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Aggressive Enforcement of the Single Subject Rule

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ABSTRACT

Most states require voter initiatives to embrace only a single subject, and courts have invalidated many initiatives for violating the single subject rule. Critics argue that the definition of a "subject" is infinitely malleable, so that if judges attempt to enforce the single subject rule aggressively, their decisions will be based on their personal views rather than neutral principles. We investigate this argument by studying the decisions of state appellate court judges in five states during the period 1997–2006. We find that judges are more likely to vote to uphold an initiative against a single subject challenge if their partisan affiliations suggest they would be sympathetic to the policy proposed by the initiative. More important, we find that partisan affiliation is highly consequential in states with aggressive enforcement of the single subject rule—the rate of voting to uphold an initiative jumps from 41 percent when a judge agrees with the policy to 83 percent when he disagrees—but not very consequential in states with restrained enforcement. The evidence suggests that it may be possible to apply the single subject rule in a neutral way when the judiciary is restrained, but with aggressive enforcement decisions are likely to be driven by the political preferences of judges.

INTRODUCTION

THE SINGLE subject rule, on the books in at least 14 states, requires that initiatives embrace only one subject.[1] This article studies the decisions of state judges in cases in which opponents of voter initiatives raised single subject claims. Courts used the rule to strike down or remove initiatives from voter consideration in at least 70 cases during the period 1997–2006 in five initiative states applying the rule.[2]

The single subject rule is controversial in part because the definition of a "single subject" is unclear and, as Daniel Lowenstein has argued, it is infinitely malleable in theory.[3] As a result, courts have a great deal of discretion in single subject cases, unless the judges themselves put meaningful restraints on their interpretation of the rule. Because of the discretion inherent in deciding single subject challenges, critics have argued that the rule cannot be enforced in an objective manner and should not be used (Hasen, 2006; Campbell, 2001:

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[1] The 14 states are Alaska, Arizona, California, Colorado, Florida, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Washington, and Wyoming. See Waters (2003). Downey (2004) and Dubois and Feeney (1998) have somewhat different counts, but these discrepancies are not important for purposes of this article. All authors agree that the five states studied here—California, Colorado, Florida, Oregon, and Washington—have a single-subject rule applicable to voter initiatives. We are not here concerned with the single subject rule for laws passed by the legislature. Most states have such a rule.

[2] See Part IV, "New Evidence," below.

[3] Lowenstein (2002: 47): "The difficulty of applying the term 'subject' in a single subject rule . . . is that by its very nature, the permissible content of a 'subject' is infinitely and essentially malleable."

163), or, as Lowenstein (1983, 2002) argues, should be used only in a restrained manner. Defenders have responded that the rule is amenable to objective application and that in practice judges have not allowed their personal beliefs to influence their decisions.[4]

Inspired by Lowenstein's analysis of the dangers of aggressive enforcement of the single subject rule, this article investigates single subject rulings in five key initiative states over a 10-year period to determine the extent to which partisan inclinations, career concerns, and other factors that should be irrelevant in deciding single subject challenges play a role in judicial decisions. Our main finding is that decisions in single subject cases are heavily influenced by a judge's partisan inclinations, but that the amount of partisan influence depends on whether the state's judicial doctrine directs judges to apply the single-subject rule aggressively or with restraint. Specifically, in a sample of 154 cases during the period 1997–2006, we find that in states with aggressive enforcement judges voted to uphold an initiative 83 percent of the time when it proposed a policy congruent with their partisan leanings but voted to uphold only 41 percent of the time when an initiative proposed a policy at odds with their partisan leanings. In contrast, in states with restrained enforcement judges voted to uphold 88 percent of congruent cases and 81 percent of noncongruent cases.

This evidence provides strong support for Lowenstein's argument that aggressive enforcement is inevitably subjective:

> Because "subjects" are chosen for convenience, notions of what forms a coherent subject in politics and legislation will depend in part on ideologies and "world-views." When judges apply the single subject rule aggressively, even if they seek to do so in accord with their sense of what the public understanding is, they will inevitably be exercising their own judgments in the most general way about what makes good political or policy sense. That is not to say that their single subject rule judgments will necessarily turn on whether they personally favor the proposals before them. But their judgments *will* necessarily reflect the way they have chosen to subjectively organize the world. (Lowenstein 2002: 47–48)

The evidence suggests that in practice the way judges subjectively organize the world is closely linked to their political ideologies, causing their single-subject decisions to be strongly connected to their political views concerning the policy proposed by the initiative.

In addition to its relevance for understanding initiatives and the single subject rule, our study speaks to broader issues related to judicial behavior, discretion, and the rule of law. At the heart of the rule of law is the idea that judges make decisions based on general rules rather than to achieve particular policy outcomes. Rule-based decisions create predictability in the legal system, which is conducive to enterprise, and provide a form of equality before the law, which is essential for justice.[5] This idea is central to the legal model of judging, which holds that decisions should be impartial, objective, unrelated to a judge's personal experiences and attitudes, and driven by legal doctrine and rules (Heise 2002). Unfortunately, empirical legal scholars have unearthed a great deal of evidence that is inconsistent with the legal model. Well known examples include Cross and Tiller (1998), Revesz (1997), and Sisk et al. (1998). In particular, numerous studies have found that partisan attitudes influence judicial decisions, mainly for federal judges, leading to what is sometimes called the behavioral or political model of judging (Heise 2002). Our study contributes to this body of knowledge by showing the importance of partisan affiliation in the context of state decisions. In contrast to most previous research, which finds measurable but modest effects of partisanship, we find effects that are quite large.

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[4] For example, Gilbert (2006: 810) proposes the following definition: "A bill can be said to embrace but one subject when all of its components command majority support due to their individual merits or legislative bargaining and the title gives notice of the bill's contents." Cooter and Gilbert (2010) propose a "separable preference" principle for applying the single subject rule that they argue can be applied neutrally. Gilbert (2009) argues that judges do in fact apply a neutral principle.

[5] Hayek (1960: 208): "There is probably no single factor which has contributed more to the prosperity of the West than the relative certainty of the law which has prevailed here." Page 214: "[T]he essence of the rule of law [is] that the private citizen and his property should not . . . be means at the disposal of government. Where coercion is to be used only in accordance with general rules, the justification of every particular act of coercion must derive from such a rule. To ensure this, there must be some authority which is concerned only with the rules and not with any temporary aims of government." Page 218: "Judicial forms are intended to insure that decisions will be made according to rules and not according to the relative desirability of particular ends or values."

Public choice scholars have advanced another model of judging that posits decisions are driven by career concerns of judges. (See Posner (1993) and McNollgast (1995) for theoretical arguments.) For example, in the federal context, judges may tailor their decisions to appeal to the President in order to increase their chances of appointment to a higher court. The public choice model is supported by a large empirical literature showing that judges decide differently when they must stand for re-election compared to when they are independent of the voters. (For example, see Hanssen (1999), La Porta et al. (2004), Klerman and Mahoney (2005), and Lim (2008).) In all of the states we study, judges face periodic elections. A judge who rules against a voter initiative runs the risk of being accused of behaving anti-democratically when he or she stands for re-election, which could imperil his or her prospects of remaining in office. To assess the importance of career concerns, we examine if judges behave differently when they are about to face the voters than when their next election is many years distant, and if they behave differently when they are on the verge of retirement than when they have many years of judging ahead of them. Consistent with the idea that career concerns matter, we find evidence that younger judges were less likely to strike down an initiative than older judges who were closer to retirement. However, we fail to find statistically significant evidence that behavior is different when a judge is about to stand for re-election than when an election is many years away, which is inconsistent with the public choice model. In neither case, are the career concern effects large.

These findings taken together have two implications for the question of what can be done to minimize the role of partisanship in judicial decisions and increase objectivity. In terms of external solutions, our evidence suggests that increasing judicial accountability or reducing judicial independence through re-elections is likely to be of little help. There is even a countervailing danger with frequent elections that judges may replace one form of bias (the judge's partisan leanings) with another (catering to the majority of the electorate). In terms of internal solutions, some scholars have suggested that judges should be encouraged to become more self-aware or self-conscious of the influence of political attitudes on their decisions. (For example, Sisk (2000: 211).) That seems a worthwhile aspiration, but may not be a realistic solution since the danger of partisan influence has been known for some time yet still appears in the data. Our finding that judicial bias is severe with aggressive enforcement but modest with restrained enforcement suggests a different possible approach, through the use of a decision-making principle or "canon" of interpretation that begins with deference to the initiative.[6]

If courts approach the single subject rule with a restrained rather than aggressive approach, our evidence suggests that the role of partisan leanings will be sharply minimized. We believe our finding that the role of partisanship is strongly connected to the degree of aggressiveness in enforcement of a law is novel. At the most general level, it raises the question whether aggressive judging is likely to be more prone to partisan decision making than restrained judging in other contexts.[7] In terms of the single subject rule itself, our evidence suggests that the most effective way to promote objectivity may be to adopt a restrained approach rather than to seek additional interpretive "tests" that operationalize the concept of a single subject.

This article proceeds as follows. Part II gives background on the single subject rule in law and theory. Part III reviews the little empirical evidence that others have collected to this point on judicial application of the single subject rule. Part IV presents the evidence from our new empirical study. Part V discusses the implications of our study for the single subject rule.

THE SINGLE SUBJECT RULE IN LAW AND THEORY

Law

At least fourteen states that allow initiated statutes or constitutional amendments provide that the initiated measure presented to the voters shall not contain more than a single subject (Waters, 2003). Some of these states further provide that each constitutional amendment put before voters

[6] On the role of canons of constructions applicable in interpreting direct democracy legislation, see Frickey (1996) and Eskridge et al. (2007).

[7] Whether aggressive enforcement leads to partisan decision making in other contexts remains to be seen. The crux of the problem with the single subject rule is the malleability of the concept of a "subject" and it is the act of trying to define a subject that seems to open the door for partisanship. An aggressive approach that rejected almost every initiative without grappling with the notion of a "subject" could also be relatively immune to partisan influences.

TABLE 1. SINGLE SUBJECT RULES IN SPECIFIC STATES

State	*Rule*	*Source*
California	"An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."	California Constitution, Article II, Section 8 (d)
Colorado	"No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title . . ."	Colorado Constitution Article V, Section 1 (5.5)
Florida	". . . any . . . revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith."	Florida Constitution, Article XI, Section 3
Oregon	"A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith."	Oregon Constitution, Article IV, Section 1 (2d)
Washington	"No bill shall embrace more than one subject, and that shall be expressed in the title."	Washington Constitution, Article II, Section 19

be subject to a "separate vote."[8] A court determining that an initiated measure contains more than one subject will often remove it from the ballot or declare the measure void if it has already been enacted; some courts consider the less drastic step of severing the measure and placing only part of it before voters.[9]

Table 1 reports the single subject language in the five initiative states we study. The language is similar though not identical across states, but in every case depends on the meaning of the term "subject." The term "subject" is not self-defining, and therefore courts must specify the appropriate standard for counting the number of subjects in an initiative. As Lowenstein (2002: 47) pithily put it,

> [S]uppose I am giving a lecture and I announce at the outset that my subject will be the battle of Antietam, the contributions made to health by vitamin C, and Shakespeare's *The Merchant of Venice*. You would undoubtedly find it a surprising subject, but you could not say in advance that it is not a subject. . . . [N]o combination of matters can be ruled out in advance as a single subject. Defining a subject is purely and essentially a matter of convenience.

Single-subject litigation during the 2006 election season showed the potential for arbitrary outcomes when courts apply a single subject rule. Consider two proposed initiatives and ask yourself if either, or both, violate the single-subject rule:

Initiative A shifts responsibility for drawing state legislative and congressional districts from the state legislature to a redistricting commission. The commission must draw single-member districts, changing current practice which allows multi-member districts for the state legislature.

Initiative B limits marriage to one man and one woman. It also prevents localities from adopting "civil unions" for non-married couples that would give those in such unions any of the rights of married couples.

In two opinions issued on the same day in March 2006, the Florida Supreme Court struck down *Initiative A* and upheld *Initiative B* against single-subject challenges.[10] The court ruled that federal redistricting and state redistricting are separate subjects, and both differ from the use of single-member districts.[11] In contrast, the court held that both parts of *Initiative B* dealt with the subject of marriage.[12]

It is not hard to imagine other courts reaching different conclusions. Indeed, some have. A California court upheld an election reform measure much more disparate than the Florida redistricting measure

[8] Lowenstein (2002) explores the separate vote cases in detail and explains how some courts with restrained enforcement of the single subject rule have adopted aggressive enforcement of the separate vote requirement to achieve the same result as aggressive enforcement of the single subject rule. In this article, we analyze single subject and separate vote requirements together, and we discuss both requirements simply as the "single subject rule."

[9] *See, e.g.*, Nevadans for the Prot. of Prop. Rights v. Heller, 141 P.3d 1235, 1245–46 (Nev. 2006).

[10] Advisory Opinion to the Attorney Gen. Re: Indep. Nonpartisan Comm'n To Apportion Legislative and Cong. Dists. Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) [hereinafter Redistricting Case]; Advisory Opinion to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229 (Fla. 2006).

[11] See Redistricting Case, 926 So.2d at 1225–26.

[12] Advisory Opinion to the Attorney Gen. Re: Fla. Marriage Prot. Amendment, 926 So.2d 1229 (Fla. 2006).

against a single-subject challenge.[13] A state court in Georgia struck down a measure very similar to *Initiative B* on the grounds that same-sex marriage and civil unions are separate subjects[14] (a decision later reversed by the Georgia Supreme Court[15]).

In his 1983 article, Lowenstein traced the history of California's single subject rule applicable to initiatives. He noted the two main approaches to single subject adjudication in the state, a liberal or restrained interpretation (under which most single subject challenges to initiatives should be rejected) requiring that the different provisions of the initiative be "reasonably germane" to one another to be upheld, and a more stringent or aggressive interpretation (under which more single subject challenges to initiatives would succeed) requiring that the different provisions of the initiative be "functionally related" to one another. California has opted for the "reasonably germane" test; not surprisingly, under that test California's courts ordinarily have rejected most single subject challenges. But in 2002, Lowenstein wrote a second article on the single subject rule, lamenting what he saw as newly aggressive enforcement of the rule in many states, including in California.

Each state has developed its own single-subject jurisprudence and linguistic glosses on the rule. It is not our purpose here to provide a detailed exegesis of these states' glosses.[16] Florida, for example, has earned a reputation as a state with aggressive enforcement of the rule (Miller 2009: 182), requiring that all parts of an initiative have a zen-like "logical and natural oneness of purpose" in order to steer clear of a single subject violation.[17] The Florida Supreme Court relied on this test in striking down the redistricting initiative described above: "A voter who advocates apportionment by a redistricting commission may not necessarily agree with the change in the standards for drawing the legislative and congressional districts. Conversely, a voter who approves the change in district standards may not want to change from the legislative apportionment process currently in place. Thus, a voter would be forced to vote in the 'all or nothing' fashion that the single subject requirement safeguards against."[18] Because a voter would be required to make this choice, the Florida high court held, the measure did not have a "oneness of purpose," and it therefore violated the single subject rule.

Regardless of the verbal formulation of the test, and whether or not the test requires aggressive or restrained implementation, courts typically have identified two potential interests served by the single-subject rule: prevention of logrolling and avoiding voter confusion.[19] It is to these interests we now turn.

Theory

The theoretical underpinnings of the single subject rule are remarkably weak. As Lowenstein (1983, pt. III) observes, the two most common rationales for the single subject rule are (1) to prevent logrolling, and (2) to prevent voter confusion. This section briefly sketches the main theoretical issues, most of which have been explored at greater length in the existing literature, as indicated throughout.

Logrolling. Logrolling may be undesirable if it subverts the electorate's will, but it does not necessarily do so. There are clearly situations where allowing logrolling can lead to outcomes more consonant with the majority's preferences. Logrolling's beneficial potential in some situations has been recognized by public choice scholars at least back to Buchanan and Tullock (1962). Here we provide a brief recap of the argument (see also Kousser and McCubbins (2005) and Gilbert (2006)).

One concern with logrolling is that by combining two "projects," one that is good and one that is bad, the voters will be forced to adopt the bad project against their interests (what Lowenstein (1983) calls a "rider"). To see the limits of this argument, consider the following hypothetical situation:

	Project A	Project B
Adopted	2	−1
Not adopted	0	0

[13] Fair Political Practices Comm'n v. Superior Court, 599 P.2d 46, 47–48 (Cal. 1979).
[14] O'Kelley v. Perdue, No. 2004CV93494, 2006 WL 1350171 (Ga. Super. Ct. May 16, 2006), *rev'd,* 632 S.E.2d 110 (Ga. 2006).
[15] Perdue v. O'Kelley, 632 S.E.2d 110, 113 (Ga. 2006).
[16] For detailed analysis, see Lowenstein, Hasen, and Tokaji (2008: 382–394).
[17] Redistricting Case, at 1225.
[18] Redistricting Case, at 1226.
[19] *See, e.g.,* Redistricting Case, at 1225; Californians for an Open Primary v. McPherson, 134 P.3d 299, 336 (Cal. 2006).

There are two projects, A and B, where A delivers the voters a utility payoff of 2 if adopted and zero otherwise, while B delivers a payoff of −1 if adopted and zero otherwise. If voted on separately, A will pass and B will fail.

If the two are bundled into a single proposition, voters would receive a payoff of 1 by approving the bundle, and zero by rejecting the bundle. The bundled measure will then pass. It is not clear why this is a problem. The voters are better off with the bundle than without it, which is why they approved it in the first place. It is true that voters would be better off if they had the opportunity to vote on the projects separately rather than as a package, but nothing guarantees this would happen if the package is not allowed. Indeed, when a court strikes down a measure on single subject grounds, it does not give voters the opportunity to vote on the separate pieces, but rather forces rejection of *both* projects, which in this case is not optimal.

A different configuration would be the following:

	Project A	Project B
Adopted	2	−3
Not adopted	0	0

Here the bad project is really bad. As before, in a separate vote, project A will pass, and project B will fail. If voters are forced to decide on a bundle of A and B, they will reject the bundle (preferring the default payoff of zero to the bundle payoff of −1). In this case, there is no need for intervention by a court because voters would reject the package on their own. It could be argued that voters lack the ability to discern the payoffs of the different elements of the package, but this argument speaks more to the validity of the entire direct democracy enterprise than the single subject rule. In order to ask voters to make policy decisions, it seems necessary to grant that they have some competence in recognizing their own interests.

The two preceding examples indicate that if the second option is not too bad, a single subject rule will prevent voters from adopting a package that makes them better off than not having the package, while if the second option is very bad, the voters will reject the bundle on their own. At best, the single subject rule is redundant; at worst, it is harmful.

The concern is deepened once we recognize that it may be possible to approve some valuable projects only through a bundle (what Lowenstein (1983) calls "coalition-building"). Consider the following situation, with three voters.

Voter 1

	A	B
Adopted	100	−1
Not adopted	0	0

Voter 2

	A	B
Adopted	−1	100
Not adopted	0	0

Voter 3

	A	B
Adopted	−1	−1
Not adopted	0	0

In this case, voter 1 enjoys very high benefits from project A and is mildly hurt by project B; voter 2 enjoys very high benefits from project B and is mildly hurt by project A; and voter 3 is mildly hurt by both projects. If we count the welfare of each person equally, the socially optimal choice is to approve both projects: project A produces a net gain of 98 as does project B.

If the projects are decided separately, both will fail: voters 2 and 3 will vote against project A, and voters 1 and 3 will vote against project B. If the projects are bundled, then both will pass: voter 1 will support the package (the gain of 100 from A offsets the loss of 1 from B); voter 2 will support the package (the gain of 100 from B offsets the loss of 1 from A); and voter 3 will vote no. Allowing the projects to be bundled brings about the socially optimal outcome. In this situation, enforcement of a single subject rule will make it impossible to achieve the optimal outcome. (As an aside, critics of direct democracy often celebrate the give and take of legislatures as compared to the one-shot nature

of ballot propositions. It should be recognized that legislatures rely extensively on logrolls to implement their agreements. Indeed, without the ability to logroll it is hard to imagine how complicated legislative bargains could be struck and enforced.)[20]

The previous example is not intended to suggest that logrolling is always beneficial. To the contrary, there are also situations where a logroll can bring about a socially undesirable outcome, such as the following:

Voter 1

	A	B
Adopted	3	−1
Not adopted	0	0

Voter 2

	A	B
Adopted	−1	3
Not adopted	0	0

Voter 3

	A	B
Adopted	−10	−10
Not adopted	0	0

Here the socially optimal course is to reject both measures. If they are voted on separately, both will fail. If they are voted on as a package, however, the package will pass, with voters 1 and 2 in support.

To be clear, the point here is not that logrolls are always beneficial but rather that logrolls can be good or bad. Much of the doctrine and analysis surrounding the single subject rule presumes that logrolls are always bad, so that voters need to be protected against all logrolls.[21] As we have seen, this view is overly simplistic, lacks theoretical justification, and stands a real chance of inhibiting socially desirable policy changes.

Voter confusion. Another alleged purpose of the single subject rule is to prevent voter confusion (Dubois and Feeney 1998: 148). The issue of voter competence has been a central concern in thinking about direct democracy for as long as the process has been around, and it is well recognized that voters must have access to information to make wise decisions (Lupia and Matsusaka, 2004). Contrary to simple intuitions, empirical research suggests that citizens are able to vote in a sophisticated manner if they have access to endorsements and other "information cues" (Lupia, 1994; Lupia and McCubbins, 1998). Be that as it may, it is difficult to see the single subject rule as a vehicle for reducing complexity and alleviating voter confusion. We cannot improve on Lowenstein's brief-yet-effective argument:

> The rule is ill-suited to prevent voter confusion because no matter how the rule is construed, it will bar some initiatives that are simple and permit others that are hopelessly complex. Consider, for example, an initiative containing two provisions: (1) change the date of the primary election from June to May; and (2) increase the maximum sentence for the crime of rape by one year. While most people would regard it as odd for these two and only these two provisions to be combined in one initiative, and while the measure would presumably violate the single-subject rule, it would also be one of the simplest and most easily understood initiatives ever proposed in California. On the other hand, one can easily imagine a proposal that would contain extensive but more or less technical revisions in a single, specialized area—say, school finance—that could not be understood thoroughly by anyone but a handful of experts, but that would satisfy the single-subject rule under any plausible construction.

[20] Our discussion here does not consider the case where the projects are interrelated in some way, as might be the case with a proposal to build a new train station and a new rail line. Forcing separate votes on possibly connected issues could lead to poor public decisions (Lacy and Niou, 2000). Kousser and McCubbins (2005, page 961) criticize the single subject rule on precisely these grounds.

[21] For example, Cooter and Gilbert (2010) describe the premise of the single subject rule to be: "bargaining in the initiative process is likely to be harmful and should be forbidden." As we have shown, the theoretical argument can go either way, and we are not aware of any evidence that would justify the claim that logrolling in initiatives is "likely" to be harmful.

> It is no doubt true that, all else being equal, a measure with fewer provisions will be easier to understand than a measure with more provisions. All else is seldom equal, however, and in most cases the complexities of the individual provisions and of the general subject matter are likely to be far more significant factors in the measure's overall complexity than the mere number of provisions. Furthermore, the correlation between the diversity of the initiative's subject matter and the number of provisions is likely to be very weak. An outlandishly diverse measure could contain one simple provision per "'subject," whereas a unified measure could contain thousands of provisions.[22]

We are unaware of any empirical evidence that the single subject rule in practice has reduced complexity or alleviated voter confusion.

OTHER RESEARCH ON JUDICIAL APPLICATION OF THE SINGLE SUBJECT RULE

Empirical research on the single subject rule is scarce. Miller (2009: ch. 4) examined single subject challenges to voter-approved initiatives in five initiative states (Arizona, California, Colorado, Oregon, and Washington) during the period 1904–2008 as part of a larger study of court invalidation of voter-approved initiatives. Miller considered only challenges to voter-*approved* initiatives; he did not consider pre-election challenges, as are routine in Colorado and sometimes used in other states. Miller found a total of seven cases in which there was a single subject or separate vote violation (Miller, 2009: 116 tbl. 4.3) but he did not go beyond this descriptive information to consider the factors that motivated judges to vote to uphold or reject an initiative. Based on a rough survey of state use of the single subject rule in recent years, he concluded: "By the early 2000s the trend was clear: Courts in several initiative states were more strictly enforcing two technical rules, the single-subject rule and the separate-vote requirement, as a constraint on the initiative power." (Miller 2009: 184).

The most comprehensive and informative study of judicial behavior in single subject cases is Gilbert's (2009) analysis of California, Colorado, Florida, and Oklahoma between 1980 and 2007. The key part of his analysis is statistical evidence on the factors that explain the decision of judges in single subject cases. Gilbert includes variables that are intended to capture objective legal factors as well as attitudinal variables that should not be relevant for decisions. For each case, he constructs what he considers "an objective measure of the number of subjects" by surveying UC-Berkeley undergraduate and law students. The students were given two principles to define the number of subjects—what he calls the "categorization subject count" and "democratic process subject count"—and asked to count the number of subjects in the initiatives that came before the courts in his sample. Gilbert finds that both subject count variables are correlated with the voting behavior of judges, meaning that the decisions of judges are to some extent associated with these underlying principles, at least as interpreted by the survey respondents. More important for our purposes, Gilbert constructs an index of each judge's "liberalness" based on the partisan makeup of the state's legislature at the time of the judge's appointment (following Brace et al. (2000)), and constructs an index of each initiative's "liberalness" based on classifications by graduate students at UC-Berkeley. He finds that judges were more likely to uphold an initiative if the judge and the initiative both had a high liberalness score, or the judge and the initiative both had a low liberalness score, that is, if there was an affinity between the judge's presumed ideological orientation and the orientation of the initiative.

Using a statistical technique to compare the two explanatory factors—objective subject count and political affinity—Gilbert concludes that (2009: 51) "law trumps politics." However, the method by which he reaches this conclusion (2009: 45–47) is not entirely satisfying. He uses the coefficient estimates from a logit model to generate predicted probabilities of a judge finding a single subject viola-

[22] Lowenstein (1983: 954–55, footnotes omitted). Given Lowenstein's rejection of both the anti-logrolling and anti-voter confusion arguments, it is somewhat puzzling why he does not simply reject the single subject rule outright (as opposed to calling for its liberal interpretation). According to Lowenstein, the liberal test should be used because it would block only outlier initiatives that went "beyond the intended scope of the initiative as an instrument of governance" toward "wholesale law revisions" *Id.* at 964. But on that basis, a cleaner rule would simply target revisions directly, rather than using the clumsy device of the single subject rule.

tion, evaluated at different values of the number of subjects and political affinity, holding the other explanatory variables at their mean values. He finds that a swing in the number of subjects changes the predicted probability of a single subject violation more than a swing in political affinity. While interesting, this approach is limited in that it only involves *predicted* probabilities, not actual probabilities, and the predictions rely on the assumption that the estimated model accurately represents the process by which judges reach their decisions (that is, it assumes the model parameters are accurate).[23]

We follow Gilbert's analysis by considering the match between the content of the initiative and the judge's views, although we rely on more transparent measures. Rather than rely on predicted probabilities to assess the magnitude of effects, we examine the actual frequency that decisions are upheld conditional on political affinity. The critical innovation of our study is to compare the influence of judge-initiative affinity in states with aggressive enforcement to the influence in states with deferential enforcement. Lowenstein's argument was not that the single subject rule is incapable of being enforced in a neutral way, but that neutral enforcement was impossible if a state adopted an aggressive posture.

NEW EVIDENCE

Description of data and variables

Our analysis is based on a sample of 154 single-subject cases decided during the decade 1997–2006 by the supreme and intermediate appellate courts in five major initiative states: California, Colorado, Florida, Oregon, and Washington. The states were chosen because they are heavy initiative users, and contain a mix of aggressive and restrained stances toward the single subject rule. The cases were identified by Lexis and Westlaw searches in the state caselaw databases for initiative cases decided by state appellate courts containing the words "single subject" or "separate vote." We then examined the actual decisions to verify that a single subject challenge was in fact part of the case. For each case, we identified the participating judges and collected a variety of information on their personal characteristics, terms, and ideological orientation, as discussed below. We also collected information on the content of the initiatives that were under review. The key explanatory variables are discussed next:

- *Partisan orientation of judge*. We are interested in understanding how often a judge's decision in a single subject case appears to be influenced by his or her view of the policy merit of the initiative under review. To that end, we classify each judge as either a Democrat or Republican. The judges in the states we study must all stand for re-election at some point, but the elections are nonpartisan, so we rarely have a judge's self-described political affiliation. Instead, we assign each judge to the party of the governor that first nominated him or her to the court. A few judges in the state of Washington won their seats in an open election rather than being appointed by a governor. For those judges, we assigned a party based on their past career (for example, a judge who previously held office in the state legislature was assigned his or her party from that period), endorsements and fundraising (for example, a judge who received funding primarily from Democratic groups was classified as a Democrat), and other miscellaneous information. For some judges, we were unable to discover any evidence suggesting a party affiliation, and they were dropped from the sample.[24]

  Assigning a partisan orientation to judges based on the party of the official appointing them has a long tradition in research on courts (Brace et al., 2000). We believe the transparency of this measure makes it better suited for our purposes than index approaches (such as the one developed by Brace et al. (2000) that imputes a continuous ideology score based on the relative strength of the parties in the judge's state in the year he or she was appointed). Our classification system is imperfect—indeed, casual observation of the U.S. Supreme Court makes it clear that the party of the nominating president is not a perfect predictor of a justice's subsequent behavior—but to the extent that our

[23] Logit models also incorporate sometimes subtle interactions between the explanatory variables that can sharply influence marginal effects.

[24] We were able to assign a partisan orientation to all judges in California, Colorado, Florida, and Oregon, and all but eight judges in Washington.

classifications are wrong, the result will be to introduce noise into the estimates, biasing against finding evidence that a judge's partisan affiliation matters. That is, to the extent our classification system is crude, it will make it more difficult to find evidence of political motivations in judicial decisions.[25]

- *Ideological orientation of initiative*. A second important variable is the ideological orientation of the initiative being challenged. Since we are interested in knowing whether a judge is likely to be favorably or unfavorably inclined toward the policy proposed by the initiative, we attempt to classify each initiative as "conservative" or "liberal/progressive." Such classifications are inherently subjective, but we think our choices are not overly controversial. Table 2 shows how we classified the different types of initiatives to allow the reader to form his or her own opinion about the validity of our measure. Some initiatives do not fit into an obvious left-right box, such as open primary laws and laws affecting the judiciary, and we assign those initiatives to a separate "other" category. Initiatives where the ideological classification seems arguable are noted with an asterisk in Table 2; in our empirical analysis, we estimate our model treating the asterisked initiatives in different ways to establish robustness. We recognize that this type of classification is simplistic, but again, to the extent that it incorporates error, it will only bias against finding any effects. As will be seen, even with our crude classification system, we find that partisanship explains a significant amount of voting behavior on single subject rulings.
- *Career concerns*. A large literature suggests that the behavior of judges, like that of other public officials, responds to their career concerns (for example, Hanssen, 1999; LaPorta et al., 2004; Klerman and Mahoney, 2005). If career concerns are important, we expect that judges would feel pressured by re-election considerations to uphold initiatives because voters strongly support the initiative process. Judges that strike down a popularly approved measure or remove a measure from the ballot without giving voters a chance to weigh in could

[25] There is an ongoing debate about the appropriate way to measure the ideology of a judge (Heise, 2002), but for our purposes it is not important whether we are measuring the "true" preferences of the judge so much as whether our variable predicts voting behavior: if judges are applying the law in an objective way, their decisions should have no connection to the party of the official that appointed them. To the extent we find that our measure of partisanship matters, it undercuts the idea that the law is being applied objectively on the basis of neutral rules.

TABLE 2. CLASSIFICATION OF INITIATIVES BY IDEOLOGY

Conservative	*Liberal/Progressive*	*Other*
Abortion, restrictions	Animal rights, increased	Campaign finance, disclosure
Campaign finance, ban on public funding*	Campaign finance, spending limits*	Gambling
Criminal sanctions, tougher	Crime, increased rights for accused	Initiative procedures
English only	Criminal sanctions, weaker	Judicial term limits and discipline
Illegal immigrants, reduction in services	Education, increased spending	Medical, choice of providers
Land use, limits on takings	Environment, pro-conservation	Medical, disclosure of hospital performance
Lawsuits, limits on noneconomic damages, and limits on contingency fees	Gun ownership, restrictions	Medical, loss of license
Nonpartisan redistricting in Democratic state (CA)	Medical, limit on doctor fees*	Medical insurance
Racial preferences prohibited	Land use, limits on development	Open primaries
Same-sex marriage, restrictions	Minimum wage increase	Smoking prevention
Tax decrease	Nonpartisan redistricting in Republican state (FL)	State universities, governance
	Product disclosure, increased*	Taxes, replace all taxes with gross receipts tax
	Same-sex marriage, expansion	Term limits
	Tax increase	Tobacco education
	Transportation, mass	Water district revenue, transfer to education

An asterisk indicates subjects for which we believe the classification is arguable.

be seen as anti-democratic, and pay a price at the polls.[26] In all five states in our sample, judges must stand for re-election. The terms vary, ranging from a low of 6 years in Washington to a high of 12 years in California, and the type of election varies (such as open elections where anyone can run in Washington, and pure retention elections where only the incumbent judge's name is on the ballot in California).[27] To test for the possibility that judges weigh the consequence of their votes on their career prospects, we construct two variables: the number of years until the judge's next election and the age of the judge. If judges take into account career concerns when making decisions, a judge will be more likely to vote to uphold an initiative when there are fewer years until his or her next election and when the judge is farther from retirement age—Florida has a mandatory retirement of 70, Colorado has a mandatory retirement age of 72, and Oregon and Washington have a mandatory retirement age of 75, but all judges anticipate retirement at some point.

- *Number of words in initiative*. One argument for the single subject rule is to reduce complexity of initiatives and minimize voter confusion (Dubois and Feeney 1998). Long initiatives are likely to be more complex, and extensive verbiage is a barrier to voter understanding. For this reason, some reformers have argued that the number of words on an initiative should be limited. For example, the California Commission on Campaign Financing (1992) recommended a 5,000-word limit on all ballot propositions. To test if decisions reflected a concern with complexity, we collected data on the number of words in each initiative. If reducing complexity is an important factor in single subject rulings, we would expect judges to be more skeptical of long initiatives than short initiatives. When a case reviewed more than one initiative at a time, we used the average number of words across the involved initiatives. There is a huge variation in the length of initiatives in our sample, ranging from 12 at the low end to almost 32,000 at the high end. The longest initiatives tend to appear in California.
- *Enforcement Stance*. We classify Colorado, Florida, and Oregon as having an aggressive enforcement stance, and California and Washington as having a restrained stance. (Oregon arguably could be included in either group. Because there are relatively few observations from Oregon, the broad pattern of our main results does not depend on how Oregon is classified.) These classifications are standard in the literature (Lowenstein, 2002; Miller, 2009). In practice, states with aggressive enforcement of the rule tend to use verbal formulations of the rule, such as Florida's "oneness of purpose" test, directing judges to delve deeply into the interrelation of various provisions of an initiative. States with more restrained enforcement tend to use less intrusive verbal formulations, such as California's "reasonably germane test," directing judges to take a more superficial look at the interrelation of various provisions of an initiative. Judicially-proclaimed doctrine therefore suggests that a Florida judge would be much more likely than a California judge to find a single subject violation in an initiative that both creates a redistricting commission and gives criteria for that commission to apply to future redistrictings.

Summary information on judges

Table 3 provides summary information on judges in the sample. Overall, our data set contains 765 votes on single subject cases. On average, 30 percent of the sample judges are classified as Republicans and 70 percent are classified as Democrats. In contrast, 57 percent of the initiatives under review are classified as conservative in their policy orientation compared to 24 percent that are classified as

[26] This is perhaps an oversimplification. A judge who strikes down an unpopular initiative in a pre-election challenge could gain the support of voters who dislike the measure, even if they support the process itself.

[27] In all five states we study, judges stand in nonpartisan elections (retention in California, Colorado, and Florida; contested in Oregon and Washington). There is not a strong connection between a state's type of election and its courts' enforcement stance regarding the single subject rule.

TABLE 3. SUMMARY STATISTICS ON JUDGES

	Mean	*SD*	*Min*	*Max*	*N*
Dummy = 1 if judge votes to uphold	0.70	0.46	0	1	765
Number of words in initiative	5,701	9,110	12	31,942	624
Year of decision	2001.2	2.6	1997	2006	765
Dummy = 1 if judge Republican	0.30	0.46	0	1	729
Dummy = 1 if conservative initiative	0.57	0.50	0	1	765
Dummy = 1 if liberal initiative	0.24	0.43	0	1	765
AGREE: Dummy = 1 if initiative agrees with judge's party	0.42	.49	0	1	729
DISAGREE: Dummy = 1 if initiative disagrees with judge's party	0.38	0.49	0	1	729
Age of judge	56.5	7.0	41	87	691
Years to next election	2.8	2.8	0	12	751

This table reports summary statistics where the unit of observation is a judge voting to uphold or strike down an initiative. AGREE is equal to one if (i) the judge is a Democrat and the initiative is liberal/progressive, or (ii) the judge is a Republican and the initiative is conservative. The sample covers the period 1997-2006 and the states of California, Colorado, Florida, Oregon, and Washington.

liberal. The remaining 19 percent do not have an obvious classification on a conservative-liberal spectrum and are therefore in our "other" category. A typical case, then, consists of judges with Democratic leanings deciding on whether to vote to uphold an initiative that implements a policy with a conservative bent.

To make this more concrete, we construct a variable called AGREE that takes on the value of one if the judge's partisan affiliation agrees with the initiative, and zero otherwise. That is, AGREE = 1 if the judge is Republican and the initiative is conservative, or the judge is Democratic and the initiative is liberal/progressive. Across the sample, 42 percent of judges find themselves agreeing (in this sense) with the initiative under review, and 38 find themselves disagreeing.

The average age of sample judges is 56.5 years, with the youngest 41 years old and the oldest 87 years old. On average, a judge deciding on a single subject case faces election in 2.8 years, with some facing election in the year of the decision and others facing election 12 years in the future.

Summary of outcomes

To provide context for the results that follow, we begin by summarizing the outcomes of the cases in the sample. Table 4 reports the frequency with which the initiatives were upheld by state and level of court. Consistent with California's reputation of restrained enforcement of the single subject rule, California courts upheld the initiative in question in 98 percent of cases during the sample period. Washington courts were also fairly accommodating, upholding in 91 percent of cases. Florida is usually considered to have strict enforcement, but its courts upheld initiatives against single subject challenges in 79 percent of cases. At the other end, Colorado courts upheld initiatives 50 percent of the time, and

TABLE 4. PERCENT OF DECISIONS THAT UPHELD INITIATIVE

	Supreme Courts	*Intermediate Appellate Courts*	*Supreme + Intermediate Courts*
California	50 [2]	100 [45]	98 [47]
Colorado	50 [32]	. . .	50 [32]
Florida	79 [29]	. . .	79 [29]
Oregon	43 [7]	0 [5]	25 [12]
Washington	67 [6]	96 [28]	91 [34]
TOTAL	62 [76]	92 [78]	76 [154]

The number of cases is reported in square brackets. Data cover the period 1997-2006.

only 25 percent of initiatives were upheld in Oregon. It should be kept in mind that these approval numbers do not necessarily indicate the aggressiveness of enforcement. Even though Florida's approval rate is high, it could be that its courts are so well known to enforce strictly that many initiatives never come to the ballot, while those that do are carefully crafted to survive challenges. The numbers do suggest that there are state-specific forces at work, so our multivariate analysis will take that into account.[28]

Table 4 also shows that state supreme courts are much less likely to uphold an initiative against a single subject challenge than state intermediate appellate courts, 62 percent versus 92 percent. Indeed, the intermediate appellate courts almost always uphold initiatives in the face of single subject challenges across both deferential and strict states. This pattern, in part, is due to the fact that most decisions in California, a state that rarely finds single subject violations, are made at the intermediate appellate court level, so it is not clear if it reflects a general deference by lower level courts, or a California effect.

We also explored but do not separately report the trend in approval rates over time. Contrary to what might be expected based on Lowenstein (2002) and Miller (2009), the fraction of cases upheld against single subject challenge has not fallen over time. Indeed, if anything, courts are more likely to uphold initiatives against single subject challenges in the later than earlier years of our sample.[29] Again, this does not necessarily indicate less aggressive enforcement over time: it could be that enforcement is becoming stricter, leading to fewer initiatives, drafted more narrowly to avoid violating the rule. There could also be a delay in observing effects. Key decisions of a state supreme court could have a significant but lagged effect at the intermediate appellate courts.

Unanimity

Lowenstein (1983) argued that the single subject rule is impossible to enforce objectively due to the inherent subjectivity of the definition of a "subject." One way to get a rough sense of the objectivity of single subject rulings is to examine the amount of agreement in decisions. If it is possible to determine objectively the number of subjects, and judges are applying the rule neutrally, decisions should be unanimous.

Table 5 reports the frequency of cases in which the decision was unanimous. For the sample as a whole, 80 percent of cases were unanimous, indicating that judges were able to agree on the proper outcome in a large majority of cases. The strongest agreement was in California (91 percent unanimous decisions) and Washington (85 percent unanimous decisions), where courts apply the single subject rule with deference to the initiative. In Colorado (75 percent), Florida (66 percent), and Oregon (67 percent), where enforcement is more aggressive, unanimous decisions were less common. Nevertheless, even in the most aggressive states, we still see at least two-thirds of the cases being decided unanimously.

The interpretation of the evidence in Table 5 is ambiguous. A high level of agreement could mean

[28] The number of failed cases in states such as Colorado and Florida which allow pre-election review might be greater than in other states because initiative proponents sometimes submit variations of the same measure for approval to see which variations can survive single subject challenge.

[29] Unfortunately, this statement conceals a remarkable fact: while the percent of judges voting to approve was never less than 58 percent in nine of our ten sample years, it was only 8 percent in 1999. Furthermore, some of the 1999 cases in which measures were found to have violated the rule were particularly prominent. Exactly what happened in 1999 is a mystery that is beyond the scope of our study to answer but it would be unwise to make trend inferences using data from that year.

TABLE 5. PERCENT OF UNANIMOUS DECISIONS

	All Cases	*Cases where all judges are same party*	*Cases where all judges are not same party*
California	91 [47]	95 [20]	89 [27]
Colorado	75 [32]	79 [19]	69 [13]
Florida	66 [29]	78 [9]	60 [20]
Oregon	67 [12]	100 [1]	64 [11]
Washington	85 [34]	100 [16]	72 [18]
TOTAL	80 [154]	89 [65]	73 [89]

The number of cases is reported in square brackets. Data cover the period 1997-2006.

that judges have found neutral principles that are broadly shared. On the other hand, it could be that that these decisions are determined by partisan considerations, and that we see so much unanimity because courts are typically composed entirely of members of the same party. In our sample, the judges were all of the same party in 42 percent of cases, and homogeneous courts were 16 percent more likely to reach a unanimous decision.[30] The next section examines the votes of individual judges for more direct evidence.

Explaining the votes of individual judges

Our core evidence concerns the votes of individual judges. We are particularly interested in understanding to what extent a judge's views on the substantive policy implications of the initiative under review can explain his or her vote. We are not asserting that the judges deliberately make single subject decisions in order to impose their policy views, although some of our results might allow that as one interpretation. Rather, we are investigating Lowenstein's (1983) argument that because the single subject rule cannot be applied objectively, judges will be forced to introduce subjective considerations into their decision making, and that the set of beliefs and philosophies that drive their party affiliation will come into play in their determinations on the single subject rule. A critical implication of this view, which we test, is whether judges appear to rely more on their substantive policy preferences when the single subject rule is applied strictly as opposed to loosely. Note that a crucial distinction between the

[30] A regression of unanimity on a dummy variable for courts consisting entirely of members of one party (parameters not reported) reveals that ideologically homogeneous courts are more likely to reach a unanimous decision, but the coefficient is not statistically significant after controlling for number of judges, number of words in the initiative, level of court, year, and state.

TABLE 6. LOGISTIC REGRESSIONS PREDICTING VOTE OF INDIVIDUAL JUDGES

	(1)	*(2)*	*(3)*	*(4)*	*(5)*
Words: Dummy = 1 if number of words greater than median for state	0.81***	0.48**	0.52**	0.45*	0.43
	(0.20)	(0.22)	(0.24)	(0.27)	(0.27)
Year	0.17***	0.14***	0.13***	0.10**	0.10**
	(0.04)	(0.04)	(0.04)	(0.05)	(0.05)
Dummy = 1 if supreme court (0 = intermediate court of appeals)	. . .	−1.24**	−1.66***	−2.21***	−2.15**
		(0.50)	(0.60)	(0.69)	(0.68)
Dummy = 1 if judge is Republican (0 if Democrat)	. . .	0.35	0.14	0.35	0.43
		(0.28)	(0.29)	(0.32)	(0.33)
Dummy = 1 if conservative initiative	. . .	−1.07***	−0.71***	−1.06***	−0.95***
		(0.25)	(0.27)	(0.33)	(0.35)
Dummy = 1 if initiative concerns judiciary	. . .	−0.78*	−0.17	−0.54	−0.38
		(0.40)	(0.45)	(0.51)	(0.53)
Age of judge	. . .	. . .	−0.03*	−0.03*	−0.03*
			(0.02)	(0.02)	(0.02)
Years to next election	. . .	. . .	−0.07		−0.002
			(0.05)	(0.06)	(0.06)
AGREE: Dummy = 1 if conservative initiative and Republican judge, or liberal initiative and Democratic judge	. . .	. . .	0.96***	0.70**	. . .
			(0.26)	(0.31)	
AGREE in "aggressive" states: Dummy = 1 if AGREE and state is Colorado, Florida, or Oregon	. . .	. . .	. . .	. . .	0.93**
					(0.39)
AGREE in "restrained" states: Dummy =1 if AGREE and state is California or Washington	. . .	. . .	. . .	. . .	0.26
					(0.54)
Observations	624	618	589	506	506

Each column reports estimates from a logistic regression that predicts the probability that a judge votes to uphold the initiative and reject the single subject challenge. Standard errors are in parentheses beneath coefficient estimates. All regressions include state-specific dummy variables for California, Colorado, Florida, Oregon, and Washington. The estimates include initiatives with conservative and progressive orientations, and initiatives involving the judiciary, but columns (4) and (5) exclude observations that do not have a partisan orientation. The data cover the period 1997-2006. Significance levels are indicated: * = 10%, ** = 5%, *** = 1%.

Lowenstein view and a simple partisan-decision-making view is that in the Lowenstein view partisan factors are important primarily when judges attempt to apply the rule aggressively.

Table 6 reports our central results, multivariate logistic regressions that estimate the probability that a judge votes to uphold an initiative. Each column reports estimates from a separate model, in which the dependent variable can be understood as an increasing (nonlinear) function of the probability that a judge votes to uphold. The variables listed are the explanatory factors. The main entries are the coefficient estimates, with the standard errors in parentheses. A positive coefficient means that an increase in the variable increases the likelihood of voting to uphold, while a negative coefficient means that an increase in the variable reduces the likelihood of voting to uphold.[31] Asterisks indicate coefficients that can be distinguished from noise at conventional levels of statistical significance. All regressions include indicator variables for California, Colorado, Florida, Oregon, Washington that allow for state-specific effects on the mean probability of approval, but we do not report the coefficients.[32]

The regression in column (1) of Table 6 includes as explanatory factors a variable for the number of words in the initiative, the year, and dummy variables for the states. The number of words is a crude proxy for the complexity of the initiative and/or the number of subjects; the year is included to allow for a trend in enforcement practices over time; and the state dummies capture differences in state single subject laws. Because there are huge differences between states in the number of words (the average number of words in California is seven times the average in Washington and more than 20 times the average in the other states), a variable equal to the absolute number of words would capture primarily state effects rather than length effects. So we use instead a dummy variable equal to one if the number of words is greater than the median number of words on initiatives that are reviewed *in that state* (and takes on a value of zero otherwise). The dummy variable for the number of words indicates whether the initiative under consideration is longer or shorter than the typical initiative reviewed in that state.[33]

The coefficient on the number of words is positive and significantly different from zero, indicating that judges are more likely to vote to uphold longer—and presumably more complex—initiatives than shorter initiatives. As will be seen in the later columns, this coefficient loses significance when other explanatory variables are included, so the relation is apparently spurious and not much should be made of the positive coefficient. However, the consistent failure to find evidence that judges reject long initiatives undercuts the view that the single subject rule is used to protect voters from complex measures. The coefficient on the year is also positive and significant, indicating that judges are increasingly likely to vote to uphold in the later years of our sample. This finding is robust to inclusion of other control variables, so does not appear to be spurious. Apparently, there has been a gradual trend toward voting to uphold initiatives during our sample period. The unreported state dummies are significant and generally similar to each other.

The regression in column (2) of Table 6 adds explanatory variables that capture potential political considerations. The first new variable is a dummy for cases decided at the supreme court level, as opposed to the state's intermediate court of appeals. The negative and significant coefficient indicates that supreme court justices are less likely to vote to uphold an initiative than intermediate appellate court judges, even controlling for state, year, number of words, and so on. A possible explanation for this pattern could be that lower-court judges have their eye on promotion to a higher court and thus are less inclined to make decisions limiting the popular initiative process.

The next variable is the political affiliation of the judge, which takes on a value of one if the judge is a Republican and zero if the judge is a Democrat. As discussed above, these affiliations are based on the party of the governor who appointed the judge to the court, and in some cases, other information in the judge's background. The coefficient is positive but not statistically significant—a pattern that holds for all reported regressions—suggesting that Democratic and Republican judges do not have a fundamentally or philosophically different approach to single subject rulings.

A third new variable in column (2) captures the ideological orientation of the initiative, taking a

[31] Unfortunately, the actual coefficient estimates cannot be interpreted directly in terms of marginal changes in probabilities.
[32] Our main findings do not change in substance if the models are estimated without the state fixed effects.
[33] We also find a significant positive coefficient when we use a variable that is simply the number of words.

value of one if the initiative has a conservative orientation, and zero otherwise. We also include a variable equal to one if the initiative affects the judiciary, such as term limits for judges. The estimates indicate that judges are significantly less likely to vote to uphold conservative initiatives and initiatives concerning the judiciary (compared to the omitted categories of "liberal/progressive" and "other" initiatives.) The fact that conservative initiatives fare less well than other initiatives suggests that political factors are connected with a judge's decision on a particular case.[34] This coefficient remains negative and significant for all reported regressions.

The regression in column (3) of Table 6 drills down into this issue by adding three new variables. The key variable is AGREE, which as discussed above takes on the value of one if the judge's partisan orientation agrees with the content of the initiative, and zero otherwise. As can be seen, agreement (so measured) is strongly and positively associated with the likelihood of voting to uphold an initiative against a single subject challenge. This is fairly direct evidence that single-subject decisions are not made neutrally, independent of a judge's substantive policy view of the initiative in question.[35]

Gilbert (2009), using somewhat different methods, reports a similar finding in a partially overlapping sample. He assigns each judge a numerical value for partisanship and assigns each initiative a numerical value for ideological orientation. He finds that the likelihood of voting to uphold is positively related to the similarity in scores. Our results reinforce Gilbert's findings and show that simple and fairly transparent partisan affiliations go a long way toward explaining voting behavior.

The regression in column (3) of Table 6 tests for career concerns by including two additional variables, the number of years until the judge's next election and the age of the judge (which is negatively related to the expected number of years before retirement).[36] If career concerns are important, we expect that a judge will be more likely to vote to uphold as an election draws near, producing a negative coefficient. Similarly, as a judge grows older and gets closer to retirement, he or she should become less concerned with re-election issues; because older judges would be less likely to cater by voting to uphold an initiative, approval rates should be negatively associated with age.

The estimates for both career variables take on the predicted negative sign, but only age is significantly different from zero at the 10 percent level of significance. The voting behavior of judges is not reliably different when an election is near than when it is distant, but judges are less likely to vote to uphold an initiative as they become older. Put differently, young judges are less likely to challenge the will of the voters by rejecting an initiative. Explanations other than career concerns are conceivable. We did not include seniority as a separate variable, but age and seniority will tend to correlate. It is possible that with seniority a judge becomes more willing to wield judicial power aggressively. All told, we have not found particularly strong evidence for career concerns.[37]

The estimates in column (3) of Table 6 indicate that judges are more likely to vote to uphold an initiative when they agree with its substance, compared to initiatives they oppose or whose content does not have an obvious partisan orientation. Since there is some ambiguity about how to interpret the cases that lack a partisan orientation, the regression in column (4) of Table 6 reports a regression with the same specification as column (3) except that the nonpartisan initiatives are omitted. In this case, the coefficient on

[34] It is also possible that conservative initiatives tend to be more wide-ranging than liberal initiatives, though we can think of no reason to believe this is the case. Another situation where judges may vote strategically is when their vote is not decisive. For example, if all of the other judges intend to uphold the initiative, a judge may go with the majority view even though he or she believes rejection would be a better decision. To investigate this possibility, we estimated regressions including a dummy variable for unanimous decisions, finding that judges are significantly more likely to uphold in unanimous decisions. Because the theoretical justification for this variable is not clear, and its inclusion does not have an important impact on the effects we are interested in, the unanimity variable is not included in the regressions reported in the table.

[35] We also estimated but do not report the effects of agreement separately for Democratic and Republican judges. For Democratic judges, a positive and statistically significant effect of agreement continues to appear. For Republican judges, the effect is estimated too imprecisely to achieve statistical significance, most likely due to the small number of cases (five percent) with a disagreeing Republican judge (i.e., Republican judge with liberal/progressive initiative).

[36] Because very long time periods to the next election can only occur in states with long terms, there is a danger that "years to next election" may be capturing state-specific effects. To adjust for this possibility, we truncate the variable at six years, that is, if the number of years to the next election is more than six years, we treat it as six years. It turns out that the results do not change in a material way with or without this adjustment.

[37] We also investigated if the effect of agreement becomes weaker as an election or retirement approaches by including an interaction term between AGREE and age/years, and failed to find robust effects.

AGREE can be interpreted as the effect of agreement relative to the case of disagreement. The basic picture remains the same: judges are more likely to vote to uphold cases when they agree with the initiative than when they disagree with the initiative.

The evidence to this point suggests that a judge's policy preferences play a role in how he or she applies the single subject rule. Lowenstein's argument is that this is an inevitable consequence of attempting to apply the rule aggressively: because it is impossible to apply the single subject rule strictly in an objective way, judges will be forced to introduce other considerations that are likely to be correlated with their general world view that also shapes their partisan affiliation. The flip side of this, Lowenstein argues, is that if judges adopt a deferential or restrained approach to the single subject rule, they are more likely to be able to apply it objectively and are less likely to rely on their subjective intuitions to make the decision. Or, perhaps more precisely, when the unconnectedness of the initiative's provisions is extreme, the subjective intuitions of judges are likely to align, even when the judges have different ideologies.

Column (5) of Table 6 tests this proposition by allowing the effect of agreement to be different in "aggressive" states (states that are believed to apply the single subject rule strictly, here Colorado, Florida, and Oregon) and "restrained" states (states that tend to give the benefit of the doubt to the initiative in single subject rules, here California and Washington). Lowenstein's argument suggests that subjective factors such as a judge's personal views will be more important in aggressive than restrained states. Consistent with this idea, column (5) shows that whether or not a judge agrees with the initiative policy is a strong predictor of his or her voting behavior in aggressive states: the coefficient on agreement in a state with aggressive enforcement is 0.93 and statistically different from zero at the five percent level. In contrast, the coefficient on agreement in a state with restrained enforcement is 0.26 and statistically insignificant. In words, decisions are strongly predicted by whether judges agree with the content of the initiative in aggressive states, but there is little or no relation in restrained states.[38] The finding that partisanship matters with aggressive enforcement but not with restrained enforcement undercuts the view that judges are using the single subject rule deliberately to impose their policy preferences, independently of legal doctrine. If this was the case, it is not clear why a judge's partisanship would not matter in restrained states.

The coefficients in Table 6 are difficult to interpret except in terms of the direction of the effects. To give a sense of the magnitude of the effects, Table 7 reports the raw percentage of votes to uphold, conditional on agreement and whether the state has an aggressive or restrained approach. In restrained states, judges voted to uphold the initiative 88.3 percent of the time when they agreed with it compared to 80.6 percent of the time when they disagreed. We see that even in restrained states, judges are less likely to support an initiative they disagree with, but the effect is modest.

The case of states with aggressive enforcement is eye-opening. Judges voted to uphold initiatives they agreed with 83.2 percent of the time in aggressive states, almost the same approval rate as in restrained states. However, in aggressive states, judges voted to uphold initiatives they disagreed with only 41.1 percent of the time. Thus, *in states with aggressive enforcement judges were 42.1 percent less likely to approve an initiative they disagreed with than an initiative they agreed with*. This is a huge effect, which highlights the important role played by subjective considerations when courts attempt to apply the single subject rule strictly.[39]

Table 7 also reports how judges voted on issues concerning the judiciary. In our sample, these ini-

[38] A nontrivial fraction of cases in our sample appear to be frivolous challenge by criminal defendants to two crime initiatives (Proposition 21 in California and I-159 in Washington). To be sure crime initiatives are not driving our results, we reestimated the main results after deleting all crime initiatives. The findings did not change in any important way. We also explored a number of other control variables, many of which have been used in the literature, including gender and ethnicity of the judge, legislative background, and academic background. See Sisk et al. (1998) for comparison. None of these variables had significant explanatory power or affected the main findings. Finally, we reestimated the regression in column (5) after deleting initiatives that one could argue are nonpartisan (those with asterisks in Table 2), and found similar results.

[39] An alternative approach to estimating the marginal effects that allows use of the conditioning information is to use the coefficient estimates from column (5) of Table 5 to calculate a predicted probability of approval for cases of agreement and cases of disagreement. Such estimates can be highly sensitive to the assumed values of the control variables. We follow standard practice by holding them at their mean values (words = 0.58, year = 2001, supreme court, Democratic judge, conservative initiative, initiative does not concern judiciary, age = 56.5, time to next election = 2.5). For a restrained state (California in this exercise), agreement increases the probability of approval by 5.6 percent. For an aggressive state (Florida in this exercise), agreement increases the probability of approval by 21.2 percent. The curvature of the logit function tends to mute extreme effects, but even so, the strong tendency of partisanship to matter with aggressive enforcement is clear.

TABLE 7. PERCENT OF JUDGES VOTING TO UPHOLD IN AGGRESSIVE AND RESTRAINED STATES

	States with "restrained" enforcement (CA, WA)	*States with "aggressive" enforcement (CO, FL, OR)*	*All states together*
AGREE: Democratic judge and progressive initiative, or Republican judge and conservative initiative	88.3 [154]	83.2 [155]	85.8 [309]
DISAGREE: Democratic judge and conservative initiative, or Republican judge and progressive initiative	80.6 [98]	41.1 [180]	55.0 [278]
Initiative pertaining to judiciary	. . .	54.8 [42]	. . .

This table reports the percentage of judges voting to uphold, conditional on whether they "agree" or "disagree" with the policy of the initiative, and conditional on whether the state has an "aggressive" or "restrained" approach to the single subject rule. Initiatives are classified ideologically as in Table 2. The number of observations is in square brackets. Data cover the period 1997-2006.

tiatives mainly proposed to curtail the prerogatives of judges. In the aggressive states (the only states where such initiatives appeared in our sample), judges voted to uphold these initiatives 54.8 percent of the time, again far below the percentage of time they voted to uphold initiatives they agreed with.

A potential econometric concern with our results arises from the connection between votes to uphold and enforcement stance. Our regressions are explaining the votes of individual judges, but those votes also contribute to a state's classification as aggressive or restrained. If we were trying to explain votes to uphold based on enforcement stance itself, we would be concerned about "hard-wiring" of a connection (that is, we would be using votes to uphold to predict votes to uphold). However, what we are actually exploring is the effect of *partisanship* on voting, conditional on enforcement stance, and we cannot think of a reason why this relation would be hard-wired. If we had a larger sample we could get at this issue directly by studying only lower courts, since a state's enforcement stance is imposed by its supreme court, but we lose 69 percent of our observations if we omit supreme courts and the results become too noisy to make inferences.

DISCUSSION

The single subject requirement is a technical rule that is often used to invalidate voter initiatives, either before they go to the ballot, or after they are approved. The rule is controversial, with critics claiming that it cannot be enforced in an objective, consistent way because the definition of a "subject" is infinitely elastic. Our evidence, based on analysis of more than 500 judicial votes in single subject cases during the period 1997–2006 strongly supports these criticisms. We find that in states with aggressive enforcement of the single subject rule, decisions are well predicted by whether or not a judge is likely to agree with the substance of the initiative under review based on his or her partisan affiliation.

The finding that political preferences play a role in judicial decisions is not novel—a sizeable literature has established that point, and Gilbert (2009) has shown that political preferences play a role specifically in the context of single subject rulings. The novelty of our article is, first, showing that the influence of a judge's political preferences grows as enforcement of the rule becomes more aggressive. This is precisely what Lowenstein (2002: 48) argued: "Aggressive application of the single subject rule therefore necessarily entails a subjective, standardless veto on the part of judges of the sort that was rejected by the framers of the Constitution when they rejected the proposed Council of Revision. Only the deferential approach permits judges honestly to apply standards drawn from the public understanding rather than from their own subjective ways of organizing the world." Our evidence provides clear support for the underlying mechanism that Lowenstein identified as problematic for enforcement of the single subject rule and builds a nor-

mative case for a restrained or deferential approach to enforcing the rule.

A second novelty of our article is the finding of a huge effect of political preferences on judicial decisions. While many previous studies have found a connection between a judge's political inclinations and his or her decisions, in most cases those effects have been modest. In contrast, we find that political inclinations play a huge, perhaps dominant role, in single subject decisions. When enforced aggressively, judges vote to uphold initiatives that agree with their political preferences 83 percent of the time, while voting to uphold initiatives that disagree with their political preferences only 41 percent of the time. There is a sense in some of the literature on judicial behavior that political preferences matter, but are small enough that they can be ignored in most cases. Our evidence shows one context where political factors appear to be central drivers of judicial decisions and suggests they must be center stage in any appraisal of the single subject rule.[40] Related to this, our results suggest that partisan decision making is not deliberate or inherent to the judging process, but an outcome that emerges when judges are put in position where neutral principles are not available to guide their decisions.

In terms of the single subject rule specifically, as noted above, our evidence strongly suggests that in the aggressive states, the rule has not been applied in a neutral way. Some defenders of the single subject rule, while acknowledging the potential dangers of decision making to suit the policy preferences of judges, claim that the problem has not appeared in practice.[41] Our evidence identifies a central role of political preferences in single subject decisions, at least in the three aggressive states and the period we study. Aggressive enforcement not only raises the bar, but significantly increases the role of political preferences in judging.

One limitation of our study is that we do not include controls for legal factors that might drive decisions (other than the number of words), and therefore we are not running a race between political and legal determinants of decisions (Gilbert, 2009). While it would be desirable to include more explanatory variables, we believe the possibility of omitted legal variables does not cast significant doubt on our findings. Our conclusions would be spurious if there was an omitted legal variable that persuades Democratic and Republican judges differently *and* also happens to persuade them that there is a single subject violation primarily in cases where they dislike the underlying initiative *and also* is more persuasive in states with aggressive than restrained enforcement. We cannot think of an obvious candidate for what such an omitted variable might be.

Another limitation of our study is the potential endogeneity of a state's decision to adopt an aggressive versus strict approach to enforcement. Because we do not know what caused one state to adopt an aggressive stance and another to adopt a restrained stance, we cannot rule out the possibility that some underlying factor in the state's political environment drives both the choice of aggressive enforcement and partisan judicial decisionmaking. If this was the case, it would not be aggressive enforcement itself that led to partisan decisions, but the unidentified factor. While we acknowledge this possibility, the fact that there is a strong theoretical case for drawing a line of causality from aggressive enforcement to partisan decisions goes some way toward allaying the concern that our finding is entirely spurious.

The politicization of judging that accompanies aggressive enforcement of the single subject rule undermines the rule of law and leads to several potential problems. To the extent that decisions depend on the identity of the judges that hear a case, initiative sponsors will find it difficult to determine the legal validity of their proposals. The problem is especially acute at the intermediate appellate level where proponents face the possibility of their measure being challenged in any number of courts, with judges of varying partisan orientation. This form of judicial roulette acts as a deterrent to the extent that proponents are risk averse, with the result that some proponents will choose to forgo the costs of an initiative campaign rather than face the uncertainty of judicial reversal.[42] As a consequence, the electorate will end up with fewer options, and policy choices will be less congruent with the will of the major-

[40] Of course, our results hold for a particular group of states and time period; it remains to be seen whether our findings hold for other states and other time periods. Some caution is in order when generalizing beyond our sample.

[41] Gilbert (2009: 5): "I find that law trumps politics. Judges apply the rule more objectively that most observers expect, although politics does matter."

[42] See Lowenstein (1983, Section III(4)) for a discussion of the problems created for initiative proponents by aggressive enforcement.

ity.[43] Lowenstein observes that a purpose of the single subject rule is to perfect the initiative process. Contrary to this purpose, subjective decision making by judges will have the effect of inhibiting its use. Politicization of the rule also threatens to undermine the direct democracy process itself by undermining the belief that the initiative process is equally available to people of all political stripes. Another problem, noted by Lowenstein (1983), is that political decisionmaking will be seen as arbitrary by citizens, thus undermining confidence in the judicial system.[44]

For the same reason, our results suggest we should be pessimistic about efforts to discover a legal theory that could objectively discriminate between one and multiple subjects. Experience shows that judges so far have been unable to settle on a doctrine that can be enforced in a neutral and consistent manner. Instead, our evidence suggests that neutrality and consistency would be better advanced by adoption of a restrained or deferential posture. As discussed by Lowenstein and elaborated above, we believe the dangers that the single subject rule is purported to address are exaggerated in any case, and the hope of alleviating these modest dangers is unlikely to outweigh the costs of aggressive enforcement.[45]

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[43] For theory and evidence that initiatives bring about policies more consonant with public opinion, see Gerber (1999), Matsusaka and McCarty (2001), and Matsusaka (2004, forthcoming). For surveys of recent research on direct democracy, see Lupia and Matsusaka (2004) and Matsusaka (2005).

[44] Hayek (1960: 219): "To use the trappings of judicial form where the essential conditions for a judicial decision are absent, or to give judges power to decide issues which cannot be decided by the application of rules, can have no effect but to destroy the respect for them even where they deserve it."

[45] For an interesting recent effort to develop an implementable neutral principle, see Cooter and Gilbert (2010). We explain our concerns with their proposal in Hasen and Matsusaka (2010).

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