# How Much Does Law Matter? Theory and Evidence from Single Subject Adjudication

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Abstract:

Scholars have long debated whether law or politics motivates judicial decision-making. The single subject rule, which requires judges to invalidate ballot propositions embracing more than one "subject" in order to eliminate earmarks, illustrates the stakes of this dispute. If judges apply the law, they provide an important check on direct democracy, which operates without oversight from other branches of government. If judges vote their politics, they can undermine citizens' will, the worst of the countermajoritarian difficulty.

Using a novel survey technique, I identify the "correct" outcome in a large sample of single subject cases according to two legal theories: the categorization theory, which is the plain language approach to single subject interpretation, and the democratic process theory, which is a purposive approach to single subject interpretation. In brief, the democratic process theory holds that only those policy proposals that strongly complement or substitute for one another can be combined without violating the single subject rule.

Regression analysis shows that both legal theories explain case outcomes better than judges' political preferences. I conclude that judges behave more objectively in single subject disputes than critics suppose. More generally, I introduce an original empirical method for evaluating case outcomes and find support for the view, widely held by judges, lawyers, and legal scholars but difficult to verify, that law plays an important role in adjudication.

# How Much Does Law Matter? Theory and Evidence from Single Subject Adjudication

Michael D. Gilbert*

## INTRODUCTION

What motivates judicial decision-making? Many legal scholars, judges, and lawyers adhere to the "legal" model, which posits that law directs judicial behavior.[1] In contrast, legal realists and social scientists embrace some version of the "political" model, which assumes that judges' political views play the principal role.[2] Empirical studies support the political model, and some of their proponents consider the case closed, stating, for example, that "the legal model" is merely a "mythology" advanced by judges and their "apologists."[3] But these studies have a systematic flaw: they do not directly test the legal model.[4] As a result, we do not know how much law matters. Without this we cannot conclude if doctrinal analysis is important and judges generally

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[1] For modern statements of this enduring principle, see, e.g., American Trucking Assocs., Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) ("To hold a governmental act to be unconstitutional is not to announce that we forbid it, but that the *Constitution* forbids it."); Harry T. Edwards, *Public Misperceptions Concerning the 'Politics' of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985) (stating that "the law - and not the personal politics of individual judges - … controls judicial decision-making in most cases resolved by the court of appeals").

[2] By "political model" I mean theories positing that judges' preferences motivate their decisions. *See, e.g.,* Karl Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431 (1930); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[3] Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision-Making*, 26 LAW & SOC. INQUIRY 465, 474 (2001) (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 62-65 (1993)). Segal and Spaeth focus on the Supreme Court, but other scholars hold the same belief with respect to lower courts. *See infra* Part I.

[4] *See e.g.*, Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 967 (1992) (reporting that "scholars in the empirical tradition have given little systematic attention to … variables that might reflect the traditional [legal] model"); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2157-58 (1998) (stating that many social scientists believe "the explanatory value of legal variables is at best not capable of being tested"). For indirect tests of the legal model, see *infra* Part I.C.

behave well, or if doctrine is tangential and steps should be taken to depoliticize adjudication.

Judicial review of direct democracy epitomizes the high stakes of this debate. Citizens in the United States have voted on hundreds of ballot propositions in recent decades, including controversial measures on abortion, affirmative action, gun ownership, the death penalty, and same-sex marriage.[5] Propositions play a key role in state and national politics,[6] and special interests spend hundreds of millions of dollars each election cycle promoting and opposing them.[7] Direct democracy enjoys widespread public support.[8] If judges reviewing propositions objectively apply the law, then they provide a critical check on an important lawmaking process that operates without oversight from other branches of government.[9] Conversely, if judges evaluate propositions on the basis of politics, they undermine citizens' will, the worst of the countermajoritarian difficulty.[10]

The single subject rule presents judges with one of the most confounding responsibilities in their review of propositions. Widespread in state constitutions, the rule limits propositions to "one subject."[11] It aims to prevent unpopular proposals from

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[5] Information on the frequency and content of ballot propositions came from a database provided by John Matsusaka at the Initiative and Referendum Institute.

[6] *See* Elizabeth Garrett, Direct Democracy and Public Choice, USC Center in Law, Economics and Organization Research Paper No. C08-16, 21-25 (2008). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1217608 (Sept. 16, 2008).

[7] *See* Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of its Effects and Prospects for Reform*, *in* THE BATTLE OVER CITIZEN LAWMAKING 73 (M. Dane Waters ed., 2001) (reporting that in 1998 special interests spent $400 million promoting and opposing ballot proposals).

[8] *See* Michael G. Hagen & Edward L. Lascher, Jr., The Popular Appeal of Direct Democracy, paper presented at annual meeting of the American Political Science Association, Sept. 1-4, 2005, Washington, DC.

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

[10] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1961).

[11] *See, e.g.,* COLO. CONST. art. V, § 1(5.5) ("No measure shall be proposed by petition containing more than one subject….").

sneaking through the lawmaking process on the backs of other measures—the rough equivalent of earmarks in Congress.[12] "[A]lmost any two … measures may be considered part of the same subject if that subject is defined with sufficient abstraction,"[13] making the rule notoriously difficult to apply. To illustrate with a recent case, a Georgia proposition banning same-sex marriage and same-sex civil unions may have two subjects (marriage, civil unions) or just one (same-sex relationships) depending on how abstractly one frames the subject.[14] The law does not specify the proper level of abstraction.

Critics claim that judges exploit the single subject rule's ambiguity and make decisions on the basis of their political preferences. In 2006, the Colorado Supreme Court found a single subject violation in an anti-immigration proposal.[15] Former Governor Richard Lamm called the decision an exercise of "raw, naked, arbitrary political power."[16] Justice Coats, who dissented in that case, wrote that judges cannot "apply a standard as amorphous as the . . . single-subject requirement . . . without conforming it to their own policy preferences."[17] Legal scholars such as Richard Hasen question whether "justices' views of the merits of … initiatives … affect[ ] their decisions" in single subject cases.[18]

Despite this controversy, single subject litigation arises frequently and involves important issues. Since 1980, courts have issued over 200 single subject decisions, finding a violation—and invalidating a popular proposition, or removing a potentially

[12] For a more precise discussion of the rule's purposes and citations, see *infra* Part II.
[13] Manduley v. Superior Court, 41 P.3d 3, 37 (Cal. 2002) (Moreno, J., concurring) (citing Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936, 938-42 (1983)).
[14] *See* Perdue v. O'Kelley, 632 S.E.2d 110 (Ga. 2006).
[15] *See* In re Title and Ballot Title and Submission Clause for 2005-2006 #55, 138 P.3d 273 (Colo. 2006).
[16] Richard D. Lamm, *Politicians in Black Robes*, DENVER POST, June 16, 2006.
[17] In re Title and Ballot Title and Submission Clause for 2005-2006 #55, 138 P.3d 273, 284 (Colo. 2006) (Coats, J., dissenting).

popular proposition from the ballot—one-third of the time.[19] Propositions at issue in these decisions addressed campaign finance, eminent domain, stem cell research, environmental protections, reapportionment, and other divisive topics.[20] Hundreds or thousands of propositions have been drafted in the shadow of the rule, and that drafting affects expensive marketing campaigns and, ultimately, citizens' votes.

Does politics drive judges' single subject decision-making? Or, while recognizing that the law is "indefinite"[21] and case outcomes "difficult to reconcile,"[22] do judges generally apply objective principles in these disputes? Given the debate over legal and political models of decision-making, the institutional dilemma posed by judicial review of direct democracy, the frequency of single subject litigation, the salience of the propositions involved, and pressure for reform—including calls to enforce the rule more leniently,[23] more strictly,[24] eliminate it,[25] or apply it to Congress[26]—much turns on the answer.

I use economic theory, original data, and quantitative methods to test the legal and political models of judicial decision-making in single subject disputes. I first develop two formulations of the legal model in this context: the categorization theory and the democratic process theory.

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[18] *See* Richard L. Hasen, *Ending Court Protection of Voters from the Initiative Process*, 116 YALE L.J. POCKET PART 117, 119 (2006).
[19] *See infra* Appendix A; Michael D. Gilbert, Law, Politics, and Preferences: An Economic Analysis of Direct Democracy and the Single Subject Rule (2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).
[20] *See id.*
[21] Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 214 (Ind. 1981).
[22] In re Initiative Petition No. 314, 625 P.2d 595, 603 (Okla. 1980).
[23] *See, e.g.,* Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35 (2002); Lowenstein, *supra* note 13.
[24] *See, e.g.,* Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633 (2005).
[25] *See* Hasen, *supra* note 18.

The categorization theory represents the "plain language" approach to the rule. It posits that judges examine provisions of a challenged proposition and use semantics, analogies, and commonsense to determine if they relate closely enough to be categorized under one subject. To date, categorization is the only theory of single subject interpretation that has been explicitly developed, and judges profess to adopt it in all of their opinions. But categorization often fails to provide predictable answers and, as I will show, cannot achieve the rule's purposes.

The democratic process theory is an original conception of the single subject rule.[27] Under this theory, judges examine challenged provisions and determine whether voters can make independent judgments about them. If voters' support for one provision depends on whether another provision in the same proposition passes, then together those provisions constitute one subject and demand one vote. Conversely, if voters' support for one provision does not depend on whether another provision passes, then those provisions constitute separate subjects and demand separate votes. As explained in Cooter and Gilbert (2010),[28] the democratic process approach achieves the rule's purposes, making it a "purposive" approach to interpretation.

To test whether either legal model—categorization or democratic process—explains case outcomes better than politics I gathered data on more than 1,000 votes cast by 125 judges in 171 single subject disputes. I determined how closely the judges' political views aligned with the proposition in each case, and I recorded other factors that could affect case outcomes, such as the level of court and year of decision. As always in

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[26] *See, e.g.,* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 (1999).

[27] *See* Robert Cooter & Michael Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 Colum. L. Rev. (forthcoming 2010).

these studies, quantifying the law posed the greatest challenge. I needed to determine how a neutral judge who properly applied the categorization and democratic process theories would resolve these 171 disputes. Hercules did not volunteer,[29] so I conducted surveys.

For the categorization theory I surveyed over 200 law students. The survey instructed how to count subjects using the same tools judges profess to use and then provided sample precedents. The survey then asked the students to apply the rule and count how many legal subjects the propositions in my sample contained. I used the average of students' responses as a proxy for the correct number of subjects in each proposition under the categorization approach.

Critically, the survey did not disclose that finding multiple subjects implies that a proposition is invalid.[30] By obscuring the relationship between adjudication and outcomes I hoped to disengage the students' political preferences. A separate experiment I conducted supports this approach. Liberal students who understood that a finding of multiple subjects implied invalidity were significantly more likely to find multiple subjects in a conservative proposition than liberal students who did not have this information.[31]

For the democratic process theory I surveyed over 200 undergraduates. The survey provided the propositions and asked the students how much their support for each provision in a proposition depended on whether the other provisions became law. I used the students' responses as a proxy for the extent to which voters can make independent

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[28] *See id.*
[29] *See* RONALD DWORKIN, LAW'S EMPIRE (1986).
[30] A post-survey questionnaire identified students who knew that finding more than one subject implied invalidity, and I discarded their responses.

judgments about the components of each proposition. The students were not given any information on the single subject rule or law generally.

I included the categorization, democratic process, and politics data in a series of regressions, permitting a comparison of the legal and political models. The results suggest that law dominates. The categorization theory of interpretation best explains single subject decision-making, with the democratic process approach coming in "second." The political model, while statistically significant, has less explanatory power than the legal variables.

With respect to the single subject rule, these results suggest that law plays a greater role in adjudication than critics suppose. With respect to the broader question of what motivates judicial decision-making, it is dangerous to generalize, but these results at least suggest that judges often apply the law. The vagueness of the single subject rule strengthens this supposition: if judges adhere to outcome-neutral principles in these cases, they probably do the same in other areas with clearer rules and less controversial topics.

The paper proceeds in four parts. Part I examines the debate over legal and political models of judicial decision-making and the challenge of subjecting legal variables to quantitative tests. Part II provides background on the single subject rule, including its history, purposes, and shortcomings. Part III briefly describes the democratic process theory of the rule. Part IV describes the research design and presents the empirical results.

[31] For a discussion of this experiment and the surveys, see *infra* Part IV.

## I. LAW AND POLITICS IN JUDICIAL DECISION-MAKING

When "the judge . . . has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, . . . laws and not men rule."[32] Hayek's statement emphasizes the stakes of the debate over legal and political models of judicial behavior. In this Part, I define the legal and political models and discuss empirical studies of these issues, few of which account for the law, and most of which conclude that politics explains case outcomes. The debate remains important and the evidence largely one-sided.

### *A. Legal and Political Models Defined*

"Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of . . . the law."[33] Chief Justice Marshall's statement captures the core of the legal model. Under this view judges reach decisions by applying preexisting rules, precedents, and logical operations to facts.[34] This generates determinative, legally correct decisions. As Judge Posner put it, "[t]he ideal legalist decision is the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion."[35] Judges in the legal model behave objectively and without regard for headlines, emotions, or policy agendas. The legal model represents the "judiciary's 'official theory' of judicial behavior."[36]

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[32] F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153 (1960).
[33] Osborn v. Bank of United States, 22 U.S. 738, 866 (1824).
[34] *See, e.g.,* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).
[35] RICHARD A. POSNER, HOW JUDGES THINK 41 (2008).
[36] *Id.* at 41.

The political model posits that judges' behavior depends on their personal policy preferences. Jeffrey Segal and Harold Spaeth summarized it in their landmark study of the Supreme Court: "[s]imply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."[37] Law and facts "merely rationalize decisions; they are not the causes of them."[38] Indeed, the "legal language" of opinions simply couches the "personal legislative preferences of . . . judges in the publicly venerated language of a judicial decree."[39] Legal realists and critical legal studies scholars first expressed the political model,[40] but social scientists get credit for systematically testing it.

The legal and political models are not sides of a coin but points on a spectrum. Even ardent legalists recognize that law contains gaps,[41] and judges' political views play a role in that "open area."[42] Many adherents of the political model acknowledge that law

[37] SEGAL & SPAETH, *supra* note 3, at 62-65, 32-33. Segal and Spaeth call this the "attitudinal" model of judicial decision-making. I use the term "political" model because of its clarity and because I do not have any information on the attitudes or values of the judges in my study, just a proxy for their political preferences on a liberal-conservative spectrum.
[38] *Id.* at 66.
[39] Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113, 118 (1990).
[40] Realists and CLS scholars did not necessarily claim that politics drives adjudication but that law is indeterminate and thus judges' preferences can affect outcomes. *See, e.g.,* Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457 (1897); Karl Llewellyn, *supra* note 2; Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).
[41] *See, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989) ("I have not said that legal determinations that do not reflect a general rule can be entirely avoided…. All I urge is that … the Rule of Law, the law of rules, be extended as far as the nature of the question allows….").
[42] POSNER, *supra* note 35, at 9; *see also* Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999) ("I register something of a ho-hum reaction to the notion that judges' personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another. Judges would be rudderless ships if we did not steer through uncharted and murky waters by some sense of conscience or some core of personal beliefs.").

sometimes directs judicial behavior, at least in straightforward cases.[43] The models may overlap. Some defensible theories of legalism reserve a place for "moral, political, and social ideas" to influence adjudication,[44] especially if judges employ them in a good-faith effort to reach the right result, not advance their personal ideology.[45] Nevertheless, the models are sufficiently distinct—as evinced by the large literature comparing them—to constitute separate and competing explanations of judicial behavior.[46]

*B. Implications of the Political Model*

Most scholars and judges support the legal model—even if they disagree on its particulars[47]—and oppose the political model.[48] That opposition reflects a belief, rooted in history and logic, that political decision-making by judges undermines the rule of law. As Hamilton put it, if judges "exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." Unlike legislators, most judges are not accountable to the public. Even elected state judges sometimes enjoy enough job security to effectively have life tenure.[49] So when judges exercise "will" they have the power of lawmakers but not the accountability. "The

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[43] *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 286-89 (1997) (discussing the "easy case" hypothesis and empirical support for it).
[44] *E.g.,* Roscoe Pound, *Theory of Judicial Decision*, 36 HARV. L. REV. 940, 949 (1923).
[45] *See* Gillman, *supra* note 3, at 486 (summarizing "postpositivist" legalism, under which "decisions are considered legally motivated if they represent a judge's sincere belief that their decision represents their best understanding of what the law requires").
[46] In addition to the legal and political models, other theories seek to explain judicial behavior. *See generally* POSNER, *supra* note 35, at 19-56.
[47] *See* Cross, *supra* note 43, at 262 ("The legal model remains ill defined, characterized by various, often contradicting theories.").
[48] *See, e.g.,* Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64-65 (1992) ("Courts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others.").
[49] *See generally* Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001).

concept of unrepresentative judicial 'philosopher-kings,' possessing authority to serve as a roving societal conscience, surely threatens the values of self-determination, accountability and representationalism that provide core notions of American political theory."[50]

Judicial review of direct democracy casts these problems in stark light. Ordinary judicial review entails conflicts between courts and legislators, who may be unrepresentative of their constituents or even corrupt. But judicial review of direct democracy pits judges against the citizens themselves. As Justice Hugo Black put it, ballot propositions are "as near to a democracy as you can get" and deserve deference from courts.[51] As Judge O'Scannlain stated after reversing a district court order to throw out a popularly-enacted proposition, "[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy."[52] In response to judicial invalidation of a Washington proposition, the measure's sponsor pilloried the "one guy with a robe on" who "might as well be wearing a crown if he's going to act like a king."[53] These quotations make clear that judicial intervention in direct democracy carries a "measure of political discomfort" absent from other judicial activities.[54]

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[50] Cross, *supra* note 43, at 263 (citing Martin H. Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 NW. U. L. REV. 165, 165-66 (1993)).
[51] *See* Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1072 (2001) (citation omitted).
[52] *See* Miller, *supra* note 51, at 1073 (citing Coalition for Economic Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1992)).
[53] *See id.* at 1053 (citing David Postman, *I-695 Ruling Fuels Debate Over Role of Courts*, SEATTLE TIMES, Apr. 11, 2000, at B1).
[54] *See* Eule, *supra* note 9, at 1507.

The political model of judicial decision-making raises another problem for judges, legal scholars, and lawyers: it challenges the foundations of their work. They assume that by

> knowing various rules, principles, or structures of argument [they] will be in a better position to understand . . . why judges decide cases as they do. . . . It would be considered malpractice if a lawyer who was preparing a case asked only about a judge's partisan affiliation and spent no time reading past opinions and researching the state of the law. Judges reinforce this . . . by requiring lawyers to talk about precedents and doctrines and by writing opinions filled with arguments about precedents and doctrines. The entire structure of legal education and the nature of the judicial process in the United States is premised on the assumption that, one way or the other, law matters.[55]

Strong proponents of the political model reject this. They claim that doctrinal analysis—and therefore most law school teaching, scholarship, and lawyering—is "silly."[56]

*C. One-Sided Story: Empirical Studies of the Legal and Political Models*

Social scientists have spent decades testing the political model of judicial decision-making.[57] They use judges' partisan affiliations[58] and votes in politically salient

[55] Gillman, *supra* note 3, at 466.
[56] Gregory A. Caldeira, *Review of the Supreme Court and the Attitudinal Model*, 88 AM. POL. SCI. REV. 485 (1994).
[57] *See generally* THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2003) (discussing early efforts to analyze judicial decision-making).
[58] Specifically, scholars look to judges' political party membership, the political party of the executive who appointed them, or both. *See, e.g.,* C. Neal Tate, *Personal Attribute Models of Voting Behavior of United States Supreme Court Justices: Liberalism in Civil Liberties and Economic Decisions, 1947-1978*, 75 AM. POL. SCI. REV. 355 (1981).

cases[59] as well as newspaper editorials regarding the judges[60] to develop measures of ideology. They then compare these measures to case outcomes. When, for example, conservative judges systematically vote to weaken civil liberties and liberal judges systematically vote to strengthen them, scholars conclude that judges' political views drive their decisions.[61] Much of this work has focused on the U.S. Supreme Court, but scholars have examined federal courts of appeals, district courts, and state courts too.[62] Instead of summarizing individual studies[63] I present the bottom line: "across a wide variety of courts and issue areas, Democratic judges are more likely to support the liberal position in case outcomes than their Republican colleagues.[64] The evidence for the political model is abundant and convincing."[65]

Most of these studies suffer from a common weakness: they do not account for the law.[66] They find correlations between judges' politics and case outcomes, but they do not search for correlations between legal variables and case outcomes. This presents at

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[59] *See, e.g.,* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the United States Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002); DAVID W. RHODE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976).

[60] *See, e.g.,* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

[61] *See id.*

[62] On the Supreme Court, see, e.g., *id.*; SEGAL & SPAETH, *supra* note 3. On the federal courts of appeals, see, e.g., CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Cross & Tiller, *supra* note 4; Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997). On the federal district courts, see, e.g., ROBERT A. CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS (1983). On state courts, see, e.g., Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147 (1992).

[63] For more exhaustive reviews of this literature and abundant citations, see, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Gillman, *supra* note 3; Cross, *supra* note 43.

[64] Frank. B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1482 (2003) (citing DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 112 (2000)) (internal quotation marks omitted).

[65] *Id.* (citing Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 103, 110 (Stephen B. Burbank & Barry Friedman eds., 2002)) (internal quotation marks omitted).

[66] *See, e.g.,* Songer & Haire, *supra* note 4, at 967 (1992) (reporting that "scholars in the empirical tradition

least two problems. First, it prevents a comparison of the relative effects of the two models on judicial decision-making.[67] Most observers agree that both law and politics matter; the fight is over which matters more.[68] Second, omitting legal variables obscures possible relationships between law and politics. If conservative judges weaken civil rights because they genuinely believe the law requires this, then an analysis that omits legal variables will find a correlation between politics and case outcomes but miss the *causal* relationship between law and case outcomes.[69]

Some scholars have sought to resolve these issues by integrating legal variables in their analyses, but this presents a dilemma. A direct test of the legal model requires scholars to compare judges' decisions in a sample of cases to the correct legal outcomes in those cases. Determining correct legal outcomes is difficult; precedent often cuts different ways and could support a number of judgments in a given case. Anyone who evaluates the cases and attempts to identify the correct outcomes will be subject to the same biases, conscious and unconscious, as the judges.[70] This helps to explain why legal

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have given little systematic attention to the potential effect of variables that might reflect the traditional [legal] model").

[67] *See* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 65, at 25 ("Until law is successfully taken into account . . . it is impossible to understand the relative role played by ideology."); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decisionmaking*, 86 AM. POL. SCI. REV. 323, 323 (1992) (noting that "for all the research conducted and all the years this debate has raged, it is almost startling to find that scholars have yet to compare these basic models systematically").

[68] *See* POSNER, *supra* note 35, at 47 ("Attitudinalists and legalists disagree about the extent of political judging rather than about its existence.").

[69] *See, e.g.,* Cross, *supra* note 43, at 292-93 ("Consideration of collinear legal variables can have a significant effect on the attitudinal model. . . . '[W]hen appropriate legal variables are included in models of legal interpretation, they sometimes displace political predictors.'") (citing C.K. Rowland, *The Federal District Courts*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 79 (John B. Gates & Charles A. Johnson eds., 1991)); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 57 (1998) (discussing how political models fail to distinguish between votes that exhibit a judge's fidelity to her notion of the law and votes that reflect naked ideology).

[70] *See* Cross, *supra* note 64, at 1467 ("One way to evaluate . . . the legal model for judges deciding individual cases is to find a legal model test that is more authoritative and reliable than the judges themselves. Still, one could reasonably question how any test relying on the evaluation of an external observer could be privileged over the opinion of the judge who decided the case. The search for such a test

variables have long been ignored. Scholars could not conceive of a way to measure them objectively.[71]

With direct tests foreclosed, scholars have turned to indirect methods to examine the legal model, and I review some of their efforts.

Some scholars have simply asked judges what motivates their decisions. In surveys and interviews judges report that law has a strong influence on their decision-making,[72] and articles by judges generally say the same.[73] But judges may fail to recognize their own biases or, more cynically, may lie.

Some scholars code case facts.[74] They examine precedents to identify the factors that judges consider in a particular type of dispute. For example, in search and seizure cases they note that possession of a warrant ostensibly strengthens the defendant's claim. They then determine if those factors are present in some cases. If the presence or absence of factors correlates with the outcomes of those cases in the way the precedents suggest they should, scholars conclude that law matters. Among other drawbacks, this approach assumes that precedent reflects a neutral conception of law and not a formalization of judges' political views, even though judges themselves shape the precedents they apply.[75]

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seems fruitless.").

[71] *See* Gillman, *supra* note 3, at 467 ("arguments about the influence of law 'were so vague that they could not be subject to falsifiable tests,' since in most cases legal factors such as precedent could support any position that a justice might take, and 'if one could not predict a priori how precedent might influence a decision, then precedent is completely meaningless as an explanation of the Court's decisions'") (citing SEGAL & SPAETH, *supra* note 3, at xv).

[72] *See* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2001); J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM (1981).

[73] *See, e.g.,* Edwards, *supra* note 1; Wald, *supra* note 42.

[74] *See, e.g.,* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); George & Epstein, *supra* note 67; Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases (1962-1981)*, 78 AM. POL. SCI. REV. 891 (1984).

[75] *See* Cross, *supra* note 43, at 310 (noting that facts influence political as well as legal judgments and law may be embedded with political preferences); *see also* POSNER, *supra* note 35, at 44 ("The original precedent in a line of precedents could not have been based on precedent. At the origin of the line must be

Another group of scholars examine fidelity to precedent. At the Supreme Court level, they ask whether Justices who dissent in a case and oppose the precedent created—possibly because it conflicts with their political views—later adhere to that precedent.[76] If they do, these scholars conclude that Justices respect precedent and law trumps politics.[77] Evidence suggests that many Justices do not behave this way,[78] but this does not discredit the legal model. Few legalists would argue that Supreme Court Justices flout law by maintaining their opposition to a precedent over time.[79]

Scholars have also questioned whether lower federal courts adhere to Supreme Court precedent.[80] They look, for example, to whether factors declared pivotal by the Supreme Court affect circuit court outcomes, and some studies suggest they do.[81] But this may not reflect a commitment to the legal model so much as "yielding to superior force"[82]—the Supreme Court—possibly to avoid the embarrassment of being overturned.[83] And lower courts may apply precedent because it incorporates their political values, not because it binds them.[84]

Despite some critiques, these studies and others have begun to fill a void in the literature on judicial decision-making by finding empirical support for the legal model. But the evidence remains largely one-sided. Far more studies examine and support the political model than the legal model. And the most direct and compelling analysis of the

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something else. It might well be a policy judgment . . . .").
[76] *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL (1999).
[77] *See id.*
[78] *See id.*
[79] For a fuller discussion of this and other critiques, see Gillman, *supra* note 3, at 480-85.
[80] *See, e.g.,* Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMP. LEGAL STUD. 369 (2005); Cross & Tiller, *supra* note 4; Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Songer & Haire, *supra* note 4.
[81] *See, e.g.,* Songer et al., *supra* note 80.
[82] POSNER, *supra* note 35, at 44.

legal model would require a test for ascertaining the correct legal outcome in a sample of cases. As a leading scholar in this area stated, "[t]he search for such a test seems fruitless."[85]

## II. THE SINGLE SUBJECT RULE AND THE CATEGORIZATION THEORY OF INTERPRETATION

The single subject rule requires judges to apply a vague law to ballot propositions, many of them politically charged, and this implicates the controversy over what motivates their decision-making. This Part describes the rule, its purposes, and the frequency and salience of litigation. It also presents the categorization theory of single subject interpretation.

### *A. History and Purposes of the Rule*

The single subject rule for ballot propositions grows from the single subject rule for legislation, which dates to ancient Rome. Crafty lawmakers there learned to carry an unpopular provision by "harnessing it up with one more favored."[86] In response, the Romans in 98 B.C. forbade laws consisting of unrelated provisions.[87]

Colonial America suffered from similar behavior. In 1695, the Committee of the Privy Council complained that diverse acts in Massachusetts were "joined together under ye same title," making it impossible to vacate unpopular provisions without also

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[83] *See* Cross, *supra* note 80, at 384-89.
[84] *See* Cross, *supra* note 43, at 1469.
[85] *See supra* note 70.
[86] ROBERT LUCE, LEGISLATIVE PROCEDURE 548 (1922).
[87] *Id.*

invalidating favorable ones.[88] In 1702, Queen Anne instructed Lord Cornbury of New Jersey to avoid "intermixing in one and the same Act[ ] such things as have no proper relation to one another."[89] New Jersey codified this language in its 1844 single subject rule, the nation's first,[90] and forty-two states followed suit.[91]

Throughout the 20th century, many states extended their legislative single subject rules to ballot propositions.[92] All such rules resemble the one in California's Constitution: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."[93]

Two primary purposes motivate the rule: preventing logrolling and preventing riding.[94] In brief, logrolling occurs when two non-complementary proposals, neither of which would pass on its own, are combined into one measure that commands majority support. Supporters of each proposal accept something they dislike to get something they favor. In brief, riding occurs when two non-complementary proposals, one of which would pass on its own and the other of which would not, are combined into one measure

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[88] *See id.* at 549 (citing E. I. MILLER, THE LEGISLATURE OF THE PROVINCE OF VIRGINIA 111 (1908)) (internal quotation marks omitted).

[89] ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 75 (1990) (internal citation omitted). A single subject requirement for bills pertaining to government salaries materialized in the Illinois Constitution in 1818. *See* Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389 (1958).

[90] *See id.* at 390; N.J. CONST. art. IV, § 7, p. 4 ("To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one subject ….").

[91] *See* Michael D. Gilbert, *Single Subject Rule and the Legislative Process*, 67 U. PITT. L. REV. 803, 812 (2006).

[92] *See generally* Rachael Downey et el., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004).

[93] CAL. CONST. art II, § 8(d). Many single subject rules also require the subject of propositions to be expressed in their title. *See, e.g.,* COLO. CONST. art. V, § 1(5.5) ("No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title."). Most single subject litigation turns on numerosity of subjects, not clarity of title, see Gilbert, *supra* note 19, and I do not address the title requirement in this paper.

[94] *See* Gilbert, *supra* note 91, at 813-27. The rule also aims to improve political transparency. *See id.*

that commands majority support. The majority of voters, unable to detach the rider, accept something they dislike to get something they favor.

Courts oppose logrolling and riding because they threaten to enact policy provisions that only command minority support. Thus, these practices have been described as "perversion[s] of majority rule,"[95] "pernicious,"[96] and akin to "stealth and fraud"[97] in lawmaking. Logrolling and riding also require voters to decide two or more issues with one vote. As the Supreme Court of Florida put it, this can force voters to accept a "repugnant provision in order to achieve adoption of a desired one."[98] The single subject rule aims to stop these practices.

*B. Frequency and Political Salience of Litigation*

In recent years, courts have used the single subject rule to strike down anti-immigration measures, gay marriage bans, reapportionment schemes, restrictions on eminent domain, and most recently, a tax on oil companies' profits.[99] They have upheld propositions that would restrict abortion, permit stem cell research, limit campaign contributions, increase tobacco taxes, and stiffen criminal penalties.[100] Between 1980

[95] Ruud, *supra* note 89, at 399. Although Ruud examined the purposes of the rule and the problems of logrolling and riding in the context of ordinary legislation, courts understand the same purposes and problems to apply in direct democracy. *See* Campbell, *supra* note **Error! Bookmark not defined.**, at 133-34.
[96] Burrell v. Miss. State Tax Comm'n, 536 So.2d 848, 865 (Miss. 1988) (Hawkins, J., dissenting).
[97] State ex rel. Dix v. Celeste, 464 N.E.2d 153, 157 (Ohio 1984).
[98] Dep't of Educ. v. Lewis, 416 So. 2d 455, 459 (Fla. 1982).
[99] *See* In re Title and Ballot Title and Submission Clause for 2005-2006 #55, 138 P.3d 273 (Colo. 2006) (immigration); Greg Bluestein, *Judge Strikes Down Ga. Ban on Gay Marriage*, S.F. CHRON., May 17, 2006 (this decision was overturned in Perdue v. O'Kelley, 632 S.E.2d 110 (Ga. 2006)) (gay marriage); Advisory Opinion to the AG re Independent Nonpartisan Comm'n to Apportion Legislative & Congressional Dists., 926 So. 2d 1218 (Fla. 2006) (reapportionment); In re Initiative Petition No. 382, State Question No. 729, 142 P.3d 400 (Okla. 2006) (eminent domain); *Denial of Clean Elections Initiative Upheld*, U.S. FED. NEWS (June 26, 2008) (oil tax).
[100] *See* In the Matter of the Title, Ballot Title and Submission Clause, and Summary For 1999-2000 No. 200A, 992 P.2d 27 (Colo. 2000) (abortion); California Family Bioethics Council v. California Institute for

and mid-2007, courts in 14 states issued 208 judgments in single subject cases involving 191 propositions, and they found 71 violations of the rule.[101] As these topics and numbers make clear, the single subject rule frequently requires courts to pass judgment on important political issues.

*C. The Categorization Theory and Its Shortcomings*

The single subject rule says nothing about preventing logrolling and riding. State constitutions simply require that ballot propositions be confined to "one subject" or something similar.[102] This presents an interpretation problem: how to define the contours of a "subject" in a way that respects the text of the rule and achieves its purposes?

Judges profess to take a plain language approach to the rule that I call the categorization theory of interpretation. They examine the challenged provisions of a proposition and ask if they are "reasonably germane" to one another[103] or if they embrace "disconnected and incongruous measures . . . that have no necessary or proper connection."[104] To make this determination judges parse text, draw analogies, and use

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Regenerative Medicine, 147 Cal. App. 4th 1319 (Cal. 2007) (stem cell research); Washington Federation of State Employees v. State, 901 P.2d 1028 (Wash. 1995) (campaign contributions); California Assoc. of Retail Tobacconists v. State, 109 Cal. App. 4th 792 (2003) (tobacco taxes); *Manduley*, 41 P.3d 3 (criminal penalties).

[101] *See* Gilbert, *supra* note 19.

[102] *See, e.g., supra* note 11.

[103] *See, e.g.,* California Assoc. of Retail Tobacconists v. State, 109 Cal. App. 4th 792, 809 (2003) (internal citations and quotation marks omitted).

[104] *See, e.g.*, Jones v. Polhill, 46 P.3d 438, 440 (Colo. 2002) (internal citations and quotation marks omitted). Judges in other states use similar language to describe their inquiries. *See, e.g.,* Amalgamated Transit Union Local 587 v. Washington, 11 P.3d 762, 782 (2000) (stating that Washington courts call for "rational unity" among a measure's provisions) (internal citations and quotation marks omitted); Taxpayer Protection Alliance v. Arizonans Against Unfair Tax Scheme, 16 P.3d 207, 208 (2001) (stating that Arizona courts look for a "consistent and workable whole … [that] should stand or fall as a whole") (internal citations and quotation marks omitted); United Gamefowl Breeders Assoc. of Missouri v. Nixon, 19 S.W.3d 137, 140 (2000) (stating that judges in Missouri require that "provisions are properly connected

commonsense. If they conclude that challenged provisions reflect a "consistent and workable whole . . . [that] should stand or fall as a whole,"[105] they categorize the provisions under one subject. If the provisions are too dissimilar to be so categorized, judges find a single subject violation and invalidate the proposition.[106]

The categorization theory yields determinate outcomes when challenged provisions are incongruous. For example, a proposition on the death penalty and spotted owls would unambiguously violate the rule under this approach. But the categorization theory fails to yield determinate outcomes when challenged provisions are similar. Thus, courts disagree on whether a proposition banning same-sex marriage and same-sex civil unions has two subjects (marriage, civil unions) or just one (same-sex relationships).[107] Likewise, judges split on whether a measure addressing gang-related crimes, California's Three Strikes Law, and the juvenile justice system embraces three subjects (gangs, repeat offenders, juvenile justice) or just one ("a safer California").[108]

Judges understand this dilemma. As Justice Kogan of Florida's Supreme Court stated, "[w]hat may be 'oneness' [of subject matter] to one person might seem a crazy quilt of disparate topics to another. 'Oneness,' like beauty, is in the eye of the beholder . . . ."[109]

Critics have identified this problem as well. In 2006, after four Democratic Justices on Colorado's Supreme Court invalidated a conservative anti-immigration

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with a central purpose") (internal citation omitted).

[105] *See, e.g.*, *Taxpayer Protection Alliance*, 16 P.3d at 208 (internal citations and quotation marks omitted).

[106] Sometimes courts cure single subject violations by severing the "subject" that is of "greater dignity." *See* Ruud, *supra* note 89, at 399 ("Several cases, however, have suggested that the court should determine whether one of the subjects is of greater dignity or is the dominant subject . . . .").

[107] *See, e.g.,* Forum for Equality PAC v. McKeithen, 893 So.2d 715 (La. 2005) (finding one subject in such a proposition and reversing a lower court that found two).

[108] *See Manduley*, 41 P.3d at 8, 27-29 (finding one subject in this proposition).

[109] Advisory Opinion to Attorney Gen.—Limited Political Terms in Certain Elective Offices, 592 So. 2d

proposition, former Governor Lamm stated that the "'single-subject' provision . . . has become an arbitrary weapon wielded by an increasingly politicized judiciary."[110] Justice Coats, who dissented in that case, wrote that his colleagues "understand[ ] the term 'subject' to be so elastic as to give this court unfettered discretion to . . . approve or disapprove . . . any . . . ballot measure at will."[111]

In addition to being indeterminate, the categorization theory fails to achieve the single subject rule's purposes. Courts assume that "if proposed legislation conduces to a single subject, logrolling . . . [is] not an issue."[112] But this is inaccurate. Logrolling can take place within a measure that embraces one logical subject. For example, two environmental proposals that individually have only minority support could be cobbled together and passed under the heading "environmental regulation." An unpopular rider, say, a corporate tax break, could be combined with a popular tax hike and passed under the heading of "business taxation." Categorization cannot detect such violations, and this makes the rule underinclusive. Conversely, two measures that individually have majority support and address different topics could be combined into a single ballot proposition, passed, and then struck down under the categorization approach, even though there was no logrolling or riding. In such circumstances categorization makes the rule overinclusive.

Despite these problems, categorization is the "official theory" of single subject decision-making.

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225, 231 (1991) (Kogan, J., concurring and dissenting).
[110] *See* Lamm, *supra* note 16.
[111] In re Title and Ballot Title and Submission Clause for 2005-2006 #55, 138 P.3d 273, 283 (Colo. 2006) (Coats, J., dissenting).

## III. A DEMOCRATIC PROCESS THEORY OF THE SINGLE SUBJECT RULE

This Part briefly describes the democratic process theory of the single subject rule. The theory is described in much greater depth in a separate paper.[113]

For purposes of single subject jurisprudence, the democratic process theory posits that "subject" means a set of policy proposals over which a majority of voters has inseparable preferences. To give meaning to this phrase I define several concepts.

A voter has *separable* preferences[114] across two policy proposals when he can decide how to vote on each without knowing the outcome of the vote on the other. Voters have such preferences when they understand the proposals to be completely independent. For example, imagine two policy proposals, one that would implement no-fault insurance for car accidents and another that would permit politicians who receive contributions from interest groups to participate in governmental decisions affecting those groups.[115] Most voters probably have separable preferences for these proposals. Their vote on the first is unaffected by the outcome of the vote on the second and vice versa.

Voters also have separable preferences across policy proposals when those proposals weakly complement or weakly substitute for one another. Two proposals weakly complement each other when passage of one increases voters' support for the other, but not by so much that voters' support for either depends on whether the other passes. Two proposals weakly substitute for each other when passage of one diminishes

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[112] League of Women Voters v. Eu, 7 Cal. App. 4th 649, 667 (1992).
[113] See Cooter & Gilbert, supra.
[114] I do not use the term "separable preferences" in the same manner as economists, who only assign this label to a voter's preferences when the cross-partial derivatives of his utility function equal zero.
[115] I base this example on the proposition at issue in California Trial Lawyers Assoc. v. Eu, 200 Cal. App. 3d 351(Cal. Ct. App. 1988), which the California Court of Appeals found to violate the single subject rule.

voters' support for the other, but not by so much that voters' support for either depends on whether the other passes.

A voter has *inseparable* preferences over two policy proposals when she cannot decide how to vote on one without knowing the outcome of the vote on the other. This occurs when the proposals are strong complements, such that she only votes for one if she is certain also to get the other, or strong substitutes, such that she only votes for one if she is certain not to get the other.

I illustrate inseparable preferences over proposals that strongly substitute for each other. Imagine competing proposals, one that would reduce property tax rates and another that would leave property tax rates unchanged but exempt half of the value of every home from taxation.[116] If voters want to reduce property taxes but believe that passing both measures would have disastrous consequences for the state budget, they have inseparable preferences over these proposals. They cannot decide how to vote on one without knowing whether the other will pass.

According to the democratic process theory, the single subject rule aims to separate policy proposals over which most voters have separable preferences and unite policy proposals over which most voters have inseparable preferences. Citizens can cast resolute votes on proposals over which they have separable preferences in isolation. Therefore, a sound democratic process permits citizens to consider such proposals individually and cast separate votes on them. If combined, such proposals violate the single subject rule. Conversely, voters cannot cast resolute votes on proposals for which they have inseparable preferences in isolation. Therefore, a sound democratic process

[116] I base this example on Measures 9 and 11, voted on simultaneously by Oregonians in November 1986. *See* Michael D. Gilbert & Joshua M. Levine, *Less Can Be More: Conflicting Ballot Proposals and the*

permits citizens to consider such proposals simultaneously and cast one vote on all of them. If combined, such proposals do not violate the single subject rule.

The democratic process theory attempts to clarify existing jurisprudence. As discussed, in determining whether a proposition embraces one subject, courts ask whether its provisions are "reasonably germane" to each other or whether they are "disconnected" and "have no necessary or proper connection."[117] If most voters have inseparable preferences for the provisions, and therefore cannot decide how to vote on one without knowing the outcome of the vote on the other, those proposals qualify as "reasonably germane." If most voters have separable preferences and can decide on the provisions in isolation, then those provisions "have no necessary or proper connection." This language, usually associated with the categorization theory of interpretation, is consistent with the claim that judges applying the rule consider separable and inseparable preferences.

The democratic process approach prevents logrolling and riding in ballot propositions and therefore achieves the purposes of the single subject rule.

Imagine two policy proposals, A and B, and suppose they can be logrolled. This means that each commands minority support; they would pass if combined; but while the minority blocks that favor each proposal—and together constitute a majority—support the combination, they respectively prefer to enact just their own proposal rather than both. Alternatively, suppose B could ride on A. This means that A would pass on its own, B would not pass on its own, the proposals would pass if combined, but most voters prefer to enact A rather than both proposals and neither proposal rather than B.

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*Highest Vote Rule*, J. LEGAL STUD. (Forthcoming June 2009).

[117] *See supra* notes 103-104 and accompanying text.

If a majority of voters has separable preferences for A and B, the combined proposal cannot survive single subject scrutiny under the democratic process theory. The proposals would have to be presented to voters individually, preventing logrolling and riders. In the case of logrolling, both A and B would fail.[118] In the case of riding, the popular measure, A, would pass, and B would fail.

What if most voters have inseparable preferences for A and B? Under the democratic process theory, sponsors could combine these proposals and submit them to voters as a package without violating the single subject rule. This does not constitute logrolling or riding. Inseparable preferences imply that the proposals are either strong complements or strong substitutes. If A and B are strong complements, then most voters favor both or neither. Therefore, combining them is not logrolling—voters who support the combination do not accept something they dislike to get something they favor. Likewise, combining them is not riding. If B is a complement, then it does not reduce support for A but rather increases it. Riders never increase support for the proposals to which they are attached.

Conversely, if A and B are strong substitutes, then voters only want A if they do not get B. In that case, the combination of A and B would not receive majority support, and logrolling and riding cannot occur.

[118] Legislators could agree to logroll two proposals but, rather than combining them in one bill, have separate votes on them, with all participants in the logroll voting in favor of each proposal individually.

## IV. LAW OR POLITICS? JUDICIAL DECISION-MAKING IN SINGLE SUBJECT DISPUTES

This Part uses original data and quantitative methods to test whether and to what extent the legal model—as conceptualized under the categorization and democratic process theories—and the political model explain judges' votes in single subject cases. Unlike prior studies, I develop a direct measure of the law, by which I mean a determination of the legally correct outcome in single subject disputes under the categorization and democratic process approaches. This permits a direct comparison of the legal and political models of judicial behavior. I find that the categorization theory best explains case outcomes, with the democratic process theory coming in second and politics third.

I first describe the research methodology, variables, and data collection. I then present the statistical analysis. I conclude by discussing the implications of this work and directions for future research.

### *A. Methodology and Data*

I test hypotheses using logit regression models. The dependent variable reflects judges' votes to resolve single subject challenges—either they did or did not find a violation of the rule. The unit of analysis, therefore, is individual judges' votes, not case outcomes. Coefficients on independent variables of interest reflect how judges' political views and two conceptions of the law, the categorization and democratic process theories, correlate with judges' votes.

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This cannot take place in direct democracy, as thousands of citizens cannot coordinate their votes.

Cases included in this study were litigated in state appellate and supreme courts in California, Colorado, Florida, and Oklahoma during the period January 1980 to June 2007. I selected these states because they had a sufficient number of cases—at least ten apiece—to analyze with quantitative methods. Collectively, they account for over 80 percent of single subject litigation nationwide during this period.[119] These states are also geographically, politically, and culturally diverse. All judges in these states were appointed,[120] and the single subject rules in each state remained essentially unchanged during the period of this study.[121]

In general, all single subject decisions from each state were included in the sample.[122] Table 1 indicates the number of cases from each state broken down by court level. Because one case may review multiple propositions for single subject compliance, the table also indicates the number of single subject judgments issued by courts in each state. Some propositions get reviewed for single subject compliance multiple times, so the table indicates the total number of propositions at issue in all judgments. Finally, the

[119] State appellate and supreme courts issued 208 single subject judgments during the period of this study, and 171 of those, or 82 percent, came from the four states examined here. *See* Gilbert, *supra* note 19. So while my results may not generalize to all single subject litigation, they hold for most litigation in recent decades.

In Colorado and Oklahoma, the state supreme court had exclusive jurisdiction over single subject challenges for the entire period of the study. COLO. REV. STAT. ANN. § 1-40-107; OKLA. STAT. ANN. tit. 34, § 8. In Florida, the state supreme court had exclusive jurisdiction over single subject challenges beginning in 1986. FLA. CONST. art. IV § 10. In California, single subject challenges often begin in trial courts, and trial courts do not issue opinions. As a result, I only have data from California appellate and supreme court decisions. The factors that influence judges on appellate and supreme courts may differ from those that influence judges on trial courts.

[120] They were appointed by governors and subject to occasional retention elections, albeit for different term lengths.

[121] In California and Oklahoma the single subject rule did not change during the period of the study. Colorado adopted the single subject rule in 1994, so all cases from there were litigated thereafter. In 1994 Florida exempted from the single subject rule ballot initiatives addressing "the power of government to raise revenues." FLA. CONST. art. XI § 3. Interpretation of the rule did not change during this period in any of the states, by which I mean that courts used the same tests throughout for identifying single subject violations and never announced a change in scrutiny.

[122] Appendix A explains in detail the criteria for including cases.

table shows "success rates," defined as the percentage of all single subject judgments in which a majority of judges found a violation of the rule.

| Table 1: Sample Overview | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | No. of Cases | | No. of Judgments | | | No. of SS Violations | | |
| State | App. Ct. | Sup. Ct. | App. Ct. | Sup. Ct. | No. Props | App. Ct. | Sup. Ct. | Success rates |
| **CA** | 24 | 8 | 24 | 8 | 19 | 2 | 2 | 13% |
| **CO** | 0 | 50 | N/A | 72 | 72 | N/A | 40 | 56% |
| **FL** | 1 | 46 | 1 | 55 | 55 | 0 | 14 | 25% |
| **OK** | 0 | 11 | N/A | 11 | 11 | N/A | 4 | 36% |
| **Total** | 25 | 115 | 25 | 146 | 157 | 2 | 60 | 36% |

As the table shows, Colorado courts issued 72 judgments, Florida courts issued 56, California courts 32, and Oklahoma courts just 11. Most litigation in California took place in appellate courts, while exclusive jurisdiction in the other states means the supreme courts heard the cases.[123] One hundred and fifty-seven propositions were challenged on single subject grounds. Only 13 percent of single subject challenges succeeded in California, while over half succeeded in Colorado. Across disputes in all states, propositions violated the rule 36 percent of the time.

I now describe the variables used to explain these patterns.

*1. Dependent Variable: Judges' Votes*

For every single subject judgment in Table 1 at least two and as many as nine judges cast votes. Each vote is an observation in the dataset. The dependent variable

[123] The one Florida appellate court case was litigated in 1983 before exclusive jurisdiction was vested in the state supreme court. *See* Fine v. Firestone, 443 So. 2d 253 (Fla. Dist. Ct. App. 1983).

equals 1 if the judge's vote implied a violation of the rule and 0 if it did not.[124] The dataset includes 1,067 votes, 411 of which implied a single subject violation.[125] One hundred twenty-five judges cast those votes.[126]

*2. Independent Variables*

I use three classes of variables to explain judges' votes: legal, political, and controls.

*a. Number of Subjects Under the Categorization Theory*

To test whether the categorization theory of single subject interpretation influences case outcomes requires an assessment of how many subjects an objective judge using this approach would find in the propositions in this study. To gather this information I conducted a survey of 255 students at Berkeley Law School. Each survey placed the student respondent in the position of a judge in one of the four states included

[124] I examined the opinions to determine which judges participated in each judgment and how they voted. Often these cases involve multiple legal claims, and the dependent variable reflects judges' votes on the single subject question only. In some instances I inferred the vote according to the following rules. If a judge concurred in the result and did not write an opinion, she is coded as voting the same as the majority on the single subject question. If a judge dissented and wrote an opinion that did not address the single subject claim, she is coded as voting the same as the majority on the single subject question. If a judge dissented but did not write an opinion, she is coded as voting the opposite from the majority on the single subject question. In a couple of instances a judge concurred in the result but stated that she did so only because of precedent and that she, if writing on a blank slate, would hold otherwise. I coded this as voting the opposite from the majority on the single subject question. I did so because I am not testing whether precedent—which judges rarely cite in these cases—guides single subject decision-making but whether the categorization and democratic process theories do.

[125] Breaking this down by court level, across all four states 55 appellate court judges cast 71 votes in single subject judgments, and 7 of those votes, or about 10%, implied a violation of the rule. Seventy supreme court justices cast 996 votes in single subject judgments, and 404 of those, or about 41%, implied a violation of the rule.

[126] As these numbers show, some individual judges participated in many single subject decisions. I account for this by clustering the error terms by judge, which means that I allow each judge's votes to correlate but assume that different judges' votes do not correlate. Alternatively I could cluster error terms by case, meaning that votes by different judges hearing the same case are allowed to correlate but that votes by the same judges across cases are not allowed to correlate. Clustering by case does not affect my results.

in the study deciding some of the cases included in the study.[127] The survey described how to count subjects using the tests judges profess to employ in that state. Each survey then provided two precedents from that state, one finding one subject in a challenged proposition and the other finding multiple subjects in a different challenged proposition.[128] Finally, each survey provided summaries of four propositions challenged on single subject grounds in that state.[129] Survey respondents applied the rule and indicated how many subjects each of the four propositions contained.[130] At least four respondents coded each proposition, and I averaged their scores to determine the "correct" number of subjects in each proposition under categorization.[131]

Recall the problem with such direct measurements of the law: anyone attempting to discern legally correct outcomes will suffer from the same biases, conscious and unconscious, as judges, making their assessments an unreliable baseline. To avoid this problem the surveys did not disclose that finding more than one subject in a proposition

[127] Assignment to states was random, and respondents did not know which state they were assigned.
[128] All propositions were assigned to one of seven topical categories developed by Ken Miller: crime; economic regulation; education; environment; health, welfare, morals; political/government reform; taxes. The precedents always came from different categories. Within these limitations the precedents were selected at random from each state's list of all propositions challenged on single subject grounds during the period of this study. The precedents varied randomly by survey. For example, one survey from Oklahoma could have different precedents from another survey from Oklahoma.
[129] The summaries were limited to the challenged provisions at issue. To illustrate, if a proposition had ten provisions and plaintiffs claimed that three embraced different subjects, the survey only summarized those three provisions. This ensures that respondents focused on the same provisions as judges—and assumes that judges did not base their decisions on unchallenged provisions or factors the opinions did not address. In a given survey no more than two of the summarized propositions came from the same topical category, and of course the summarized propositions differed from the propositions addressed in the precedents. Otherwise propositions summarized in each survey were selected at random from all propositions challenged in that state. The actual wording of the proposition summaries came from the cases, with some minor editing to make them grammatically correct in the survey context.
[130] They provided this information in two formats: an absolute number of subjects, and a score on a six-point scale indicating how closely the provisions in each proposition interrelated.
[131] I developed several measures of the law: the "true" number of subjects in each proposition, which was an average of respondents' subject counts; the true number of subjects as a fraction of the number of provisions in each proposition; the fraction of respondents who found more than one subject in each proposition; and the average score on the one-to-six relatedness scale. To foreshadow the results, each of these measures shows a statistically significant positive correlation with judges' votes. In the reported

implied unconstitutionality.[132] I hypothesize that obscuring the connection between adjudication and outcomes disengages students' political preferences. This should untangle law from politics and generate objective measurements of law.

To test this hypothesis I conducted a separate experiment with an additional 157 Berkeley law students. All were placed in the position of a judge evaluating the Florida Marriage Protection Amendment ("Amendment"), which would ban same-sex marriage and same-sex civil unions.[133] All were instructed to count subjects using the same tests that Florida judges profess to employ, and all received the same two example precedents. One-half of the students were informed that finding more than one subject in the Amendment implied invalidity while the other half were not.[134] Because respondents were politically liberal,[135] I expected informed students to find more subjects, and they did. Informed students on average counted 1.8 subjects while uninformed students on average counted 1.6. This difference is statistically significant. A t-test rejects the hypothesis that the mean subject counts of these two groups are the same in favor of an alternative hypothesis that the mean subject count of the informed group is higher (p-value equals 0.049).

This experiment supports the use of surveys that obscure the legal implications of students' responses to generate objective measures of the law.

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regressions I use the average scores on the relatedness scale because they are easiest to compare across propositions.

[132] The surveys simply stated that "Lawyers, judges, and scholars are interested in how many legal 'subjects' ballot propositions embrace because this affects how those propositions are interpreted." Post-survey questions showed that of the 255 students who completed a survey, only eight understood that a finding of multiple subjects implied that the proposition is unconstitutional. I discarded their responses.

[133] This proposition is slated to appear on the November 2008 ballot. The Florida Supreme Court found that it did not violate the single subject rule. *See* Advisory Opinion to the Attorney General Re Florida Marriage Protection Amendment, 926 So. 2d 1229 (Fla. 2006).

[134] The students who received this information were selected at random from all students completing the survey. Eighty-one students received the information and the other 76 did not.

*b. Number of Subjects Under the Democratic Process Theory*

To test whether the democratic process theory of single subject interpretation influences case outcomes requires an assessment of whether voters have separable or inseparable preferences for the provisions in each proposition in this study. To gather this information I conducted a survey of 247 undergraduates at U.C. Berkeley. The survey defined separable and inseparable preferences and provided a clarifying example. Each survey then presented summaries of four propositions drawn at random from the sample. The summaries were identical to the summaries provided to the law students. Survey respondents described their preferences for the provisions in each proposition using a seven-point scale. Higher numbers mean that enacting or defeating one provision has little or no influence on students' support for the other provision(s)—strong separable preferences—and lower numbers mean the opposite. Between four and eight students coded every proposition. I used the average of their scores as a proxy for whether voters have separable preferences for the provisions in each proposition.

The surveys did not disclose their purpose or provide information on the single subject rule. Consequently, this measure is independent of the law.

This methodology assumes that students are representative of all voters.[136] It also assumes that students have similar views on the separability or inseparability of policy provisions even if their support for those provisions varies widely. This is reasonable. To illustrate, students probably have separable preferences for provisions tightening

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[135] On a seven-point scale, with 1 signifying "very conservative" political views and 7 signifying "very liberal" political views, respondents self-reported a mean score of 5.2 with a standard deviation of 1.2.
[136] On a seven-point scale, with 1 signifying "very conservative" political views and 7 signifying "very liberal" political views, respondents self-reported a mean score of 4.5 with a standard deviation of 1.3.

pollution controls and increasing library funding, regardless of whether they support or oppose these measures. Students probably have inseparable preferences for a tobacco tax that funds a tobacco education program (their support for the tax turns on where the money will go, and their support for the program turns on how it will be funded). This assumption permits me to gauge whether voters have separable preferences with a small number of survey responses.

*c. Judges' Political Views*

To test the political model requires a measure of judges' political views. I use Party-Adjusted Judge Ideology (PAJID) scores, the gold standard in the literature on state courts.[137] PAJID scores assume that the political environment in which judges are initially appointed along with judges' partisan affiliation provides information on their political ideology.[138] PAJID scores were available for all supreme court justices in this study but not for the appellate court judges, so I calculated those scores myself.[139]

*d. Political Orientation of Propositions.*

In addition to PAJID scores, testing the political model requires a measure of the political orientation of the ballot propositions. If the ideological distance between a judge

[137] PAJID scores were developed in Paul Brace, Laura Langer, & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. OF POLITICS 387 (2000).
[138] Time series measurements of citizen and elite ideology developed in Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327 (1998) provide information on each state's political environment. All judges in this study were appointed, so their PAJID scores are based on the elite ideology index score from their state and their partisan affiliation. *See* Brace, Langer, & Hall, *supra* note 137.
[139] I followed the same methodology employed by Brace, Langer, and Hall to calculate PAJID scores for the supreme court justices in this study. Like supreme court justices, the appellate court judges in this study were appointed. I assume PAJID scores provide a sound measure of their political preferences.

and a proposition positively correlates with that judge's likelihood of finding a single subject violation, then that supports the political model.

To measure the political orientation of the propositions, four master's students from U.C. Berkeley's Goldman School of Public Policy and one Ph.D. student from U.C. Berkeley's Jurisprudence and Social Policy Program independently assigned each proposition in the study a score on a seven-point scale, where high scores indicate liberal propositions and low scores indicate conservative propositions. The students were unfamiliar with the details of this research. The average of their scores serves as a proxy for the orientation of the propositions.

*e. Control Variables*

I determined the year of each judgment because, despite identical text and stated methods of interpretation, judges may apply the single subject rule differently over time. I also coded whether each judgment came before or after the election and whether an appellate or supreme court issued the judgment. I also noted the state in which litigation took place.

*3. Variable Names and Data Overview*

Table 2 identifies the labels assigned to the variables, describes the variables, and specifies their means.

| Table 2: Overview of Variables | | |
|---|---|---|
| **Variable** | **Description** | **Mean** |
| *Dependent variable* | | |
| Single subject violation | 1 if the judge found a single subject violation, 0 otherwise | 0.385 |
| *Law variables* | | |
| Categorization subject count | "Subject count" under the categorization theory using the mean relatedness score[140]; range from 1 to 5.5; larger numbers indicate many subjects | 2.956 |
| Democratic process subject count | "Subject count" under the democratic process theory; range from 0.5 to 6; larger numbers indicate separable preferences/multiple subjects | 3.253 |
| *Politics variables* | | |
| Judges' politics | Judge's PAJID score; range from -37 to 54; larger numbers indicate more liberal views | 0 |
| Proposition politics | Politics score for each ballot proposition; range from -2.5 to 3.3; larger numbers indicate more liberal orientation | 0 |
| Judge-proposition political compatibility | Interaction of judges' politics and proposition politics; range from -106 to 119; larger numbers indicate greater political compatibility between judge and proposition | -2.046 |
| *Control variables* | | |
| Opinion year | Year judgment issued | 1997.818 |
| Pre-election review | 1 if proposition reviewed before citizens voted on it, 0 otherwise | 0.889 |
| Supreme court review | 1 if state supreme court issued judgment, 0 otherwise | 0.932 |
| CA | 1 if judgment issued by a California court, 0 otherwise (excluded from regressions) | 0.133 |
| CO | 1 if judgment issued by a Colorado court, 0 otherwise | 0.450 |
| FL | 1 if judgment issued by a Florida court, 0 otherwise | 0.329 |
| OK | 1 if judgment issued by an Oklahoma court, 0 otherwise | 0.089 |

The mean value of the dependent variable, "single subject violation," indicates the percentage of all judicial votes in the dataset finding a violation of the rule. The independent variables "categorization subject count" and "democratic process subject count" are self-explanatory. Positive correlations between these variables and the

[140] *See supra* notes 130-131 and accompanying text.

dependent variable support the hypothesis that law drives single subject decisions. Large positive values of "judge-proposition political compatibility" imply that judges' political views align closely with the proposition at issue and vice versa. A negative correlation between this variable and the dependent variable supports the hypothesis that politics drives single subject decisions. "Opinion year" indicates the year each judgment was issued. "Pre-election review" and "supreme court review" indicate whether each judgment was issued before the election and by the state supreme court, respectively. The mean values of these variables signify the fraction of judgments that meet each criterion. "CA," "CO," "FL," and "OK" indicate the state in which each judgment was issued. The mean values signify the fraction of judgments issued in each state.

*B. Results*

The results of the statistical analysis support both the legal and political models, as reported in Table 3, specification 1. The categorization subject count is positively associated with single subject violations at a statistically significant (1%) level. The democratic process subject count is also positively associated with single subject violations at a statistically significant (1%) level. These findings support the legal model: as the number of subjects in a proposition increases, judges are more likely to find single subject violations. Judge-proposition political compatibility is negatively associated with violations at a statistically significant (5%) level. This finding supports the political model: as the ideological distance between a judge and the proposition she reviews decreases, the judge is less likely to find a single subject violation.

**Table 3: Models of Single Subject Adjudication**

| | Dependent variable: Single subject violation | | |
|---|---|---|---|
| | Estimation technique: logit | | |
| | (1) | (2) | (3) |
| Categorization subject count | 1.014*** | | 1.008*** |
| | (0.127) | | (0.123) |
| Democratic process subject count | 0.419*** | | 0.445*** |
| | (0.0876) | | (0.0884) |
| Judges' politics | 0.00774 | 0.00540 | 0.00801 |
| | (0.00642) | (0.00470) | (0.00653) |
| Proposition politics | -0.508*** | -0.545*** | -0.488*** |
| | (0.0576) | (0.0541) | (0.0566) |
| Judge-proposition political compatibility | -0.00825** | -0.00786*** | -0.00853** |
| | (0.00357) | (0.00293) | (0.00361) |
| Pre-election review | 2.204*** | 3.259*** | |
| | (0.618) | (0.639) | |
| Supreme court review | 2.230*** | 1.629** | |
| | (0.823) | (0.687) | |
| Opinion year | -0.00156 | -0.00741 | -0.00204 |
| | (0.0170) | (0.0137) | (0.0179) |
| CO | -0.00321 | -0.746 | 2.772*** |
| | (0.651) | (0.551) | (0.366) |
| FL | -0.394 | -1.616*** | 2.339*** |
| | (0.658) | (0.551) | (0.413) |
| OK | -1.597** | -1.390** | 0.831* |
| | (0.637) | (0.590) | (0.483) |
| Constant | -5.860 | 10.68 | -3.300 |
| | (34.10) | (27.18) | (36.07) |
| N | 1067 | 1067 | 1067 |
| Standard errors in parentheses | | | |
| ="* p<.1 | ** p<.05 | *** p<.01" | |

If law and politics influence single subject determinations, which matters more? The signs on the regression coefficients indicate the direction of the relationship between each variable and judges' votes, but because of the non-linearity of the logit model, the

coefficients themselves are difficult to interpret. To make them meaningful I hold all independent variables at specific values and determine the predicted probability of a judge finding a single subject violation in that scenario. Comparing predicted probabilities in different scenarios provides a sense of the relative importance of law and politics.

To illustrate, I assume a Colorado (CO=1) supreme court justice (supreme court review=1) reviews a proposition for single subject compliance before the election (pre-election review=1). I set all remaining variables at their average values (e.g., opinion year=1998) except for categorization subject count and judge-proposition political compatibility. In one scenario, I assume that categorization subject count takes on its minimum value, meaning the proposition has one subject, and judge-proposition political compatibility takes on its maximum value, meaning the judge supports the proposition. The upper-right cell in Table 4 reports that the predicted probability of a single subject violation in this circumstance is 0.03, with a 95% confidence interval ranging from 0 to 0.07. In other words, the model predicts there is a 3% chance the judge will find a violation of the rule in this scenario. The rest of the table is completed using different values of categorization subject count and judge-proposition political compatibility.

**Table 4: Predicted Probability of a Single Subject Violation (using specification (1) above)**

| | **Political compat. = min (J opposes prop)** | **Political compat. = mean (J indifferent to prop)** | **Political compat. = max (J supports prop)** |
|---|---|---|---|
| **Categ. subject count = min (one subject)** | .18 (.04, .31) | .08 (.03, .14) | .03 (0, .07) |
| **Categ. subject count = mean (avg. # of subjects)** | .62 (.42, .82) | .41 (.26, .55) | .2 (.02, .38) |
| **Categ. subject count = max (many subjects)** | .95 (.9, 1) | .9 (.81, .98) | .76 (.51, 1) |

To understand the relative effects of law and politics I compare scenarios. Consider the first column, where the judge politically opposes the proposition in all three scenarios—and therefore we expect a violation. If the proposition has only one subject, there is an 18% chance that the judge will find a violation. If the proposition has many subjects, there is a 95% chance he will find a violation, a difference of 77 percentage points. Now consider the third row, where the proposition has many subjects—and again, we expect a violation. If the judge opposes the proposition, there is a 95% chance he will find a violation. If the judge supports it, there is a 76% chance he will find a violation, a difference of only 19 percentage points. Comparing these scenarios, when one expects to see a violation based on politics, the number of subjects in the proposition has a large predicted effect on whether a judge actually finds a violation. When one expects to see a violation based on law, politics has only a small predicted effect on whether a judge actually finds a violation.

Table 5 uses a similar approach to provide a more precise comparison of the relative effects of law and politics on single subject outcomes. Again, assume a Colorado supreme court justice reviews a proposition before the election, and all variables except for categorization subject count assume their mean values. Changing this variable from its minimum to its maximum value increases the likelihood of a judge finding a violation by 82 percentage points. Repeating this with a different variable, changing democratic process subject count from its minimum to its maximum value implies a 50 percentage point increase in the likelihood of a violation. Changing judge-proposition political compatibility from its minimum to its maximum implies a 42 percentage point decrease in the likelihood of a violation. The same exercise with a more modest change—each

variable starts at one-half standard deviation below its mean and moves to one-half standard deviation above—yields the same general result: law trumps politics.

| Table 5: Change in Predicted Probability of a Single Subject Violation (using spec. (1) above) | | |
|---|---|---|
| | **Min to Max** | **-½ SD to ½ SD** |
| **Categ. Subject Count** | **.82** | **.23** |
| **Demo. Proc. Subject Count** | **.50** | **.11** |
| **Judge-Prop. Political Comp.** | **-.42** | **-.06** |

At least two statistical problems could undermine this analysis: problems in the measurement of the variables categorization subject count, democratic process subject count, and proposition politics; and selection bias in the sample, which only includes propositions challenged in court, not all propositions. Appendix B reports robustness checks on these potential problems and concludes they do not disturb the analysis.

Table 3 includes two other specifications that deserve brief mention. Specification 2 omits the legal variables and only tests the political model. Therefore, it resembles most empirical studies of judicial behavior. It is easy to understand how a researcher examining just this model would erroneously conclude that politics drives judicial behavior.[141] Specification 3 makes a descriptive point. The pre-election review and supreme court review variables are eliminated. This makes CO and FL positive and statistically significant (1%). All litigation in Colorado and Florida takes place pre-election in the supreme court, and together these states account for about three-quarters of the data. Only a few observations from the other states are from pre-election review in supreme courts. Therefore, I cannot conclude if pre-election review and review by a supreme court actually lead to higher invalidation rates, or if pre-election and supreme

[141] Specification 2 performs more poorly in goodness-of-fit statistics than specification 1. For example, the adjusted $R^2$ of specification 2 is 0.179, and for specification 1 is it 0.281.

court review just serve as proxies for something else that affects judges' votes in Colorado and Florida.

*C. Discussion and Future Work*

This analysis compares the relative effects of law and politics on adjudication, and I find that law dominates. Changes in the number of legal subjects in a proposition according to the categorization theory associate with a large change in the likelihood of a judge finding a violation. Comparable changes in the number of subjects according to the democratic process theory associate with a "medium-sized" change in the likelihood of a judge finding a violation. And comparable changes in a judge's support for a proposition associate with the smallest change in the likelihood of a violation.

These results have implications for legal and policy debates on the single subject rule. The categorization theory systematically provides predictable answers in single subject disputes. This does not mean that categorization *always* yields clear outcomes; as discussed, some cases are difficult. But the rule has more traction than many observers claim. Judges' political preferences also systematically influence outcomes, but to a lesser degree than scholars expect. Simply put, judges behave better than most would predict. The democratic process theory strongly correlates with case outcomes. This supports the hypothesis that many judges intuitively apply the theory in many disputes.

The results also have implications for the broader debate over what motivates judicial decision-making. By including a direct measure of the law in the same regression as political variables, this study begins to bridge the gap between the legal

model, which resonates with lawyers but lacks direct empirical support, and the political model, which offends notions of justice and has empirical support.

This project lays the foundation for future work. With data already collected I can address (and will address if invited to ALEA) the following questions: is the correlation between law and judges' votes the same for conservative and liberal judges, or does one type of judge behave "better" than the other? Is the correlation between politics and outcomes the same for conservative and liberal judges, or is one type of judge more political than the other? Does law matter less and politics more when a proposition is ideologically extreme? And does politics matter more when the legally correct outcome is ambiguous, where the variance of survey responses for a proposition serves as a proxy for legal ambiguity?

## CONCLUSION

Judges, lawyers, scholars, and cynics have long debated whether law or politics motivates judicial decision-making. The single subject rule requires judges to apply a malleable standard to politically salient propositions and, occasionally in the face of overwhelming popular support, strike some down. This illustrates the high stakes of this debate, both for the law and for democracy.

I aim to make en empirical and methodological contribution to this literature. I develop an objective measure of the number of subjects in a host of propositions and use quantitative methods to test whether law or politics plays a greater role in single subject adjudication. I find that law trumps politics. Judges apply the rule more objectively than most observers expect, although politics does matter. This analysis helps to explain the

oft-litigated and controversial single subject rule and supports the legal model of judicial decision-making.

## APPENDIX A

### DATA ON SINGLE SUBJECT LITIGATION

This appendix describes in detail the criteria and methods employed to create the dataset. I relied on the WESTLAW service. For every state with a single subject rule that applies to initiatives I searched the specific WESTLAW database containing all opinions from that state's state-level courts. I limited the date range of the searches to the period between January 1, 1980, and June 30, 2007. I chose that start date because, according to the Initiative and Referendum Institute, it marks the beginning of the modern era of heavy initiative usage.[142] The end date was current when this research began.

I read all cases returned by each search and retained for further study those that met the following criteria: (a) included a single subject challenge to a (b) statewide ballot proposition, and (c) a state appellate or state supreme court (d) issued a decision on the single subject question. If one or more appellate courts addressed the constitutionality of a particular proposition and then the supreme court addressed that same proposition, all appellate opinions were retained, along with the supreme court opinion.[143] Cases involving other constitutional provisions that were interpreted to operate identically to the single subject rule (e.g., separate vote rules in some states) were retained.[144] I excluded cases involving indirect initiatives that were enacted by the legislature because they did not involve a vote of the citizenry.

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[142] *See* Initiative and Referendum Institute, *Initiative Use,* Los Angeles: University of Southern California Law School. Report available at: http://www.iandrinstitute.org/.

[143] In a handful of cases ongoing litigation was rendered moot by an intervening decision of the supreme court on the single subject question. These cases were discarded.

[144] The separate vote rule has generated a handful of cases in several states in recent years. I used WESTLAW to identify every case in each state premised on a separate vote rule claim, and I retained those cases in which that rule was expressly interpreted the same as the single subject rule.

To be clear, single subject challenges to local ballot measures and ordinary legislation were discarded. Likewise, single subject challenges that were unresolved (e.g, non-justiciable due to ripeness concerns) and single subject decisions issued by federal courts were discarded. I estimate that excluding local, unresolved, and federal single subject cases reduced the total case count by about 5 percent. In Florida, the single subject rule can be used to invalidate propositions for failing to identify the constitutional provisions that they substantially alter and for affecting multiple functions of government. Because such cases do not require the court to "count" subjects I discarded them.

Coding all opinions that satisfied the above criteria yielded 178 cases from 14 states. Those cases addressed 191 ballot propositions, and courts issued 208 decisions on the single subject question. Of those decisions, 71 found a single subject violation, and this resulted in the complete invalidation of 67 propositions.

For the regressions I only used data from states with at least ten cases. California, Colorado, Florida, and Oklahoma satisfied this criterion.

## APPENDIX B

## ROBUSTNESS CHECKS

This appendix examines two potential statistical problems that could undermine the analysis in Part IV: problems in the measurement of the categorization subject count, democratic process subject count, and proposition politics; and selection bias in the sample, which only includes propositions challenged in court, not all propositions.

### *A. Measurement Errors*

The independent variables categorization subject count and democratic process subject count were gathered with surveys of students. The independent variable proposition politics was gathered by having student research assistants independently code the propositions. Each of these variables may suffer from measurement problems. The unobserved true values of each variable may differ from the observed estimates derived from student responses. More formally, each observation, *k*, of one of these variables is the sum of the true unobserved value, indicated with an asterisk, and measurement error: $x_k = x_k^* + e_k$. If the observed values correlate with the measurement error, $\text{cov}(x_k, e_k) \neq 0$, then including the observed values in the regressions leads to attenuation bias in the coefficient estimates.[145] This is because an included regressor, $x_k$, correlates with the error term.

I can correct for this by using the student responses to generate two variables rather than one and then use one as an instrument for the other. To illustrate, each observation of the variable categorization subject count is the average of all students'

survey responses with respect to the proposition at issue. I can use those same responses to generate two new variables, "CATEG1" and "CATEG2." The former is the average of two students' survey responses, randomly selected from all survey responses, and the latter is the average of the remaining students' survey responses. CATEG1 and CATEG2 are proxies for the variable categorization subject count and for "CATEG*," the true, unobserved values of this variable. An OLS regression in which CATEG1 is the independent variable and CATEG2 the dependent variable generates a set of predicted values for CATEG1. I can use those predicted values in the primary regression and, because they do not correlate with the error term, mitigate attenuation bias.

I followed this process to generate predicted values for the variables categorization subject count, democratic process subject count, and proposition politics. The new variables have the same names as the old but with the prefix "predicted." I also created a new variable, "predicted political compatibility," that interacts judges' politics with predicted proposition politics. Table 6 reports the results of the same regression as in Table 3, specification 1, but with the use of predicted values.

[145] For a discussion, see JEFFREY M. WOOLDRIDGE, ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA 73-75 (2002).

**Table 6: Measurement Errors**

| | Dependent variable: Single subject violation<br>Estimation technique: logit |
|---|---|
| Predicted categorization subject count | 1.757*** |
| | (0.175) |
| Predicted democratic process subject count | 10.95*** |
| | (1.763) |
| Judges' politics | 0.00641 |
| | (0.00609) |
| Predicted proposition politics | -0.576*** |
| | (0.0867) |
| Predicted political compatibility | -0.00887* |
| | (0.00496) |
| Pre-election review | 1.877*** |
| | (0.610) |
| Supreme court review | 2.255*** |
| | (0.808) |
| Opinion year | -0.00900 |
| | (0.0173) |
| CO | 0.267 |
| | (0.643) |
| FL | -0.402 |
| | (0.633) |
| OK | -1.254** |
| | (0.625) |
| Constant | -28.09 |
| | (35.54) |
| N | 1067 |

Standard errors in parentheses
* p<.1 ** p<.05 *** p<.01

The signs on all variables of interest are the same as in Table 3. Predicted categorization subject count and predicted democratic process subject count remain statistically significant (1%), as does predicted political compatibility, albeit at a lower level (10%) than before. To interpret these coefficients, Table 7 replicates Table 5 with the new variables. Values in parentheses are drawn from the corresponding cells in Table 5. Table 7 makes clear that the predictions from the two models are almost the same.

| Table 7: Change in Predicted Probability of a Single Subject Violation | | |
|---|---|---|
| | **Min to Max** | **-½ SD to ½ SD** |
| **Predicted categ. subject count** | **.76 (.82)** | **.22 (.23)** |
| **Predicted demo. proc. subject count** | **.47 (.50)** | **.13 (.11)** |
| **Predicted political compatibility** | **-.34 (-.42)** | **-.05 (-.06)** |

I find no evidence that measurement problems are significantly biasing the results in Part IV.

*B. Selection Bias*

Propositions challenged on single subject grounds are not randomly selected from all propositions that appear on the ballot. Presumably, propositions likely to violate the rule get challenged, and propositions unlikely to violate the rule do not. Because I only observe propositions that get challenged, the sample may be biased. If an unaccounted for variable in the error term—such as who sponsored each proposal—correlates with included variables, such as the number of the subjects in each proposition; and if that same unaccounted for variable correlates with judges' votes; then coefficients in the model are biased.

A standard technique for solving selection bias is to estimate a two-stage model using an instrument that explains which propositions get challenged but does not correlate with judges' votes. Identifying a suitable instrument is notoriously difficult. Instead, I rely on a natural corrective. All propositions on Florida's ballot get reviewed

for single subject compliance.[146] Consequently, the Florida data do not suffer from the selection problem.

Table 8 shows a model using most of the same independent variables as in Table 3.[147] For each independent variable the model also includes an interaction term between that variable and the Florida dummy (indicated with the prefix "FL"). The coefficients on these interaction terms indicate the effect of each variable on judges' votes in Florida as compared to the other states. If these coefficients equal zero, the covariates have the same association with judges' votes in Florida as elsewhere.

An F-test of the hypothesis that the coefficients on all Florida interaction terms simultaneously equal zero cannot be rejected.[148] I conclude that selection does not significantly bias the results in Part IV.

[146] This has been true since 1986. *See supra* note 119. Only one Florida proposition appeared on the ballot during the period of this study without ever being reviewed for single subject compliance. Therefore, the sample from Florida is essentially the complete universe of Florida propositions.

[147] I exclude variables from Table 3 that could not be interacted with the Florida dummy: supreme court review, CO, FL, OK.

[148] $\chi^2 = 8.89, \Pr(> \chi^2) = .2603.$ T-tests of the hypothesis that the coefficient on each individual Florida interaction equals zero also cannot be rejected with the exception of the hypothesis that FL democratic process subject count = 0, where $\chi^2 = 3.02, \Pr(> \chi^2) = .0822.$

Table 8: Selection Bias

| | Dependent variable: Single subject violation |
|---|---|
| | Estimation technique: logit |
| Categorization subject count | 0.970*** |
| | (0.185) |
| Democratic process subject count | 0.467*** |
| | (0.144) |
| Judges' politics | 0.0237 |
| | (0.0177) |
| Proposition politics | -0.539*** |
| | (0.0748) |
| Judge-proposition political compatibility | -0.00832 |
| | (0.00660) |
| Pre-election review | 3.110*** |
| | (0.474) |
| Opinion year | 0.0389 |
| | (0.0346) |
| FL categorization subject count | -0.178 |
| | (0.244) |
| FL democratic process theory subject count | -0.275* |
| | (0.158) |
| FL judges' politics | -0.0228 |
| | (0.0188) |
| FL proposition politics | 0.0538 |
| | (0.0902) |
| FL judge-proposition political compatibility | 0.00464 |
| | (0.00729) |
| FL pre-election review | 26.03 |
| | (75.38) |
| FL opinion year | -0.0125 |
| | (0.0375) |
| constant | -85.53 |
| | (69.66) |
| N | 1067 |
| Standard errors in parentheses | |
| ="* p<.1 | ** p<.05 *** p<.01" |