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COMMENTS

IT'S STILL A PEANUT BUTTER COOKIE: A COMMENT ON *DOUGLAS V. COX RETIREMENT PROPERTIES, INC.*

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I. INTRODUCTION

In June of 2013, the Oklahoma Supreme Court rocked the legal and business communities by declaring the Comprehensive Lawsuit Reform Act of 2009 (CLRA) unconstitutional in *Douglas v. Cox Retirement Properties, Inc.*¹ Although the stated rationale behind the CLRA was tort reform,² the Court held that the CLRA violated article V, section 57, of the Oklahoma Constitution, also known as the Single Subject Rule (SSR),³ because it contained too many diverse and unrelated subjects.⁴

* J.D. candidate, Oklahoma City University School of Law, 2016. The Author would like to thank her parents, Michael and Sophia Adams, for their love and support; her mentor, Mike Perri, for his knowledge, guidance, and encouragement, and for being her inspiration to study law; Susan Wortham, Beau Bruhwiler, and Daron Southerland for their continuous support and lively debates, which made the study of law unforgettable; and most importantly, her husband, Benny Dooley, and son, Elijah Dooley, for their endless love, support, and patience.

1. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 12, 302 P.3d 789, 794.
2. *Id.* ¶ 1, 302 P.3d at 801 (Winchester, J., dissenting).
3. *See infra* Part III.B.3.
4. *Douglas*, 2013 OK 37, ¶ 10, 302 P.3d at 793.

The purpose of this Comment is not to debate the merits of tort reform in Oklahoma; rather, this Comment will discuss the difficulties of strictly and narrowly interpreting Oklahoma's SSR.

Part II begins with some background on the SSR, including its history and policies. Part III is a discussion regarding two problems of the SSR: (1) the problem of using a single test to determine relatedness and (2) courts' subjectivity in applying the SSR. Part IV will then turn to an analysis of *Douglas* and the difficulties presented as a result of its narrow holding. This analysis will begin with a review of tort reform in Oklahoma, to put into context the legislature's intent in enacting the CLRA, and then focus on the abandonment of the broad construction of the SSR, judicial precedent, and the refusal of the Court to sever the unconstitutional provisions of the act, all of which are evident in *Douglas*. This Comment will conclude with a call to the Oklahoma Supreme Court to uphold a broader construction of the SSR and avoid a narrowly construed interpretation.

II. BACKGROUND TO THE SINGLE SUBJECT RULE

Before delving into an argument about whether a court should apply a narrow or broad interpretation of the SSR, the historical and policy background of the rule provides the proper lens to see specific applications of the rule. Looking at the history of the SSR allows one to understand the origins of the rule and how it was treated in the past to enable more consistent and effective future applications.

A. History

1. Roman Origins

Ancient Rome is responsible for what is now known as the SSR.⁵ Roman lawmakers found that they could successfully "enact[] dubious proposals by" mingling them with "popular ideas."⁶ When the time came to vote, the choice was either to take the good provisions with the bad or

5. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 811 (2006).

6. Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1640 (2005).

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none at all.⁷ The practice of combining popular and unpopular provisions into one act was so prevalent that “the Romans in 98 B.C. forbade laws consisting of unrelated provisions.”⁸ Observing this past application and its role in a modern context enables policy makers to determine the correctness of their decisions, especially when working with numerous policies. Much of the rule’s history has given way to modern policies behind the SSR such that in order to avoid repeating past mistakes, these policies have become accepted and adopted in most jurisdictions.

2. American Colonialism

Colonial America adopted the Romans’ practice of forbidding unrelated provisions.⁹ As early as the 17th century, the Committee of the Privy Council in Massachusetts grew frustrated with legislators combining multiple subjects “under ye same title.”¹⁰ If the legislature wanted to invalidate an unfavorable provision, the process was not easy: they could not simply separate and enact the favorable provisions.¹¹ Consequently, in 1844, New Jersey took the first step in enacting a form of the SSR.¹² Other states soon followed suit. By 1846, four other states (Louisiana, Texas, New York, and Iowa) had all enacted their own versions of the SSR.¹³ By 1959, only seven states—Connecticut, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, and Vermont—were without any form of the SSR.¹⁴

B. Policies

1. Logrolling

Like the early Romans, state legislators will sometimes seek to pass unfavorable proposals by appending them to favorable legislation.¹⁵ This

7. *Id.*

8. Gilbert, *supra* note 5, at 811.

9. Kastorf, *supra* note 6, at 1640.

10. Gilbert, *supra* note 5, at 811.

11. *Id.*

12. *Id.* at 812.

13. *Id.*

14. *Id.* at 812 n.41.

15. BLACK’S LAW DICTIONARY 1026 (9th ed. 2009).

practice is called “logrolling.”¹⁶ Although the United States Congress may roll several subjects into one bill,¹⁷ most states have statutes that restrict legislative logrolling¹⁸ since the basis of the SSR is “to prevent [logrolling].”¹⁹ The basis of the anti-logrolling provisions is to prevent manipulation by legislators to trade votes in order to have their own political agendas advanced.²⁰ Thus, the SSR was enacted to deter logrolling by prohibiting miscellaneous combinations of proposals in one act.²¹ While history has shown that there are good reasons to prevent logrolling, the SSR has created much confusion because it lacks a clear definition, as discussed later in this Comment.²²

2. Severability

Severing unconstitutional provisions has a dual purpose. Not only is it a remedy to cure SSR violations, but it is also an alternative to wholesale invalidation. Besides, “[a] cardinal principle of statutory construction is to save and not destroy.”²³ Invalidation, generally speaking, is frowned upon.²⁴ Instead of wholesale invalidation, if the court finds that some provisions of a bill are in violation of the SSR, the

16. *Id.*

17. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 12, 302 P.3d 789, 799.

18. Stanley R. Kaminski & Elinor L. Hart, *Log Rolling Versus the Single Subject Rule*, 80 U.S.L.W. Online (Feb. 28, 2012), available at http://www.duanemorris.com/articles/static/kaminski_hart_bloombergna_022812.pdf.

19. *Id.* In addition, logrolling was also enacted “to prevent riders; . . . to reduce the confusion and deception of voters; and . . . to improve political transparency.” *Id.* Another “less obvious” purpose is to “protect[] gubernatorial veto power. . . .” *Id.* Of these purposes, the Oklahoma Supreme Court places special emphasis on prevention of logrolling. See generally *Fent v. State ex. rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 14, 214 P.3d 799, 804; *Fent v. State ex. rel. Office of State Fin.*, 2008 OK 2, ¶ 30, 184 P.3d 467, 478; *Weddington v. Henry*, 2008 OK 102, 202 P.3d 143; *In re Initiative Petition No. 382*, 2006 OK 45, ¶ 8, 142 P.3d 400, 405; *Morgan v. Daxon*, 2001 OK 104, ¶¶ 1, 4, 49 P.3d 687, 687–88, 693; *Campbell v. White*, 856 P.2d 255, 258 (Okla. 1993).

20. Gilbert, *supra* note 5, at 815.

21. *Id.* at 829.

22. John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399, 399 (2010).

23. *Conaghan v. Riverfield Country Day Sch.*, 2007 OK 60, ¶ 23, 163 P.3d 557, 565; *In re Okla. Dep’t of Transp. for Approval of Not to Exceed \$100 Million Okla. Dep’t of Transp. Grant Anticipation Notes, Series 2002*, 2002 OK 74, ¶ 27, 64 P.3d 546, 553.

24. Gilbert, *supra* note 5, at 828–29.

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court has the option of severing the unconstitutional portions of the act.²⁵ Severability provisions are “general legislative directive[s] . . . that if any part of a statute is found to be unconstitutional, the remaining provisions shall be valid.”²⁶ The decision to strike offensive provisions of a statute requires the court to consider multiple factors. These factors ask whether severing would affect legislative intent, whether the remaining provisions would have still been enacted by the legislature despite severing, and whether the statute would survive in the absence of “the non-offending language.”²⁷

The concept of severability as a remedy and alternative to invalidation is consistent with the principles of statutory construction; that is, “to save and not destroy.” Thus, when a provision is deemed unconstitutional, severance is a more favorable course of action.²⁸ This is because severance “represents ‘a far less disruptive’ course of action than . . . complete nullification.”²⁹ Wholly overturning an entire bill invalidates all of the work that it took to pass it.³⁰ A legislature’s intent can be best served by severing the unrelated provisions.³¹

III. INTERPRETING THE SINGLE SUBJECT RULE

Most courts use different parameters to determine whether an act violates the SSR. Specifically, context can play a significant role in determining whether a particular act contains more than one subject. In making that determination, the interpretation of what a single subject should constitute is often left up to the discretion of a judge. Alternatively, tests have been developed to address whether diverse provisions in a single act are related. Yet these tests vary in jurisdictions resulting in inconsistencies. This leaves the door wide open for judicial interpretation and disregards legislative intent. Therefore, courts should

25. *Liddell v. Heavner*, 2008 OK 6, ¶ 29, 180 P.3d 1191, 1203; *Ethics Comm’n of Okla. v. Cullison*, 850 P.2d 1069, 1077 (Okla. 1993).

26. *Conaghan*, 2007 OK 60, ¶ 24, 163 P.3d at 565.

27. *Okla. Corr. Prof’l Ass’n v. Jackson*, 2012 OK 53, ¶ 13, 280 P.3d 959, 965.

28. Alexander R. Knoll, *Tipping Point: Missouri Single Subject Provision*, 72 Mo. L. REV. 1387, 1392 (2007).

29. Gilbert, *supra* note 5, at 828.

30. *Douglas v. Cox Ret. Prop., Inc.*, 2013 OK 37, ¶ 9, 302 P.3d 789, 803 (Winchester, J., dissenting).

31. Gilbert, *supra* note 5, at 829.

adopt a broader interpretation of the SSR that defers to legislative intent while simultaneously minimizing judicial interpretation.

A. Context and Subjectivity

The term *subject* ordinarily means “reason, motive, cause.”³² Thus, one could surmise that the term *subject* connotes subjectivity; that is to say, what a subject is to a particular individual is based on his or her internal thoughts.³³ Opponents of strict enforcement of the SSR warn that “a subject is in the eye of the beholder”³⁴ and that “[t]opics or themes cannot objectively be classified into one subject or another.”³⁵ In plain language, this means that the SSR is largely based on the subjectivity of a judge.³⁶ Thus, SSR enforcement is not necessarily objective.³⁷

Whether multiple provisions of an act relate to a single subject also depends on context.³⁸ However, determining context is not easy as two minds rarely interpret information the same way. Consequently, a judicial ruling that finds an act too all-encompassing is suspicious because it is highly probable that the judge, versus the legislature, understood the context differently from what constitutes a single subject.³⁹ To determine the context in which a bill is enacted, it “would require a transcript of the thoughts of every legislator who voted for the bill.”⁴⁰ Judges who aggressively apply the SSR must essentially make arbitrary decisions about rule violations according to their subjective, personal ideas of politics or policy rather than whether the act actually contains multiple subjects.⁴¹

32. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2275 (unabr. 1986). See 17 THE OXFORD ENGLISH DICTIONARY 29 (2d ed. 1989) (“In a specialized sense: ‘That which forms or is chosen as the matter of thought, consideration, or inquiry; a topic, theme.’”).

33. Gilbert, *supra* note 5, at 825.

34. *Id.* (quoting Daniel Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936, 938 (1938)).

35. *Id.*

36. See Matsusaka & Hasen, *supra* note 22, at 400.

37. Gilbert, *supra* note 5, at 825.

38. *Id.*

39. *Id.*

40. *Id.*

41. Matsusaka & Hasen, *supra* note 22, at 400.

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B. Inconsistent Tests for Relatedness

1. California's "Germaneness"

There are competing interpretations of the SSR among the states.⁴² At one end of the spectrum, for example, California has adopted a more lenient interpretation of the SSR.⁴³ California courts broadly construe the SSR when the provisions of an act "are reasonably germane."⁴⁴ By rejecting a technical construction, the intent of the legislature is given deference, and California courts rarely invalidate proposed legislation based on the SSR.⁴⁵ California's generous deference to the legislature thus allows the legislature to pass laws with "numerous complex provisions . . . that [are] only vaguely related."⁴⁶

2. Florida's "Oneness"

At the other end of the spectrum, Florida applies the SSR "in a sweepingly broad and uniquely aggressive manner."⁴⁷ In Florida, to avoid a violation of the SSR, oneness is key; that is, the provisions that make up an act must contain a "logical and natural oneness of purpose."⁴⁸ To illustrate the restrictiveness of Florida's rule, the Court's decision in *In re Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination* nullified an amendment to Florida's constitution that prevented the legislature from enacting "antidiscrimination laws based on characteristics other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status."⁴⁹ The Florida Supreme Court held that the

42. See Kenneth S. Hicks, *The Politics of Plebiscites: The Initiative Process and Oklahoma's Single Subject Rule*, 21 OKLA. POL. 29, 42 (2011).

43. *Id.*

44. *Id.* (quoting *Perry v. Jordan*, 207 P.2d 47, 50 (Cal. 1949)).

45. *Id.* (quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1083 (Cal. 1990)).

46. *Id.* at 42–43.

47. *Id.* at 43.

48. *Matusaka & Hasen*, *supra* note 22, at 403 (quoting *Advisory Op. re Indep. Nonpartisan Comm'n*, 926 So. 2d 1218, 1225 (Fla. 2006)).

49. *Id.* (quoting *In re Advisory Op. to Atty. Gen.*, 632 So. 2d 1018, 1020 (Fla. 1994)) (internal quotation marks omitted).

initiative contained multiple subjects and violated the SSR by making voters answer yes or no to “each criterion of discrimination.”⁵⁰

3. Oklahoma’s “Middle Ground”

Oklahoma’s SSR is codified in article V, section 57, of the Oklahoma State Constitution:

Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof.⁵¹

The Oklahoma Supreme Court has visited the issue of violations of the SSR at least seven times in the past 20 years.⁵² The Court has held bills unconstitutional that contain multiple subjects because policy dictates that all involved in the law-making process deserve to know “the scope and effect of” the laws they are required to follow.⁵³ Thus, the Court asks: Was the public “misled” or “forced to choose between . . . provisions” that are not related by “a common, closely akin theme or purpose”?⁵⁴

In 1993, Oklahoma adopted a germaneness test in *Campbell v. White* to determine relatedness.⁵⁵ Oklahoma’s interpretation appears to be somewhere between the strict and lenient interpretation of the SSR. Similar to California, the Oklahoma Supreme Court uses the germaneness test to determine whether the provisions are related to one

50. *Id.*

51. OKLA. CONST. art. V, § 57.

52. *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 4, 233 P.3d 380, 382.

53. *Campbell v. White*, 856 P.2d 255, 258 (Okla. 1993).

54. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 6, 302 P.3d 789, 792–93.

55. *Campbell*, 856 P.2d at 260.

subject.⁵⁶ However, unlike California, Oklahoma does not allow vague relationships between provisions but determines relatedness by asking whether the voting public was left “with an unpalatable all-or-nothing choice” by allowing the legislature to piggyback multiple provisions in one bill.⁵⁷ Thus, in that respect, Oklahoma is more similarly situated to Florida’s stringent standard of interpreting the SSR.⁵⁸

According to Oklahoma’s germaneness test, the Court will uphold legislation as long as the subjects contained in the bill are unified as well as “germane, relative, and cognate to one another.”⁵⁹ For example, provisions are *germane* if they “reflect a common, closely akin theme or purpose.”⁶⁰ But does this mean that the provisions should be closely akin to one another or that the provisions should be closely akin to the title of the act? The text of § 57 does not say that subjects under the title must be related to one another.⁶¹ It does say that “[e]very act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title”⁶² It would be useful if the Court would clarify the ambiguity of the relatedness prong because strict enforcement of the SSR leaves the door open for interpretation.

Such ambiguity raises other problems when these questions remain unanswered because such tests “are far from precise, leaving judges with little guidance and much discretion.”⁶³ This discretion fosters a judicial system based on preference, whether political or personal, rather than on the relatedness of an act.⁶⁴ Moreover, courts will overlook the fact that not all multiple-provision bills are “the product of logrolling.”⁶⁵ The endgame for the legislature is to promote efficiency by eliminating the need for extended sessions or allowing time for multiple votes.⁶⁶ Thus,

56. *Douglas*, 2013 OK 37, ¶ 6, 302 P.3d at 792.

57. *Id.* ¶ 15, 302 P.3d at 800 (quoting *In re Initiative Petition No. 382*, 2006 OK 45, ¶ 14, 142 P.3d 400, 408) (internal quotation marks omitted).

58. *Id.* ¶ 2, 302 P.3d at 801 (Winchester, J., dissenting) (quoting *Griffin v. Thomas*, 206 P. 604, 609 (Okla. 1922)).

59. *Campbell*, 856 P.2d at 260.

60. *Douglas*, 2013 OK 37, ¶ 6, 302 P.3d at 793.

61. *See supra* note 51 and accompanying text.

62. *Id.*

63. Gilbert, *supra* note 5, at 827.

64. *Id.* 827–28 (quoting Carl H. Manson, *The Drafting of Statute Titles*, 10 IND. L.J. 155, 159 (1934)); Kaminski & Hart, *supra* note 18.

65. Gilbert, *supra* note 5, at 830.

66. *Id.*

when legislators are operating on a short fuse, combining multiple provisions is advantageous.⁶⁷

IV. APPLYING THE SINGLE SUBJECT RULE: *DOUGLAS V. COX RETIREMENT PROPERTIES, INC.*

A. *Oklahoma Tort Reform and the Comprehensive Lawsuit Reform Act of 2009*

For nearly 30 years, the Oklahoma legislature has grappled with tort reform.⁶⁸ In 1995, the legislature passed its first attempt to address the tort reform issue with Citizens Against Lawsuit Abuse, an organization dedicated to curbing frivolous lawsuits.⁶⁹ The resulting compromise—S.B. 263—contained several measures that focused on decreasing lawsuit abuse, such as adopting a loser-pay approach to recovery.⁷⁰ This meant that if a party that refused to settle lost, the act required the party to pay some of the opponent's trial costs.⁷¹ S.B. 263 was a product of compromise between those who thought the measure encouraged settlement disputes, and those who complained that the bill was drafted by big businesses and without the legislature's intent.⁷²

But to many medical doctors and medical malpractice insurance carriers, S.B. 263 was not enough, and tort reform efforts continued.⁷³ The rationale was that tort reform would ensure more affordable malpractice insurance premiums, thereby lowering the overall cost of healthcare. For example, the Affordable Access to Health Care Act (AAHCA) in 2003 had four goals: (1) to “[l]ower the cost of medical liability insurance;” (2) to “[i]mprove access of health care services;” (3) to “[e]nsure fair and adequate compensation for health care claims; and” (4) to “[i]mprove the fairness and cost-effectiveness of [Oklahoma's] current medical liability system”⁷⁴ In the end, the AAHCA achieved

67. *Id.*

68. Chris D. Jones, Note, *Medical Negligence Lawsuits in Oklahoma: An Empirical Study*, 31 OKLA. CITY U. L. REV. 93, 99 (2006).

69. *Id.* at 100.

70. *Id.*

71. *Id.*

72. *Id.* at 99–100.

73. *Id.* at 101.

74. OKLA. STAT. tit. 63, § 1-1708.1B (2001); Beth Reynolds, *A Review of Oklahoma's 2003 and 2004 Tort Reform*, 57 OKLA. L. REV. 935, 936 (2004) (discussing

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its intent by limiting non-economic damages to \$300,000⁷⁵ and requiring a qualified expert's affidavit attesting to the merit and good faith of a plaintiff's professional negligence claims.⁷⁶

Yet the anxiety about rising malpractice insurance premiums, excessive jury awards, and the overall cost to the medical community in Oklahoma continued.⁷⁷ Legislative hearings in 2004 drew attention to concerns on one hand held by medical students, practicing physicians, and insurance companies and victims of malpractice on the other.⁷⁸ The legislature's emerging response was the approval of H.B. 2661, which amended the AAHCA and was heralded as the "most comprehensive piece of tort reform legislation" passed in Oklahoma.⁷⁹ Among other things, the tort reform bill included provisions that ultimately catered to the business and medical communities by, for example, limiting the amount a plaintiff can recover for pain and suffering and restricting a plaintiff's opportunity to forum shop.⁸⁰ Governor Henry described the bill as "a major step . . . for Oklahoma, . . . [being] pro-business, pro-health and pro-consumer."⁸¹

Tort reform was on the agenda for the Oklahoma legislature again in 2009.⁸² H.B. 1603, the CLRA, passed the Oklahoma House of Representatives by a vote of 86–13 and the Senate by a vote of 42–5.⁸³ The CLRA officially went into effect on November 1, 2009.⁸⁴ The provisions of the CLRA sought to remediate the court system by limiting a plaintiff's ability to sue on unmeritorious grounds while simultaneously promoting judicial efficiency without barring a plaintiff's access to civil

the legislative history surrounding the AAHCA).

75. Reynolds, *supra* note 74, at 937.

76. OKLA. STAT. tit. 63 § 1-1708.1E(A)(1) (2001) (repealed 2013); Reynolds, *supra* note 74, at 936 (discussing the affidavit requirement for petitions in medical liability actions in the AAHCA).

77. Jones, *supra* note 68, at 101.

78. *Id.* at 103.

79. *Id.* at 99.

80. *Okla. Gov. Applauds Tort Reform Approval*, INS. J. (May 28, 2004), <http://www.insurancejournal.com/news/southcentral/2004/05/28/42745.htm> (quoting Gov. Brad Henry).

81. *Id.*

82. See Michael McNutt & Julie Bisbee, *Tort Reform Bill Goes to Oklahoma Gov. Brad Henry*, NEWSOK (May 15, 2009), <http://newsok.com/tort-reform-bill-goes-to-oklahoma-gov.-brad-henry/article/3369622>.

83. *Id.*

84. 8 VICKI LAWRENCE MACDOUGALL, OKLAHOMA PRACTICE SERIES: OKLAHOMA PRODUCT LIABILITY LAW § 3:9 (Supp. 2012).

remedies.⁸⁵ The CLRA included “caps [on] non-economic damages, eliminate[d] joint and several liability, cap[ped] appeal bonds at \$25 million . . . [all] while providing consumer safeguards for Oklahomans with legitimate claims.”⁸⁶ Agreeing on a comprehensive lawsuit reform package, doctors, insurance companies, and lawyers came together to support the CLRA.⁸⁷

B. The Douglas Decision

1. Facts

The popular CLRA faced its fatal test in *Douglas v. Cox Retirement Properties, Inc.* in 2013. This case arose out of a wrongful death action against the defendant, Cox Retirement Properties, Inc.⁸⁸ Richard Douglas was admitted to Cox’s facility for long-term care but was discharged 21 days later.⁸⁹ Douglas died soon thereafter, and his estate filed suit in Tulsa County, Oklahoma, “alleging [that] Douglas died as a result of the facility’s negligent care and treatment.”⁹⁰

Cox filed for dismissal, pointing out that the Douglas estate failed to comply with the CLRA requirement of attaching an affidavit of a qualified expert to its petition in an action for professional negligence.⁹¹ The statute required that the affidavit set forth certain information such as a statement that the plaintiff has obtained a written opinion from a qualified expert, and that based on the expert’s review of the facts and materials, the acts or omissions of the defendant constituted professional negligence.⁹²

85. *Okla. Gov. Signs Comprehensive Tort Reform Legislation*, INS. J. (May 22, 2009), <http://www.insurancejournal.com/news/southcentral/2009/05/22/100775.htm>.

86. *Id.*

87. McNutt & Bisbee, *supra* note 82.

88. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 1, 302 P.3d 789, 791.

89. *Id.*

90. *Id.*

91. *Id.* ¶ 2, 302 P.3d at 791.

92. The CLRA stated, in part,

A. 1. In any civil action for professional negligence, except as provided in subsection B of this section, the plaintiff shall attach to the petition an affidavit attesting that:

a. the plaintiff has consulted and reviewed the facts of the claim with a qualified expert,

The court granted Cox's motion to dismiss and ordered that the estate file the affidavit required by statute within 30 days from the entry of the order.⁹³ Alternatively, if the estate wished to file a certified interlocutory appeal of the order, the proceedings would be stayed pending the outcome of the interlocutory appeal.⁹⁴ On January 9, 2012, the estate opted to appeal and filed for certiorari.⁹⁵

2. The Majority's Analysis

The legal issue presented in *Douglas* was whether the CLRA constituted logrolling in violation of the Oklahoma Constitution's SSR.⁹⁶ Indeed, the Court held that the CLRA was "unconstitutional and void *in its entirety*."⁹⁷ As illustrated in *Douglas*, the Court does not accept diverse provisions that are not, directly or indirectly, related to one another, or provisions that are broadly construed.⁹⁸ The rationale stayed true to the policies underlying the SSR, which simply stated, is to provide notice of the effect of legislation and to prevent legislators from piggybacking unpopular provisions to popular ones in order to secure enactment.⁹⁹

In its opinion, the Court flatly "rejected a broad, expansive approach" for applying the SSR.¹⁰⁰ Instead, the Court used the germaneness test to determine "whether a voter, or legislator, [was] able to make a choice without being misled [or] forced to choose between two

b. the plaintiff has obtained a written opinion from a qualified expert that clearly identifies the plaintiff and includes the determination of the expert that, based upon a review of the available material including, but not limited to, applicable medical records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the defendant against whom the action is brought constituted professional negligence, and

c. on the basis of the review and consultation of the qualified expert, the plaintiff has concluded that the claim is meritorious and based on good cause.

OKLA. STAT. tit. 12, § 19 (2009) (repealed 2013).

93. *Douglas*, 2013 OK 37, ¶ 2 n.2, 302 P.3d at 792 n.2.

94. *Id.*

95. *Id.* ¶ 2, 302 P.3d at 792.

96. *Id.* ¶ 4, 302 P.3d at 792.

97. *Id.* ¶ 12, 302 P.3d at 794 (emphasis added).

98. *See id.* ¶ 2, 302 P.3d at 794 (Kauger, J., concurring).

99. *Id.* ¶ 4, 302 P.3d at 792 (majority opinion).

100. *Id.* ¶ 5, 302 P.3d at 792.

unrelated provisions contained in one measure.”¹⁰¹ The Court reiterated that the issue is “not how similar two provisions in a proposed law are.”¹⁰² Instead, the issue was that the SSR requires that multiple provisions in an act be related by “a common, closely akin theme or purpose,” and the CLRA did not meet that requirement.¹⁰³

The Court specifically rejected the use of a broad topic like “tort reform” in order to maintain compliance with the SSR.¹⁰⁴ Indeed, the majority reasoned that the CLRA had “90 [different] sections, encompassing a variety of subjects that do not reflect a common, closely akin theme or purpose.”¹⁰⁵ As a result, the Court held that in order to ensure passage of the CLRA, the public was fundamentally “faced with an all-or-nothing choice.”¹⁰⁶

In the Court’s opinion, severance of the unrelated provisions was not an option because the act contained too many different subjects.¹⁰⁷ The majority stated that severance would be difficult and dangerous because the “Court would essentially become the policy-maker[,] [and] [p]olicy-making is the job of the Legislature.”¹⁰⁸ Moreover, it was unclear whether the legislature would have passed the CLRA without the severed provisions.¹⁰⁹

3. Justice Kauger’s Concurrence

Concurring, Justice Kauger agreed with the majority that the CLRA was “simply too large, and attempt[ed] to address too many subjects, to be reconciled with the requirements of” article V, § 57, of the Oklahoma Constitution.¹¹⁰ Growing weary of having to decide this issue again, Justice Kauger offered the legislature some guidelines to maintain

101. *Id.* ¶ 6, 302 P.3d at 792.

102. *Id.* ¶ 6, 302 P.3d at 792–93.

103. *Id.* ¶ 6, 302 P.3d at 793.

104. *Id.* ¶ 10, 302 P.3d at 793.

105. *Id.* ¶ 7, 302 P.3d at 793. “The first 24 sections of H.B. 1603 amend and create new laws within our civil procedure code found in Title 12. Many of these provisions have nothing in common . . . Of the remaining 66 sections of H.B. 1603, 45 sections create entirely new Acts, which have nothing in common with each other . . .” *Id.* ¶¶ 7–8, 302 P.3d at 793.

106. *Id.* ¶ 10, 302 P.3d at 793.

107. *Id.* ¶ 11, 302 P.3d at 793.

108. *Id.* ¶ 11, 302 P.3d at 793–94.

109. *Id.* ¶ 11, 302 P.3d at 794.

110. *Id.* ¶ 1, 302 P.3d at 794 (Kauger, J., concurring).

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compliance with the SSR:

The provisions of a bill must be related to a single subject. The provisions are related to a single subject if the provisions are germane, relative, and cognate to a readily apparent common theme and purpose.

A voter or a legislator must be able to make a choice about voting for a bill without being misled, and may not be forced to choose between two unrelated provisions contained in one measure in order to embrace the one they support.

Legislation may not be made “veto proof” by combining two totally unrelated subjects in one bill.

A mere functional relationship between provisions is insufficient; rather, the subjects have to have at least a semblance of relation to each other and must not be misleading or provide the voter or legislator with an all or nothing choice.¹¹¹

Obviously, the Court is tired of addressing this issue.¹¹² Taken together, Justice Kauger’s guidelines set forth above seem relatively straightforward. Nonetheless, while the Court addressed the issue as to whether voters were faced with an all-or-nothing choice, the majority opinion focused on the relatedness of the CLRA’s provisions. Thus, more questions arise: Which is more important to the Court—related

111. *Id.* ¶ 18, 302 P.3d at 800–01 (footnotes omitted). Justice Kauger provided an analogy to illustrate her point:

If you make a peanut butter cookie, it is apparent that it is a smooth, one flavor cookie. It is still a peanut butter cookie even if you use crunchy peanut butter, because its major flavor is still peanuts. When you add chocolate chips, pecans, coconut, M & M’s, raisins, and dried cranberries, the additional discrete ingredients change the homogenous nature of a peanut butter cookie into a jumble of different tastes and textures. It is still a cookie, it is just not a peanut butter cookie. Likewise, the CLRA is still a statute, but it ceased to be a statute for the reform of civil procedure when sections having nothing to do with civil procedure were included.

Id. ¶ 19, 302 P.3d at 801.

112. *See id.* ¶ 21, 302 P.3d at 801. After all, just three years before, in 2010, the Court struck down abortion restrictions under the SSR. *See Nova Health Sys. v. Pruitt*, 2012 OK 103, 292 P.3d 28 (per curiam).

provisions or having the voter face an all-or-nothing choice? Or are these options equally important?

4. Justice Winchester's Dissent

In stark contrast to the majority's struggle, the dissenting Justices found the motivation behind the CLRA clear: "Its purpose [was] tort reform."¹¹³ In the dissent's view, the majority erred because "[t]he term 'subject' . . . is to be given a broad and extended meaning, so as to allow the Legislature full scope to include in one act all matters having a logical or natural connection."¹¹⁴ Moreover, the dissent argued that the majority opinion is incorrect because the legislature knew it was legislating tort reform when it passed the CLRA.¹¹⁵ The majority vote of both the House and Senate makes the dissent's argument very likely.¹¹⁶

As the Court noted, "[e]very presumption is to be indulged in favor of the constitutionality of [the] statute."¹¹⁷ The dissent argued that the majority did not meet this burden; thus, the "Court should [have] adopt[ed] a more deferential approach toward the rule."¹¹⁸ Concluding that the majority's opinion ensures "chaos,"¹¹⁹ the dissent's final argument rested on the premise that the legislature will have "substantial difficulty passing any comprehensive legislation including any uniform codes that are generally adopted among the states."¹²⁰

C. The CLRA as Unconstitutional: Judicial Legislation?

If a statute "clearly, palpably and plainly" offends the Constitution, it will be invalidated.¹²¹ After all, "[t]he Constitution [is] the bulwark to which all statutes must yield."¹²² Courts should look at legislative intent

113. *Id.* ¶ 1, 302 P.3d at 801 (Winchester, J., dissenting).

114. *Id.* ¶ 2, 302 P.3d at 801 (quoting *Griffin v. Thomas*, 206 P. 604, 609 (Okla. 1922)) (internal quotation marks omitted).

115. *Id.* ¶ 4, 302 P.3d at 802.

116. *Id.*

117. *Id.* ¶ 5, 302 P.3d at 802 (quoting *Fent v. Okla. Capitol Improvement Auth.*, 1999 OK 64, ¶ 3, 984 P.2d 200, 204).

118. *Id.* ¶ 9, 302 P.3d at 803.

119. *Id.*

120. *Id.* ¶ 8, 302 P.3d at 803.

121. *Liddell v. Heavner*, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1200 (quoting *Reherman v. Okla. Water Res. Bd.*, 679 P.2d 1296, 1300 (Okla. 1984)).

122. *Id.* ¶ 16, 180 P.3d at 1199 (quoting *Draper v. State*, 621 P.2d 1142, 1145 (Okla.

to determine the validity of a statute and not a judge's interpretation of the "propriety, wisdom, desirability, necessity, or practicality" of the legislation.¹²³ Thus, one who wishes to challenge a statute's validity has to overcome the burden of showing its unconstitutionality.¹²⁴ In *Douglas*, the Court did not defer to legislative intent.¹²⁵ While the Court acknowledged that the subject matter of the CLRA was lawsuit reform,¹²⁶ the Court gave no weight to the rationale of the act, which was to keep costs low for entrepreneurs, doctors, and hospitals, and to preserve Oklahoma's status as a "business friendly state."¹²⁷ Instead, the Court exceeded its precedential boundaries by pumping the brakes on duly enacted legislation.¹²⁸

A much broader interpretation of the SSR would have saved the CLRA. The SSR should be reasonably construed to adhere to the policies behind the rule while minimizing disruption to the law-making process.¹²⁹ Precedent demonstrated that the SSR was to be broadly construed: "The constitutional provision prohibiting a statute from containing more than one subject or object should not be technically, strictly, or narrowly, but reasonably, fairly, broadly, and liberally construed, with due regard to its purpose."¹³⁰ Further, the rule "should not be so construed so as to hamper or cripple legislation, or render it oppressive or impracticable . . . or to make laws unnecessarily restrictive in their scope and operation, or to multiply the number of laws."¹³¹ However, the Court rejected such a broad interpretation in *Douglas*, stating that it "defeats the [SSR's] purpose."¹³² Though bound by *stare decisis*, the Court overtly rejected the application of a broad interpretation that would have been consistent with precedent and would

1980)).

123. *Id.* ¶ 16, 180 P.3d at 1199–1200 (citing *In re Askins Props.*, L.L.C., 2007 OK 25, ¶ 12, 161 P.3d 303, 311).

124. *Id.* ¶ 16, 180 P.3d at 1200.

125. *Douglas*, 2013 OK 37, ¶ 9, 302 P.3d at 803 (Winchester, J., dissenting).

126. *Id.* ¶ 10, 302 P.3d at 793.

127. Randy Ellis & Graham Lee Brewer, *Oklahoma Lawmakers Conclude Special Session*, NEWSOK (Sept. 9, 2013), <http://newsok.com/oklahoma-lawmakers-conclude-special-session/article/3881088> (quoting Gov. Mary Fallin).

128. *Douglas*, 2013 OK 37, ¶ 9, 302 P.3d at 803 (Winchester, J., dissenting).

129. *In re Initiative Petition No. 347 State Question No. 639*, 813 P.2d 1019, 1027 (Okla. 1991).

130. *Bond v. Phelps*, 191 P.2d 938, 947 (Okla. 1948).

131. *Id.*

132. *Douglas*, 2013 OK 37, ¶ 5, 302 P.3d at 792.

have allowed the diverse provisions to be included in the CLRA.¹³³

As a result, the Court's decision in *Douglas* has been criticized by some current and former politicians as a form of judicial legislation.¹³⁴ Fundamentally, it is a legislature's choice "to allocate subjects within a bill."¹³⁵ When the judiciary interferes with the legislature's managerial power, it "offends the separation-of-powers doctrine enjoined . . . by Art. 4, § 1, Okl. Const."¹³⁶ Each of the three branches of government should retain the power to govern itself without influence or interference from the other branches.¹³⁷ In other words, the judiciary should give due deference to the legislature as to the allocation of the subjects within a bill.¹³⁸ Without deference, the Court, in effect, chooses "to legislate from the bench instead of exercising judicial restraint."¹³⁹

Long-standing precedent from *Bond v. Phelps* declared that "[t]he constitutional prohibition of more than one subject in an act does not impose any limitation on the comprehensiveness of [a] subject, which may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several."¹⁴⁰ The *Bond* Court further explained that a "legitimate connection" is required to constitute a single subject.¹⁴¹ However, it is

133. *Campbell v. White*, 856 P.2d 255, 260 (Okla. 1993).

134. See Greg Ryan, *Okla. High Court Strikes Down Major Tort Reform Law*, LAW360 (June 6, 2013, 6:50 PM), <http://www.law360.com/articles/448020/okla-high-court-strikes-down-major-tort-reform-law>; Michael McNutt, *Oklahoma Lawsuit Reform Measure Tossed Out*, NEWSOK (June 4, 2013, 9:11 PM), <http://newsok.com/oklahoma-lawsuit-reform-measure-tossed-out/article/3841673>.

135. *Campbell*, 856 P.2d at 270 (Opala, J., dissenting).

136. *Id.* The separation of powers doctrine states that "the whole power of one department shall not be exercised by the same hands which possess the whole power of either of the other departments." *State ex rel. York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984).

137. *Campbell*, 856 P.2d at 270–71 (Opala, J., dissenting) (quoting *Turpen*, 681 P.2d 763, 767 (Okla. 1984)).

138. *Id.* at 264 ("I would adopt a test that will insulate us from day-to-day entanglement in the political thicket rather than one that saddles the court with the task of micromanaging another department of government. The proper allocation of a bill's content is a managerial prerogative of each house.").

139. McNutt, *supra* note 134 (quoting Fred Morgan, CEO, State Chamber of Oklahoma).

140. *Bond v. Phelps*, 191 P.2d 938, 947 (Okla. 1948). See *Nat'l Mut. Cas. Co. v. Briscoe*, 109 P.2d 1088, 1090 (Okla. 1940) ("The general subject to which the act relates may be broad and comprehensive, and if the title sufficiently brings the attention of the mind to that general subject it is sufficient.").

141. *Bond*, 191 P.2d at 947.

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not unconstitutional for an act to contain a general subject.¹⁴² Indeed, multiple provisions do not violate the SSR as long as those provisions relate to the broad topic of the act.¹⁴³ The law allows for a general subject to contain numerous details, but those details must be related to that general subject.¹⁴⁴ The Court in *Griffin v. Thomas* agreed that a general subject is sufficient to comply with the SSR but noted that the provisions of an act should be drafted in a way that “they are all germane [to the general subject,] and are such that if traced back they will lead the mind to the subject as the generic head.”¹⁴⁵

As *Douglas* demonstrates, there is a fundamental disagreement within the Oklahoma Supreme Court about how strictly the SSR should be interpreted. Though the majority acknowledged the inconsistent case law on the SSR, it contends that the policies behind the SSR are upheld by viewing each case in light of those policies.¹⁴⁶ The stated rationale behind the rule is simple: The rule is meant to give notice and prohibit logrolling.¹⁴⁷ In support of the majority’s decision, Justice Kauger reasoned that in the past, the rule was bypassed by rolling unrelated provisions into general subjects while knowing that none of the provisions would “command or merit” independent enactment.¹⁴⁸ Accordingly, the germaneness test determines whether an act’s provisions are not so closely related as to violate the Oklahoma Constitution.¹⁴⁹

On its face, the CLRA attempted to follow those guidelines. The provisions of the CLRA were germane to the general topic of tort reform, and an analysis of the provisions undoubtedly leads back to the general subject of tort reform. A transcript of each legislator’s intent was not necessary since it is apparent that the legislators understood the context

142. Even constitutional provisions may “embrace one *general* subject,” with voters voting on the individual proposals submitted. OKLA. CONST. art. XXIV, § 1 (emphasis added).

143. *Briscoe*, 109 P.2d at 1090.

144. *Bond*, 191 P.2d at 949.

145. *Griffin v. Thomas*, 206 P. 604, 609 (Okla. 1922).

146. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 15, 302 P.3d 789, 799 (quoting *In re Initiative Petition No. 382*, State Question No. 729, 2006 OK 45, ¶ 14, 142 P.3d 400, 407).

147. *Id.* ¶ 4, 302 P.3d at 792.

148. *Id.* ¶ 8, 302 P.3d at 798 (quoting *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1, 233 P.3d 380, 382).

149. *Id.* ¶ 6, 302 P.3d at 792.

of the CLRA to embrace all subjects, including tort reform, based on the fact that the CLRA received “overwhelming support of two branches of government.”¹⁵⁰

D. The Aftermath: Special Session

Since legislators, attorneys, and business advocates had time to process the Court’s ruling, the common question remained: What to do now? Additional and related questions lingered: What is the law? Is there going to be a race to the courthouse to file lawsuits before the legislature has the opportunity to reenact the CLRA in separate bills?

After the decision was handed down in *Douglas*, Governor Mary Fallin asked the legislature to return for a special session.¹⁵¹ She, like the legislature, understood the CLRA to encompass a single subject—lawsuit reform.¹⁵² The rationale was that in order for Oklahoma to remain business-friendly, lawsuit reform was necessary to protect businesses from potentially frivolous lawsuits.¹⁵³

Governor Fallin clearly did not want to wait for the legislature’s regular session to address the matter.¹⁵⁴ As a result, the legislature reconvened and passed “mini-CLRAs” in order to comply with the SSR.¹⁵⁵ At the end of the special session, lawmakers approved 23 separate bills aimed at lawsuit reform,¹⁵⁶ which were formerly contained in one bill—the CLRA passed in 2009.¹⁵⁷

A special session would have been unnecessary if Oklahoma did not strictly adhere to its SSR. Should the legislature be expected to be haled back into special session every time an act has been deemed unconstitutional, even if it is for the smallest violation of the SSR? One

150. *Id.* ¶ 4, 302 P.3d at 802 (Winchester J., dissenting).

151. Mary Fallin, *Why Lawsuit Reform Must Be Addressed Now*, EDMOND SUN (Sept. 4, 2013), <http://www.edmondsun.com/opinion/x31539160/Why-lawsuit-reform-must-be-addressed-now>.

152. *Id.*

153. Graham Lee Brewer, *Oklahoma Legislature’s Special Session to Open, but Questions Remain*, NEWSOK (Sept. 3, 2013), <http://newsok.com/oklahoma-legislatures-special-session-to-open-but-questions-remain/article/3878713>.

154. Fallin, *supra* note 151.

155. *Id.*

156. Ellis & Brewer, *supra* note 127.

157. Patrick B. McGuigan, *OK Special Session Puts Lawsuit Reforms Back in Place*, OKLA. WATCHDOG (Sept. 11, 2013), <http://watchdog.org/105410/ok-special-session-done-special-litigation-forthcoming-and-special-legislation-in-february/>.

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of the reasons special sessions are problematic is that they are expensive.¹⁵⁸ In this case, the special session cost taxpayers \$150,000.¹⁵⁹ Not only was the work duplicative, but the bills were given to the legislature right before the Labor Day holiday weekend.¹⁶⁰ It is unlikely that the lawmakers were very zealous in, first, trying to enact laws before a holiday weekend and, second, essentially copying and pasting provisions from the CLRA into smaller bills. While it is understandable that this is the legislature's job, people expect that the laws they are required to follow would be enacted after careful thought and deliberation and not spontaneously via an emergency session. This is especially true when the legislators are analyzing a bill that will shape the landscape for future lawsuits.

V. CONCLUSION

Whether a peanut butter cookie is made with M&M's, nuts, or dried cranberries, the essence of the cookie has not changed—it's still a peanut butter cookie. Just as a baker would bake a peanut butter cookie, the legislature simply added ingredients to the CLRA that did not change its nature. Its nature was still tort reform. A rule that restricts legislators from combining genuinely unrelated provisions in one act undoubtedly protects the public from legislative logrolling.¹⁶¹ However, strictly construing the SSR costs the legislature time and productivity, not to mention the high standard the legislature will have to meet in passing uniform laws. More importantly, the business community risks future investment in the State of Oklahoma because it opens entrepreneurs up to liability and excessive jury awards; the investment may not be worth that risk. In any event, the message to the legislature is clear: any comprehensive legislation it intends to enact must be modified into smaller "single-subject" bills in order to comply with the SSR. Modifying the bills into smaller subjects would be unnecessary,

158. Ellis & Brewer, *supra* note 127 (explaining that the special session costs approximately \$30,000 per day).

159. *Id.*

160. *Id.*

161. M. Scott Carter, *A Question for the People*, J. REC., Aug. 22, 2013, at 1. "If we didn't have the single-subject rule, we would see legislation like they had in North Carolina, where they bundled abortion restrictions with Shariah law." *Id.* (quoting Bob Sheets, attorney, Phillips Murrah).

however, by upholding a broad construction of the SSR and avoiding a narrowly construed interpretation.