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ARTICLE

THE OKLAHOMA CONSTITUTION'S SINGLE-SUBJECT RULE: THE OKLAHOMA SUPREME COURT'S APPLICATION TO ACTS OF THE LEGISLATURE

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INTRODUCTION

Oklahoma's Constitution, like those of forty-two other states,[1] contains provisions limiting acts of the Legislature to one subject.[2] The word "subject," however, has no generally accepted definition and can be interpreted broadly or narrowly. As other authors have noted, whether a particular bill violates the single-subject rule depends almost entirely on the level of breadth that a court or legislature uses to categorize its subject.[3] The Oklahoma Supreme Court, among others, uses a standard of "germaneness" when it decides single-subject challenges: whether the provisions are "related to a common theme or

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1. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 812 & n.41 (2006).

2. OKLA. CONST. art. 5, §§ 56-57.

3. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 709-10 (2010).

purpose."[4] But terms such as "germane" and "common theme" do no better in illuminating the permissible bounds of a bill. In fact, the court has stated that it is "not possible to refine this formulation more precisely."[5]

When the court invalidates an act of the legislature using this vague terminology, friction is created between the legislature and the court. Although the legislature has the option to then pass separate bills for each item the court considered a separate subject, this creates inefficiency and creates public doubt about the operations of the legislature and the courts. In 2017, then-Justice Patrick Wyrick wrote that the Oklahoma Supreme Court's

> single-subject . . . jurisprudence . . . allows the court to judicially veto virtually any of the Legislature's . . . laws so long as someone files the proper papers in the clerk's office to initiate suit—this despite the fact that the single-subject rule was never intended "to be so exactingly enforced and in such technical manner as to cripple legislation."[6]

This Article attempts to determine the accuracy of that criticism and other similar criticisms from dissenting justices of the Oklahoma Supreme Court in recent years, as they apply to legislation.[7]

Although the same rule applies to legislative measures proposed by initiative petitions,[8] and the Oklahoma Supreme Court uses the same test for challenges to both types of laws,[9] this Article does not address initiative petitions. As noted by other authors, different policies and processes inform the application of the single-subject rule in those two separate contexts.[10] For example, bargaining among voters is not possible

4. Campbell v. White, 1993 OK 89, ¶ 12, 856 P.2d 255, 260.

5. *Id*. ¶ 14, 856 P.2d at 260.

6. Hunsucker v. Fallin, 2017 OK 100, ¶ 16, 508 P.3d 599, 620 (Wyrick, J., concurring in part and dissenting in part) (quoting Brooks v. State, 1931 OK 580, ¶ 17, 3 P.2d 814, 816).

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

8. *See In re* Initiative Petition No. 347 State Question No. 639, 1991 OK 55, ¶¶ 11-17, 813 P.2d 1019, 1026; Edmondson v. Pearce, 2004 OK 23, ¶ 43, 91 P.3d 605, 628. A similar single-subject rule also applies to initiative petitions for constitutional amendments. *See also* OKLA. CONST. art. 24, § 1.

9. *E.g.*, *In re* Initiative Petition No. 362, 2006 OK 45, ¶¶ 8-9, 142 P.3d 400, 405.

10. *Compare* Cooter & Gilbert, *supra* note 3, at 689, *with* Gilbert, *supra* note 1, at

regarding initiative petitions. The voters on initiative petition proposals have a take-it-or-leave-it choice because they cannot attempt to amend the proposals or attempt to divide questions. As will be discussed, presumptions of constitutionality apply to legislative acts, unlike proposals in initiative petitions, and principles of comity lead most courts to defer to the legislative branch of government where possible. This is not to say that the right to initiative petition should be any less protected,[11] only that the analysis is different.[12]

The Article will first briefly address the origins and purposes of the single-subject rules, a topic that has been exhaustively covered elsewhere but is a necessary foundation to examining the rule's application in Oklahoma.[13] Second, the Article will discuss Oklahoma's purported test for applying the rule—i.e. how the court determines what a "subject" is and whether an act contains more than one—and how the court has actually applied the test to specific bills. Third, the Article addresses the application of the Oklahoma single-subject provision's severability clause, which provides that if an act violates the single-subject prohibition, only the violative portions of the act shall be stricken. Finally, the Article discusses other states' formulations of the test and proposals from other commentators and analyzes how those might be implemented in Oklahoma to create a more cohesive single-subject jurisprudence.

856-57 n.230.

11. *See, e.g.*, *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 3, 142 P.3d 400, 403 ("The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law. Because the right of the initiative is so precious, all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.")

12. *See generally*, Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, in THE BATTLE OVER CITIZEN LAWMAKING, 153-61 (M. Dane Waters ed. 2001).

13. *See, e.g.*, Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 389-92 (1958); Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 966-67 (1999); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 142 (2001); Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 38 ALBANY L. REV. 1629, 1632-36 (2019).

ORIGINS AND PURPOSES OF THE SINGLE-SUBJECT RULE

The Oklahoma Constitution actually contains two single-subject rules for legislation. The primary one in article 5, section 57 of the Oklahoma Constitution provides as follows in relevant part:

> § 57. Subjects and titles - Revival or amendment by reference - Extent of invalidity.
> 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; . . . : 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.[14]

This section actually contains more than one requirement. The single-subject requirement is the focus of this Article, but the "clearly expressed in its title" requirement can sometimes come into play within single-subject analysis and will be discussed where relevant. The "clearly expressed" provision is also relevant to the severability requirement at the end of the section, which requires severance of only subjects not expressed in the title.

The Oklahoma Constitution also contains a single-subject requirement for appropriation bills. After limiting general appropriation bills to certain types of expenses, article 5, section 56 provides that "[a]ll other appropriations shall be made by separate bills, each embracing but one subject."[15] Both single-subject provisions have been applied in

14. The full text of article V, section 57 of the Oklahoma Constitution reads as follows:

> 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.

The second and third clauses about revival are not relevant to this Article.

15. The full text of article V, section 57 of the Oklahoma Constitution reads as

Oklahoma cases, sometimes separately and sometimes in the same case.[16]

Many scholars have traced the origins of the single-subject prohibition to the Romans[17] and followed its development through colonial times to the constitutions of the states.[18] The Oklahoma Supreme Court stated the generally accepted purposes of the rule for the first time in *In re County Commissioners*:

> The abuses which called such provision into existence are clearly understood, and are twofold. Each subject brought into the deliberation of the legislative department of the government is to be considered and voted on singly, without having associated with it any other measure to give it strength. Experience had shown that measures having no common purpose, and each wanting sufficient support on its merits to secure its enactment, have been carried through legislative bodies and enacted into laws, when neither measure could command or merit the approval of a majority of that body.
>
> The other abuse against which this provision was leveled was to prevent matters foreign to the main objects of a bill from finding their way into such enactment surreptitiously.[19]

The court cited no authority for these "clearly understood" abuses, and—unlike in some states[20]—the recorded history of the adoption of the

follows:

> General appropriation bills – Salaries – Separate appropriation bills.
>
> The general appropriation bill shall embrace nothing but appropriations for the expenses of the executive, legislative, and judicial departments of the State, and for interest on the public debt. The salary of no officer or employee of the State, or any subdivision thereof, shall be increased in such bill, nor shall any appropriation be made therein for any such officer or employee, unless his employment and the amount of his salary, shall have been already provided for by law. All other appropriations shall be made by separate bills, each embracing but one subject.

16. *E.g.*, Johnson v. Walters, 1991 OK 107, 819 P.2d 694.

17. *See, e.g.*, Ruud, *supra* note 13, at 389; Gilbert, *supra* note 1, at 811.

18. Gilbert, *supra* note 1, at 812.

19. *In re* Cty. Comm'rs of Ctys. Comprising Seventh Judicial Dist., 1908 OK 207, ¶ 5, 98 P. 557, 558.

20. *See* Justin W. Evans & Mark C. Bannister, *The Meaning and Purposes of State Constitutional Single Subject Rules: A Survey of States and the Indiana Example*, 49 VA. U. L. REV. 87, 91 (2014) (discussing Indiana's constitutional history).

Oklahoma Constitution contains no explanation of the purpose of the provision.[21] More recent Oklahoma cases have consistently identified the prevention of logrolling—combining measures that individually lack independent support—as the basis for decisions declaring acts of the legislature in violation of the single-subject clause.[22] Another somewhat related purpose sometimes cited is the need for political transparency.[23] The court has since identified another purpose: to protect the gubernatorial veto power.[24] Because the governor's veto power is all or nothing regarding an entire bill, combining multiple subjects would limit the usefulness of the power.

Professor Michael D. Gilbert, in his 2006 article proposing a framework for analyzing and resolving single-subject disputes, questions whether the prevention of logrolling was what the various states' constitutional framers actually intended.[25] Gilbert provides evidence that the second purpose stated above—preventing surreptitious or manipulative insertion of foreign matters, sometimes called riding—may have been the true intent of the earliest constitutional provisions.[26] Nonetheless, the distinction between the two justifications has blurred, and riding now seems to be considered a sub-species of logrolling.[27]

Assuming that prevention of logrolling is the primary purpose of the single-subject provision in Oklahoma, it is worth pausing to consider why logrolling is considered an abuse. The United States Constitution—a model for many provisions of the state constitution—contains no

21. *See* 1907 Oklahoma Constitutional Convention Proceedings, LLMC, (containing no statement or debate about the purpose of the rule.); *but see* Benjamin M. Lepak, *Legislators in Black Robes: Unelected Lawmaking by the Oklahoma Supreme Court*, 1889 INST., 6 (Sept., 2019) https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1889_OKSupremeCourt_PolicyAnalysis.pdf?ver=1567546525343 [https://perma.cc/D4RQ-RCGD] (arguing that the participants at the Oklahoma constitutional convention adopting a resolution limiting convention proposals to one subject yet adopting provisions containing what the supreme court would today deem multiple subjects should be used as evidence that the constitution's single-subject rule should be interpreted expansively).

22. *E.g.*, Douglas v. Cox Ret. Prop., Inc., 2013 OK 37, ¶ 12, 302 P.3d 789 ("the constitutional infirmity of logrolling . . . is the basis of this opinion").

23. Gilbert, *supra* note 1, at 813. *E.g.*, Burns v. Cline, 2016 OK 99, ¶ 4, 382 P.3d 1048, 1050.

24. Johnson v. Walters, 1991 OK 107, ¶ 14, 819 P.2d 694, 697.

25. Gilbert, *supra* note 1, at 856-57, 856 n.230.

26. *Id*.

27. Ruud, *supra* note 13, at 391.

prohibition of legislative logrolling, although some rules of the federal legislature limit it.[28] Yet as stated above, state constitutions almost universally contain single-subject rules, with the accepted justification of preventing logrolling.

Scholars present opposing normative opinions of logrolling, characterizing it as anything from an "impediment to governance" and "the legislative ice cream truck"[29] to "the glue that holds legislative deals together."[30] Perhaps the best analysis of the positive benefits of logrolling is Professor Gilbert's 2006 article.[31] Using public choice theory, he persuasively posits that legislative acts evidencing logrolling should be presumptively constitutional because they are the product of exchange among legislators and a majority of legislators are always better off as a result. "Logrolling in this scenario looks suspiciously like a common and considerably less-maligned practice: legislative compromise."[32] His simplest example is three legislators who each support a separate policy, policies A, B, and C. Voting on each item separately, none would garner majority support because each legislator prefers the status quo to enacting only another legislator's policy. But hypothesizing that each legislator would prefer enacting her favored policy even at the cost of enacting her two disfavored policies, and assigning utility values reflecting a larger utility for the favored policy

28. H.R. Rule XVI § 7 ("No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment."); *see also* William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2d ed. 2006).

29. Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U. L. REV. 3, 23, 39 (1992) ("I have specifically identified logrolling, the natural consequence of interest-group politics, as a structural impediment to governance in the permanent and aggregate interest of the whole . . . .").

30. Eskridge, Frickey & Garrett, *supra* note 28, at 178-79 ("The absence of any robust single-subject requirement may be responsible in part for the rise of omnibus bills in Congress as the preferred legislative vehicle. Whether this trend is negative is not clear. Most liberals believe that logrolling is necessary for interest group pluralism to flourish, and it provides the normative advantage of enabling each group to satisfy its most intensely held preferences. Critical theorists can appreciate this argument as well because minority legislators can sometimes obtain government benefits for marginalized groups by logrolling with a faction of the majority. In a real sense, logrolling and 'Christmas tree' bills that give a little present to everyone are the glue that holds legislative deals together, allowing a greater number of proposals to be enacted.").

31. Gilbert, *supra* note 1.

32. *Id*. at 832.

than the combined negative utilities of the two disfavored policies, the three legislators may agree to logroll A, B, and C, and each experience a net gain in utility.[33]

Because of this, Gilbert actually proposed a new test for single-subject violations that would exclude logrolling as described. Under this proposal, a bill would not contain multiple subjects if each component commanded majority support either because of its individual merits or because of legislative bargaining.[34] The problem with this proposed test—as he concedes—is that it is inconsistent with precedent and possibly with the intent of the framers.[35] It would allow a bill to contain indisputably diverse subjects, so long as legislators bargained for that result. But the analysis does appear relevant and potentially useful because of the way the Oklahoma Supreme Court has framed the underlying problem in single-subject cases: "that a legislator voting on this matter could have been left with an unpalatable all-or-nothing choice."[36] The fact that perceived logrolling may not have been "unpalatable" at all should be considered in deciding how to enforce the single-subject requirement.

Additionally, deciding single-subject challenges by attempting to decide whether logrolling existed or may have existed is also unsatisfactory because logrolling and the single-subject requirement are far from a perfect match. Logrolling can easily occur within a bill that indisputably contains only one subject.[37] Further, logrolling could occur across multiple bills, although enforcing the agreement would be more difficult.[38] And finally, Gilbert points out that if logrolling is indeed the target, the single-subject rule can be overinclusive because multiple

33. *Id*. at 833.

34. *Id*. at 858.

35. *Id*. at 856 n.230. Other approaches have also been proposed that are not consistent with the Oklahoma Constitution because the constitution requires the analysis. *E.g.*, Daniel L. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1237 (2017) (proposing use of the rule as a tool to construe ambiguous statutes, thus precluding its use for unambiguous statutes, contrary to the requirements of the state's constitution).

36. Burns v. Cline, 2016 OK 99, ¶ 13, 382 P.3d 1048, 1052.

37. Gilbert, *supra* note 1, at 830 (positing legislators trading votes for various tax breaks under one subject of corporate taxation); Douglas v. Cox Ret. Prop., Inc., 2013 OK 37, ¶ 9, 302 P.3d 789, 803 (Winchester, J. dissenting) ("At times, even the wording of a single statute on a single subject may result in an all-or-nothing choice for those voting on it.").

38. Gilbert, *supra* note 1, at 830.

subjects may be packaged in one bill for other purposes, primarily to "lower[] transaction costs by preventing legislators from wasting time on multiple sets of deliberations and voting sessions when only one would suffice."[39] Nonetheless, the prevention of logrolling is identified as the primary "abuse" to be avoided, and the Oklahoma Supreme Court analyzes cases with the stated purpose of prohibiting it.

OKLAHOMA'S SINGLE-SUBJECT JURISPRUDENCE

Unlike other states, the Oklahoma Supreme Court has been especially assertive in invalidating statutes using the single-subject rule. In his seminal 1958 article on single-subject clauses, Professor Millard Ruud wrote that in the "great bulk of" the hundreds of single-subject cases to that point, the courts had held that the act in question included only one subject, and in "only a handful" had the courts found violations.[40] Thus he concluded that "an argument based on the one subject rule is often the argument of a desperate advocate who lacks a sufficiently sound and persuasive one,"[41] and that the rule "does not invite much litigation."[42] Although the last part of that statement is now outdated because of an abundance of challenges,[43] the rest of the statement appears to be generally correct in the past twenty years, at least as it relates to legislative actions rather than initiative petitions.[44] For

39. *Id*. An example of this occurred in Oklahoma regarding the legislation declared unconstitutional in Douglas v. Cox Ret. Prop., Inc., 2013 OK 37, 302 P.3d 789. After the case was decided in 2013, the legislature met in an Extraordinary Session to repeal and replace the statutes declared unconstitutional by passing individual acts rather than comprehensive legislation. *E.g.*, H.B. 1003, 54th Leg., 1st Extraordinary Sess., 2013 Okla. Sess. Laws 2373.

40. Ruud, *supra* note 13, at 403, 447.

41. *Id*. at 447.

42. *Id*. at 452.

43. *See, e.g.*, Gilbert, *supra* note 1, at 805-06, 818-22, showing an increase in single-subject litigation. Gilbert points out, however, that much of the increase is due to courts' "aggressively review[ing] initiatives for compliance with the rule." *Id*. at 820. He also notes that his data is overinclusive because of the search parameters.

44. *E.g.*, Evans & Bannister, *supra* note 20, at 88 ("In most states, single subject rules effectively have been rendered dormant, in large measure due to the courts' refusal to enforce the rule"); Eskridge, Frickey, and Garrett, *supra* note 28, at 179 ("few laws are struck down because they encompass more than a single subject; instead, judges tend to defer to the legislature's judgment . . . ."). Gilbert concluded in 2006, however, that "in recent years . . . judges in many states have adopted a more aggressive stance towards single subject enforcement, striking down more laws and injecting themselves deeper into

example, the Texas appellate courts have considered two single-subject challenges to legislation during that time and held that both were constitutional.[45] In Nevada, where the state's highest court has stated that "liberal construction . . . cannot be extended to the point of nullification,"[46] the court has considered none.[47] The Montana Supreme Court considered a few cases where the issue was raised, but the court never actually decided a case on single-subject grounds during that timeframe, despite its earlier statement that the rule would be "strictly construed."[48] At first glance, the Florida Supreme Court appears to have considered over a hundred single-subject challenges, but after excluding initiative petitions, repetitive cases based on the court's decision in one case, and cases where the single-subject rule was merely referred to in discussion, the court has decided only six single-subject challenges to bills. The court held three unconstitutional.[49] In Colorado—where a dissenting justice criticized the state's single-subject jurisprudence by stating in regards to an initiative petition, "nor do I believe it is possible for judicial officers, however conscientious, to apply a standard as amorphous as the majority obviously considers the single-subject requirement to be, without conforming it to their own policy

the legislative process." Gilbert, *supra* note 1, at 808 n.26. The primary source for that proposition, however, was Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L. J. 35 (2002) (discussing increased success in challenges to initiatives rather than legislation).

45. *Ex parte* Jones, 440 S.W.3d 628 (Tex. Crim. App. 2014); Tex. Alcoholic Beverage Comm'n v. Silver City Club, 315 S.W.3d 643 (Tex. App. 2010).

46. State v. Payne, 295 P. 770, 772 (Nev. 1931)

47. I searched for single-subject cases using various methods, including West key numbers, but the broadest search results came from using the Westlaw search Professor Gilbert used in his 2006 article. *See* Gilbert *supra* note 1, at 818 n.89 (("single subject" or "single object" or "one subject" or "one object" +1 rule or requirement or provision or clause or limitation or doctrine) or "title-object clause" or (embrac! or relat! or refer! or contain! or confin!) /5 ("single subject" or "single object" or "one subject" or "one object")). I then reviewed the results for Texas, due to its proximity, as well as several states that were cited in Justin W. Evans & Mark Bannister, *Reanimating the States' Single Subject Jurisprudence, A New Constitutional Test*, 39 S. ILL. U. L. J. 163, 210-11 (2015), as construing the single-subject rule less liberally than other states. In reviewing those results, I excluded cases that were challenges to initiative petitions rather than challenges to legislation and excluded cases where the search had turned up non-pertinent results.

48. Mont. Auto Ass'n v. Greely, 632 P.2d 300, 311 (Mont. 1981).

49. Fla. Dept. of Highway Safety & Motor Vehicles v. Critchfield, 842 So. 2d 782 (Fla. 2003); Tormey v. Moore, 824 So. 2d 137 (Fla. 2002); Heggs v. State, 759 So. 2d 620 (Fla. 2000).

preferences"[50]—only two legislative acts have been challenged during this time period, and both were upheld.[51] Even the Ohio Supreme Court, which a dissenting justice in 2004 alleged "continues to utilize the one-subject rule to invalidate legislation with little consistency or reason,"[52] invalidated only three statutes during that period.[53]

The Oklahoma Supreme Court has been considerably more active during that twenty-year period, deciding thirteen single-subject challenges to legislation and holding that eleven were unconstitutional in whole or in part.[54] This is somewhat surprising, given that the court in its early cases stated the rule in broad terms that were deferential to the legislature. An examination of the history of the court's single-subject jurisprudence is revealing.

In the Oklahoma Supreme Court's first case dealing with a single-subject challenge to an act of the legislature, the court found no single-subject violation (but held that the act in question was void as an unconstitutional delegation of legislative power to the courts).[55] In analyzing the single-subject issue, the court set out several principles as established from "the best-considered cases" in other jurisdictions:

> That the clause is mandatory; that its requirements are not to be exactingly enforced, or in such a technical manner as to cripple legislation; that the title of a bill may be very general, and need not contain an abstract of the contents of the bill, or specify every clause therein, it being sufficient if they are all referable and cognate to the subject expressed. Everything which is necessary to make a complete enactment, or to result as a complement of the thought therein contained, is included in and

50. *In re* Title & Ballot Title & Submission Clause for 2005-2006 #55, 138 P.3d 273, 284 (Colo. 2006), *as modified on denial of reh'g* (June 26, 2006).

51. Colo. Criminal Justice Reform Coal. v. Ortiz, 121 P.3d 288 (Colo. Ct. App. 2005); People v. Montgomery, 342 P.3d 593 (Colo. Ct. App. 2014).

52. State *ex rel*. Ohio Civil Serv. Emps. Ass'n, AFSCME, Local 11 v. State Emp. Relations Bd., 818 N.E.2d 688, 706 (Ohio 2004) (Lundberg Stratton, J., dissenting).

53. Rumpke Sanitary Landfill, Inc. v. State, 941 N.E.2d 1161 (Ohio 2010); *In re* Nowak, 820 N.E.2d 335 (Ohio 2004); State *ex rel*. Ohio Civil Serv. Emps. Ass'n, AFCSME, Local 11 v. State Emp. Relations Bd., 818 N.E.2d 688 (Ohio 2004).

54. *See* Morgan v. Daxon, 2001 OK 104, ¶ 1, 49 P.3d 687, 687 (holding that the bill violated both section 56 and section 57).

55. *In re* Cty. Comm'rs, 1908 OK 207, ¶¶ 6, 26, 98 P. 557, 558, 563.

> authorized by such title expressed in general terms.[56]

In that same year, the court also decided a challenge to another act based on the "clearly expressed" title portion of the same clause of the Constitution.[57] In rejecting the challenge, the court recited another principle that

> appears to be recognized with absolute universality, and that is that, when an act of the Legislature is assailed on the ground that it is repugnant to the Constitution of the state or nation, it is never stricken down, except that it be shown to be unconstitutional beyond a reasonable doubt.[58]

With those principles in mind, the likelihood of statutes being invalidated would seem small. And for many years, the court regularly rejected single-subject challenges. For example, in *Bond v. Phelps*, an often-cited case from 1948, the court summarized five previous decisions of the court that had rejected single-subject challenges, and denied a challenge to an act that imposed additional duties on the Corporation Commission and its officers and employees, and provided additional compensation for them.[59] Although an easy case, the opinion is notable for approvingly reciting two rules: (1) "the rule that every legislative act is presumed to be constitutional and every intendment must be indulged by the courts in favor of its validity, is applicable to statutes claimed to be unconstitutional as in violation of the provision prohibiting statutes from containing more than one subject or object"; and (2) an act contains "plurality of subject" only when "by no fair intendment can [its subjects] be considered as having any legitimate connection with or relation to each other."[60] And in *Rupe v. Shaw*,[61] the court repeated the same rules, approvingly quoting the United States Supreme Court (as recited in an Arkansas case) for the reason behind them: "It is but a decent respect due to the wisdom, the integrity, and patriotism of the legislative body by which any law is passed to presume in favor of its validity until its

56. *Id*. at 558 (citations omitted); *see also* Black v. Okla. Funding Bond Comm'n, 1943 OK 270, ¶ 3, 140 P.2d 740, 743 ("germane, relative and cognate").
57. City of Pond Creek v. Haskell, 1908 OK 153, 97 P. 338.
58. *Id.* ¶ 20, 97 P. at 348.
59. Bond v. Phelps, 1948 OK 76, ¶¶ 37-41, 44, 191 P.2d 938, 947-50.
60. *Id.* ¶¶ 34, 35, 191 P.2d at 947 (quoting 50 AM. JUR. *Statutes* §§ 195, 197 (1944)).
61. Rupe v. Shaw, 1955 OK 223, ¶ 10, 286 P.2d 1094, 1099.

violation of the Constitution is proved beyond all reasonable doubt."[62]

The Oklahoma Court of Criminal Appeals has also interpreted the single-subject requirement broadly. For example, in *King v. State*,[63] the court considered a bill that provided enhanced penalties for various crimes and included a schedule of fines for traffic violations. The court held that no single-subject violation occurred because both provisions were encompassed within the category of crimes and punishments, which was expressed in the title of the bill.[64] The court reasoned that the constitutional provision should be interpreted "liberally and broadly."[65]

The Oklahoma Supreme Court's attitude toward single-subject analysis seemed to change beginning with *Johnson v. Walters*,[66] a case involving an egregious violation of the single-subject rule. In *Johnson*, the court considered two bills. The first bill contained three sections, which the legislature had passed on the last day of the legislative session. The first two sections "empowered the Legislature to allocate space in the State Capitol Building and relocate various officials. The bill's third section authorized the sale of surplus water from Sardis Reservoir."[67] Another bill at issue in the same case was held to violate section 56 of the Constitution, which requires that a general appropriation bill "embrace nothing but appropriations."[68] The bill included appropriations and substantive provisions. The court also correctly reasoned that the same bill was unconstitutional under section 57 because the substantive provisions included multiple subjects, for example, "the unrelated topics of state employee benefits, coal-fired electric generating plants, the indigent defense system, state travel reimbursement, and officer verification of traffic citations."[69] The bills' defenders alleged that the single subject was "state government."[70] Reasoning that the bill was a "blatant violation"[71] of the single-subject requirement, the court held that the governor's attempted veto of the office-allocation sections was

62. State v. Moore, 88 S.W. 881, 882 (Ark. 1905) (quoting Ogden v. Saunders, 25 U.S. (12 Wheat) 213 (1827)).
63. King v. State, 1982 OK CR 15, ¶ 13, 640 P.2d 983, 987.
64. *Id*.
65. *Id*.
66. Johnson v. Walters, 1991 OK 107, 819 P.2d 694.
67. *Id*. ¶ 1, 819 P.2d at 695.
68. *Id*. ¶¶ 12, 20-21, 819 P.2d at 697-98 (quoting OKLA. CONST. art. 5, § 56).
69. *Id*. ¶ 17, 819 P.2d at 698.
70. *Id*.
71. *Id*.

ineffective.[72] The court reasoned that the governor is bound by the single-subject rule, so it deemed the entire bill vetoed.[73] A concurring justice referred to this as a "strict application" of the single-subject rule, although the court actually enunciated no new rules or interpretations.[74]

Two years later, the court dealt with another single-subject challenge in *Campbell v. White*.[75] *Campbell* involved the special appropriation provision of section 56 of article 5, which provides that all non-general appropriation bills—sometimes referred to as a special appropriation—must be "made by separate bills, each embracing one subject."[76] The court made no distinction between the section 56 challenge and the previous ones under section 57 and reasoned that *Johnson* was dispositive.[77] The opinion is notable for the language of the court's reasoning and for a dissenting proposal that was rejected. The two bills in *Campbell* combined funding for various entities in each bill, and the legislature contended that each bill contained only one subject because each related to only one "function" of state government.[78] One bill funded the State Arts Council, the Department of Libraries, two memorial commissions, the Historical Society, the Tourism and Recreation Department, and the Education Television Authority. The legislature contended—and the title of the bill provided—that the bill funded "State Cultural Entities."[79] The other bill funded various agencies such as the Department of Banking, the Department of Commerce, the Department of Labor, and the Securities Commission, under the category of "State Business Regulatory Agencies."[80]

The court first rejected the functional relationship approach except to the extent that it might affect the court's germaneness analysis.[81] And applying what it called the germaneness "test,"[82] the court held that the provisions failed because, for example, a provision for reappropriating to the Tourism Department funds relating to development of an industrial

72. *Id*. ¶ 19, 819 P.2d at 698.
73. *Id*. ¶ 29, 819 P.2d at 699.
74. *Id*. ¶ 1, 819 P.2d at 700 (Wilson, J. concurring).
75. Campbell v. White, 1993 OK 89, 856 P.2d 255.
76. OKLA. CONST. art. 5, § 56.
77. *Campbell*, ¶ 9, 856 P.2d at 259.
78. *Id*. ¶ 5, 856 P.2d at 257.
79. *Id*. ¶ 3, 856 P.2d at 257.
80. *Id*.
81. *Id*. ¶ 12, 856 P.2d at 260.
82. *Id*.

airpark economic study was not related to "cultural entities" identified as the subject, implicitly reasoning that tourism is too disconnected from cultural entities.[83] The court also reasoned that a provision establishing an intern program for the State Regents for Higher Education had "no relationship to the subject of cultural entities"[84] despite the fact that the program was for students who were pursuing a business degree in tourism management.[85] Significantly, the court also stated that it was "not possible to refine this formulation more precisely," but it rejected an "expansive reading" of the single-subject rule and reasoned that the "provisions must reflect a common, closely akin theme or purpose" and that the "common themes or purposes embodied in legislation must be *readily manifest*."[86]

This "readily manifest" requirement and "no expansive reading" language were a significant departure from "not to be exactingly enforced" and "unconstitutional beyond a reasonable doubt"—the standards previously announced. The court's seeming mistrust of the legislature was indicated by its statement that "skillful drafting of a broad topic would defeat the purpose of the single-subject" rule, implying nefarious intent by the legislature.[87] The court cited *Johnson v. Walters* for this proposition, perhaps reflecting lingering resentment from that case.[88] But this is inconsistent with the court's statement in *City of Pond Creek v. Haskell*, carried forward to other cases, that "the title of a bill may be very general."[89]

Justice Opala's dissent, joined by Justice Lavender, urged that the court adopt a rule finding no section 56 single-subject violation if the bill's compliance was "fairly debatable" under either the germaneness test or the functionality test.[90] The dissent considered this broad latitude necessary to avoid "judicial micromanagement of legislative decision-making on allocation of subjects,"[91] and reasoned that the court "should interfere with the content of a bill only in a case of clear

83. *Id*. ¶ 15, 856 P.2d at 260-61.
84. *Id*.
85. S.B. 142, 43d Leg., 2d Reg. Sess.,1992 Okla. Sess. Laws 1584.
86. *Campbell*, ¶ 14, 856 P.2d at 260 (emphasis added).
87. *Id*.
88. *Id*.
89. City of Pond Creek v. Haskell, 1908 OK 153, ¶ 28, 97 P. 338, 349 (quoting Ballentyne v. Wickersham, 75 Ala. 533, 536 (1883)).
90. *Campbell*, ¶ 7, 856 P.2d at 264 (Opala, J., dissenting).
91. *Id.* ¶ 25, 856 P.2d at 270.

noncompliance."[92] The dissent also predicted the result of the majority's decision: "The court's germaneness analysis leaves the legislature without a workable standard to manage its own affairs. This will inevitably place the court in the position of having frequently to revisit these issues and will multiply the number of challenges made to legislative allocations."[93]

That prediction of frequent revisitation proved correct. As stated earlier, excluding initiative petition cases, the court has decided thirteen single-subject challenges since 1999 and held eleven bills unconstitutional.[94] What are the reasons for these repeated challenges and especially the success of those challenges? In part, the court's restrictive interpretation of the rule has resulted in holdings of unconstitutionality. But that is not the only reason. Some of the blame must go to the legislature.

Six of the successful challenges in the last twenty years were contrary to the single-subject rule under any conceivable formulation of the analysis. *Morgan v. Daxon* held unconstitutional a large appropriations bill mixed with numerous substantive provisions on various subjects, a facial violation of the Constitution.[95] In *Weddington v. Henry*,[96] the proposed single subject in the title was "uniform laws."[97] The bill included amendments to and adoptions of various unrelated uniform laws including, for example, the Uniform Commercial Code, the Uniform Limited Partnership Act, and the Uniform Anatomical Gift Act. In a two-sentence order, the court held the bill unconstitutional.[98] In *Fent v. State ex rel. Office of State Finance*,[99] the act violated section 56 by mixing appropriations for various agencies and purposes.[100] In *Fent v.*

92. *Id*. ¶ 32, 856 P.2d at 272.

93. *Id*. ¶ 38, 856 P.2d at 273.

94. In 2013, in *Douglas v. Cox Ret. Prop., Inc.*, 2013 OK 37, 302 P.3d 789, Justice Kauger's concurring opinion bemoaned that as of 2010, the court had addressed the rule "at least seven times over the previous two decades, and four times in three years." *Douglas*, ¶ 9, 302 P.3d at 798. This statement included one initiative petition.

95. Morgan v. Daxon, 2001 OK 104, ¶ 1, 49 P.3d 687, 687 (holding that the bill violated both section 56 and section 57).

96. Weddington v. Henry, 2008 OK 102, 202 P.3d 143.

97. S.B. 1708, 51st Leg., 2d Reg. Sess., 2008 Okla. Sess. Laws 1763.

98. *Weddington*, ¶ 1, 202 P.3d at 143.

99. Fent v. State *ex rel*. Office of State Finance, 2008 OK 2, ¶ 25, 184 P.3d 467.

100. The court made the relief prospective rather than voiding the statute, to avoid harm to government operations. *Id*. ¶ 30, 184 P.3d at 478.

State ex rel. Oklahoma Capitol Improvement Authority,[101] the act involved three bond projects: one for the Native American Cultural Center in Oklahoma City; one for various dams and other water projects in various counties in Oklahoma; and one for the purchase of property and construction of dams on the Arkansas River in Tulsa County. The court held this unconstitutional as "the quintessential logrolling example—something for Oklahoma City, something for Tulsa, and something for the rest of the state."[102] And in *Fent v. Fallin*,[103] the bill reduced personal income tax rates and created a repair fund for the state capitol, two obviously unrelated subjects.

The other clear case, *Thomas v. Henry*,[104] in which only one section of a bill was held unconstitutional, dealt with an act whose subject was "illegal immigration."[105] The court held that all but one section was related to that subject. The exception was a section that amended a law that had allowed resident tuition for students who (1) graduated from an Oklahoma high school or passed the General Educational Development (GED) test and (2) lived with a parent or guardian in Oklahoma for two years prior to graduation or passing the test. The amendment removed the clause about the GED as an option for qualifying for resident tuition. The court reasoned that the removal of the GED provision was unrelated to immigration.[106] This seems especially warranted since another section of the bill denied resident tuition to any person not lawfully present in the United States. The court severed the offending provision.

On the other hand, the court's analysis is muddled in the remaining five cases where the court found single-subject violations. Three of the five cases related to abortion laws. In 2010 in *Nova Health Systems v. Edmondson*,[107] the court considered a bill that contained numerous provisions relating to abortion, including such topics as mifepristone, signage at abortion facilities, mandatory notices to minors, mandatory ultrasounds, damages, and "Freedom of Conscience"—protecting employees who object to participating in abortion procedures.[108] But the

101. Fent v. State *ex rel*. Oklahoma Capitol Improvement Auth., 2009 OK 15, ¶ 2, 214 P.3d 799.
102. *Id*. ¶ 23, 214 P.3d at 807.
103. Fent v. Fallin, 2013 OK 107, ¶¶ 6-7, 315 P.3d 1023, 1025.
104. Thomas v. Henry, 2011 OK 53, ¶ 31, 260 P.3d 1251, 1261.
105. H.B. 1804, 51st Leg., 1st Sess., 2007 Okla. Sess. Laws 545.
106. *Thomas*, ¶¶ 29-31, 260 P.3d at 1260-61.
107. Nova Health Sys. v. Edmondson, 2010 OK 21, 233 P.3d 380.
108. S.B. 1878, 51st Leg., 2d Sess., 2008 Okla. Sess. Laws 159.

act also contained provisions unrelated to abortion such as a prohibition on assisted suicide and a prohibition on "wrongful birth" or "wrongful life" actions.[109] The defendants contended that the single subject was "issues arising from healthcare practices that take human life."[110] Neither the trial court nor the Supreme Court pointed to specific provisions that violated the single-subject rule. The Supreme Court merely "admonish[ed] the Legislature for so flagrantly violating the terms of the Oklahoma Constitution."[111] Because of the lack of an informative opinion, it was not clear whether the provisions that were totally unrelated to abortion were the only offending provisions, or whether the court deemed some of the abortion-related provisions as single-subject violations also.

The court's rationale became clear five years later, when it issued unanimous opinions in two more challenges to abortion bills. In the first case, *Burns v. Cline* (*Burns I*),[112] the challenged bill contained four sections. The first section amended laws and added new subsections regarding parental notification and misrepresentations connected with abortions for minors. The second section added a new statute requiring preservation of fetal tissue from abortions performed on minors less than fourteen years old. The third section added a new statute requiring the Department of Health to create new licensing and inspection procedures for abortion facilities. The fourth section provided criminal and civil penalties for violations of the new law or certain existing abortion laws.[113]

The court held that "each of these sections is so unrelated and misleading that a legislator voting on this matter could have been left with an unpalatable all-or-nothing choice."[114] The court added that the bill also violated the single-subject rule because it delegated authority to more than one state agency, citing *Oklahoma Capitol Improvement Authority*.[115] In fact, the *Oklahoma Capitol Improvement Authority* opinion was based on the fact that the bill provided bond funding for

109. *Id*.

110. Defendants' Response to Plaintiff's Motion for Partial Summary Judgment and Brief in Support at 1, Nova Health Systems v. Edmondson, 2010 OK 21, 233 P.3d 380 (Case No. CJ-2008-9119).

111. *Nova Health Sys.*, ¶ 1, 233 P.3d at 382.

112. Burns v. Cline, 2016 OK 99, 382 P.3d 1048.

113. *Id*. ¶ 10, 382 P.3d at 1051.

114. *Id*. ¶ 13, 382 P.3d at 1052.

115. *Id*.

unrelated projects, not that duties were assigned to different state agencies.[116] But the court also clarified its reasoning in *Nova Health Systems*, stating that the case was indistinguishable from *Nova Health Systems*, where "[m]ost sections . . . contained some reference to abortion procedures."[117] The court added that "[a]lthough each section relates in some way to abortion,"[118] "a common connection or theme is not sufficient to satisfy the single subject rule where the legislation is potentially misleading or leaves the Legislature with an all-or-nothing choice."[119]

Two months later, the court decided another *Burns v. Cline* case (*Burns II*).[120] The court first held the bill unconstitutional under *Whole Woman's Health v. Hellerstedt*,[121] where the United States Supreme Court held a "substantively identical"[122] provision in a Texas statute unconstitutional as creating undue burdens on the constitutional right to abortion.[123] Both the Texas and Oklahoma bills required abortion facilities to have a physician on premises with admitting privileges to a nearby hospital, so this requirement rendered the Oklahoma legislation unconstitutional.[124] The Oklahoma Supreme Court then reasoned that a further ground for the Oklahoma bill's unconstitutionality was that it violated the single-subject rule.[125] In addition to the above subsection, the bill contained several other subsections that the State contended all related to the common theme and purpose of establishing standards for abortion facilities.[126] The court held that this was insufficient as a single subject because these multiple subjects were not "'germane, relative and cognate' to a common theme and purpose."[127] The court specifically cited the provisions regarding (1) supplies and equipment, (2) physician and staff training, (3) patient screening, (4) abortion procedures, (5)

116. Fent v. State *ex rel*. Oklahoma Capitol Improvement Auth., 2009 OK 15, ¶ 23, 214 P.3d 799, 807.
117. Burns v. Cline, 2016 OK 99, ¶ 17, 382 P.3d 1048, 1053.
118. *Id*. ¶ 18, 382 P.3d at 1053.
119. *Id*. ¶ 17, 382 P.3d at 1053.
120. Burns v. Cline, 2016 OK 121, 387 P.3d 348.
121. *Id*. ¶ 1, 387 P.3d at 350 (citing Whole Woman's health v. Hellerstedt, 136 S. Ct. 2292 (2016)).
122. *Burns II*, ¶ 9, 387 P.3d at 352.
123. *Whole Women's Health*, 136 S. Ct. at 2318.
124. *Burns II*, ¶¶ 10, 30, 387 P.3d at 352, 356.
125. *Id*. ¶ 28, 387 P.3d at 356.
126. *Id*.
127. *Id*.

reporting, (6) admitting privileges, and (7) criminal and civil penalties as being "so unrelated and misleading that a legislator voting on this matter could have been left with an unpalatable all-or-nothing choice."[128] Interestingly, no single-subject challenge was raised in the Texas case, which also included numerous sections in addition to the admitting privileges requirement, such as requiring facilities to meet standards for ambulatory surgical facilities.[129]

The single-subject analysis in each of these opinions is troubling and is certainly a departure from the standards announced in the earliest cases. First, note how the language itself has changed. In *County Commissioners*, the court reasoned that a title could be general and that the provisions must be "referable and cognate to the subject expressed."[130] The standard later became "germane, relative and cognate,"[131] adding another synonym, and the "germaneness" terminology has been carried forward. In *Campbell*, the court added the requirement that the common theme must be readily manifest.[132] Then in *Thomas*, without stating the "readily manifest" requirement, the court recited that "[i]t is enough that the various provisions are reasonably related to a common theme or purpose."[133] But in *Burns I*, the court wrote that "a common connection or theme is *not* sufficient to satisfy the single subject rule . . . ."[134] Instead, the court's focus now is on purportedly determining whether the proposal is "misleading" or that the provisions "are so unrelated" that a legislator would be "faced with an unpalatable all-or-nothing choice."[135]

This is incoherent. First, how can a bill be misleading, except for the

128. *Id*. ¶¶ 28-29, 387 P.3d at 356.

129. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014), *rev'd in part sub nom*. Whole Woman's Health v. Cole, 790 F.3d 598 (5th Cir. 2015), *rev'd sub nom*., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); H.B. 2, 83d Leg., 2d Called Sess., 2013 Tex. Gen. Laws 5013, 5017.

130. *In re* Cty. Comm'rs of Ctys. Comprising Seventh Judicial Dist., 1908 OK 207, ¶ 5, 98 P. 557, 558.

131. Black v. Oklahoma Funding Bond Comm'n, 1943 OK 270, ¶ 3, 140 P.2d 740, 743.

132. Campbell v. White, 1993 OK 89, ¶ 14, 856 P.2d 557, 260.

133. Thomas v. Henry, 2011 OK 53, ¶ 27, 260 P.3d 1251, 1260.

134. Burns v. Cline, 2016 OK 99, ¶ 17, 382 P.3d 1048, 1053 (emphasis added).

135. *E.g.*, *id*. ¶ 11, 382 P.3d at 1051. This language first appeared in the context of a legislative bill in Fent v. Oklahoma Capitol Improvement Authority, 2009 OK 15, ¶ 16, 214 P.3d 799, 805, quoting *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 14, 142 P.3d 400, 407-08, which was its first appearance regarding an initiative petition.

bill's title, which was not at issue in any of these cases? None of the three abortion bills were lengthy. The provisions were reasonably clear. Anyone who read the bills could not have been misled about what they required. And regarding the "unpalatable choice," the court offers no explanation of how it determines whether such a choice existed. The court simply announces that it did exist and therefore the bill is unconstitutional. But this type of prediction offers no meaningful distinction between bills that have been held to violate the rule and those that have been upheld. For example, in *Burns II*, why would provisions regarding supplies and equipment, training, screening, medical procedures, records and reporting, and penalties violate the single-subject rule when all the provisions relate to abortion facilities? Certainly, an individual legislator could conceivably be in favor of, for example, the provisions regarding supplies and equipment but not the training provisions; another could be in favor of the provisions regarding reporting but not the penalties. But the same thing could be said about, for example, the immigration law provisions that the court held constitutional in *Thomas*. A legislator might be in favor of prohibiting issuance of identification documents to a person in the country unlawfully but oppose the provision making it a felony to transport such a person within the state; another legislator might be in favor of one of those provisions but believe it burdensome to require jailers to determine citizenship status of DUI offenders. Or consider *Coates v. Fallin*,[136] where the court summarily held that the new workers' compensation laws were constitutional without even reciting the "unpalatable choice" standard. A legislator could easily have been in favor of overhauling the workers' compensation laws yet objected to the exclusion of same-sex spouses from benefits, resulting in an unpalatable choice.[137] Where is the line? There is no principled difference between the outcomes in these cases.

Similar problems exist in the other two cases. *Douglas v. Cox Retirement Properties, Inc.*[138] dealt with Oklahoma's tort reform

136. Coates v. Fallin, 2013 OK 108, 316 P.3d 924.

137. *See id.* ¶ 9, 316 P.3d at 927 (Reif, V.C.J., concurring in part and dissenting in part) (noting the distinction and arguing that it was unconstitutional on other grounds). *See also*, Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 9, 302 P.3d 789, 803 (Winchester, J., dissenting) ("Legislation requires some compromise. At times, even the wording of a single statute on a single subject may result in an all-or-nothing choice for those voting on it.").

138. *Douglas*, 2013 OK 37, 302 P.3d 789.

legislation. In a 7-2 decision, the court held that the legislation violated the single-subject rule.[139] The plaintiff's brief had primarily argued that one provision—prohibiting school district representatives from conducting due process hearings and then advising the school board—was dissimilar from other provisions about various types of lawsuit reforms.[140] In part, the defendants argued that the single-subject rule was not violated because the offending provision had been repealed.[141] In a procedural quirk, this section had been repealed but had been passed twice as part of two different statutes, so it still existed.[142] But the court did not base its decision solely on this provision. The majority opinion described numerous sections of the bill—primarily by reciting the titles of various acts within the bill or amended by the bill, for example, Mandatory Seat Belt Use Act and Oklahoma Livestock Activities Liability Limitation Act—and held that they were too unrelated under the court's test for logrolling.[143] The court also declined to sever whatever provisions it deemed in violation of the single-subject requirement, reasoning that "picking and choosing which provisions relate to lawsuit reform . . . would essentially" make the court a policymaker.[144] As noted by the dissent,[145] the majority opinion started by reciting the "heavy burden" on those arguing unconstitutionality and that "[e]very presumption is to be indulged in favor of the constitutionality of a statute."[146] But the opinion made no attempt to apply that language in its reasoning.[147] Had it done so, the various provisions would be characterized as relevant to tort reform. For example, the Mandatory Seat Belt Use Act amendments related to admissibility in civil cases of evidence regarding the use of seat belts.[148]

139. *Id*. ¶ 12, 302 P.3d at 794.

140. Brief in Chief on Appeal of Plaintiff/Petitioner at 2-3, Douglas v. Cox Ret. Prop., Inc., 2013 OK 37, 302 P.3d 789 (No. 110,270), 2012 WL 3136553.

141. *Douglas*, ¶ 9 n.4, 302 P.3d at 793.

142. *Id*.

143. *Id*. ¶¶ 8-9, 302 P.3d at 793.

144. *Id*. ¶ 11, 302 P.3d at 793-94.

145. *Id*. ¶ 5, 302 P.3d at 802 (Winchester, J., dissenting).

146. *Id*. ¶ 3, 302 P.3d at 792.

147. *Id*. ¶ 5, 302 P.3d at 802 (Winchester, J., dissenting).

148. To be sure, this was not the first tort reform package to be declared unconstitutional by a state's highest court. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1100 (1999) held similar legislation unconstitutional for—among other reasons—violating the Ohio constitution's one-subject rule. *But see* Evans *ex rel*. Kutch v. State, 56 P.3d 1046, 1070 (Alaska 2002) (rejecting a single-subject

The court's most recent decision was *Hunsucker v. Fallin*,[149] where the court held the Impaired Driving Elimination Act unconstitutional. There, the court took a somewhat different approach from its prior cases. The court noted the title of the act but implicitly rejected it as a legitimate subject for deciding the single-subject challenge, calling impaired driving a "highly generalized subject."[150] Instead, the court focused on the provision stating that the purpose of the act was "effective and meaningful *administrative monitoring by the Department of Public Safety* of impaired driving offenders."[151] The court used this narrower statement of purpose to hold several provisions of the act unconstitutional.[152] The court held that a section regarding seizure and destruction of drivers' licenses was not related to administrative monitoring of impaired driving, so it was outside the single subject.[153] Similarly, a provision regarding criminal liability for a breath test refusal was deemed unrelated to administrative monitoring, as was an amendment to an evidentiary statute that applied to both administrative and criminal proceedings. And the court held that a provision expanding the scope of medical personnel authorized to draw blood was outside the scope of the single subject. The court particularly noted that "the individual legislator's calculus in deciding whether to vote for or against such language involves the legislator's discretion concerning the professional expertise of the classes of individuals named for the statutory task and not the Department's administrative monitoring of impaired drivers."[154]

The problem with this analysis is that the constitution requires that the *subject* of the act be stated in the title.[155] The title begins with "[a]n

challenge to tort reform legislation that included damages caps, modifications to statutes of limitation, comparative allocation of fault, changes to offer of judgment procedures, and partial immunity for hospitals); Smith v. Dep't of Ins., 507 So. 2d 1080, 1085-87 (Fla. 1987) (rejecting a single-subject challenge to tort reform legislation that included provisions relating to insurance companies, coverage, and contracts; changes to joint and several liability, damage limits, and civil procedure; and financial responsibility requirements for physicians, among other provisions).

149. Hunsucker v. Fallin, 2017 OK 100, ¶ 0, 408 P.3d 599, 601.
150. *Id*. ¶ 31, 408 P.3d at 610.
151. *Id*. ¶ 22, 408 P.3d at 608 (emphasis in original).
152. *Id*. ¶¶ 32-35, 408 P.3d at 610-11.
153. *Id*. ¶ 32, 408 P.3d at 610.
154. *Id*.
155. *Id*. ¶ 17, 408 P.3d at 621 (Wyrick, J., concurring in part and dissenting in part).

act relating to impaired driving."[156] The court provides no reason why this is too "highly generalized" to serve as the subject and provides no test or guidance regarding what—in its view—the proper scope of a subject might be.[157] The court's chosen subject of "administrative monitoring" by the Department of Public Safety does not appear in the title, but it could certainly be a subtopic of the subject of "impaired driving."[158] So could the other provisions, however, and the court gave no rationale for why it chose the "purpose" section of the act to be the subject for purposes of the single-subject rule. Certainly, the purpose could be relevant to the analysis, but it is not a substitute for the subject.[159]

The court applied different logic regarding a provision amending an existing notice statute that applied to impaired driving offenses and other offenses. The court reasoned that because the amendments would affect notices for offenses in addition to those that were the subject of the bill, those provisions violated the single-subject rule. But as the dissent pointed out, assuming that the legislature wanted the amendments to apply to all the offenses in the existing statute, the court's analysis would require the legislature to enact two (or more) laws—one for impaired driving offenses and one for all or perhaps *each* of the other offenses in the existing statute.[160]

Because the court held the notice statute unconstitutional, it reasoned that two other sections must also be unconstitutional because their execution required notice and thus they could not be severed from the notice provisions. One section revoked driving privileges, and the other provided for creation of a new "accountability program" involving modified licenses and ignition locks.[161] Having concluded that those seven sections were unconstitutional, the court reasoned that they could not be severed from the rest of the act, because of their interconnectedness with the remaining sections.

The *Hunsucker* opinion removes any doubt that the court has

156. S.B. 643, 56th Leg., 1st Sess., 2017 Okla. Sess. Laws 1664.
157. *Hunsucker*, ¶ 31, 408 P.3d at 610.
158. *Id*. ¶¶ 31-34, 408 P.3d at 610-11.
159. *See* Ruud, *supra* note 13, at 395-96. And this analysis is inconsistent with the court's reasoning in *City of Pond Creek v. Haskell*, 1908 OK 153, ¶¶ 28-31, 97 P. 338, 349-50, that the title of a bill may be very general.
160. *Hunsucker*, ¶ 20, 408 P.3d at 622 (Wyrick, J., concurring in part and dissenting in part).
161. S.B. 643, 56th Leg., 1st Sess., 2017 Okla. Sess. Laws 1664.

rejected its (and most other jurisdictions') earlier jurisprudence. The court has abandoned any pretense of presuming a statute's constitutionality, avoiding exacting enforcement in a technical manner, or finding multiple subjects only when its subjects have no legitimate connection or relation. Even a "readily manifest" common theme or purpose no longer seems enough. Instead, the court looks to the legislature's stated purpose of the bill to find its subject, identifies the provisions that clearly fit within that purpose and rejects those that may be only tangential, and declines to sever the rejected provisions. The severability analysis is also flawed.

SEVERABILITY

The last clause of section 57 requires a severability analysis: "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."[162] The clause uses the word "shall," so the analysis is mandatory.[163] The words "this section" mean that the clause applies to any type of section 57 violation, including single-subject violations.[164] This clause cannot be ignored.[165] The court itself has recognized that "the provisions of a Constitution are construed using the usual rules of statutory construction."[166] "It is not to be supposed that a Constitution contains excess verbiage without force and effect. Statutes (and generally Constitutions) must be construed as a consistent whole in harmony with common sense and reason and every portion thereof should be given effect if possible."[167] Yet in none of the cases where the court has struck down bills or provisions of bills as single-subject violations has the court recognized the mandatory nature of this clause when it considers severability.

The only discussion of this clause in a reported opinion is in Justice

162. OKLA. CONST. art. 5, § 57.
163. *Id*.
164. *Id*.
165. *See* People v. Olender, 854 N.E.2d 593, 606 (Ill. 2005) (discussing the mandatory severance clause that was contained in the single-subject article of the Illinois Constitution of 1870 as compared to the Illinois Constitution of 1970 that removed the mandatory language).
166. Cowart v. Piper Aircraft Corp., 1983 OK 66, ¶ 4, 665 P.2d 315, 317 (citing Sullivan v. Securities Investment Co. of St. Louis, 508 P.2d 1077 (Okla. 1972)).
167. *Cowart*, ¶ 4, 665 P.2d at 317.

Kauger's concurrence in *Johnson*.[168] There she pointed out that the final clause of section 57 does not "prohibit[] the challenge of multi-subject bills" even if "all subjects are included in the title of an act," correctly reasoning that such a rule would vitiate the requirement that the single subject be stated in the title.[169] But the final clause is also operable.[170] The title and the body of an act must contain only one subject, and those subjects must be the same. But if the body contains two or more subjects, only those that are not part of the single subject stated in the title are void according to the final clause.

Instead of addressing the final clause of section 57, the court analyzes severability by considering (1) the presence of a severability clause or a non-severability clause and (2) the statutory construction rules of section 11a in title 75 of the Oklahoma Statutes.[171] Those statutory construction rules also preserve the remaining provisions where part of an act is unconstitutional, but the statute has exceptions where the court finds that:

> the valid provisions . . . are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or . . . the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.[172]

These statutory exceptions certainly are necessary and appropriate in other contexts. But the problem with applying these exceptions to single-subject violations is two-fold: First, the Oklahoma Constitution voids only the parts of the law that are not expressed in the title, so the court is *required* to make the determination of which parts are outside the title; the statute cannot override the constitutional requirement. Second, a true single-subject violation would never fall within the statutory exceptions, because if a provision of a bill were truly on a different subject from that expressed in the title, it could never be inseparably connected or

168. Johnson v. Walters, 1991 OK 107, ¶ 0, 819 P.2d 694, 701.
169. *Id*. ¶ 4, 819 P.2d at 703.
170. *Id*.
171. *E.g.*, Hunsucker v. Fallin, 2017 OK 100, ¶ 35, 408 P.3d 599, 611.
172. Douglas v. Cox Ret. Prop., Inc., 2013 OK 37, ¶ 11 n.6, 302 P.3d 789, 794 n.6.

dependent on the others or be incomplete and incapable of being executed. By definition, such a provision would be unrelated and independent of the other provisions, because it was not even on the same subject.

Ignoring the severance clause in section 57 by not engaging in the process of severing the purportedly offending sections in a bill also allows the court to avoid reckoning with its narrow yet undefined view of the title clause of section 57 and providing guidance as to when it considers a title's subject as too broad. For example, in *Douglas v. Cox Retirement Properties, Inc.*, the court explicitly refused to engage in any severance analysis, which would have required identifying and severing only those subjects that were outside the subject of "lawsuit reform."[173] The court claimed that severing provisions was "not an option . . . [because] [i]t would be both dangerous and difficult."[174] The "dangerous" aspect was based on a fear that the court, "[b]y picking and choosing which provisions relate to lawsuit reform and which do not," would be intruding on the legislature's policy-making function by eliminating only some of the bill's provisions.[175] The "difficult" characterization was based on the number of sections.[176] The majority opinion never identified any provisions as outside the scope of "lawsuit reform" and certainly never explained *why* those provisions did not fall within that subject. Instead, it listed the titles of certain sections and said that they had nothing in common. Because it never explained why any particular provision was not connected to the others as "lawsuit reform," the court's implicit reasoning seems to have been that the topic of "lawsuit reform" was too general. This was further implied by the court's quoting again from *Campbell* that "skillful drafting of a broad topic" would defeat the single-subject rule.[177]

The concurring opinion in *Douglas* pointed to at least one section that was unrelated—creating a criminal offense for making false accusations against an education employee.[178] That provision could have been severed. Also, the disputed provision about school districts and due

173. *Id*. ¶ 11, 302 P.3d at 793-94.
174. *Id*.
175. *Id*.
176. *See id.* ¶ 3, 302 P.3d at 794 (Winchester, J., dissenting). The court also cited OKLA. STAT. tit. 75, § 11(a)(1) in concluding that it could not presume which portions the legislature would have enacted separately. *Id.* ¶ 11 n.6, 302 P.3d at 794.
177. *Id*. ¶ 5, 302 P.3d at 792.
178. *Id*. ¶ 6, 302 P.3d at 797 (Kauger, J., concurring).

process hearings could have been severed.[179]

The court should consider the United States Supreme Court's guidance on severability issues that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[180] To be sure, the Court also notes that being "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it,"[181] and that a "court cannot 'use its remedial powers to circumvent the intent of the legislature.'"[182] But in the single-subject context, these two considerations cannot be used to avoid the court's constitutional duty.

OTHER APPROACHES

In view of Oklahoma's problematic analysis of single-subject challenges, proposals by legal scholars and approaches of other jurisdictions should be considered before moving on to proposed modifications. As discussed, Oklahoma opinions sometimes recite liberal, deferential language but never apply it in the analysis. The only standard is "germaneness," which is subjective and has correctly been described as falling short of a "workable standard [for the legislature] to manage its own affairs."[183]

Some states attempt to be more specific, but so long as words like "germane" are used, the analysis is always subject to ambiguity.[184]

179. The concurrence's other example, the Uniform Emergency Volunteer Health Practitioners Act sections that created a registration system, could actually be deemed to be related to tort lawsuit reform because it authorized volunteers to practice and provided the scope of such practice, which could affect tort liability in the aspect of the standard of care. *Id*. ¶ 5, 302 P.3d at 796.

180. Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006) (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)).

181. *Ayotte*, 546 U.S. at 329 (quoting Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 397 (1988).

182. *Ayotte*, 546 U.S. at 329 (quoting Califano v. Westcott, 443 U.S. 76, 94, 99 (1979) (Powell, J., concurring in part and dissenting in part)).

183. Campbell v. White, 1993 OK 89, ¶ 38, 856 P.2d 255, 273 (Opala, J., dissenting).

184. For example, Illinois has stated the following:

> The statute embraces but one subject or object where the matters included are such that, if traced back, they will lead the mind to the subject as the generic head. On the other hand, an act may not embrace unrelated or unconnected subjects or objects, but the various topics in the body of the act should and must be kindred in nature, and germane to the subject or object. *It has been said that*

Regardless of the language, however, most states apply their standards liberally and defer to the legislature in most cases,[185] in accordance with the universal principle that statutes are presumed constitutional and that the single-subject rule is not to be exactingly enforced.[186] The Oregon Supreme Court, for example, frames its analysis as requiring these steps:

> (1) Examine the body of the act to determine whether (without regard to an examination of the title) the court can identify a unifying principle logically connecting all provisions in the act, such that it can be said that the act "embrace[s] but one subject."
> (2) If the court has *not* identified a unifying principle logically connecting all provisions in the act, examine the title of the act with reference to the body of the act. In a one-subject challenge to the body of an act, the purpose of that examination is to determine whether the legislature nonetheless has identified, and expressed in the title, such a unifying principle logically connecting all provisions in the act, thereby demonstrating that the act, in fact, "embrace[s] but one subject."[187]

This standard effectively requires the court to search for the single subject, in both the body and the title of the act, unlike Oklahoma's requirement that the single subject be readily manifest and that even a common connection or theme is not sufficient. The Florida Supreme Court goes further and considers whether legislation was comprehensive,

> *there can be no surer test of compliance with the constitutional requirement of singleness of subject than that none of the provisions of an act can be read as relating or germane to any other subject than the one named in the title.*

People v. Burdunice, 211 Ill. 2d 264, 268, 811 N.E.2d 678, 681 (2004) (emphasis added) (quoting Co-ordinated Transport, Inc. of Illinois v. Barrett, 412 Ill. 321, 326–27, 106 N.E.2d 510 (1952)). The italicized language especially is self-defeating. Provisions of any act can be read as relating to a subject more broad or narrow than the one expressed in the title. The real issue is how broad or narrow the subject is required to be and how direct the connection between the bill's provisions and the stated subject must be.

185. *See, e.g.*, Justin W. Evans & Mark C. Bannister, *Reanimating the States' Single Subject Jurisprudence: A New Constitutional Test*, 39 S. Ill. U. L. J. 163, 211 (2015) ("Most [states] have defined their single subject tests in very broad and vague language, calculated to defer to the legislature.").

186. *E.g.*, *In re* County Commissioners, 1908 OK 207, ¶ 5, 98 P. 556; City of Pond Creed v. Haskell, 1908 OK 153, ¶ 20, 97 P. 338, 348.

187. McIntire v. Forbes, 909 P.2d 846, 854–56 (Or. 1996) (abrogated on other grounds) (emphasis added).

allowing a broader subject in such cases.[188]

As noted earlier, Professor Gilbert has presented the most thorough scholarly analysis, and he proposed a test to determine whether logrolling or riding has occurred.[189] Under his proposed test, only riding would be unconstitutional. And as noted earlier, this result is inconsistent with the rule's underlying purpose as identified by most states, including Oklahoma.[190] But his proposed methodology for determining the existence of riding is instructive and can be used analogously to look for evidence of logrolling. First, he recognized that trying to identify logrolling or riding requires guesswork, an admission that the Oklahoma Supreme Court has not recognized.[191] So he proposes that courts should look at the legislative process and history of the bill and place the burden on the contestant to produce that information and show evidence of riding.[192]

Some states analyze this type of information to determine whether logrolling (rather than riding) existed. The Florida Supreme Court considers whether the challenged provisions were added by amendment, were proposals that had previously failed to pass out of committee and were added to another bill, or were passed near the end of the legislative session. Any of these may make the presence of logrolling more likely. For example, in *State v. Thompson*,[193] three provisions about civil causes of action that had died in House committees were added to a career criminal bill by amendments made on the floor near the end of the session. The court reasoned that this legislative history supported its decision that career criminal sentences and domestic violence civil cases were separate subjects.[194] Similarly, the Maryland Court of Appeals has

188. *Compare* State v. Thompson, 750 So. 2d 643, 648 (Fla. 1999) ("the Legislature has not identified a broad crisis encompassing both career criminals and domestic violence") *with* State v. Lee, 356 So. 2d 276, 282 (Fla. 1978) ("Chapter 77-468 is an attempt by the legislature to deal comprehensively with tort claims and particularly with the problem of a substantial increase in automobile insurance rates and related insurance problems.").

189. Gilbert, *supra* note 1.

190. *See supra* text accompanying notes 34-36.

191. Gilbert, *supra* note 1, at 810, 850.

192. *Id*. at 862-63.

193. State v. Thompson, 750 So. 2d 643, 647 (Fla. 1999).

194. *See also* Fla. Dep't of Highway Safety & Motor Vehicles v. Critchfield, 842 So. 2d 782, 785–86 (Fla. 2003) (provisions added by Senate about vehicle registrations, drivers' licenses, and speeding fines were unrelated to original House bill provisions about worthless checks, and House approved the bill one day before the end of the

considered whether the challenged provisions were added to a bill upon receipt from the other chamber.[195] Considering any of this information would be an improvement on what exists in Oklahoma now, which fits Gilbert's characterization of single-subject jurisprudence as requiring litigants only to "dream up a plausible formulation by which the components of a challenged act relate to more than one logical subject."[196]

The Oklahoma Supreme Court has admitted that its cases may on the surface seem inconsistent but claims that they actually form a cohesive jurisprudence based on applying the purpose of avoiding misleading bills or those that leave legislators with "an unpalatable all-or-nothing choice."[197] But as discussed earlier, "unpalatable" is in the eye of the beholder. And the court's determinations of unpalatability have not been consistent.[198] A better approach is needed.

If the Oklahoma Supreme Court is to develop a better supported methodology to analyze single-subject cases, it should start with some guidance regarding what level of generality it will accept in a bill's stated subject. As discussed, the court in *Hunsucker* seemed to reason that "impaired driving" was not a proper subject when it referred to that subject as "highly generalized" and ignored it in the analysis.[199] And in *Douglas*, the court implied that "lawsuit reform" was an unacceptable subject.[200] Instead of impliedly rejecting subjects, the court should return

session).

195. Porten Sullivan Corp. v. State, 568 A.2d 1111, 1121–22 (Md. 1990) (holding that ethics provisions added in senate were not the same subject as tax provisions in the original house bill).

196. Gilbert, *supra* note 1, at 863.

197. Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 15, 315 P.3d, 789, 799-800 (Kauger, J. concurring).

198. *E.g.*, Burns v. Cline, 2016 OK 99, ¶ 11, 382 P.3d 1048, 1051. This language first appeared in the context of a legislative bill in Fent v. Oklahoma Capitol Improvement Authority, 2009 OK 15, ¶ 16, 214 P.3d 799, 805, quoting *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 14, 142 P.3d 400, 407-08, which was its first appearance regarding an initiative petition; Coates v. Fallin, 2013 OK 108, 316 P.3d 924. *See id*. ¶ 9, 316 P.3d at 927 (Reif, V.C.J., concurring in part and dissenting in part) (noting the distinction and arguing that it was unconstitutional on other grounds). *See also* Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 9, 302 P.3d 789, 802 (Winchester, J., dissenting) ("Legislation requires some compromise. At times, even the wording of a single statute on a single subject may result in an all-or-nothing choice for those voting on it.").

199. Hunsucker v. Fallin, 2017 OK 100, ¶ 31, 408 P.3d 599, 610.

200. *Douglas*, ¶ 5, 302 P.3d at 792 ("skillful drafting of a broad topic defeats the purpose of the single-subject rule.") (quoting Campbell v. White, 1993 OK 89, ¶ 14, 856

to the principles it stated in earlier cases, such as *Griffin v. Thomas*: "The term 'subject' as used in these provisions 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."[201]

This standard does not have to be limitless. As the Oregon Supreme Court stated, "a 'subject' must be narrower than the universe of those things with respect to which the legislature is empowered to act, or the provision would be meaningless."[202] For example, "state government" is so broad that nothing specific could be predicted.[203] Although slightly less egregious, "uniform laws" is also too broad, because uniform laws exist in virtually all areas of law.[204] A reasonable limit would be that the subject must be narrow enough that certain categories of statutes or titles could be identified that would fairly fall within the subject or would be reasonably expected to be affected by legislation with that subject title.[205] Obviously, a "reasonably expected" standard is not a bright line and is subject to argument about the level of acceptable generality. But especially when combined with a construction that is deferential to the legislature, it is an improvement over the court's standard now, which is nothing more than "I know it when I see it."

Then having identified an acceptable subject, the actual contents of the legislation must be consistent with what would have been reasonably expected to be within that subject.[206] In making this determination, the

P.2d 255, 260).

201. Griffin v. Thomas, 1922 OK 134**,** ¶ 17, 206 P. 604, 609 (quoting 25 R. C. L., section 88, at 842).

202. McIntire v. Forbes, 909 P.2d 846, 855 (Or. 1996) (abrogated on other grounds).

203. Johnson v. Walters, 1991 OK 107, ¶ 17, 819 P.2d at 698.

204. *See supra* text accompanying notes 90-91.

205. Cf. Evans & Bannister, *supra* note 186, at 220 (proposing a similar rule of reasonable specificity: "the reasonable layperson can (a) anticipate, to a reasonable degree of accuracy, the likely contents and import of the act, and (b) not find any individual provision's inclusion in the act a surprise in light of the manner in which the act's subject is characterized . . . .").

206. One author proposed a more mechanical rule—a presumption that a bill contains multiple subjects if the bill affects multiple chapters in the Missouri Revised Statutes. Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 142 (2001). Although the presumption could be rebutted "by a showing that the provisions fairly relate to the same subject or are means of accomplishing the subject." This seems too restrictive. As will be discussed regarding *Hunsucker*, the subject of "impaired driving" would commonly be considered to include both criminal and civil matters. In practice, an arrest for DUI creates both a criminal case

court should apply the deferential standard that it formerly used, finding a single-subject violation only when "by no fair intendment can [its subjects] be considered as having any legitimate connection with or relation to each other."[207] This standard presumes constitutionality. And the presumption should actually mean something—not just be a recital at the beginning of the analysis.

Although the presumption of constitutionality is not an evidentiary presumption, overcoming the presumption should require more than hypothesizing about what a legislator might have thought at the time of passage. That is no presumption at all.[208] As the United States Supreme Court has reasoned where state laws were challenged as exceeding the authority of state constitutions,

> It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.[209]

This "clear and strong conviction" language is analogous to what appellate courts require under a clearly erroneous standard for reversal of a lower court's factual determinations. In that context, the court uses a "plausible" standard in deference to the trial court.[210] An appellate court

and a license revocation proceeding.

207. Bond v. Phelps, 1948 OK 76, ¶ 35, 191 P.2d 938, 947 (quoting 50 AM. JUR. *Statutes* § 197 (1944)).

208. For example, Federal Rule of Evidence 301 requires that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." FED. R. EVID. 301. And in Oklahoma, once a will contestant has obtained a presumption of undue influence, the will proponent must rebut with evidence supporting a finding of nonexistence of undue influence. Holcomb v. Drennan (*In re* Estate of Holcomb), 2002 OK 90, ¶ 32, 63 P.3d 9, 19.

209. Fletcher v. Peck, 10 U.S. 87, 128-29, 6 Cranch 87 (1810) (holding that the Georgia legislature had constitutional authority to pass an act to sell certain land). *See also* Sweet v. Rechel, 159 U.S. 389, 393 (1895) ("It is a well-settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed." Reasoning that an act of the Massachusetts legislature was constitutional because it "had for its real object the protection of the public health, [rather than the] acquisition of property for . . . profit").

210. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

may not reverse even if it would have come to a different decision. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[211] The court should apply analogous reasoning in single-subject cases, as Justice Opala argued for in *Campbell* when he proposed the "fairly-debatable" standard.[212]

In fact, Oklahoma still purports to use a reasonable doubt standard.[213] The court also purports to place the burden on the contestant.[214] But in single-subject challenges, this burden seems to require only a listing of the sections that allegedly create multiple subjects and an argument that they are not germane.[215] Instead, the court should require contestants to rebut the presumption with some evidence that logrolling may have occurred. The types of history suggested by Gilbert and used by Florida and Pennsylvania should be examined to determine whether the presumption has been defeated. A mere opinion that the legislation involves more than one subject should not be enough.[216]

Applying this proposed framework would result in different outcomes in the single-subject analysis in both *Burns v. Cline* abortion cases, as well as in *Douglas* and *Hunsucker*. In *Burns I*, the title clearly

211. *Id*.

212. Campbell v. White, 1993 OK 89, ¶ 7, 856 P.2d 255, 264 (Opala, J., dissenting).

213. "Any Legislative enactment . . . will be presumed constitutional unless its unconstitutionality is shown beyond a reasonable doubt." Fent v. State *ex rel*. Office of State Fin., 2008 OK 2, ¶ 14, 184 P.3d 467, 474 (quoting Wiseman v. Boren, 1976 OK 2, ¶ 3, 545 P.2d 753, 761, *reh'g granted*, 1976 OK 2, ¶ 3, 545 P.2d 753, 761). Other states also use this standard. For example, in Florida, "[t]o overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law. Therefore, the act must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score." Franklin v. State, 887 So. 2d 1063, 1073 (Fla. 2004).

214. "The burden is on the City of Enid, the entity challenging the Act, to show beyond a reasonable doubt that the Act is unconstitutional. Otherwise, we will not disturb the presumption of the Act's validity." City of Enid v. Pub. Emps. Relations Bd., 2006 OK 16, ¶ 5, 133 P.3d 281, 285 (special law challenge) (citations omitted).

215. *See, e.g.*, Brief in Support of Application to Assume Original Jurisdiction and Petition for Declaratory and Injunctive Relief at 3-7, Hunsucker v. Fallin, 2017 OK 100, 408 P.3d 599 (No. 11613).

216. Gilbert, *supra* note 1, at 862-64. Gilbert also suggests that legislatures create more legislative history, including by voting not to divide the question. If a large majority supports the bill, and no one in that majority votes to divide the question, that should be considered strong evidence that no legislator considered herself faced with an unpalatable choice. Of course, that could be criticized as a tactic to protect a logroll, but it is no more suspect than taking separate votes on each provision.

stated that the topic was abortion, and each clause related to abortion procedures and facilities.[217] So no single-subject violation would have existed. (Presumably, the bill was unconstitutional in any event under *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[218] although only four justices voted on that basis.[219])

In *Burns II*, the subject was abortion, and all thirteen clauses related to abortion.[220] Provisions relating to abortion facilities and procedures would be reasonably expected to appear in such a bill. No indications exist that the legislation resulted from a combination of bills or late amendments, so the presumption of constitutionality would stand.[221] (Again, the bill was unconstitutional in any event under *Hellerstedt*.[222])

The legislation involved in *Douglas* would pass the proposed test, with two exceptions. In *Douglas*, the legislature urged that the subject was "lawsuit reform" or "tort reform," and the court used that subject in its analysis.[223] Presuming constitutionality, and applying a liberal construction, that topic is not so broad that various statutes could not be identified as reasonably expected. For example, rules regarding civil procedure, evidentiary requirements, standards of care, damages, statutes of limitation, and perhaps insurance, would all be reasonably expected.[224]

217. Burns v. Cline, 2016 OK 99, ¶ 10, 382 P.3d 1048, 1051.

218. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

219. *Burns I*, ¶ 1, 382 P.3d at 1053 (Combs, concurring specially).

220. *Burns II*, 2016 OK 121, ¶¶ 23-25, 387 P.3d 348, 354-55.

221. The court did not address the "clear title" requirement in this case or the others discussed. In *Burns II*, the first clause of the title referenced only "public health," but that was followed by twelve clauses separated by semicolons, and three of those mentioned abortion. "Public health" by itself seems too general even under a liberal interpretation, because it could also include a topic such as the public health crisis of opioid addiction or licensing requirements for graduates of foreign medical schools. But all thirteen clauses related to abortion, and that narrower subject did appear in three clauses. Considering the title as a whole, the subject was abortion, and the court used abortion as the subject in holding that the bill violated the constitution.

222. *Burns II*, ¶ 19, 387 P.3d at 354.

223. The title of the bill was six pages long and contained numerous clauses listing the various individual provisions contained in the bill. The first clause of the title stated that it was "[a]n [a]ct relating to civil procedure." 2009 Okla. Sess. Laws 935.

224. *See* State *ex rel*. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1100 (1999) **(**held similar legislation unconstitutional for—among other reasons—violating the Ohio constitution's one-subject rule); Evans *ex rel*. Kutch v. State, 56 P.3d 1046, 1070 (Alaska 2002) (rejecting a single-subject challenge to tort reform legislation that included damages caps, modifications to statutes of limitation, comparative allocation of fault, changes to offer of judgment procedures, and partial immunity for hospitals); Smith v. Dep't of Ins., 507 So. 2d 1080, 1085-87 (Fla. 1987) (rejecting a

And the actual contents of the bill are consistent with what would reasonably be expected from the topic. Aside from the school board provision and the provision about false accusations against an education employee, all the provisions plausibly related to lawsuit reform.[225] No rebuttal facts about the legislative process are evident.

Hunsucker would also have been decided differently under the proposed test. The topic was "impaired driving."[226] Civil and criminal provisions about drivers' license seizure and revocation, evidence, and sobriety testing would reasonably be expected in such a bill. And those provisions were in fact contained in the bill. Again, no rebuttal facts are evident.

Nova Health Systems would fail the proposed test. First, the proposed single subject is not apparent. The title of the bill began with "[a]n act relating to public health and safety," and contained forty-five clauses.[227] Only three of those clauses explicitly related to abortion. Many of the others used vague adjectives such as "certain" that are not conducive to predicting what laws would be affected. The petitioners' brief proposed a single subject of "healthcare practices that take human life."[228] But that topic is vague and could reasonably be expected to perhaps include provisions about the death penalty rather than a prohibition against lawsuits for a botched vasectomy. As noted earlier, the bill contained provisions relating to abortion as well as provisions about assisted suicide and wrongful birth actions. Further, rebuttal evidence was apparently available because the court noted that the bill was allegedly a combination of five separate bills.[229] Finally, the court would not even be able to sever certain provisions, because there is no single subject to use as the basis.

Attempting to apply the proposed test to two cases involving bond projects presents a slightly different issue. As discussed earlier, in

single-subject challenge to tort reform legislation that included provisions relating to insurance companies, coverage, and contracts; changes to joint and several liability, damage limits, and civil procedure; and financial responsibility requirements for physicians, among other provisions).

225. *Douglas*, ¶¶ 2, 6, 302 P.3d at 794-95, 797 (Kauger, J., concurring specially).

226. Hunsucker v. Fallin, 2017 OK 100, ¶¶ 21-22, 408 P.3d 599, 608.

227. 2008 Okla. Sess. Laws 159.

228. Defendants' Response to Plaintiff's Motion for Partial Summary Judgement and Brief in Support at 1, Nova Health Systems v. Edmondson, 2010 OK 21, 233 P.3d 380 (No. 1009585948).

229. *Nova Health Sys.*, ¶ 1, 233 P.3d at 380-81.

Oklahoma Capitol Improvement Authority, the court found a single-subject violation where a bill included three bond projects for unrelated projects in diverse areas of the state.[230] But in a 2016 case, the court found no single-subject violation in a bill involving four bond issuances when all were for turnpike projects.[231] These results can be reconciled under the proposed test only if "revenue bonds" is rejected as a subject on the basis that it is too general. And it is too general. By itself, "revenue bonds" provides no more information than "state law" or "uniform laws." Bonds are merely a funding mechanism for a project. Without knowing the proposed projects that the bonds will be used for, the subject is not informative. Looking at the use, the turnpike projects were related and in fact authorized under the same statute, whereas in *Oklahoma Capitol Improvement Authority*, the state was unable to offer a single subject other than water or flood control, and the Native American Cultural Authority obviously did not relate to that.

CONCLUSION

The Oklahoma Supreme Court is regularly asked to apply the single-subject rule,[232] and at its next opportunity, it should reconsider the direction its jurisprudence has taken in recent years. Although the court continues to recite a standard deferential to the legislature—a heavy burden to prove unconstitutionality beyond a reasonable doubt—it has ceased to apply that standard. Instead, it purports to evaluate whether a hypothetical legislator was faced with an unpalatable choice, based on the court's own judgment, perhaps after considering the stated purpose of the legislation. Instead, the court should use an actual consistent methodology such as the one proposed here. The court should begin by presuming that the legislation is constitutional and place the burden on the party making a single-subject challenge to actually show otherwise.

230. Fent v. Stat *ex rel* Okla. Improvement Auth., 2009 OK 15, ¶ 23, 214 P.3d 799, 807.

231. *In re* Application of the Okla. Turnpike Auth., 2016 OK 124, ¶ 10, 389 P.3d 318, 321.

232. For example, in the last quarter of 2019, the court saw two single-subject challenges, but neither required an analysis of the rule. In *Shadid v. City of Oklahoma City*, 2019 OK 65, ¶ 7, 451 P.3d 161, 166, the court rejected a challenge to a city ordinance that clearly did not contain multiple subjects. And in *Lowe v. Stitt*, No. 118371 (Okla. Dec. 13, 2019), the appeal of a denial of a single-subject challenge was dismissed by the appellants.

As demonstrated, this methodology would still allow the court to invalidate legislation that violates the rule. But it would give the legislature notice of what the court considers the constitution to require as a single subject, and thereby increase the legislature's efficiency and public confidence in the operations of both the legislature and the court. Further, to the extent a violation does occur, the court should recognize and apply the Constitution's mandatory severability clause in single-subject cases.