

Fall 10-1-2018

## Single Subject Rules and Civil Rights: Using Legislative-Process Restrictions to Facially Challenge Constitutionally Suspect Laws

Annie Melton

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

 Part of the [Constitutional Law Commons](#), [Legislation Commons](#), [Public Law and Legal Theory Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Annie Melton, *Single Subject Rules and Civil Rights: Using Legislative-Process Restrictions to Facially Challenge Constitutionally Suspect Laws*, 27 J. L. & Pol'y 257 (2018).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol27/iss1/7>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

## **SINGLE SUBJECT RULES AND CIVIL RIGHTS: USING LEGISLATIVE-PROCESS RESTRICTIONS TO FACIALLY CHALLENGE CONSTITUTIONALLY SUSPECT LAWS**

*Annie Melton*

*In recent years, many state legislatures have turned to religious freedom to temper the gains made by proponents of LGBTQ equality and women's health. The result has been a distinctive breed of law, one of sweeping faith-based exemptions masked in targeted language. The savvy lawmakers responsible claim no animus toward a particular group of people, and no favoritism toward a particular religion; they are drafting bills with the intention of initiating and ultimately surviving the scrutiny of a constitutional challenge. Though this legislation has been and will continue to be wielded in discriminatory ways, there is little civil rights advocates can do to prevent its enactment.*

*This Note argues that the single subject rule, a procedural restriction, can be used to facially challenge certain insidious laws. By giving courts an opening to review a law in its most elemental form—a deliberated-over means of adequately implementing a new, or remedying an existing, policy—the single subject rule tests it for characteristics like clarity, practicality, and predictability. The rule is rarely litigated in many states, but doing so draws attention to a fundamental philosophy of the legislative process, which is especially compelling in light of the ideological battles that are dominating statehouses across the country and giving rise to problematic laws. While not an apolitical or evenhanded solution, bringing more single subject challenges could help prevent frenzied lawmaking and give advocates another opportunity to invalidate dangerous legislation.*

## INTRODUCTION

Forty-one state constitutions include a provision limiting legislation to a single subject.<sup>1</sup> The theory behind these single subject rules—ensuring a transparent and focused legislative process<sup>2</sup>—is as relevant today as it has ever been. The framers of these states' constitutions intended the restriction to function as a mechanism through which to secure political accountability by keeping laws precise and lawmakers honest.<sup>3</sup> When approaching a single subject challenge, some courts have been unable to resist addressing the rule's importance within the greater constitutional system of checks and balances, producing decisions that do not shy away from weighty considerations of judicial and legislative roles and responsibilities.<sup>4</sup> Such treatment indicates how critical the single subject restriction is to the principles of democracy.

Single subject jurisprudence is positioned to confront the potential deficiencies of a new phenomenon: legislation that offers sweeping religious exemptions to services providers, particularly welfare and health care providers.<sup>5</sup> Recently, lawmakers in several states<sup>6</sup> have drafted laws that allow child welfare organizations to exercise religious-based discretion when providing their many

---

<sup>1</sup> 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. 87, 88 (2014).

<sup>2</sup> Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 816–17 (2006).

<sup>3</sup> *See id.* at 813.

<sup>4</sup> *See generally* *Nova Health Systems v. Edmondson*, 233 P.3d 380, 381–82 (Okla. 2010) (addressing the constitutionality of a bill that would eliminate the single subject requirement under the Oklahoma Constitution).

<sup>5</sup> *See* Ineke Mushovic, *Religious Exemptions: The Coordinated Attack on LGBT People, Women, Parents, Children, and Health Care*, HUFFPOST (Oct. 17, 2017), [https://www.huffingtonpost.com/entry/religious-exemptions-the-coordinated-attack-on-lgbt\\_us\\_59e4a963e4b09e31db975ac1](https://www.huffingtonpost.com/entry/religious-exemptions-the-coordinated-attack-on-lgbt_us_59e4a963e4b09e31db975ac1) (describing the recent swell of religious exemption laws at the local, state, and federal levels).

<sup>6</sup> Ashe McGovern, *Michigan Lawsuit Challenges Constitutionality of Religious-Based Discrimination by Child Welfare Agencies*, MEDIUM.COM (Sept. 26, 2017), [https://medium.com/@PRPCP\\_Columbia/michigan-lawsuit-challenges-constitutionality-of-religious-based-discrimination-by-child-welfare-52a8847451a1](https://medium.com/@PRPCP_Columbia/michigan-lawsuit-challenges-constitutionality-of-religious-based-discrimination-by-child-welfare-52a8847451a1).

services,<sup>7</sup> much to the chagrin of civil rights advocates, who view the laws as licenses to discriminate against certain communities.<sup>8</sup> In some states, these laws go so far as to outline specific beliefs regarding marriage, sexual relationships, and gender identity, and give providers the ability to decline their services in circumstances that would offend those beliefs.<sup>9</sup>

In the past, advocates have facially challenged religious freedom legislation, seeking to enjoin such bills prior to enactment,<sup>10</sup> First and Fourteenth Amendment doctrines are traditional avenues for doing so.<sup>11</sup> Nonetheless, there are roadblocks: First and Fourteenth Amendment standards, which are already difficult to meet,<sup>12</sup> are further complicated by some courts' preference for as-applied challenges,<sup>13</sup> and legislators have learned

---

<sup>7</sup> Richard Whittaker, *Lege Lines: Think of the Children*, AUSTIN CHRONICLE (May 12, 2017), <https://www.austinchronicle.com/news/2017-05-12/lege-lines-think-of-the-children/>.

<sup>8</sup> *ACLU Challenges Discriminatory Practices in Michigan's Foster Care System*, ACLU (Sept. 20, 2017), <https://www.aclu.org/news/aclu-challenges-discriminatory-practices-michigans-foster-care-system>.

<sup>9</sup> Mark Joseph Stern, *Appeals Court Lifts Block on Mississippi's Malicious Anti-LGBTQ "Religious Freedom" Law*, SLATE (June 22, 2017), [http://www.slate.com/blogs/outward/2017/06/22/fifth\\_circuit\\_lifts\\_injunction\\_on\\_mississippi\\_s\\_anti\\_lgbtq\\_religious\\_freedom.html](http://www.slate.com/blogs/outward/2017/06/22/fifth_circuit_lifts_injunction_on_mississippi_s_anti_lgbtq_religious_freedom.html); see also Brent Skarky, *Senate Bill to Allow Business Owners to Refuse Service Based On Religious Beliefs*, KFOR (Feb. 1, 2018), <https://kfor.com/2018/02/01/senate-bill-to-allow-business-owners-to-refuse-service-based-on-religious-beliefs/> (explaining religious exemption laws in Oklahoma).

<sup>10</sup> Larrison Campbell, *State Confronts Two Challenges to "Religious Freedom" Law*, MISS. TODAY (May 26, 2016), <https://mississippitoday.org/2016/05/26/state-confronts-two-challenges-to-religious-freedom-law/>.

<sup>11</sup> *Barber v. Bryant*, 860 F.3d 345, 350 (5th Cir. 2017); see also Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1079–80 (1996) (describing Fourteenth Amendment equal protection as a method for challenging religious exceptions and the harm caused by the resulting discrimination).

<sup>12</sup> See *Barber*, 860 F.3d at 352; WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 82 (2017).

<sup>13</sup> Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 784 (2009).

from past litigation and use neutral, non-targeted language in drafting and speaking about their bills.<sup>14</sup> Thus, it can be quite difficult to stake a successful facial claim.

However, the extensive religious exemptions that are emerging today risk encompassing multiple subjects.<sup>15</sup> This Note asserts that state single subject rules can be invoked to facially challenge such constitutionally suspect legislation. Part I explores the history of the single subject rule and examines its contemporary usage. Part II explains that religious freedom bills are being introduced in statehouses with increasing frequency and fervor, heightening existing concerns about the laws' troubling civil rights implications. Part III performs a single subject analysis of a Texas statute that protects the religious freedom of child welfare services providers, and explains why the single subject rule is a compelling approach to facially challenging the law. Part IV studies the drafting, passing, and upholding of a Mississippi law protecting services providers that oppose LGBTQ relationships and transgender people. Part V argues that, given recent difficulties in successfully challenging problematic religious freedom legislation, the single subject rule is potentially a valuable addition to a civil rights litigator's doctrinal toolkit.

## PART I: THE EVOLUTION OF SINGLE SUBJECT JURISPRUDENCE

### *A. The History of the Single Subject Rule*

The first iteration of the single subject rule, the *lex Caecilia Didia*, was enacted in 98 B.C. by Roman Republic politicians who were uneasy with the conduct in which some of their colleagues were engaging: passing "dubious proposals by tying them to popular ideas."<sup>16</sup> In the 19th century, during America's rapid westward expansion, state constitutional framers tasked with

---

<sup>14</sup> Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 437 (2000).

<sup>15</sup> See *infra* Section II.B.

<sup>16</sup> Kurt G. Kastorf, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1640 (2005).

forming effective methods of governing their new domains assuaged similar concerns by including single subject rules in their founding documents.<sup>17</sup>

By limiting a piece of legislation to one topic, the framers of the New York Constitution thought there would be less opportunity for sneaky regulation; both the means and the end would be manifest in the law itself.<sup>18</sup> When New York Senator Aaron Burr drafted a bill chartering what he alleged was a water supply company, he quietly included unrelated provisions that allowed the entity to operate as a bank<sup>19</sup>—which it did, quickly rising to become the primary competitor to Alexander Hamilton’s Bank of New York.<sup>20</sup> Worried that other lawmakers would follow Burr’s lead, the state legislature later enacted its version of the single subject rule, which provides that a bill “embrace only one subject” and explicitly state that subject in the title.<sup>21</sup> Other state provisions are similarly worded: “No bill shall contain more than one subject which shall be clearly expressed in its title.”<sup>22</sup>

Though this language is a seemingly straightforward encapsulation of the framers’ aforementioned motivations, it is also vague, and courts have agonized over how to interpret the single subject rule; “[N]one of the cases dealing with the issue give us any guidance as to the analysis we should employ in order to determine what constitutes a discrete ‘subject,’” the Court of Appeals of Texas wrote in 1990,<sup>23</sup> more than a century after the

---

<sup>17</sup> *Id.* at 1641.

<sup>18</sup> NYC C.L.A.S.H. v. City of New York, 147 A.D.3d 97, 100–01 (N.Y. App. Div. 2017).

<sup>19</sup> *Id.*

<sup>20</sup> *Aaron Burr Opens Earliest Predecessor Firm*, JP MORGAN, <https://www.jpmorgan.com/country/US/en/jpmorgan/about/history/month/sept> (last visited Sept. 16, 2018).

<sup>21</sup> NYC C.L.A.S.H., 147 A.D.3d at 101; *see also* NY CONST. art. III §15 (“No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.”).

<sup>22</sup> MO. CONST. art. III, § 23; *see also* S.D. CONST. art. III, § 21; TEX. CONST. art. 3, § 35.

<sup>23</sup> State Bd. of Ins. v. Nat’l Emp. Benefit Adm’rs, Inc., 786 S.W.2d 106, 109 (Tex. App. 1990).

state included the rule in its constitution.<sup>24</sup> In 1895, the Pennsylvania Supreme Court pointed out that “no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough.”<sup>25</sup> Nevertheless, according to scholar Michael D. Gilbert, the rule “plays a momentous role in state constitutional law and policy,”<sup>26</sup> and its very existence has served as a moderating influence. Former Michigan state senator George Leef wrote that he and his fellow legislators, mindful of the rule and the threat of its enforcement by the courts, were “deter[re]d . . . from trying to sneak extraneous material into bills.”<sup>27</sup> Therefore, it seems that, regardless of the apprehension enshrined in some states’ single subject jurisprudence, the rule endures because of the profundity of what it represents.

States have varying standards in applying the single subject rule, but all are substantially similar in practice.<sup>28</sup> These state standards can be synthesized into the following analytical framework: A court determines whether the single subject rule has been violated by examining whether the provisions of the law in question relate to each other such that an overarching subject can be gleaned.<sup>29</sup> In some states, a successful single subject challenge will invalidate an entire law<sup>30</sup>; in others, a successful challenge

---

<sup>24</sup> *Day Land & Cattle Co. v. State*, 4 S.W. 865, 872 (Tex. 1887); *see also* TEX. CONST. art. III § 35 (amended 1876).

<sup>25</sup> *Payne v. School Dist. of Coudersport*, 31 A. 1072, 1074 (Pa. 1895).

<sup>26</sup> Gilbert, *supra* note 2, at 808.

<sup>27</sup> George Leef, *Crimp Wasteful Federal Spending With This Constitutional Amendment*, FORBES (Jan. 29, 2016), <https://www.forbes.com/sites/georgeleef/2016/01/29/could-a-single-subject-amendment-put-an-end-to-christmas-tree-bills/#529771328834>.

<sup>28</sup> Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1263–64 (2017).

<sup>29</sup> *Id.* at 1262–63.

<sup>30</sup> *See e.g.*, Stephanie Hoffer & Travis McDade, *Of Disunity and Logrolling: Ohio’s One-Subject Rule and the Very Evils It Was Designed to Prevent*, 51 CLEV. ST. L. REV. 557, 571–72 (2004); *see also* discussion *supra* Section I.A (describing single subject jurisprudence in Texas, which is one such state).

will result in the severance of the offending provision(s).<sup>31</sup> An examination of Texas's single subject jurisprudence brings to light the various considerations that can be brought into an interpretation of the rule.

*B. A Blank-Slate Doctrine: Texas's Single Subject Rule*

A summary of Texas courts' application of the single subject restriction<sup>32</sup> demonstrates that, as a result of the tension between the single subject rule's democratic importance and the difficulty of its application, its framework provides a perennial tabula rasa that is less wedded to precedent than other constitutional doctrines.<sup>33</sup> A standard articulated by the Texas Supreme Court in a 1974 case, *Robinson v. Hill*, remains the starting point<sup>34</sup> for state courts analyzing a single subject challenge: "The statute will not be held unconstitutional where its provisions relate, directly or indirectly, to the same general subject, have a mutual connection, and are not foreign to the subject expressed in the title."<sup>35</sup>

At issue in *Robinson* was a statute that created bail bond boards and provided licensing requirements for bondsmen.<sup>36</sup> The law was challenged as a single subject violation because its various provisions also regulated sheriffs, corporations, and the state

---

<sup>31</sup> M. Albert Figinski, *Maryland's Constitutional One-Subject Rule: Neither a Dead Letter nor an Undue Restriction*, 27 U. BALT. L. REV. 363, 369 (1998); John P. Krill, Jr. et al., *The Rules of the Game: How the Constitution Affects Lawmaking in Pennsylvania* (2012), [http://www.klgates.com/files/Publication/1ea92230-a1fa-4c75-96f6-060b3ebfb5c7/Presentation/PublicationAttachment/24aa4e9b-2910-425c-9bb4-0b0349351150/Volume\\_III\\_The\\_Temple\\_Papers.pdf](http://www.klgates.com/files/Publication/1ea92230-a1fa-4c75-96f6-060b3ebfb5c7/Presentation/PublicationAttachment/24aa4e9b-2910-425c-9bb4-0b0349351150/Volume_III_The_Temple_Papers.pdf) (last visited Sept. 3, 2018).

<sup>32</sup> The Texas Constitution states that "No bill . . . shall contain more than one subject . . . the subject of each bill [must] be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject." TEX. CONST. art. III, § 35.

<sup>33</sup> See discussion *infra* Section I.B.

<sup>34</sup> *Ex parte Jones*, 440 S.W.3d 628, 633 (Tex. Crim. App. 2014) (citing *Robinson* when analyzing whether an amendment to the evading-arrest statute violated the "single-subject rule" of Texas Constitution).

<sup>35</sup> *Robinson v. Hill*, 507 S.W.2d. 521, 524–25 (Tex. 1974).

<sup>36</sup> *Id.* at 523.



Insurance Code.<sup>37</sup> However, the court found it constitutional under the single subject rule.<sup>38</sup> The court's substantive analysis is cursory—it is one sentence long<sup>39</sup>—but the case is notable for its explanatory overview of single subject scrutiny, especially its emphasis on legislative deference and its statement of the rule's rationales.<sup>40</sup>

According to the *Robinson* court, determining the constitutionality of a law under the single subject rule begins with the presumption that legislators did not act “unreasonably or arbitrarily.”<sup>41</sup> Additionally, if the statute fulfills the relatedness requirement, it will not be found unconstitutional.<sup>42</sup> The *Robinson* court provides the following rationales for relatedness requirements in legislation:

First, [the single subject rule] is designed to prevent log-rolling legislation, i.e., to prevent the writing of several subjects having no connection with each other in one bill for the purpose of combining various interests in support of the whole.

Second, it prevents surprise or fraud upon legislators by means of provisions in bills of which the titles give no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted.

Third, it permits the people to be fairly apprised of the subjects of legislation under consideration, so that they may have an opportunity of being heard if they so desire.<sup>43</sup>

Applications of the *Robinson* standard have varied greatly. Sometimes *Robinson's* presumption of constitutionality proves dispositive; for example, in *Ex parte Jones*, a bill listing activities

---

<sup>37</sup> *Id.* at 524.

<sup>38</sup> *Id.* at 525.

<sup>39</sup> *Id.* (“In this instance the several matters that appellants say are different subjects actually relate to the same general subject, i.e. the licensing and regulation of bail bondsmen, and that general subject is expressed in the title.”).

<sup>40</sup> *Id.* at 524.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 524–25.

<sup>43</sup> *Id.* at 524.

and penalties related to tire deflation devices was found constitutional, even though it contained a provision amending the punishment for evading arrest in a motor vehicle, a subject seemingly unrelated to tire deflation.<sup>44</sup> After studying the bill, the court—which framed its responsibility under *Robinson* as that of “liberally construing the bill in favor of constitutionality”—determined that its overarching subject was vehicle-related crimes, not tire deflation; the evading-arrest amendment was connected to that broader subject.<sup>45</sup> “[T]he Legislature decided to criminalize possession of tire deflation devices because individuals use the devices to stop vehicles,” the court wrote,<sup>46</sup> and “also decided to address other vehicle-related offenses . . . The common theme of these topics is criminal behavior related to vehicles—behavior that has recently become more problematic in South Texas.”<sup>47</sup>

Other cases hint at stricter interpretations of the single subject rule. In *State Board of Insurance v. National Employee Benefit Administrators*, a Texas court invalidated a bill titled “[a]n act relating to the regulation of third party administrators and certain nonprofit subscription programs” in its entirety because third party administrators and nonprofit subscription programs were unrelated subjects.<sup>48</sup> The court found that the sections of the bill referencing nonprofit subscription programs did not reference third party administrators, and the sections referencing administrators did not reference subscription programs.<sup>49</sup> Moreover, the court noted that the third party provisions amended a chapter of the state’s Insurance Code, while the subscription provisions amended the state’s Emergency Medical Services Act.<sup>50</sup> The court framed its responsibility under the single subject doctrine around one of the rule’s rationales, the prevention of logrolling.<sup>51</sup> The court scrutinized the bill and concluded that its provisions lacked a

---

<sup>44</sup> *Ex parte Jones*, 410 S.W.3d 349, 350 (Tex. App. 2013).

<sup>45</sup> *Id.* at 353.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *State Bd. of Ins. v. Nat’l Emp. Benefit Adm’rs, Inc.*, 786 S.W.2d 106, 107–08 (Tex. App. 1990).

<sup>49</sup> *Id.* at 109.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 108.

“mutual connection”—an indication of logrolling—and was thus unconstitutional.<sup>52</sup>

*Robinson, Jones*, and *State Board* illuminate the multiple facets of a single subject analysis; a court has a variety of starting points from which to choose. The *Jones* court took *Robinson*'s deferential approach, positioning its inquiry as an evaluation of the legislature's duty to target a specific problem that was plaguing a community.<sup>53</sup> In so doing, the court itself determined the subject of the law; once it identified the problem the legislature was trying to solve, it could easily find an overarching objective.<sup>54</sup> *State Board* focused less on the legislature's incentive and more on whether the law in question exemplified a practice<sup>55</sup> the single subject rule was intended to prevent.<sup>56</sup> The court examined the law's title, sections, and individual provisions and concluded that it was an attempt at logrolling.<sup>57</sup> These opposing schools of thought regarding the rule's interpretation, and the resulting lack of a standard for its application, create space for addressing the particular complications of recent religious freedom laws<sup>58</sup> and present interesting litigation opportunities.<sup>59</sup>

## PART II: AN ERA OF IMPULSIVE LEGISLATION

The single subject rule has played a part in a number of hotly contested social and economic legal issues, such as same-sex

---

<sup>52</sup> *Id.* at 108–10.

<sup>53</sup> *See generally Ex parte Jones*, 410 S.W.3d 349, 353 (Tex. App. 2013).

<sup>54</sup> *Id.*

<sup>55</sup> When it comes to complying with the single subject rule, the Texas legislature itself appears to be primarily concerned with avoiding logrolling. According to a recent bill-drafting guide written by the Texas Legislative Council, “The policy behind the one-subject rule is that a legislative proposal should stand on its own merits and not be combined with unrelated proposals to generate broader support.” TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL (2017), <http://www.tlc.state.tx.us/docs/legref/draftingmanual.pdf>.

<sup>56</sup> *State Bd.*, 786 S.W.2d at 108–09.

<sup>57</sup> *Id.* at 108–10.

<sup>58</sup> *See infra* Section III.A.

<sup>59</sup> *See infra* Part IV.

marriage,<sup>60</sup> abortion,<sup>61</sup> minimum wage increases,<sup>62</sup> and school voucher programs.<sup>63</sup> The rule's foundations, and the factors that a court will consider during a single subject analysis, make it especially well-suited for challenging politically charged legislation.

### *A. Legislating in a Combative Political Environment*

In *Obergefell v. Hodges*, the Supreme Court decision that legalized same-sex marriage nationwide, Chief Justice John Roberts wrote a dissent in which he expressed concern that the Court was preemptively constitutionalizing something state legislatures had yet to fully explore: "Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept."<sup>64</sup> Undoubtedly, there is great conflict between certain social issues and religious liberty.<sup>65</sup> As suggested by Chief Justice Roberts's dissent, in the wake of *Obergefell*, several states have, in the name of religious

---

<sup>60</sup> Corey Moss, *Judge Rules Georgia's Gay Marriage Ban Unconstitutional*, MTV NEWS (May 16, 2006), <http://www.mtv.com/news/1531910/judge-rules-georgias-gay-marriage-ban-unconstitutional/>.

<sup>61</sup> Joseph Ax, *Oklahoma Supreme Court Strikes Down Restrictive Abortion Law*, REUTERS (Oct. 4, 2016), <http://www.reuters.com/article/us-oklahoma-abortion/oklahoma-supreme-court-strikes-down-restrictive-abortion-law-idUSKCN12420G>.

<sup>62</sup> Kaylee Remington, *Judge Tosses Out State Minimum Wage Law and Micro-wireless Law Cities Opposed*, CLEVELAND (June 4, 2017), [http://www.cleveland.com/metro/index.ssf/2017/06/judge\\_tosses\\_out\\_state\\_minimum.html](http://www.cleveland.com/metro/index.ssf/2017/06/judge_tosses_out_state_minimum.html).

<sup>63</sup> Eric Pera, *Polk Schools Will Join Lawsuit Against State Over HB 7069*, THE LEDGER (Aug. 23, 2017), <https://www.theledger.com/news/20170822/polk-schools-will-join-lawsuit-against-state-over-hb-7069>.

<sup>64</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015).

<sup>65</sup> See, e.g., SOUTHERN POVERTY LAW CENTER, RELIGIOUS LIBERTY AND THE ANTI-LGBT RIGHT (2016), [https://www.splcenter.org/sites/default/files/splc\\_religious\\_liberty\\_and\\_anti-lgbt\\_right.pdf](https://www.splcenter.org/sites/default/files/splc_religious_liberty_and_anti-lgbt_right.pdf).

freedom, attempted to preserve their earlier opposite-sex-only marriage laws, and refused to extend various protections to their LGBTQ-identified constituents.<sup>66</sup> For example, the Louisiana legislature's enactment of the state's "Defense of Marriage" law, a constitutional amendment excluding same-sex couples from both marriages and civil unions, was immediately met with a single subject challenge contending that marriages and civil unions are different subjects.<sup>67</sup> A *USA Today* article published almost one year after *Obergefell* described "[l]egislative and legal skirmishes" between religious freedom and LGBT rights advocates resulting from the formers' objections to the Supreme Court decision.<sup>68</sup> Those who disagreed with *Obergefell* were lashing out in new, tangential ways; legislatures began passing laws that allowed businesses to refuse their services to LGBTQ people<sup>69</sup> and restricted transgender people's use of public restrooms.<sup>70</sup>

Women's health—specifically, abortion and contraception—is another topic that has come to be intertwined with religious freedom.<sup>71</sup> In the 2016 case *Whole Women's Health v. Hellerstedt*, the Supreme Court found unconstitutional a Texas statute that

---

<sup>66</sup> *Id.*; see also Alexa Ura, *Texas Supreme Court Throws out Ruling That Favored Same-sex Marriage Benefits*, TEX. TRIBUNE (June 30, 2017), <https://www.texastribune.org/2017/06/30/texas-supreme-court-ruling-houston-same-sex-marriage-benefits/> (describing a 2017 Texas Supreme Court case regarding the marriage benefits of same-sex couples that does not follow the precedent set in *Obergefell*).

<sup>67</sup> Candace B. Ford, *Marriage, Religion, and the Art of Judging in Post-Obergefell Louisiana*, 43 S.U. L. REV 291, 304–05 (2016); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV 803, 804–05 (2006).

<sup>68</sup> Richard Wolf, *Gay Marriage Victory at Supreme Court Triggering Backlash*, USA TODAY (May 29, 2016), <https://www.usatoday.com/story/news/politics/2016/05/29/gay-lesbian-transgender-religious-exemption-supreme-court-north-carolina/84908172/>.

<sup>69</sup> *Id.*

<sup>70</sup> Richard Socarides, *North Carolina and the Gay-Rights Backlash*, THE NEW YORKER (Mar. 28, 2016), <https://www.newyorker.com/news/news-desk/north-carolina-and-the-gay-rights-backlash>.

<sup>71</sup> Emma Green, *The Supreme Court Isn't Waging a War on Women in Hobby Lobby*, THE ATLANTIC (June 30, 2014), <https://www.theatlantic.com/national/archive/2014/06/hobby-lobby-isnt-waging-a-war-on-women/373717/>.

placed strict admitting-privileges requirements and surgical-center standards on abortion providers.<sup>72</sup> As with *Obergefell* and state marriage laws, some legislators rebelled against *Whole Women's Health* by introducing bills in an attempt to regulate abortion on their own terms,<sup>73</sup> including providing religious exemptions.<sup>74</sup> Months after *Whole Women's Health*, the Oklahoma Supreme Court invalidated an abortion bill similar to the unconstitutional Texas law under the single subject rule, finding that several provisions were too far-reaching to relate to the law's purported subject (the protection of women's reproductive health).<sup>75</sup> The state's attempt at retaliation was blocked by the mandates of the legislative process.

Recent laws aimed at LGBTQ rights and reproductive freedom show that, in the midst of heated cultural shifts and their accompanying policy changes, lawmakers who do not support those shifts feel obligated to immediately resist their reach legislatively.<sup>76</sup> Elected officials must be responsive to the wants and needs of those they represent, and courts must respect their duty to do so; in his prescient *Obergefell* dissent, Chief Justice Roberts championed judicial restraint, a principle widely held in high regard.<sup>77</sup> However, a problematic trend has emerged from the

---

<sup>72</sup> *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

<sup>73</sup> See Laura Bassett, *States Enacted More Than 60 Abortion Restrictions In 2016*, HUFFPOST (Dec. 28, 2016), [https://www.huffingtonpost.com/entry/supreme-court-anti-abortion-states\\_us\\_5863e1b5e4b0de3a08f6bf53](https://www.huffingtonpost.com/entry/supreme-court-anti-abortion-states_us_5863e1b5e4b0de3a08f6bf53); see also Christopher Keating, *Abortion, Women's Health Debate Returns To State Capitol*, HARTFORD COURANT (Jan. 23, 2017), <http://www.courant.com/politics/hc-abortion-debate-ct-20170123-story.html> (detailing the attempts of Republican legislators in Connecticut to enact abortion restrictions in the state in the aftermath of *Whole Women's Health*).

<sup>74</sup> Nina Liss-Schultz, *Trump is Coming for Your Birth Control. Can States Stop Him?*, MOTHER JONES (Oct. 16, 2017), <http://www.motherjones.com/politics/2017/10/trump-is-coming-for-your-birth-control-can-states-stop-him/#>.

<sup>75</sup> *Burns v. Cline*, 387 P.3d 348, 354–56 (Okla. 2016).

<sup>76</sup> See generally S. POVERTY L. CTR., *supra* note 65; see also Ura, *supra* note 66.

<sup>77</sup> See Lisa A. Mazzie, *The Initial Appeal of Chief Justice John Roberts' Dissent in Obergefell v. Hodges*, MARQ. U. L. SCH. FAC. BLOG (July 8, 2015),

perceived necessity for rapid, undaunted opposition to social change: pushing through laws “that may be constitutionally questionable in an effort to safeguard values.”<sup>78</sup> For example, an Ohio bill introduced in 2018, which would ban abortion at any point during a pregnancy and includes no health-related exceptions, is, like other recent abortion legislation, “radically unconstitutional . . . by design” as part of an effort to spark enough legal challenges to encourage the Supreme Court to revisit *Roe v. Wade*.<sup>79</sup>

These retaliations could be dismissed as simply the political norm; the act of legislating has been described by scholars as “an often-chaotic process of lobbying by interest groups and of assessments by legislators of the public interest and of their own, sometimes less public-regarding needs (such as reelection).”<sup>80</sup> Such a view explains, but does not excuse, the drafting of purely ideologically motivated laws. The contentious and reactive form of governance that has taken root at the state and federal levels actually supports the assertion that legislative restraints are all the more important and should be more frequently enforced.

This combative context has proven fertile ground for religious freedom legislation, including recent religious liberty carve-outs in bills related to welfare programs.<sup>81</sup> State welfare systems are extremely complicated, comprised of webs of public, private, state-funded, and state-licensed entities that provide all manners of services, and are governed by the particularized legal landscapes of

---

<https://law.marquette.edu/facultyblog/2015/07/08/the-initial-appeal-of-chief-justice-john-roberts-dissent-in-obergefell-v-hodges/>.

<sup>78</sup> Jessica Mendoza, *In America's Culture war, State Legislatures Lead the Charge*, CHRISTIAN SCI. MONITOR (June 6, 2016), <https://www.csmonitor.com/USA/Society/2016/0606/In-America-s-culture-war-state-legislatures-lead-the-charge>.

<sup>79</sup> The Editorial Board, *An Ohio Bill Would Ban All Abortions. It's Part of a Bigger Plan.*, N.Y. TIMES (Mar. 25, 2018), <https://www.nytimes.com/2018/03/25/opinion/ohio-abortion-ban-bill.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region>.

<sup>80</sup> WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 3 (2006).

<sup>81</sup> See *infra* Section II.B.

multiple regulatory bodies at the local, state, and federal levels.<sup>82</sup> When this inherent complexity is combined with an impulsive legislative process that results in extremely broad, discretion-granting laws, grave constitutional concerns arise.

### *B. The Rise of Religious Exemptions*

Recent religious freedom bills are the products of the aforementioned antagonistic political climate. Though bills providing religious exemptions to certain institutions and individuals are nothing new,<sup>83</sup> introducing and enacting them is now a top priority in statehouses across the country.<sup>84</sup>

On May 4, 2017, President Donald Trump issued an Executive Order Promoting Free Speech and Religious Liberty.<sup>85</sup> While the

---

<sup>82</sup> Robert I. Field, *Why Is Health Care Regulation So Complex?*, 33 PHARMACY AND THERAPEUTICS 607, 608 (2008), <https://www.ptcommunity.com/system/files/pdf/ptj3310607.pdf>; DIANE F. REED & KATE KARPILOW, UNDERSTANDING THE CHILD WELFARE SYSTEM IN CALIFORNIA: A PRIMER FOR SERVICE PROVIDERS AND POLICYMAKERS 2, 7–9 (2009), <http://www.phi.org/uploads/application/files/h31ef4xly0mtt9oa4lsv07oko48r6kg19g6fisd62qmymwbs5.pdf>; see also S.C. Exec. Order 2018-12 (2018) (detailing the state’s governance of faith-based welfare organizations).

<sup>83</sup> Religious exemption bills have been regularly considered in state legislative sessions since the early 1990s. Ray Sanchez, *Why the Onslaught of Religious Freedom Laws?*, CNN (Apr. 7, 2016), <http://www.cnn.com/2016/04/06/us/religious-freedom-laws-why-now/index.html>.

<sup>84</sup> See Laura Sydell, *LGBTQ Advocates Fear ‘Religious Freedom’ Bills Moving Forward In States*, NPR (Feb. 26, 2017), <http://www.npr.org/2017/02/26/515585721/lgbtq-advocates-fear-religious-freedom-bills-moving-forward-in-states>; see also Jessica Yarvin, *Republicans Plan to Bring Back Religious Freedom Bill*, PBS NEWS HOUR (Feb. 3, 2017), <https://www.pbs.org/newshour/politics/republicans-plan-bring-back-religious-freedom-bill> (describing a federal bill that “would block the federal government from taking punitive action . . . to people and organizations who discriminate based on a religious belief or moral conviction.”).

<sup>85</sup> Ali Vitali, *Trump Signs ‘Religious Liberty’ Executive Order Allowing for Broad Exemptions*, NBC NEWS (May 4, 2017), <https://www.nbcnews.com/news/us-news/trump-signs-religious-liberty-executive-order-allowing-broad-exemptions-n754786>.



order's legal heft is questionable,<sup>86</sup> its symbolism is not; it represents the Trump White House's oft-asserted dedication to protecting faith-based (and more specifically, in the President's own words, "Judeo-Christian")<sup>87</sup> individuals and organizations from legal action.<sup>88</sup> Even before the Order, state legislatures, energized by the new administration, began fast-tracking religious freedom bills in the months following the 2016 election.<sup>89</sup> "[C]ulture wars . . . have come to define" the Trump presidency,<sup>90</sup> and state lawmakers have been the foot soldiers.

Recently, attempts to protect religious freedom have surfaced in the context of welfare services.<sup>91</sup> An early draft of President Trump's Executive Order included a section exempting organizations from providing health care plans that cover contraception and abortion, and prohibiting adverse action against child welfare providers that decline their services for religious reasons.<sup>92</sup> This language was removed from the final version of the Order,<sup>93</sup> but in January 2018, the U.S. Department of Health and

---

<sup>86</sup> William Fernholz, *What Does Trump's Religious Freedom Order Actually Do? Not Much . . .*, THE HILL (May 4, 2017), <http://thehill.com/blogs/pundits-blog/the-administration/332017-what-does-trumps-religious-freedom-order-actually-do>.

<sup>87</sup> Joan Biskupic, *Trump Puts Faith in Religious Right*, CNN (Oct. 14, 2017), <http://www.cnn.com/2017/10/14/politics/donald-trump-religious-conservatives-appeals/index.html>.

<sup>88</sup> Ellen P. Aprill, *Trump's Religious Freedom Order No More Than a Symbolic Statement*, THE HILL (May 10, 2017), <http://thehill.com/blogs/pundits-blog/civil-rights/332776-trumps-religious-freedom-order-nothing-more-than-a-symbolic>.

<sup>89</sup> Sydell, *supra* note 84.

<sup>90</sup> Claire Landsbaum, *"Trump Is Stirring the Pot": The Hot-Button Supreme Court Case that Could Explode the Culture Wars*, VANITY FAIR (Mar. 21, 2018), <https://www.vanityfair.com/news/2018/03/nifla-v-becerra-hot-button-supreme-court-case-that-could-explode-trump-culture-wars>.

<sup>91</sup> See Mushovic, *supra* note 5.

<sup>92</sup> Sarah Posner, *Leaked Draft of Trump's Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION (Feb. 1, 2017), <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/>.

<sup>93</sup> *Annotated: Trump's Executive Order on Religious Liberty*, NPR (May 4, 2017), <https://www.npr.org/2017/05/04/526840823/annotated-trumps-executive-order-on-religious-liberty>.

Human Services established the Division of Conscience and Religious Freedom to protect from legal action health care workers who decline to treat patients because of faith-based objections.<sup>94</sup> The agency's powers of oversight and enforcement extend to child welfare services.<sup>95</sup> Moreover, on July 11, 2018, the House Appropriations Committee passed an amendment that would protect the ability of child welfare providers to refuse to perform their services on religious grounds.<sup>96</sup>

Several recent state bills have also proposed religious exemptions for child welfare providers.<sup>97</sup> These laws are arguably part of the anti-*Obergefell* legislative swell. After the legalization of same-sex marriage, faith-based adoption agencies in some states decided to close rather than extend their services to LGBTQ parents.<sup>98</sup> In 2014, less than a year before the *Obergefell* decision,

---

<sup>94</sup> Alison Kodjak, *Trump Admin Will Protect Health Workers Who Refuse Services on Religious Grounds*, NPR (Jan. 18, 2018), <https://www.npr.org/sections/health-shots/2018/01/18/578811426/trump-will-protect-health-workers-who-reject-patients-on-religious-grounds>.

<sup>95</sup> See Trudy Ring, *Trump Is Pushing Health Care Discrimination. Here's How You Could Be Affected*, THE ADVOCATE (Feb. 21, 2018), <https://www.advocate.com/politics/2018/2/21/trump-pushing-health-care-discrimination-heres-how-you-could-be-affected>.

<sup>96</sup> Daniella Diaz, *Adoption Agencies Could Refuse Same-Sex Couples Under Measure OK'd by House Panel*, CNN (July 12, 2018), <https://www.cnn.com/2018/07/12/politics/house-appropriations-committee-gay-couple-adoption-amendment/index.html>.

<sup>97</sup> See Marissa Evans, *Senate Passes Religious Protections for Child Welfare Agencies*, TEX. TRIBUNE (May 23, 2017), <https://www.texastribune.org/2017/05/21/senate-passes-religious-protections-child-welfare-agencies/>; Katrina Lim, *Supporters and Opponents React to Signing of Senate Bill 149*, BLACK HILLS FOX (Mar. 12, 2017), <http://www.blackhillsfox.com/content/news/Supporters-and-opponents-react-to-signing-of-Senate-Bill-149--415990653.html>; Anna Claire Vollers, *Religious Freedom or Taxpayer-funded Discrimination? Child Welfare Bill Prompts Debate*, AL.COM (Feb. 9, 2017), [http://www.al.com/news/index.ssf/2017/02/religious\\_freedom\\_taxpayer-fun.html](http://www.al.com/news/index.ssf/2017/02/religious_freedom_taxpayer-fun.html).

<sup>98</sup> Chris Johnson, *South Dakota Governor Signs First Anti-LGBT Law of 2017*, WASH. BLADE (Mar. 10, 2017), <https://www.washingtonblade.com/2017/03/10/s-d-governors-signs-first-anti-lgbt-law-2017/>.

the *National Catholic Reporter* published a commentary summarizing the dilemma in which these agencies found themselves: “If same-sex marriage becomes the law of the land, anti-discrimination laws could be activated, putting Catholic agencies across the country out of business.”<sup>99</sup> Moreover, after *Obergefell*, several state legislatures formulated religious freedom bills to protect faith-based services providers from the inevitable lawsuits that would arise from the organizations’ exercise of religious-based discretion.<sup>100</sup> This only compounds the problems that religious freedom legislation presents, and gives courts another lens through which to examine the constitutionality of those laws: the single subject rule.

### C. Texas’s HB 3859

One recently enacted<sup>101</sup> Texas law, HB 3859, is an example of religious freedom as applied to welfare services. HB 3859 allows child welfare providers—from counseling organizations and youth shelters to adoption and foster care agencies<sup>102</sup>—to exercise faith-based discretion when choosing whom to serve.<sup>103</sup> The statute does not allow providers to decline their services on the basis of “race, ethnicity, or national origin.”<sup>104</sup> In March 2017, the bill’s author, Texas state representative James Frank, presented HB 3859 at a committee hearing and told his colleagues that it pertained solely to child welfare reform, part of a larger initiative to regulate and improve Texas’s system.<sup>105</sup> Two months later, Representative

---

<sup>99</sup> Phyllis Zagano, *Throwing Catholic Charities Under the Bus*, NAT’L CATHOLIC REP. (Oct. 8, 2014), <https://www.ncronline.org/blogs/just-catholic/throwing-catholic-charities-under-bus>.

<sup>100</sup> See *Religious Exemption Laws*, LGBT MAP, <http://www.lgbtmap.org/img/maps/citations-religious-exemption.pdf> (last visited Oct. 24, 2018).

<sup>101</sup> TEX. HUM. RES. CODE ANN. § 45 (West 2017).

<sup>102</sup> TEX. HUM. RES. CODE ANN. § 45.002 (3) (West 2017).

<sup>103</sup> TEX. HUM. RES. CODE ANN. § 45.004 (West 2017).

<sup>104</sup> TEX. HUM. RES. CODE ANN. § 45.009 (West 2017).

<sup>105</sup> Video Player, *State Affairs*, TEX. H. OF REP. (Mar. 29, 2017, 3:14:50), [http://tlchouse.granicus.com/MediaPlayer.php?view\\_id=40&clip\\_id=13270](http://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13270)

Frank told *USA Today* that President Trump's religious freedom executive order was a boon to his own bill, which was then awaiting passage in the Texas Senate.<sup>106</sup>

HB 3859 "allows faith-based providers to re-engage with Texas Department of Family Protective Services . . . without worrying that potential lawsuits will take limited resources away from the people we should be helping," Cynthia Colbert, the CEO of Catholic Charities Houston, said in a press release.<sup>107</sup> The bill immediately triggered First and Fourteenth Amendment concerns, particularly in the context of discrimination against LGBTQ children and adoptive and foster parents.<sup>108</sup> The bill's own nondiscrimination section does not include protections for sexual orientation or gender identity, leaving an opening for religious providers to refuse their services on those bases.<sup>109</sup> However, HB 3859 is also vulnerable to a single subject challenge, and such a claim is all the more compelling when recent political and doctrinal evolutions are taken into consideration.

---

(citing statement of Representative James Frank at the 85<sup>th</sup> Legislative Session of the Texas House of Representatives Committee on State Affairs).

<sup>106</sup> Rick Jervis, *In Texas: 'It's An All-out Assault on LGBT People'*, USA TODAY (May 15, 2017, 11:53 AM), <https://www.usatoday.com/story/news/nation/2017/05/15/texas-bills-lgbt-rights-bathroom-bills/101633302/>.

<sup>107</sup> *Catholic Charities Welcome Passage of House Bill 3859*, TEX. CATHOLIC (May 10, 2017), <https://txcatholic.org/catholic-charities-welcomes-passage-of-house-bill-3859/>.

<sup>108</sup> See Laura Marie Thompson, *'Recipe for Discrimination': Legal Battle Brews Over New 'Religious Refusal' Child Welfare Law*, TEX. OBSERVER (July 5, 2017), <https://www.texasobserver.org/recipe-discrimination-legal-battle-brews-new-religious-refusal-child-welfare-law/>; see also Dan Quinn, *Avalanche of Proposed Bills Would Allow the Use of Religion to Discriminate in Texas*, TEX. FREEDOM NETWORK (Mar. 29, 2017), <http://tfn.org/avalanche-proposed-bills-allow-use-religion-discriminate-texas/> (providing examples of reactions from legal groups, politicians, and LGBTQ people to HB 3859).

<sup>109</sup> TEX. HUM. RES. CODE ANN. § 45.009 (West 2017).

PART III: THE SINGLE SUBJECT RULE AS A METHOD OF FACIALLY  
CHALLENGING RELIGIOUS FREEDOM LEGISLATION

Texas's HB 3859 is emblematic of how lawmakers are using religious freedom to stunt the progression of LGBTQ and reproductive rights. Viewing this statute through the framework of the single subject rule exposes its weaknesses as a piece of legislation and the troubling consequences of those weaknesses, and also illustrates the importance of the ability to bring facial challenges.

*A. Applying Texas's Single Subject Rule to HB 3859*

The subject of HB 3859 is the religious freedom of child welfare services providers.<sup>110</sup> This is expressed in the title of the law, "AN ACT relating to the protection of the rights of conscience for child welfare services providers."<sup>111</sup> The original title, "AN ACT relating to the conscience rights of certain religious organizations and individuals," related only to religious freedom, with no mention of child welfare.<sup>112</sup>

The title of a law can be an important component of single subject analysis, as demonstrated by the Texas case *State Board*, which tackled the problem of a statute's title that indicated two different subjects.<sup>113</sup> The court scrutinized the bill's sections and individual provisions in an attempt to determine whether one of the indicated subjects could be identified as the true focus, or, alternatively, whether a broader subject could be gleaned from both, and found that it could not make such determinations.<sup>114</sup> No such problem exists with HB 3859; its title does not indicate distinct subjects, and a textual examination of its contents reveals

---

<sup>110</sup> See *id.* at § 45.001.

<sup>111</sup> *Id.* at § 45.

<sup>112</sup> Compare H.B. 3859 85th H. REP., (Tex. 2017) ("introduced version"), <https://capitol.texas.gov/tlodocs/85R/billtext/pdf/HB03859I.pdf#navpanes=0>, with H.B. 3859, 85th H. REP., (Tex. 2017), ("enrolled" version), <https://capitol.texas.gov/tlodocs/85R/billtext/pdf/HB03859F.pdf#navpanes=0>.

<sup>113</sup> See *State Bd. of Ins. v. Nat'l Emp. Benefit Adm'rs, Inc.*, 786 S.W.2d 106, 109 (Tex. App. 1990).

<sup>114</sup> See generally *id.* at 107–09.

that the religious freedom of child welfare services providers is its identifiable overarching subject.<sup>115</sup> Unlike the bill at issue in *State Board*, which regulated the two types of entities mentioned in its title and separated those regulations into distinct sections that were unrelated and made no reference to the other provisions,<sup>116</sup> the title of HB 3859 suggests that the law as a whole pertains to protecting the religious beliefs of child welfare providers.<sup>117</sup>

Having established the single subject of HB 3859, the inquiry turns to whether any part of the law strays from this topical foundation.<sup>118</sup> Texas's single subject standard, as expressed in *Robinson*, holds that a law violates the state's single subject restriction if it includes a provision that does not reference the same general subject as the other provisions of the law.<sup>119</sup> § 45.004 of HB 3859, "Child Welfare Services Providers Protected," details the religious-based choices a services provider can make without legal repercussion.<sup>120</sup> One provision stands out: § 45.004(3), which prohibits adverse action against a provider who "has declined or will decline to provide, facilitate, or refer a person for abortions, contraceptives, or drugs, devices, or services that are potentially abortion inducing."<sup>121</sup> § 45.004(3) is unlike the other provisions because it makes no mention of religious freedom as the basis for its inclusion in the law and affects services that are provided by medical professionals, not child welfare organizations themselves.<sup>122</sup>

In considering a possible single subject violation, a Texas court will establish a degree of legislative deference, presuming the law's constitutionality, and consider why lawmakers introduced it

---

<sup>115</sup> See generally TEX. HUM. RES. CODE ANN. § 45 (West 2017).

<sup>116</sup> *State Bd.*, 786 S.W.2d at 107–08.

<sup>117</sup> See generally TEX. HUM. RES. CODE ANN. § 45 (West 2017).

<sup>118</sup> See *Ex parte Jones*, 440 S.W.3d 628, 632 (Tex. Crim. App. 2013).

<sup>119</sup> See *supra* Section I.B.

<sup>120</sup> TEX. HUM. RES. CODE ANN. § 45.004.

<sup>121</sup> *Id.* at § 45.004, § 45.004 (3).

<sup>122</sup> Compare TEX. HUM. RES. CODE ANN. §§ 45.004 (3) (relating to provider policies on abortion), *with* (1) (relating to religious beliefs of providers), *and* (2) (relating to provider policies on religious education) (West 2017).

in the first place.<sup>123</sup> However, the inclusion of a provision that does not reference or relate to the same general subject as other provisions raises suspicions of logrolling and thus overrides the court's initial presumption of constitutionality.<sup>124</sup>

First, in presuming HB 3859's constitutionality and pinpointing the problem the law is intended to address, a court may note the alarming state of child welfare services in Texas; since 2011, more than 1,000 children in Texas's foster care system "have died as a result of abuse or neglect".<sup>125</sup> In *Ex parte Jones*, the court's acknowledgment of the rise in criminal activity related to vehicles contributed to the deference it afforded the legislature, and strengthened its ultimate assertion that the bill in question did not violate the single subject rule.<sup>126</sup> According to news coverage of HB 3859's House committee hearing, the legislature felt pressured to "tak[e] bolder, more creative actions to fix how Texas cares for abused and neglected children."<sup>127</sup> A court that sees HB 3859 as part of the state legislature's broader attempt to improve its foster care system could sympathize with the need to protect religious providers so that they can effectively serve children in need.

However, the universe of the bill at issue in *Ex parte Jones* is much smaller than that of HB 3859. In *Jones*, the court found a clear connection between the challenged provision—evading arrest in a vehicle—and the overarching subject—criminal activity related to vehicles; the former is a specific example of the latter.<sup>128</sup> The connection between abortion, contraception, and the religious freedom of child welfare services providers is much more tenuous;

---

<sup>123</sup> *Ex parte Jones*, 410 S.W.3d at 353.

<sup>124</sup> *State Bd. of Ins. v. Nat'l Emp. Benefit Adm'rs, Inc.*, 786 S.W.2d 106, 109 (Tex. App. 1990).

<sup>125</sup> Laura Marie Thompson, 'Recipe for Discrimination': Legal Battle Brews Over New 'Religious Refusal' Child Welfare Law, TEX. OBSERVER (July 5, 2017), <https://www.texasobserver.org/recipe-discrimination-legal-battle-brews-new-religious-refusal-child-welfare-law/>.

<sup>126</sup> *Ex parte Jones*, 410 S.W.3d at 353.

<sup>127</sup> Marissa Evans, *House Panel Hears Testimony on Child Welfare Religious Liberty Bill*, TEX. TRIBUNE (Mar. 29, 2017), <https://www.texastribune.org/2017/03/29/house-state-affairs-hears-testimony-child-welfare-religious-liberty-bi/>.

<sup>128</sup> *Ex parte Jones*, 410 S.W.3d at 353.

§ 45.004(3) is *not* a specific example of the care offered by child welfare providers, and thus falls outside of the confines of the law’s subject. Welfare organizations do not themselves provide medical services related to abortion and contraception.<sup>129</sup> § 45.002(3) defines “child welfare services” providers as those organizations which assist and counsel children and parents, provide foster homes and group shelters, and recruit and assist adoptive parents and families.<sup>130</sup> The decision to receive an abortion or use contraception involves the person actually receiving or using this care, their legal guardian, and physicians and other medical professionals.<sup>131</sup> By including § 45.004(3), HB 3859 steps into the realm of women’s health, a subject wholly separate from welfare reform and regulated by a host of other statutes;<sup>132</sup> in this sense, the bill is analogous to *State Board*, in which the court invalidated a law under the single subject rule because two provisions affected two different existing laws.<sup>133</sup> Accordingly, § 45.004(3) authorizes welfare services providers to make decisions beyond their purview.

Second, in examining the language of HB 3859, a court may find that the text of § 45.004(3) stands out from that of the rest of the statute. Unlike the other subsections of § 45.004, the abortion provision does not establish ties to religious freedom: § 45.004(1) prohibits adverse action against organizations that “decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider’s sincerely held religious beliefs;”<sup>134</sup> § 45.004(2) extends the prohibition to organizations that “provide[] or intend to provide[] . . . religious education.”<sup>135</sup> The text of § 45.004(3), however, does not reference religious discretion, beliefs, or

---

<sup>129</sup> See generally TEX. HUM. RES. CODE ANN. § 45.002(3) (West 2017).

<sup>130</sup> *Id.*

<sup>131</sup> TEX. DEP’T OF STATE HEALTH SERV., ADOLESCENT HEALTH GUIDE (2016), <http://www.dshs.texas.gov/thsteps/Adolescent-Health-Guide/>.

<sup>132</sup> *Id.*

<sup>133</sup> *State Bd. of Ins. v. Nat’l Emp. Benefit Adm’rs, Inc.*, 786 S.W.2d 106, 109–110 (Tex. App. 1990).

<sup>134</sup> TEX. HUM. RES. CODE ANN. § 45.004 (1) (West 2017).

<sup>135</sup> *Id.* at § 45.004 (2).



intentions; rather, it simply states that organizations can refuse to provide access to abortion and contraception.<sup>136</sup>

It is worth stepping back to reflect upon the initial reasoning behind the widespread adoption of the single subject rule in the 19th century, first voiced by the Romans millennia ago: lawmakers' continual attempts to hide "dubious" provisions in popular legislation.<sup>137</sup> Abortion is a deeply contentious issue; the number of pro-choice-identified Texans is almost the same as the number of pro-life identified Texans,<sup>138</sup> and laws regulating the procedure have been met with public attention and immediate legal challenges.<sup>139</sup> Welfare reform, meanwhile, is universally favored, given the current problems with the state's system.<sup>140</sup> § 45.004(3) is arguably a dubious abortion provision in an otherwise popular piece of legislation. This is a prime example of logrolling,<sup>141</sup> and a Texas court evaluating the foundational rationales of the single subject rule is likely to be more inclined to invalidate the bill.

Although Texas courts have focused primarily on the anti-logrolling reasoning behind the state's ratification of the single subject rule, HB 3859 is also questionable under one of the other rationales noted by the *Robinson* court: "permit[ing] the people to be fairly apprised of the subjects of legislation."<sup>142</sup> HB 3859's title does not suggest that the law pertains to the availability of abortion and contraception, and that availability is ancillary to the care offered by child welfare providers. Thus, people who engage with the state's welfare system—parents, legal guardians, and children—may be not be aware or have any reason to think that this sensitive aspect of their lives is impacted by the law.

---

<sup>136</sup> *Id.* at § 45.004 (3).

<sup>137</sup> Kastorf, *supra* note 16, at 1640.

<sup>138</sup> See generally *Pro-Life, Pro-Choice Identification*, TEX. POL. PROJECT (June 2016), <https://texaspolitics.utexas.edu/set/pro-life-pro-choice-identification-june-2016>.

<sup>139</sup> Renuka Rayasam, *How Texas Is Beating the Supreme Court on Abortion*, POLITICO (Apr. 17, 2017), <https://www.politico.com/story/2017/04/texas-supreme-court-abortion-237306>.

<sup>140</sup> See Thompson, *supra* note 108.

<sup>141</sup> See, e.g., *Robinson v. Hill*, 507 S.W.2d 521, 524 (Tex. 1974).

<sup>142</sup> *Id.* at 524.

Examining another state's single subject jurisprudence is instructive. Like Texas, Oklahoma's single subject rule was ratified to ensure adequate notice for citizens and to stifle logrolling attempts.<sup>143</sup> In the 2016 case *Burns v. Cline*, the Oklahoma Supreme Court evaluated a single subject challenge to an abortion law with twelve different provisions regulating and penalizing abortion providers.<sup>144</sup> Although the court conceded that all of the provisions at issue had "some" connection to abortion,<sup>145</sup> it nonetheless held that the law violated the rule.<sup>146</sup> The law's regulatory scope was so wide as to reach everything from medical equipment to physician's assistants, screenings and evaluations, and record-keeping requirements.<sup>147</sup> The court found that these were separate subjects, and including them in one piece of legislation was an inappropriate attempt to bring together "unrelated and misleading" provisions.<sup>148</sup> According to the court, the main focus of a single subject analysis is whether a law gives adequate notice of its effects and whether it includes unfavorable provisions in an otherwise favorable law.<sup>149</sup> This is similar to the analytical framework of the Texas court in *State Board*.<sup>150</sup> As *Burns* demonstrates, abortion is such an intrinsically expansive issue that even a law pitched as a comprehensive abortion measure can violate the single subject rule.<sup>151</sup>

Given the lack of a consistent, objective standard under which to adjudicate single subject disputes, it is important to recognize a possible alternative to the above interpretation of HB 3859. For example, it could be argued that abortion is not a separate subject, but rather an issue that falls under the umbrella of child welfare. Religious leaders like Russell Moore, president of the Southern Baptist Convention's Ethics and Religious Liberty Commission,

---

<sup>143</sup> *Burns v. Cline*, 387 P.3d 348, 354 (Okla. 2016).

<sup>144</sup> *Id.* at 354.

<sup>145</sup> *Id.* at 355.

<sup>146</sup> *Id.* at 356.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 354.

<sup>150</sup> *See State Bd. of Ins. v. Nat'l Emp. Benefit Adm'rs, Inc.*, 786 S.W.2d 106, 108 (Tex. App. 1990).

<sup>151</sup> *Burns*, 387 P.3d at 356.

and academics such as James A. Mann, a professor at Liberty University, have recently said that religious organizations providing adoption, foster care, education, counseling and other services exemplify a “pro-life” philosophy that also aims to restrict or eliminate abortion.<sup>152</sup> Though compelling, this framing of abortion would fall flat in a single subject analysis. As evidenced by the Texas cases, a court will likely recognize the doctrinal and administrative mechanisms governing the access to and receipt of abortion services as comprising a uniquely specific regulatory sphere, one that distinguishes abortion from the other services in which these organizations are engaged. The existing legal landscape is a matter that the court will have to confront at some point, and efforts to shape the narrative around abortion will not change this element of a single subject analysis.

Religious freedom laws like HB 3859 contravene the legislative principles embodied in the single subject rule. § 45.004(3) indicates that lawmakers may see categorical religious exemptions within a purportedly targeted field for governing other controversial matters. This legislative process is neither transparent nor focused. It is strategic and Burr-esque; it is the behavior the rule was designed to penalize.

### *B. Preserving the Utility of the Facial Challenge*

A single subject challenge in a state without the severability doctrine—a state that, like Texas, would invalidate an entire law if it violated the rule—is essentially a facial challenge. A facial challenge contends that a law as a whole must be struck down because any application or enforcement of it would be unconstitutional, or because the law implicates constitutional rights and an as-applied, case-by-case approach to challenging it would

---

<sup>152</sup> See generally Daniel Davis, *Q&A: Russell Moore Weighs in on Abortion, Adoption, and the Compassion of the Pro-Life Movement*, The Daily Signal (Jan. 18, 2018), <http://dailysignal.com/2018/01/18/qa-russell-moore-weighs-in-on-abortion-adoption-and-the-compassion-of-the-pro-life-movement/>; James A. Mann, *The Church Has Long Legacy of Contributing to Society*, DENTON RECORD-CHRONICLE (Mar. 9, 2018), [https://www.dentonrc.com/life/james-a-mann-church-has-long-legacy-of-contributing-to/article\\_80881f91-e5dc-5109-9e78-411933315471.html](https://www.dentonrc.com/life/james-a-mann-church-has-long-legacy-of-contributing-to/article_80881f91-e5dc-5109-9e78-411933315471.html).

be insufficient to protect those rights.<sup>153</sup> In addition to saving plaintiffs from a law's looming harms, a successful facial challenge prevents *anyone* from being harmed by the law: "Facial invalidation . . . allows a court to vindicate the rights of many in a single litigation."<sup>154</sup> Facial challenges have long been an indispensable tool for civil rights lawyers.<sup>155</sup> The Fourteenth<sup>156</sup> and First Amendments,<sup>157</sup> particularly Equal Protection and the Establishment Clause, have been used to facially challenge religious freedom legislation.<sup>158</sup>

The facial challenge, much like the single subject rule, is considered an important way to ensure legislative accountability.<sup>159</sup> "When unpopular minorities or controversial rights are at issue, legislatures may knowingly enact unconstitutional legislation in response to public hysteria and/or constituent pressure," writes scholar Caitlin E. Borgmann.<sup>160</sup> Facial challenges thus penalize legislatures not only for unconstitutional applications of the law at issue, but also for legislating recklessly in the first place.<sup>161</sup> However, there are hurdles to claims of facial unconstitutionality.

<sup>153</sup> David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1334, 1341–42 (2005).

<sup>154</sup> *Id.* at 1335. For example, in a single subject challenge to HB 3859, invalidating the law because of its errant abortion provision would also accomplish the goal of a different, substantive constitutional challenge: preventing the LGBT community from being discriminated against.

<sup>155</sup> Christopher Dunn, *A Key Law-Reform Tool in Peril — The End of Facial Challenges?*, NYCLU (Apr. 22, 2008), <https://www.nyclu.org/en/publications/column-key-law-reform-tool-peril-end-facial-challenges-new-york-law-journal>.

<sup>156</sup> Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 953 (2011).

<sup>157</sup> Dunn, *supra* note 155.

<sup>158</sup> Laws regulating abortion, on the other hand, are scrutinized under the undue burden standard, a branch of the due process doctrine. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992). However, because HB 3859 is not an abortion law, this Note will not examine the undue burden standard.

<sup>159</sup> Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 566–68 (2009).

<sup>160</sup> *Id.* at 567.

<sup>161</sup> *Id.* at 567–68.

PART IV: *BARBER V. BRYANT* AND THE DIFFICULTIES OF FACIAL CHALLENGES

Over the last decade, federal and state courts have conveyed hostility toward facial challenges.<sup>162</sup> First and Fourteenth Amendment facial challenges pose high burdens for a plaintiff; in the recent Fifth Circuit case *Barber v. Bryant*, the court upheld a law's facial constitutionality under the Equal Protection Clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment, finding that the plaintiffs did not have standing to bring either claim.<sup>163</sup> In *Barber*, the plaintiffs challenged Mississippi's HB 1523, a wide-ranging religious freedom bill that included a prohibition of adverse action against faith-based organizations "plac[ing] of children in foster or adoptive homes."<sup>164</sup> The bill protected organizations and individuals with the following specific beliefs: marriage is between a man and a woman; sex is reserved for marriage; and one's gender is determined by one's anatomy at time of birth.<sup>165</sup> While as-applied challenges made after a law goes into effect can draw upon any tangible discriminatory impact the law has had, there is much less on which a facial challenge can hang its hat, and the *Barber* court found that the plaintiffs' claim of injury as a result of the bill's "message"—"that the 'state government disapproves of'" the LGBTQ community<sup>166</sup>—was too abstract and speculative.<sup>167</sup>

A brief analysis of a possible First Amendment challenge to HB 3859 shows that plaintiffs could be stymied on similar grounds.<sup>168</sup> The Establishment Clause has been a dependably successful method of facially challenging legislation.<sup>169</sup> A law can

---

<sup>162</sup> Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 *FORDHAM URB. L.J.* 773, 784 (2008).

<sup>163</sup> *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

<sup>164</sup> *Barber*, 860 F.3d at 351.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 352.

<sup>167</sup> *Id.* at 357.

<sup>168</sup> Texas belongs to the Fifth Circuit, so *Barber* is binding precedent for federal district courts in the state.

<sup>169</sup> Richard H. Fallon Jr., *Fact and Fiction About Facial Challenges*, 99 *CAL. L. REV.* 915, 937 (2011); Gans, *supra* note 151.

be invalidated under the Establishment Clause if it does not have a secular purpose, or if it advances a particular religion (including the promotion of religious adherence over non-adherence).<sup>170</sup> Unlike the Mississippi bill at issue in *Barber*, HB 3859 does not advance specific religious beliefs, but arguably promotes religious adherence by insulating faith-based organizations from adverse action.<sup>171</sup> However, *Barber* shows that Establishment Clause standing could be difficult to satisfy in a facial challenge to HB 3859. Because the law at issue in *Barber* listed the religious beliefs it protected, the plaintiffs were able to craft arguments about how those beliefs differed from their own and how they were injured by those beliefs.<sup>172</sup> HB 3859 does not enumerate the beliefs it protects,<sup>173</sup> and plaintiffs could have great difficulty in arguing why shielding religion *in general* affects them.

An examination of HB 3859 under Fourteenth Amendment Equal Protection offers another example of a difficulty in challenging this brand of religious freedom legislation: showing discriminatory intent. A statute can be invalidated on equal protection grounds if it expressly targets and discriminates against a group of people<sup>174</sup> or if the language of the law is neutral, the context surrounding its creation reveals a discriminatory intent.<sup>175</sup> The equal protection intent requirement is difficult to satisfy when the legislative history is quiet on the matter being litigated. It could be argued that HB 3859 violates equal protection because its authorization of faith-based discretion could be wielded to discriminate against certain groups, such as the LGBTQ community. However, HB 3859 itself makes no express classifications,<sup>176</sup> and a dive into its legislative history reveals no

---

<sup>170</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>171</sup> *See supra* Section II.C.

<sup>172</sup> *Barber v. Bryant*, 860 F.3d 345, 351–52 (5th Cir. 2017).

<sup>173</sup> H.B. 3859, 85th Legis. (Tex. 2017); TEX. HUM. RES. CODE ANN. § 45.004(3) (West 2017).

<sup>174</sup> *Gans*, *supra* note 153, at 1381.

<sup>175</sup> Thomas B. Henson, *Proving Discriminatory Intent From A Facially Neutral Decision With A Disproportionate Impact*, 36 WASH. & LEE L. REV. 109, 114 (1979).

<sup>176</sup> H.B. 3859, 85th Legis. (Tex. 2017); *see supra* Section II.C.

discriminatory intent toward a particular community.<sup>177</sup> Assertions that the bill functions only as welfare reform<sup>178</sup> could frustrate the dispositive intent prong of a facial equal protection challenge to a textually neutral law.

Concerns over facial challenges often center on the idea that such challenges allow for judicial activism, and further undermine institutional roles by disrupting the ideal relationship between courts and legislatures.<sup>179</sup> The arguments against facial challenges, especially when the potential for sweeping social change hovers overhead, are strong. If courts adjudicate claims that do not have concrete bases and interrupt debates that are being handled legislatively, the legitimacy of the judicial system is threatened. Also, a more closely monitored and stringently enforced legislative process could slow down the enactment of laws that are constitutionally sound.

These arguments are in tension with the equally valid contention that such challenges are necessary to prevent the harmful, unconstitutional discrimination citizens and legislatures are capable of inflicting.<sup>180</sup> In some ways, the single subject rule resolves this tension. During a single subject analysis, a court holds a legislature to *legislative* procedural restrictions and standards;

---

<sup>177</sup> See *supra* note 105 (stating that the specific intent is to protect a group of vulnerable children and that it is not a “license to discriminate, but rather a license to participate.”).

<sup>178</sup> *Id.*

<sup>179</sup> Christopher Dunn, *A Key Law-Reform Tool in Peril — The End of Facial Challenges?*, NYCLU (Apr. 22, 2008), <https://www.nyclu.org/en/publications/column-key-law-reform-tool-peril-end-facial-challenges-new-york-law-journal>; see also B. Jessie Hill, *A Radically Immodest Judicial Modesty: The End of Facial Challenges to Abortion Regulations and the Future of the Health Exception in the Roberts Era*, 59 CASE W. RES. L. REV. 997, 998 (2009) (“[T]here are signs of newfound judicial restraint in the Roberts Court. One example is the Roberts Court’s expressed preference for narrower, as-applied decisionmaking in constitutional cases, as opposed to striking down statutes on their face.”).

<sup>180</sup> Lisa A. Mазzie, *The Initial Appeal of Chief Justice John Roberts’ Dissent in Obergefell v. Hodges*, MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG (July 8, 2015), <https://law.marquette.edu/facultyblog/2015/07/08/the-initial-appeal-of-chief-justice-john-roberts-dissent-in-obergefell-v-hodges/>.

lawmakers are corralled by the rules of their own institution.<sup>181</sup> As evidenced by the Texas single subject cases,<sup>182</sup> courts are mindful of legislative deference. Even when a court takes a stricter interpretive approach, it generally does so because it has considered long-established principles of the legislative process and concluded that the process has been corrupted.<sup>183</sup> Though the dearth of single subject cases suggests otherwise, procedural restrictions are not merely symbolic. They exist to be actively enforced; as Alexander Hamilton wrote in the *Federalist* papers, “The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.”<sup>184</sup>

The inability to facially challenge a statute’s validity under the First and Fourteenth Amendments is a blow to litigators who rely upon such challenges to enjoin constitutionally suspect religious freedom legislation. Single subject rules give courts a fresher, more flexible lens through which to analyze legislation with individual constitutional rights implications. As evidenced by Texas courts’ unpredictable application of the standard, every case has the potential to produce an enormous leap in a state’s single subject jurisprudence, and courts are less likely to be faithful to a particular line of analysis when rendering a decision.<sup>185</sup> According to scholar Martha J. Dragich, who describes raising single subject challenges as a “low-risk” way of challenging legislation, “each [single subject case], depending as it does on the specific text of a particular enactment, is *sui generis*.”<sup>186</sup> Facial challenges under the single subject rule thus face none of the aforementioned doctrinal barriers of traditional constitutional claims.

---

<sup>181</sup> See *supra* Section I.A.

<sup>182</sup> See *supra* Section I.B.

<sup>183</sup> See *supra* Section I.B, Section II.B.

<sup>184</sup> *The Federalist* No. 73 (A. Hamilton).

<sup>185</sup> See *supra* Section I.B.

<sup>186</sup> 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, 106 (2001).



## PART VI: THE SINGLE SUBJECT RULE'S LITIGATION VALUE

The difference between a single subject challenge and a First or Fourteenth Amendment challenge to a law is that the former focuses on the pre-enactment legislative process<sup>187</sup> and the latter focuses on post-enactment substantive impact.<sup>188</sup> By raising these procedural and substantive challenges together where appropriate, a litigator can bring virtually every dimension of a law to a court's attention.

In *Burns*, the Oklahoma case that struck down an abortion regulation bill, the plaintiff's approach to facially challenging the law was two-pronged; the single subject claim was accompanied by a due process claim under the abortion-specific "undue burden" standard.<sup>189</sup> Every facet of the bill was scrutinized by the court, from its creation<sup>190</sup> to its potential effects.<sup>191</sup> Analyzing the bill under the undue burden standard led the court to determine that one particular provision, an admitting privileges requirement, imposed restrictive regulations that violated a woman's constitutional right to an abortion.<sup>192</sup> The court returned to that same provision during its single subject evaluation.<sup>193</sup> Oklahoma lawmakers' inclusion of the unconstitutionally burdensome provision in the same bill as other varying severe regulations informed the court's finding that the legislation was logrolled and "misleading".<sup>194</sup> Even if the due process challenge had failed, the Oklahoma bill would have still been enjoined for violating the single subject rule, as the restrictions contained in other provisions of the law were scattershot.<sup>195</sup> However, one can take away from *Burns* that, although procedural and substantive inquiries are distinct, they can play into each other in an influential way when

---

<sup>187</sup> See *supra* Section I.A.

<sup>188</sup> See *supra* Section III.B.

<sup>189</sup> The plaintiff succeeded on both claims. *Burns v. Cline*, 387 P.3d 348, 350–51 (Okla. 2016).

<sup>190</sup> *Burns*, 387 P.3d at 350–54.

<sup>191</sup> *Id.* at 353.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 354.

<sup>194</sup> *Id.* at 354–56.

<sup>195</sup> *Id.* at 356.

brought together, especially regarding a court's examination of the single subject rule's rationales.

A litigator who sees a bill as vulnerable under the single subject rule and the First or Fourteenth Amendment may find looking into the procedural and substantive challenges a symbiotic undertaking. Recall that the rationales of the single subject rule are: 1) preventing logrolling; 2) preventing legislators from being misled as to the contents of a law, so they know the extent of what is being deliberated; and 3) preventing the public from being misled, "so that they may have an opportunity of being heard if they so desire."<sup>196</sup> The single subject rule is a legislative process restriction, so the law itself is at issue.<sup>197</sup> But the presence of the rule's rationales in a court's analysis indicates that context is also critical in determining whether a legislature has stepped out of bounds.<sup>198</sup> Further, noting the reach of a provision's scope—who or what it seeks to restrict, and if and how its restrictions are relevant to the law's overarching subject or theme—is important in concluding whether that provision is tangential to the rest of the legislation.<sup>199</sup> The single subject rule is meant to minimize the potential for enacting laws that affect people in unanticipated ways; the full measure of those effects is an examination fit for a substantive constitutional inquiry.<sup>200</sup> Given the complementary nature of single subject and First and Fourteenth Amendment evaluations, a more consistent use of the single subject rule would be largely uncomplicated from a litigation perspective.

## CONCLUSION

Restrictions like the single subject rule exist because there are countless ways to manipulate and obfuscate the legislative process. Seminal eras in the evolution of democratic governance have recognized this problem and approved the rule as an effective

---

<sup>196</sup> *Robinson v. Hill*, 507 S.W.2d 521, 524 (Tex. 1974); *see supra* Section I.B.

<sup>197</sup> This includes the law's title, the language of its provisions, and the way those elements relate to each other. *See supra* Section I.B.

<sup>198</sup> *See supra* Section I.B.

<sup>199</sup> *See supra* Section I.B.

<sup>200</sup> *See supra* Section III.B.

solution.<sup>201</sup> However, despite this awareness, deceptive and reactive lawmaking has continually persisted.<sup>202</sup> If anything, this highlights the significance of the single subject rule; disputes under it have been adjudicated for thousands of years.<sup>203</sup> Lawmakers know that some of the bills they draft are questionable—they simply “believe in staking out their ground and are largely indifferent to the practical consequences.”<sup>204</sup>

The single subject rule’s timelessness is precisely why it should be wielded as part of the effort to solve the puzzle of politically fraught, potentially discriminatory religious freedom bills proposed as reformative measures for troubled welfare systems. These systems are inherently complex,<sup>205</sup> and laws that reach into their territory necessarily implicate individual rights; as exemplified by the Texas law HB 3859, inserting a far-reaching provision into an otherwise seemingly focused piece of legislation can affect a large number of parties and entities.<sup>206</sup> This runs counter to the principles of clarity and honesty that have always been the underlying rationales of the legislative process. The single subject rule should be given new life to combat the deleterious lawmaking that is occurring today.

---

<sup>201</sup> See *supra* Section I.A.

<sup>202</sup> See *supra* Section II.A.

<sup>203</sup> See *supra* Section I.A.

<sup>204</sup> See Mendoza, *supra* note 78.

<sup>205</sup> See *supra* Section II.A.

<sup>206</sup> See *supra* Section III.A.