

# REANIMATING THE STATES' SINGLE SUBJECT JURISPRUDENCE: A NEW CONSTITUTIONAL TEST

Justin W. Evans\* & Mark C. Bannister\*\*

## I. INTRODUCTION: THE SINGLE SUBJECT RULE'S SIGNIFICANCE AND NEGATION

The constitutions of most U.S. states, forty-one of them, contain a general single subject rule.<sup>1</sup> Indiana's single subject rule,<sup>2</sup> a constitutional mandate confining all legislative acts to one subject and matters properly connected therewith, was crafted by the 1850 Constitutional Convention to prevent logrolling and multi-subject acts.<sup>3</sup> (Indiana's single subject rule is found in section 19 of the state constitution's legislative article and will hereafter be referred to as "section 19" for short.) A previous article, *The Meaning and Purposes of State Constitutional Single Subject Rules: A Survey of States and the Indiana Example*,<sup>4</sup> employed numerous historical sources, including the Convention Debates, to show that the Indiana Constitution's framers and ratifiers intended for the judicial enforcement of the single subject rule. Since that time, however, the rule has seldom enjoyed enforcement in the courts.<sup>5</sup> As it happens, most states have similarly given little weight to their respective single subject rules.<sup>6</sup> This is significant for at least two reasons. First, the intent of the constitution's framers and ratifiers is identified in most states as a primary factor in constitutional interpretation and implementation.<sup>7</sup> As such, the single subject rule's under-enforcement

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\* International Coordinator, College of Business & Entrepreneurship, Fort Hays State University (juwevans@alumni.iu.edu). I thank Justice Brent E. Dickson (Indiana Supreme Court) for his mentorship, and for inspiring my interest in this subject.

\*\* Dean, College of Business & Entrepreneurship, Fort Hays State University (markbannister@fhsu.edu).

1. 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 VAL. U. L. REV. (forthcoming 2015) (manuscript at 1) (on file with authors) (citing *A.B. v. State*, 949 N.E.2d 1204, 1221 n.1 (2011) (Dickson, J., concurring)).

2. "An act . . . shall be confined to one subject and matters properly connected therewith." IND. CONST. art. IV, § 19.

3. See generally Evans & Bannister, *supra* note 1.

4. *Id.*

5. See *infra* Parts II & III.

6. See *infra* Part IV.

7. See, e.g., *Embry v. O'Bannon*, 798 N.E.2d 157, 160 (Ind. 2003) (quoting *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 447 (Ind. 2001)) ("The intent of the framers of the Constitution is paramount in determining the meaning of a provision.").

(or non-enforcement) represents a major departure from this intent.<sup>8</sup> Second, the rule's proper enforcement would have a significant, positive impact on the quality of lawmaking throughout the states.<sup>9</sup> Yet few states have articulated workable frameworks for the analysis of their single subject questions.<sup>10</sup>

Whereas our previous work on this topic was directed toward identifying and articulating the precise intent surrounding the single subject rule (in Indiana as well as in the other single subject states),<sup>11</sup> this Article's purpose is two-fold. First, the Article considers and analyzes the doctrines that today frustrate the consistent judicial enforcement of the single subject rule. Second, this Article proposes a new single subject framework in accordance with its intended constitutional role. Indiana is employed here as the lead example, as it was in our previous work,<sup>12</sup> because most other states' historical records yield little or no direct evidence concerning their framers' and ratifiers' intentions for the rule.<sup>13</sup> Still, this Article examines the trends in single subject jurisprudence across the states, and the framework proposed here would likely align well with most of these jurisdictions.

Part II reviews the evolution of the single subject rule in Indiana's case law over time and illustrates how sharply this treatment deviates from what Indiana's framers and ratifiers intended. The two major hurdles to the rule's enforcement—the “enrolled act rule” and “doctrine of infinite reasonableness”—are identified and discussed. Part III considers the jurisprudential foundations of the enrolled act rule and doctrine of infinite reasonableness and concludes that these roadblocks should be renounced. Part IV considers the single subject rule's treatment across the states. Part V then proposes a new analytical framework for single subject analysis. The framework is directly grounded in the Indiana framers' and ratifiers' intent and likely would function well across the single subject states. Part VI then concludes the paper.

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8. See *infra* Parts II & III.

9. Evans & Bannister, *supra* note 1 (manuscript at 1–2).

10. See *infra* Part IV.

11. See generally Evans & Bannister, *supra* note 1.

12. See generally *id.*

13. See, e.g., *Migdal v. State*, 747 A.2d 1225, 1228–30 (Md. 2000) (noting that a “perusal of the debates of the 1851 [Maryland] Constitutional Convention reveals little about the purpose of the provision,” and discussing this at length).

## II. INDIANA'S SINGLE SUBJECT JURISPRUDENCE OVER TIME: THE ENROLLED ACT RULE, INFINITE REASONABLENESS, AND JUDICIAL DISENGAGEMENT

The framers of the Indiana Constitution unambiguously intended that the courts would enforce the single subject rule,<sup>14</sup> but section 19 is couched in broad language. Broad wording is common in constitutions, as the framers “could not look down the stream of time and see all the cases wherein it would be proper for a state government to exert legislative power, specify them and exclude all others . . . .”<sup>15</sup> The framers thus intended that the courts would develop section 19 jurisprudence over time—*within, of course, the parameters defined by their intent*. We have seen how the framers defined these parameters,<sup>16</sup> and we turn now to consider how section 19 has actually fared in the common law over time.<sup>17</sup>

### A. Defining the Contours of Section 19

#### 1. *The Earliest Cases*

Indiana's early courts were uncertain how to develop the state's single subject jurisprudence—an ambivalence that would prevail until the Civil War,<sup>18</sup> when the Indiana Supreme Court developed several doctrines to effectively relieve the courts from the rule's enforcement. Most cases throughout the nineteenth century focused on section 19's title requirement, oftentimes neglecting the single subject rule altogether.

It appears that the first judicial comment on the single subject requirement was provided by Judge Samuel Gookins, who authored a dissent in *Beebe v. State*.<sup>19</sup> The defendant was convicted of violating the Liquor Act of 1855, and had not paid the resultant fees. Although the *Beebe* majority

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14. Evans & Bannister, *supra* note 1 (manuscript at 28–29, 34–35).

15. Madison & Indianapolis R.R. Co. v. Whiteneck, 8 Ind. 217, 227–28 (1856).

16. See generally Evans & Bannister, *supra* note 1; see also *infra* Part V.A. (summarizing these).

17. In its first iteration (1851–1960), section 19 read as follows:

Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such an act shall be void only as to so much thereof as shall not be expressed in the title.

IND. CONST. art. IV, § 19 (1851). This is the text under which most of the cases discussed in Part II were decided. Not until 1960 and 1974 was the language altered. The major difference between the 1851 version and today's version is that the title requirement is no longer a part of section 19. Substantively, no changes have been made to the single subject rule.

18. As late as the 1860s, courts acknowledged that section 19 jurisprudence “seems to be as far from being settled in its meaning and application as it was in the beginning.” *Hingle v. State*, 24 Ind. 28, 30 (1865); accord *Bright v. McCullough*, 27 Ind. 223, 226 (1866) (Section 19 questions “have been the source of much perplexity, both in the legislature and in the courts.”).

19. 6 Ind. 501 (1855).

decided the case on unrelated grounds, the defendant had lodged two section 19 claims: first, that the Liquor Act embraced more than one subject; and second, that the Act's myriad provisions were not adequately expressed in the Act's title. This is significant: for the first time, a litigant had properly asserted that section 19 contained two discrete requirements.<sup>20</sup>

Voting to uphold the conviction, Judge Gookins critiqued not only the defendant's section 19 claim, but also section 19 *itself*.<sup>21</sup> One aspect of Gookins' analysis, however, appears consistent with the framers' intent. Gookins took the judicial initiative to characterize the Act's subject, and he did so by looking to *both* the Act's title *and* its substantive provisions.<sup>22</sup> The framers intended that the courts would decide section 19 questions (including, necessarily, whether a given act contains more than one subject).<sup>23</sup> In fulfilling this duty, the courts must look to the body of the act and not to its title alone.<sup>24</sup> On this point, Gookins' dissent was correct.

The first case resolved on section 19 grounds appears to be *Indiana Central Railroad Co. v. Potts*.<sup>25</sup> *Potts* is a landmark case; indeed, it appears that *Potts* may represent the closest approximation of the framers' and ratifiers' intent in the decisional law. Township trustees sued the defendant railroad company for obstructing a highway.<sup>26</sup> Unsatisfied in the lower courts, the company appealed and claimed that the statute under which it had been fined was in violation of section 19.<sup>27</sup> The Act, entitled "an act providing for the election or appointment of supervisors of highways, and prescribing certain of their duties, and those of county and township officers

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20. The subject and title requirements were discrete provisions. See Evans & Bannister, *supra* note 1 (manuscript at 12 n.66). The subject requirement survived the 1974 removal of the title requirement. One feature not discerned in *Beebe* was the existence of the two requirements *within* the single subject rule: a procedural requirement (that the act in question not have been the product of logrolling), and a substantive requirement (limiting the substance of the act to one subject). See *id.* (manuscript at 33–34) (discussing these dual prongs).

21. Gookins' criticisms are considered at length in *infra* Part II.B.

22. *Beebe*, 6 Ind. at 552 (Gookins, J., dissenting) (concluding that the subject of the act was the suppression of intemperance, and that "[i]f [the act] had no title, the context would show this to be the subject.>").

23. Evans & Bannister, *supra* note 1 (manuscript at 28–29, 34–35).

24. See, e.g., *Herman v. Dransfield*, 200 N.E. 612, 612–13 (Ind. 1936) (limiting the title requirement to expressing the general subject of an act, since "[t]he details and means by which it is proposed to make the law effective in accomplishing its purpose must be looked for, not in the title, but in the body of the bill.") (quoting *Western Union Tel. Co. v. Braxtan*, 74 N.E. 985, 986 (Ind. 1905)); *Sarlls v. State*, 166 N.E. 270, 275 (Ind. 1929) (evaluating a statute for alleged violation of section 19 by looking to both the act's title and its body). Other states have made similar findings. See, e.g., *In re Petition for Laying Out Cypress Farms Ditch*, 180 A. 536, 538 (Del. Super. Ct. 1935); *Pletz v. Secretary of State*, 336 N.W.2d 789, 796 (Mich. Ct. App. 1983); *State Bd. of Health v. Chippenham Hosp.*, 245 S.E.2d 430, 434 (Va. 1978). See also Evans & Bannister, *supra* note 1 (manuscript at 12 n.66) (noting that Indiana's title and single subject requirements were intended to serve distinctive purposes).

25. 7 Ind. 681 (1856).

26. *Id.* at 682.

27. *Id.*

in relation thereto,” declared that if any person or company obstructed a highway, they were to be fined five dollars per offense.<sup>28</sup>

Judge Samuel Perkins, the majority author, first recognized that the analysis and resolution of section 19 disputes comprise a judicial function—“we consider [section 19] as much a matter of judicial cognizance as any other provision in [the 1851 Constitution]”<sup>29</sup>—and prophetically noted that “[t]he necessity for [section 19’s] observance increases with each successive session of the legislature.”<sup>30</sup> Section 19’s requirements are enforceable, and it is a judicial duty to test acts of the legislature against the rule when a claimed violation is properly raised.<sup>31</sup> Further, section 19 ought not be viewed as a self-enforcing provision:

It [section 19] assumes that the law-making power will, in the short time allowed for the discharge of much business, improperly confound matters under a given title, and it charges the Courts, who act deliberately, and generally upon much discussion by counsel, with the duty of weeding out and classifying sections, aiding, in short, in establishing proper rules for distributing subjects in legislation.<sup>32</sup>

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28. *Id.*

29. *Id.* at 683.

30. *Id.* Other states have more recently recognized that the need for the rule’s enforcement has grown with time, and have linked this growing need to the courts’ lackadaisical enforcement (or outright deference). *See, e.g.*, *Minn. Constitution Assn. Builders & Contrs. v. Carlson*, 590 N.W.2d 130, 135 (Minn. Ct. App. 1999); *Nova Health Sys. v. Edmondson*, 233 P.3d 380 (Okla. 2010) (noting that the Oklahoma legislature had ignored both the single subject rule and the Supreme Court’s prior opinions invalidating acts in violation thereof).

31. *See Potts*, 7 Ind. at 683–84; *see also* *Evans & Bannister*, *supra* note 1 (manuscript at 31 n.180) (noting that, in contrast to another constitutional provision, the language of section 19 is not merely aspirational but is instead mandatory and judicially enforceable).

32. *Potts*, 7 Ind. at 684; *see also* *Evans & Bannister*, *supra* note 1 (manuscript at 28–29, 34–35) (illustrating the universal expectation of judicial enforcement among both supporters and opponents at the Convention). Some states, such as Kansas, have effectively held to the contrary. *See, e.g.*, *State ex rel. Stephan v. Thiessen*, 612 P.2d 172, 178 (Kan. 1980). There, the court found that “the title of an act may be as broad and comprehensive as the legislature may choose to make it; or it may be as narrow and restricted as the legislature may choose to make it.” *Id.* Indeed, the Kansas Legislature may even include multiple subjects in the same act, “provided all [such subjects] can be so united and combined as to form only one single, entire, but more extended subject.” *Id.* at 178–79. This represents the zenith of the single subject states’ methodologies for defining an act’s subject. It thus appears that in Kansas, the courts will define the subject as broadly as is necessary to defer to the legislature. Although this may be a function of the Kansas provision’s unique directive (which mandates that “[t]he provisions of this section shall be liberally construed to effectuate the acts of the legislature,” KAN. CONST. art. II, § 16; *accord* *Stueve v. Am. Honda Motors Co.*, 448 F. Supp. 167, 170 (D. Kan. 1978) (finding that this language was the public’s way of directing the courts to defer to the legislature)), it is obviously at odds with states whose single subject provisions do not mandate deference through their plain language. *See also* *Meredith v. Johnson*, 166 S.W.2d 409, 411 (Ky. 1942) (circularly reasoning that “[t]he courts have never held a title to be insufficient because of general terms, so long as it is inclusive of all the subjects dealt with in the act”); *Yellow Cab Co. v. Neb. State Ry. Comm’n*, 120 N.W.2d 922, 927 (Neb. 1963)

Hence, *Potts* correctly recognized that the framers had delegated to the courts the development of the rules for enforcing section 19. *Potts* then crafted the first such rule:

And we lay down the proposition . . . that [the] subject must be reasonably particular and not too general; for otherwise the object of the constitutional provision would be wholly thwarted. A part of the object of that provision was that the title should indicate the character of the sections of the act. To effect this object, the title must be reasonably particular; and, to secure such particularity, as a general rule, titles should not express ends, objects, or purposes to be accomplished, but rather means by which ends are to be accomplished . . . . There are doubtless exceptions, but these are general propositions.<sup>33</sup>

Hence, when evaluating single subject disputes, the courts' characterization of the subject must be "reasonably particular." Otherwise, the purpose of section 19 "would be wholly thwarted."<sup>34</sup>

Building on *Potts*, subsequent pre-Civil War decisions continued to define the contours of section 19. For example, in a position effectively annulled by the end of the Civil War, the phrase "matters properly connected therewith" was not viewed as an invitation to join separate subjects in

("[i]f an act has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate" the single subject rule); *Crawford v. Nashville, C. & St. L. Ry.*, 284 S.W. 892, 893 (Tenn. 1925) ("The title of an act may be as broad and general as the legislature may prefer, and, if the legislation under it is germane to the general subject, [the single subject rule] is not violated."); *State ex rel. Fire Fighters Local 946 v. Laramie*, 437 P.2d 295, 303 (Wyo. 1968) ("[T]he subject in a bill may be as comprehensive as the legislature chooses to make it . . . ."); *Wash. Cnty. Taxpayers Ass'n v. Peppel*, 604 N.E.2d 181, 188 (Ohio App. Ct. 1992) ("The 'one subject rule' of the Ohio Constitution is merely directory in nature . . . . It is within the discretion of the courts to rely upon the judgment of the General Assembly as to a bill's compliance with the Constitution . . . ."). "Ohio is the only state which holds its one-subject provision to be directory rather than mandatory." *State ex rel. Dix v. Celeste*, 464 N.E.2d 153, 156 (Ohio 1984). Still, as the *Dix* Court noted,

other states have achieved the laudable aim of judicial non-interference in the legislative process by holding that their one-subject constitutional provisions should be liberally construed or that they should be construed so as not to hamper the legislature or to embarrass honest legislation. It is indeed most noteworthy that while this provision has been invoked in hundreds of cases in various jurisdictions, "in only a handful of cases have the courts held an act to embrace more than one subject."

*Id.* at 156–57. Ohio bases its position in part on Professor Ruud's 1958 observation that the single subject rule addresses "an internal institutional problem, one that could have been left to the legislative rules to treat." *Id.* at 156. This is reminiscent of the arguments made by single subject opponents at the 1850 Indiana Constitutional Convention. See *Evans & Bannister*, *supra* note 1 (manuscript at 28 n.162). Yet as we have seen, although logrolling was an issue that *could* have been left to the legislature to address; the fact is that the framers and ratifiers of single subject constitutions elected not to allocate responsibility for this issue solely to the legislature. See *generally id.*

33. *Potts*, 7 Ind. at 684.

34. *Id.* What the standard of "reasonable particularity" demands is considered in *infra* Part V.

derogation of the rule's plain language. Instead, "the matter must be, in and of themselves, properly connected with the subject and not such merely as might with propriety be brought into connection."<sup>35</sup>

Additionally, in evaluating section 19 claims, the fundamental inquiry is whether the given "case [falls] within the evils intended to be guarded against by section 19 . . . ."<sup>36</sup> Having set forth this rule, however, the courts invited future difficulties in that few of them consulted the historical record to determine accurately what those evils were. Few opinions appreciated the dual goals of the subject and title requirements; virtually no opinions acknowledged the procedural and substantive dimensions of the subject restriction. Even those cases largely aligned with the framers' intent were incorrect in certain respects. *Potts*, for example, claimed that "another object of this constitutional provision was to promote codification . . . ."<sup>37</sup> While the subject and title requirements of section 19 might have the beneficial effects of promoting more clearly written and better-organized statutory law, there is absolutely no evidence from the Debates that the framers intended this. By its own terms, section 19 regulates the *passage* of acts; it does not speak to the organizational fate of statutes after passage.<sup>38</sup>

## 2. *The Civil War Era*

The Civil War era witnessed the rise of nearly absolute deference to the General Assembly on single subject questions. For reasons considered below,<sup>39</sup> the Supreme Court adopted rules designed veritably to ensure section 19's non-enforcement. In the meantime, additional interpretations of the provision were generated. One court declared that in section 19, the term "subject" refers to "the chief thing about which legislation is had," while the term "matters" refers to "the things which are secondary, subordinate or

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35. *State v. Bowers*, 14 Ind. 159, 161 (1860); *accord* *Evans & Bannister*, *supra* note 1, (manuscript at 24 n.140) (matters "properly connected" must be understood as a subset of the act's subject).

36. *Robinson v. Skipworth*, 23 Ind. 311, 317 (1864); *accord* *State v. Closser*, 99 N.E. 1057, 1059 (Ind. 1912).

37. *Potts*, 7 Ind. at 685.

38. The only instance in which the single subject rule might impact codification is where the legislature endeavors to adopt an official codification by the passage of a single act. Indeed, section 19 was amended in 1960 in an effort to accommodate statutory codifications, precisely because section 19's original version did not appear to allow for codifications passed as a single act. The General Assembly created the 1971 Indiana Code in reliance upon the rule's 1960 iteration (the first official codification in Indiana's modern history). Despite the legislature's good intentions, the Indiana Supreme Court found the codification to violate the 1960 version of section 19 in *State ex rel. Percy v. Criminal Court of Marion Cnty.*, 274 N.E.2d 519 (Ind. 1971). The *Percy* opinion, in turn, prompted section 19's 1974 amendment, which made clear that codifications were exempt from the single subject requirement. *Evans & Bannister*, *supra* note 1 (manuscript at 37–40).

39. *See infra* Part II.B.

incidental.”<sup>40</sup> During this time, the Court acknowledged that section 19 questions turn largely upon how the court defines or characterizes the act’s subject.<sup>41</sup> Several opinions also held that section 19 is grounded in a test of “legal connectivity”: namely, the General Assembly may not join two or more items lacking a “legal connection.”<sup>42</sup> Although vague like many rules of law tendered for the single subject rule’s application, this standard is not obviously at odds with the framers’ intent. The court also found that in the event the *title itself* expressed more than one subject, the judiciary would be compelled to hold void the entire law, as there would be no basis (apart from arbitrariness) for deciding which of the subjects expressed in the title would be upheld and which would not.<sup>43</sup> This is significant today because in the absence of the title requirement, acts found to violate section 19 must be voided in their entirety, or else upheld in their entirety.<sup>44</sup>

The Civil War era was characterized by a strenuous ideological struggle<sup>45</sup> with respect to section 19. Very few section 19 decisions offered any rationales or substantive analyses in justification of their outcomes.<sup>46</sup> The rule’s opponents, typically seeking to uphold state powers created by statute, sought a liberal interpretation of the connection of subjects—contrary to the intent of the drafters of section 19, whose overriding concern was the curtailment of legislative powers and discretion.<sup>47</sup>

### 3. *The Twentieth Century and Today*

By the turn of the twentieth century, a consensus effectively had arisen that the courts would, in practice, simply defer to the legislature on single subject questions. Thus, the language of the section 19 test was expanded even further such that “if it appears . . . that all the provisions of the act are *fairly referable* to one *general* subject, and that subject is clearly expressed

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40. *Hingle v. State*, 24 Ind. 28, 32 (1865). The meaning of “matters properly connected” is considered at length in *Evans & Bannister*, *supra* note 1 (manuscript at 20–25). The meaning of “subject” is considered in *infra* Part V.B.

41. *Bright v. McCullough*, 27 Ind. 223, 225 (1866).

42. *See, e.g., Grubbs v. State*, 24 Ind. 295, 297 (1865).

43. *State ex rel. Pitman v. Tucker*, 46 Ind. 355, 360 (1874).

44. *Evans & Bannister*, *supra* note 1 (manuscript at 19).

45. The case of *State v. Young*, 47 Ind. 150 (1873), is illustrative. There, the majority found that the 1873 Liquor Act violated section 19’s title requirement, discussing the issue without resort to any rules of law. *See id.* at 151–53. The dissent was no more grounded in the framers’ intent, using the undefined standard of “legal connection” and the notion that section 19 is to receive an interpretation benefitted by “some liberality” so as to uphold the validity of the act. *Id.* at 174–75 (Buskirk, J., dissenting).

46. *See, e.g., Mewherter v. Price*, 11 Ind. 165 (1858); *Gabbert v. Jeffersonville R.R. Co.*, 11 Ind. 296 (1858); *Coffman v. Keightley*, 24 Ind. 509 (1865); *Cory v. Carter*, 48 Ind. 327 (1874); *State v. Gerhardt*, 44 N.E. 469 (Ind. 1896).

47. *See infra* Part II.B; *see also Evans & Bannister*, *supra* note 1 (manuscript at 4–7).



in the title, the act is valid.”<sup>48</sup> While the courts recognized that section 19 “is explicit, admits of no doubt, and is mandatory”<sup>49</sup>—statements of principle that would have pleased the framers—section 19’s mandatory nature was curtailed in practice nearly to the point of removing it from the Constitution.<sup>50</sup>

Two significant cases defied the trend of automatic deference throughout the twentieth century. In *Jackson v. State ex rel. South Bend Motor Bus Co.*,<sup>51</sup> the court first observed that “because of the wide difference in the facts involved in each case, there is little of value in the precedents, except as they announce general principles . . . .”<sup>52</sup> *Jackson* then summarized the purposes of section 19 as preventing logrolling, preventing surprises upon legislators, informing citizens of the subjects being acted upon, and promoting codification.<sup>53</sup> The court further noted that the subject of an act cannot be defined according to the type of legislative authority used to pass the law.<sup>54</sup> The Act in *Jackson* was found to have violated section 19.<sup>55</sup> Years later, in *State ex rel. Percy v. Criminal Court of Marion County*,<sup>56</sup> the court held void an act concerning both criminal sentences and prison officials.<sup>57</sup>

More recently, in his 1995 dissent in *Pence v. State*, Justice Brent Dickson became the first modern Supreme Court jurist to call for adherence to the framers’ and ratifiers’ intent.<sup>58</sup> Justice Dickson correctly observed that “[a]bandoning to the legislature essentially free reign to act without heeding constitutional requirements surely defeats—rather than follows—Indiana’s

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48. *Closser*, 99 N.E. at 1059 (internal citations and quotation marks omitted) (emphasis added). *Closser* further held that with respect to the title requirement, it “is not essential that the general subject of an act shall be stated in the title in so many words. It is quite permissible to use the details of the title, where available, to grasp the general subject to which the act relates.” *Id.*

49. *Powell v. State*, 139 N.E. 670, 670 (Ind. 1923).

50. *Powell* further explained that “legislative action is presumed to be constitutional and it will be so declared unless its invalidity is clearly shown” and that “[t]he difficulty in most cases where the title to a statute is involved is in determining with legal precision the subject of the act, as well as the matter properly connected with that subject.” *Id.* at 263.

51. 142 N.E. 423 (Ind. 1924).

52. *Id.* at 424. Regrettably, as we have seen, the courts have viewed this as an invitation to simply defer to legislative action, usually without the benefit of an analysis. The Article endeavors to more sharply define the “general principles” that ought to guide section 19 analysis in the courts.

53. As *Jackson* demonstrates, even those few cases to find section 19 violations were conjectural with respect to the framers’ intent. Though the dissemination of information to citizens may have been a *beneficial result* of section 19’s title requirement, the Debates do not reflect this as a factor in its approval at the Convention. Indeed, other provisions were included to encourage the legislature’s and public’s knowledge concerning proposed acts. See Evans & Bannister, *supra* note 1 (manuscript at 26–27).

54. *Jackson*, 142 N.E. at 425.

55. The Act addressed in *Jackson* contained multiple provisions concerning motor vehicles, as well as a provision concerning the inheritance tax. See *id.* at 423–24.

56. 274 N.E.2d 519 (Ind. 1971).

57. *Id.* at 523. Also at issue in *Percy* was the constitutional status of the first Indiana Code. See Evans & Bannister, *supra* note 1 (manuscript at 37–40).

58. 652 N.E.2d 486 (Ind. 1995) (Dickson, J., dissenting).

Distribution of Powers Clause . . . .”<sup>59</sup> Section 19, moreover, was included in the Constitution to prevent logrolling, and Indiana’s voters have twice reaffirmed their support for the single subject rule through constitutional ratifications; it follows that the single subject rule should therefore be enforced.<sup>60</sup> Although Justice Dickson has more recently reiterated this position,<sup>61</sup> the Indiana Supreme Court has thus far declined to reexamine its single subject jurisprudence.<sup>62</sup>

#### 4. Summary

If the foregoing represented the entire state of Indiana’s single subject jurisprudence, one might argue that the courts had developed a fair volume of decisional law in accordance with the framers’ and ratifiers’ intent (even though very few of these cases assessed that intent on the basis of the historical record). But the authorities thus far discussed do not represent the entirety of section 19 jurisprudence. Developing simultaneously to these rules—in many instances, throughout the same cases as those noted above—was another set of rules, a line of thought designed to limit, and in some cases even to eliminate, the single subject rule from Indiana’s constitutional order. The cases discussed below complete the story of how Indiana’s contemporary section 19 jurisprudence came to be.

### B. Attacks on Section 19: Divergence between the Framers’ Intent and the Common Law<sup>63</sup>

#### 1. A Hostile Jurisprudence

Early judicial opponents attacked section 19 directly, questioning the efficacy of its policy goals.<sup>64</sup> These opponents quickly assailed the wisdom of the rule’s constitutional enshrinement, resuming where section 19’s

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59. *Id.* at 489.

60. *Id.*

61. *See* A.B. v. State, 949 N.E.2d 1204, 1221-25 (Ind. 2011) (Dickson, J., concurring).

62. *See* Loparex, LLC v. MPI Release Tech., 964 N.E.2d 806, 812-15 (Ind. 2012). *See also infra* Part III.D.6 (discussing this case).

63. This section reviews the objections to section 19 over time and addresses the minor objections. *See infra* Part III, analyzing the validity of the major hurdles that have arisen to section 19’s enforcement.

64. Though this Article’s focus is the single subject rule, several cases also undercut the title requirement in attacking “section 19.” *See, e.g.,* Robinson v. Skipworth, 23 Ind. 311 (1864) (only the subject of an act, and not the matters connected therewith, must be expressed in the title); Hines v. Aydelotte, 29 Ind. 518 (1868) (so long as one could not be “misled” by the title, it is valid); Ule v. State, 194 N.E. 140 (Ind. 1935) (extremely broad titles are constitutionally permissible); Albert v. Ind. Milk Control Bd., 200 N.E. 688 (Ind. 1936) (even titles so broad as to permit multiple matters, which may or may not be properly connected, are permissible).

Convention opponents had left off. Later critics exhibited more subtlety but were more effective at curtailing section 19's enforcement. By the late 1860s, section 19's stature had been greatly compromised. Supporters of the single subject rule had prevailed at the Convention. They would not prevail for very long thereafter.

Section 19's earliest opponent on the bench was Judge Samuel Gookins of the Supreme Court. Gookins, a former member of the Indiana House of Representatives,<sup>65</sup> expressed his opposition to section 19 through his dissents in *Beebe v. State* (1855)<sup>66</sup> and *Madison & Indianapolis Railroad Co. v. Whiteneck* (1856).<sup>67</sup> In *Beebe*, Gookins noted that "subjects are almost infinitely divisible," and implied that section 19 was therefore unenforceable.<sup>68</sup> Gookins made explicit his opposition to enforcement in *Whiteneck*, where he declared that section 19 prompted him to question "whether *any* system of laws, adapted to the wants and exigencies of the people of the State, is *practicable* under the present [1851] constitution."<sup>69</sup> He further charged that section 19 could potentially implicate a large portion of the state's laws.<sup>70</sup> Gookins then delivered the decisional law's most explicit condemnation of the single subject rule, declaring that the framers could not have intended for the judicial enforcement of section 19:

Was this what our statesmen were about when making a constitution for us? If so, no one of them, in debating the subject, (Debates Const. Conv. vol. 2, p. 1768, *et seq.*) suggested any thing of the kind; and, if so, *then statesmanship is a different thing from what I had supposed it to be*. I can well enough understand why a system of legislation should require that laws should operate throughout the State alike; but *why that system should*

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65. Gookins ran for a seat on the Supreme Court while a member of the Indiana House, losing in 1852, but ran again and won in 1855. See Indiana Courts, Indiana Supreme Court Website, "Justice Biographies: Justice Samuel Barnes Gookins," available at <http://www.in.gov/judiciary/citc/justice-bios/gookins.html>. Gookins' membership in the legislature may explain his willingness as a jurist to criticize section 19 itself. Gookins' dissents reveal his belief that the legislature was not merely paramount in legislation, but exclusive, a position obviously at odds with Indiana's long-standing recognition of judicial review. His view was also in conflict with the prevailing sentiment of the time. See generally Evans & Bannister, *supra* note 1 (manuscript at 4–7) (documenting that the very motivation for the 1851 Constitution was a restraint of the state's lawmaking authority).

66. 6 Ind. 501 (1855) (Gookins, J., dissenting).

67. 8 Ind. 201 (1856) (Gookins, J., dissenting).

68. 6 Ind. at 503 (Gookins, J., dissenting). This topic is considered at length in Part V, *infra*. Although the nature of "a subject" presents certain conceptual challenges, this does not render section 19 unenforceable.

69. *Whiteneck*, 8 Ind. at 240 (Gookins, J., dissenting) (emphasis added).

70. *Id.* Gookins neglected two crucial points in this criticism. First, section 19 was intended by the framers to affect the law; this was the entire point of its inclusion in the new Constitution. Second, the renewed enforcement of section 19 could be applied exclusively in a prospective manner, so that past legislatures relying upon the historical decisional law would not see their acts struck on section 19 grounds. See, e.g., *Pence*, 652 N.E.2d at 489 (Dickson, J., dissenting). See also *infra* Part III.D.2.

*regulate the details of practice*, is, I confess, a phase in government-making quite new to me.<sup>71</sup>

Gookins, a former legislator himself, was thus intractably opposed to any constitutional mechanism purporting to regulate the internal mechanics of the General Assembly. Yet the 1851 Constitution had created just this type of arrangement. Instead of seeking a repeal of the provision by voters, however, Gookins urged that the courts simply not enforce section 19. This was itself a constitutional breach, since it was the framers' and ratifiers' prerogative to establish the system of their choosing. Ironically, Gookins and his ideological successors became judicial activists by insisting upon *inaction* from the courts.

Related doctrines rationalizing the non-enforcement of section 19 soon arose. In the 1865 decision of *Hingle*, the Court asserted, without substantiation (and again implying that the framers were wrong to include it in the Constitution), that section 19 had "become itself a greater curse, we fear, than had been the vices which it was intended to cure."<sup>72</sup> Section 19's non-enforcement was thus rationalized: *since the framers are forcing us to choose between two evils, we are justified in selecting the lesser of the two by refusing to enforce this provision.*<sup>73</sup> As if this conclusion was not sweeping (or decisive) enough, the *Hingle* Court went a step further by finding that the phrases "subject" and "matters" were essentially synonyms and that different phrases were used for the purpose of avoiding

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71. *Whiteneck*, 8 Ind. at 240 (Gookins, J., dissenting) (emphasis added). Gookins' citation to the Debates overlooks most of the discussion had on section 19, *see* Evans & Bannister, *supra* note 1 (manuscript at 8-30), but numerous other problems hamper Gookins' position. First, he believed (erroneously) that section 19 was intended to accomplish codification. *See id.* (accusing the majority of finding the statute at issue unconstitutional "because of its particular position in the statute book"); *see also supra* note 30. Second, the framers indeed *did* intend that Section 19 would be enforced—though not to mandate codification. Rather, section 19 was intended as a check on the legislative power operating through its procedural and substantive prongs. Evans & Bannister, *supra* note 1 (manuscript at 4-14). Finally, voters are at liberty to dictate, through their constitution, regulations concerning their legislature's internal workings; and they may further delegate enforcement of such provisions to the judiciary. In the case of section 19, Indiana's framers intended exactly this. *Id.* (manuscript at 8-30).

72. *Hingle v. State*, 24 Ind. 28, 31 (1865). This conclusion may be explained in large measure by the historical circumstances of the times: the dominant political force of this era favored extremely strong legislative authority, whereas the 1850 Indiana Convention was called for the purpose of curtailing legislative abuses. *See* Evans & Bannister, *supra* note 1 (manuscript at 4-7).

73. The difficulty with this view is clear: the deliberate non-enforcement of a justiciable constitutional provision represents an abdication of the courts' own well-settled duties. As the Court has pointed out with respect to logrolling (though in the context of another provision), "[w]hether [the constitution's] effort to limit logrolling is wise is not the issue. The Constitution makes that call for us." *City of S. Bend v. Kimsey*, 781 N.E.2d 683, 686 n.4 (Ind. 2003). *See also infra* Part V.B (noting the misguided perception that this as a binary choice).

redundancy.<sup>74</sup> The result was to morph the rule's existing phraseology at the time, "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title," into a phrase in which the two terms were interchangeable: "[E]very act shall embrace but one subject and [other subjects] properly connected therewith; [with one of these subjects being] expressed in the title."<sup>75</sup>

This reading of section 19 is logically untenable.<sup>76</sup> Two additional conclusions necessarily follow if *Hingle* is correct. First, the actual meaning of section 19 must be profoundly different than the import of its plain language.<sup>77</sup> Second, the framers must not really have sought to limit each legislative act to just one subject, notwithstanding the uniform evidence that they intended exactly that.<sup>78</sup>

Though subsequent courts were unwilling to go as far as *Hingle* had, they nevertheless found other (equally effective) avenues to the single subject rule's non-enforcement. In *Bright* (1866), for example, the court acknowledged the *Potts* standard—requiring that the subject be “reasonably specific”—but promptly limited *Potts* in a number of ways.<sup>79</sup> Judge

74. See *Hingle*, 24 Ind. at 32. Reading these phrases synonymously produces a contradiction. Evans & Bannister, *supra* note 1 (manuscript at 24 n.140). Additionally, *Hingle*'s reading renders the expression “shall be limited to one subject” meaningless, as the phrase would serve no purpose if acts in fact need not be confined to only one subject. This is problematic because it has long been understood that “[t]he words of the Constitution must be presumed to have been carefully chosen so that *each word* has a meaning,” *Eakin v. State*, 474 N.E.2d 62, 65 (Ind. 1985) (emphasis added), that the “language of each provision of the Constitution must be treated with particular deference, as though *every word* had been *hammered into place*,” *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484 (Ind. 2006) (internal citation omitted) (emphasis added), and that “the same words occurring at different places in a constitution will be given the same meaning unless the context requires a different meaning,” *Bayh v. Sonnenburg*, 573 N.E.2d 398, 418 (Ind. 1991). Had the framers intended these phrases to mean the same thing, they would have used the “subject” phrase twice—or, more likely, would not have included the provision at all. If acts are not really to be restricted to one subject, *all* of section 19's language is meaningless: under the 1816 Constitution, no affirmative authorization was necessary to enable an act to cover multiple subjects. See Evans & Bannister, *supra* note 1 (manuscript at 24 n.140). Finally, the framers' intent was clearly that section 19 would limit every act to a single subject. See *id.* (manuscript at 12–16). *Hingle*'s interpretation can be squared with neither the framer's intent nor with the plain language of the Constitution.

75. See *Hingle*, 24 Ind. at 32 (illustrating that this was the practical effect of the Court's judgment).

76. See *supra* note 72; see also Evans & Bannister, *supra* note 1 (manuscript at 24 n.140).

77. This possibility is foreclosed by the long-standing rule that “[i]n examining the language of a constitution, the courts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution.” 16 AM. JUR. 2D *Constitutional Law* § 64 (2014).

78. See Evans & Bannister, *supra* note 1 (manuscript at 7–35).

79. The *Bright* Court defined “reasonably specific” as “indicat[ing] some particular branch of legislation, as a head under which the particular provisions of the act might reasonably be looked for.” 27 Ind. at 227. This conception, however, invited subjects as broad as the imagination could conceive, rather than subjects “reasonably particular.” The court posited that in drafting a title, the legislature might (a) select a title broad enough to cover everything in the act; or (b) enumerate each detail of the act in its title. However, the court also found that section 19 required only that the

Gookins' early dissents were extended through related ideas. Non-enforcement was justified, for example, since "[t]here can be no exact standard of certainty erected, by which to test the sufficiency of the expression of the subject."<sup>80</sup> Hence, section 19 would have to be interpreted with "liberality" in order to prevent the single subject rule from becoming a greater evil than that which it was designed to prevent.<sup>81</sup> This represented the formalization of a position of nearly absolute judicial deference. Cases throughout the late 1800s and early 1900s similarly eroded the subject rule by continuing the themes of questioning the wisdom of its inclusion in the Constitution,<sup>82</sup> construing section 19 with "great liberality,"<sup>83</sup> and by virtually conclusively presuming constitutionality.<sup>84</sup>

Most of these cases undercut section 19's substantive prong (the subject restriction). As previous research has demonstrated, however, the single subject rule also contains a procedural prong, designed to prevent logrolling.<sup>85</sup> This dimension has also been judicially nullified. The 1869 case of *Evans v. Browne* established the "enrolled act rule."<sup>86</sup> There, it was claimed that the act in dispute did not become a law because, before its passage, forty-two members of the House resigned in order to destroy the capacity of the House to conduct business by reducing its membership below

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subject be expressed in the title. Concluding that a title such as "an act concerning highways" would be acceptable, *id.*, the court demonstrated that section 19 no longer had any regulatory or incentivizing effect. The court had recognized the *Potts* requirement that the subject be "reasonably specific," while at the same time noting that the highway title "would constitute a comprehensive title, under which almost any desired provision relating to highways might be enacted." *Id.* A title this broad is not "reasonably specific"—to be sure, logrolling could still be masked under such a rubric with ease—but by the mid-1860s, this was the state of the law. *See also infra* Part V (discussing the parameters of a reasonableness test in the context of the single subject rule).

80. *Shoemaker v. Smith*, 37 Ind. 122, 133 (1871).

81. *Id.*

82. *See, e.g., State ex rel. Pitman v. Tucker*, 46 Ind. 355, 361–62 (1874) ("It may be doubted whether [section 19] has accomplished all the good that was anticipated when it was adopted . . . thus almost, if not entirely, defeating what seems to us the main object of the section.")

83. *See, e.g., State v. Young*, 47 Ind. 150, 151–52 (1873) (whenever there is any doubt, the law will be sustained); *Mull v. Indianapolis & Cincinnati Traction Co.*, 81 N.E. 657, 659 (Ind. 1907) ("The title is in all cases given a liberal interpretation, and the largest scope accorded to the words employed that reason will permit in order to bring within the purview of the title all the provisions of the act.") (internal citation and quotation marks omitted); *State v. Closser*, 99 N.E. 1057, 1059 (Ind. 1912) ("The title of an act is to receive a liberal construction if necessary to sustain the legislative intent . . ."). As we will see, section 19 was construed with such liberality that virtually all combinations were found to be constitutional. *See infra* Part III.C. But infinite reasonableness defeats the purpose of section 19 and is not what the framers intended. *See infra* Parts III and IV.

84. *See, e.g., Powell v. State*, 139 N.E. 670, 670 (Ind. 1923) ("[L]egislative action is presumed to be constitutional and it will be so declared unless its invalidity is clearly shown."). In theory, this was a rebuttable presumption—but experience soon revealed that, with only the most rarified exception, this was instead a veritable conclusion.

85. *Evans & Bannister*, *supra* note 1 (manuscript at 33–34).

86. 30 Ind. 514 (1869).

sixty-seven, its constitutional quorum.<sup>87</sup> The Supreme Court of Indiana held that so long as an act was authenticated by the presiding officers of each chamber of the General Assembly, the courts were not at liberty to look to the journals or other external evidence to test the compliance of an act with the procedural requirements of article IV. An authenticated act, in other words, was absolute evidence of the act's compliance with the Constitution's procedural requirements.<sup>88</sup> Though *Evans* was decided with respect to sections 11 and 25, the enrolled act rule was later applied to all of the procedural requirements of article IV, including section 19.<sup>89</sup> Unlike the infinite reasonableness standard (which has occasionally been overcome), the enrolled act rule is conclusive.

Such was the state of section 19 as of the Great Depression, when the noteworthy case of *State v. Steinwedel*<sup>90</sup> was decided. Building upon previous thought, *Steinwedel* observed that the Constitution does not define the term "subject," and concluded that there can be no absolute test of general applicability for single subject questions.<sup>91</sup> The only possible test is one of reasonableness.<sup>92</sup> *Steinwedel* then proposed something new: for section 19 purposes, a "subject" is not to be regarded as "a metaphysical singleness of idea or thing, but rather . . . some rational unity between the matters embraced in the act, the unity being found in the general purpose of the act and the practical problems of efficient administration."<sup>93</sup> Hence,

matters which ordinarily would not be thought to have any common features or characteristics might for purposes of legislative treatment be grouped together and treated as one subject. For purposes of legislation, "subjects" are not absolute existences to be discovered by some sort of *a priori* reasoning, but are the result of classification for convenience of treatment and for greater effectiveness in attaining the general purpose of the particular legislative act.<sup>94</sup>

The standard of nearly absolute deference was thus reaffirmed: if "there is any reasonable basis for the grouping together in one 'act' of various matters,

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87. *See id.* at 515.

88. *See id.* at 522–27.

89. *See Jackson v. State ex rel. S. Bend Motor Bus Co.*, 142 N.E. 423, 424 (Ind. 1924) (holding that the courts "are not authorized to pass upon or question the motives which actuated the legislature in passing the act, our concern being whether the act as finally passed is or is not valid"); *Bayh v. Ind. State Building & Construction Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996) (the courts' "inquiry into whether an act violates Art. 4, § 19 ends upon review of the final act itself"). The problems associated with the application of the enrolled act rule to section 19 are considered in Part III.B, *infra*.

90. 180 N.E. 865 (Ind. 1932).

91. *Id.* at 868.

92. *Id.* On this particular point, this Article is in agreement. *See infra* Parts III.D.6 & V.

93. *Steinwedel*, 180 N.E. at 868.

94. *Id.* *See also infra* Parts III.C and IV.

this court cannot say that such matters constitute more than one subject.”<sup>95</sup> In principle, such a reasonableness test could optimally balance the mandate that the framers and ratifiers had ensconced in the plain language of section 19 with the legislature’s otherwise unrestrained authority. But these cases pushed the test as it was actually used into the realm of unreasonableness. Finally, although *Steinwedel* acknowledged that the concepts of “subject” and “object” are distinct, “still we think the object [purpose] of an act must be considered in determining whether matters embraced in the act may be reasonably treated as ‘one subject.’”<sup>96</sup> The result was that a “subject” could be defined so broadly as to bring nearly any infinite number of provisions within the gambit of the “subject.”<sup>97</sup> *Potts*’ mandate, requiring that a subject be “reasonably specific,” was now entirely abandoned.<sup>98</sup>

Though section 19 had by this time been nearly wholly vanquished, the 1930s and 1940s witnessed the development of *additional* safeguards against its enforcement. By the 1930s, the courts were characterizing subjects so broadly that acts could not possibly be found in contravention of section 19;<sup>99</sup> still, the Indiana Supreme Court began finding that any portion of an act not obviously connected to the extremely general subject was nevertheless “properly connected therewith.”<sup>100</sup> The cases reiterated that any “reasonable” basis for grouping items together in an act would render it compliant with section 19.<sup>101</sup> And some cases even resorted to once more writing the single subject rule out of the Constitution.<sup>102</sup>

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95. *Steinwedel*, 180 N.E. at 868 (emphasis added).

96. *Id.*

97. *See id.* at 868–69 (finding that an act entitled “an act concerning minors” would not only be constitutionally permissible, but desirable, in that the legislature could include “a great number of relationships and interests peculiarly affected by legal minority”).

98. *See, e.g., State ex rel. Taylor v. Greene Circuit Court*, 63 N.E.2d 287, 288–89 (Ind. 1945) (reviewing just how general titles may be in Indiana and upholding the title at issue since “[a] more general title is difficult to imagine . . . Because of its generality all these things may be properly inferred.”).

99. Perhaps it is more accurate to say that the Court was characterizing the subjects of acts so broadly *in order that* they would not be found to violate section 19. Such causality between the manner of characterizing subjects and the conclusion of constitutional validity, however, is precisely the opposite of what the framers and ratifiers intended. *See generally* Evans & Bannister, *supra* note 1. The test for single subject compliance had eroded the rule to the point that it was nearly a dead letter. *See also infra* Part III.D.6 (discussing the rule as a dead letter).

100. *See, e.g., Bolivar Bd. of Finance of Benton Co. v. Hawkins*, 191 N.E. 158, 161 (Ind. 1934).

101. *See, e.g., Stith Petroleum Co. v. Ind. Dept. of Audit & Control*, 5 N.E.2d 517, 521 (Ind. 1937).

102. *See, e.g., Tucker v. Muesing*, 39 N.E.2d 738 (Ind. 1942). *Tucker* held that section 19’s concern “is the sufficiency of titles to sustain legislation, and *it does not undertake to enumerate other grounds upon which legislation may be declared invalid.*” *Id.* at 739 (emphasis added). This is inaccurate. The single subject rule, distinct from the title requirement, established additional grounds upon which legislation should be declared invalid: by being a product of logrolling and by embracing two or more subjects. *See* Evans & Bannister, *supra* note 1 (manuscript at 33–34); *see also* remarks of Mr. Pettit, 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 2009 (Indiana Historical Bureau 1936) (1850) (hereafter “DEBATES”) (noting that if the single subject rule was to be included in the new constitution, “you will constantly have your courts construing two questions: first, as to whether a



Cases since the Second World War have been similarly at odds with the framers' intent. The modern zenith was realized in *Dague v. Piper Aircraft*.<sup>103</sup> Although by the time *Dague* was decided the title requirement had been removed from section 19, this decision, like many of its predecessors, attributed the purpose of the title requirement to the single subject restriction.<sup>104</sup> *Dague* reiterated that "a very liberal interpretation is to be applied, with all doubts resolved in favor of the legislation's validity," such that combinations are allowed which "at first blush, might appear quite diverse."<sup>105</sup> *Dague* confirmed that even today, the courts will characterize the subject of an act so broadly that virtually any two items may be included in the act. Other modern cases have continued applying the enrolled act doctrine to the single subject rule<sup>106</sup> and have even applied additional hurdles to section 19's enforcement.<sup>107</sup>

## 2. *Why the Common Law Developed as It Did*

Several reasons explain why such a tremendous divergence arose between the framers' intent<sup>108</sup> and judicial interpretation. First, the duty of enforcing the single subject rule is difficult. The framers crafted a section that, while conceptually straight-forward, is challenging to apply.<sup>109</sup> Second, the framers' and ratifiers' intent has been misunderstood; in the vast majority of cases, no effort whatsoever was made to ascertain this intent, with no citation to the Debates made.<sup>110</sup> The few cases that attempted to do so were extraordinarily cursory and did not seek to analyze the framers' intent with

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bill contains two subjects, and secondly, whether these subjects are expressed in the title of the bill." Of course, logrolling can be undertaken without direct evidence in the legislature's procedural records: this scenario occurs when legislators swap votes without combining their measures into a single bill, instead swapping votes on separate bills. But this form of vote-swapping did not concern the framers of the Indiana Constitution; in fact, supporters of the single subject rule endorsed this means of vote-swapping as an alternative to the practice prohibited by section 19. See Evans & Bannister, *supra* note 1 (manuscript at 13). Vote-swapping in the sense of "a bill for a bill" was not deemed to be "logrolling" as far as the framers were concerned, since under this arrangement, each disparate subject received its own, independent consideration and scrutiny before the legislature. *Id.*

103. 418 N.E.2d 207 (Ind. 1981).

104. See *id.* at 214–15 (finding that "the title of the act specifically mentions the subject matter of section twenty-eight" such that no one could be deceived as to the location of a provision in the act).

105. *Id.* at 214 (emphasis added).

106. See, e.g., *Bayh v. Ind. State Bldg. & Constr. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996).

107. See *Pence v. State*, 652 N.E.2d 486 (Ind. 1995) (declining to hear the single subject claim by finding a lack of standing to make a constitutional challenge).

108. See *supra* Part I; see also generally Evans & Bannister, *supra* note 1 (discussing the framers' and ratifiers' intentions as to section 19).

109. See *supra* Part II (discussing the challenges of fashioning a single subject test); see also *supra* note 18 and accompanying text (noting that even as of the 1860s, the court's single subject jurisprudence was as uncertain as it had been a decade before).

110. See generally *supra* Part II.

any degree of vigor.<sup>111</sup> Third, section 19's broad language invited myriad innovative interpretations.<sup>112</sup>

Fourth, a genuine respect for the legislative branch and for the separation of powers also contributed to the judiciary's hesitation to nullify acts on the basis of section 19. While this respect is as virtuous as it is necessary under the Constitution, Indiana's framers did not view their delegation of enforcement to the courts as discourtesy toward the legislative branch, and would indeed be surprised to find courts today deferring in this area. Institutionalizing certain restraints upon the legislative branch was the entire motive for calling the 1850 Convention.<sup>113</sup> The framers recognized that such institutionalization cannot occur in the absence of judicial enforcement of the rule.<sup>114</sup> Neither can elections institutionalize the rule.<sup>115</sup> If elections were the answer, then the 1816 Constitution would not have been viewed as a failure in this respect. Moreover, a public majority might support a course of action in violation of the Constitution—but this has never been grounds for judicial abdication. Indeed, one of the judiciary's primary purposes is to delineate the limits imposed upon majority rule by the constitution itself. In the U.S. tradition, majority rule has never been viewed as absolute.<sup>116</sup> Fifth, judges were elected by popular partisan vote until the 1970s. Many judges had political careers preceding and following their service in the courts and brought *active* partisan predispositions to the bench.<sup>117</sup> This was especially true when ideological emotions ran high in the Civil War era.

Finally, the difficulty of an alternative to near-absolute deference has pervaded the background of virtually every single subject decision to date. The beginnings of an alternative framework are considered below.<sup>118</sup> Other areas of constitutional jurisprudence, many of which are at least as challenging as the single subject rule, have developed over time; there is no inherent reason why today's courts cannot similarly fulfill the framers' and ratifiers' intentions for section 19.

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111. See generally *supra* Part II.

112. Evans & Bannister, *supra* note 1 (manuscript at 29 n.166); see also *supra* text accompanying note 29 n.166; see also *supra* Part II (noting the rule's broad language).

113. See Evans & Bannister, *supra* note 1 (manuscript at 4-7).

114. See *supra* notes 27-29; see also *supra* text accompanying notes 27-29; see also generally Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007) (discussing principal-agent problems in the context of legislative bodies).

115. See *infra* Part III.D.3 (discussing majority rule and the single subject rule).

116. See *infra* Part III.D.3.

117. See generally JEROME L. WITHERED, *HOOSIER JUSTICE: A HISTORY OF THE SUPREME COURT OF INDIANA* (1998); see also John G. Baker, *Indiana Judges: A Portrait of Judicial Evolution*, in *THE HISTORY OF INDIANA LAW* 303, 319 (David J. Bodenhamer & Hon. Randall T. Shepherd eds., 2006) (noting that the Indiana judiciary experienced a "political phase").

118. See *infra* Part V.

### III. THE NEED FOR AN ALTERNATIVE: FAULT LINES IN INDIANA'S JURISPRUDENCE

#### A. Overview

Prior scholarship<sup>119</sup> has established two key features of section 19's original language that have gone unacknowledged in Indiana's decisional law. First, the single subject requirement and the title requirement, though intended to work together, were discrete requirements.<sup>120</sup> While the title requirement was eliminated in 1974, the single subject rule remains a viable provision of the Constitution still defined by the intent of the Constitution's framers and ratifiers.<sup>121</sup> Second, the single subject rule was, and remains, dual-pronged.<sup>122</sup> The rule was intended to prevent logrolling within the legislature. Since logrolling concerns the passage of legislation, this is the single subject rule's procedural prong.<sup>123</sup> Section 19's plain text, meanwhile, limits acts to one subject and matters properly connected therewith. This goes to the actual contents of acts, and is the single subject rule's substantive prong. The rule's earnest enforcement would nullify acts that are shown to either (1) be the product of logrolling or (2) embrace a multiplicity of subjects.<sup>124</sup>

The decisional law has incapacitated each of these prongs. The enrolled act rule serves as a formal bar to the judicial enforcement of article IV's procedural requirements (including the single subject rule), while the practice of near-absolute deference, grounded in the notion of infinite reasonableness, has deflated the single subject rule's substantive prong.<sup>125</sup> These relationships can be illustrated thusly:

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119. See generally Evans & Bannister, *supra* note 1.

120. *Id.* (manuscript at 11–14). Other states have drawn a similar conclusion. See, e.g., Harbor v. Deukmejian, 742 P.2d 1290, 1300 (Cal. 1987) (in California, “the two aspects of section 9 relating to the subject of an act and its title are independent provisions which serve separate purposes. A statute must comply with both the requirement that it be confined to one subject and with the command that this one subject be expressed in its title.”).

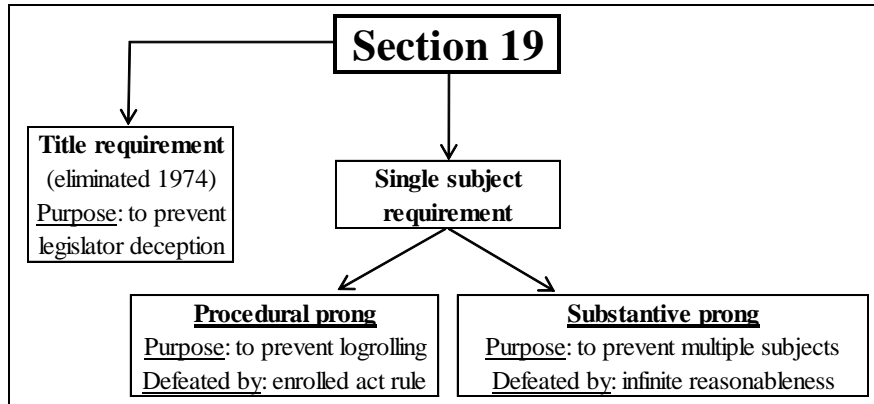
121. Evans & Bannister, *supra* note 1 (manuscript at 35–42).

122. *Id.* (manuscript at 33–34). Some cases have recognized the relationship between multi-subject acts and logrolling. See, e.g., Davis v. Grover, 480 N.W.2d 460, 465 (Wis. 1992) (“Multi-subject bills by their nature are subject to a greater susceptibility of smuggling and logrolling.”).

123. Consistent with this procedural prong, the current rules of both houses of the Indiana legislature require amendments to be germane to the subject matter under consideration. See sections 80, 118, and 119, *Rules, House of Representatives 118th Indiana General Assembly* and sections 55 and 66(b) *Senate 2013-2014 Standing Rules and Orders, 118th Indiana General Assembly*, available at <http://iga.in.gov/legislative/2014/rules/> (last visited Jan. 24, 2015).

124. Evans & Bannister, *supra* note 1 (manuscript at 33–34).

125. See *infra* Parts III.B & III.C.



In addition to the two major doctrines frustrating the enforcement of the single subject rule (the enrolled act rule and the doctrine of infinite reasonableness), several other smaller hurdles have also arisen. Each of these is considered below. We argue that the courts should immediately remove these hurdles to section 19's enforcement.

#### B. The Enrolled Act Rule: Removing the Procedural Roadblock to Enforcement

In 1890 (regrettably, twenty-one years *after* the enrolled act rule was announced), the Indiana Supreme Court declared that:

[I]t is beyond belief that the framers [of the Indiana Constitution] were guilty of the folly of inserting therein conflicting, or inconsistent provisions. So, if it can be shown that such conclusion *renders meaningless* a single word or sentence in the Constitution [the interpretation] must fall, for it cannot be maintained that any word in an instrument of so much importance as this was not to have a potent meaning. There may well exist a difference of opinion as to the proper meaning to be given to some of the words, or sentences, there found, owing to the imperfections of our language; but there should be no dispute as to the fact that some meaning is to be attached to each and every word found therein, and *we are not at liberty to attach to any word there found a meaning that will conflict with any other word, or sentence, or the well known intent of the framers of the Constitution.*<sup>126</sup>

Thus, precedents in conflict with the framers' intent or shown to create conflict between various constitutional provisions not only *can* be, but *must* be, repudiated by the courts.

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126. State *ex rel.* Collett v. Gorby, 23 N.E. 678, 680 (Ind. 1890) (emphasis added).

This paper has thus far demonstrated that the framers' intent for section 19, while it could have (and *should* have) been well-known, was not well-established or often cited in the single subject precedents. As this portion of the Article will reveal, the court's reading of article III of the Constitution (in which the enrolled act rule is grounded) is *purely* a matter of judicial inference—an inferential reading that produces *unnecessary conflict* between article III and section 19. Courts today, however, have the opportunity to correct the legal anachronism known as the enrolled act rule.

### 1. *The Enrolled Act Rule—Theory and Application*

The enrolled act rule has been applied specifically to Indiana's single subject rule.<sup>127</sup> Three particular cases illustrate the enrolled act rule's foundations and influence.

#### a. *Evans v. Browne*

The enrolled act rule was announced in *Evans v. Browne*.<sup>128</sup> As noted above,<sup>129</sup> Thomas Browne claimed a payment from John Evans, the State Auditor, which had been authorized by the legislature. Evans refused to pay claiming that, prior to the act's final passage, forty-two members of the Indiana House had resigned, rendering that chamber constitutionally unfit to transact business by bringing its membership beneath its quorum.<sup>130</sup> The court held that so long as an act was authenticated by the presiding officers of each chamber of the General Assembly, as required by article IV, section 25, the courts were not at liberty to look to the legislature's journals or other external evidence to test the compliance of an act with the procedural requirements of article IV.<sup>131</sup> In other words, authentication was absolute evidence of the act's compliance with the Constitution's procedural requirements, including the need for a quorum.

The Court first held that “[t]he very fact that [a legislative body] proceeds with legislative business must . . . be . . . very strong evidence of the presence of a quorum; for, if a quorum were not present, then a duty imposed by parliamentary law upon the presiding officer has not been performed; and it is not becoming that one co-ordinate department of the government should thus condemn another.”<sup>132</sup> By begging the question, then, the court signaled an unwillingness even to consider evidence of

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127. *See Bayh v. Ind. State Bldg. & Constr. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996).

128. *See generally Evans v. Browne*, 30 Ind. 514 (1869).

129. *See supra* notes 83–85; *see also* text accompanying notes 83–85.

130. *Evans*, 30 Ind. at 514–15.

131. *Id.* at 527.

132. *Id.* at 522.

constitutional violations so long as the provisions violated were procedural in nature.<sup>133</sup> The *Evans* Court was unmoved by the Indiana framers' intention that the courts would nullify procedurally uncompliant acts.<sup>134</sup> The framers found it entirely acceptable—indeed, *necessary*—that each branch would “condemn” the others on the occasions they surpass the boundaries of the Constitution.

The *Evans* Court next held that the legislature “must, in the first instance, judge for itself as to the presence of a quorum. No other tribunal can so well ascertain the fact as itself; and it would seem scarcely fit, therefore, that courts should be at liberty to enter into that investigation.”<sup>135</sup> It is entirely unclear why the court inferred that, because the legislature was in the *best* position to judge the presence of a quorum, it therefore follows that the courts *cannot* judge the question. Moreover, the House's *own journal* reflected the absence of a quorum. *Evans*' metaphysical principle is its own undoing: if the House is in the best position to document the fulfillment of its own procedural obligations, then it seems the courts should be comfortable relying upon the journals as evidence of this compliance.<sup>136</sup> Moreover, the legislature equally “decides for itself” the constitutionality of every act it passes; implicit in every bill the legislature passes is its determination that the bill is constitutional. Yet the courts have voided laws under judicial review since the earliest days of statehood.<sup>137</sup> Finally, it should be noted that *Evans*' reasoning is a step away from the rule of law. The

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133. See generally *id.*

134. This unwillingness to test acts for compliance with the Constitution's procedural requirements would later function as an absolute bar against the single subject rule's procedural prong. See *supra* note 124; *infra* Part III.B.3 (discussing the enrolled act rule's application to the single subject rule). See also *Evans & Bannister*, *supra* note 1 (manuscript at 8, 28–29, 34–35) (documenting that the framers intended that the courts would enforce the single subject rule); see also *id.* (manuscript at 33–34) (noting that the framers intended to include—and indeed did include—a procedural prong within the single subject rule).

135. *Evans*, 30 Ind. at 522.

136. Some states have struck a moderated position on the use of external evidence in assessing an act's compliance with procedural requirements. See generally, e.g., *Jensen v. Matheson*, 583 P.2d 77 (Utah 1978) (discussing the enrolled act rule and generally endorsing it on the grounds that the courts ought not oversee the legislature's internal workings, but holding nevertheless that because the journals are constitutionally required of the legislature, the courts may look to the journals but to no other extrinsic evidence to test enrolled acts for procedural compliance). This paper urges that *Jensen* did not go far enough, as the rule's framers and ratifiers specifically intended an active judicial role in ensuring the legislature's compliance with procedural requirements. See generally *Evans & Bannister*, *supra* note 1.

137. See, e.g., *Clark v. Ellis*, 2 Blackf. 8, 10 (Ind. 1826) (noting that the court had “heretofore decided that a part of an act of assembly being unconstitutional, does not affect a constitutional part of the same act relative to the same subject,” and thus, “[t]hat part which is unconstitutional, is considered as if stricken out of the act; and if enough remains to be intelligibly acted upon, it is considered as the law of the land . . .”); see also *Armstrong v. Jackson*, 1 Blackf. 374, 376 (Ind. 1825) (finding one portion of the statute at issue “unconstitutional and void”). See also *infra* note 186 and accompanying text (citing *Municipal City of S. Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003) for this proposition).

framers and early courts under the 1851 Constitution recognized that judicial review is an integral, indispensable part of limited government.<sup>138</sup> It has also been well-documented that the *entire purpose* of calling the 1850 convention was to limit government—in particular, to *limit the legislative authority* of the State.<sup>139</sup> This is commensurate with the framers' express intention that the courts would vigorously enforce section 19.<sup>140</sup> If as a matter of law the courts refuse to condemn constitutional violations because they are of a particular breed (e.g., *procedural* violations), then the legislature is incentivized to act as though the requirements do not exist at all.<sup>141</sup> Indeed, *Evans*' approach is itself an unconstitutional abdication of the judicial authority allocated by article III.<sup>142</sup>

The *Evans* opinion next asserted that “the question of the presence of a quorum is a legislative and not a judicial question,” and that “the courts, in a case like this, cannot inquire into it without passing beyond their jurisdiction as limited by the constitution, and thereby invading the field which belongs exclusively to the legislature.”<sup>143</sup> In support of this position, the court cited article III of the Constitution, Indiana's separation of powers article.<sup>144</sup> As discussed below,<sup>145</sup> this argument is flawed since article III does not demand deference from the courts on these questions—indeed, article III imposes an *affirmative duty* on the courts to exercise the judicial power of the State. The *Evans* Court also asserted that article III mandates branches of government

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138. See generally, e.g., *Madison & Indianapolis R.R. Co. v. Whiteneck*, 8 Ind. 217 (1856) (noting, *inter alia*, that in the absence of constitutional restrictions, the legislative power would be unbounded; that the courts are, in practice, the only institutions capable of enforcing the constitution's limitations upon the legislature; and that “[t]he courts of justice are to be considered the bulwarks of a limited constitution.”) (quoting Federalist No. 68)).

139. See *Evans & Bannister*, *supra* note 1 (manuscript at 4-7).

140. See *id.* (manuscript at 8, 28–29, 34–35).

141. *Pence v. State*, 652 N.E.2d 486, 490 (Ind. 1995) (Dickson, J., dissenting) (noting the “resulting implied invitation to the General Assembly to accord minimal attention to the single-subject requirement in our Constitution,” “[d]ue to [the Indiana Supreme Court's] prior reluctance to enforce the single-subject-per-act requirement.”). Another problem concerning incentives arises such that when prospective litigants believe that the courts will not enforce a constitutional provision, litigants are discouraged from raising colorable questions of law. Indeed, some courts have expressed annoyance that their high or absolute degrees of deference to the legislature have not been more discouraging to litigants. See, e.g., *Balt. Transit Co. v. Metro. Transit Auth.*, 194 A.2d 643, 649 (Md. 1963) (“Although we have repeatedly held that every presumption favors the validity of a statute and it will not be declared unconstitutional unless it plainly contravenes the Constitution, litigants seize upon every opportunity to claim a violation of the above provisions [including the single subject rule], if they feel there is any possibility of a successful challenge.”). The response that settled precedents are intended to provide the efficiencies achieved through certainties in the law (and the need not to relitigate settled questions) is unmoving in the constitutional context, where *stare decisis* does not apply with its usual force. See *infra* note 228; see also *infra* text accompanying note 228.

142. See *infra* notes 136–40, and *infra* Part III.B.2.

143. *Evans*, 30 Ind. at 522.

144. *Id.* at 523.

145. See *infra* Part III.B.2.

“separate and independent of each other . . . wholly beyond the control of the other,”<sup>146</sup> and that as a result, the authentication of statutes is a legislative function that is per se outside the scope of judicial cognizance.<sup>147</sup> The infirmities of these arguments are considered at length below.<sup>148</sup>

Beyond the article III arguments, the *Evans* Court also found that the only possible reason for requiring authentication was to establish an absolute verification that all procedural requirements had been observed.<sup>149</sup> This assertion, however, is demonstrably flawed because *the authentication requirement was also included in Indiana’s 1816 Constitution*.<sup>150</sup> This fact suggests other possible reasons for the authentication requirement’s inclusion in the 1851 document,<sup>151</sup> but it also reveals a critical flaw in the *Evans* opinion’s reasoning. The 1816 Constitution imposed no other procedural conscriptions upon the legislature.<sup>152</sup> If the authentication requirement was included for no reason other than to verify compliance with procedural requirements, one wonders why the identical requirement was included in the 1816 Constitution, *which contained no procedural directives*. The authentication requirement was not included in the 1851 Constitution to provide unquestionable evidence of procedural compliance; rather, it was simply a tradition imported from the 1816 Constitution.

The *Evans* Court then asserted that the legislative journals were not reliable evidentiary records.<sup>153</sup> “Such journals,” the court reasoned, “it is notorious, are, and must be, made in haste, in the confusion of business, and are often inaccurate.”<sup>154</sup> Several problems pervade this characterization of the journals. The journals are just as constitutionally required as are the authenticating signatures on acts. If the courts can presume the accuracy of the authentications, then they can, as a constitutional matter, just as reliably presume the accuracy of the journals. In reality, of course, the journals are made in the haste of business—but *so are statutes*. Laws are passed under the same circumstances of haste, in the confusion of business. This is one of

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146. *Evans*, 30 Ind. at 522–23.

147. *Id.*

148. *See infra* Part III.B.2.

149. *See Evans*, 30 Ind. at 523 (“What possible object, then, was sought to be accomplished by it, unless it was to furnish evidence that the paper thus attested had been by the proper processes of each house clothed with the force of law—evidence upon the enrolled act itself which should be taken as authentication and prove itself upon inspection?”). Curiously, this position is wholly unsubstantiated in the 1850 Convention Debates.

150. *See* IND. CONST. of 1816 art. III, § 17.

151. It is entirely possible, for example, that the framers of the 1851 Constitution simply borrowed the authentication requirement for the sake of retaining it, or that the framers wished to impress upon the officers of the legislature the solemn nature of the constitutional requirements, having observed so many legislative abuses under the 1816 Constitution. *See Evans & Bannister, supra* note 1 (manuscript at 4–7).

152. *See generally* IND. CONST. of 1816 art. III.

153. *Evans*, 30 Ind. at 524.

154. *Id.*



the very reasons that Indiana has always recognized judicial review.<sup>155</sup> If the journals are unreliable because they are made in haste, then the judgment of the legislature as to the substantive constitutionality of its acts is also undeserving of deference, or the presumption of validity with which acts are cloaked. If, on the other hand, the presumption of constitutionality is appropriate, then the journals, made under the same circumstances as the acts themselves, should be accorded a presumption of accuracy, rendering them reliable evidentiary records.<sup>156</sup>

The *Evans* opinion next declares that the risk of corrupt officers abusing the legislative process by authenticating procedurally non-compliant acts is simply a risk that society must embrace:

[h]uman governments must repose confidence in officers . . . Nor is there any great force in the argument . . . that some important provisions of the constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the constitution, or else it assumes that they will willfully violate that oath.<sup>157</sup>

The irony, of course, is that Indiana's framers reposed *their* confidence in the State's *judicial* officers, mandating that "the courts will decide"<sup>158</sup> single subject issues. Three discrete branches of government have long been viewed in American political thought as optimal precisely because citizens are unwilling to cloak their elected officials in a presumption of fidelity. Hence, America's founders discerned that "[a]mbition must be made to counteract ambition."<sup>159</sup> Ironically, the acceptance of this very idea in Indiana was a key motivator for section 19's inclusion in the 1851

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155. See *Ind. Cent. R.R. Co. v. Potts*, 7 Ind. 681 (Ind. 1856) (the court acknowledged this early on when it wrote that section 19 "assumes that the law-making power will, in the short time allowed for the discharge of much business, improperly confound matters under a given title, and charges the Courts, who act deliberately, and generally upon much discussion by counsel, with the duty of weeding out and classifying sections . . . ." The review of acts for constitutional compliance is inherently a judicial duty; this is part of the reason the people delegated section's 19 enforcement to the courts); see also *infra* Part III.B.2.

156. One of *Evans*' great ironies—and perhaps an explanation for why the opinion did not reference the Debates—is that the framers made clear that one of the *principal reasons* for requiring the journals, and for empowering just two members to demand the recording of the yeas and nays in those journals, was to prevent the passage of bills without a quorum. See, e.g., remarks of Mr. Miller of Gibson, 2 DEBATES 1075 (in arguing in favor of empowering just two in either chamber to demand the yeas and nays, asking "[h]ow often do you find it the case, when the yeas and nays are called that there is no quorum present?"); remarks of Mr. Read of Clark, *id.* at 1076 (in discussing the evils of legislative minorities passing bills, noting that "[t]he reason" minorities are able to pass bills was "the yeas and nays were not taken").

157. *Evans*, 30 Ind. at 526–27.

158. See *Evans & Bannister*, *supra* note 1 (manuscript at 28–29, 34–35).

159. THE FEDERALIST NO. 51 (James Madison).

Constitution.<sup>160</sup> Experience has demonstrated that constitutional provisions exempt from judicial review are often dead letters in practice, at least where natural incentives to violate the provisions exist.<sup>161</sup> For this reason, the framers intended that the single subject rule would have practical force in the real-world, and that the courts would enforce it.<sup>162</sup>

The final piece of *Evans*' analysis declared that "[i]t is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able that all times with truth to say that its high places have not been disgraced."<sup>163</sup> In denying the courts' duty to evaluate constitutional questions with this red herring, *Evans* missed the more crucial point.

b. *Colbert v. Wheeler*

In *Colbert v. Wheeler*,<sup>164</sup> the court reaffirmed its adherence to the enrolled act rule. Here, one of the parties sought to establish by oral testimony that a particular bill had been vetoed. The Court held that oral testimony was inadmissible for this purpose because "the silence of the house journal, upon a matter which, if it occurred, the Constitution requires the house to enter it upon its journal, is conclusive that it did not occur as against oral testimony to the contrary. To hold otherwise is to overlook the fact that legislators are sworn to support the Constitution, or else assume they have willfully violated their oath."<sup>165</sup>

By 1909, then, the court's view had evolved in one respect from its position in *Evans*, in which it held the journals inadmissible by virtue of their inevitable inaccuracy.<sup>166</sup> *Colbert* found the journals not only a reliable memorial of events, but an absolute and unquestionable memorial. Amazingly, these irreconcilable positions were *both* held to *support* the enrolled act rule; the doctrine enjoys such great flexibility that it is conducive

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160. The primary motive for calling the 1850 Convention was the restraint of the state's legislative power. The courts were conceived as playing a key role in this architecture. *See generally* Evans & Bannister, *supra* note 1. Modern economic commentary notes that legislators have a *natural incentive* to logroll; doing so enables legislators to express the intensity of their policy preferences by, in effect, controlling more than one vote on the issues most important to them. JEFFERY L. HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 399-401 (4th ed. 2007). Outcomes under logrolling tend to be stable. *See also id.* at 400. In Indiana's case, the "stable outcome" was the consistency with which otherwise unpassable bills were logrolled into acts. *See* Evans & Bannister, *supra* note 1 (manuscript at 4-7). This is *precisely* what Indiana's framers sought to avoid by including the single subject rule and by delegating to the courts the duty of its enforcement.

161. There was, in the framers' experience, a natural tendency for the legislature to do all of the things prohibited by article IV's restrictions. *See* Evans & Bannister, *supra* note 1 (manuscript at 4-35); *see also supra* note 151.

162. Evans & Bannister, *supra* note 1 (manuscript at 30).

163. *Evans*, 30 Ind. at 527.

164. *See generally* *State v. Wheeler*, 89 N.E. 1 (Ind. 1909).

165. *Id.* at 5.

166. *See supra* note 145; *see also* text accompanying note 145.

to shifting (and irreconcilable) rationales. The enrolled act rule is not a natural consequence of article III's plain language.<sup>167</sup>

*Colbert* is noteworthy for a second reason. Like *Evans*, *Colbert* insisted that any judicial inquiry into these questions either (1) ignores the fact that legislators take an oath to support the Indiana Constitution, or (2) necessarily assumes that legislators have willfully violated their oaths by passage of the particular act in question.<sup>168</sup> This, too, is misguided. The courts need not (and in fact, do not)<sup>169</sup> assume any ill-will on the legislature's part.<sup>170</sup> Alternatively, if this presumption exists, then it seems that *all* of judicial review must be renounced; for the same assumption must presumably apply with equal force when the courts review an act for compliance with the Constitution's substantive requirements. A more accurate assessment is that the *enrolled act rule* assumes *perfection* on the part of the legislature—a notion the Indiana framers would find most unpalatable.<sup>171</sup>

c. *Roeschlein v. Thomas*

The court's most recent extensive elaboration in support of the enrolled act rule was provided in the 1972 case of *Roeschlein v. Thomas*.<sup>172</sup> The Plaintiff in this case sued to enjoin the Governor from implementing the Constitution's newly adopted judicial article (article VII), which had just been revised to change the method of selecting appellate judges from popular election to gubernatorial appointment.<sup>173</sup> The Plaintiff claimed that the legislature had not passed the proposed amendment in accordance with article XVI, section 1 of the Indiana Constitution (governing constitutional amendments); specifically, the Plaintiff asserted that the legislature had neglected to record the yeas and nays in the journals, as required.<sup>174</sup>

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167. See *infra* Part III.B.2.

168. *Wheeler*, 89 N.E. at 5.

169. See, e.g., *State v. Barclay*, 708 P.2d 972, 977 (Kan. 1985) (noting that “courts are bound to presume that the legislature did not intend to violate the Constitution”).

170. Significantly, the legislature's intent is not germane to questions of constitutionality. Courts have never held that an act otherwise clearly in conflict with the Constitution should be sustained because the legislature had “good intentions” in passing it. The Constitution itself does not create exceptions for “good intentions.” The only inquiry is whether an act violates the Constitution, *not* whether it was *intended* to violate the Constitution. See also 16A AM. JUR. 2D *Constitutional Law* § 186 (2014) (“Just as bad motives of the legislators do not nullify laws passed within the bounds of the Constitution, good motives or good faith on the part of the legislators in passing a law will be ineffective in sustaining it if it clearly violates the provisions of the Constitution. However meritorious its purpose, legislation must of necessity conform to fundamental constitutional principles.”).

171. See *Evans & Bannister*, *supra* note 1 (manuscript at 4–7) (noting that the driving force behind the calling of the 1850 Constitutional Convention was the curtailment of the legislative power).

172. See generally *Roeschlein v. Thomas*, 280 N.E.2d 581 (Ind. 1972).

173. *Id.* at 583.

174. *Id.* at 584.

The court first made several preliminary assertions. For instance, the court distinguished the Plaintiff's cited case of *Ellingham v. Dye*, in which it was held that the legislature had violated Article 16 by passing a constitutional amendment in the form of a conventional bill (as opposed to a joint resolution).<sup>175</sup> The court declared that *Ellingham* was distinguishable since the journals were not consulted in voiding the act passed there; rather, "[s]ince there was no pretense of following [Article 16's] steps, the legislature acted without authority as was apparent on the face of the bill."<sup>176</sup> The *Roeschlein* Court mischaracterized *Ellingham* and its rule of law. The legislature's act in *Ellingham* violated the Constitution not because there was an absence of a "pretense" of compliance, but rather because the legislature *in fact* did not comply with the Constitution. In light of the Constitution's fundamental status and the intent of the framers, it would seem that it is actual compliance, and not "pretenses," that should be the measure of constitutionality. *Roeschlein* reaffirmed the counterproductive rule that procedural failures unapparent on the face of an act are *de facto* constitutional.<sup>177</sup> The enrolled act rule declares that procedural constitutional violations are *per se* acceptable so long as they are well-masked or latent. This defeats the entire purpose of including the Constitution's procedural mandates, and defeats the framers' intent.<sup>178</sup>

The *Roeschlein* Court also reiterated the key propositions in *Evans* and *Colbert*: namely, that the legislature acted in "good faith" in passing the acts in question,<sup>179</sup> and that the authentication requirement mandates absolute deference from the courts on procedural questions.<sup>180</sup>

*Roeschlein* is of the greatest interest, however, because it synthesizes the court's primary reasons for retaining the enrolled act rule. After endorsing *Evans*' principal finding—that the enrolled act rule is mandated by article III of the Constitution<sup>181</sup>—the court commenced its discussion of why the enrolled act rule remains important. First, the court asserted, was "[t]he

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175. *Id.* at 588–89.

176. *Id.* at 589.

177. *Id.* at 594–95.

178. Neither is it sufficient to argue that the electoral process provides a sufficient check against legislative procedural violations. The framers recognized that an unorganized citizenry was not in a position to hold legislators accountable *in masse* for their constitutional violations. The abuses the framers sought to curtail in the new Constitution had long prevailed under the 1816 document, *even though these practices had long been criticized by the public*. See *Evans & Bannister*, *supra* note 1 (manuscript at 4–7). And even if a majority of the public approved of procedural violations, this would not justify the courts' pacification. If the rule of law is to mean anything, then the Constitution's provisions must be observed *so long as they remain* part of the Constitution. See *State ex rel. Hovey v. Noble*, 21 N.E. 244, 245 (Ind. 1889) ("Until the people themselves shall change or annul their constitution, all must obey its mandates.").

179. *Roeschlein*, 280 N.E.2d at 589.

180. *Id.* at 589–90; see also *supra* Parts III.B.1.a & III. B.1.b (discussing these propositions in *Evans* and *Colbert*).

181. See *infra* Part III.B.2.

need to recognize and preserve the independence and separateness of each of the three branches of government and the functions to be performed by them.”<sup>182</sup> Article III must therefore be construed strictly. The two problems with this line of reasoning are considered at length below,<sup>183</sup> but are mentioned here: the review of acts for constitutionality is a *judicial* function, and while it is appropriate to construe article III strictly, nothing in the plain language of the article’s text necessitates (or even allows for) the enrolled act rule.

The *Roeschlein* Court’s second reason in favor of the enrolled act rule was the belief that a “factual investigation as to whether constitutional procedures have been followed in proposing amendments to the constitution by joint resolution can best be conducted by the legislature, which is most suited for that purpose.”<sup>184</sup> The court’s conclusion, however, does not necessarily follow from its premise. The legislature is also best-suited for the purposes of creating statutory laws and public policy—does it therefore follow, as an extension of *Roeschlein* leads, that the courts should renounce judicial review entirely, on the grounds that *all* statutes originate in the branch best-suited to their creation? The legislature implicitly approves of the constitutionality of its own acts. Moreover, even if the opinion is correct that the legislature is best-positioned to conduct an investigation into procedural compliance, this fact does not preclude judicial review. *Roeschlein*’s reasoning is akin to declaring that, in the case of a car accident in which only the tortfeasor survives, the court will not inquire into factual questions but will instead rely exclusively upon the tortfeasor’s version of events, on the ground that the tortfeasor was at the scene of the accident and is best-positioned to relay the facts. Courts have always relied upon factual records. They do so because (1) the fact that the court itself did not observe the events in question should not preclude the law’s enforcement by the impartial judicial tribunals, and (2) the evidence-based development of facts best ensures that *reality* is reflected in the courts.

The court’s third reason for retaining the enrolled act rule was that “[c]ourts have no right to assume that the action of the authenticating officers as public officials is false or fraudulent.”<sup>185</sup> As the discussion of *Colbert* demonstrated,<sup>186</sup> however, the courts assume nothing of the sort, and should indeed be entirely unconcerned with the legislature’s intent to violate or comply with the Constitution. Courts should not be in the business of making

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182. *Roeschlein*, 280 N.E.2d at 590.

183. *See infra* Part III.B.2.

184. *Roeschlein*, 280 N.E.2d at 590; *see also supra* note 128; *see also* text accompanying note 128 (noting the same assertion in *Evans* in the context of the presence of a quorum).

185. *Roeschlein*, 280 N.E.2d at 590; *see also supra* notes 159–61 (noting this argument in *Colbert*).

186. *See supra* Part III.B.1.b.

*assumptions* either way.<sup>187</sup> At all rates, to the extent the courts' entertainment of constitutional challenges implies fraud on the part of the legislature, Indiana's framers intended that the single subject rule would be enforced by the courts, and approved of continuing judicial review precisely because they had experienced rampant legislative fraud under the 1816 Constitution.<sup>188</sup>

The court's final basis for favoring the enrolled act rule was its assertion that "[t]o countenance inquiries into the journals of the legislature is to expose every act and joint resolution of the legislature to the mercy of those having access to the journals and thereby create an atmosphere conducive to fraud."<sup>189</sup> It is not clear how, in a democracy, the exposure of public laws to "those having access to the journals" (i.e., the citizenry) would be conducive to fraud. At the same time, it is entirely clear how the policy of exempting from judicial review the procedural requirements of article IV *would* be conducive to fraud. The framers included these requirements in the 1851 Constitution precisely because their absence in the former constitution invited the very fraud that the 1851 document sought to end, and delegated the duty of enforcing these provisions to the judiciary.

To summarize, then, the Indiana Supreme Court has considered a number of cases over time addressing the judiciary's power to review legislative actions and has generally given great deference to the legislature's procedural maneuvers. The enrolled act rule declares that procedural constitutional violations are per se acceptable so long as they are well-masked or latent. This deference defeats the very purpose of the Constitution's procedural mandates, and defeats the framers' intent with respect to the single subject rule's procedural prong.<sup>190</sup>

## 2. Article III—Theory and Application

Article III of the Indiana Constitution, which consists only of one section, reads as follows:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.<sup>191</sup>

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187. Even facts judicially noticed are grounded in empirical evidence or experience, and are therefore not "assumed" in this sense.

188. See Evans & Bannister, *supra* note 1 (manuscript at 4–7).

189. *Roeschlein*, 280 N.E.2d at 590.

190. See generally Evans & Bannister, *supra* note 1.

191. IND. CONST. art. III, § 1.

And article IV, section 1 declares that “[t]he Legislative authority of the State shall be vested in a General Assembly . . . .”<sup>192</sup> We have seen that the framers specifically intended that single subject issues would be *judicial questions* to be resolved through judicial review.<sup>193</sup> Even if this was not the case, however, the enrolled act rule still lacks support in article III.

While article III and article IV, section 1 dictate that the legislative authority shall be vested in the General Assembly, they “do not define that legislative authority; they simply ordain a division of powers and designate the department in which the legislative, whatever it may be, shall be lodged.”<sup>194</sup> Hence, it fell to the judiciary to discern the parameters of the legislative power, and to determine the meaning of article III. As an initial matter, however, *Evans* and its progeny were incorrect to assert that article III necessitates the enrolled act rule. In merely allocating the “legislative authority” to the legislature, article III neither necessitates nor intimates that the legislature will go unchecked by the other branches. One defining feature of a constitution is that no faction or generation may disregard it out of expediency. The right to amend the Constitution is clear, but the power to ignore it is found nowhere.

Article III’s history also cuts against the legitimacy of the enrolled act rule. Article III was included in the 1816 Constitution.<sup>195</sup> The first version of article III to be proposed at the 1816 Convention stated that “no person or persons duly elected and qualified to serve in one branch of the government, shall, during his continuance in office, be eligible to or have *any concern* in the duties of either of the other two branches of the government, except in the instances herein after expressly permitted or enjoined.”<sup>196</sup> But this language was ultimately rejected. Throughout its iterations in the 1816 and 1851 Constitutions, no version of article III has forbidden one branch from having “any concern in the duties of” the other branches. Instead, the 1816 and 1851 documents simply prohibited the exercise by one branch of the powers of the other branches. The framers of both constitutions realized that to prohibit *any concern* with the duties of the other branches would necessarily preclude checks and balances, *including judicial review*. Had this language been retained, the enrolled act rule might legitimately claim to be a product of article III.

Whatever the “legislative authority” is, moreover, the decisional law has long uniformly acknowledged that it does not extend to that which the

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192. *Id.* art. 4, § 1.

193. See *Evans & Bannister*, *supra* note 1 (manuscript at 28–29, 34–35).

194. *Madison & Indianapolis R.R. Co. v. Whiteneck*, 8 Ind. 217, 220 (1856).

195. See IND. CONST. of 1816 art. II.

196. See *1816 Convention Journal – June 10 – June 14, 1816*, IN.GOV, <http://www.in.gov/history/2887.htm> (entry of “Thursday Morning, Nine o’clock, June 13, 1816”) (last visited Mar. 13, 2015) (emphasis added).

Constitution expressly forbids.<sup>197</sup> If the courts inquire into alleged breaches of article IV's procedural requirements and discover that the requirements were in fact followed, the law will be upheld as constitutional, and no invasion of the legislature's interest has been accomplished. If on the other hand the courts find that the procedural requirements were not followed and the law is voided, this, too, avoids an impermissible invasion of the legislature's authority since the passage of an act non-compliant with the Constitution's procedural requirements is not within the legislative authority to begin with.

This reasoning applies equally to article III's fount of judicial authority. "In employing the term 'the judicial power' the constitution refers to the power as it then existed . . . . It means the power which the people understood to be vested in judges, for no other power is judicial."<sup>198</sup> And the power "vested in judges," as it existed under both the 1816 Constitution and at the time of the 1850 Convention, included judicial review:

[B]oth the 1816 and 1851 constitutions were adopted at a time when judicial review of legislation for conformity to constitutional text was well established. As we held in *Dawson v. Shaver*, 1 Blackf. 204, 206-07 (1822), citing *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803): "The task is delicate and unpleasant, but the *duty* of the Court is imperative, and its authority is *unquestionable*, to declare any part of a statute null and void that *expressly contravenes the provisions of the constitution, to which the legislature itself owes its existence*."<sup>199</sup>

Only with the advent of the enrolled act rule in 1869 did the court suddenly exempt article IV's procedural requirements from the realm of justiciable constitutional questions. Cases preceding *Evans*, including the earliest cases decided under the 1851 Constitution, uniformly held that the legislative journals and other extrinsic evidence *could* be consulted to determine whether an act failed to meet the procedural requirements of the Constitution.<sup>200</sup> Hence, from 1851 until 1869, article III was not read to prohibit judicial inquiry into questions of the legislature's procedural

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197. See, e.g., 5A IND. LAW ENCY., *Constitutional Law* § 40 (2005) ("The Legislature is supreme and sovereign in the exercise of the law-making power thus conferred upon it, *subject only to such limitations as are imposed, expressly or by clear implication, by the Indiana Constitution . . . .*") (emphasis added). Nor may the legislature or the courts unilaterally enlarge their respective powers beyond the Constitution's limitations. See, e.g., *Beebe v. State*, 6 Ind. 514 (1855).

198. *State ex rel. Hovey v. Noble*, 21 N.E. 244, 248 (Ind. 1889). Section 19 in particular was understood to contemplate judicial review in the very earliest cases. See *supra* note 30 and accompanying text (discussing *Potts*). This is commensurate with the framers' and ratifiers' understanding as well. *Evans & Bannister*, *supra* note 1 (manuscript at 28–29, 34–35).

199. *Municipal City of S. Bend v. Kimsey*, 781 N.E.2d 683, 696 (Ind. 2003) (emphasis added).

200. See *Roeschlein v. Thomas*, 280 N.E.2d 581, 586 (Ind. 1972) (acknowledging the prior law and listing example cases).



compliance. The enrolled act rule itself overruled established precedents approving of judicial inquiry into these questions. These facts justify the immediate abandonment of the enrolled act rule.

The essence of article III is that “[t]he courts cannot encroach on, or interfere with, the *proper* exercise of the Legislature’s constitutional powers. Stated otherwise, the judiciary must not usurp the constitutional function of the Legislature. Accordingly, the courts may not interfere with matters *within the discretion* of the Legislature . . . .”<sup>201</sup> The same logic undergirds the political question doctrine, which involves matters that the Constitution makes purely a function of legislative or executive *discretion*.<sup>202</sup> The trouble for the enrolled act rule is that, like the other procedural requirements of article IV, the single subject rule is *not in any way discretionary*, nor are acts passed in derogation of the rule an exercise of the legislature’s power.<sup>203</sup>

The enrolled act rule reallocates to the legislature the last word on a certain breed of constitutional question—namely, whether article IV’s procedural requirements have been met by that very body. The enrolled act rule is itself a deviation from article III, which delegates the state’s judicial power to the courts—a power that has uniformly been held to include questions of the legislature’s constitutional compliance. Notwithstanding recent assertions to the contrary,<sup>204</sup> article III, together with article VII (the judicial article) and the clear intent of the framers, imposes an *affirmative duty* upon the courts to exercise the last word on *all* questions of constitutionality that are otherwise properly brought before the courts.<sup>205</sup> It is equally axiomatic that any provision included in the Constitution, whether substantive or procedural, is “constitutional”—that is to say, part of the Constitution. Unfortunately, when the courts abdicate their duty, there is little that either of the other branches can do to rectify the challenge, since it is the courts themselves that are the final arbiters as to the Constitution’s meaning. Correcting the error of the enrolled act rule must therefore be a

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201. 5A IND. LAW ENCY., *supra* note 197, § 62 (emphasis added).

202. *Parker v. State*, 32 N.E. 836, 838-39 (Ind. 1892) (discussing the rationale for the political question doctrine).

203. *See Evans & Bannister*, *supra* note 1 (manuscript at 16 n.89 and accompanying text).

204. *See State ex rel. Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993) (“Although it is the duty of the Courts to determine the constitutionality of statutory law, this Court has held repeatedly that courts should not intermeddle with the internal functions of either the Executive or Legislative branches of Government.”).

205. *See, e.g.*, 5A IND. LAW ENCY., *supra* note 197, § 59 (2005) (“The courts have the *exclusive* responsibility and duty to interpret the law, including the Constitution . . . Allegations that a statute is unconstitutional are matters *solely* for judicial determination.”) (emphasis added); *see generally City of Evansville v. State ex rel. Blend*, 21 N.E. 267 (Ind. 1889) (holding in the context of articles III and IV, that “[a] law may be within the inhibitions of the Constitution as well by implication as by expression. And when it is, it is the duty of the courts to so declare.”); *Beebe v. State*, 6 Ind. 501, 507–08, 515 (1855) (holding that the limitations upon the legislature exist to protect the integrity of the citizenry, and that the question of a statute’s constitutionality is a judicial question, “to be finally determined by the *Courts alone*”) (emphasis added).

judicial initiative. As a creation of the courts, the enrolled act rule's retraction by the courts would not invade the province of the other branches.

### 3. *Summary: A Misguided Doctrine*

Several enrolled act authorities claim that the procedural requirements in article IV are "legislative functions," which functions the courts themselves cannot exercise. *Evans*, for example, observed that "[c]ourts should be very careful not to invade the authority of the legislature . . . No person charged with official duties under the judicial department shall exercise any of the functions of the legislative department."<sup>206</sup> This is true insofar as the courts may not themselves authenticate an act, or pass a statute. But this observation confuses the issue. The act of *evaluating* these functions for constitutional compliance, *once they are performed by the legislature*, is a *judicial* function. Moreover, the framers specifically intended that the single subject rule would be enforced by the courts.<sup>207</sup> Section 19 is in no way self-enforcing.

In overruling the existing line of authorities, the *Evans* Court discarded the fundamental principle of interpretation that "in construing constitutional provisions, [the court] may not substitute for the clear language of the constitution its own notions of what the provisions should have been."<sup>208</sup> It is the legislature's job to create law; it is the judiciary's role to evaluate this law for constitutional compliance. Contrary to the implications of *Evans* and its progeny, there is no conflict between the principles of "separation of powers" and "checks and balances."<sup>209</sup> Checks and balances do not undermine the separation of powers, since the "check" of judicial review is not an exercise of a legislative function. If *Evans* is correct in holding to the contrary, then the entire doctrine of judicial review must be renounced, because crafting the *substance* of acts is equally a legislative function.

*Evans*' distinction between the justiciability of the Constitution's procedural and substantive provisions is therefore illusory. Both types of requirement are equally mandatory; both are equally "a part" of the Constitution, and, therefore, an act is equally unconstitutional whether it is passed in derogation of a procedural or a substantive requirement. The powers of authenticating an act and of creating its substance to begin with are equally "legislative functions;" hence, the degree of "invasion" is equal

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206. *Evans v. Browne*, 30 Ind. 514, 523 (1869).

207. See *Evans & Bannister*, *supra* note 1 (manuscript at 28–29, 34–35).

208. 5 IND. LAW ENCY., *supra* note 197, § 12. We have noted many instances of early Indiana jurists questioning what section 19 ought to have entailed. See *generally supra* Part II.

209. And indeed, the Indiana Supreme Court has more recently recognized that the two doctrines are harmonious and are not a zero-sum game. See, e.g., *State v. Monfort*, 723 N.E.2d 407, 413 (Ind. 2000) ("The separation of powers provision exists not only to protect the integrity of each branch of government, but also to permit each branch to serve as an effective check on the other two.").

whether the court voids a law based upon procedural or substantive grounds. Neither the Constitution's text nor the framers' intent distinguishes between procedural requirements and substantive requirements in defining the scope of judicial review.

Indeed, the framers *specifically intended* that the courts would enforce the single subject rule.<sup>210</sup> It is true that "the legislature cannot interfere with the discharge of judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business."<sup>211</sup> But this is true because the Constitution itself does not authorize legislative inquiry into the courts' internal operations. Such is not the case with the legislature. The entire purpose of section 19 was the creation of a rule—one of constitutional force—touching upon the internal mechanics of the General Assembly. Whether this arrangement is "fair" or "sensible" is not for the courts to say; it was the framers' prerogative to arrange Indiana's constitutional order in this manner. If the General Assembly or the public disapproves of the framer's design, they enjoy the power to amend the Constitution.

The enrolled act rule is a misguided doctrine and should be abandoned, for "where the means by which [a legislative] power granted shall be exercised are specified, no other or different means for the exercise of such power can be implied, *even though considered more convenient or effective than the means given in the Constitution.*"<sup>212</sup> The legislature may not pass an act through logrolling, as the framers and ratifiers understood that notion—even if such a procedure could be deemed more convenient or efficient.<sup>213</sup>

If the courts are unwilling to renounce the enrolled act rule altogether, then at a minimum an exception to the rule ought to be recognized. *Roeschlein* acknowledged several exceptions to the enrolled act rule—circumstances under which the legislative journals may be consulted by the courts.<sup>214</sup> Indeed, one of these exceptions applies when "the very fact of the attestation of a bill is alleged to be due to fraud and mistake of fact."<sup>215</sup> Arguably, on any occasion that logrolling is proven, the authentication of the act in question was, by definition, made under a "mistake of fact." Finally, even if the judicial review of procedural questions was to invoke a "legislative function," article III of Indiana's Constitution provides that such

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210. See Evans & Bannister, *supra* note 1 (manuscript at 28–29, 34–35).

211. *Monfort*, 723 N.E.2d at 411.

212. *Ellingham v. Dye*, 99 N.E. 1, 15 (Ind. 1912) (emphasis added).

213. See Evans & Bannister, *supra* note 1 (manuscript at 27–28) (noting that the Indiana convention specifically rejected the argument that the single subject would preclude arrangements that are often convenient for the legislature).

214. See *Roeschlein v. Thomas*, 280 N.E.2d 581, 588 (Ind. 1972).

215. *Id.* (quoting *State v. Marion Circuit Court*, 176 N.E. 626, 628 (Ind. 1931)).

an exercise is permissible where “this Constitution expressly provide[s].”<sup>216</sup> By virtue of the framers’ indisputable intent,<sup>217</sup> Section 19 must be read to mandate the judicial resolution of single subject disputes, including, in the case of the section’s procedural prong,<sup>218</sup> whether logrolling occurred in the passage of an act.

Ultimately, the enrolled act rule resists two simple inquiries: first, whether the Constitution’s fount of legislative authority extends to acts expressly prohibited by the Constitution itself (the answer, of course, is “no”); and second, whether the Constitution’s fount of judicial authority includes the duty and obligation to void laws in derogation of the Constitution (the answer, with equal force, is “yes”). Whether it is because the courts renounce the enrolled act rule altogether or because an exception is recognized for section 19, the enrolled act doctrine should not preclude the active and consistent judicial enforcement of the single subject rule’s procedural prong, as Indiana’s constitutional framers intended.

At one time, Indiana’s courts refused to enforce the single subject rule’s sister provisions in sections 22 and 23, which together prohibit special and local laws, because “[i]t was initially thought that Article IV presented no justiciable issue.”<sup>219</sup> In other words, it was not a judicial function to determine whether an act was “special” or “local” in the context of article IV.<sup>220</sup> The modern jurisprudence, however, rejects absolute deference on section 22 and 23 questions, acknowledging the courts’ duty to analyze questions arising under these provisions.<sup>221</sup> The courts should embrace this rationale with respect to section 19, as they had before the Civil War, because the framers’ intent, almost entirely neglected in the case law, was even more directly stated.<sup>222</sup>

### C. Infinite Reasonableness as an Unreasonable Standard: Removing the Substantive Roadblock to Enforcement

Section 19 has long been recognized to require a test of reasonableness to effectuate its substantive purposes (i.e., whether an act contains one or more than one “subject”).<sup>223</sup> The majority in *Steinwedel* attacked section 19

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216. IND. CONST. art III, §1.

217. See Evans & Bannister, *supra* note 1 (manuscript at 7–35).

218. See *id.* (manuscript at 33–34).

219. See *Municipal City of S. Bend v. Kimsey*, 781 N.E.2d 683, 687 (Ind. 2003).

220. *Id.* at 687–89. This was expressed as either absolute deference or as a reasonableness test in which virtually all legislative action was held to be reasonable. See *id.*

221. *Id.* at 689–90.

222. See Evans & Bannister, *supra* note 1 (manuscript at 7–35).

223. See *Ind. Cent. R.R. Co. v. Potts*, 7 Ind. 681 (1856) (an act’s “subject must be reasonably particular and not too general . . .”); *State v. Steinwedel*, 180 N.E. 865, 868 (Ind. 1932) (citing *Potts* and noting that “[t]his early case recognized that the only test which this court can apply is the indefinite

on this ground, labeling it “indefinite” and concluding that section 19’s “reasonableness nature” necessitates essentially absolute deference from the courts on section 19 questions.<sup>224</sup> The concept of “reasonableness,” however, is nothing new to American law. Indeed, the notions of “reasonableness” and “reasonableness tests” are so pervasive throughout our law as to be deemed *ubiquitous*.<sup>225</sup> More particularly, tests of reasonableness have been invoked throughout Indiana’s *constitutional law*.<sup>226</sup> Why *Steinwedel* characterized section 19’s “reasonableness nature” as an insurmountable problem is entirely unclear, for legal standards of “reasonableness” are firmly rooted in American jurisprudence generally as well as in Indiana’s constitutional thought.<sup>227</sup>

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one of ‘reasonableness’ . . .”); *see also* *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 214 (Ind. 1981).

224. *Steinwedel*, 180 N.E. at 868.

225. By way of example, a brief perusal of *American Jurisprudence* reveals dozens of applications of reasonableness and reasonableness tests throughout U.S. law. These include, for example, in the law of contracts, the notions of “reasonable construction,” 17 AM.JUR.2d *Contracts* §§ 337–38 (2004), “reasonable disapproval of performance,” *id.* §§ 630–32, “reasonable effort,” *id.* § 602, “reasonable time,” *id.* § 467, the “reasonable interpretation” of contracts, *id.* §§ 337–38, the “reasonable foreseeability” of damages, 22 AM. JUR. 2d *Damages* § 305 (2003), and the use of “reasonable” customs and usages in construing contract terms, 21A AM.JUR.2d *Customs and Usages* § 9 (2008); and in the law of torts, the “reasonable person standard,” 57A AM.JUR.2d *Negligence* § 7 (2004), “reasonableness” in comparative fault analysis, 57B AM.JUR.2d *Negligence* §§ 970–71 (2004), and in the exercise of “reasonable care,” *id.* § 825.

226. *See generally* *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005) (holding that the legality of a government search under the Indiana Constitution “turns on an evaluation of the *reasonableness* of the police conduct under the totality of the circumstances”) (emphasis added); *Collins v. Day*, 644 N.E.2d 72, 78–79 (Ind. 1994) (holding that, in the context of Indiana’s privileges and immunities clause of article I, section 23, where “the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be *reasonably* related to such distinguishing characteristics”) (emphasis added). In *Municipal City of S. Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003), the court held that the language of article IV, sections 22 and 23 did not require a reasonableness test, but instead the language itself was sufficiently definitive so as to provide a purely definitional test for questions of special and general legislation, in part because “[t]he terms ‘general law’ and ‘special law’ have widely understood meanings.” The language of section 19 is necessarily more akin to article I, section 23 (requiring a reasonableness test) than it is to article IV, sections 22 and 23 (requiring no reasonableness test). *See infra* Part V.B.

227. Indeed, the courts routinely acknowledge the challenges inherent to reasonableness. In the criminal context, for example, the court of appeals has observed that “probable cause is a fluid concept that is incapable of precise definition” but that, nevertheless, “[p]robable cause is established where a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of the premises or person will uncover evidence of a crime.” *Frensemeier v. State*, 849 N.E.2d 157, 162 (Ind. Ct. App. 2006) (citations omitted). Despite the fact that this fundamental legal concept cannot be defined with precision, courts often apply the notion of probable cause. We do not throw out probable cause jurisprudence because it eludes precise definition. Why single subject rule jurisprudence should be any different is unclear. One might rejoinder that the single subject rule implicates the function of another branch of government—but this does not seem persuasive. Probable cause questions can lead to weighty criminal sanctions such as the death penalty or the loss of a person’s freedom. The framers expressly intended that the courts would, one way or

Nevertheless, modern courts have taken advantage of section 19's reasonableness nature to continue the doctrine of nearly-absolute deference.<sup>228</sup> Today, an act is invariably found to contain only "one subject and matters properly connected therewith,"<sup>229</sup> irrespective of its contents. Most decisions have accomplished this by the two-part strategy of (1) defining the act's subject as broadly as necessary so that virtually any two provisions can fit within the "subject," and (2) characterizing, without supporting analysis, those provisions still outside of the subject as being "properly connected" to it. The first jurist to attack section 19 asserted that "subjects are almost infinitely divisible," and implied that this made section 19 questions exclusively a "legislative" issue,<sup>230</sup> despite the framers' uncontroverted intent to the contrary.<sup>231</sup> With only the very rare exception, the last hundred years of the decisional law has reflected this protocol.<sup>232</sup>

The case law's approach to the single subject rule has defeated the framers' and ratifiers' intent for this important provision. The framers intended that "the courts will decide" section 19 questions.<sup>233</sup> We have seen that the framers intended single subject questions to be judicially cognizable. It is equally important that the courts *decide* single subject disputes. By "decide," the framers did not mean that the courts would effectively determine ahead of time to defer to whatever the legislature has done. Rather, the framers had in mind the process of judicial decision-making to which they were already accustomed: courts would craft a framework and would apply the new legal standard to the facts of particular disputes on a case-by-case basis, without a pre-determined result in mind. Yet the case law has embraced such a pre-determined result (namely, deference to the legislature in all but a few rare cases). Some observers have recognized this over time and have encouraged a more moderated single subject framework than that of absolute deference.<sup>234</sup>

Other areas of the law (including constitutional law) routinely operate under equally general doctrines. Few (if any) absolute rules of law can exist in the context of a reasonableness test, but this has not slowed the ubiquity

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another, *actually enforce* section 19. And a judicial finding of a lack of probable cause implicates the functions of executive branch (law enforcement) officials.

228. *See generally supra* Part II.

229. This trend reached a zenith in the late twentieth century. One act, for example, was upheld despite containing provisions as diverse as (1) the operation and jurisdiction of Indiana's courts, and (2) the Indiana Products Liability Law. *See Evans v. Browne*, 30 Ind. 514 (1869) (discussing the *Dague* case).

230. *See Beebe v. State*, 6 Ind. 501, 553 (1855) (Gookins, J., dissenting) (although the nature of "a subject" presents certain conceptual challenges, this does not render section 19 unenforceable.).

231. *See Evans & Bannister, supra* note 1 (manuscript at 7-35).

232. *See generally supra* Part II.

233. *See Evans & Bannister, supra* note 1 (manuscript at 28-29, 34-35).

234. *See, e.g., Ind. Cent. R.R. Co. v. Potts*, 7 Ind. 681, 684 (1856) (an act's "subject must be reasonably particular and not too general . . ."); *see also infra* Part V.

of reasonableness throughout the law—nor should it.<sup>235</sup> Like other tests of “reasonableness,” section 19 demands not a series of absolute rules, but an analytical architecture. The construction of such a framework is considered below in Part V.

#### D. Other Roadblocks to Enforcement

The enrolled act rule and the standard of infinite reasonableness represent the major hurdles to the enforcement of the single subject rule’s procedural and substantive prongs, respectively. The removal of these roadblocks would enable the courts to apply an analytical framework to section 19 far better aligned with the framers’ intent than the prevailing approach. However, even with the removal of these major roadblocks, other minor (but potentially significant) objections have been, or could be, raised to frustrate section 19’s enforcement. These are briefly considered below.

##### 1. *Issues of Original Intent*

We have already noted that few Indiana appellate decisions consulted the historical record to ascertain what the framers intended for the single subject rule. Beyond this, section 19’s general phraseology invited ideological opponents who favored unchecked legislative authority to eviscerate the framers’ intent. Previous scholarship has undertaken a detailed study of section 19’s meaning (and of the framers’ and ratifiers’ intentions in creating it) in part to remove this difficulty.<sup>236</sup> Uncertainties surrounding this intent should no longer foreclose the creation of a workable single subject framework.

##### 2. *Stare Decisis and Legislative Expectations*

Any modification to Indiana’s single subject jurisprudence would appear to offend the doctrine of stare decisis. Stare decisis, however, does not prohibit the adoption of a revised single subject framework that is more firmly rooted in the framers’ intent.

“The doctrine of stare decisis states that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same.”<sup>237</sup> However, “[p]recedence . . . can be no justification for the continuance of an erroneous practice. Where judicial

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235. See *State v. Steinwedel*, 180 N.E. 865, 868 (Ind. 1932).

236. See generally *Evans & Bannister*, *supra* note 1.

237. *Emerson v. State*, 812 N.E.2d 1090, 1099 (Ind. Ct. App. 2004).

errors are apparent, they should be judicially corrected . . . .”<sup>238</sup> We have heretofore seen that the existing section 19 framework is *inexorably and unnecessarily* conflicted with the framers’ and ratifiers’ intent, and is therefore, by definition,<sup>239</sup> an apparent judicial error. While “decisions should be governed by precedent,” it is equally true that “when the reasons for a rule of law cease to exist, the rule should be discontinued. When the question is properly raised, it is the duty of the court to investigate the wisdom of precedents established many years ago.”<sup>240</sup> In light of what is now known about the framers’ intent,<sup>241</sup> the courts are justified in revising the existing section 19 framework.

These principles are particularly compelling in the area of constitutional law. The Indiana Supreme Court has observed that

[t]he rule of *stare decisis* has not been held to apply with its usual force and vigor to decisions upon constitutional questions . . . . “The rule of *stare decisis* [does not apply] to questions involving the construction and interpretation of the organic law, the structure of the government, and the limitations upon the legislative and executive power.”<sup>242</sup>

Resistance to a new single subject framework may be grounded in the legislature’s historical and contemporary reliance upon the existing rule of absolute deference. But the law’s default presumption is that new constitutional pronouncements will be applied *prospectively*: “[a] newly-announced constitutional principle will not be given retroactive effect . . . unless it is plainly and unequivocally made retroactive by the supreme court.”<sup>243</sup> Endorsing the single subject rule’s enforcement, Justice Brent Dickson has urged, in a noteworthy dissent, that a new, enforceable framework be applied only on a prospective basis.<sup>244</sup> Thus, the legislature’s historical expectation of section 19’s non-enforcement carries no weight in the question of its future enforcement. Beyond this, neither the legislature nor the executive branch expects the courts to be infallible, and, as with the conduct of their own affairs, neither branch would expect the courts to refuse

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238. *Martin v. State*, 480 N.E.2d 543, 548 (Ind. 1985) (citation and quotation marks omitted).

239. *See Evans & Bannister*, *supra* note 1 (manuscript at 1–4 and cases cited therein) (noting that the framers’ and ratifiers’ intent is the paramount authority as to the meaning of a constitutional provision).

240. *Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781 (Ind. Ct. App. 1990) (citations omitted).

241. *See generally Evans & Bannister*, *supra* note 1.

242. *Robinson v. Schenck*, 1 N.E. 698, 706 (Ind. 1885) (quoting *Willis v. Owen*, 43 Tex. 41, 49 (1875)) (emphasis added); *accord Denney v. State*, 42 N.E. 929, 940 (Ind. 1896) (“it will not be considered that the rule of *stare decisis* requires that, in deciding so grave a matter as that of the constitutionality of an act of the legislature, we should be bound by even our own former decisions”).

243. 7 IND. LAW ENCYCLOPEDIA, *Courts* § 36 (2008).

244. *Pence v. State*, 652 N.E.2d 486, 489–90 (Ind. 1995) (Dickson, J., dissenting).



corrective action once a rule's erroneousousness or obsolescence becomes apparent.

Because *stare decisis* does not apply with its usual force to constitutional questions, and because a new framework would apply only to future acts, the courts should not feel obligated to retain the shortcomings of the present single subject jurisprudence.

### 3. *Majority Rule and the Presumption of Constitutionality*

As to claims arising under the constitution generally, it remains true that statutes are "presumed constitutional; a challenger must rebut this presumption."<sup>245</sup> Yet this presumption is not effectively absolute; it is instead realistically rebuttable. The test thus far used to evaluate section 19 questions has morphed into such a barrier that virtually any combination of items in an act will be upheld.<sup>246</sup> As many cases have phrased it, a "statute is presumptively valid and will not be overthrown as unconstitutional if it can be sustained on any *reasonable basis*."<sup>247</sup> The difficulty with the existing section 19 framework is the unreasonableness of absolute (or near-absolute) deference, on account of its irreconcilability with the framers' intent. Upholding statutes by defining their subjects so broadly that any two items may be included is not "reasonable." The existing framework's definition of "any reasonable basis"—namely, whatever the legislature happens to do—is illusory because *it is not grounded in the framers' intent*.

The framework below proposes an alternative to near-absolute deference. A *bona fide* reasonableness test, grounded in the framers' intent, will best serve the framers' and ratifiers' intent (and will vindicate those interests of society that animated the rule's inclusion to begin with). Indeed, the entire notion of *reasonableness* necessarily rejects *both* (1) the position that no laws except the most obvious and egregious instances of invalidity can be found in violation of section 19 (the common law's present stance) *and* (2) the position that acts will frequently be voided on overly technical grounds (what the decisional law incorrectly presents as the only alternative to absolute deference). The framers did not intend to stack the deck so heavily in favor of legislative acts that future courts would void them only when the challenger presented the perfect case of its unconstitutionality. Instead, the framers intended that courts would forcefully give effect to

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245. *McManus v. State*, 814 N.E.2d 253, 255 (Ind. 2004).

246. By way of example in Indiana, every single subject challenge since section 19's amendment has been rejected in pro forma fashion, applying the standard of absolute deference. *See supra* Part II.A.3 (discussing Indiana's twentieth-century treatment of the single subject rule).

247. *Book v. State Office Bldg. Com.*, 149 N.E.2d 273, 280 (Ind. 1958) (emphasis added).

article IV's restrictions, so that they would not become empty words in practice.<sup>248</sup>

By definition, the judicial act of voiding a statute thwarts the will of a legislative majority. Courts must be cautious in overturning a statute on constitutional grounds. However, there is nothing unique about this principle in the section 19 context. Many cases have explained that while the majority generally rules in our legal system, this rule is not absolute.<sup>249</sup> Notwithstanding the presumption of constitutionality, the legislature still "must regulate within the restrictions of the constitution."<sup>250</sup> Otherwise stated, "[t]he majority rules *when all act within the limits of the constitution*."<sup>251</sup> The presumption of deference is not (or, in the case of section 19, ought not to be) absolute. The courts "only attempt to confine that of the legislature within the limits the people, by their fundamental law, assigned to it," and "[i]f those limits are unsatisfactory, the fault is of the constitution, not of" the courts.<sup>252</sup>

The presumption of validity and the notion of majority rule are sound. But neither concept can operate to trump the *framers' intent* that reasonableness, as they understood it, would define the framework for testing acts for compliance with the single subject rule. In the context of section 19, the presumption of validity has morphed into a veritably automatic finding of validity. In so doing, it has inhibited the establishment of a *bona fide* reasonableness test.

#### 4. *Standing*

Though seldom invoked, this potential ground for defeating single subject challenges merits brief consideration. Justice Brent Dickson's view on standing should be adopted;<sup>253</sup> specifically, the public standing doctrine should operate to empower interested citizens to challenge statutory enactments on the basis of constitutional infringement. "Where public rather than private rights are at issue, the usual requirements for establishing standing need not be met."<sup>254</sup> A lack of standing to challenge the constitutionality of the legislature's acts is inconsistent with the idea that "all power is inherent in the People" such that "the People have, at all times, an indefeasible right to alter and reform their government."<sup>255</sup>

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248. See *infra* Part III.D.6.

249. See, e.g., *Madison & Indianapolis R.R. Co. v. Whiteneck*, 8 Ind. 217, 231–32 (1856).

250. *Beebe v. State*, 6 Ind. 501, 518 (1855).

251. *Whiteneck*, 8 Ind. at 231 (emphasis added).

252. *Id.* at 232.

253. See *Pence v. State*, 652 N.E.2d 486, 489 (Ind. 1995) (Dickson, J., dissenting).

254. *Id.*

255. IND. CONST. art. I, § 1.

### 5. *The Difficulty of an Alternative*

Crafting an alternative to the existing single subject framework is undoubtedly challenging and, like virtually every other constitutional provision, will require the benefit of evolving over time in the case law. The formation of such an alternative will be challenging both intellectually (for the reasons observed above) and politically (out of concern that the legislature will react adversely should the courts begin enforcing the single subject rule). As for the intellectual challenge, the single subject rule, like other difficult constitutional questions, will develop with time and effort. As for the political challenge, we have already observed that most legislators would *appreciate* the judicial enforcement of the single subject rule.<sup>256</sup> The legislature's response to the Court's decision in *State ex rel. Percy v. Criminal Court of Marion County*<sup>257</sup> is illustrative. *Percy* voided, not merely an act but the entire Indiana Code.<sup>258</sup> The legislature responded by amending the Constitution (with the public's approval).<sup>259</sup> There followed no assault upon the integrity of the courts; the public would not tolerate such a response. The courts must not fail to adopt a functional single subject framework on the basis of the anticipated difficulties—real or imagined—of arriving at a new jurisprudence.

### 6. *Recent Views*

The Indiana Supreme Court's most recent pronouncement on the single subject rule is found in the 2012 case of *Loparex, LLC v. MPI Release Technologies*.<sup>260</sup> *Loparex* sued two of its former employees, accusing the former employees of violating their non-compete agreements and of taking trade secrets to MPI, their new employer.<sup>261</sup> One of these former employees had voluntarily resigned from *Loparex* and thereafter went to work for MPI.<sup>262</sup> The former employees counterclaimed, asserting that *Loparex* had attempted to get them fired from MPI by offering to drop its lawsuit if MPI

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256. See Evans & Bannister, *supra* note 1 (manuscript at 41 n.244) (noting the views of a former Indiana legislator, and the sponsor of the 1974 amendment to section 19, that legislators disfavor being forced to vote for items they oppose in order to achieve the passage of items they favor, which situation often prevails in the absence of the courts' enforcement of section 19). See also *supra* note 120 (observing that both chambers of the Indiana Legislature have incorporated this notion in their rules).

257. 274 N.E.2d 519 (Ind. 1971).

258. *Id.*

259. Evans & Bannister, *supra* note 1 (manuscript at X).

260. 964 N.E.2d 806 (Ind. 2012).

261. *Id.* at 809–10.

262. *Id.* at 810.

agreed to fire them.<sup>263</sup> The former employees claimed that Loparex's attempt to get them fired was a violation of Indiana's Blacklisting Statute.<sup>264</sup>

Because one of the former employees had left Loparex voluntarily to join MPI,<sup>265</sup> the question arose as to whether an individual who voluntarily leaves employment is entitled to bring a claim under Indiana's Blacklisting Statute.<sup>266</sup> In the 1904 case of *Wabash Railroad Co. v. Young*,<sup>267</sup> the Indiana Supreme Court had held a portion of Indiana's Blacklisting Statute unconstitutional as a violation of the single subject rule.<sup>268</sup> The Blacklisting Statute's text provides a cause of action to discharged employees, as well as to "employees who may have voluntarily left said company's service."<sup>269</sup> Looking to the title of the Blacklisting Statute, which read "An act for the protection of discharged employees and to prevent blacklisting,"<sup>270</sup> the *Young* Court determined that the subject of the act was "the protection of discharged employees."<sup>271</sup> The *Young* Court "concluded that this subject did not encompass 'protection of employees who have not been discharged, or who voluntarily quit the service of their employer,'"<sup>272</sup> and, thus, the Court held as void the portion of the statute providing a cause of action for workers who voluntarily leave their previous employer.<sup>273</sup>

The *Loparex* Court first observed that the language of section 19 was still in its original iteration when *Young* was decided in 1904.<sup>274</sup> At that time, section 19 declared that

[e]very act shall embrace but one subject and matters properly connected therewith; which shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.<sup>275</sup>

The contemporary version of section 19, under which Loparex was decided, reads: "An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one subject and matters properly connected therewith."<sup>276</sup> The *Loparex* Court then noted that under today's

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263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 809.

267. 69 N.E. 1003 (Ind. 1904).

268. *Id.*

269. *Loparex*, 964 N.E.2d at 812.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*; see also IND. CONST. art. IV, § 19 (1851 version).

276. IND. CONST. art. IV, § 19.

version of section 19, “the single subject [rule] is no longer tethered to the act’s title,”<sup>277</sup> and, as a result, the analytical process for evaluating questions arising under section 19 has changed since *Young* was decided.<sup>278</sup> (On this ground, the *Loparex* Court overruled *Young*, concluding that Indiana’s Blacklisting Statute does not violate the single subject rule, and that employees who voluntarily leave their employment do enjoy a cause of action under the law today.)<sup>279</sup>

Of greater interest to us is *Loparex*’s discussion of the single subject rule itself. *Loparex* retained and relied upon many of the precedents that this article has attempted to show are inconsistent with the framers’ and ratifiers’ intent.<sup>280</sup> For instance, the *Loparex* Court noted that “we continue to apply [a] liberal construction [from precedents such as *Dague*] when analyzing statutes against section 19 as it is written today.”<sup>281</sup> Acknowledging that this approach “has often been favorable to the legislature’s enactments,”<sup>282</sup> the court then declared that its precedents “did not leave section 19 a dead letter.”<sup>283</sup> Yet whether the court’s current framework for single subject analysis has left the rule literally a dead letter, or merely very nearly a dead letter, this is not the best benchmark against which the current framework can be assessed. A better standard is the degree to which the current framework approximates and effectuates the framers’ and ratifiers’ intent for the single subject rule.<sup>284</sup>

The *Loparex* Court rightly observed that “the indefinite test of ‘reasonableness,’ rather than a structured bright-line rule,” must be applied to the single subject rule.<sup>285</sup> But this does not mean that *any* “reasonableness test” is appropriate for the single subject context: “[a] constitutional provision must never be construed in such a manner as to make it possible

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277. *Loparex*, 964 N.E.2d at 813.

278. *Id.* at 809; *see also* Evans & Bannister, *supra* note 1 (manuscript at 40–42) (discussing the implications for single subject analysis under the current language as opposed to the original language).

279. *Loparex*, 964 N.E.2d at 815.

280. *See generally supra* Parts II & III.

281. *Loparex*, 964 N.E.2d at 813; *see also* *Dague v. Piper Aircraft Co.*, 418 N.E.2d 207, 214–15 (Ind. 1981) (finding that “the title of the act specifically mentions the subject matter of section twenty-eight” such that no one could be deceived as to the location of a provision of the act).

282. *Loparex*, 964 N.E.2d at 813.

283. *Id.* at 814.

284. 16 AM. JUR. 2D, *supra* note 78, § 63 (“In interpreting a constitutional provision, the court’s primary purpose is to effectuate the intent of both those who framed the provision and those who adopted or voted for the provision.”); *see also* *Embry v. O’Bannon*, 798 N.E.2d 157, 160 (Ind. 2003) (noting this rule in Indiana).

285. *Loparex*, 964 N.E.2d at 814; *accord* *State ex rel. Test v. Steinwedel*, 180 N.E. 865, 868 (Ind. 1932) (noting that a test of reasonableness is indeed the only viable measure for single subject analysis) and *infra* Part V (proposing a more precisely defined reasonableness test for single subject rule analysis grounded in the clear intent of the framers and ratifiers).

for the will of the people to be frustrated or denied.”<sup>286</sup> Among the many principles that should guide single subject analysis today, is the framers’ and ratifiers’ unmistakable intent that the rule be included in the 1851 Constitution for the specific purpose of limiting the legislature’s discretion in the process of statutory creation;<sup>287</sup> that the single subject rule, entirely apart from the title requirement, embodies both a procedural prohibition against logrolling and a substantive prohibition against multi-subject acts;<sup>288</sup> that the courts would rigorously enforce the rule;<sup>289</sup> and that the prevailing guides for single subject analysis—the enrolled act rule and the doctrine of infinite reasonableness—are affirmatively and deeply conflicted with the framers’ and ratifiers’ intent,<sup>290</sup> and have indeed “[made] it possible for the will of the people to be frustrated or denied.”<sup>291</sup> *Loparex* did little to substantiate the courts’ continuing reliance upon the enrolled act rule and doctrine of infinite reasonableness:<sup>292</sup> although the title requirement is no longer solely determinative of an act’s subject (since the 1974 amendment removed the title requirement from section 19 altogether), *Loparex* did not acknowledge that the 1974 amendment *preserved* the framers’ and ratifiers’ intent.<sup>293</sup> In other words, the mere fact that section 19 was amended in 1974 did not erase the framers’ and ratifiers’ intent for the single subject rule, and the amendment was not intended to further the long line of precedents upon which *Loparex* relied in continuing the enrolled act rule and doctrine of infinite reasonableness.<sup>294</sup>

To summarize, the principal authorities throughout which the contemporary single subject test evolved were developed with little or no attempt to discern the framers’ and ratifiers’ actual intent. As a result, Indiana’s contemporary single subject test is affirmatively conflicted with the

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286. 16 AM. JUR. 2D, *supra* note 78, § 63.

287. Evans & Bannister, *supra* note 1 (manuscript at 4–7).

288. *Id.* (manuscript at 33–34).

289. *Id.* (manuscript at 28–29, 34–35). In so doing, the courts must define an act’s subject with “reasonable specificity.” See *Ind. Cent. R.R. Co. v. Potts*, 7 Ind. 681, 685 (1856). Of the many precedents it cited in summarizing contemporary single subject analysis, *Loparex* made no mention of “reasonable specificity” or of *Potts*.

290. See generally Evans & Bannister, *supra* note 1; see also generally *supra* Parts II & III.

291. See *supra* note 269 (reciting this standard).

292. See generally *Loparex*, 964 N.E.2d 806.

293. Evans & Bannister, *supra* note 1 (manuscript at 40–42).

294. “In the years since 1909,” the Court noted, “a good many cases analyzing challenges to statutes under section 19 have employed a more accommodating approach than that taken in *Young*.” *Loparex*, 964 N.E.2d at 813. Yet to the extent the cases alluded to deviated from the framers’ and ratifiers’ intent, they, too, are lacking. See generally Evans & Bannister, *supra* note 1; see also generally *supra* Parts II & III. Although the single subject rule and title requirements remained separate provisions, each with their own purposes, Indiana’s case law often conflated the two. See Evans & Bannister, *supra* note 1 (manuscript at 43–44 nn.250–55 and accompanying text); see also *supra* Part III.A (discussing this topic). But there is no doubt that the present version of the single subject rule continues to embody, and ought to be defined by, the framers’ and ratifiers’ intent. Evans & Bannister, *supra* note 1 (manuscript at 40–42).

framers' and ratifiers' intent. A better test or framework within which to analyze single subject questions can be devised—one that is firmly grounded in this intent. Part V, *infra*, considers the parameters of such a framework. First, however, we turn to the question of how the other 40 single subject states have treated single subject analysis. We will see that the courts of most of the other single subject states are as deferential to legislative action as is Indiana, although some encouraging trends are evident.

#### IV. SINGLE SUBJECT TESTS ACROSS THE STATES

Although the decisional law across the states may vary somewhat in its phraseology and application, it appears that most single subject states have adopted the same general line of common law principles as those now prevailing in Indiana.<sup>295</sup> For instance, many of the single subject states hold that “[i]n determining whether a bill is confined to one subject . . . [a]ll that is necessary is that the act should embrace some one general subject.”<sup>296</sup> Just how general a “general subject” may be varies, but most often this generality is defined as any “logical” or “natural” connection among the parts of the act, or between the subject and each part of the act.<sup>297</sup> Several states stretch this standard such that the constituent parts of an act need not even directly bear a connection to the subject, but may instead be upheld by sharing “indirect” connections to the act’s subject.<sup>298</sup> Even matters that appear to constitute distinct, separate subjects will be upheld in some states “unless they are incongruous and diverse to each other.”<sup>299</sup>

Similarly, many states hold that the single subject rule is to be construed with “liberality” or “considerable breadth.”<sup>300</sup> This standard is commonly explained by asserting that the single subject rule was intended to address only “flagrant evils” or violations that are “substantial,” or “gross and fraudulent.”<sup>301</sup> Some courts have even held, contrary to the plain language

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295. See *supra* Parts II & III (detailing Indiana’s common law treatment of the single subject rule); see also *infra* Part IV (discussing the common law’s treatment of the single subject rule in the other single subject states).

296. *Short v. State*, 600 P.2d 20, 24 (Alaska 1979).

297. See, e.g., *Bazley v. Tortorich*, 397 So. 2d 475, 485 (La. 1981); *Silver City Consol. Sch. Dist. v. Board of Regents*, 401 P.2d 95, 110 (N.M. 1965); *Boise City v. Baxter*, 238 P. 1029, 1032 (Idaho 1925).

298. See, e.g., *Robinson v. Hill*, 507 S.W.2d 521, 524–25 (Tex. 1974); *Merchants’ Nat’l Bank v. Dawson Cnty.*, 19 P.2d 892, 900 (Mont. 1933); *Pioneer Irrigation Dist. v. Bradbury*, 68 P. 295, 297 (Idaho 1902).

299. *Clendaniel v. Conrad*, 83 A. 1036, 1042 (Del. 1912).

300. See, e.g., *Brinegar v. Clark*, 371 P.2d 62, 66 (Wyo. 1962) (single subject rule “must be liberally and reasonably construed”); *Gellert v. State*, 522 P.2d 1120, 1122 (Alaska 1974) (rule must be “construed with considerable breadth”).

301. See, e.g., *Beagle v. Walden*, 676 N.E.2d 506, 507 (Ohio 1997) (a finding that the legislature violated the single subject rule “is proper only when a violation of the rule is manifestly gross and fraudulent”); *Schwab v. Ariyoshi*, 564 P.2d 135, 139 (Haw. 1977) (in order to void an act, the

of the rule, that acts may contain more than one subject.<sup>302</sup> These lines of authority are usually premised upon minimizing judicial involvement in legislative functions<sup>303</sup>—a legitimate sentiment in the general constitutional sense, but one that was intended not to hold with the usual force with respect to the single subject rule.

Of course, as we have seen, the simple requirement of a “general subject” and the notion of “great liberality” are at odds with the standard of reasonable specificity.<sup>304</sup> Some states have recognized a limit to these doctrines. Wisconsin’s courts, for instance, have declared that the single subject rule is an important constitutional restriction upon the legislative power; that those who object to enforcement of the rule as a mere technicality misconceive the rule and its purpose; and that the courts must enforce the rule, as it is mandatory and binding upon the legislature.<sup>305</sup> Other states mitigate the rule of “liberal construction”<sup>306</sup> while others observe a strict construction for their single subject rules, some of which acknowledge that the legislature can regularly defeat the constitutional mandate when courts apply a liberal construction.<sup>307</sup> For many states, then, the question thus

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legislature’s single subject violation must be “plain, clear, manifest, and unmistakable”); *Brinegar v. Clark*, 371 P.2d 62, 66 (Wyo. 1962) (“All that is necessary for compliance with this provision of the constitution is a reasonable adherence thereto.”); *Sullivan v. Siegal*, 245 P.2d 860, 863 (Colo. 1952) (single subject rule to guard against “flagrant evils connected with the adoption of laws”).

302. See, e.g., *Boise City*, 238 P. at 1032 (holding that “a single act may embrace many subjects and not be duplicitous, if they pertain to matters that are properly connected with the subject of the act”). This position results in a logical contradiction. See *Evans & Bannister*, *supra* note 1 (manuscript at 24 n.140 and accompanying text).
303. See, e.g., *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1196 (1985) (single subject rule to be construed liberally so as to minimize judicial involvement with legislature); *State v. Gulf States Theatres, Inc.*, 270 So. 2d 547, 554 (La. 1972) (“The title of an act must be broadly construed with a view to effectuating, not frustrating, the legislative purpose.”). Stating the test this way undercuts the framers’ and ratifiers’ intent for the rule: the intent was not that the courts would either effectuate or frustrate the legislature per se, but instead that the courts would serve as a bulwark against logrolling. See generally *Evans & Bannister*, *supra* note 1.
304. The standard of “reasonable specificity” was first propounded in *Ind. Cent. R.R. Co. v. Potts*, 7 Ind. 681, 685 (1856), and is incorporated into the framework proposed here, see *infra* Part V.
305. See generally *Durkee v. Janesville*, 26 Wis. 697 (1870).
306. See, e.g., *State ex rel. Davis v. Woolley*, 92 A.2d 600, 602 (Del. 1952) (“While [the single subject and title provision] is to be construed liberally in an effort to uphold legislation, liberality in construction should not be carried to an extreme that verges on emasculation.”); *Bd. of Penitentiary Comm’rs v. Spencer*, 166 S.W. 1017, 1018 (Ky. 1914) (“[t]he section should be liberally construed so as not to hinder or embarrass the Legislature in its efforts to enact laws, but at the same time a construction so loose as to virtually nullify the section, which is mandatory in its terms, should not be adopted.”); *State v. Payne*, 295 P. 770, 772 (Nev. 1931) (“[t]he rule of liberal construction . . . cannot be extended to the point of nullification . . . .”); *Pa. State Ass’n of Jury Comm’rs v. Commonwealth*, 64 A.3d 611, 614 (Pa. 2013) (“no proposed unifying scheme can be ‘so broad as to stretch ‘the concept of a single topic beyond the breaking point’ or ‘encompass[s] a limitless number of subjects’”).
307. See, e.g., *Douglas v. Cox Retirement Props., Inc.*, 302 P.3d 789, 792 (Okla. 2013); *accord* *Montana Auto. Ass’n v. Greely*, 632 P.2d 300, 311 (Mont. 1981). An older Kentucky case illustrates one approach, holding that “although a title may begin with a generally designated subject which is



becomes “at what point does a ‘liberal construction’ verge on emasculating the single subject rule?” This Article submits that the answer is straightforward: any framework or test for single subject analysis that demonstrably frustrates or defeats the clear intent of the framers and ratifiers has, by definition, emasculated the single subject rule.<sup>308</sup>

Yet this is not how most states have approached their single subject rules. Most have defined their single subject tests in very broad and vague language, calculated to defer to the legislature.<sup>309</sup> Georgia’s test is representative: “The test of whether an Act or a constitutional amendment violates the multiple subject matter rule is whether all of the parts of the Act or of the constitutional amendment are germane to the accomplishment of a single objective.”<sup>310</sup> Often, these tests declare that an act comports to the single subject rule so long as all of the provisions in the act share a “natural connection,” or are “reasonably related” to one another or to the subject of the act.<sup>311</sup> The issue then becomes what “natural connection” really means. In practice, it appears to mean only that the courts will defer to the legislature’s act.<sup>312</sup>

A few states offer somewhat greater detail in their single subject tests, sometimes in recognition of the fact that single subject frameworks over time have lacked clarity and consistency.<sup>313</sup> Some, such as Utah, have articulated

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broad enough to justify the provisions of the act relating thereto, yet if this is followed by restrictive language curtailing the scope of such general designation and in such form as to confine the title to legislation within the restrictions only, then the body of the act may go no further than authorized by the restrictive language.” *Jefferson County Fiscal Court v. Thomas*, 130 S.W.2d 60, 65 (Ky. 1939). This reasoning says in effect that the legislature may define the subject of each act as generally as it likes, but if it chooses to define the act’s subject narrowly, then the act’s provisions will have to be more tightly connected. This reading of the rule, which allows (and indeed incentivizes) the legislature to define the subjects of acts as broadly as one can imagine, defeats the framers’ intent; it tells the legislature that it will have to worry about being held to the single subject rule only if it chooses to define the subject narrowly. *See infra* note 321 and accompanying text.

308. *See infra* Part V.

309. Even those commentators who oppose a “stricter” construction of the single subject rule concede that the more liberal standard “has a weak conceptual foundation.” *See* Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938 (1983).

310. *Wall v. Bd. of Elections*, 250 S.E.2d 408, 413 (Ga. 1978) (quoting *Carter v. Burson*, 198 S.E.2d 151, 156 (Ga. 1973)); *accord Sunbehm Gas, Inc. v. Conrad*, 310 N.W.2d 766, 772 (N.D. 1981); *Caldwell v. Harris*, 204 S.W.2d 1019, 1021 (Tenn. 1947).

311. *See, e.g., State v. Huntley*, 658 P.2d 1246, 1247 (Wash. 1983) (rational unity needed between act’s subject and its provisions); *State v. Cooper*, 382 So.2d 963, 965 (La. 1980) (statute’s provisions must have a natural connection and reasonably relate to act’s subject); *Buhl v. Joint Indep. Consol. Sch. Dist.*, 82 N.W.2d 836, 839 (Minn. 1957) (to violate the single subject rule, “an act must embrace two or more dissimilar and discordant subjects which cannot reasonably be said to have any legitimate connection.”); *Jefferson Cnty. Fiscal Court v. Thomas*, 130 S.W.2d 60, 64 (Ky. 1939) (provisions must have a natural connection with the act’s subject).

312. *See generally supra* Parts II-IV.

313. *See, e.g., Pa. State Ass’n of Jury Comm’rs v. Commonwealth*, 64 A.3d 611, 616 (Pa. 2013) (noting that in Pennsylvania, “by 2003, germaneness had evolved to a standard of ‘whether the court can fashion a single, over-arching topic to loosely relate the various subjects included in the statute

several discrete (but nevertheless general) parameters for single subject analysis.<sup>314</sup> Other states provide more specific steps in the analysis. In Florida, for example, “the first step in determining whether legislation violates the single subject rule is to determine the single subject,” and this is usually the subject expressed in the act’s title.<sup>315</sup>

The second step in single subject review requires an analysis of the provisions of the law to determine whether they are ‘properly connected’ to this single subject. A provision is ‘properly connected’ to the subject ‘(1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject.’<sup>316</sup>

Similarly, Illinois employs a two-part test in which courts first “determine whether the act, on its face, involves a legitimate single subject,” and then “discern whether the various provisions within an act all relate to the proper subject at issue.”<sup>317</sup> Oregon’s appellate guidance is also helpful to its lower courts:

[T]he appropriate analysis of a one-subject challenge to the body of an act, made under Article IV, section 20, should proceed in 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.”<sup>318</sup>

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under review.’ . . . Nevertheless, we cautioned that we should be careful not to render section 3 ‘impotent to guard against the evils that it was designed to curtail’ by fashioning a theme that is all-encompassing in its broadness.”); *McIntire v. Forbes*, 909 P.2d 846, 853–54 (Or. 1996) (noting that “[t]he Oregon appellate courts have adjudicated at least 90 cases under article IV, section 20 . . . The cases are not always clear or consistent in analytical approach.”).

314. *State v. McCornish*, 201 P. 637, 638–39 (Utah 1921) (explaining that the single subject rule must be literally construed so as not to hamper the legislature, that the rule must guard against the evils that inspired it, and that no bright-line guidance for the rule can be formulated beyond general benchmarks).

315. *Whitsett v. State*, 913 So.2d 1208, 1211 (Fla. 2005).

316. *Id.*

317. *People v. Burdunice*, 811 N.E.2d 678, 681 (Ill. 2004).

318. *McIntire v. Forbes*, 909 P.2d 846, 856 (Or. 1996).

Even these more detailed single subject tests leave open the question of “how do we know what is reasonable?” We have noted already that most single subject states lack direct evidence of what their framers and ratifiers intended for their respective single subject rules; nevertheless, most states express fidelity to this intent in the process of constitutional interpretation and implementation.<sup>319</sup> Indiana, which enjoys an extensive historical record concerning its framers’ and ratifiers’ intent for the single subject rule (and which intent has been thoroughly assessed both here<sup>320</sup> and in our prior work),<sup>321</sup> could serve well as a reliable persuasive precedent for the other single subject states.<sup>322</sup> To that end, Part V considers an alternative constitutional framework for the analysis of single subject claims—a framework explicitly grounded in the prescient guidance of Indiana framers and ratifiers.

## V. A NEW JURISPRUDENCE

### A. The Known Constraints

The construction of a revised single subject framework should begin by defining the parameters within which the new framework should operate. For guidance, Part V primarily (but not exclusively) references the Indiana framers’ and ratifiers’ intentions for the single subject rule, as well as the necessary implications gleaned from this article and from our prior work on this topic.<sup>323</sup> These parameters are, at a minimum, as follows:

- The major impetus for calling Indiana’s 1850 Convention was the reform (and restriction) of the legislative branch.<sup>324</sup> This was not simply to be done in theory, as the Indiana framers were practical and sought restrictions that would function in practice.<sup>325</sup>
- The two principal purposes of the single subject rule are to prevent logrolling (a procedural goal) and to prevent incongruous items, with little reasonable connection, from being joined in the same bill (a substantive goal). The single subject rule thus contains a procedural prong as well as a substantive prong.<sup>326</sup>

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319. *See supra* Part I.

320. *See generally supra* Parts II-IV.

321. *See generally* Evans & Bannister, *supra* note 1.

322. *See supra* Part I.

323. *See generally* Evans & Bannister, *supra* note 1. Because Indiana’s historical record is probably the most extensive among the single subject states, the new framework proposed here could likely be adopted throughout the single subject jurisdictions. *See supra* notes 303–05 and accompanying text.

324. Evans & Bannister, *supra* note 1 (manuscript at 4–7).

325. *Id.* (manuscript at 29) (discussing the framers’ intent that the rule would function in practice).

326. *Id.* (manuscript at 33–34).

- The plain language of the single subject rule establishes the mandatory requirement that acts must be confined to one subject and to subsets of that subject.<sup>327</sup>
- The single subject rule is to be enforced. More particularly, Indiana’s framers intended that the single subject rule would be enforced by legislative and executive leadership and, if needed, *by the courts*.<sup>328</sup> This means that the single subject rule is not self-enforcing, but is instead judicially cognizable.<sup>329</sup> Determining an act’s compliance with the single subject rule is not a “legislative function,” rather, it is a “judicial question.”<sup>330</sup>
- The separation of powers doctrine thus creates no barriers to the judicial enforcement of the single subject rule.<sup>331</sup>
- Those delegates opposed to section 19 at Indiana’s 1850 Constitutional Convention asserted that the single subject rule was unnecessary and superfluous; that it would obstruct effective legislative functioning; that the rule would require judicial involvement; and that the rule would be unworkable in practice. The Convention majority considered and rejected these concerns, rendering them illegitimate barriers to the single subject rule’s enforcement today.<sup>332</sup>
- The framers understood logrolling much like we do today, as the combination of two or more unrelated items for the purpose of passing both when either (1) the two provisions standing alone would not accumulate sufficient support for passage individually, or (2) the legislature finds it inconvenient to debate, discuss and scrutinize each provision separately.<sup>333</sup>
- The phrase “matters properly connected therewith” does not mean “additional subjects,” but instead indicates that the courts should not void laws based upon technical flaws in their titles. Matters properly connected must be a subset of the act’s subject.<sup>334</sup>
- A functional, sound framework for single subject analysis must be based upon a reasonableness test designed to effectuate the framers’ intent for each of the single subject rule’s prongs, procedural and substantive.<sup>335</sup>

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327. See IND. CONST. art. IV, § 19. See also Evans & Bannister, *supra* note 1, at 20–25 (discussing the “matters properly connected phrase” as a subset of the act’s subject).

328. Evans & Bannister, *supra* note 1 (manuscript at 28–29, 34–35).

329. *Id.*; see also *supra* Parts II.A.1 & III.B.3.

330. Evans & Bannister, *supra* note 1 (manuscript at 28–29, 34–35); see also *supra* Part III.B.3.

331. See *supra* Part III.B.

332. Evans & Bannister, *supra* note 1 (manuscript at 25–30).

333. *Id.* (manuscript at 12, 45–46); see also *supra* note 99.

334. Evans & Bannister, *supra* note 1 (manuscript at 20–25).

335. See *supra* notes 31–32 & 89, and accompanying text.

- Although acts are presumed constitutional, this presumption cannot be so overwhelming as to trump the framers' intent.<sup>336</sup> The current jurisprudence in most states defeats the framers' intent by refusing to consider the single subject rule's procedural prong altogether and by eviscerating the substantive prong by defining the act's subject so broadly that virtually any two items can be included under it.<sup>337</sup>
- The subject of an act must necessarily be defined with "reasonable specificity;" otherwise, the framers' intent is defeated and the rule's entire purpose is lost.<sup>338</sup>
- An act found to contain more than one subject may be voided in its entirety, or may be voided only as to those provisions falling outside of the subject.<sup>339</sup>

With these restrictions in mind, we next consider what the beginnings of a new single subject framework might look like.

#### B. The Reasonableness Spectrum, Judicial Activism, and the Case for the Centrist Approach

As discussed below,<sup>340</sup> crafting a test or framework for section 19's procedural prong is relatively simple: once the enrolled act rule is removed, litigants will be at liberty to prove by evidence (including the legislature's journals) whether or not logrolling occurred. It is the single subject rule's substantive prong—the prohibition against an act containing more than one subject—for which the development of a framework is more challenging.

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336. Evans & Bannister, *supra* note 1 (manuscript at 2 n.5); *see also supra* Part IV (citing numerous authorities supporting this proposition).

337. *See generally supra* Parts II & III.

338. *See supra* notes 31–32 & 89, and accompanying text. Some courts have affirmatively incentivized the legislature to defeat the purpose of the rule by noting that general titles are more likely to be constitutional than specific titles. *See, e.g.,* Swedish Hosp. of Seattle v. Dep't of Labor & Indus., 176 P.2d 429, 435 (Wash. 1947).

339. Many states that have retained both the single subject rule and the title requirement find that a multi-subject act is void only as to those provisions falling outside of the subject defined in the title. *See, e.g.,* Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 304-05 (Minn. 2000) (discussing this topic with respect to Minnesota's single subject rule); *McCamey v. Cummings*, 172 S.W. 311, 313–14 (Tenn. 1914). This was once the rule in Indiana, before the 1974 amendment that eliminated the title requirement. *See, e.g.,* Wabash R.R. Co. v. Young, 69 N.E. 1003 (Ind. 1904). Since Indiana's single subject provision is no longer tied to the title requirement, however, it is likely that the whole act must be declared void, once two or more provisions pertaining to separate subjects have been identified. *See* Evans & Bannister, *supra* note 1 (manuscript at 19 n.108); *see also, e.g.,* Am. Petroleum Inst. v. S.C. Dep't of Revenue, 677 S.E.2d 16, 19-20 (S.C. 2009) (holding that "to sever only part of the unconstitutional act would require this Court to go beyond its proper role and to intrude into the province of the legislature," and, thus, the Court was "constrained to find the entire Act violative of" the single subject rule); *Whitlock v. Hawkins*, 53 S.E. 401, 402 (Va. 1906) ("We concede that, if an act embraces two subjects, the entire act must be declared void . . .").

340. *See infra* Part V.C.2.

Our task is to discern what type of framework would fill the vacuum if the existing jurisprudence—near-absolute deference through infinite reasonableness—was to be renounced.

In answering this we must first consider two important preliminary issues, beginning with the tension between two of the earliest competing visions for the single subject rule.<sup>341</sup> Indiana's record is helpful on this point. In his dissent in *Beebe v. State*, Judge Gookins, an opponent of the single subject rule, observed that "subjects are almost infinitely divisible."<sup>342</sup> Gookins implied that this fact made the single subject rule unenforceable in practice. This view was contested by Judge Perkins in *Potts*, where the court held that the "subject must be reasonably particular and not too general; for otherwise the object of the constitutional provision would be wholly thwarted."<sup>343</sup>

Just how one defines or characterizes the subject of an act is crucial. Gookins was correct when he observed that the subject of an act might be characterized in any number of ways, with varying degrees of generality to specificity. But he was wrong to declare that this feature renders the single subject rule unenforceable: the rule's purposes can be effectuated only if the act's subject is defined with reasonable specificity.

Resolving these differences suggests a "reasonableness spectrum" along which we can plot both (1) the degree of specificity with which the subjects of acts must be defined and (2) the reasonableness of the courts themselves in applying the single subject rule. The later of these is a direct function of the first: a reasonable framework will make for the reasonable application of the single subject rule.

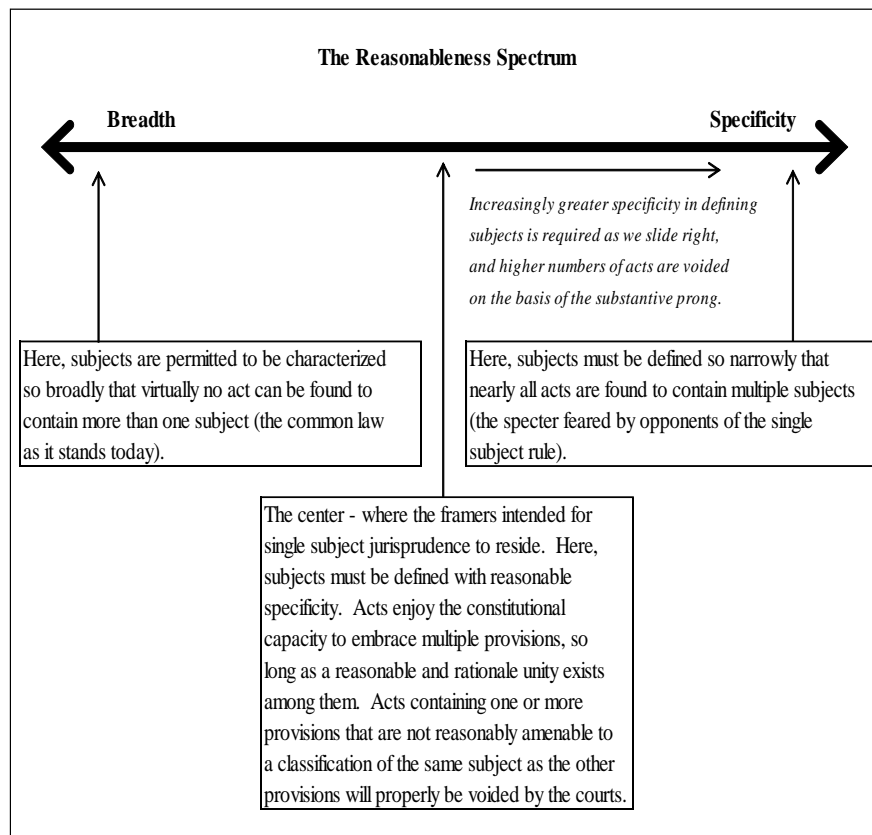
The reasonableness spectrum is perhaps best represented visually:

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341. See *supra* Part II.A.1 (discussing these cases).

342. 6 Ind. 501, 553 (1855).

343. Ind. Cent. R.R. Co. v. Potts, 7 Ind. 681 (1856)



The second preliminary issue concerning a new single subject framework is the notion of judicial activism and its relationship to the preceding ideas. The framers did not intend that the single subject rule would be an instrument of judicial oppression—to become, in the words of section 19’s opponents, an evil greater than the evils it was intended to prevent. Yet it is equally indisputable that the framers intended the rule to be judicially enforced, and that acts would be voided at whatever frequency offending acts happened to be promulgated. The framers’ and ratifiers’ intent, and not the legislature’s convenience, should guide the courts’ jurisprudence.<sup>344</sup> Opponents of Indiana’s single subject rule were correct that if the courts were to deploy section 19 to strike acts on mere technicalities, this would be an abuse of the judicial station. But in light of the overwhelming evidence of

344. See *Embry v. O’Bannon*, 798 N.E.2d 157, 160 (Ind. 2003) (quoting *City Chapel Evangelical Free Inc. v. City of S. Bend*, 744 N.E.2d 443, 447 (Ind. 2001)) (“[t]he intent of the framers of the Constitution is paramount in determining the meaning of a provision”); see also *Ellingham v. Dye*, 99 N.E. 1, 15 (Ind. 1912) (“where the means by which [a legislative] power granted shall be exercised are specified, no other or different means for the exercise of such power can be implied, even though considered more convenient or effective than the means given in the Constitution”).

the framers' and ratifiers' intent, *the current jurisprudence is also equally an abdication of the judiciary's duty.*

The framers intended that section 19 would be judicially enforced,<sup>345</sup> that an act's subject would be defined with reasonable specificity,<sup>346</sup> and that a reasonable connection between the provisions of an act would have to be shown in order to satisfy section 19.<sup>347</sup> The common law can deviate from this centrist position in either of two ways. First, the courts might embrace the position actually taken in Indiana's common law, under which acts are defined so broadly that any two provisions imaginable are characterized as "one subject." This plainly defeats the framers' intent, as they were combating, among other things, the popular practice of entitling acts very generally, "to which was added the words, 'and for other purposes.'"<sup>348</sup> If subjects may be defined as broadly as "contract law" or "juvenile law," this is no better than a very narrow and specific title, the end of which reads "and for other purposes." Second, the law might embrace the position feared by section 19's opponents, which would void acts for mere technicalities or by defining the subject of an act with unreasonable narrowness.

If we define "judicial activism" as a deviation from the well-defined intent of the framers, then a substantial movement in *either* of these alternative directions is *equally* a manifestation of activism. The degree of activism is measured by the legal test's distance from the framers' centrist intent for the single subject rule.<sup>349</sup> Graphing the notion of judicial activism with the reasonableness spectrum results in the following:

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345. See Evans & Bannister, *supra* note 1 (manuscript at 28–29, 34–35).

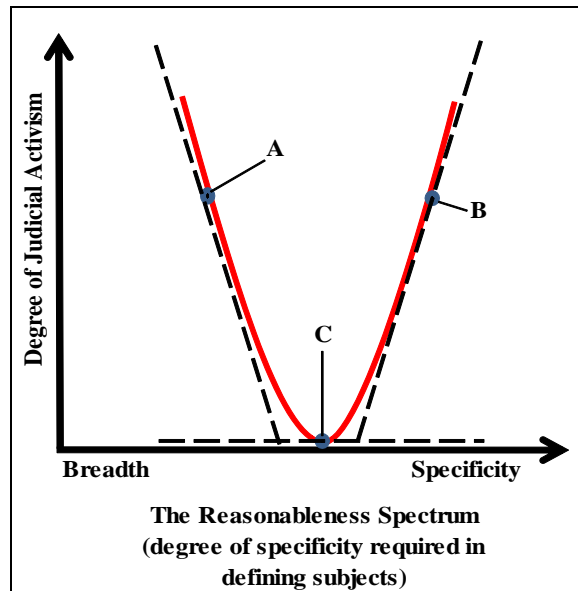
346. See *supra* Part II.A.1.

347. See *supra* notes 33 & 40 and accompanying text.

348. See, e.g., 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1086–87 (2009) (see remarks of Mr. Maguire); see also Evans & Bannister, *supra* note 1 (manuscript at 13 n.76).

349. Although it has been accomplished outside of the context of the framers' and ratifiers' intent, some courts over time have articulated an essentially centrist position with respect to single subject analysis. See, e.g., *State v. Morgan*, 48 N.W. 314, 316–17 (S.D. 1891).





The parabolic curve defines the possible locations of a state's single subject jurisprudence. Its shape is derived from the framers' intent: that the single subject rule would be enforced, and that the courts would characterize acts with neither over-breadth nor extreme narrowness, but instead with *reasonable specificity*. Point A describes a jurisprudence in which courts characterize the subjects of acts very broadly. Point B describes the opposite jurisprudence: here, subjects are construed very narrowly. Few acts are found (*can* be found) in violation of the single subject rule under jurisprudence A, because "the deck is stacked" very heavily in favor of finding any two provisions imaginable comprising the same (very broad) subject. Similarly, in jurisprudence B, the courts would strike laws falling outside of the evils that section 19 was designed to remedy. Individual cases decided under either jurisprudence would be found along the tangents of points A and B, scattered across the dashed lines but clustered primarily around points A and B. Under jurisprudence A, all but the most demanding decision will represent *some* degree of judicial activism. The same is true for all but the most broadly defined subjects under jurisprudence B.

Point A represents the actual common law in Indiana and in most single subject states; Point B represents the scenario that the Convention minority feared. Point C represents the framers' intent, where subjects are characterized according to reasonable specificity. The line tangent to Point C is horizontal and overlays the x-axis. This is a unique place within the graph: for every point along C's tangent line, the degree of judicial activism (its y-axis coordinate) is zero.

Indiana's present treatment of the single subject rule is errant in two respects. First, Indiana's decisional law adopted the Point A jurisprudence instead of the Point C jurisprudence.<sup>350</sup> But the common law also labors under the false premise that section 19 jurisprudence is a binary choice between points A and B, and that position A is justified as the lesser of two evils. Later rationalizations, including the argument from article III and the separation of powers,<sup>351</sup> were added to justify this view. Yet moving in *either* direction away from Point C represents judicial activism. Thus, whether position A can be found philosophically more palatable than position B is wholly irrelevant: they are both vastly (and, it would seem, equally) inferior to position C.

We thus turn to the challenge of defining the subject of an act—that is, how a court characterizes the subject with “reasonable specificity.” Based on what we have thus far observed in this article and in our prior work,<sup>352</sup> it follows that:

(1) in characterizing the subject, the characterization must be as specific as possible while still incorporating or accounting for all provisions, the title, the apparent legislative intent, and other indicia of the subject; and (2) this characterization must be reasonably specific, (that is, no more broad than is necessary to accomplish step (1) above), such that the reasonable layperson<sup>353</sup> 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<sup>354</sup> in light of the manner in which the act's subject is characterized (that is, in light of its breadth).

An example will illustrate this new test of reasonable specificity.<sup>355</sup> Suppose that the state legislature passes an act containing the following provisions:

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350. From the earliest cases, such as *Potts*, a “reasonable specificity” standard prevailed in Indiana until the Civil War era cases began adopting new rules. See *supra* Part II.

351. See *supra* Part III.

352. See generally *Evans & Bannister*, *supra* note 1.

353. Because it was for the benefit of the average citizen for whom the 1851 Constitution was drafted—and not for the legislature's convenience or efficiency—it is appropriate to consider the reactions of the average reasonable citizen in the section 19 framework. See *Evans & Bannister*, *supra* note 1 (manuscript at 4–7) (discussing both (1) the populist sentiment prevailing at the time of, and motivating the drafting of, the 1851 Constitution, and (2) the goal of eradicating perceived legislative excesses in the new Constitution).

354. By “surprise,” we mean “not reasonably foreseeable in light of how the subject is defined.” Some states, even those that embrace a highly deferential single subject standard, recognize this notion. See, e.g., *Jackson v. Gallet*, 228 P. 1068, 1070 (Idaho 1924) (“when one, reading a bill with a full scope of the title thereof in mind, comes upon provisions which he *could not reasonably have anticipated* because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby”) (emphasis added) (quoting *Diana Shooting Club v. Lamoreux*, 89 N.W. 880, 883 (Wis. 1902)).

355. At least one state has adopted a similar understanding. In Missouri, the titles of acts (which must express and define the act's subject) can violate the “clear title” requirement in two ways. First, a

(1) it shall be an offense to use the credit card of another without the owner's permission; (2) it shall be an offense to take or possess the credit card of another without the owner's permission; (3) it shall be an offense to sell the credit card information of another without their consent; (4) for all of the foregoing offenses, the penalty upon conviction shall be one year imprisonment or a \$5,000 fine; and (5) the rate of the state's sales tax is lowered from 6% to 1%.

The new framework requires that we characterize the subject of this hypothetical act with "reasonable specificity"—that is to say, as specifically as possible while still incorporating or accounting for all provisions, the title, the apparent legislative intent, and other indicia of the subject. In the absence of the fifth provision, the subject of this act might be characterized as "protecting the security of credit card ownership." The fifth provision, however, renders this characterization impossible, because the effective rate of sales tax cannot be said to reasonably relate to the security of credit cards. This would fail our new rule: the average citizen would be surprised to find the tax rate provision a part of the act in light of how we have characterized the act's subject. Significantly, we must note that at some abstract level, if we are willing to be "broad" enough, the two *are* related. One could argue that a lower sales tax rate will encourage greater spending in society, the preponderance of which is likely to be undertaken with credit cards by virtue of their convenience; and that the consumer, knowing that there are now penalties in place for the theft and fraudulent use of credit cards, will be more inclined to use their cards. But this is *precisely* the type of maneuver the framers sought to preclude through the single subject rule. There being no direct connection between the sales tax rate and credit card fraud, we would have to salvage our proposed definition of the subject by appending another phrase to it: "protecting the security of credit card usage, and for other purposes."<sup>356</sup>

As noted, however, this possibility is foreclosed: the single subject rule's proponents sought to end the practice of appending "and for other purposes" to the titles of acts.<sup>357</sup> Thus, in an effort to salvage our hypothetical

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title can be "attacked on the basis that it is so restrictive and underinclusive that some of the provisions of the bill fall outside its scope." *Home Builders Ass'n of Greater St. Louis v. State*, 75 S.W.3d 267, 270 (Mo. 2002) (citing *Mo. State Med. Ass'n v. Mo. Dep't of Health*, 39 S.W.3d 837, 841 (Mo. 2001)). Alternatively, "a title may be unclear because the subject it expresses is so broad and amorphous in scope that it fails to give notice of its content, which 'effectively renders the single subject requirement meaningless or obscures the actual subject of the legislation.'" *Home Builders Ass'n of Greater St. Louis*, 75 S.W.3d at 270 (quoting *Drury v. City of Cape Girardeau*, 66 S.W.3d 733, 739 (Mo. 2002)). This Article arrives at the same conclusion as these Missouri authorities, but by virtue of the rule's meaning as it is surmised from the rule's plain language and from the intent of the Indiana framers and ratifiers.

356. See *supra* note 331 and accompanying text.

357. See *Evans & Bannister, supra* note 1 (manuscript at 13 n.76 and accompanying text).

statute, we are forced to instead redefine its subject more broadly, as something like, “promoting and encouraging commerce.” But *this* would fail the requirement that the reasonable layperson be capable of anticipating, to a *reasonable degree of accuracy*, the *likely contents and import* of the act. Our “commerce” characterization of the subject does nothing to inform the average citizen that it contains provisions specifically concerning credit card security or the rate of sales tax. Thus, under the standard proposed here, our example statute would invariably (and correctly) be held void by virtue of embracing more than one subject.

The standard proposed here is more rigorous than that found in *Bright*, where the Court defined “reasonably specific” as “indicat[ing] some particular branch of legislation, as a head under which the particular provisions of the act might reasonably be looked for.”<sup>358</sup> For the reasons we have seen, the framers did not intend a standard of infinite reasonableness (like the standard actually applied in *Bright*).<sup>359</sup> Yet, neither is the “reasonable particularity” standard an invitation to the courts to void acts for mere technicalities. The phrase “matters properly connected” was offered to reassure opponents of section 19 that the courts would not void acts for mere technical defects or by characterizing subjects with extreme narrowness.<sup>360</sup> In other words, the “matters properly connected” phrase operates to reject Jurisprudence B on the graph above; but this does not mean, as the common law holds, that the “properly connected” phrase mandates Jurisprudence A. The test proposed here accomplishes what neither of the competing alternatives can: it implements *reasonable specificity*.

### C. Beginnings of a New Single Subject Framework

#### 1. *The Substantive Prong*

The first analytical portion demanded by the single subject rule’s substantive prong—namely, whether the subject of an act has been defined with reasonable specificity—was discussed above. A second part of the

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358. *Bright v. McCullough*, 27 Ind. 223, 227 (1866).

359. The *Bright* standard must be rejected for the additional reason that section 19 had nothing to do with codification or with the act’s location within the statute books. *See supra* notes 35 & 36 and accompanying text.

360. *See Evans & Bannister*, *supra* note 1 (manuscript at 20–25). The Indiana Convention majority rejected the “matters properly connected” phrase for the same reason that its opponents returned it to the language of section 19 in the closing phase of the Convention. Opponents of section 19 hoped that the phrase “matters properly connected” would induce future courts to establish a jurisprudence at Point A in the graph above, instead of at Point C. Experience has borne out the opponents’ strategy. *See generally supra* Parts II & III.

analysis remains: the question of whether all provisions of an act are reasonably related.<sup>361</sup>

The case of *State v. Steinwedel*<sup>362</sup> discussed the nature of the substantive prong. Two principal points of law are taken from *Steinwedel* in the Burns Indiana Statutes Annotated:

The object of the act, the rational basis for the grouping of the subject matter, and the potential for deceiving the public are points to be considered in determining whether the matters embraced constitute one subject.<sup>363</sup>

...

A statute is not invalid as including more than one subject, if there is any reasonable basis for grouping together in one act various matters of the same nature, and the public will not be readily deceived thereby.<sup>364</sup>

The first of these points is essentially correct.<sup>365</sup> The second point, however, is not. It is this second proposition that led to the current jurisprudence of infinite reasonableness and absolute deference, rather than one of reasonable specificity and reasonable connection. It is not sufficient that there be *any* basis for grouping disparate provisions together, for “subjects are infinitely divisible,” and in practice, this standard has proven to mean that *any* two provisions that the legislature includes in the same act will inevitably be found to have, *at some level*, a “reasonable connection.”<sup>366</sup>

Consider again our previous example (this time, for simplicity’s sake, omitting the renegade fifth provision on sales tax): (1) it shall be an offense to use the credit card of another without the owner’s permission; (2) it shall be an offense to take or possess the credit card of another without the owner’s permission; (3) it shall be an offense to sell the credit card information of another without their consent; and (4) for all of the foregoing offenses, the penalty upon conviction shall be one year imprisonment or a \$5,000 fine. This act might inspire numerous characterizations of its subject, including:

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361. Even states that have very lax standards for the enforcement of the single subject rule have adopted this view. *See, e.g., Migdal v. State*, 747 A.2d 1225, 1230 (Md. 2000) (“The key to evaluating a particular piece of legislation under [Maryland’s single subject rule] appears to be the germaneness of the individual components of the law as passed.”).

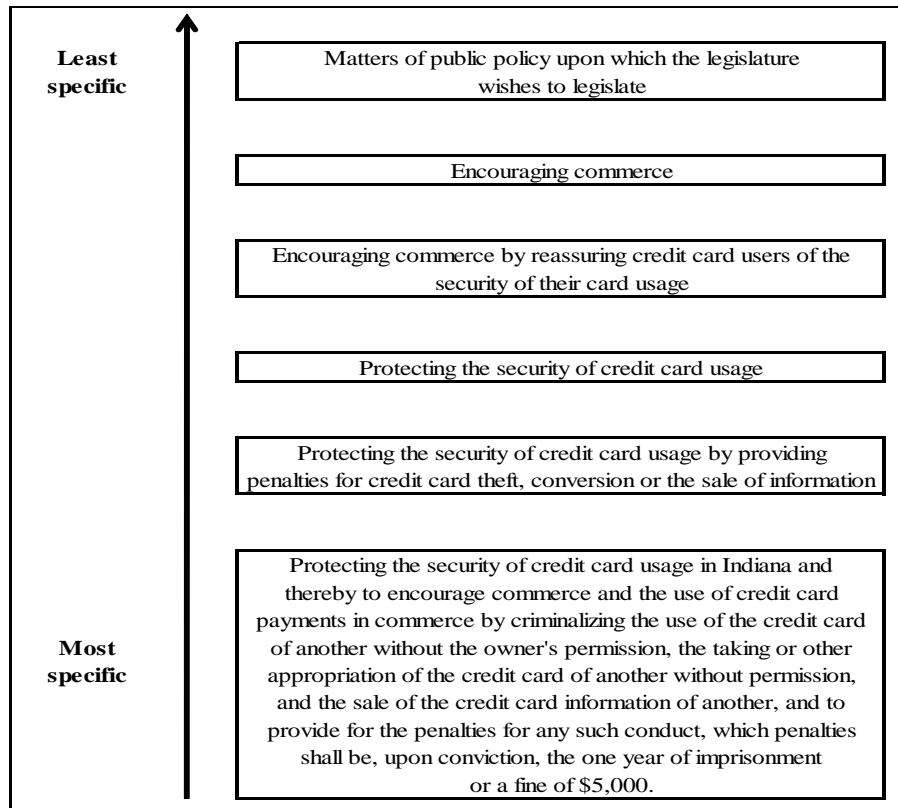
362. 180 N.E. 865 (Ind. 1932). *See also supra* notes 83–91 and accompanying text.

363. IND. CONST. art. IV, § 19, at 396.

364. *Id.*

365. *See generally* Evans & Bannister, *supra* note 1.

366. For the same reason, *Steinwedel* was also incorrect when it held that “the unity” between provisions is “found in the general purpose of the act and the practical problems of efficient administration.” *Id.* Section 19 was not designed for the legislature’s convenience; yet under the *Steinwedel* rule, any two provisions that the legislature finds convenient to treat as one subject are to be considered one subject. This begs the very legal question at issue and undermines the intent of the framers. *See also* GEORGE A. MILLER, *THE SCIENCE OF WORDS* 173, 176–78 (1991) (noting that “[t]hings that have names usually have many names,” and discussing lexical hierarchies).



Now, if the *Steinwedel* approach is at work—if this law will be found to comply with the single subject rule upon a showing that there is *any* “reasonable” basis for grouping these provisions together—then even the most general of the characterizations above will be acceptable. All of our hypothetical act’s provisions are indeed “matters of public policy upon which the legislature wishes to legislate.” The same is true for the next broadest possibilities of “promoting the public welfare” and “encouraging commerce.” Significantly, however, these would also be “accurate” descriptions of the subject *had we included the fifth provision (concerning the rate of sales tax) in the act*. And indeed, the same would be true for *any two provisions imaginable*, which might be grouped together in a single act. The *Steinwedel* standard invariably permits provisions which are truly unrelated (or, equally as bad, which relate only at the most abstract and general of levels) to be included under the same “subject.” This is manifestly contrary to the framers’ goal of ensuring reasonably related provisions.<sup>367</sup>

367. See generally Evans & Bannister, *supra* note 1; see also *supra* notes 31 & 32 and accompanying text.

A better test—one commensurate with the framers' intent—would seek to evaluate whether a unifying thread, or an essential nexus, is shared amongst all of the act's provisions, *from the perspective of those responsible for its passage*.<sup>368</sup> A better test for evaluating whether all of the provisions are reasonably related would be the following question:

Would the legislator whose *only* concern in the world is the passage of the act at issue (the subject of which has been defined through the steps above) *reasonably* care about, or support, the provision allegedly falling outside of the subject, *but for* its inclusion in the same act?<sup>369</sup>

In other words, we must look for “outlier” provisions within an act—provisions that lack a unifying thread, or the essential nexus, that at least some of the other provisions share, *as well as the degree to which* they share their common thread.

It follows that, under the framework proposed here, claims arising out of the single subject rule's substantive prong are questions of law.

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368. We assume the legislator's perspective on this portion of the single subject test because its fundamental purpose is to preclude legislative logrolling. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1085 (2009). The prohibition against logrolling forbids the combination of unrelated provisions under one heading. Hence, we ask whether a legislator who introduced a bill purportedly on the single subject *X* would or could reasonably care about provision *Y*, if the subject *X* was the only matter about which the legislator cared. This perspective finds support in at least some of the single subject states, even where similar rules were propagated without reference to the intent of the state's framers and ratifiers. In Colorado, for instance, the Supreme Court has noted that [t]he matter covered by legislation is to be ‘clearly,’ not ‘dubiously’ or ‘obscurely,’ indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric will not be necessary to reveal it. Such connection *should be within the comprehension of the ordinary intellect, as well as the trained legal mind.*

*Sullivan v. Siegal*, 245 P.2d 860, 863–64 (Colo. 1952) (emphasis added). Although the *Sullivan* Court was assessing the title requirement as it relates to the single subject rule, the point is well-taken in either context: the subject of an act as expressed in its title must be so clearly connected that even non-lawyers can easily comprehend what the subject is. As we argue in Part V, *infra*, this reasoning extends to individual provisions within the act: in light of how the act's subject is defined, every provision contained within the act must be unsurprising, and must bear a clear and obvious connection to that subject, even in the mind of a non-lawyer member of the state legislature.

369. This is reminiscent of Oklahoma's position, where the “question [for single subject claims] is not how similar two provisions in a proposed law are, but whether it appears that the proposal is misleading or that the *provisions in the proposal are so unrelated that those voting on the law would be faced with an all-or-nothing choice.*” *Douglas v. Cox Ret. Props., Inc.*, 302 P.3d 789, 792–93 (Okla. 2013) (emphasis added).

## 2. *The Procedural Prong*

Once it is liberated from the enrolled act rule,<sup>370</sup> the analytical framework for the single subject rule's procedural prong can be articulated in a straight-forward manner. Whether or not logrolling actually occurred is a question of fact, and as such, evidence tending to prove or disprove the presence of logrolling (including the House and Senate journals) should be admissible pursuant to the Rules of Evidence.<sup>371</sup>

The framers understood logrolling much as we do today. For the framers, logrolling occurred “[w]hen a bill is presented and its friends are not numerous enough to pass it, and they enter into a coalition with [other legislators] who desire the passage of some other measure to mutually assist each other in the passage of both combined under one head.”<sup>372</sup> Any evidence relevant to the occurrence of such a “coalition” or “combination” should be admissible with respect to section 19's procedural prong. Evidence that the act in question began its existence as multiple, different acts therefore presents a *prima facie* case of logrolling. This presumption can be rebutted by a showing that the constituent provisions (the previously separate bills) fall under the same subject (as determined by the previous steps in this new framework).<sup>373</sup>

Empirical evidence of logrolling may not be available in a given case. This alone would not defeat a section 19 challenge, for the act in question must also be shown to contain only one subject—an issue, we have said, that is solely a question of law.

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370. *See supra* Part III.B.

371. In Indiana, for example, these are Evidence Rules 401 and 402, which define “relevant evidence” and provide that all “relevant evidence is admissible . . . .” IND. R. EVID. 402.

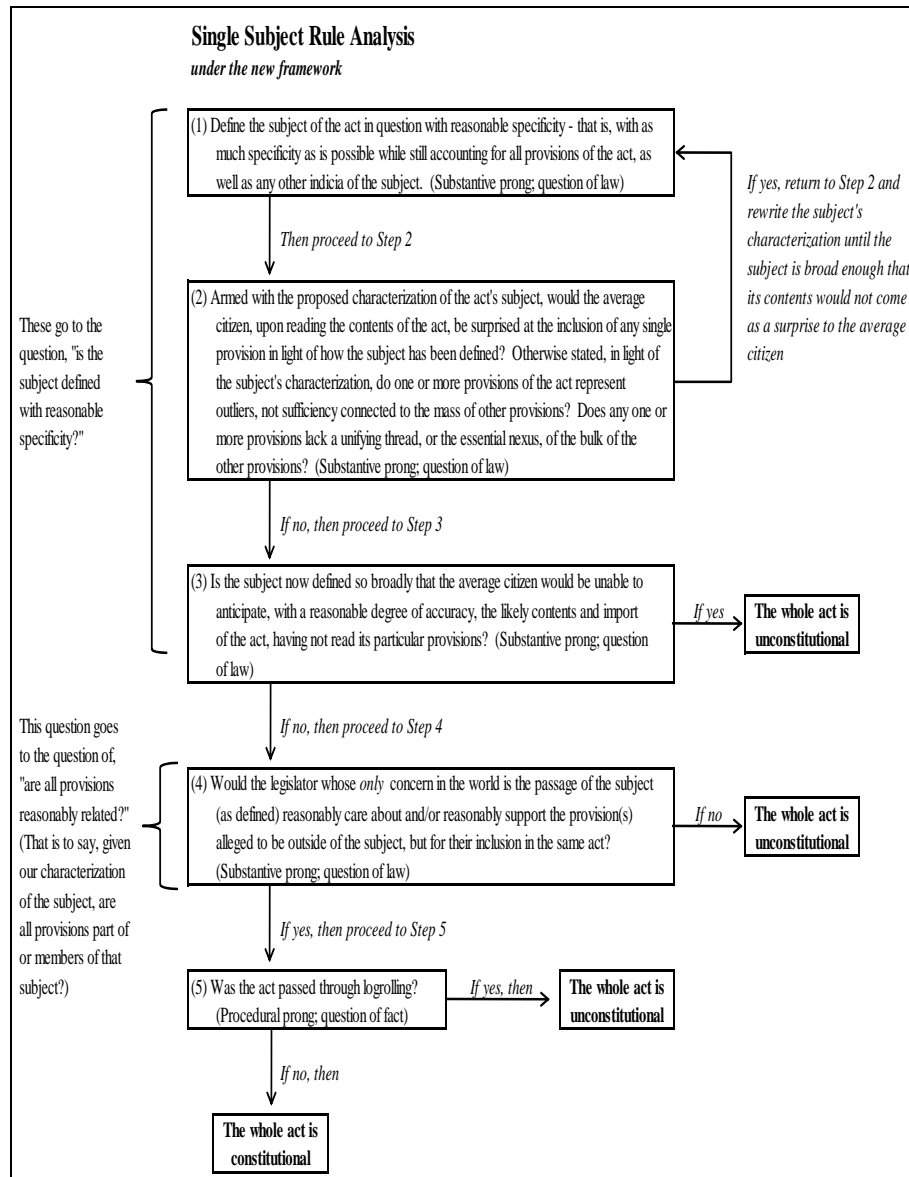
372. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1085. Logrolling was understood to occur when bills were “[tacked] upon other bills.” *Id.* at 2010; *see also* Evans & Bannister, *supra* note 1 (manuscript at 30 n.169 and accompanying text).

373. Evidence that bills were combined prior to passage “raises a flag” that may be indicative of the behavior that the framers and ratifiers sought to eliminate through the single subject rule, but not all combinations of bills are indicative of logrolling. Bills that concern the same subject might legitimately be combined as a matter of the legislature's time management or procedural simplicity, or to create a better law substantively. *See, e.g., State ex rel. Dix v. Celeste*, 464 N.E.2d 153, 157 (Ohio 1984) (noting that the combining of bills “may not be for purposes of logrolling but for the purposes of bringing greater order and cohesion to the law or of coordinating an improvement of the law's substance” and that “when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act, there is a strong suggestion that the provisions were combined for tactical reasons, i.e., logrolling”). Although this paper disagrees with the bulk of *Dix's* treatment of the single subject rule (*see generally supra* Parts II-V and note 30 (discussing Ohio's approach to the single subject rule)), we agree with *Dix's* assessment of this particular point.



3. Summary: A Reasonable Reasonableness Test

To summarize, this article's framework proposes the following analytical process:



#### 4. *Examples from History*

It may be useful to apply the new framework to actual cases from history. The first, to illustrate an acceptable combination of provisions, comes from an example at Indiana's 1850 Convention. One delegate opposed to the single subject rule worried that the following act would be void under section 19:

[An act] which shall provide that when, hereafter, any person shall agree, in the body of a promissory note or bill of exchange that he will pay the same without any relief from valuation or appraisement laws, and that upon judgment being rendered on such note or bill, the court shall award execution to be levied with such relief, and that upon execution issued on such judgment, the sheriff or other officer shall make sale of property, without any valuation or appraisement.<sup>374</sup>

This delegate asserted that,

[T]here are three distinct subjects which may be all embraced in one section—first in relation to the execution of the contract, secondly, in relation to the judgment of the court upon that contract, and thirdly, with regard to the duty of the officer in executing the judgment.<sup>375</sup>

The delegate incorrectly surmised that section 19 would provide a basis for voiding such a law. Following the steps of our new framework, we first define the subject of this act with reasonable specificity, which might be “an act recognizing the right of parties to a contract to forego the legal protections otherwise supplied by the State's valuation and appraisement laws, and providing for the consequences when such a contract is breached.” Upon reading the contents of the act, the average citizen would not be surprised by any of its provisions, given the manner in which the subject was characterized. In our third step, we find that the average citizen would indeed be able to anticipate, with a reasonable degree of certainty, the likely contents and import of the act. The fourth step is also clear. If a legislator whose only care in the world was “the passage of an act to legalize contracts which forego the protection of the State's valuation and appraisement laws” were to read the contents of this act, he or she would reasonably care about each and every one of the three provisions in the act. None of the three provisions is an outlier; they all can be said to reasonably share the common nexus of crafting a public policy concerning the legalization of such contracts. There is a

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374. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1086–87 (2009).

375. *Id.*

reasonable relation between all of the act's provisions. Our hypothetical legislator would care about each provision here because there is a linear progression between them: there is no disjointedness, and each provision reasonably relates to the subject of such contracts to the same degree.

Contrast the example above with the statute sanctioned in the 1935 case of *Ule v. State*.<sup>376</sup> In *Ule*, the purported subject of the act, proclaimed in its title, was:

AN ACT providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, for the regulation of the use and operation thereof on the public highways, defining chauffeurs and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records of motor vehicles, motor bicycles and motor trucks for which storage, supplies or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof.<sup>377</sup>

The party challenging the act claimed that it embraced two subjects: “the regulation of motor vehicles upon the public highways and [the] granting [of] liens to persons in certain cases.”<sup>378</sup> The *Ule* Court concluded that the act complied with Section 19 because the actual subject was “motor vehicles.”<sup>379</sup>

Under our new framework, this statute is impermissible. The *Ule* statute encounters problems in steps two, three and four of the new framework. For example, characterizing the subject as “motor vehicles” would *not* enable the average citizen to anticipate, with a *reasonable degree* of accuracy, the fact that this act contains provisions touching upon the licensing of chauffeurs, the keeping of records related to motor bikes, and liens upon vehicles. A subject such as “motor vehicles” is not reasonably specific. Even if this was not the case, the reasonable legislator whose *only* care in the world was to regulate the licensure of chauffeurs could not reasonably care about or support a provision speaking to the keeping of certain records pertaining to “motor trucks for which storage, supplies or repairs are furnished,” but for its inclusion in the same act. There is no inherent or reasonable nexus between these provisions; they cannot be said to share a linear progression toward some coherent policy, unless and except if the subject is defined unreasonably broadly. If we were to take the relatively detailed title of the act as its subject, the same difficulty is encountered, as the title itself contains multiple subject.

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376. 194 N.E. 140 (Ind. 1935).

377. *Id.* at 143.

378. *Id.*

379. *Id.* at 144.

## VI. CONCLUSION: REANIMATING THE SINGLE SUBJECT RULE

The state constitutional mandate known as the “single subject rule” merits enforcement. The framers intended that the courts would enforce this vital provision through a centrist standard of reasonableness. In Indiana, the common law’s existing roadblocks to enforcement are unjustified as a matter of both the framers’ intent for section 19 as well as by virtue of the misguided reasoning upon which these roadblocks rely. Additionally, the single subject rule has, to varying degrees, been under-enforced throughout most of the single subject states. If the robust historical record surrounding the intent of Indiana’s framers and ratifiers is any guide (and it should be, for most states’ records speak little to their framers’ and ratifiers’ intentions for the rule), then the new single subject framework proposed here would likely contribute productively across the states as they move to reanimate their single subject rules.