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Of Disunity and Logrolling: Ohio's One-Subject Rule and the Very Evils It Was Designed to Prevent

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OF DISUNITY AND LOGROLLING: OHIO’S ONE-SUBJECT
RULE AND THE VERY EVILS IT WAS DESIGNED TO
PREVENT

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I. INTRODUCTION

The curse of the omnibus bill is not a recent problem; in 98 B.C., the Romans’ *Lex Caecilia Didia* forbade the proposal of a law containing unrelated provisions.³ Still, the grouping of unrelated legislative proposals—a disease that seems inherent in elected deliberative bodies—persisted and eventually made its way to the United States. The first effort to deal with the problem through American constitutional means came from the State of Illinois in its 1818 Constitution, which limited bills appropriating salaries for members of the legislature and officers of the government to that one specific subject.⁴ In 1844, New Jersey became the first state to actually

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³Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV 389, 389 (1958).

⁴*Id.*

put a generally applicable one-subject provision in its constitution.⁵ Ohio followed barely seven years later.

Section 15(D) of Article II of the Ohio Constitution provides that “[n]o bill shall contain more than one subject.”⁶ Ohio’s one-subject rule came into being as a product of the Convention of 1850-1851 with little debate.⁷ Though the rule would eventually change from regarding “one object” to “one subject,” a change made in committee without comment, the rule itself moved along without controversy.⁸ That’s no mean feat in a record of convention debates that spans more than 1700 pages and addresses all manner of minutiae.⁹ The next and only other time Ohio lawmakers debated the rule was at the Convention of 1873-1874 (though in the 1970s the rule was moved from Article II, Section 16 to Article II, Section 15).

Interpretation of the rule, like the rule itself, went largely unchanged throughout the course of its history. Until late in the Twentieth Century there was no real change in the way the rule was used, when it was used at all. Then, in the span of a decade and a half, the rule exploded onto the scene of Ohio law to become a powerful arrow in the quiver of a supreme court increasingly willing to use it.

This article looks at the one-subject rule’s history and significant jurisprudence with particular note of any rules that can be determined. Next, we address the court’s use of the rule in the controversial case of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.¹⁰ Finally, we look at Amended Substitute Senate Bill No. 281—recently passed by the Ohio General Assembly—to determine if it will pass one-subject muster under recent jurisprudence.

II. THE ONE-SUBJECT RULE

The major intent behind the one-subject rule was to avoid logrolling, which is now most often associated with federal legislation.¹¹ Also, by limiting bills to one subject, legislators thought that a very similar surreptitious legislative technique—

⁵*Id.* at 390.

⁶OHIO CONST. art. II, §15(D): “No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.”

⁷John J. Kulewicz, *The History of the One-Subject Rule of the Ohio Constitution*, 45 CLEV. ST. L. REV. 591, 592 (1997).

⁸*Id.*

⁹*See* 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 69 (1851) [hereinafter REPORT OF DEBATES].

¹⁰86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

¹¹*Log Rolling* (written in this paper, as in many Ohio decisions, as *logrolling*) is defined by Black’s Law Dictionary as a “legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measure into a majority that will adopt them.” For weighty evidence of Congressional logrolling, see most recently the Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 305, 117 Stat. 333, 337-38 (2003), which includes, amongst other things, \$90,000 to the Cowgirl Hall of Fame and \$350,000 to the Rock and Roll Hall of Fame.

the addition of “riders” to otherwise popular or necessary bills to insulate them from veto—would be prevented.¹² Judging by their routine incantation of the word “evil” when speaking of logrolling and riders, this intent seems still to be very much what the Ohio Supreme Court considers the heart of the rule. That a provision written more than 150 years ago adequately addresses the same concerns today as it did when ratified may sound surprising in ordinary life, but it is not with regard to the Ohio Constitution. Despite two later constitutional conventions, the fundamental 1851 constitution remains the law of the state.¹³

A. *First Impressions*

On May 14, 1850, Guernsey County lawyer Robert Leech made the first mention of the one-subject rule; he asked that a provision of the constitution be made to “require that every law enacted by the General Assembly...embrace but one object.”¹⁴ On June 4, 1850, the Committee of the Whole accepted the recommendation of the Committee of the Legislative Department that the provision that “every bill shall contain but one act, embrace but one object,” should be included in the constitution with only slight changes.¹⁵ When the convention was winding up, there was a final move to substitute “one subject” for “one object” and this language was adopted, along with the rest of the proposed constitution, on June 17, 1851.¹⁶

It did not take long until the first judicial interpretation of the rule was issued. A scant five years after the ratification of the new Ohio Constitution, the Ohio Supreme Court gave what would become the definitive ruling on the subject for the next 128 years. In *Pim v. Nicholson*, the Ohio Supreme Court ruled that the one-subject rule was directory only; such a rule—like the number of times a bill was to be read aloud—was to be enforced by the houses of the legislature “and not by judicial interposition.”¹⁷ The court wrote that if the rule was “intended to effect any practical object for the benefit of the people in the examination, construction, or operation of acts passed and published, we are unable to perceive it.”¹⁸ In case there was still any ambiguity in the court’s interpretation of the rule, the justices stated simply how they felt: The one-subject rule “relates to bills and not to acts.”¹⁹

The *Pim* court’s opinion was definitive on the meaning of the one-subject rule for two reasons. First, the opinion was not only explicit but possessed of a unique common sense. “It would be most mischievous in practice, to make validity of every law depend upon the judgment of every judicial tribunal of the state as to whether an act or a bill contained more than one subject, or whether this one subject was clearly

¹²OHIO REV. CODE ANN., OHIO CONST. art. II, § 15(D) (West 1994) (editor’s commentary).

¹³GEORGE W. KNEPPER, OHIO AND ITS PEOPLE 214 (1997).

¹⁴1 REPORT OF DEBATES, *supra* note 9, at 69.

¹⁵*Id.* at 297.

¹⁶Kulewicz, *supra* note 7, at 593.

¹⁷*Pim v. Nicholson*, 6 Ohio St. 176, 179 (1856).

¹⁸*Id.*

¹⁹*Id.* at 180.

expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge.”²⁰ On a level of pure self-interest, the court wanted to avoid the prospect of seeing hundreds of cases like *Pim* every year. The essential good sense of this statement, too, can be garnered from the fact that most subsequent one-subject-rule cases either outright quote or at least allude to it.

Second, the legislature got a chance to weigh in on the court’s opinion at the Ohio Constitutional Convention of 1873-1874. There was more debate about the rule this time around than there had been twenty years earlier, thanks largely to the *Pim* ruling.²¹ Since one of the explicit rulings of the Ohio Supreme Court had been that the rule acts upon bills but not laws, one delegate sought to overturn the ruling by changing the word “bill” to “law” in the one-subject rule.²²

One repudiation of this change echoed the *Pim* decision by predicting that such a revision would lead to constant litigation of whether or not a law contained just one subject.²³ Still another delegate to the convention made a similar claim, and, foreseeing the sentiments of future court rulings, anticipated how the rule might be misused. George Hoadly conjectured that the rule might “give rise to a large crop of litigation” as to whether, for instance, the title actually described the contents fairly—or that a small legislative blunder might annul an otherwise satisfactory piece of legislation.²⁴

The move to amend the constitution to repudiate the *Pim* decision was ultimately defeated by a vote of the Committee of the Whole in December 1873.²⁵ That was the way the entire convention went. There was a general feeling during that nineteenth-century convention that not only was a new constitution not needed but the never-ending public discussion was a waste of time. The one-subject rule, like the constitution itself, survived that convention unchanged.²⁶

B. Revisiting the Rule

The history of the one-subject rule can be divided into two “lives.” The First Life—before the 1970s—is marked by some of the unique occurrences just

²⁰*Id.*

²¹Kulewicz, *supra* note 7, at 595-96.

²²*Id.*

²³*Id.*

²⁴OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 1193 (1873-1874). Hoadly is a rather unknown and underappreciated Ohio fixture. He graduated from Western Reserve University, worked in the law office of Salmon P. Chase (before that Ohio figure became prominent in state and national politics), was elected to the Cincinnati Superior Court, and later declined then-Governor Chase’s offer for a position on the Ohio Supreme Court. (He would later decline again when asked by Governor David Tod.) Instead he became a professor of law at the University of Cincinnati, became active (and disillusioned) with state politics, and was elected Governor in 1884. After leaving office, he had had enough of Ohio politics and moved to New York, where he died in 1902. See 1 OHIO BIOGRAPHICAL DICTIONARY 395-396 (1997).

²⁵Kulewicz, *supra* note 7, at 600.

²⁶OHIO PROGRAM COMMISSION, OHIO’S CONSTITUTION IN THE MAKING 7 (1950).

discussed. The rule was created by the 1850-1851 Constitutional Convention and almost immediately interpreted by the Ohio Supreme Court; that decision was, in turn, reviewed by the 1873-1874 Constitutional Convention and “upheld.”²⁷ So the one-subject rule had the rare honor of meaning exactly what both the judicial and the legislative arms of government thought it meant. For roughly the next hundred years, there was universal agreement on the rule’s interpretation.

The Second Life couldn’t be more different. Marked by strident disagreement couched in terms of harmony, all drawing on the same essential sources for support, the recent history of the rule shows that not only do the judiciary and the legislature have divergent views of the rule, but within the court system itself there is often radical disagreement about what the rule means. What makes this Second Life stranger still is that the one source that all sides feel confident in citing is a law review article written in 1958: Millard Ruud’s *No Law Shall Embrace More Than One Subject*.²⁸

Adding to this strangeness, the Second Life of the one-subject rule began with neither a convention nor a judicial interpretation. It commenced instead with the Ohio Constitutional Revision Commission (OCRC). The commission was created by the 108th General Assembly to study the Ohio Constitution, identify problems with the way the state is governed, and make recommendations for constitutional amendments.²⁹ One of the recommended changes was that the one-subject rule be moved from Article II, Section 16 to Article II, Section 15(D).³⁰ Though none of the substance of the rule was changed, the commission did have occasion to speak to the intent and value of the rule as seen in *Pim*. Having heard testimony as to the rule’s effective impotence—testimony asserting that a rule that is only directory has no place in the constitution—the commission decided to keep it. The commission stated that, notwithstanding the rule’s directory-only nature, it should be kept because such rules “in some instances...provide a minimum guarantee for an orderly and fair legislative process.”³¹

III. MODERN CASES CONSTRUING THE RULE

The first of the major modern cases was decided by the Ohio Supreme Court in June 1984.³² In *Dix v. Celeste*, the court relied heavily on *Pim* when ruling that a bill containing the abolishment of an agency, the transfer of its duties, and appropriations to fund matters related to the transfer, did not violate the rule.³³ Leaning on

²⁷It should be clarified that this occurrence is “unique” in terms of federal constitutional interpretation. Individual states have, on occasion, revisited constitutional language in subsequent conventions in light of their state supreme court’s interpretation of the rule. See, for instance, Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

²⁸Ruud, *supra* note 3.

²⁹OHIO CONSTITUTIONAL REVISION COMMISSION, FINAL REPORT 16 (1977).

³⁰*Id.* at 119, 129.

³¹*Id.* at 125.

³²*Dix v. Celeste*, 11 Ohio St. 3d 141, 464 N.E.2d 153 (1984).

³³*Id.* at 145, 464 N.E.2d at 157.

Professor Ruud, the court found that it was possible for a bill to “establish an agency, set out the regulatory program, and make an appropriation for the agency without violating the one-subject rule.”³⁴ The unanimous decision of the court seemed both to clarify and support *Pim* while perhaps unwittingly leaving it open to expansion at the same time.

For instance, by considering the merits of the act, the court tacitly acknowledged that the one-subject rule was no longer simply an internal legislative rule that applied to bills and not acts. The court recognized the rule as an important provision that helped the court keep the legislature in check.³⁵ This was an important departure from the hands-off attitude of *Pim*, the 1873-1874 Constitutional Convention, and the recent discussion by the OCRC, and it was made with neither any seeming recognition of its magnitude nor any real justification. Perhaps the court failed to recognize the need for explanation because it maintained the deference adopted by the *Pim* court, just through other means. While claiming that it was entirely appropriate for the judicial branch to step in when the legislature committed a gross or fraudulent violation of the rule, the *Dix* court gave a wide berth as to what such a violation might be, going so far as to say that “there are rational and practical reasons for the combination of topics on certain subjects.”³⁶ The court stated explicitly that a large number of topics on one unifying subject could be harmlessly gathered as long as they are for the “purposes of bringing greater order and cohesion to the law or of coordinating an improvement of the law’s subject.”³⁷

After the court's unanimous decision in *Dix*, the General Assembly could be reasonably expected to be on notice for two things. First, the Ohio Supreme Court would be applying the one-subject rule to its acts. Second, the court would allow the legislature latitude when applying that rule to acts with multiple-topic bills that attempted to bring order to a single subject. What that seemed to mean was that after *Dix* little had changed. Quite explicitly, the court claimed to recognize “the necessity of giving the General Assembly great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.”³⁸

A little over a year later, the court showed that it meant what it said—sort of. In *Hoover v. Board of Franklin County Commissioners*, the court overruled a lower court that had subscribed to the pre-*Dix* “directory only” view of the rule.³⁹ Though the Ohio Supreme Court never ruled that the statute in question violated the rule, it wrote: “[I]f plaintiff can prove that the bill actually contains two subjects and those subjects are in fact so distinct that their combination defies rationality, he will be

³⁴*Id.* at 146, 464 N.E.2d at 158 (quoting Ruud, *supra* note 3, at 441).

³⁵*Id.* at 142-45, 464 N.E.2d at 155-57.

³⁶*Id.* at 145, 464 N.E.2d at 157.

³⁷*Id.* at 145, 464 N.E.2d at 157.

³⁸*Id.* at 145, 464 N.E.2d at 157.

³⁹*Hoover v. Board of Franklin County Commissioners*, 19 Ohio St. 3d 1, 6, 482 N.E.2d 575, 580 (1985).

entitled to relief in the form of judgment declaring” the Ohio Revised Code provision invalid.⁴⁰ So, after more than 130 dormant years, the one-subject rule had had the dust blown off of it—though the court had only just begun to re-examine it.

The problem for scholars and later courts was that neither *Dix* nor *Hoover* stated explicitly why it made such a radical change or how it justified such a change given the clear one-subject-rule pedigree. What the court *could* have said, but didn't, was that the rule itself had recently undergone a subtle but significant change that made all the difference in their interpretation. The OCRC had furnished the necessary justification; the court just hadn't used what it was given.

When the *Pim* court issued its decision in 1856, it was interpreting a constitutional provision that looked far different from the one construed in *Dix*. Article II, Section 16 was a large block of text that contained several important legislative provisions—among them the requirement that each bill be read on three distinct days, a long passage concerning the governor's actions in making the bill law, and the one-subject rule itself. The OCRC changed that provision in a way that, while not altering its substance, allowed for a different interpretation. By the time the *Dix* court examined the one-subject rule, it had been removed from the block of text in Section 16 to its own subsection (D) in Section 15. What that meant in practical terms was little; Section 15(D) contained basically the same language as old Section 16. What it should have meant to the *Dix* court was this: a fresh look at a new section of the constitution.

The reason it could be considered a new section of the Ohio Constitution was simple. Before the OCRC made the change, the interpretation of the one-subject rule had been bound up with the interpretation of the whole section. When the *Pim* court decided in 1856 that the one-subject rule was directory, it relied on an earlier Ohio Supreme Court case, *Miller v. State*, for the interpretation of Section 16.⁴¹ The *Pim* court listed all of the rules contained in Section 16 and then reasoned that, since *Miller* had already deemed the section to be directory only, it was a *fait accompli*. But *Miller* only dealt with one part of Section 16—the part about each bill being read on three different occasions—not with the one-subject rule.⁴² So, while *Pim*'s reliance on *Miller* for that proposition might have been sound, when Section 16 was broken apart and the one-subject rule was divorced from the rule maintaining that each bill must be read three different times (amongst other provisions), reliance on that arcane decision was no longer necessary. In fact, it was no longer proper.

So, in 1984, the Ohio Supreme Court had a perfect right and justification to revisit the one-subject rule as it then stood in Section 15(D). The problem is that the court didn't do any such thing. It reinterpreted settled jurisprudence not for the perfectly justified reason that the constitutional text had changed, but for another, unspecified reason.

A. Severability and Exceptions

The next major case—which, having the imprimatur of *Dix*, didn't need a separate constitutional justification—was *Comtech Systems v. Limbach*.⁴³ In this

⁴⁰*Id.* at 6, 482 N.E.2d at 580.

⁴¹*Pim*, 6 Ohio St. at 179 (citing *Miller v. State*, 3 Ohio St. 475 (1854)).

⁴²*Miller*, 3 Ohio St. at 479.

⁴³*Comtech Systems v. Limbach*, 59 Ohio St. 3d 96, 570 N.E.2d 1089 (1991).

case, the court carved out a very explicit and very broad exception to the one-subject rule: appropriations bills. Looking to *Dix* for precedent, the court wrote that “the one-subject rule is not directed at a plurality of topics but at disunity in the subject.”⁴⁴ In this case, the subject was an appropriations bill that dealt “with the operations of the state government.”⁴⁵

In 1991, when both *Comtech* and *State ex rel. Hinkle v. Franklin County Board of Elections*⁴⁶ were decided, the court showed the first real signs of wielding the one-subject rule in a more aggressive fashion. The issue in *Hinkle* was whether a law that dealt primarily with the state judicial system—creating an environmental division of a court, adding a separate common pleas court, changing the disposition of certain fines, etc.—could also entail a liquor law that defined “residence district” for the purpose of exercising a local option privilege.⁴⁷ The state claimed that the common subject was “election matters.”⁴⁸ The court was not convinced.

The court wrote that to claim “that laws relating to the state judiciary and local option have elections in common is akin to saying that securities laws and drug trafficking penalties have sales in common—the connection is merely coincidental.”⁴⁹ But instead of declaring the whole law unconstitutional, the court took the unique step of excising that portion of the act pertaining to liquor control.⁵⁰ Invoking *Dix*, the court asserted that logrolling was the ill that the one-subject rule sought to cure; therefore, it would sever the act’s unrelated portion, presumably because that portion benefitted from the logrolling.⁵¹

Though the one-subject rule nowhere mentions severing sections of legislation, the practice is not without precedent in the realm of constitutional law. The court looked to an earlier, unrelated case, *Livingston v. Clawson*, for guidance.⁵² In *Livingston*, the court recognized a general rule that “if an unconstitutional part of an [a]ct is stricken, and if that which remains is complete in and of itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which rejected, the remaining part must be sustained.”⁵³ Further, the court in *Livingston* employed a three-part test to determine severability. First, determine if the constitutional and unconstitutional parts are capable of separation so that each may stand by itself.⁵⁴ Second, determine if the unconstitutional part is so

⁴⁴*Id.* at 99, 570 N.E.2d at 1093.

⁴⁵*Id.* at 99, 570 N.E.2d at 1093.

⁴⁶*State ex rel. Hinkle v. Franklin County Board of Elections*, 62 Ohio St. 3d 145, 580 N.E.2d 767 (1991).

⁴⁷*Id.* at 148, 580 N.E.2d at 770.

⁴⁸*Id.* at 148, 580 N.E.2d at 770.

⁴⁹*Id.* at 148, 580 N.E.2d at 770.

⁵⁰*Id.* at 149, 580 N.E.2d at 770.

⁵¹*Id.* at 148-49, 580 N.E.2d at 770.

⁵²*Id.* at 149, 580 N.E.2d at 770.

⁵³*Livingston v. Clawson*, 2 Ohio App. 3d 173, 177, 440 N.E.2d 1383, 1388 (1982).

⁵⁴*Id.* at 177, 440 N.E.2d at 1388 (citing *Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28, 33 (1927)).

connected with the general scope of the whole as to make it impossible to give effect to the legislature's apparent intent if the offending part were taken out.⁵⁵ Third, determine whether the insertion of words or terms is necessary to separate the constitutional part from the unconstitutional part, and to give effect to the former only.⁵⁶

This severing of one part of the statute by the *Hinkle* majority did not sit well with at least one justice, who was moved to cite scripture in his dissent.⁵⁷ Justice Douglas "vigorously" dissented from the judgment, stating that he could not "believe that an opinion such as this could ever emanate from this court."⁵⁸ Justice Douglas mentioned two major problems with the opinion. First, he wrote that the court found the statute—the whole statute—unconstitutional, not just the excised portion.⁵⁹ Second, by deciding to cut out a particular portion, despite this finding, they created a precedent for a "race to the court."⁶⁰ Since there was no clear reason why the excised portion was to be considered the "logrolled" portion, Justice Douglas predicted that the first plaintiff to challenge any legislation would succeed in removing whatever portion *they* disliked, without much attention paid to the actual offending portion.⁶¹

So by the end of 1991, there were two more very clear additions to one-subject-rule jurisprudence. First, appropriations bills in and of themselves, despite the fact that they might contain unrelated topics, were bound together by the subject of appropriations and would not be considered unconstitutional. Second, to the extent that a law was considered unconstitutional, it could be remedied simply by excising the offending portion.

The Ohio Supreme Court dealt again with the rule in 1994. In *State ex rel. Ohio AFL-CIO v. Voinovich*, the court ruled on a statute alleged to contain seven different subjects.⁶² The *Voinovich* decision is a mess, and it is so largely because of *Hinkle*. Justice Wright wrote the opinion of the court, and each of the six other justices wrote separately.

The court made two noteworthy claims vis-à-vis the rule. First, the court found that while some provisions of the bill were not on the same subject, they were not unrelated enough to constitute a gross and fraudulent violation.⁶³ The court wrote that although the provisions embraced more than one singular topic they did have a

⁵⁵*Id.* at 177, 440 N.E.2d at 1388.

⁵⁶*Id.* at 177, 440 N.E.2d at 1388.

⁵⁷*Hinkle*, 62 Ohio St. 3d at 151, 580 N.E.2d at 772 (Douglas, J., dissenting). And not just any scripture: *Luke* 23:34, "Father, forgive them; for they know not what they do."

⁵⁸*Id.* at 151, 580 N.E.2d at 772 (Douglas, J., dissenting).

⁵⁹*Id.* at 152-53, 580 N.E.2d at 772-73 (Douglas, J., dissenting).

⁶⁰*Id.* at 153, 580 N.E.2d at 773 (Douglas, J., dissenting).

⁶¹*Id.* at 153, 580 N.E.2d at 773 (Douglas, J., dissenting).

⁶²*State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 228, 631 N.E.2d 582, 586 (1994).

⁶³*Id.* at 229, 631 N.E.2d at 586.

common purpose.⁶⁴ So as long as the topic in a bill had a “clear common relationship”—in this case workers’ compensation—the bill was square with the rule.⁶⁵

Second, when the court found that two provisions of the bill were distinct enough from the other five to fall outside the one-subject rubric, it cited *Hinkle* and found *those distinct provisions* unconstitutional.⁶⁶ Of the two provisions severed, one had already been found by a previous court to be unrelated to workers’ compensation (the main subject of the bill) and the other was found by that court not to touch at all on the subject.⁶⁷

In *Voinovich*, though the “severing” that Justice Douglas claimed to find anathema in *Hinkle* was very much employed, he did not dissent from the majority. Instead, he wrote a separate concurring opinion that sounded remarkably like his earlier dissent—claiming that, though *Hinkle* was still bad law, it must be followed until overruled.⁶⁸ He claimed to reluctantly concur, though there is no indication as to why his reluctant concurrence was not another vehement dissent.

The problem, as elucidated in a concurring and dissenting opinion by Justice William Sweeney, was that though Douglas claimed to be against the ruling in *Hinkle* (that’s twice now), he refused to overrule it.⁶⁹ Fully four justices—William Sweeney, Douglas, Resnick, and Pfeifer—indicate in their opinions the folly of *Hinkle*, but only two were willing to do anything about it. Douglas and Resnick, who each wrote separate concurring opinions and who each joined the other’s opinion, claimed *Hinkle* was bad law but refused to overrule it. Given the language of their opinions (Douglas wrote: “The law is clear and unless and until a majority of this court are prepared to overrule *Hinkle*...,”⁷⁰ while Justice Resnick wrote: “We are constrained to follow *Hinkle* until it is overruled.”⁷¹), it would seem that both justices were in favor of overruling *Hinkle* but, in fact, their actions indicate differently.

Justice Moyer’s concurrence is different still: He believes that one of the two excised portions is sufficiently related to the overall law and should have been left in.⁷² Justice Francis Sweeney took a *Hinkle*-era Douglas approach, condemning the severance of the particular acts while the whole act is deemed unconstitutional. He felt the court didn’t cut out enough of the bill.⁷³ In this way, he seemed to be playing the role that Justice Douglas was cast in.

⁶⁴*Id.* at 228, 631 N.E.2d at 586.

⁶⁵*Id.* at 229, 631 N.E.2d at 586.

⁶⁶*Id.* at 230, 631 N.E.2d at 587.

⁶⁷*Id.* at 230, 631 N.E.2d at 587.

⁶⁸*Id.* at 241-44, 631 N.E.2d at 594-96 (Douglas, J., concurring).

⁶⁹*Id.* at 249, 631 N.E.2d at 600 (William Sweeney, J., concurring and dissenting).

⁷⁰*Id.* at 246, 631 N.E.2d at 598 (Douglas, J., concurring).

⁷¹*Id.* at 247, 631 N.E.2d at 598 (Resnick, J., concurring).

⁷²*Id.* at 248, 631 N.E.2d at 599 (Moyer, C.J., concurring and dissenting).

⁷³*Id.* at 250-51, 631 N.E.2d at 601 (Francis Sweeney, J., dissenting and concurring).

What is also strange is that, though the court quoted liberally from the Millard Ruud article,⁷⁴ it failed to fully take it into account. This is especially true of Justice Douglas, of course, who had stuck to his Ruud guns in the *Hinkle* decision. Ruud made it quite clear that if the evil of logrolling was to be prevented—a result that everyone seemed to agree on—then severing one portion of an act is not acceptable:

Where a portion of an act is unconstitutional, the doctrine of severability saves the constitutional portions and gives them effect, where to do so will carry out the legislative purpose. Unconstitutionality generally flows from lack of legislative power. The one-subject rule is not concerned with substantive legislative power. It is aimed at log-rolling. It is assumed, without inquiring into the particular facts, that the unrelated subjects were combined in one bill in order to convert several minorities into a majority. The one-subject rule declares that this perversion of majority rule will not be tolerated. The entire act is suspect and so it must all fall.⁷⁵

So in *Voinovich*, four members of the court and the scholar the court cites in its rationale all disagree with the efficacy of the majority decision. If one-subject-rule jurisprudence had been without solid mooring before the decision, it is completely without tether afterwards.

B. Worse for the Wear

By 1997 the court again took an almost *Dixian* approach to the one-subject rule. In *Beagle v. Walden*, the court cited *Dix*—but not *Hinkle*—in finding that a bill that “[n]o doubt...addresses multiple topics” was tied together by a common thread and therefore not unconstitutional.⁷⁶ Though the addition of a provision to the law was added at the eleventh hour after it had been passed by the Senate and considered by the House several times—a move that a concurring justice called “distasteful” and “highly unusual” but not “unconstitutional”—and was clearly logrolling, they found that each of the separate parts worked toward the goal of eliminating the dangers posed by uninsured motorists.⁷⁷

After the *Beagle* decision, the Ohio Supreme Court’s use of the one-subject rule had become almost surreal. Besides the semi-controversial act of severance (Justice Douglas, the original opponent, had clearly warmed to the idea) and the exception for appropriations bills, the one-subject rule now even embraced clearly logrolled sections as long as there was a “common thread” that tied the topics together. In *Beagle*, that thread was a “legislative scheme to reduce the dangers posed by uninsured and underinsured motorists.”⁷⁸

⁷⁴*Id.* at 229-30, 631 N.E.2d at 587 (majority opinion)(quoting Ruud, *supra* note 3, at 441); *id.* at 244, 631 N.E.2d at 596 (Douglas, J., concurring) (quoting Ruud, *supra* note 3, at 441); *id.* at 254, 631 N.E.2d at 603 (Francis Sweeney, J., dissenting and concurring) (quoting Ruud, *supra* note 3, at 413).

⁷⁵Ruud, *supra* note 3, at 399.

⁷⁶*Beagle v. Walden*, 78 Ohio St. 3d 59, 62, 676 N.E.2d 506, 507 (1997).

⁷⁷*Id.* at 62, 676 N.E.2d at 507 (majority opinion); *id.* at 65-66, 676 N.E.2d at 510 (Pfeifer, J., concurring in part).

⁷⁸*Id.* at 62, 676 N.E.2d at 507.

The rule was no longer the nebulous concept that *Pim* stated wasn't even really the province of the court; by 1997, the rule was an active and useful tool the court felt it could use to shape legislation. And shape legislation is exactly what it did. It had been a little more than ten years since the court decided *Dix* without a dissent. That decision—which had been clear cut, easy to follow, and only slightly more intrusive on the legislature's power than *Pim* — was but a memory. The court relied on it only to the extent that the court wanted to exclude appropriations from the one-subject rule. There was no longer any consensus as to what the rule meant, whether portions of an act could rightly be severed, and, if so, the technique used to decide which parts to sever. Then came 1999.

C. *Simmons-Harris v. Goff*

In the mid-1990s the Ohio General Assembly, like many state legislatures, began to consider a school voucher program. In Amended Substitute House Bill No. 117, a law the court would later deem an appropriations bill, the legislature included a provision for a voucher "Pilot Program" in Cleveland. Among the challenges to the voucher program were allegations that it violated the Establishment Clause of the United States Constitution and the Uniformity Clause of the Ohio Constitution.⁷⁹ Though the Ohio Supreme Court found that neither of those charges was valid, it did rule that the bill contained more than one subject.⁸⁰

In *Simmons-Harris* the court again took a novel approach, bringing in several of its past one-subject-rule techniques to remedy the situation. Though the bill was admittedly for appropriations—a noted exception to the rule—the court found that the section specifically concerning the voucher program was a rider attached to an otherwise popular bill and cut that piece out.⁸¹ The action the court took was, once again, unprecedented. Since the court had already exempted appropriations bills, it should have seemed strange to the legislature that this appropriations bill was an exception to that exception. Stranger still was the court's rationale that there was blatant disunity between the voucher part of the bill and the rest, since disunity is *understood* in appropriations bills—that is why they are an exception. Strangest of all was that the court claimed to have chosen to except the voucher portion from the exception for appropriations bills because that portion was a rider. Not only did the court offer no evidence for this proposition but earlier jurisprudence in *Beagle* had negated "riderism" as a disqualifying factor.

But the nonsensical nature of the *Simmons-Harris* decision, it turns out, was just a warm up. Three months after that decision was handed down, another one-subject ruling followed—this one with even less cohesion and less reliance on what could only be seen as increasingly worthless one-subject rules: *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*.⁸²

⁷⁹*Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

⁸⁰*Id.* at 17, 711 N.E.2d at 216.

⁸¹*Id.* at 15-16, 711 N.E.2d at 215.

⁸²86 Ohio St. 3d 451, 715 N.E.2d 1062 (1999).

IV. THE RULE'S CURRENT STATUS AND ITS APPLICATION TO
AMENDED SUBSTITUTE SENATE BILL NO. 281

The Supreme Court's varied rulings in *Pim*, *Dix*, and *Voinovich* were all recited but none followed in *Sheward*. In a decision that was as much a political shake-up as a judicial pronouncement, Justice Alice Robie Resnick wrote that Amended Substitute House Bill No. 350 (H.B. 350) violated the one-subject rule. Specifically, the court found that the bill, which was designed to bring about comprehensive tort reform, addressed "at least 19 diverse topics" that were "so blatantly unrelated that, if allowed to stand as a single subject, this court would be forever left with no basis upon which to invalidate any bill, no matter how flawed."⁸³

Although Justice Resnick's disapproval of Ohio's tort-reform package and its legislature is evident from her opinion, the basis of her disapproval is less evident, at least as regards the one-subject rule. At the beginning of her opinion, Justice Resnick quotes Attorney General Betty Montgomery's statement that "each and every provision contained in H.B. 350 deals with the law of torts."⁸⁴ If the Ohio Academy of Trial Lawyers or the justices themselves disagreed with the attorney general's statement, it is not evident from the opinion. Nonetheless, the court disregarded "the law of torts" as a subject on the basis of its breadth. The court's true jeremiad was not that the bill's provisions were unrelated to tort reform, but rather that the bill encompassed too many topics. In fact, the decision noted that "[t]he bill affects some eighteen different titles, thirty-eight different chapters, and over one hundred different sections of the Revised Code, as well as procedural and evidentiary rules, and hitherto uncodified common law."⁸⁵ The court concluded that the legislature tailored the subject "tort reform" to encompass this wide array of provisions.⁸⁶

After setting aside H.B. 350's stated subject as overly broad, the court analyzed the cohesiveness of the bill's varied amendments, additions, and deletions. While the *Sheward* court enunciated the single-subject standards set forth by prior courts, the test that the court actually applied was more demanding and more loosely constructed than any of its predecessors. The contrast between *Sheward* and earlier rulings can best be understood in the form of a diagram. The rule of *Dix* and *Voinovich* was that a multiplicity of topics is permissible so long as each topic is related to a single central subject.⁸⁷ This can be best visualized as a pinwheel with

⁸³*Id.* at 494, 498, 715 N.E.2d at 1097, 1100.

⁸⁴*Id.* at 494, 715 N.E.2d at 1097.

⁸⁵*Id.* at 497, 715 N.E.2d at 1099.

⁸⁶The majority opinion refuted the legislature's finding that the bill complied with *Dix* and *Voinovich*. *Id.* at 494, 715 N.E.2d at 1097-98. Justice Resnick wrote, "[In] pronouncing its compliance with the one-subject rule, the General Assembly has managed to concoct a subject broad enough to encompass the multifarious provisions of [H.B. 350]." *Id.* at 498, 715 N.E.2d at 1100. Public debate belied the court's assertion. *See, e.g., There They Go Again*, COLUMBUS DISPATCH, Dec. 4, 1997, at 6A; *Courting Abuse Without Tort Reform*, PLAIN DEALER, Feb. 4, 1997, at 8B; *Governor Signs Tort Overhaul*, COLUMBUS DISPATCH, Oct. 29, 1996, at 1C; *Lobbyists' Farewell to Tort Trough*, PLAIN DEALER, Sept. 26, 1996, at 11B; *Rewrite Ahead for Tort Reform Bill*, COLUMBUS DISPATCH, May 13, 1996, at 2C.

⁸⁷*See supra* notes 36-37 & 63-65 and accompanying text.

individual topics drawn as leaves connected to a central point, the subject. (See Figure 1.) In contrast, *Sheward* requires a relationship not only between the topics and the subject, but also between the topics themselves. This reasoning looks less like a pinwheel and more like a game of cat's cradle or a Stephen Hawking diagram.⁸⁸ (See Figure 2.)

Figure 1: The Pre-*Sheward* Test

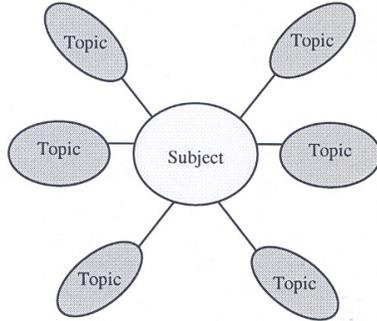
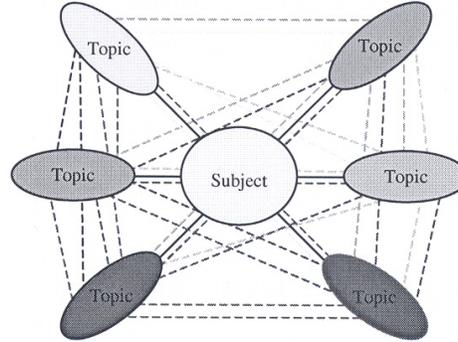


Figure 2: The *Sheward* Test



Support for a diagrammatic interpretation of *Sheward* can be drawn from various aspects of the opinion. Because the court chose to disregard the legislature's stated subject, it could not compare individual provisions to that subject. Instead, the court was forced to compare the bill's individual provisions to one another. Justice Resnick, discussing the various aspects of the bill, wrote, "While an examination of any two provisions contained in [H.B. 350], carefully selected and compared in isolation, could support a finding that a common purpose or relationship exists among the sections, representing a potential plurality but not disunity of topics, an examination of the bill in its entirety belies such a conclusion."⁸⁹ In other words, the majority required the topics of H.B. 350 to bear a greater relationship to one another than that of simple leaves on a tort-reform pinwheel. This idea is borne out by Justice Resnick's statement that "[H.B. 350] attempts to combine the wearing of seat belts with employment discrimination claims, . . . actions with a roller skater with supporting affidavits in a medical claim, and so on."⁹⁰ Under the reasoning of *Dix* and *Voinovich*, these combinations would not be problematic so long as each topic related to the bill's stated subject. *Sheward*, however, holds otherwise.

Indeed, the *Sheward* court's basic objection to H.B. 350—that some of its topics are unrelated to some of its other topics—stems not from scattershot legislation as the court suggests, but instead from the sheer size of the bill. In its previous one-subject-rule decisions, the court was usually addressing bills of lesser magnitude—so it is little wonder that the topics they contained related both to each other and to a single, central subject. One recent case stands out from that crowd. In *Simmons-*

⁸⁸For a headier discussion of Dr. Hawking's diagrams, see Fig. 1.15: Warping of Space Time Around a Massive Star Burning Nuclear Fuel and the accompanying text, STEPHEN HAWKING, *THE UNIVERSE IN A NUTSHELL* (2001).

⁸⁹*Sheward*, 86 Ohio St. 3d at 497, 715 N.E.2d at 1099 (internal quotations omitted).

⁹⁰*Id.* at 498, 715 N.E.2d at 1100.

Harris, as discussed above, the court considered a single-subject challenge to an appropriations bill.⁹¹ Decided only three months before *Sheward*, the *Simmons-Harris* test is years apart in its execution.⁹² Undaunted by the size of the measure before it and seemingly unchained from the *Com-Tech* case, the *Simmons-Harris* court turned to the tests described by *Dix* and *Voinovich*. The court found that Ohio's school voucher program, which bore no relation to appropriations, simply didn't fit the bill. Justice Pfeifer, writing for the majority, observed that "[a]ppropriations bills, of necessity, encompass many different items, all bound by the thread of appropriations."⁹³ In other words, the opinion draws a pinwheel for its readers with "appropriations" at its center and individual allocation measures as its leaves. The school voucher program, which was not an appropriations measure, was severed. Why, then, did the court require something more in a case that it heard just one day later?

Political acrimony may be the answer. In the ten-year run-up to the *Sheward* decision, the Ohio Supreme Court carved out substantial portions of the legislature's previous tort-reform bills on constitutional grounds.⁹⁴ The result has been likened to "swiss cheese."⁹⁵ Like H.B. 350, earlier tort-reform measures shortened statutes of limitations and limited the amount of damages a plaintiff could receive.⁹⁶ The court viewed the re-introduction of those aims by the legislature in H.B. 350 as an affront. Justice Resnick wrote:

[H.B. 350] changes the complexion of the reform debate into a challenge to the judiciary as a coordinate branch of government. It marks the first time in modern history that the General Assembly has openly challenged this court's authority to prescribe rules governing the courts of Ohio and to render definitive interpretations of the Ohio Constitution binding on other branches.⁹⁷

These strong words demonstrate the court's considerable ire over the bill—and, indeed, the one-subject rule was but one of several grounds used by the court to strike the bill from Ohio's law books. It was, however, the most important.

Prior jurisprudence would have allowed the court to declare portions of H.B. 350 unconstitutional.⁹⁸ Instead, the court relied on the one-subject rule to declare H.B.

⁹¹*Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

⁹²The court heard *Simmons-Harris* on September 28, 1998 and decided it on May 27, 1999. The court heard the *Sheward* case one day later, on September 29, 1998 and decided it on August 16, 1999.

⁹³*Simmons-Harris*, 86 Ohio St. 3d at 16, 711 N.E.2d at 215.

⁹⁴See Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 525 (2002).

⁹⁵Thomas Suddes, *Justices Make Another End-Run*, PLAIN DEALER, April 30, 1997, at 11B.

⁹⁶See *id.*

⁹⁷*Sheward*, 86 Ohio St. 3d at 459, 715 N.E.2d at 1073.

⁹⁸See *id.*, syllabus ¶ 2.

350 “unconstitutional *in toto*.”⁹⁹ This forced the court to once again consider *Hinkle* and the issue of severability. In a surprising decision, the court struck the entire bill but again expressly refused to overrule *Hinkle*.¹⁰⁰

In its decision not to sever portions of H.B. 350, the majority relied on two arguments. First, Justice Resnick wrote:

[H.B. 350] is designed to comprehensively reform the civil justice system, and any attempt on our part to carve out a primary subject by identifying and assembling what we believe to be key or core provisions of the bill would constitute a legislative exercise wholly beyond the province of this court.¹⁰¹

In other words, the provisions of the bill, while potentially unrelated to one another, were all related to tort reform, so the choice to keep some but not others would be a random one. This argument seems to tacitly admit that H.B. 350 had a single subject.

Second, the court wrote that comments to the press made by Representative Pat Tiberi and other key supporters of the bill indicated that “passage of the bill was so dependent upon its unconstitutional parts . . . that any possible identifiable core would not be worthy of salvation.”¹⁰² The court’s second argument against severability is particularly vexing. Looking past the plain language of a bill to the legislative process used to create it abrogates the one-subject rule entirely. The rule was designed as a proxy for the very examination that the court relied on in its severability argument.¹⁰³ The court in *Beagle v. Walden*, which openly acknowledged the eleventh-hour addition of a rider, made it clear that the one-subject rule is limited to its plain language.¹⁰⁴ The *Beagle* court held that because the subject of the bill and the subject of the rider were the same, the bill was not unconstitutional.¹⁰⁵ In other words, the court did not look to the legislative process for answers, but limited itself to the text of the bill. The *Sheward* court did not exercise similar restraint.

The court’s reliance on Representative Tiberi’s comments opened the door for future courts to put the legislative process, and not just its result, on trial. This is another essential change in one-subject-rule analysis. Under *Sheward*, not only do the individual topics of a bill have to bear a minimal relation to one another, but

⁹⁹*Id.*, syllabus ¶ 3.

¹⁰⁰*See id.* at 500-01, 715 N.E.2d at 1101-02.

¹⁰¹*Id.* at 500, 715 N.E.2d at 1102.

¹⁰²*Id.* at 500-01, 715 N.E.2d at 1102.

¹⁰³*See Sheward*, 86 Ohio St. 3d at 495, 715 N.E.2d at 1098. The court cites Professor Ruud for the proposition that the one-subject rule targets “unnatural combinations of provisions in acts” as a means of identifying logrolling. *Id.* at 496, 715 N.E.2d at 1098 (citing Ruud, *supra* note 3, at 447). The court also expresses its reluctance “to interfere or become entangled with the legislative process.” *Id.* at 496, 715 N.E.2d at 1099. The one-subject rule, then, serves as a proxy.

¹⁰⁴*See supra* notes 76-77 and accompanying text.

¹⁰⁵*See Beagle*, 78 Ohio St. 3d at 62, 676 N.E.2d at 507-08.

courts may also look to the legislative process (or informal comments to the press describing that process) to choose between severing unfavorable provisions under *Hinkle* or determining that the “identifiable core” of a bill is not “worthy of salvation” under *Sheward*. If the drafters of the one-subject rule had intended to put the actions of legislators under a microscope, they would have forbidden logrolling. Instead they forbade bills containing more than one subject, a point that the *Sheward* court both relied upon and ignored completely when crafting its decision.¹⁰⁶

Since *Sheward*, the Ohio Supreme Court, with the exception of Justice Douglas, has remarked little on the one-subject rule but has borne intense criticism for the tenor and contents of the majority opinion.¹⁰⁷ Indeed, the immediate outcry was great enough to spur Justice Douglas to use his concurrence in an unrelated case to respond to it. “Notwithstanding incessant pounding,” he wrote, “the justices making up the majority in *Sheward* have remained silent, letting the opinion speak for itself.”¹⁰⁸ Indeed, the justices have remained remarkably silent, not even citing *Sheward* in *Holeton v. Crouse Cartage Company*,¹⁰⁹ the lone one-subject ruling handed down by the court since *Sheward*'s release.

In *Holeton*, the supreme court reviewed several constitutional challenges to a workers' compensation bill.¹¹⁰ Amended Substitute House Bill No. 278 enacted two new workers' compensation sections of the Ohio Revised Code, amended four others, and provided appropriations for the relevant bureau.¹¹¹ The court simply wrote that the bill “comes nowhere close to violating the one-subject rule. . . . The bill contains one subject, and only one subject—workers' compensation. There is no disunity of subject matter.”¹¹² Because *Holeton* provided no analysis and cited no caselaw, *Sheward*, as it was decided in 1999, remains the definitive authority in one-subject-rule jurisprudence. The remainder of this paper will examine the implications of that decision for the Ohio General Assembly, Ohio's lower courts, and, in particular, for Amended Substitute Senate Bill No. 281, Ohio's latest and limited attempt at tort reform.

A. Post-*Sheward* Decisions

A brief look at Ohio Court of Appeals cases following *Sheward* shows substantial confusion on the part of lower courts and litigants. For instance, one of

¹⁰⁶See *Sheward*, 86 Ohio St. 3d at 495, 715 N.E.2d at 1098 (citing 1 REPORT OF DEBATES, *supra* note 9, at 351).

¹⁰⁷See Entin, *supra* note 94; Richard H. Finan & April M. Williams, *Government is a Three-Legged Stool*, 32 U. TOL. L. REV. 517 (2001); Victor E. Camden & Leah L. Schwartz, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907 (2001).

¹⁰⁸*Burger v. City of Cleveland Heights*, 87 Ohio St. 3d 188, 189, 718 N.E.2d 912, 912 (1999) (Douglas, J., concurring).

¹⁰⁹92 Ohio St. 3d 115, 748 N.E.2d 1111 (2001).

¹¹⁰*Id.* at 116, 748 N.E.2d at 1114.

¹¹¹*Id.* at 116-17, 748 N.E.2d at 1114-15.

¹¹²*Id.* at 133, 748 N.E.2d at 1128.

the parties in *Campo v. Daniel* in the Eighth Appellate District asked the court to overturn *Beagle v. Walden* in light of *Sheward* and to invalidate the entire act considered by the *Beagle* court.¹¹³ Setting deference and jurisdictional questions aside, the request highlights *Sheward's* murky contribution to the severability debate, which led at least one litigant to believe that violation of the one-subject rule requires invalidation of the entire bill.¹¹⁴

A second ambiguity introduced by *Sheward* came to matter in *City of Dublin v. State of Ohio*.¹¹⁵ The underlying case involved a challenge to the biennial budget bill, H.B. 283, on constitutional grounds.¹¹⁶ In addition to appropriations, the bill contained a limitation on municipalities' authority to recover costs imposed on them by utilities and telecommunications uses of public rights-of-way.¹¹⁷ The cities of Dublin and Upper Arlington based their challenge on the one-subject rule, the takings clause, and municipal home rule.¹¹⁸ To aid the prosecution of their position, the cities filed a motion to compel discovery of several aspects of the legislative process.¹¹⁹ Specifically, the cities sought information about staff meetings with utilities representatives, names and work product of individuals who had researched the constitutional issues raised by the bill, the source or basis of the disputed enactments, legislative amendments to the bill, and the production of all documents relating to relevant communications between members of the General Assembly and third parties.¹²⁰ The State invoked the free speech and debate clause without success.¹²¹ The court confined its decision for plaintiffs to a brief discussion of the legislative privilege, and it upheld the lower court's order compelling discovery.¹²² Nowhere did the majority opinion question whether the evidence sought by the cities was relevant to the plaintiffs' constitutional claims.

Although the *Dublin* majority does not cite *Sheward* (or even mention the one-subject rule), its decision implies that plaintiffs' evidence of heavy lobbying or a legislator's last-minute handshake would be relevant to a one-subject-rule decision. While it is true that such evidence tends to show logrolling, the Ohio Constitution does not forbid logrolling. As a proxy, it forbids bills with more than one subject.¹²³ *Sheward's* introduction of legislative considerations into the severability analysis muddied the waters considerably and perhaps played a role in the *Dublin* court

¹¹³*Campo v. Daniel*, No. 81419, 2002 WL 31883370, at *6 (Ohio Ct. App. Dec. 26, 2002).

¹¹⁴*See id.* at *6.

¹¹⁵138 Ohio App. 3d 753, 742 N.E.2d 232 (2000).

¹¹⁶*Id.* at 756, 742 N.E.2d at 234.

¹¹⁷*Id.* at 756, 742 N.E.2d at 234.

¹¹⁸*Id.* at 760-61, 742 N.E.2d at 237-38 (Lazarus, J., concurring).

¹¹⁹*Id.* at 756-57, 742 N.E.2d at 234-35.

¹²⁰*Id.* at 756, 742 N.E.2d at 234.

¹²¹*Id.* at 756-57, 742 N.E.2d at 235.

¹²²*Id.* at 758-59, 742 N.E.2d at 236-37.

¹²³*See supra* note 24 and accompanying text.

ruling.¹²⁴ Judge Lazarus highlighted the court's lack of analysis on relevance in his concurrence, calling the majority's decision "fundamentally erroneous."¹²⁵ He wrote separately to clarify that the question of relevance, although silently decided by the court, was not before it.¹²⁶ In spite of that assertion, Judge Lazarus went on to say: "According to the court, obtaining information regarding what arguments were made to state legislators or their staff might be relevant in determining the purposes of the legislation, the statewide interest that might be advanced by the legislation, and the possible reasons for including the legislation in the biennial budget act."¹²⁷ If applied in future decisions, the court's reasoning would be a significant departure from past one-subject-rule jurisprudence.

Despite the *Dublin* appellate court's questionable opinion, the trial court's decision on the merits of the *Dublin* case was straightforward and ignored the legislative process entirely.¹²⁸ Judge Hogan, writing for the common pleas court, quoted liberally from the supreme court's various one-subject rulings.¹²⁹ In the end, he relied almost exclusively on *Simmons-Harris* because of its analogous facts.¹³⁰ Like the *Simmons-Harris* court, Judge Hogan noted that there were numerous riders on the budget bill, but he addressed only the challenged provision, declaring it unconstitutional.¹³¹ Although the State appealed the *Dublin* decision, it later voluntarily dismissed that appeal.

B. Applying the Rule

After weathering the *Sheward* and *Dublin* decisions, the legislature returned to the drawing board with a much smaller canvas to revive a modest piece of H.B. 350. Amended Substitute Senate Bill No. 281 (S.B. 281)¹³² affects six chapters of the Ohio Revised Code by amending nineteen sections, repealing two, and enacting six more. While the act is smaller and less diverse than the legislation in *Sheward*, the subject matter is just as contentious. The act reworks the statutes of limitations and damage caps applicable to medical malpractice claims largely in the same manner as H.B. 350. Consequently, the legislature anticipated constitutional challenges to S.B. 281 and made several official findings regarding the act's validity.

¹²⁴Indeed, there is no question as to whether the case was briefed by the parties. Judge Lazarus expressly cites it in his concurrence, although for the opposite proposition. *Dublin*, 138 Ohio App. 3d at 760-61, 742 N.E.2d at 237-38 (Lazarus, J., concurring).

¹²⁵*Id.* at 761, 742 N.E.2d at 238 (Lazarus, J., concurring).

¹²⁶*Id.* at 760, 742 N.E.2d at 237 (Lazarus, J., concurring).

¹²⁷*Id.* at 761, 742 N.E.2d at 238 (Lazarus, J., concurring).

¹²⁸*See* *City of Dublin v. State of Ohio*, 118 Ohio Misc. 2d 18, 769 N.E.2d 436 (Franklin County C.P. 2002).

¹²⁹*Id.* at 28-39, 769 N.E.2d at 444-53.

¹³⁰*Id.* at 32-39, 769 N.E.2d at 447-53.

¹³¹*Id.* at 35-39, 769 N.E.2d at 449-53.

¹³²Act of Dec. 10, 2002 (effective Apr. 11, 2003), S.B. 281, 2002 Ohio Legis. Serv. at L-3250 (Banks-Baldwin).

The legislature began by stating that medical malpractice claims represent “an increasing danger to the availability and quality of health care in Ohio.”¹³³ It noted that while the number of claims has remained constant, the average award to plaintiffs has “risen dramatically,” giving it a rational and legitimate state interest in the legislation.¹³⁴ Next, the legislature addressed the constitutionality of damage caps.¹³⁵ It wrote that the Third Circuit and the Alaska Supreme Court have held that damage caps like those in S.B. 281 do not violate a plaintiff’s right to a jury trial.¹³⁶ This is because the cap applies only after the jury makes its award.¹³⁷ In addition, the legislature looked to the Delaware Supreme Court for a favorable ruling on the statute of repose.¹³⁸ Finally, the legislature wrote that S.B. 281 contradicts *Sheward’s* holding on the common law collateral source rule and asked the court to reconsider its position.¹³⁹ Notably, the legislature made no finding on the act’s compliance with the one-subject rule, perhaps because there is no need for one.

Although it may have disregarded *Sheward’s* other holdings, the 124th General Assembly took note of the court’s decision on the one-subject rule. S.B. 281 focuses entirely on issues surrounding medical claims. Its substantive provisions are a blueprint for reducing the number and dollar amount of malpractice claims in the state.¹⁴⁰ The act provides for the following:

- Annual reporting by every clerk of court of common pleas to the Department of Insurance providing information about medical claims filed and prosecuted in that court;¹⁴¹
- A bar on most medical claims brought more than four years past the date on which the cause of action accrued;¹⁴²
- Definitions of terms related to medical claims;¹⁴³

¹³³*See id.* § 3(A)(1), 2002 Ohio Legis. Serv. at L-3280.

¹³⁴*See id.* §§ 3(A)(2)-(A)(3), 2002 Ohio Legis. Serv. at L-3280.

¹³⁵*See id.* § 3(A)(4), 2002 Ohio Legis. Serv. at L-3281.

¹³⁶*See id.* § 3(A)(4)(c), 2002 Ohio Legis. Serv. at L-3281.

¹³⁷*See id.*

¹³⁸*See id.* § 3(A)(6)(f), 2002 Ohio Legis. Serv. at L-3282.

¹³⁹*See id.* §§ 3(B)(5)(a), 3(C)(1), 2002 Ohio Legis. Serv. at L-3282.

¹⁴⁰Not surprisingly, S.B. 281 also makes a concession to the group most likely to oppose it—the Ohio Academy of Trial Lawyers. One provision states that where an attorney’s contingency fee exceeds the capped amount of compensatory damages, the attorney is required to submit a report for approval by the probate court. *See id.* § 1, 2002 Ohio Legis. Serv. at L-3266 (codified at OHIO REV. CODE § 2323.43(F)). At first blush, the plain language of the provision seems to act as a limitation on attorneys’ fees. It is not. The legislature refrained from flatly limiting attorneys’ fees to the capped amount of non-economic compensatory damages. In fact, the act does not even prohibit attorneys from basing their contingency fees on the jury award prior to the application of the damage cap. As a result, the act works little, if any, change on the economic position of medical malpractice litigators.

¹⁴¹*See id.* § 1, 2002 Ohio Legis. Serv. at L-3253 (codified at OHIO REV. CODE § 2303.23).

¹⁴²*See id.* § 1, 2002 Ohio Legis. Serv. at L-3255 (codified at OHIO REV. CODE § 2305.113(C)).

- Legislative override of the collateral source rule in medical claims, allowing defendants to introduce evidence as to other amounts payable to the plaintiff on account of his or her injury;¹⁴⁴
- Creation of a new show-cause motion in medical claims proceedings requiring the court to determine whether the plaintiff has a good-faith basis for his or her claim;¹⁴⁵
- Limitations on compensatory damages for noneconomic loss in medical claims;¹⁴⁶
- Requirement for juries in medical claims cases to answer interrogatories allocating between present and future damages where damages exceed \$50,000;¹⁴⁷
- Where the award for a medical claim exceeds \$50,000, a requirement for a hearing upon the motion of either party to determine whether the plaintiff will receive periodic payments rather than a lump sum;¹⁴⁸
- Enforceable contracts for binding arbitration entered into by doctors and patients prior to diagnosis or treatment;¹⁴⁹
- Creation of an Ohio Medical Malpractice Commission to examine the effect of the bill;¹⁵⁰
- Commission of a study by the Superintendent of Insurance to examine the feasibility of a "Patient Malpractice Fund" to cover medical malpractice claims.¹⁵¹

At first glance, S.B. 281 seems to encompass a much broader range of subjects than those named above. For instance, the act amends sections of the Ohio Revised Code on care for newborn infants, the procedure for presenting a claim against a decedent's estate, and grounds for asserting the privilege in court.¹⁵² Each of these sections is reprinted in the act, but the only changes are newly renumbered definitions for medical, dental, optometric, and chiropractic claims.¹⁵³ Because the

¹⁴³*See id.* § 1, 2002 Ohio Legis. Serv. at L-3256 (codified at OHIO REV. CODE § 2305.113(E)).

¹⁴⁴*See id.* § 1, 2002 Ohio Legis. Serv. at L-3264 (codified at OHIO REV. CODE § 2323.41).

¹⁴⁵*See id.* § 1, 2002 Ohio Legis. Serv. at L-3265 (codified at OHIO REV. CODE § 2323.42).

¹⁴⁶*See id.* § 1, 2002 Ohio Legis. Serv. at L-3265 (codified at OHIO REV. CODE § 2323.43).

¹⁴⁷*See id.* § 1, 2002 Ohio Legis. Serv. at L-3268 (codified at OHIO REV. CODE § 2323.55(B)).

¹⁴⁸*See id.* § 1, 2002 Ohio Legis. Serv. at L-3268 (codified at OHIO REV. CODE § 2323.55(D)).

¹⁴⁹*See id.* § 1, 2002 Ohio Legis. Serv. at L-3273 (codified at OHIO REV. CODE § 2711.22).

¹⁵⁰*See id.* § 4, 2002 Ohio Legis. Serv. at L-3282.

¹⁵¹*See id.* § 5, 2002 Ohio Legis. Serv. at L-3283.

¹⁵²*See id.* § 1, 2002 Ohio Legis. Serv. at L-3251 (codified at OHIO REV. CODE § 1751.67) (infant care); 2002 Ohio Legis. Serv. at L-3252 (codified at OHIO REV. CODE § 2117.06) (claims against estate); 2002 Ohio Legis. Serv. at L-3260 (codified at OHIO REV. CODE § 2317.02) (privileged communications).

¹⁵³*See id.* § 1, 2002 Ohio Legis. Serv. at L-3256 (codified at OHIO REV. CODE § 2305.113(E)).

legislature worked no substantive change on the miscellaneous sections named above, they should be excluded from a reviewing court's single-subject analysis.

Once miscellaneous provisions are removed from the calculus, the question becomes which test to employ. Should a reviewing court focus on the pinwheel test used by *Dix*, *Voinovich*, and *Simmons-Harris*, or should it choose the more complicated test used by *Sheward*? Jurisprudence requires that the most recent test take precedence;¹⁵⁴ therefore, a reviewing court must require a common thread running between the subject of the bill and its topics as well as between the topics themselves.

S.B. 281 clearly meets the first prong of the *Sheward* test. Each portion of the act is related to the relatively narrow topic of medical malpractice claims. The act focuses only on a fraction of the material covered by H.B. 350 and is by no means an attempt to "revamp all Ohio law in two strokes of the legislative pen."¹⁵⁵ Each of the eleven substantive provisions relates to medical claims.

The act's success under the second prong of the *Sheward* test is less clear but seems just as likely. The *Sheward* decision leaves unresolved the required level of relatedness between a bill's topics, mainly because the court did not acknowledge the nature of the test that it applied. In spite of this ambiguity, it is a near certainty that S.B. 281 meets *Sheward's* second and more nebulous requirement. The act contains two action themes. The first theme is gathering information and formulating recommendations to deal with the State's medical claims dilemma. The second theme is making medical claims more difficult and less profitable to litigate. Even at their most unrelated point—for instance, the commission of a feasibility study for a medical malpractice compensation fund combined with a shorter statute of limitations period—the two themes have substantial common ground. In contrast, provisions named by Justice Resnick in the *Sheward* decision—securities claims, claims by roller-skaters, and medical claims—had virtually no common ground outside of tort reform.¹⁵⁶ As a result, S.B. 281 more closely resembles the act in *Holeton*, and a reviewing court should conclude (to the credit of the 124th General Assembly) that it does not violate the one-subject rule.

Has the 125th General Assembly followed suit? So far, the answer is yes and no. In a survey of the first fifty bills introduced by the Ohio House and Senate, ninety-three follow the rule. Three house bills and four senate bills were less than clear winners.¹⁵⁷ For instance, Amended Substitute House Bill No. 7 combines a five-

¹⁵⁴Indeed, Judge Hogan recited this rule in the one-subject arena in *Dublin*. He wrote on the issue of appropriations bills that "to the extent that *Dix* and *ComTech* might imply a different analysis than *Simmons-Harris*, the latter is the more recent case and is therefore controlling." *Dublin*, 118 Ohio Misc. 2d at 39, 769 N.E.2d at 452.

¹⁵⁵*Sheward*, 86 Ohio St. 3d at 499, 715 N.E.2d at 1101.

¹⁵⁶*See id.* at 499, 715 N.E.2d at 1101.

¹⁵⁷*See* Am. Sub. H.B. 7, Sub. H.B. 24, Sub. H.B. 40, Sub. S.B. 6, S.B. 34, S.B. 45, S.B. 64, 125th Gen. Assem., Reg. Sess. (Ohio 2003). A number of these bills have now been enacted. *See* Act of Apr. 29, 2003, No. 11, 2003 Ohio Legis. Serv. at L-225 (Banks-Baldwin) (enacting Am. Sub. H.B. 7); Act of May 7, 2003, No. 7, 2003 Ohio Legis. Serv. at L-206 (Banks-Baldwin) (enacting Sub. H.B. 24); Act of Feb. 25, 2003, No. 1, 2003 Ohio Legis. Serv. at L-1 (Banks-Baldwin) (enacting Am. Sub. H.B. 40); Act of June 25, 2003, No. 20, 2003 Ohio Legis. Serv. at L-1793 (Banks-Baldwin) (enacting Sub. S.B. 64).

dollar fee for securities services of the Secretary of State with increased penalties for theft from an elderly person. Substitute House Bill No. 40 combines electronic payment of sales tax with provisions allowing the Director of Job and Family Services to prescribe eligibility requirements for state-funded day care. Substitute Senate Bill No. 6 combines provisions for the release of protected health care information with an increase in the “penalty for violation of the prohibition against spreading contagion.” These are but a few examples; the rest of the year awaits. The GOP and the Ohio Academy of Trial Lawyers are already preparing for their next meeting before the seven justices of the Ohio Supreme Court.¹⁵⁸ Senator Steve Stivers (R-Columbus) plans to roll out a new tort-reform package this year.¹⁵⁹ Will it be drafted like S.B. 281 to withstand the *Sheward* test? Will *Sheward* withstand the test of time? Only time will tell.

¹⁵⁸Lee Leonard, *Senator to Revive Tort Reform Debate*, COLUMBUS DISPATCH, March 25, 2003.

¹⁵⁹*Id.*