

THE TRUTH-IN-LEGISLATION AMENDMENT: AN IDEA WHOSE TIME HAS COME

BRANNON P. DENNING* & BROOKS R. SMITH**

If a constitutional convention were called tomorrow and the delegates solicited proposals for topics, we would dust off a proposal we made over ten years ago to subject congressional legislation to a single-subject rule similar to those found in most state constitutions.¹ As Congress continues to pass legislation that its members cannot possibly have read or understood beforehand, and then when members of Congress tell the public that they must first pass legislation to find out what is in it,² only to discover that the contents are deeply unpopular, we think it is time to renew our call for the “Truth-in-Legislation Amendment.” This article will lay out our proposal and our rationale for its passage. We will also anticipate some criticisms that went unaddressed in our earlier article.

I.

The Truth-in-Legislation Amendment (TILA) would be modeled on provisions found in most state constitutions.³ It would read:

Section 1. Congress shall pass no bill, and no bill shall become law, which embraces more than one subject, that subject being clearly expressed in the title.

Section 2. Notwithstanding the requirements of Article III, any taxpayer and any member of Congress shall have standing to enforce the provisions of Section 1 by filing suit in federal district court.

As noted in our earlier article, similar provisions began to appear in state constitutions during the mid-nineteenth century.⁴ The first single-subject

* Professor, Cumberland School of Law, Samford University.

** Partner, Bradley Arant Boult Cummings, LLP, Nashville, Tennessee. The opinions expressed herein are those of the authors and not necessarily those of Bradley Arant Boult Cummings, LLP or its clients.

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

2. E.g., Marguerite Higgins, Video of the Week: “We have to pass the bill so you can find out what is in it,” THE FOUNDRY (Mar. 10, 2010, 3:30 PM), <http://blog.heritage.org/2010/03/10/video-of-the-week-we-have-to-pass-the-bill-so-you-can-find-out-what-is-in-it/> (recapping a speech on health care reform legislation by then-Speaker Nancy Pelosi (D-CA)).

3. See Denning & Smith, *supra* note 1, at apps. A & B.

4. See *id.* at 965–67; see also Millard H. Ruud, “No Law Shall Embrace More Than One Subject,” 42 MINN. L. REV. 389 (1958).

provision, which appeared in the New Jersey constitution in 1844, provides that its purpose is “[t]o avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other.”⁵

By confining legislation to a single subject, legislators will be unable to append extraneous or unrelated amendments to must-pass legislation or to trade the appendage of such riders for support of the legislation itself.⁶ Moreover, requiring the subject to be expressed in the title forces legislators to establish the purpose of the legislation and to provide a kind of baseline for evaluating the bill’s provisions for compliance with the single-subject requirement.⁷ In theory, this combination would enhance transparency in the legislative process—something the federal process seems of late to have lacked. Specifically, we hoped that a federal TILA might curb the use of riders and force the break-up of omnibus bills that had come into frequent use.⁸ We hoped that the increased transparency would encourage greater accountability among members of Congress by, for example, “requiring legislators to submit their pork to scrutiny through the normal lawmaking process,” thereby “clarify[ing] who is really responsible for legislative boondoggles.”⁹

We also tied our proposal to what Hans Linde termed “due process of lawmaking.”¹⁰ In a nutshell, Linde argues that the means legislatures use in pursuit of their ends are as important to the legitimacy of the lawmaking process as the ends themselves.¹¹ Indeed, as we wrote in 1999: “At the heart of Linde’s due process of lawmaking model . . . is a concern with procedural integrity and legislative honesty, which in turn assure that the substance of the legislative process is seen by the public as legitimate.”¹²

Public concerns over the passage of the Patriot Act and health care, banking, and financial services reforms demonstrate that these problems of legislative legitimacy have not disappeared in the last decade.¹³ It seems that even the bills’ putative authors hardly know what is in them.¹⁴ Surely the perception of legislative chicanery in the passage of landmark legislation, the disclosure of earmarks submerged in appropriations bills,

5. N.J. CONST. art. IV, § 7, ¶ 4; *see also* Denning & Smith, *supra* note 1 at app. B.

6. *See* Denning & Smith, *supra* note 1, at 972.

7. *See id.* at 974.

8. *See id.* at 971–74.

9. *Id.* at 974.

10. *See id.* at 981–86; Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

11. *See* Linde, *supra* note 10, at 200.

12. Denning & Smith, *supra* note 1, at 984.

13. *See* Jason Iuliano, *Eliminating Earmarks: Why the Congressional Line Item Vote Can Succeed Where the Presidential Line Item Veto Failed*, 112 W. VA. L. REV. 947, 957 (2010).

14. *See* Denning & Smith, *supra* note 1, at 959.

and a kind of ends-justify-the-means attitude in the passage of bills have contributed to Congress's abysmal approval ratings.¹⁵

Public dissatisfaction with Congress is, of course, hardly new.¹⁶ And we are not naïve enough to think that a single proposal like ours could inaugurate a golden age of good government. But we think that Linde was onto something when he suggested that perceptions of legitimacy in the exercise of political power are influenced by the degree to which legislators are perceived to “play by the rules” when considering and passing legislation.¹⁷

II.

Our earlier article anticipated some objections to the proposal, ranging from arguments that pork and riders are necessary lubricants to our legislative system,¹⁸ to concerns about the efficacy of similar state provisions,¹⁹ to concerns that the TILA would be *too* effective and would empower the judiciary to paralyze Congress.²⁰ But perhaps the most powerful potential objections is one that we did not address: whether and how the judiciary could effectively enforce the TILA. In other words, can the judiciary create effective legal doctrine that will help ensure optimal enforcement of the TILA?²¹ In the remainder of this article, we consider several interpretive issues courts would face while attempting to enforce the TILA. First, can courts develop a workable definition of “subject?” Second, how would courts enforce the TILA in the context of appropriations bills? Finally, what should courts order as a remedy, rescission of the offending provision or invalidation of the legislation as a whole?

A.

The biggest interpretive challenges for a court would come defining “subject” adequately and providing rules for determining whether a provision in a bill—perhaps embedded in a long and complicated bill—is germane enough to the legislation’s overall subject to survive judicial review.²² Courts would also need to specify who bears the burden of proof

15. See Iuliano, *supra* note 13, at 957.

16. See Denning & Smith, *supra* note 1, at 957.

17. See *id.* at 982–83; Linde, *supra* note 10 at 239, 241.

18. See *id.* at 988–92.

19. See *id.* at 993–1000 (addressing arguments that single-subject provisions have not been effective at curbing riders and logrolling).

20. See *id.* at 1001–03 (noting concerns that the provisions are too formalistic for modern governance and would encourage over-enforcement by the judiciary).

21. See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

22. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U.

and what quantum of evidence would satisfy the burden to uphold or invalidate the provision.²³

Perhaps we ought to begin by making the affirmative case that these decisions are within courts' institutional capabilities. When answering this question, we are put in mind of the preacher who, when asked by a member of his congregation whether he believed in infant baptism, replied, "Believe in it? I've actually seen it done!"²⁴ Some state courts have had more than 150 years of experience implementing similar constitutional provisions.²⁵ However, as one recent commentator put it:

The single subject rule remains, even after a century-and-a-half of life, a source of uncertainty. Not all courts recognize all of the purposes of the rule, and among the purposes they do recognize, there is sometimes hesitancy to flesh them out. Resolution of single subject disputes turns on vague tests that rely as much on judicial commonsense as legal analysis.²⁶

Despite the shortcomings of existing single-subject jurisprudence, the large body of case law furnishes an exemplar—even if a negative exemplar—that federal courts might profitably study to enforce the TILA.²⁷ Moreover, recent scholars and commentators have attempted to sketch workable formulae for courts.²⁸

For example, in a recent article, Michael Gilbert has employed public choice theory to solve single-subject problems that have bedeviled courts for more than a century.²⁹ Gilbert argues rather persuasively that "logrolling"—the practice of legislative vote trading and long a celebrated reason for single-subject requirements—is not inherently harmful.³⁰ It can produce net social gains as well as losses.³¹ By contrast, "riders"—those provisions that, but for their attachment to a popular bill, would likely *not* command majority support—involve not exchange (as does logrolling), "but rather manipulation of legislative procedures."³² Gilbert defines a rider

PITT. L. REV. 803, 806–07 (2006).

23. *See id.* at 807.

24. THE PREACHER JOKE BOOK 41 (Loyal Jones ed., 1989).

25. For our own summary of some of those decisions, *see* Denning & Smith, *supra* note 1, at 993–1000.

26. Gilbert, *supra* note 22, at 829.

27. *See* Denning & Smith, *supra* note 1, at 994.

28. *See id.*; Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103 (2001).

29. *See* Gilbert, *supra* note 22; *see also* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687 (2010) (articulating rules for single-subject provisions governing initiatives and referenda).

30. *See* Gilbert, *supra* note 22, at 809.

31. *See id.* at 833–36.

32. *Id.* at 837.

as “a political measure that lacks majority support on its merits but whose opponents vote for it in sufficient numbers to ensure its passage despite not receiving compensation from the measure’s supporters.”³³

Gilbert argues that courts should permit logrolling because “every instance of it improves the well being of a majority of legislators,” presumably because each gains something during the exchange.³⁴ He argues that courts should, on the other hand, invalidate riders: “When a bill containing a rider is passed, a majority of legislators is left worse off. They oppose the rider on its face and received nothing in exchange for their support of it.”³⁵ In Gilbert’s view, “[e]very bill containing a rider should be condemned for violating the single subject rule.”³⁶

How then should courts distinguish between permissible logrolling and presumptively invalid riders? Again, Gilbert argues that courts have generally failed to produce tests that are neither tautological nor essentially arbitrary because, at some level of abstraction, every item in any given bill could be said to have been part of a single subject.³⁷ Instead, he urges judges to inquire into “functionally related components” and to identify whether, if a particular component was “removed and voted upon separately,” that component would receive majority support.³⁸ “If the answer is no,” Gilbert says, “the component is a rider, and the bill violates the single subject rule.”³⁹ Gilbert further suggests that judges consult the legislative process that produced the bill (whether provisions were added in committee, for example), any legislative history of the bill, and even “voting records, political affiliation, and . . . poll data to hypothesize how legislators would vote on a truncated bill.”⁴⁰ If courts clearly articulate that this information must be available to support a claim for violation of the single-subject provision, then parties will have incentives to produce it.⁴¹ Gilbert speculates that it might encourage careful recordkeeping and the retention of legislative history in states that do not currently preserve it, so that riders and mere logrolling could be distinguished.⁴²

The point is not, of course, that Gilbert’s solution to the problem of judicial standards is the best or the only one.⁴³ Rather, we would contend

33. *Id.* (emphasis omitted).

34. *See id.* at 849.

35. *Id.* at 858.

36. *Id.* at 859.

37. *See id.* at 829–30; *see also* Cooter & Gilbert, *supra* note 29, at 710 (“There is no workable theory of interpretation for the single subject rule.”).

38. Gilbert, *supra* note 22, at 860–61.

39. *Id.* at 861; *see also* Cooter & Gilbert, *supra* note 29, at 720–21 (discussing the “separable preferences” of voters in applying single-subject provisions to initiatives and referenda).

40. Gilbert, *supra* note 22, at 863 (footnote omitted).

41. *See id.* at 863–64.

42. *See id.*

43. We are not entirely convinced, for example, that logrolling is the benign legislative

that Gilbert's thoughtful attention to the issue, along with existing state court jurisprudence, suggests at least that federal judges applying the TILA would not be required to engage in doctrinal design completely from scratch.

B.

A second important issue is whether to exempt appropriations bills from single-subject provisions, as some states do.⁴⁴ As written, the TILA does not allow for this exemption, with good reason: must-pass appropriations bills are often attractive vehicles to which legislators attach riders.⁴⁵ Naturally, applying TILA to appropriations bills is hardly a panacea. Earmarked money in appropriations bills, for example, would not violate the TILA as long as the earmarks were related to the subject of the particular appropriations bill (e.g., a transportation bill earmarking money for road projects in particular districts).

C.

One further issue that will confront courts is whether the remedy for violating a single-subject or title provision is to invalidate the entire legislation or simply to sever the offending provision. As Gilbert notes, "severing is an attractive option. When riders are present, they can be excised, and the popular and logrolled provisions of the bill can be left intact. This rewards legislators who enacted legislation through appropriate channels."⁴⁶

Nevertheless, Gilbert rightly points out that severance "fails to provide legislators with an incentive not to engage in this behavior. Indeed, severing encourages legislators to attach riders: with any luck, they will go undetected and become law, and if they are detected, they will simply be removed and can be reattached to another bill."⁴⁷ Better to invalidate the entire bill, thereby forcing rider-attaching legislators to internalize the costs of their behavior. Gilbert writes that "[o]ther legislators, whose hard-fought political bargain was undone because of the rider, may be incensed and less likely to bargain with the culprits, and citizens may be enraged by the delay or failure to enact important legislation."⁴⁸

phenomenon Gilbert makes it out to be.

44. See Gilbert, *supra* note 22, at 824. Even when a constitution does not exempt appropriations bills explicitly, courts sometimes apply more relaxed scrutiny to such bills. See *id.*

45. See Denning & Smith, *supra* note 1, at 961.

46. Gilbert, *supra* note 22, at 867.

47. *Id.*

48. *Id.* at 867–68 (footnote omitted).

We find Gilbert's case for invalidation as opposed to severance convincing and would urge courts to adopt it in implementing the TILA. In addition to creating proper incentives for legislators, we also note that the invalidation remedy—and the TILA in general—could also strengthen the President's veto power.⁴⁹ Presidents are often forced to accept riders and other provisions in must-pass legislation for fear of a popular backlash stemming from the veto of a bill containing essential or popular provisions.⁵⁰

CONCLUSION

The TILA would not be a cure-all for the legislative (or political) pathologies that plague our system of government. But for all their faults, single-subject and title requirements have served to curb some egregious abuses of the legislative process in the states for over a century and a half. We think that it is time to incorporate the TILA into the U.S. Constitution as both a symbolic reaffirmation of the importance of due process of lawmaking and as a powerful weapon for lawmakers and citizens when Congress falls short of those standards. Obviously we lack the space to canvass all the issues raised by the prospect of enforcing such a provision, but we do hope our short article will at the very least begin a conversation and debate.

49. See Denning & Smith, *supra* note 1, at 1000.

50. See *id.* at 972.