsure).

76%.[142] In Oklahoma only 45% of voters supported restrictive abortion laws.[143] And in Florida, where restrictive legislation has been proposed, only 39% of voters support such restrictive laws.[144]

There are other examples of legislative misalignment. In North Carolina, a strong majority of voters favor Medicaid expansion under the Affordable Care Act, but the legislature has refused and even prohibited the governor from expanding Medicaid.[145] A similar situation has played out in Wisconsin.[146] In Mississippi, voters have long supported reform regarding marijuana policy, but until very recently, the legislature refused to enact popular reforms and continued to stymie proposals.[147] And, in several states, popular support for an independent redistricting commission is strong, but legislatures refuse to move in that direction.[148]

Many of these examples draw attention to how Republican state legislatures are currently misaligned with statewide popular majorities, but this is a nonpartisan phenomenon. Historically, Democrats have benefited from manufactured majorities in state legislatures more frequently than Republicans.[149]

It is also important to note that, apart from the misalignment inherent in the structure and design of state legislative elections, state legislatures have frequently been misaligned with voters because of corruption and undue influence by special interests. For example, after the Civil War, large and powerful corporations, especially rail-

142. *See* Katherine Patterson, PUB. POL'Y POLLING (Aug. 21, 2020), https://www.prochoiceamerica.org/2020/08/24/strong-majority-of-arizona-voters-support-reproductive-freedom/ [https://perma.cc/8LSQ-F8CJ]; Jeff Diamant & Aleksandra Sandstrom, *Do State Laws on Abortion Reflect Public Opinion*, PEW RSCH. CTR. (Jan. 21, 2020), https://www.pewresearch.org/fact-tank/2020/01/21/do-state-laws-on-abortion-reflect-public-opinion/ [https://perma.cc/Q7LC-AP8Y].

143. *See* Diamant & Sandstrom, *supra* note 142. For an interesting article on how gerrymandering affects abortion policy in Ohio, see Susan Tebben, *Reproductive Rights: How Gerrymandering Impacts Abortion Access*, OHIO CAP. J. (Aug. 16, 2021), https://ohiocapitaljournal.com/2021/08/16/reproductive-rights-how-gerrymandering-impacts-abortion-access/ [https://perma.cc/6SEF-9VGN].

144. *See* Diamant & Sandstrom, *supra* note 142; Rachel Treisman, *A Florida Lawmaker is Proposing A Restrictive Texas-Style Abortion Bill*, NPR (Sept. 23, 2021), https://www.npr.org/2021/09/23/1040132587/florida-abortion-restriction-bill-texas-ban [https://perma.cc/2XLD-Y5CH] (discussing proposed bill).

145. *See* Kennedy & Corriher, *supra* note 132, at 20.

146. *See id*. at 7.

147. *See Mississippi Becomes the 37th State to Legalize Medical Marijuana*, NPR (Feb. 2, 2022), https://www.npr.org/2022/02/02/1077784525/mississippi-becomes-the-37th-state-to-legalize-medical-marijuana [https://perma.cc/2J3Z-NJHR] (discussing history of attempts to legalize marijuana).

148. *See generally* Michael Li & Kelly Percival, *The Attack on Michigan's Independent Redistricting Commission*, BRENNAN CTR. FOR JUST. (Feb. 13, 2020), https://www.brennancenter.org/our-work/analysis-opinion/attack-michigans-independent-redistricting-commission [https://perma.cc/Q6WJ-NG65].

149. *See* Seifter, *supra* note 128, at 1764–65.

roads, captured many state legislatures and secured wildly equitable benefits at the public's expense.[150] And concerns about corporate influence on state legislatures persist, especially following the Supreme Court's ruling in *Citizens United*.[151]

Finally, even when the political branches align with popular preferences, state government outputs can be misaligned because of state court rulings that invalidate popular policies.[152] As noted above, this phenomenon first came into stark relief during the Progressive Era when state courts blocked popular reforms related to working conditions, collective bargaining, and social welfare programs.[153] But it persists. Emboldened by the theories of the New Judicial Federalism during the late twentieth century, state courts have invalidated popular policies regarding a host of issues, including the death penalty, criminal procedure protections, education financing, local government authority, gubernatorial veto powers, gun rights, victims' rights, abortion regulation, tort reform, marriage, and others.[154] In these instances, state government outputs and popular preferences are misaligned because, for better or worse, state courts independently enforce limits on the political branches.[155]

B. The Initiative and Policy Realignment

In the face of these misalignments, voters in initiative states have sought to use the initiative to realign state policies with popular preferences. To be sure, not all initiatives serve this purpose. The initiative is surely subject to abuse by special interests and even state officials, but it is clear that voters use the initiative to address misalignment between popular preferences and discrete state policies.[156]

Consider, for example, how voters in various states have responded to Medicaid expansion. After Medicaid expansion became available in 2014, thirty-two states adopted it by either executive action or legislation. Following this initial wave, however, several state governments

150. *See generally* Tarr *supra* note 37, at 115.
151. *See* Alexander Hertel-Fernandez, *Who Passes Business's "Model Bills"? Policy Capacity and Corporate Influence in U.S. State Politics*, 12 Am. Pol. Sci. 582, 595 (2014).
152. *See* Dinan, *supra* note 45, at 55–62.
153. *See also id*. (describing this occurrence); Dinan, *supra* note 24, at 206 (same).
154. *See generally* Robert F. Williams, The Law of American State Constitutions 119–31 (2009).
155. I do not mean to suggest that judicial review is not important and normatively desirable. My more simplistic point is that it come with costs regarding democratic outputs and state courts have a history of using judicial review in ways that frustrate popular majorities, which then respond through various mechanisms, including the initiative. *See generally* Kenneth P. Miller, Direct Democracy and the Courts (2009).
156. *See generally* David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution (1989).

refused to expand Medicaid despite popular support for expansion.[157] Thus, beginning with Maine in 2017, voters used the initiative to bypass state government and expand Medicaid themselves.[158] Voters in Idaho, Nebraska, Utah, Missouri, Mississippi, and Oklahoma pursued ballot measures expanding Medicaid in the face of state government opposition or inaction.[159] Voters in South Dakota have submitted an initiative for the upcoming 2022 election.[160] Only in Montana did voters reject Medicaid expansion at referendum.[161]

Medicaid is just one of many recent examples where voters used the initiative to bypass state government and better align policies with popular statewide preferences. In the most extensive study of state constitutional politics to date, John Dinan has detailed hundreds of initiatives proposed because of perceived misalignment between state government and voters on discrete policy issues.[162] These have included environmental regulation, anti-discrimination norms, limits on executive power, public finance, local government, and many more. Quantitative studies and theoretical political science literature also suggest that the initiative is used (and can be effective prophylactically) to address misalignment between state government policy and popular preferences.[163] In short, voters use the initiative to respond to

157. *See* Phillip M. Singer & Daniel B. Nelson, *Expansion by Ballot Initiative: Challenges and Future Directions in Health Policy*, 34 J. GEN. INTERN. MED. 1913 (2019).

158. *See id*. Republican Governor Paul LePage in Maine vetoed Medicaid expansion several times before the initiative was approved. *See* Patty Wight, *After Maine Voters Approve Medicaid Expansion, Governor Raises Objections*, NPR (Nov. 8, 2017), https://www.npr.org/sections/health-shots/2017/11/08/562758848/after-maine-voters-approve-medicaid-expansion-governor-raises-objections [https://perma.cc/3G54-EJG6].

159. For a summary of the status and history of Medicaid Expansion in the states, see *Where the States Stand on Medicaid Expansion*, ADVISORY BOARD (Oct. 8, 2020), https://www.advisory.com/en/daily-briefing/resources/primers/medicaidmap [https://perma.cc/JP3W-SVU5].

160. *See* Phil Galewitz, *South Dakota Voters to Decide Medicaid Expansion*, KAISER HEALTH NEWS, (Jan. 6, 2022), https://khn.org/news/article/south-dakota-medicaid-expansion-ballot-initiative/ [https://perma.cc/9MH6-7TDK].

161. And the reason was likely because of an unusual funding source in the plan. *See* Erin Brantley & Sara Rosenbaum, *Ballot Initiatives Have Brought Medicaid Eligibility To Many But Cannot Solve The Coverage Gap*, HEALTH AFFAIRS (Jun. 23, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210617.992286/full/ [https://perma.cc/FJ9R-EWZD] ("[Failing was] likely a result of the controversial nature of the funding source (a tobacco tax increase.").

162. *See generally* Dinan, *supra* note 24.

163. *See, e.g.*, John G. Matsusaka, *Popular Control of Public Policy: A Qualitative Approach*, 5 Q. J. POL. SCI. 133 (2010) (analyzing ten policy issues in state government and finding that the presence of direct democracy devices increases policy congruence between preferences of median voters and state government); Lucas Leeman & Fabio Wasserfallen, *The Democratic Effect of Direct Democracy*, 110 AM. POL. SCI. REV. 750 (2016) (theorizing that direct democracy is more effective in aligning policy with popular preferences when deviation between elite prefer-

perceived misalignment between state policies and popular preferences.

C. The Countermeasure Playbook

But this is just the beginning of the story. In general, state officials do not like to be undone by the initiative. Party-loyalist governors want to retain favor with donors and party bosses by developing a strong record on party platforms. Likewise, manufactured majorities in state legislatures want to retain control over lawmaking to further their agendas and satisfy district constituents. The result is that state officials have developed a series of sophisticated tactics for evading, undermining, and invalidating disfavored initiatives. Here, I focus on cataloguing and describing five especially common tactics and phenomena that characterize constitutional politics in initiative states. In the following Part, I show how these factors can combine with the single-subject rule to undermine the initiative.

1. Implementation Sabotage

Perhaps the most common and potent tactic for state officials unhappy with an initiative is to undermine its implementation without formally repealing or amending it. Although initiatives can include very clear policy adjustments and directives, they often are not self-executing.[164] They can be dependent on state government for implementation in a variety of ways, which can provide state government with opportunities to sabotage the initiative's effectiveness. And, if done tactfully, state government can undermine the initiative while evading meaningful popular backlash. State governments have developed a few strategies in this regard.

Failing to fund policies and programs adopted by initiative is a common tactic. Missouri's experience with stem cell research is a good

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ences and popular preferences is great; further finding empirical support for this thesis in the policies and politics of Swiss Cantons); Caroline J. Tolbert, *Direct Democracy and Institutional Realignment in the American States*, 118 POL. SC. Q. 467 (2003); Lucas Leemann, *Political Conflict and Direct Democracy: Explaining Initiative Use 1920-2011*, 21 SWISS POL. SCI. REV. 596 (2015); Daniel C. Lewis, Saundra K. Schneider & William G. Jacoby, *The Impact of Direct Democracy on State Spending Priorities*, 40 ELECTORAL STUD. 531 (2015).

164. A good example are initiatives authorizing state legislatures to establish lotteries. *See* Dinan, *supra* note 24, at 227 (noting Arkansas's 2008 amendment which eliminated a prohibition on lotteries and included a clause stating: "The General Assembly may enact laws to establish, operate, and regulate State lotteries."). The right to hunt and fish is another example. These provisions sometime embrace state regulation, which ensures a level of discretion for officials and the possibility of implementation sabotage. *See id*. at 105; Jeff O. Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 57 TENN. L. REV. 58 (2009).

example. In 2006, in response to legislative opposition to stem cell research, voters adopted an initiative that authorized it.[165] In response, state government took a variety of steps to stymie the initiative, including the withdrawal of $85 million previously awarded to the University of Missouri for the construction of a new research facility.[166] This action, along with others, shook investor confidence in Missouri as a stable jurisdiction for investing in stem cell research, causing industry to look elsewhere.[167]

Medicaid expansion provides another example. Several initiatives expanding Medicaid fail to include a specific funding mechanism for the state's share of the expansion.[168] In Missouri, the Republican-controlled legislature refused to fund Medicaid expansion, and the governor has refused to implement it without dedicated funding.[169] Thus, because the initiative deferred funding decisions to state government, the legislature and governor were able to impede the initiative by withholding funding.

Another strategy is for state government to withhold necessary oversight or implementation. Some initiatives require state agencies and departments to adopt regulations, implement programming, or provide oversight for their implementation. In those cases, governors, legislatures, and other state officials can sabotage initiatives by failing to provide the bureaucracy necessary to implement the initiative or by implementing the initiative in ways that dilute its potency.

Florida's medical marijuana amendment, adopted in 2016, provides a good example. The amendment legalized "the medical use of marijuana by a qualifying patient or caregiver."[170] The amendment was approved by more than 71% of voters, and, at more than 1,200 words, it was rather detailed.[171] However, Governor Rick Scott and the legislature opposed the initiative and took steps to undermine it.[172] Most notably, they passed "enabling" legislation that included a provision banning the smoking of marijuana for medical purposes on

165. Dinan, *supra* note 24, at 245; *see also* MO. CONST. art. III § 38(d).

166. *See* Monica Davey, *Stem Cell Amendment Changes Little in Missouri*, N.Y. TIMES (Aug. 10, 2007), https://www.nytimes.com/2007/08/10/us/10stemcell.html [https://perma.cc/H2BY-DB2M]. This occurred despite the fact that the amendment prohibits the state from withholding funds to undermine stem cell research.

167. *See id.*

168. Singer & Nelson, *supra* note 157, at 1914.

169. *See* Phil McCausland, *Missouri Governor Won't Fund Medicaid Expansion, Flouting State Constitution and Voters*, NBC NEWS (May 13, 2021), https://www.nbcnews.com/politics/politics-news/missouri-governor-won-t-fund-medicaid-expansion-flouting-state-constitution-n1267265 [https://perma.cc/U5UG-D46V].

170. FLA. CONST. art. X, § 29(a)(1).

171. It defined key terms and created clear mandates for the Department of Health and the legislature to faithfully implement legalization of medical marijuana.

172. *See* Editorial, *Rick Scott's Fight Against Smoking Medical Marijuana Could Affect Next Presidential Race*, S. FLA. SUN SENTINEL (Jun. 27, 2018), https://

the theory that the initiative did not require legalization of all methods of use.[173] The same legislation also placed significant hurdles in the way of doctors seeking to prescribe marijuana, including a requirement that they take a two-hour, five-hundred dollar course before lawfully prescribing marijuana.[174] As a result of these measures, and others, medical marijuana was significantly delayed in Florida and there were several lawsuits claiming that implementation by state government was inadequate and violated the initiative.[175]

State implementation of Victims' Rights Amendments provides another example. Beginning in the 1980s, votes in various states approved initiatives that constitutionalized the rights of crime victims "to be informed about and participate in legal proceedings."[176] These initiatives grew from concerns about how state government officials, especially prosecutors and law enforcement officers, treat victims during criminal investigations and prosecutions.[177] The amendments were intended to correct the behavior of these officials by constitutionalizing protections for crime victims, including a right to advanced notification of certain critical proceedings and limited participation rights.[178] However, in many states where these initiatives were adopted, prosecutors and law enforcement failed to implement necessary protocols, training, or bureaucracy to effectuate these guaran-

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www.sun-sentinel.com/opinion/fl-op-editorial-scott-marijuana-opposition-20180626-story.html [https://perma.cc/7UXC-3DC2].

173. The legislation legalized the medical use of marijuana as a pill, oil, edible or vape. The prohibition on smoking was ultimately repealed by the legislature in 2019. *See* S.B. 182, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/00182/?Tab=BillText [https://perma.cc/BLT5-7YSA].

174. Other forms of implementation sabotage included long delays by the department of health in issuing "medical I.D." cards required for patients to obtain medical marijuana. *See* Justine Griffin, *Smoking Medical Pot is no Longer Illegal in Florida. But How Soon Can Patients Buy It?*, TAMPA BAY TIMES (Mar. 20, 2019), https://www.tampabay.com/health/smoking-medical-pot-is-no-longer-illegal-in-florida-but-how-soon-can-patients-buy-it-20190321/ [https://perma.cc/VZX5-FQC4]. Another tactic was a requirement that licensed distributors incorporate vertical integration—"a business strategy where the same company is required to grow, process and sell the product." *See* Fla. Dep't of Health v. Florigrown, LLC, 317 So. 3d 1101 (Fla. 2021) (upholding vertical integration).

175. *See Florida Supreme Court Overturns Rulings on Medical Marijuana*, FLA. POL. REV. (June 16, 2021), http://www.floridapoliticalreview.com/florida-supreme-court-overturns-rulings-on-medical-marijuana/ [https://perma.cc/ZX5Z-JDDS]. Maine's legislature took a similar approach to an initiative statute legalizing recreational marijuana. *See* Elaine S. Povich, *Lawmakers Strike Back Against Voter-Approved Ballot Measures*, PEW (July 28, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/07/28/lawmakers-strike-back-against-voter-approved-ballot-measures [https://perma.cc/58BN-Q25R].

176. *See* Dinan, *supra* note 24, at 99.

177. *See id*.

178. *See id*.

tees.[179] State legislatures likewise failed to enact or fund necessary reforms.[180] Thus, one commentator concluded that "victims' rights largely remain 'paper promises'" because of failed implementation by state government.[181]

Finally, state government can sabotage an initiative by choosing to ignore it outright. In Maine, for example, voters approved an initiative expanding Medicaid in 2017 and the Maine Supreme Court later held that the initiative required state government to submit an expansion plan to the federal Department of Health and Human Services.[182] However, days after voters approved the initiative, Governor Paul LePage had issued a statement declaring that he would "not implement Medicaid expansion until it has been fully funded by the Legislature at the levels DHHS has calculated, and [he would] not support increasing taxes on Maine families, raiding the rainy day fund or reducing services to our elderly or disabled."[183] As a result of the Governor's brinkmanship, Medicaid was not expanded in Maine until 2019 when LePage left office and Governor Janet Mills chose to honor the 2017 initiative.[184]

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179. *See* U.S. DEP'T JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 4 (1998) ("Many victims' rights laws are not being implemented, and most states still have not enacted fundamental reform such as consultation by persecutors with victims prior to plea agreements.").

180. *Id*. at 4.

181. *See id*.; *see also* BEATTY, D., S. HOWLEY, AND D. KILPATRICK, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS, SUB-REPORT: CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS, (1997) (providing data showing that victims' rights are no implemented as of 1997).

182. *See* Me. Equal Just. Partners v. Comm'r, 193 A.3d 796 (Me. 2018); *see also Maine Supreme Court Orders Medicaid Expansion to go Forward*, MODERN HEALTHCARE (Aug. 23, 2018), https://www.modernhealthcare.com/article/20180823/NEWS/180829946/maine-supreme-court-orders-medicaid-expansion-to-go-forward [https://perma.cc/UT5F-8NX3] (detailing the court's holding).

183. *See* Statement of Governor Paul R. LePage (Nov. 8, 2017), https://www.maine.gov/tools/whatsnew/index.php?topic=gov+News&id=771214&v=article2011 [https://perma.cc/W4LN-JG5N].

184. The Maine Supreme Court did find that LePage was in violation of the amendment, but he continued to deploy effective sabotage tactics. Although he complied with the court's order by submitting an expansion plan to the federal Department of Health and Human Services, he also sent a letter to that department asking them to reject the plan. *See* Rachana Pradhan, *Maine Governor Sued for Defying Medicaid Expansion Ballot Measure*, POLITICO (May 30, 2018), https://www.politico.com/story/2018/04/30/lepage-sued-medicaid-expansion-ballot-measure-559952 [https://perma.cc/C9UZ-VDHF]; *see also* Sarah Holder, *Where it's Legal to Reverse the Vote of the People*, BLOOMBERG (Oct. 12, 2018), https://www.bloomberg.com/news/articles/2018-10-12/where-the-people-s-vote-can-be-negated-by-legislators [https://perma.cc/LE4C-QYAG] (detailing strategies used by politicians to defeat or alter citizen-initiated ballot measures).

2. Collateral Attacks

Even if an initiative is relatively self-enforcing, and as a result, largely immune from implementation sabotage by state government, state government can adopt independent policies and practices that collide with an initiative and undermine its potency. Here, the core strategy is to leverage other institutions of state government to counteract the initiative.

A prime example is how Florida's government responded to the felon voting rights amendment approved by 65% of voters in 2018.[185] The amendment was short, direct, and by most accounts self-executing.[186] It changed article VI, section 4 of the Florida Constitution to mandated that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."[187] Nevertheless, the incumbent Florida legislature and governor separately adopted a law that required convicted felons to pay all outstanding restitution, costs, fees, or fines before regaining the right to vote.[188] In this way, state government was able to deeply undermine the potency of the initiative. Indeed, by some estimates, the legislation reduced the number of re-enfranchised voters by 80%.[189]

185. *See generally* Veronica Stracqualursi & Caroline Kelly, *Florida House Passes Bill That Makes It Harder for Ex-felons to Vote*, CNN (May 3, 2019), https://www.cnn.com/2019/05/03/politics/florida-house-vote-amendment-4-felons-voting-rights/index.html [https://perma.cc/T28E-9388].

186. *See* Jones v. DeSantis, 462 F. Supp. 3d 1196, 1206 (N.D. Fla. 2020) (court referring to law as self-executing); *see also* George Bennett, *DeSantis to Act Quickly on Water, Supreme Court, Broward Sheriff*, PALM BEACH POST (Dec. 12, 2018), https://www.palmbeachpost.com/story/news/politics/2018/12/12/exclusive-desantis-to-act-quickly-on-water-supreme-court-broward-sheriff/6658926007/ [https://perma.cc/8UAL-K7ST] ("Amendment 4, approved by 64.6 percent of Florida voters to restore voting rights to most felons who have completed their sentences, should not take effect until 'implementing language' is approved by the Legislature and signed by him, DeSantis said."); Carolina Bolado, *11th Circ. Sides With Fla. In Felon Voting Rights Dispute*, LAW360 (Sept. 11, 2020), https://www.law360.com/publicpolicy/articles/1309432 [https://perma.cc/QV7E-R7XW].

187. FLA. CONST. art. VI, § 4(a). Certain felony convictions were excluded from the restoration of voting rights ("murder or a felony sexual offense.").

188. *See* S.B. 7066, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/7066/ [https://perma.cc/M2W9-6SQW]; *see also* Case Comment, *Eleventh Circuit Upholds Statute Limiting Constitutional Amendment on Felon Reenfranchisement*, 134 HARV. L. REV. 2291, 2292 (2021) (connecting the voter initiative to S.B. 7066); Advisory Op. to the Governor re Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1072, 1084 (Fla. 2020) (per curiam).

189. *See* Case Comment, *supra* note 188 at 2296. Of course, the state had argued that the initiative was never intended to enfranchise all convicted felons who were not complete with parole or their jail sentences, and that the intended effect of the statute captures the intended effect of the initiative.

Michigan's experience with legalizing stem cell research provides another example. In 1998, the Michigan legislature banned stem cell research and remained unwilling to lift the ban notwithstanding growing popular support for repeal.[190] In 2008, voters approved an initiative legalizing stem cell research to the extent "permitted under federal law."[191] However, republicans in the legislature remained opposed to stem cell research, and, in 2010, the Michigan Senate passed legislation that prohibited the sale or purchase of human embryos, imposed burdensome reporting requirements on research facilities conducting stem cell research, and imposed civil and criminal penalties for violating the law.[192] Although the bill was ultimately rejected in the house, it had a chilling effect on research and investment in Michigan and illustrates how state government can dilute initiatives by collateral attack in the form of independent legislation.[193]

3. Direct Repeal

A less subtle strategy is for state government to pursue a direct repeal of an initiative. This tactic is perhaps more common in response to initiative statutes, but it also occurs in response to initiative constitutional amendments. The key idea is that while the initiative provides citizens with a direct pathway to constitutional reform, all state constitutions also provide state legislatures with a separate pathway to constitutional amendment. Moreover, state officials can, and do, use the initiative themselves.[194] Thus, if citizens amend the constitution in a way that state government dislikes, state government can unleash a counter-amendment.[195] Under the right conditions, direct appeal can be an important tactic for evading initiatives; especially if combined with other countermeasures.

190. *See* Dinan, *supra* note 24, at 245.
191. *See id*. at 245 n.50.
192. *See* Nisha Satkunarajah, *Michigan Senate Passes Stem Cell Regulation Bill*, BIONEWS (May 4, 2010), https://www.bionews.org.uk/page_92310 [https://perma.cc/B5FZ-HQTT].
193. *See Uncertain Funding, Regulatory Changes Slow Embryonic Stem Cell Research Innovation*, STATE & HILL (Dec. 6, 2010), https://fordschool.umich.edu/news/2010/uncertain-funding-regulatory-changes-slow-embryonic-stem-cell-research-innovation [https://perma.cc/W974-E8KC].
194. *See* Seifter *supra* note 115, at 529 ("[G]overnors now regularly use the initiative to their own advantage . . . ").
195. Counter amendments can be complete repeals or partial repeals. *See, e.g.*, *Florida Amendment 2, $15 Minimum Wage Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_2,_$15_Minimum_Wage_Initiative_(2020) [https://perma.cc/SE87-GJFG] (last visited Mar. 6, 2022) (referencing pending proposed counter amendment by Florida legislature to reduce minimum wage for prisoners and employees with felony convictions and employees under twenty-one in response to earlier initiative that raised the minimum wage categorically to $15 per hour. The proposal is a legislative referred constitutional amendment—Senate Joint Resolution 854—introduced by Republican Jeff Brandes).

Of course, direct repeal can be a complicated phenomenon to assess. In all states except Delaware, amendments must be ratified by a popular referendum. This means that even counter-amendments must be evaluated by voters directly. Concerns about misalignment between government policy and popular preferences are surely reduced in this context because voters have the final say on whether to repeal or affirm the prior initiative. Some initiatives are no doubt misguided, and voters may appreciate the opportunity to change course. On the other hand, state government is often uniquely situated to influence and control counter-amendments in ways that might pre-determine outcomes.[196] In any event, the initiative's efficacy as an accountability device is surely diluted if it is subject to government-orchestrated revotes whenever the government dislikes the initiative. State government officials often appreciate this, and seek to undo initiatives by pursing direct appeal.

A good example is Florida's 2000 high speed rail amendment.[197] For decades, Floridians had pressured government to construct a high-speed rail system that would connect the state's major metropolitan areas.[198] By 2000, there had been multiple legislative commissions, reports, investigations, and failed statutes.[199] The final straw in public sentiment appears to have been a conservative and incremental plan developed by the Florida Department of Transportation that would have extended ordinary rail service across the state over three, multi-year phases.[200] As a result of this plan, frustrated citizens took to the initiative and proposed a constitutional amendment that would require the government to create a high-speed rail system by a date certain.[201] The amendment was ratified by voters, and it required construction to begin by "November 1, 2003" on a "high speed ground transportation system . . . capable of speeds in excess of 120 miles per hour" and connecting "the five largest urban areas of the

196. I illustrate this below in the context of the Florida high-speed rail amendment. There, the governor was accused of using a financial impact committee to make the high-speed rail project "as politically un-charming as possible" so that voters would approve the repeal amendment. *See* Jack Lyne, *Derailed: Florida Amendment for $25B Bullet Train Bites Dust in Vote*, SITE SELECTION MAG. (Nov. 8, 2004), https://siteselection.com/ssinsider/snapshot/sf041108.htm [https://perma.cc/4MEQ-SMSC].

197. I've written about this amendment elsewhere. See Jonathan L. Marshfield, *supra* note 34, at 365–68 for context, and I draw on some of that account here.

198. *See* ALLISON L. C. DE CERRENO ET AL., HIGH SPEED RAIL PROJECTS IN THE UNITED STATES: IDENTIFYING ELEMENTS FOR SUCCESS-PART 1, MTI REPORT 05-01, at 29 (2005).

199. *Id*. at 29–30.

200. *See id*. at 37–38.

201. *See id*.

State."[202] The amendment left many details of the project to "the Legislature, the Cabinet and the Governor."[203]

By 2003, state agencies had conducted significant studies and taken various preliminary measures toward constructing the rail system.[204] The legislature had also authorized $14 million to begin the project. However, Governor Jeb Bush became a strong opponent and engaged in implementation sabotage to undermine the initiative.[205] He vetoed $5 million of the legislature's funding or the project[206] and $7.2 million in operating funds for the responsible state agency.[207] These cuts had the effect of voiding contracts with critical private contractors and brought the project to a halt.[208] Nevertheless, the Governor continued to fund the project at minimal levels on account of the clear mandate in the initiative.[209] That changed in 2004, when the Governor formalized his attack by spearheading an amendment to repeal the original initiative.[210] While the repeal campaign was underway, Governor Bush convened a financial impact committee to assess the project's cost.[211] Not surprisingly, the committee arrived at a shockingly large estimate: $40 to 51 billion.[212] Although that number was later reduced, and even rejected by the Florida Supreme Court,

202. *See id*. at 38–39 (reprinting amendment).
203. *See id*. The amendment was subsequently repealed by another initiative in 2004. *See* FL. CONST. art. X, § 19.
204. *See* DE CERRENO ET AL., *supra* note 198, at 38–44 (providing detailed history of agency and legislative action after the amendment).
205. See Noah Bierman, *Jeb Bush's War Against Florida High-Speed Rail Shows His Governing Style*, L.A. TIMES (May 10, 2015), https://www.latimes.com/nation/politics/la-na-jeb-bush-high-speed-rail-20150510-story.html [https://perma.cc/S6RL-3VQ6] for a summary of various actions taken by Governor Bush.
206. Bush's reasons for opposing the project are unclear. He expressed concerns regarding tax exemptions and problems with rider-revenue projections, but there were also rumors that personality conflicts between Jeb Bush and leadership in support of the project may have played a role in Bush's opposition. *See* DE CERRENO ET AL., *supra* note 198, at 45.
207. *See* [FLA.] HOUSE OF REPRESENTATIVES STAFF ANALYSIS: HB 215, at 5 (Mar. 26, 2004).
208. *See* Bierman, *supra* note 205.
209. *See* John Kennedy, *Governor Derails High-Speed Train*, S. FLA. SUN SENTINEL (Jun. 23, 2003), https://www.sun-sentinel.com/news/fl-xpm-2003-06-24-0306230493-story.html [https://perma.cc/3QXC-ESY2] (noting that governor complied with letter but not spirt of the initiative).
210. Interestingly, the state legislature rejected the governor's request that it propose a constitutional amendment repealing the initiative. The main concern was that voters would view the proposal as a direct affront to their declared preferences. This forced the governor to take to the initiative himself.
211. *See* Jack Lyne, *Derailed: Florida Amendment for $25B Bullet Train Bites Dust in Vote*, SITE SELECTION MAG. (Nov. 8, 2004), https://siteselection.com/ssinsider/snapshot/sf041108.htm [https://perma.cc/4MEQ-SMSC].
212. *See* Advisory Op. to the Att'y Gen. re Repeal of High Speed Rail Amend., 880 So. 2d 628 (Fla. 2004); *see also* Lyne, *supra* note 211 ("the Florida Supreme Court sent it back to the panel. Court justices said that the group shouldn't have

the high cost of the project became the tagline for the Governor's successful repeal campaign.[213]

4. Judicial Review

Courts, especially state courts, provide state government with another avenue for challenging or limiting initiatives. Unlike federal courts, which have avoided oversight of the federal amendment process under the political question doctrine,[214] state courts universally review and enforce amendment rules, including rules regulating the initiative.[215] In theory, when a court reviews an initiative, it ostensibly operates as a neutral arbiter and expositor of initiative rules.[216] State courts perform this role to promote the rule of law and ensure that citizens and government abide by the constitution. Thus, at least in theory, judicial review does not give state government an inherent advantage in evading initiatives.[217] There are, however, several practical considerations that can tilt the process in the government's favor and incentivize misaligned state government to pursue judicial review of initiative amendments. This in turn creates extra risk than an initiative will be undermined and increases the cost of pursuing initiatives.

First, state statutes and judicial doctrine afford generous standing to parties opposing an initiative.[218] In most initiative states, any citizen or voter can sue, usually by writ of mandamus, to challenge the certification of an initiative for the ballot.[219] Although some courts require petitioners to show injury, most state courts hold that all voters and taxpayers have a cognizable injury in unlawful initiatives.[220] As a result, misaligned state governments (and their donors and political parties) are often involved in challenging unwanted initiatives. In-

used the verb could. And they also ruled that the group overstepped its bounds by including the by-household cost breakdown.").

213. *See* Lyne, *supra* note 211. When the initiative was first ratified, law did not require an economic assessment for the initiative. Thus, Bush argued that voters approved the initiative without key information, and that the re-vote was appropriate because reliable economic impact information was now available and required for initiatives. This may very well be true. My point here is not that this particular initiative repeal was done to entrench misalignment but that it illustrates how that tactic can be deployed by state government.

214. *See* Coleman v. Miller, 307 U.S. 433 (1939) (applying political question doctrine to certain Article V disputes).

215. *See* Williams, *supra* note 154, at 401–09.

216. *See generally* Scott Kafker & David Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives After Hollingsworth v. Perry*, 71 WASH. & LEE L. REV. 229, 259 (2014).

217. *See id*.

218. *See id*. at 259.

219. *See id*. at 259 n.157.

220. *See id*. at 260.

deed, it is not uncommon for state officials to bring challenges to initiatives.[221] In a recent example, the Governor of South Dakota directed state officials challenge a marijuana initiative after it was ratified by 54% of voters.[222] The Governor was an outspoken opponent of the initiative, and she ultimately prevailed when the Supreme Court of South Dakota found that she had standing to sue and that the initiative was invalid.[223]

Second, unlike federal courts, which are constitutionally prohibited from rendering advisory opinions, many state supreme courts are authorized to answer certified questions from state government officials. This provides state officials with a powerful tool for undermining or testing disfavored initiatives. For example, in 2019, Florida citizens gathered signatures in support of a constitutional amendment to legalize recreational marijuana.[224] After gathering sufficient signatures to qualify the initiative for the ballot, the Florida Attorney General Ashley Moody—an outspoken opponent of marijuana legalization—petitioned the Florida Supreme Court for an advisory opinion on whether the initiative satisfied the legal requirements of a clear ballot title and summary.[225] The Court held that the title and ballot summary were unclear, which effectively ended the initiative campaign

221. *See, e.g.*, Fann v. State, 493 P.3d 246 (Ariz. 2021) (lawsuit brought by Senate President and other lawmakers challenging initiative); *see also* Laura Gómez, *Despite Court Ruling, Education Advocates Say Prop. 208 Can Have a Long Life*, ARIZ. MIRROR (Aug. 26, 2021), https://www.azmirror.com/2021/08/26/despite-court-ruling-education-advocates-say-prop-208-can-have-a-long-life/ [https://perma.cc/G8AP-8SNR] (noting that lawsuit was a reflection of the fact that "the majority of Arizona voters and the legislature seems to be "'in a war, in a battle" over educating financing.).

222. Order from Kristi Noem, Governor of South Dakota, Executive Order 2021-02: Ratification of Amendment A Litigation (Jan. 8, 2021), https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.PDF [https://perma.cc/B58V-77SB] ("I directed Colonel Rick Miller to commence the Amendment A Litigation on my behalf in his official capacity.").

223. *See* Thom v. Barnett, 967 N.W.2d 261 (S.D. 2021).

224. Jeffrey Schweers, *Florida Supreme Court Strike Proposed Measure Legalizing Recreational Use of Marijuana*, TALLAHASSEE DEMOCRAT (Apr. 22, 2021), https://www.tallahassee.com/story/news/local/state/2021/04/22/florida-supreme-court-strikes-down-adult-use-marijuana-proposal/7335039002/ [https://perma.cc/M7YY-Y6KK].

225. *See id*. (providing that the Attorney General petitioned the court a month after signatures); *In re* Advisory Op. to the Att'y Gen., 315 So. 3d 1176 (Fla 2021). On Attorney General's opposition to marijuana see, Jim Saunders, *Legalize Marijuana Supporters Fire Back at Florida AG Ashley Moody's Objections*, S. FLA. SUN SENTINEL (Jan. 21, 2020), https://www.sun-sentinel.com/news/politics/os-ne-recreational-marijuana-supporters-fire-back-20200121-5ej32l5cqzbufdvef65qjcho54-story.html [https://perma.cc/B7VX-P8R4]; Jim Saunders, *Attorney General Ashley Moody Says Florida Supreme Court Should Decide Marijuana Amendment Issue,* S. FLA. SUN SENTINEL (Mar. 23, 2020), https://www.sun-sentinel.com/news/politics/fl-ne-nsf-ashley-moody-marijuana-ruling-voters-20200323-mpz42kg755dybb6sanddl7c3se-story.html [https://perma.cc/Q7TG-WTLP]. Under Florida law, the

and prevented a popular referendum on the issue.[226] Florida's Governor pursued a similar tactic regarding the felon voting initiative. The Governor requested a ruling on whether legislation limiting the initiative was constitutional, and the Court issued an advisory opinion upholding the legislation because the language of the initiative was broad enough to accommodate the legislation.

Third, and perhaps most importantly, there is often little direct financial cost to state government and the potential for a windfall gain.[227] Many cases challenging initiatives begin when private parties challenge pre-election decisions by state government regarding certification of an initiative for the ballot. In those instances, state government is obligated to defend the decisions of its officials, which means that it finances (with taxpayer money) the case against the initiative. An attorney general may, for example, refuse to certify an initiative for some procedural violation, causing the initiative's proponents to sue the official for improperly applying initiative rules.[228] That lawsuit triggers the state's obligation to defend the case against the initiative. In those situations, litigation presents a low risk, high reward scenario for misaligned state government. If a court rules against the initiative, state policy remains intact and government has neutralized a threatening initiative. If the court rules in favor of the initiative, taxpayers finance the state's losing case.[229] These dynamics are most common in cases where the state is a defendant, but they can also play out in instances where state officials are plaintiffs.[230]

Attorney General is required to seek opinion from the Supreme Court. *See* Downey, et al., *supra* note 5, at 589–90.

226. *See* Kirby Wilson, *Florida Marijuana Legalization Dealt Blow by Florida Supreme Court*, TAMPA BAY TIMES (Apr. 22, 2021), https://www.tampabay.com/news/florida-politics/2021/04/22/florida-marijuana-legalization-effort-dealt-blow-by-florida-supreme-court/ [https://perma.cc/D7T8-8D42].

227. *See generally* Betsy Z. Russell, *State Asked to Pay $152K for Winning Side's Fees, After Losing Initiatives Lawsuit*, IDAHO PRESS (Sept. 6, 2021), https://www.ktvb.com/article/news/politics/elections/state-initiatives-lawsuit-fee-idaho-press/277-9634c2ca-50a0-489b-9b4f-75f843561e2f [https://perma.cc/J398-N7EX] (legislature unlawfully limited initiative then hired outside firm and attorney general to defend law against attack).

228. *See e.g.*, David Ramsey, *Attorney General Rutledge Rejects Full Marijuana Legalization Ballot Initiative*, ARK. TIMES (Apr. 24, 2018) https://arktimes.com/arkansas-blog/2018/04/24/attorney-general-rutledge-rejects-full-marijuana-legalization-ballot-initiative [https://perma.cc/E4YA-CKTJ].

229. There are, of course, political consequences to frivolously rejecting initiatives.

230. Stephen Groves, *Pot Advocates Cry Foul on Noem Using State Funds for Lawsuit*, A.P. NEWS (Mar. 5, 2021), https://apnews.com/article/constitutions-lawsuits-marijuana-kristi-noem-courts-68002b0c64417a4c92be4a558051c58d [https://perma.cc/MQX4-YDHE] (describing how South Dakota governor sued after initiative was ratified and financed litigation through taxpayer money).

5. Reform of the Initiative Itself

State governments may also seek to undermine and evade initiatives by making the initiative process more difficult and costly to use.[231] This tactic can work to undermine the initiative in at least two ways. First, state government may use this tactic preemptively to reduce the number of initiatives going forward.[232] This would, in general, make it more difficult for citizens to correct government policy and empower state government with greater policy independence.[233] Second, state government may combine this tactic with other countermeasures as part of a multifaceted effort to evade a particular initiative and maintain control over that policy issue. For example, a state may pass legislation that undermines an initiative, obtain a ruling from a state court upholding that legislation, and then change the initiative process so that a responsive initiative is much more difficult. In this way, state government can entrench its power over a particular policy issue.

Florida's experience with the felon voting initiative illustrates this. As noted above, voters approved an initiative amendment in November 2018 that re-enfranchised felons who had completed their "terms of sentence." In June 2019, the governor signed legislation that defined "terms of sentence" to include various court costs, fees, and restitution.[234] That legislation significantly reduced the number of felons who would qualify for re-enfranchisement under the initiative. Nevertheless, in an advisory opinion requested by the Governor, the Florida Supreme Court upheld the legislation. Importantly, in June 2019, the same month that the Governor signed the felon-voting rights legislation, he also signed legislation that made the initiative process signifi-

231. See John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives*, 101 NEB. L. REV. 40 (2022).

232. This might include initiatives that are currently being circulated by citizens. *See, e.g.*, H.B. 5, 2019 Leg., Reg. Sess. (Fla. 2019) which affected efforts underway to qualify initiatives for minimum wage, etc., for 2020 ballot. *See* Lloyd Dunkelberger, *If You're Collecting Signatures for a 2020 Florida Ballot Campaign, You're Probably Nervous Right Now*, FLA. PHOENIX (Jun. 5, 2019), https://floridaphoenix.com/2019/06/05/if-youre-collecting-signatures-for-a-2020-florida-ballot-campaign-youre-probably-nervous-right-now/ [https://perma.cc/58SH-Y3LG].

233. *See* Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES, https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html [https://perma.cc/6XX2-WU5U] (quoting ACLU lawyers as saying: "With every successful initiative or every big effort that the Legislature doesn't approve of, there is a new law to make it more costly, more burdensome, to propose an initiative."); *id*. (describing South Dakota attempt to raise ratification threshold from 50% to 60% in advance of anticipated referendum on Medicaid expansion).

234. *See* FLA. STAT. § 98.0751 (2021).

cantly more difficult.[235] House Bill 5 imposed various new restrictions and requirements on the initiative that were explicitly intended to make it more difficult to qualify an initiative for the ballot.[236] As a result, state government significant limited the original felon voting rights initiative and has now further insulated its policies from subsequent initiatives.

Initiatives in South Dakota regarding marijuana and Medicaid expansion provide further examples. In 2020, voters approved an initiative amendment that legalized marijuana over opposition from Republican Governor Kristi Noem.[237] After the referendum, Governor Noem issued an executive order directing state officials to challenge the amendment in court.[238] In November 2021, the South Dakota Supreme Court invalidated the amendment as offending the state constitution's single-subject rule.[239] During this time, citizens were separately gathering signatures for an initiative to expand Medicaid, another policy opposed by Governor Noem and Republican legislators.

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235. *See* H.B. 5, 2019 Leg., Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/00005/?Tab=BillText [https://perma.cc/77SV-DXBQ]; *see also* Jim Saunders, *Gov. DeSantis Signs HB5, 'Eviscerating' the Democratic Process in Florida*, ORLANDO WEEKLY (Jun. 9, 2019), https://www.orlandoweekly.com/Blogs/archives/2019/06/09/gov-desantis-signs-hb5-eviscerating-the-democratic-process-in-florida [https://perma.cc/A3GV-CLH4] (explaining how H.B. 5 made the process more difficult).

236. Indeed, it appears that the law effectively ended an ongoing initiative campaign to expand Medicaid. *See* Alexandria Glorioso, *Medicaid Expansion Won't Be on 2020 Ballot*, POLITICO (Aug. 8, 2019), https://www.politico.com/states/florida/story/2019/08/08/medicaid-expansion-wont-be-on-2020-ballot-1136863 [https://perma.cc/PKG9-N2FP] (attributing the initiative's failure to qualify for the ballot to H.B. 5); *see also* Jim Saunders, *DeSantis Signs Controversial Law Adding Restrictions On Ballot Initiative Petitions*, WJCT NEWS (Jun. 10, 2019), https://news.wjct.org/first-coast/2019-06-10/desantis-signs-controversial-law-adding-restrictions-on-ballot-initiative-petitions [https://perma.cc/X4H6-ATZ2]; Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES, https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html [https://perma.cc/Q35J-2XME] (referring to H.B. 5 and other recent changes to the initiative process: "Recently, the Legislature cut in half the time period in which signatures must be submitted before they expire; banned the practice of paying signature collectors on a per-signature basis; required those gathering signatures to use a separate piece of paper for each signature; and required every signature to be verified, banning a much cheaper 'random sampling' process.").

237. *See* A.J. Herrington, *Marijuana Next Target of GOP Bids to Overturn Elections*, FORBES (Jan. 11, 2021), https://www.forbes.com/sites/ajherrington/2021/01/11/marijuana-next-target-of-gop-bids-to-overturn-elections/?sh=1b015ef41790 [https://perma.cc/HMN5-9DZR].

238. *See* Order from Kristi Noem, Governor of South Dakota, Executive Order 2021-02: Ratification of Amendment A Litigation (Jan. 8, 2021), https://sdsos.gov/general-information/executive-actions/executive-orders/assets/2021-02%20-%20.PDF [https://perma.cc/XZW6-6VC2]; Herrington, *supra* note 237 (explaining executive order).

239. *See* Thom v. Barnett, 967 N.W.2d 261 (S.D. 2021).

That initiative qualified for the November 2022 ballot. However, when it became clear that the Medicaid initiative would qualify, the state legislature introduced a resolution raising the threshold for initiative amendments from 50%-plus-one to 60%.[240] If that resolution is approved by primary voters in June 2022, it would make Medicaid expansion and marijuana reform more difficult and further entrench state government policy from voters.

IV. TODAY'S SINGLE-SUBJECT RULE PROBLEM

It is within this environment of misalignment and countermeasures that initiative sponsors now operate. On one hand, the initiative is especially relevant and popular today because of incongruence between majority preferences and government policy. On the other hand, the initiative can be hard to execute successfully because sponsors must anticipate and navigate likely countermeasures. The result is that initiative sponsors are often under pressure to expand the scope and detail of initiatives to neutralize anticipated countermeasures, which makes it more likely that the initiative will violate the single-subject rule. In this section, I develop and support these two claims.

A. Anticipating Countermeasures

When initiative sponsors set out to draft an initiative, they must now account for how state government may work to undermine it. This exercise will often put pressure on sponsors to enlarge the initiative's scope and detail to minimize state government discretion and thereby limit evasive tactics.

Consider, for example, an initiative amendment designed to undo legislation that allows retailers to sell handguns without first doing background checks. If that initiative is short and general (e.g., "No firearm shall be sold and delivered to a purchaser until after the seller receives a background check approving the transfer"), it is susceptible to various forms implementation sabotage by hostile state government. State government could adopt legislation defining "background check" to include only nominal review. It might carve out firearm

240. Legislators were very clear that the change was directed at defeating the Medicaid amendment. In fact, the legislature moved the referenda for the threshold change from the November 2022 election to the June 2022 primaries to ensure that the Medicaid amendment would be subject to the higher threshold. *See* Cory A. Heidelberger, *Dakotans for Health Suing to Refer HJR 5003 Primary Vote to a General Election Vote*, DAKOTA FREE PRESS (Mar. 22, 2021), https://dakotafreepress.com/2021/03/22/dakotans-for-health-suing-to-refer-hjr-5003-primary-vote-to-a-general-election-vote/ [https://perma.cc/XR2L-5H73]; Epstein & Corasaniti, *supra* note 233 ("State Senator Lee Schoenbeck, a Republican, said in March that he specifically wanted to block Medicaid expansion.").

"swaps" or "trade-ins" from the definition of "transfer." It might adopt legislation that imposes only nominal penalties for violations. It might fail to appoint an agency or officer to monitor and enforce compliance or fatally underfund a designated agency. The legislature might also launch a collateral attack by adopting "privacy" legislation that prohibits the gathering and dissemination of certain types of personal information, thus gutting the value of background checks. Moreover, state government might delay implementation of the initiative until legislators and the governor can negotiate solutions on all these issues. And if those negotiations fail, state government might try to use the evidence collected during legislative sessions to build a campaign in favor of repeal.[241]

With this in mind, initiative sponsors might look to preempt these tactics in the text of the initiative itself.[242] They could provide rules or guidelines defining the required background checks. They could create a scheme for investigating and adjudicating violations. They could create an agency to administer the background checks or designate an existing agency. They might also declare the initiative to be self-enforcing and attempt to insulate it from further legislative tinkering by setting a higher threshold for subsequently legislative amendments. Finally, they might anticipate judicial review of the initiative and add a severability scheme. While these additions would surely limit the tactics available to evasive state government actors, they would also expand the scope and detail of the initiative's text.

This sort of scenario might seem far-fetched, but it happens. In Florida, for example, it is now commonplace for initiatives to include explicit language declaring that "the provisions of this section are self-implementing and are immediately in effect upon adoption."[243] Other initiatives have relied on legislative implementation but set specific dates for adoption of the legislation and dictated terms and policies.[244] In California, initiative amendments anticipate judicial review and in-

241. There are, of course, myriad other ways that state government might work to undermine such a general initiative.

242. *See, e.g.*, *Firearm Purchase Background Check*, FLA. DIV. OF ELECTIONS, https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_1903_EN.pdf [https://perma.cc/DT26-T3VY] (requiring background checks but also defining "transfer," "background check," establishing specific penalties for violations, and declaring that the initiative "is self-executing, and no legislative implementation is required.").

243. *See also Oklahoma State Question 793, Right of Optometrists and Opticians to Practice in a Retail Mercantile Establishment*, OKLA. SEC'Y OF ST., https://www.sos.ok.gov/documents/questions/793.pdf [https://perma.cc/A3G4-QZFD] ("This section shall become effective upon adoption, and laws in conflict with this section shall be deemed null and void.").

244. *See, e.g.*, *Firearm Purchase Background Check*, *supra* note 242.

clude severability language stating that "any provision held invalid shall be severable from the remaining portions of this section."[245]

Other initiatives anticipate particular implementation problems or collateral attacks. A 1999 California initiative sought to increase funding for public education. To do this, the initiative imposed a new sales tax and directed revenue from that tax into a new agency that it created and defined. The initiative detailed how the agency was to appropriate the revenue, and in anticipation of legislative interference, also stated that the state legislature "shall have no power to transfer or control any funding created by this tax measure."[246] A 2017 Oklahoma initiative amendment sought to undo legislation prohibiting optometrists and opticians from practicing in a retail mercantile establishment.[247] In addition to a general provision legalizing optical care within retail stores, the initiative also anticipated particular collateral attacks and implementation sabotage. It went on to say that "no law shall require an optometric office located within a retail mercantile establishment to have an entrance opening on a public street" and that no law may prohibit optometric offices from selling "optical goods."[248] The initiative also included detailed definitions of key terms and a list of permissible legislation.[249]

Other examples abound, but the 2016 medical marijuana amendment in Arkansas is especially illustrative. The amendment was the result of long-standing efforts to legalize medical marijuana in the face of widespread opposition from state government.[250] In 2016, when it was ratified by 53% of voters, at least three different state officials or departments publicly opposed the initiative, including the governor, the Republican caucus that controlled the legislature, and the state Department of Health. Within this context, the initiative's author and chief sponsor, David Couch, was highly strategic in his drafting of the initiative.[251] Indeed, he operated against the backdrop

245. *See Civil Rights. Taxes for Higher Education. Initiative Constitutional Amendment*, U.C. HASTINGS SCHOLARSHIP REPOSITORY, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2024&context=ca_ballot_inits [https://perma.cc/7Q6D-BW2M].

246. *Id*.

247. *See Oklahoma State Question 793, Right of Optometrists and Opticians to Practice in a Retail Mercantile Establishment*, *supra* note 243.

248. *Id*.

249. *Id*.

250. Goforth & Goforth, *supra* note 22, at 653 n.29 (noting that governor, health department, and long list of government officials opposed medical marijuana). Moreover, the contemporary movement to legalize medical marijuana in Arkansas began in 2012 with a statewide initiative that was narrowly defeated. In 2014, an initiative measure was again proposed and key proponents withdrew support and focused instead on the 2016 election.

251. *See* Matthew Mershon, *Provision in Medical Marijuana Law Allows Arkansas Communities to Vote Themselves Dry*, KATV (Jan. 13, 2017), https://katv.com/

of state officials and courts having squashed several other medical marijuana initiative attempts.[252] As a result, the initiative was incredibly detailed and broad in scope.

The final amendment was more than 8,500 words, which is longer than the entire United States Constitution with all twenty-seven amendments. The amendment has twenty-three major sections, including a definition section that defines twenty different terms. It has regulation-like detail regarding the permissible cultivation of marijuana plants, requirements for proscribing physicians, conditions for use by patients, a scheme for allowing qualified caregivers to assist patients with obtaining and using marijuana, and rules for dispensaries.[253] In anticipation of implementation sabotage by state government, the amendment imposes specific new mandates on the state Department of Health and the Alcoholic Beverage Control Division, and sets specific deadlines for agency compliance.[254] The amendment also creates a new Medical Marijuana Commission that administer licensing for cultivation and dispensary facilities and requires that the state provide staff and resources for the commission.[255] The amendment also addresses taxation and funding for medical marijuana. It anticipates judicial review of the amendment with a severability provision. Finally, in anticipation of direct repeal, the amendment explicitly excludes certain provisions from amendment by the legislature and requires a supermajority for any legislative changes to remaining sections.[256]

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news/local/provision-in-medical-marijuana-law-allows-arkansas-communities-to-vote-themselves-dry [https://perma.cc/2WVQ-8JNL]; *see also* Olivia Paschal, *How to Change Policy Without Politicians*, THE ATLANTIC (May 18, 2019), https://www.theatlantic.com/politics/archive/2019/05/arkansas-direct-democracy-ballot-measures/589513/ [https://perma.cc/C9S6-W5XE] (describing several initiatives drafted by Couch).

252. *See* Danielle Kloap, *Marijuana Amendment Ballot Wording Rejected*, ARK. DEMOCRAT GAZETTE (May 1, 2015), https://www.arkansasonline.com/news/2015/may/01/rutledge-rejects-title-marijuana-amendment/?page=1 [https://perma.cc/TD8P-2N92]; Brian Fanney, *Some Arkansas Cities Say They Aren't Ready for New Medical Marijuana Laws*, ARK. DEMOCRAT GAZETTE (July 30, 2017), https://www.arkansasonline.com//news/2017/jul/30/local-bans-a-medical-marijuana-snag-201/ [https://perma.cc/G75E-B47W].

253. It is hard to overstate the level of detail contained in the amendment. It seems to have addressed every possible attack from state government and was designed so that state government could not avoid it.

254. *See* ARK. CONST. amend. XCVIII.

255. *See id*. § 19(a)(1).

256. Fears of implementation sabotage by legislation were apparently well founded. In the first session after voters ratified the amendment, the legislature adopted 24 different laws making changes to the amendment. It also considered, but rejected, several other laws that were clearly intended to attack or undermine the initiative. *See New Arkansas Marijuana Laws Include Restrictions, But No Reversal of November Vote*, KATV (Apr. 24, 2017), https://katv.com/news/local/new-arkansas-marijuana-laws-include-restrictions-but-no-reversal-of-november-vote

There have certainly been problems with realizing the Arkansas medical marijuana initiative.[257] Some of those problems stem from the rigidity created by the amendment's detail and scope.[258] Some commentators have understandingly decried the initiative as an example of rushed drafting and the product of voter ignorance regarding complicated policy initiatives.[259] However, the initiative's successes should not be minimized, and its problems must be measured against its achievements. The initiative successfully introduced medical marijuana into a very conservative state against near total state government opposition.[260] To be sure, the initiative may have been suboptimal in legalizing medical marijuana, but it is hard to imagine another approach that would corral state government and force policy change under the conditions in Arkansas. For example, it may have been unwise from the standpoint of public policy and government administration to constitutionalize the number of dispensaries and cultivation facilities.[261] The growth or decline of the market will surely require flexibility in setting those numbers. On the other hand, by deeply entrenching a random but set number of facilities, the amendment reduced government discretion and preempted various countermeasures. It forced the government to move towards licensing facilities to grow and distribute marijuana, which was the initiative's primary goal. The amendment may have been an inefficient instrument for legalizing medical marijuana when compared to well-functioning and supportive representative government, but it was very effective at making medical marijuana a reality in Arkansas in the face of recalcitrant and obstructionist state government.[262]

This trend towards greater detail and broader scope may also be observable by studying the texts of initiatives over time. A full analysis is beyond the scope of this article, but an exploratory analysis of initiatives from Florida seems to confirm the trend. In 1980, the first year for which the Florida Division of Elections provides full-text copies of all initiative proposals, there were nine initiatives with an aver-

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[https://perma.cc/TV6J-FMY3] (describing law that would make the amendment ineffectual until marijuana was legal under federal law).

257. *See generally* Goforth & Goforth, *supra* note 22 (providing critical perspective on amendment and collecting list of perceived problems with implementation); *see also* David Conrads, *Medical Marijuana: in Arkansas, it's a Hit*, ARK. MONEY & POL. (June 16, 2021), https://www.armoneyandpolitics.com/medical-marijuana-in-arkansas-its-a-hit/ [https://perma.cc/EMA2-6JQU] (stating that implementation of the initiative was "beset by legal problems from the start.").

258. *See* Goforth & Goforth, *supra* note 22, at 695.

259. *See id*.

260. *See* Conrads, supra note 257 (summarizing current state of police and industry).

261. *See* Goforth & Goforth, *supra* note 22, at 695.

262. *See* Conrads, supra note 257 (noting that the initiative was slow in getting implemented but "it has exceeded our expectations on a variety of levels.").

age of 135 words.[263] In 2020, there were fifteen initiatives with an average of 161 words—a 20% increase. More tellingly, the median increased from 90 to 183 words—a 103% increase. A similar trend is observable regarding the level of detail in each initiative. There was a 23% increase in the average level of detail from 1980 to 2020.

In short, as policy incongruence grows between state government and popular majorities, initiatives seem to be growing in detail and scope as a way of addressing anticipated countermeasures by state government.

B. The Single-Subject Rule Paradox in Practice

The growth in initiative detail and scope naturally raises the specter of the single-subject rule. As initiative sponsors work to corral evasive state government through detailed and broad initiatives, they increase the risk that the initiative violates the single-subject rule. This is especially true in jurisdictions that strictly apply the rule. In those jurisdictions, initiative sponsors may be forced to choose between diluting an initiative's effectiveness to comply with the single-subject rule or drafting an effective initiative that will likely be declared invalid for addressing too many subjects.[264]

Consider the Florida Supreme Court, which tends to view the rule as a strict prohibition on logrolling.[265] In 1998, the state Attorney General requested an advisory opinion from the Court regarding an initiative amendment designed to protect the "right of every natural person to the free, full and absolute choice in the selection of health care providers."[266] To accomplish this, the amendment specifically prohibited any legislation that might limit choice in healthcare providers and also prohibited private contracts that would do the same.[267] The initiative was clearly structured to ensure that in light of long-standing legislative acquiescence, insurance companies could not cir-

263. *See Initiative/Amendments/Revisions Database*, FLA. DIV. ELECTIONS, https://dos.elections.myflorida.com/initiatives/ [https://perma.cc/V2GZ-3DPS] (last visited Mar. 5, 2022).

264. Of course, sponsors could split up initiatives into separate measures. But this can be cost prohibitive and indirectly works to undermine the initiative's purpose in certain cases.

265. The court also applies the single-subject rule as a protection against unfiltered majority rule regarding constitutional issues. *See* Fine v. Firestone, 448 So.2d 984, 989 (Fla. 1984).

266. Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 565 (Fla. 1998); *see also* Glen D. Wieland, *The Right to Choose Your Health Care Provider*, FLA. BAR J. (Apr. 1997), https://www.floridabar.org/the-florida-bar-journal/the-right-to-choose-your-health-care-provider/ [https://perma.cc/T9DN-DPRU] (setting forth the text of the proposal and summarizing its intended effects).

267. It accomplished this with the simple phrase: "shall not be denied or limited by law or contract."

cumvent the initiative by unregulated private agreements.[268] The initiative was also in direct response to inaction by the legislature on this issue, which had allowed insurance companies to limited patient choice by agreement.[269]

In applying the single-subject rule to the initiative, the Florida Supreme Court said:

> The proposed amendment combines two distinct subjects by banning limitations on health care provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit health care provider choice. The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the health care provider issue in an 'all or nothing' manner. Thus, the proposed amendment has a prohibited logrolling effect and fails the single-subject requirement.[270]

In other words, by slightly expanding the scope and detail of the initiative to neutralize anticipated countermeasures, the initiative sponsors ran afoul of the single-subject rule. The court's application of the rule meant that the sponsors had to either water down the initiative and risk it being ineffectual, or have it declared entirely invalid under the court's single-subject jurisprudence.[271]

Single-subject jurisprudence in Colorado provides another example. The Colorado Supreme Court has recognized that some long and detailed initiatives may nevertheless address only one subject if they involve comprehensive schemes to implement a unifying policy change.[272] Nevertheless, the court has applied this principle rigidly and often been unwilling to endorse connections within an initiative designed to enhance the initiative's efficacy. In 2007, for example, the Court rejected an initiative that sought to introduce the public trust doctrine and establish an agency necessary for the doctrine's imple-

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268. *See* Wieland, *supra* note 266 (noting that the purpose was primarily to control insurance companies and that it had 70% support).

269. *See id*. (noting that before initiative there was at least one legislation session where more than twelve bills were introduced to address the issue but none were passed).

270. Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998). In subsequent cases, the court has remained committed to this approach while also developing a parallel "function of government" test. In 2000, the court rejected an initiative that was designed to prohibit affirmative action by state government. *See Advisory Op. to the Att'y Gen. re Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888 (2000). The initiative identified five prohibited classifications (race, sex, color, ethnicity, and national origin) and prohibited the state from providing preferential treatment based on those classifications in public education, employment, or contracting. The court held that by combining classifications and subjects of regulation, the initiative combined numerous subjects into one initiative.

271. Indeed, there examples where sponsors have split up initiatives to account for the single-subject rule and the have still been rejected. *See* Miller, *supra* note 155, at 121–22.

272. Kemper v. Hamilton (*In re* Ballot Title), 172 P.3d 871, 874 (Colo. 2007).

mentation and oversight.[273] The initiative's sponsor was a longtime advocate of the public trust doctrine for regulating Colorado water rights, but he faced strong opposition from existing landowners. The initiative was clearly designed to ensure that the public trust doctrine was implemented and enforced by constitutionalizing a dedicated agency for its administration. However, the Court reasoned that adopting a substantive standard for agency administration was a separate issue from creating an agency. In dissent, three justices observed that there was an obvious connection between creating a new agency and providing the standard for agency decision-making.[274]

My point here is not that these cases represent efforts by state courts to protect recalcitrant state government. Rather, my point is that the single-subject rule can have that effect when rigidly applied without regard to the initiative's underlying purpose and the nature of contemporary state constitutional politics. To be sure, multifaceted initiatives sometimes reflect nefarious efforts to trick voters into adopting an unwanted policy, and the single-subject rule was surely designed to protect against this.[275] But multifaceted initiatives can also reflect thoughtful efforts to neutralize anticipated countermeasures by state government and help empower voters to realign state policy with popular preferences. Courts that fail to account for this in their analysis risk applying the single-subject rule in ways that undermine the initiative's core purpose.

V. IMPLICATIONS

All of this suggests that the single-subject rule should be carefully assessed. The rule has many virtues, but its costs involve more than generic rule-of-law concerns about inconsistent or biased judicial application. The single-subject rule increasingly works to shield recalcitrant state government from popular majorities. This cost, which goes to the very core of the initiative, deserves more attention by courts, scholars, officials, and voters. In this section, I suggest a few instances where this consideration might be relevant and helpful. In short, some states are actively considering whether to adopt the single-subject

273. *See id*. at 875–76.

274. *See id*. at 879 (Eid, J., dissenting); *see also* Howes v. Brown, 235 P.3d 1071, 1077, 1080 (Colo. 2010) (finding that Initiative #91 contained multiple subjects where its "broad statement of purpose—'to protect and preserve the waters of this state'—[did] not properly unite' the initiative's provision creating and implementing a tax on beverage containers, primarily benefiting the state's basin roundtables and the interbasin compact committee, with its provision limiting "the power of the General Assembly to exercise legislative supervision over the" aforementioned entities).

275. *See In re* Title, Ballot Title, Submission Clause for 2011-2012 No. 45, 274 P.3d 576, 580 (describing initiative as containing a policy "coiled up in the folds of a complex initiative.").

rule as a constraint on the initiative. The rule's capacity to empower recalcitrant state officials should be central to those deliberations, especially if the rule is being promoted by incumbent state officials. Second, courts should explicitly recognize how countermeasures by state governments place pressure on initiative sponsors under the single-subject rule. Incorporating this concern into single-subject rule jurisprudence would more properly conceptualize the rule as a tool to enhance the initiative rather than a self-justifying prohibition on logrolling.

A. Reassessing the Single-Subject Rule

Do initiative states really need the single-subject rule? If we assume that logrolling and voter confusion are the dominant threats to the initiative, then the single-subject rule may be worthwhile.[276] Its value would have to be assessed by accounting for errors and inconsistencies in its application, which are high with such a vague rule, but the rule may nevertheless make to protect against voter confusion and harmful logrolling. However, in this article, I have advanced two arguments that warrant reconsideration of this simplistic assessment of the single-subject rule.

First, under certain conditions, logrolling can enhance, rather than undermine, the initiative. A carefully crafted initiative might coble together citizen voting blocs in ways that result in better alignment with majoritarian preferences. Thus, it is not clear that prohibiting logrolling protects or enhances the initiative's underlying purpose. Stated differently, one of the costs associated with the single-subject rule is that it might bar some appropriate initiatives. When this cost is added to the rule-of-law concerns about inconsistent judicial application, the benefits of adopting the rule seem less compelling.

Second, the single-subject rule can work to undermine the initiative, which is a significant cost that deserves more consideration. This happens when initiative sponsors anticipate that state government will work to evade a disfavored initiative. To neutralize those evasive tactics, initiative sponsors are often forced to expand the initiative's scope and detail, which makes it more likely to violate the single-subject rule. In those scenarios, the single-subject rule can provide recalcitrant state officials with a significant advantage because initiative sponsors must pick between crafting a simple initiative that is easy to evade or a robust initiative that is easy to challenge under the single-subject rule. In either scenario, the initiative's core purpose of allowing citizens to realign government policy is frustrated. This is a

276. California's history with the rule suggests an admirable purpose for its adoption and highlights how the rule can be adopted from desire to enhance the initiative. *See* Lowenstein, *supra* note 9, at 959 (discussing history).

significant cost that should be considered when evaluating the single-subject rule.

This perspective on the single-subject rule is relevant to ongoing discussions in several states where the single-subject rule is under consideration. Of the eighteen states that allow for constitutional amendment by initiative, Arizona, Arkansas, Michigan, Mississippi, and North Dakota do not have an explicit single-subject rule for initiative amendments.[277] In Nevada, Ohio, and Illinois, it appears that courts infer a single-subject rule for initiative amendments based on explicit language applying a similar rule in other contexts.[278] In both Arizona and North Dakota, groups have recently proposed adopting the single-subject rule for initiatives,[279] and South Dakota adopted the rule in 2018.

What is striking about recent campaigns to adopt the single-subject rule is that they are driven largely by incumbent state officials with clear interests in limiting the initiative. In South Dakota, for example, the proposal to adopt the single-subject rule was the product of a task force created by the state legislature following a record number of initiatives in 2016 targeting state policies.[280] The rule was ultimately adopted by the legislature as a proposed constitutional amendment, and not an initiative-proposed amendment. Although the proposal had broad-based support from incumbent state officials and legislators, it was opposed by many grassroots groups.[281] However, debates regarding the amendment did not draw out how the rule could, and very likely would, benefit incumbent state officials.[282] To

277. *See generally* Downey, *supra* note 5 (surveying all states); Campbell *supra* note 9, at 137. South Dakota adopted the single-subject rule in 2018. *See* H.R.J. Res. 1006, 93d Sess., 2018 Legis. Assemb. (S.D. 2018) (submitting to the voters a proposed amendment to add a single subject rule to Article XXIII, Section 1 of South Dakota's Constitution); S.D. CONST. art. XXIII, § 1.

278. *See generally* Downey, *supra* note 5.

279. *See* Tiffany Stecker, *Impeding Citizen-Driven Initiatives Is Latest Election Law Fight*, BLOOMBERG GOV'T (Jan. 24, 2022), https://about.bgov.com/news/impeding-citizen-driven-initiatives-is-latest-election-law-fight/ [https://perma.cc/99JZ-WV2M].

280. *See* Dirk Lammers, *2018 Legislators Chip Away at Initiated Measure Process*, CAP. J. (Sept. 24, 2019), https://www.capjournal.com/news/legislators-chip-away-at-initiated-measure-process/article_d258a640-3308-11e8-be49-9f9bb2167c9b.html [https://perma.cc/MB3X-D2KW].

281. *See id.*; OFF. OF SEC'Y OF STATE SHANTEL KREBS, SOUTH DAKOTA 2018 BALLOT QUESTION (2018) (listing arguments for and against the initiative).

282. The South Dakota ballot pamphlet does offer an insightful assessment of adding the single-subject rule. *See* OFF. OF SEC'Y OF STATE SHANTEL KREBS, SOUTH DAKOTA 2018 BALLOT QUESTION, supra note 281. The pamphlet notes that "citizen initiated constitutional amendments often contain multiple subjects to achieve the desired effect." *Id.* The pamphlet also noted how the rule could impose higher costs on multi-subject initiatives, but it did not draw out how the rule might operate to further entrench incumbent policies. *Id.* The debates in Colorado in 1994 are similar. *See* LEGIS. COUNCIL COLO. GEN. ASSEMB., AN ANALYSIS OF 1994 BAL-

be sure, opponents emphasized the increased costs to initiative sponsors associated with the single-subject rule, but there seems to have been very little appreciation for how the single-subject rule can be weaponized by incumbent state officials seeking to entrench policies under attack from statewide popular majorities.

In Arizona, the push to adopt the single-subject rule is a direct response to a failed attempt to upend a 2016 initiative raising the minimum wage and creating a right to paid sick leave. Fifty-eight percent of Arizona voters approved that initiative following legislative opposition, and even hostility, towards raising the minimum wage.[283] After the initiative was approved, various groups sued to challenge the initiative as violating the single-subject rule.[284] When the case appeared before the Arizona Supreme Court, the sitting House Speaker-elect, Senate President-elect, and Governor's office of Strategic Planning & Budgeting filed an amicus brief joining the position that the initiative violated the single-subject rule. The Court upheld the initiative, in part, because the Arizona constitution did not include an explicit single-subject rule applicable to the initiative.[285] However, following the ruling, there was a campaign by the Arizona legislature to adopt an explicit single-subject rule.[286] The legislature passed a resolution to adopt the rule, along party lines, and the proposal will be considered by voters in November 2022.[287] The development of the issue in Arizona suggests that state officials can view the single-subject rule as working in their favor, but this point has not been centered in the

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LOT PROPOSALS 2–4 (1994). That said, the Colorado pamphlet does make the very important and astute observation that:

> The proposal gives increased authority to the ballot title setting board whose judgments could interfere with the initiative process. Two of the board's three members would be able to keep ideas that they considered unacceptable from becoming law by their interpretation of the single subject rule. If part of a proposal is not included in the ballot title, that part is declared invalid, giving the board further control over the content of the initiative.

Id. at 4.

283. *See Hell Yes! The 2016 Tucson Weekly Endorsements*, TUCSON WEEKLY (Oct. 20, 2016), https://www.tucsonweekly.com/tucson/hell-yes-the-2016-tucson-weekly-endorsements/Content?oid=7311156 [https://perma.cc/HAG5-3HQP] ("[I]t's a safe bet that state lawmakers are not going to make the effort to raise the minimum wage themselves. (Far too many of our Republican lawmakers don't believe in a minimum wage, period.) In fact, in this last session, lawmakers made it impossible for cities and towns to increase minimum wages in their own jurisdictions.").

284. *See* Ariz. Chamber of Com. & Indus. v. Kiley, 399 P.3d 80, 83 (2017).

285. *See id*. at 88–89.

286. *See* Ryan Byrne, *Arizona Voters to Decide Single-Subject Rule Amendment for Citizen-Initiated Ballot Measures*, BALLOTPEDIA NEWS (July 2, 2021), https://news.ballotpedia.org/2021/07/02/arizona-voters-to-decide-single-subject-rule-amendment-for-citizen-initiated-ballot-measures/ [https://perma.cc/DAT6-8GAZ].

287. *Id*.

public debates regarding the rule.[288] My modest claim here is that it should receive more focused consideration as voters weigh whether to adopt, or perhaps repeal, the single subject rule.

B. Broadening Single-Subject Rule Jurisprudence

Courts apply the single-subject rule to the initiative with varying degrees of coherence and rigor.[289] Indeed, as Anne Campbell has shown, courts have deviated from their own standards of review and precedential applications of the rule dramatically across time.[290] This variation is likely the result of the rule's indeterminacy, which courts generally seek to remedy by drawing on the rule's underlying purposes or by offering conceptual definitions of "single subject" that are more susceptible to consistent application. The prevailing view among scholars is that these approaches have generally failed and that single-subject rule jurisprudence lacks coherence and predictability.[291] A few scholars have offered their own theories of the rule designed to address these problems.[292] But many have suggested that the best approach for courts is to apply the rule liberally so that voters rather than courts determine the fate of complicated initiatives.[293]

In this section, I add to the list of arguments offered in favor of judicial restraint regarding the single-subject rule. I do not portend to offer a general jurisprudential theory of the single-subject rule. Nor do I presume to know where courts should draw the line when enforcing the rule. My more modest point is that when courts approach these cases, they should directly consider the degree to which the single-subject rule may be working to empower recalcitrant officials and undermine the core purpose of the initiative. In some cases, it may be appropriate for courts to temper the single-subject rule out of concern for how a strict application of the rule would allow state government to evade an otherwise legitimate initiative. This inquiry will not be a panacea for problems with the single-subject rule. In fact, it may further complicate the analysis and in some cases may even be beyond the judicial pale. However, in other cases, it may be a useful inquiry to help courts reach results more consistent with the purpose of the initiative and state constitutional theory. I offer two arguments in support of this claim.

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288. *See generally* Tiffany Stecker, *Impeding Citizen-Driven Initiatives Is Latest Election Law Fight*, BLOOMBERG GOV'T (Jan. 24, 2022), https://about.bgov.com/news/impeding-citizen-driven-initiatives-is-latest-election-law-fight/ [https://perma.cc/99JZ-WV2M] (noting that Arizona reforms to initiative reflect growing tension between state officials and initiative activists).
289. *See* Campbell, *supra* note 9, at 150–61.
290. *Id.* at 156–61.
291. *See generally* Briffault, *supra* note 12.
292. *See, e.g.*, Cooter & Gilbert, *supra* note 7, at 720–26.
293. *See, e.g.*, Hasen, *supra* note 9, at 116–17.

1. Ordinary Structural Reasoning Supports a Liberal Application of the Single-Subject Rule

When courts apply constitutional provisions, they rely on various sources of constitutional meaning, such as text, history, and precedent. But courts also engage in "structural" reasoning. This form of constitutional analysis, most famously articulated by Charles L. Black, Jr., holds that judges can resolve constitutional disputes by drawing inferences from the relationships between institutions created by the constitution—such as the legislature, the executive, federalism, local government, democracy, and citizenship.[294] Judges do this by testing a proposed constitutional rule against an uncontroversial structural principle.

Another related modality of structural argument is "interpretive holism."[295] This method of constitutional construction emphasizes that constitutional provisions should be construed in view of their context within the constitution as a whole.[296] Judges should examine a constitution's "patterns, premises, layout and logic, assumptions and animating principles."[297] By looking at the constitution holistically, judges can identify "overarching" constitutional patterns that may help resolve constitutional disputes.

These structural forms of constitutional argumentation do not "supplant" other methods of constitutional construction. Instead, they operate in tandem with other techniques to provide a more complete toolkit for judges to resolve constitutional disputes.[298]

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294. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); *see also* Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 834–35 (2004) (describing the structural method).

295. *See* Dorf, *supra* note 291, at 835–36.

296. *See id*.

297. Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 n.3 (1999).

298. Dorf, *supra* note 291, at 841 (describing Black's position on this issue); *see also* BLACK, *supra* note 291, at 31 ("There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."). The most famous example of structural reasoning is from McCulloch v. Maryland, 17 U.S. 316 (1819). In concluding that the state of Maryland did not have authority to tax a federal bank, Chief Justice Marshall looked to how the constitution organized the relationships between citizens, states, and the federal government. *Id.* at 396–98. He concluded a government's taxing authority is derived from representation. The state of Maryland could constitutionally tax its citizens because those citizens had representation in the Maryland legislatures. *Id.* However, the state of Maryland could not tax a federal bank because that tax amounted to a tax on all

State courts are well versed in structural argumentation, and they use it often to resolve state constitutional disputes. For example, as I have argued elsewhere, state courts have relied on the structure of state constitutional amendment rules to determine the proper scope of judicial review. State courts also have a long and sophisticated history of engaging in structural reasoning when faced with questions regarding the scope of state judicial power.[299] Additionally, state courts are deft at using interpretive holism to help guide their constitutional rulings. In *Vreeland v. Bryne*, for example, the New Jersey Supreme Court explained its interpretation of the New Jersey Constitution:

> In considering the meaning of this Article, an important principle of constitutional interpretation should not be overlooked. Not all constitutional provisions are of equal majesty. Justice Holmes once referred to the "great ordinances of the Constitution." . . . The task of interpreting most if not all of these "great ordinances" is an evolving and on-going process . . . The "great ordinances" are flexible pronouncements constantly evolving responsively to the felt needs of the times.
>
> But there are other articles in the Constitution of a different and less exalted quality. Such provisions generally set forth—rather simply—those details of governmental administration . . .
>
> Such constitutional provisions as these. . . should receive entirely different treatment.[300]

The argument I make here is simply that state courts should engage in structural reasoning when construing the single-subject rule. To be sure, courts should look to the rule's text, history, and purposes. But as noted above, the text and history of the single-subject rule in the initiative context is often unhelpful, vague, or indeterminate. Moreover, the conventional policies associated with the rule, logrolling and voter awareness, are rationales supplied by courts to overcome the rule's indeterminate text and history. My claim here is that courts should explicitly place the rule within its broader institutional and constitutional context. At a minimum, this would require connecting the rule to the initiative's core purpose of enhancing government accountability. When viewed in context, the single-subject rule is clearly not a freestanding constitutional principle. It is derivative of the initiative, and absent any evidence from text or history to the contrary, courts should construe the rule in ways that enhance the initiative's goals. This presumption is also consistent with the fact that within many state constitutions, the initiative is a core principle deeply connected to how states have institutionalized popular sovereignty. In many initiative states, the initiative is a core collective right of the people that reflects great trust in voters and great distrust of government officials. The single-subject rule, on the other hand, often ap-

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Americans, including many people who had no representation in the Maryland Legislature. *Id.*

299. *See* Williams, *supra* note 154, at 288–98.

300. Vreeland v. Bryne, 370 A.2d 825, 831–32 (N.J. 1977).

pears as a somewhat mysterious and haphazard tag designed to protect the initiative from perversion. In other words, most state constitutions elevate the initiative and its underlying policies above a standalone commitment to the single-subject rule to be applied by state officials and courts.[301]

Thus, to the extent courts are asked to decide a difficult case under the single-subject rule, they should be cautious to apply the rule in ways that enhance the initiative rather than strictly applying the rule as a categorical ban on logrolling or multifaceted initiatives. The polestar for single-subject rule jurisprudence in difficult cases should be how the ruling will impact the efficacy of the initiative as an accountability device. Sometimes this analysis might suggest a rather rigid application of the rule. Other times, it might support a more liberal application. In any event, concerns about logrolling and voter capacity should be viewed through the lens of the initiative and not as strict, self-justifying constitutional principles.

2. This Analysis is Well Within the Judicial Pale in at Least Some Cases

My argument above raises its own challenges. For one thing, it is not immediately clear that courts are well-equipped to assess how a proposed amendment aligns with the underlying purposes of the initiative. To be sure, there are likely many situations where a court would be unable to determine if a particular initiative could operate as an effective accountability device. This is especially true if the initiative is complex and includes multiple issues that might confuse voters or engage in logrolling. In some cases, my proposal is surely unhelpful, and courts must draw on other forms of constitutional reasoning to decide cases.

However, there are other cases where courts would be well-equipped to apply the single-subject rule through the lens of the initiative's underlying purposes. Legislative history is, of course, well within the judicial pale. Courts frequently look to statements by legislators, especially bill sponsors, committee reports, floor debates, and amendments to statutory language when resolving statutory ambiguities. My proposal would require courts to engage in something analogous to determine an initiative's historical predicate and overall purpose. Initiatives are different from statutes in that they do not generate the same formal record of their history. However, there is often evidence of the sponsor's purposes and clear indications of the histori-

301. Florida's single-subject rule jurisprudence directly contradicts this view through an interesting form of structural argument. *See In re* Advisory Op. to the Att'y Gen.-Save Our Everglades Tr. Fund, 636 So. 2d 1336, 1339 (Fla. 1994) (describing the single-subject rule as constraint on direct democracy in favor of representative law making).

cal predicate for the initiative. If a multifaceted initiative can be explained by its history, and that history suggests that the initiative expanded its scope to some reasonable degree because of obstructionist measures by state government and not harmful logrolling or voter deception, then courts should liberally apply the single-subject rule and allow voters to consider the initiative.

Consider for example, the difference between how the Florida and California Supreme Courts approach the single-subject rule. As noted above, in 1998 the Florida Supreme Court held that an initiative designed to ensure all patients the right to choose their medical providers violated the single-subject rule because it prohibited restraints on choice via legislation and via private agreement.[302] The court reasoned that this constituted impermissible logrolling because some voters may approve of the legislative ban but not the ban on private agreements.[303] The court made this argument in the abstract without any suggestion that it was an actual policy divide among voters.[304] More importantly, the court failed to mention or analyze the lengthy history included in the sponsor's brief that shed much light on the initiative's purpose and structure.[305] The brief explained that the state legislature had failed to act on this issue and that state regulators—enabled by loose legislation—continued to rubber-stamp private insurance agreements that limited patient choice.[306] The initiative was structured to limit legislation and private agreement because the problem it was addressing involved legislation, regulators, and private insurers. On these facts, it is hard to see how the court's strict application of the rule was justified if the rule is placed in proper context.

By contrast, in 1979, the California Supreme Court considered whether a lengthy and complex campaign finance and lobbying initiative violated the single-subject rule.[307] The court found that the initiative did not violate the single subject rule.[308] In response to claims that the initiative involved impermissible logrolling and would result in voter confusion, the court explained:

> Although the initiative measure before us is wordy and complex, there is little reason to expect that claimed voter confusion could be eliminated or substantially reduced by dividing the measure into four or ten separate proposi-

302. Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563, 566 (Fla. 1998).
303. *Id*. To access all briefs for the case, see *Florida Supreme Court Briefs and Opinions*, FLA. ST. UNIV. COLL. L., http://library.law.fsu.edu/Digital-Collections/fl-supct/dockets/90160/90160.html [https://perma.cc/P6HC-EU3N] (last visited Mar. 4, 2022).
304. *Advisory Op. re Health Care*, 705 So. 2d at 566.
305. *Id.* at 565.
306. Brief of Respondent at 2–5, Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998) (No. 90,160).
307. Fair Pol. Pracs. Comm'n v. Super. Ct., 599 P.2d 46, 47 (Cal. 1979).
308. *Id.* at 51.

> tions. Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne.
>
> Nor does the possibility that some voters might vote for the measure while objecting to some parts warrant rejection of the reasonably germane test. Such risk is inherent in any initiative containing than one sentence or even an "and" in a single sentence unless the provisions are redundant. . . .
>
> The enactment of laws whether by the Legislature or by the voters in the last analysis always presents the issue whether on balance the proposed act's benefits exceed its shortcomings.[309]

Thus, the California Supreme Court held that the initiative complied with the single-subject rule because there was no principled basis for excluding it in that particular case without undermining the initiative.[310] This approach, I argue, represents a more coherent and accurate approach to the single-subject rule that places the rule in proper context. Moreover, as the California Supreme Court has illustrated, it is well within the judicial pale to conduct this analysis.

VI. CONCLUSION

The single-subject rule may be at an important crossroads. Historically, the rule has been understood as an important protection against abuse and misuse of the initiative. Proponents of the rule emphasize that the initiative is easy to manipulate through logrolling, riding, and voter confusion. These rationales have sustained the rule despite growing concern that it is too vague and indefinite for predictable judicial application. Nevertheless, as political science literature has documented and clarified enforcement problems with the single-subject rule, the rule has attracted new supporters.

In this article, I have argued that the single-subject rule is increasingly vulnerable to a deeper problem. When state governments are misaligned with popular majorities on discrete policies, they have become increasingly bold in efforts evade disfavored initiatives. As a result, initiative sponsors have had to broaden the scope and specificity of initiatives to reduce opportunities for government evasion. But this has increased the vulnerability of many initiatives to challenge under the single-subject rule. Thus, the rule runs the risk of undermining rather than enhancing the initiative. This new phenomenon deserves more focused study and recognition by courts, which should temper the rule in cases where it would obviously undermine the initiative and shield recalcitrant officials.

309. Fair Pol. Prac. Comm'n v. Sup. Ct., 599 P.2d 46, 50–51 (Cal. 1979).
310. *Id.* at 51.