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Dustin Buehler

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## WASHINGTON'S TITLE MATCH: THE SINGLE-SUBJECT AND SUBJECT-IN-TITLE RULES OF ARTICLE II, SECTION 19 OF THE WASHINGTON STATE CONSTITUTION

Dustin Buehler

*Abstract:* Article II, section 19 of the Washington State Constitution provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” This provision contains two rules. First, an act violates the single-subject rule if it has a general title and its provisions lack rational unity, or if it has a restrictive title and contains provisions not fairly within the scope of that title. Second, an act violates the subject-in-title rule if the plain language of its title does not indicate the scope and purpose of the bill to an inquiring mind, or if it does not give notice to parties whose rights and liabilities are affected by the legislation. During the 2005 legislative session, the Washington State Legislature enacted Engrossed Substitute Senate Bill 5395, “AN ACT Relating to requiring electronic voting devices to produce paper records.” This Comment argues that ESSB 5395 violates both the single-subject and subject-in-title requirements of Article II, section 19. The bill violates the single-subject rule because section 5 of the act, which requires county audits of electronic voting devices, is not fairly within the scope of its restrictive title. The bill also violates the subject-in-title rule because the plain language of its title does not provide adequate notice of the legislation’s scope and purpose, specifically the county audit requirement.

During the nineteenth and early twentieth centuries, a majority of states enacted constitutional provisions requiring that each legislative bill contain a single subject reflected in the bill’s title.<sup>1</sup> States enacted these provisions to check legislative abuse.<sup>2</sup> For example, legislators used single bills to enact laws on diverse subjects, no one of which had the political impetus to pass on its own.<sup>3</sup> Legislatures also passed bills under titles that gave inadequate notice both to legislators and to the public of the legislation’s contents.<sup>4</sup>

Like many states during this period, Washington enacted a constitutional provision to limit the ability of the legislature to pass

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1. See Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 1005–25 (1999) (noting that forty-three state constitutions have either a single-subject or subject-in-title requirement, or both).

2. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 171–72 (5th ed. 1883).

3. See *id.* at 172.

4. See *id.*

multi-subject laws.<sup>5</sup> Article II, section 19 of the Washington State Constitution provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.”<sup>6</sup> This provision contains two checks against legislative abuse: (1) no bill shall embrace more than one subject (single-subject rule) and (2) no bill shall have a subject which is not expressed in the title (subject-in-title rule).<sup>7</sup> Provisions of an act are unconstitutional if they violate either of these two requirements.<sup>8</sup> An act violates the single-subject rule either if it has a general title and its provisions lack rational unity<sup>9</sup> or if it has a restrictive title and contains provisions not fairly within the scope of that title.<sup>10</sup> An act violates the subject-in-title rule if either the plain language of its legislative title does not indicate the scope and purpose of the bill to an inquiring mind or it does not give notice to parties whose rights and liabilities are affected by the legislation.<sup>11</sup> These rules prevent “logrolling,” the practice of attaching unpopular provisions to popular legislation,<sup>12</sup> and ensure that legislators and citizens receive adequate notice of proposed legislation.<sup>13</sup>

The recent passage of Engrossed Substitute Senate Bill 5395 (ESSB 5395)<sup>14</sup> in 2005 raises single-subject and subject-in-title concerns.<sup>15</sup> The main thrust of the bill requires electronic voting devices to produce paper records, and regulates the use, storage, and preservation of these records.<sup>16</sup> The bill also contains a separate provision, section 5, which

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5. See JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, 309–11 (Rosenow ed., 1962).

6. WASH. CONST. art. II, § 19.

7. See *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wash. 2d 226, 249, 88 P.3d 375, 387 (2004).

8. See *Patrice v. Murphy*, 136 Wash. 2d 845, 852, 966 P.2d 1271, 1274 (1998).

9. See *City of Burien v. Kiga*, 144 Wash. 2d 819, 825–26, 31 P.3d 659, 663 (2001).

10. See *State v. Broadway*, 133 Wash. 2d 118, 127, 942 P.2d 363, 369 (1997); *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 26, 200 P.2d 467, 474 (1948).

11. See *Patrice*, 136 Wash. 2d at 853–54, 966 P.2d at 1275.

12. See *Citizens Against Tolls*, 151 Wash. 2d at 249, 88 P.3d at 387; COOLEY, *supra* note 2, at 173.

13. See *Yelle*, 32 Wash. 2d at 24, 200 P.2d at 472 (quoting *State ex rel. Potter v. King County*, 49 Wash. 619, 623, 96 P. 156, 157 (1908)).

14. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788–90.

15. See *infra* Part IV.

16. See E.S.S.B. 5395 at 788–90.

requires county auditors to conduct audits of votes cast on electronic voting devices.<sup>17</sup>

This Comment argues that the legislature violated both the single-subject rule and the subject-in-title rule of Article II, section 19 by enacting ESSB 5395.<sup>18</sup> The bill violates the single-subject rule because its title is restrictive and the requirement of county audits in section 5 is a second subject not fairly within the scope of the legislative title.<sup>19</sup> The bill violates the subject-in-title rule because its title does not indicate the scope and purpose of the law to an inquiring mind and does not give notice to the parties whose rights and liabilities are affected by the audit requirements of section 5.<sup>20</sup> Part I of this Comment examines the test for a violation of the single-subject rule. Part II examines the test for a violation of the subject-in-title rule. Part III provides information on the enactment of ESSB 5395. Finally, Part IV argues that ESSB 5395 violates both the single-subject and subject-in-title requirements of Article II, section 19 of the Washington State Constitution.

#### I. AN ACT VIOLATES THE SINGLE-SUBJECT RULE IF IT HAS A GENERAL TITLE BUT NO RATIONAL UNITY OR PROVISIONS NOT FAIRLY WITHIN A RESTRICTIVE TITLE

When determining whether an act violates the single-subject rule, courts first classify a bill's title as general or restrictive.<sup>21</sup> Courts liberally construe acts with general titles.<sup>22</sup> These acts are unconstitutional only if rational unity is lacking among their provisions.<sup>23</sup> However, courts closely scrutinize acts with restrictive titles<sup>24</sup> and nullify all provisions not fairly within the scope of a given act's title.<sup>25</sup> The purpose behind the single-subject rule is to prevent

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17. *See id.* at 789.

18. *See infra* Part IV.

19. *See infra* Part IV.A.

20. *See infra* Part IV.B.

21. *See Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 207–11, 11 P.3d 762, 781–83 (2000).

22. *See Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 632–33, 71 P.3d 644, 650 (2003).

23. *See City of Burien v. Kiga*, 144 Wash. 2d 819, 825–26, 31 P.3d 659, 663 (2001).

24. *See Cory v. Nethery*, 19 Wash. 2d 326, 331, 142 P.2d 488, 490 (1943) (quoting *DeCano v. State*, 7 Wash. 2d 613, 627, 110 P.2d 627, 634 (1941) (citing cases in which courts closely scrutinized restrictive titles)).

25. *See State v. Broadway*, 133 Wash. 2d 118, 127, 942 P.2d 363, 369 (1997).

logrolling by ensuring that each legislative subject passes on its own merits.<sup>26</sup>

*A. Under Single-Subject Rule Analysis, Courts First Categorize a Legislative Title as General or Restrictive*

The first step in analyzing legislation under the single-subject rule is to classify the title as general or restrictive<sup>27</sup> by referencing the title language only.<sup>28</sup> A general title is broad rather than narrow, and is comprehensive and generic rather than specific.<sup>29</sup> A general title does not necessarily contain a general statement of an act's subject.<sup>30</sup> Rather, a few well-chosen words are sufficient.<sup>31</sup> General titles are all-encompassing, and embrace an entire subject area rather than carving out a particular subsection.<sup>32</sup>

By contrast, a restrictive title carves out a narrow subset of an overarching subject as the focus of the legislation.<sup>33</sup> Restrictive titles are narrow as opposed to broad and are of specific rather than general

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26. See *State Fin. Comm. v. O'Brien*, 105 Wash. 2d 78, 88, 711 P.2d 993, 998 (1986).

27. See *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 207–11, 11 P.3d 762, 781–83 (2000).

28. See *Gruen v. State Tax Comm'n*, 35 Wash. 2d 1, 9, 211 P.2d 651, 657 (1949) (quoting *Great N. Ry. Co. v. Cohn*, 3 Wash. 2d 672, 680, 101 P.2d 985, 989 (1940)), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963). The relevant portion of the title for a single-subject analysis is the words, phrase, or phrases following the conventional language, “AN ACT Relating to” and preceding the first semicolon. See *State v. Thomas*, 103 Wash. App. 800, 808, 14 P.3d 854, 860 (2000).

29. See *Amalgamated Transit*, 142 Wash. 2d at 207–08, 11 P.3d at 781.

30. See *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 632–33, 71 P.3d 644, 650 (2003).

31. See *id.*

32. See, e.g., *In re Boot*, 130 Wash. 2d 553, 566, 925 P.2d 964, 970 (1996) (“AN ACT Relating to violence prevention”); *State Fin. Comm. v. O'Brien*, 105 Wash. 2d 78, 79, 711 P.2d 993, 993 (1986) (“[A]n act relating to capital projects”). The courts also infer an all-encompassing general subject from legislative titles with several specific clauses. See, e.g., *Fritz v. Gorton*, 83 Wash. 2d 275, 290, 517 P.2d 911, 920–21 (1974). Courts are reluctant to do so, however, when analyzing narrow single-part titles. See *State v. Broadway*, 133 Wash. 2d 118, 127–28, 942 P.2d 363, 368–69 (1997). The courts' treatment of multi-part legislative titles is beyond the scope of this Comment.

33. See *Responsible Wildlife*, 149 Wash. 2d at 633–34, 71 P.3d at 650–51.

import.<sup>34</sup> Such titles expressly limit the scope of legislation to that expressed by a bill's title.<sup>35</sup>

Two cases illustrate the difference between general and restrictive titles. In *In re Boot*,<sup>36</sup> the Washington State Supreme Court analyzed a general title.<sup>37</sup> The Washington legislature had passed an omnibus bill titled "AN ACT Relating to violence prevention."<sup>38</sup> The provisions in the bill addressed a number of issues including public health, community networks, weapons, public safety, education, employment and media.<sup>39</sup> The court held that the bill had a general title and upheld the constitutionality of the legislation.<sup>40</sup> It reasoned that the title reflected the broad and comprehensive problem of violence prevention, a subject that encompassed the diverse provisions in the legislation.<sup>41</sup> Because the legislature chose an all-encompassing phrase, the bill had a general title.<sup>42</sup>

In contrast, the legislative title at issue in *State v. Broadaway*<sup>43</sup> provides an example of a restrictive title. In 1995, the legislature approved an act titled "An Act Relating to increasing penalties for armed crimes."<sup>44</sup> The act contained various provisions including sections that increased sentencing enhancements and penalties for use of deadly weapons, expanded the scope of various criminal statutes and required the maintenance of public records.<sup>45</sup> In *Broadaway*, the Washington State Supreme Court classified the bill's title as restrictive because it

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34. See, e.g., *Broadaway*, 133 Wash. 2d at 124, 126–27, 942 P.2d at 367–69 ("An Act Relating to increasing penalties for armed crimes"); *Blanco v. Sun Ranches, Inc.*, 38 Wash. 2d 894, 901, 234 P.2d 499, 503–04 (1951) ("AN ACT relating to the protection of employees in factories where machinery is used").

35. See *Broadaway*, 133 Wash. 2d at 127, 942 P.2d at 369.

36. 130 Wash. 2d 553, 925 P.2d 964 (1996).

37. See *id.* at 565–68, 925 P.2d at 970–72; see also *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 208, 11 P.3d 762, 781 (2000) (recognizing that the title examined in *In re Boot* was general in nature).

38. *In re Boot*, 130 Wash. 2d at 566–68, 925 P.2d at 971.

39. See *id.* at 565–66, 925 P.2d at 970.

40. See *id.* at 568, 925 P.2d at 972.

41. See *id.* at 568, 925 P.2d at 971–72.

42. See *id.*; see also *Amalgamated Transit*, 142 Wash. 2d at 208, 11 P.3d at 781 (recognizing that the title examined in *In re Boot* was general in nature).

43. 133 Wash. 2d 118, 942 P.2d 363 (1997).

44. *Id.* at 123, 942 P.2d at 367.

45. See *id.* at 123 n.1, 942 P.2d at 367 n.1.

contained two limitations.<sup>46</sup> First, the legislature carved out a subset, armed crime, from the overarching subject of criminal offenses.<sup>47</sup> Second, the legislature further limited the title's scope by specifying increased penalties for armed crime.<sup>48</sup> Because the legislature carved out a subset of an overarching subject as the focus of the legislation and limited the title's scope, the bill had a restrictive title.<sup>49</sup>

*B. An Act with a General Title Violates the Single-Subject Rule if Its Provisions Lack Rational Unity*

Courts liberally construe general title acts.<sup>50</sup> Legislation with a general title is constitutional under the single-subject rule as long as there is rational unity between its provisions and its title.<sup>51</sup> A general title need not be an index to a bill's contents.<sup>52</sup> Rather, all provisions that are reasonably connected to the title are germane.<sup>53</sup> Courts allow a broad title to encompass the incidental subjects in a bill's provisions.<sup>54</sup> Thus, a broad title is more likely to survive constitutional scrutiny than a restrictive title.<sup>55</sup>

Courts strike down legislation with general titles only if the provisions and title of an act do not share rational unity.<sup>56</sup> For example, in *Washington Toll Bridge Authority v. State*,<sup>57</sup> the Washington State

46. See *id.* at 127–28, 942 P.2d at 369; see also *Charron v. Miyahara*, 90 Wash. App. 324, 330, 950 P.2d 532, 536 (1998) (finding that the title “AN ACT Relating to the use of examinations in the credentialing of health professionals” is restrictive because it carves out a specific subset, credentialing of health professionals, and further limits its scope to the use of examinations).

47. See *Broadaway*, 133 Wash. 2d at 127–28, 942 P.2d at 369.

48. See *id.*

49. See *id.*

50. See *Gruen v. State Tax Comm'n*, 35 Wash. 2d 1, 10, 211 P.2d 651, 657 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963) (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 26, 200 P.2d 467, 473–74 (1948)).

51. See *City of Burien v. Kiga*, 144 Wash. 2d 819, 825–26, 31 P.3d 659, 663 (2001).

52. See *Wash. Educ. Ass'n v. State*, 97 Wash. 2d 899, 907, 652 P.2d 1347, 1351 (1982) (quoting *Flanders v. Morris*, 88 Wash. 2d 183, 188, 558 P.2d 769, 773 (1977)).

53. See *id.*

54. See *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 207, 11 P.3d 762, 781 (2000).

55. See *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wash. 2d 819, 830, 176 P.2d 429, 435 (1947).

56. See *Amalgamated Transit*, 142 Wash. 2d at 209, 216–17, 11 P.3d at 782, 786.

57. 49 Wash. 2d 520, 304 P.2d 676 (1956).

Supreme Court first implied the general subject of “toll roads” from a title with multiple subparts.<sup>58</sup> The court then noted that this broad subject adequately expressed all of the subject matter contained in the act.<sup>59</sup> It concluded that rational unity was lacking, however, because one provision created a state agency that was long-term and continuing in nature, while another provision provided one-time funding of a specific toll road linking Tacoma, Seattle, and Everett.<sup>60</sup>

*C. An Act with a Restrictive Title Violates the Single-Subject Rule if Its Provisions Are Not Fairly Within the Limited Scope of Its Title*

In contrast to the liberal construction of general titles, courts closely scrutinize legislative acts with restrictive titles,<sup>61</sup> and void provisions not fairly within the title language.<sup>62</sup> If the legislature chooses a restrictive title, the act’s contents must be confined to the particular portion of the subject expressed in the title.<sup>63</sup> Even if the legislature could have used a more general title to encompass all of the provisions, courts cannot enlarge the scope of a restrictive title<sup>64</sup> and must declare provisions outside of a title’s scope unconstitutional.<sup>65</sup>

Courts have voided several provisions not fairly within the scope of a restrictive title.<sup>66</sup> For example, in 1943 the legislature enacted a bill titled

58. *See id.* at 522–23, 304 P.2d at 678–79. The title read in part, “AN ACT to facilitate vehicular traffic in the state of Washington by providing for the acquisition, construction, improvement, extension, reconstruction, maintenance, repair and operation of toll road projects by the Washington toll bridge authority; defining the powers and duties of the Washington toll bridge authority, cities, towns and other political subdivisions and agencies of the state with respect to such toll road projects; specifically authorizing and establishing the location of the Tacoma-Seattle-Everett toll road project and pledging a portion of the excise tax on motor vehicle fuels to assist the financing thereof.” *Id.* at 522, 304 P.2d at 678.

59. *See id.* at 523, 304 P.2d at 678.

60. *See id.* at 523–25, 304 P.2d at 678–79.

61. *See Cory v. Nethery*, 19 Wash. 2d 326, 331, 142 P.2d 488, 490 (1943).

62. *See State v. Broadaway*, 133 Wash. 2d 118, 127, 942 P.2d 363, 369 (1997).

63. *See Gruen v. State Tax Comm’n*, 35 Wash. 2d 1, 23, 211 P.2d 651, 664 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

64. *See id.*

65. *See Swedish Hosp. v. Dep’t of Labor & Indus.*, 26 Wash. 2d 819, 831–32, 176 P.2d 429, 435–36 (1947).

66. *See Blanco v. Sun Ranches, Inc.*, 38 Wash. 2d 894, 900–02, 234 P.2d 499, 503–04 (1951); *Swedish Hosp.*, 26 Wash. 2d at 830–82, 176 P.2d at 434–36; *see also DeCano v. State*, 7 Wash. 2d 613, 628–29, 110 P.2d 627, 634–35 (1941) (collecting cases in which courts voided provisions outside of restrictive titles).



“AN ACT relating to the protection of employees in factories where machinery is used.”<sup>67</sup> Section 1 of the act regulated all factories, mills, workshops or any operation where machinery was used.<sup>68</sup> In *Blanco v. Sun Ranches, Inc.*,<sup>69</sup> the Washington State Supreme Court voided section 1 under the single-subject rule.<sup>70</sup> The court first categorized the title as restrictive, because its language expressly limited the legislation’s protection to employees in factories.<sup>71</sup> Given this restrictive title, the court had an obligation to invalidate any provision not fairly within the title’s scope.<sup>72</sup> The court held that section 1 was over-inclusive because it attempted to regulate any operation where machinery was used, rather than factories only.<sup>73</sup> Because the legislature chose a restrictive title, it could not attempt to regulate outside of the title’s scope.<sup>74</sup>

#### D. *The Purpose of the Single-Subject Rule is to Prevent Logrolling*

Ensuring that each legislative subject passes on its own merits is the purpose behind the Article II, section 19 single-subject rule.<sup>75</sup> Single-subject provisions have sought to prevent the pairing of unpopular subjects with popular legislation since Roman times,<sup>76</sup> and the vast majority of American states have enacted such provisions.<sup>77</sup> The language of Article II, section 19 is similar to the provisions of other states,<sup>78</sup> and thus the purpose behind Washington’s provision is likewise similar to the provisions of other states—the prevention of logrolling.<sup>79</sup>

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67. *Blanco*, 38 Wash. 2d at 901, 234 P.2d at 503–04.

68. *See id.* at 900–01, 234 P.2d at 503.

69. 38 Wash. 2d 894, 234 P.2d 499 (1951).

70. *See id.* at 901–02, 234 P.2d at 504.

71. *See id.*

72. *See id.* at 902, 234 P.2d at 504.

73. *See id.*

74. *See id.*

75. *See State Fin. Comm. v. O’Brien*, 105 Wash. 2d 78, 88, 711 P.2d 993, 998 (1986).

76. *See* ROBERT LUCE, LEGISLATIVE PROCEDURE 548–49 (1922).

77. *See* Denning & Smith, *supra* note 1, at 1024–25.

78. *Compare, e.g.*, WASH. CONST. art. II, § 19 (“No bill shall embrace more than one subject, and that shall be expressed in the title.”), with CAL. CONST. of 1879, art. IV, § 24 (“Every act shall embrace but one subject, which subject shall be expressed in its title.”), and MINN. CONST. of 1857, art. IV, § 27 (“No law shall embrace more than one subject, which shall be expressed in its title.”).

79. *See State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 24–25, 200 P.2d 467, 472–73 (1948). *See generally* Wash. Water Jet Workers Ass’n v. Yarbrough, 151 Wash. 2d 470, 493–501, 90 P.3d 42, 53–57 (2004) (turning to other states with similar constitutional provisions for guidance in interpreting Washington’s constitution).

Concern about unrelated provisions in legislation dates back to Roman times,<sup>80</sup> and American states rushed to adopt single-subject rules during the nineteenth century.<sup>81</sup> The practice of attaching unpopular subjects to popular legislation became so common that Rome enacted the *Lex Cæcilia Didia* in 98 B.C., forbidding a *lex satura*, a law with unrelated provisions.<sup>82</sup> In 1844, New Jersey became the first American state to place a single-subject provision in its constitution,<sup>83</sup> “[t]o avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other.”<sup>84</sup> Other states followed New Jersey’s lead.<sup>85</sup> Single-subject provisions guarded against the perceived shortcomings of federal lawmaking, most notably the practice of logrolling, in which unpopular provisions were attached to popular legislation.<sup>86</sup>

Article II, section 19 of the Washington State Constitution incorporates this general concern about legislative logrolling.<sup>87</sup> The 1889 Washington State Constitutional Convention adopted Article II, section 19 without debate.<sup>88</sup> The provision bears a striking resemblance to similarly focused provisions in other state constitutions.<sup>89</sup> Indeed, South

80. See LUCE, *supra* note 76, at 548–49.

81. See Denning & Smith, *supra* note 1, at 1024–25 (noting that thirty-six states adopted a single-subject provision during the nineteenth century).

82. See LUCE, *supra* note 76, at 548.

83. See Millard H. Ruud, “No Law Shall Embrace More Than One Subject,” 42 MINN. L. REV. 389, 390 (1958).

84. N.J. CONST. of 1844, art. IV, § 7, para. 4.

85. See Denning & Smith, *supra* note 1, at 1024–25.

86. See Ruud, *supra* note 83, at 391; Jeffrey Gray Knowles, Note, *Enforcing the One-Subject Rule: The Case for a Subject Veto*, 38 HASTINGS L.J. 563, 566–67 (1987) (noting that California’s second constitutional convention viewed the single-subject rule as a reaction to the logrolling occurring in U.S. Congress); Carl N. Everstine, *Titles of Legislative Acts*, 9 MD. L. REV. 197, 200 (1948) (quoting *Davis v. State*, 7 Md. 151, 160 (1854)) (noting that the single-subject rule was inserted in the Maryland constitution to guard against “evil and injurious legislation”).

87. See *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 25, 200 P.2d 467, 473 (1948).

88. See JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, *supra* note 5, 534.

89. Compare WASH. CONST. art. II, § 19 (“No bill shall embrace more than one subject, and that shall be expressed in the title.”), with CAL. CONST. of 1879, art. IV, § 24 (“Every act shall embrace but one subject, which subject shall be expressed in its title.”), and MICH. CONST. of 1850, art. IV, § 20 (“No law shall embrace more than one object, which shall be expressed in its title.”), and MINN. CONST. of 1857, art. IV, § 27 (“No law shall embrace more than one subject, which shall be expressed in its title.”), and TENN. CONST. art. II, § 17 (“No bill shall become a law which embraces more than one subject, that subject to be expressed in the title.”); see also Seattle Sch. Dist. No. 1 v.

Dakota's constitutional convention adopted a virtually identical provision the same year.<sup>90</sup> Given the generic language of Article II, section 19, the Washington State Supreme Court frequently cites to the nineteenth-century concern of logrolling to inform its single-subject analysis.<sup>91</sup>

In sum, an act violates Article II, section 19 if it contains more than one subject. Courts analyzing a bill under the single-subject rule first categorize its title as general or restrictive. An act with a general title violates the rule if its provisions and title do not share rational unity. An act with a restrictive title violates the rule if its provisions are not fairly within the limited scope of its title. Finally, the purpose behind the single-subject rule is to ensure that each legislative subject passes on its own merits.

## II. AN ACT VIOLATES THE SUBJECT-IN-TITLE RULE IF THE TITLE'S PLAIN MEANING FAILS TO INDICATE THE SCOPE AND PURPOSE OF THE LAW TO AN INQUIRING MIND

An act complies with the subject-in-title rule if its title provides notice that leads to an inquiry into the body of the act, or indicates the scope and purpose of the law to an inquiring mind.<sup>92</sup> Under this rule, courts interpret the plain meaning of an act's title.<sup>93</sup> Courts then determine whether the plain meaning of the title adequately reflects the contents of underlying legislation.<sup>94</sup> The main purpose of the subject-in-title rule is to ensure adequate notice.<sup>95</sup>

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State, 90 Wash. 2d 476, 499, 585 P.2d 71, 85 (1978) ("Without question the language used by other states was before the drafters of our state constitution.").

90. Compare WASH. CONST. art. II, § 19 ("No bill shall embrace more than one subject, and that shall be expressed in the title."), with S.D. CONST. art. III, § 21 ("No law shall embrace more than one subject, which shall be expressed in its title.").

91. See *Yelle*, 32 Wash. 2d at 25, 200 P.2d at 473; *Petroleum Lease Props. Co. v. Huse*, 195 Wash. 254, 259, 80 P.2d 774, 776 (1938).

92. See *Wash. State Grange v. Locke*, 153 Wash. 2d 475, 491–92, 105 P.3d 9, 18 (2005).

93. See *id.* at 492, 105 P.3d at 18.

94. See *id.*

95. See *id.* at 491, 105 P.3d at 18.

A. *Under the Subject-in-Title Rule, Courts First Interpret the Language of a Bill's Title In Order to Discern Its Plain Meaning*

When performing subject-in-title analysis, courts start by interpreting the plain meaning of a bill's title.<sup>96</sup> Courts give the words found in a title their common and ordinary meaning<sup>97</sup> in order to discern the meaning that the title would convey to a typical reader.<sup>98</sup> In doing so, courts strictly limit their interpretations to the words of a title.<sup>99</sup> References to a bill's text, context, and legislative history are irrelevant at this stage of the analysis.<sup>100</sup> In giving the words of a title their common and ordinary meaning,<sup>101</sup> courts refer to definitions found in standard dictionaries<sup>102</sup> and refuse to consider definitions provided in the content of a bill.<sup>103</sup>

The Washington State Supreme Court recently provided an example of the plain meaning approach in *Washington State Grange v. Locke*.<sup>104</sup> In 2004, the legislature passed a bill titled "AN ACT Relating to a qualifying primary."<sup>105</sup> The bill established a Louisiana-style primary system, and allowed for implementation of a Montana-style primary system should the Louisiana system be overturned by the courts.<sup>106</sup> The governor vetoed only those sections of the bill enacting the Louisiana system, leaving the Montana system in place.<sup>107</sup> The Washington State Grange sued, arguing that the bill violated the subject-in-title rule because the Montana system was not adequately reflected in the words

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96. *See id.* at 492, 105 P.3d at 18.

97. *See id.* at 495–96, 105 P.3d at 20.

98. *See id.* at 492, 105 P.2d at 18.

99. *See id.* at 493–94, 105 P.3d at 19.

100. *See id.* at 495, 105 P.3d at 20.

101. *See id.* at 492–93, 105 P.3d at 18.

102. *See id.* at 495–96, 105 P.3d at 20; *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 221–22, 11 P.3d 762, 788–89 (2000). If the act is amendatory in nature, courts also consider prior legislative definitions and prior judicial constructions of the term. *See Grange*, 153 Wash. 2d at 493 n.9, 105 P.3d at 19 n.9.

103. *See Grange*, 153 Wash. 2d at 496–97, 105 P.3d at 20–21.

104. 153 Wash. 2d 475, 495–97, 105 P.3d 9, 20–21 (2005).

105. *Id.* at 492, 105 P.3d at 18.

106. *See id.* at 478–79, 105 P.3d at 11–12. A Louisiana-style primary does not require voters to affiliate with any particular political party. The two candidates receiving the most votes, regardless of party, advance to the general election. A Montana-style primary requires voters to choose among major party ballots. The candidate with the most votes from each party advances to the general election. *See id.* at 479 n.2, 105 P.3d at 11–12 n.2.

107. *See id.* at 479, 105 P.3d at 11–12.

“qualifying primary” in the bill’s title.<sup>108</sup> Analyzing the plain meaning of the title, the court limited its inquiry to the words of the title, and refused to consider the bill’s context and legislative history.<sup>109</sup> The court then discerned the common and ordinary meaning of the title by referencing definitions of “qualify,” “primary,” and “primary election” from *Webster’s Third New International Dictionary* and *The American Heritage Dictionary*.<sup>110</sup> The court upheld the governor’s veto, and stressed that the meaning of a title for a subject-in-title analysis is the plain meaning, not a technical definition from a bill’s text.<sup>111</sup>

*B. Under the Subject-in-Title Rule, a Title’s Plain Meaning Must Give Notice of the Substance and Scope of the Law to an Inquiring Mind*

After discerning the plain meaning of a title, courts next determine whether the title adequately reflects the bill’s contents.<sup>112</sup> The title is constitutionally adequate if its plain meaning prompts inquiry or gives notice to an inquiring mind.<sup>113</sup> In particular, the title must give adequate notice to parties whose rights and liabilities are affected by the bill.<sup>114</sup>

Under the subject-in-title rule, courts declare legislation unconstitutional if the plain meaning of the title fails to give adequate notice of an act’s substance<sup>115</sup> or scope.<sup>116</sup> A legislative title must give notice that would lead to an inquiry into the body of the act, or would indicate to an inquiring mind the scope and purpose of the law.<sup>117</sup> The title need not be an index to the legislation’s contents,<sup>118</sup> and courts

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108. *See id.* at 491, 105 P.3d at 18.

109. *See id.* at 495, 105 P.3d at 20.

110. *See id.* at 495–96, 105 P.3d at 20.

111. *See id.* at 496, 105 P.3d at 21.

112. *See id.* at 492, 105 P.3d at 18.

113. *See id.* at 491–92, 105 P.3d at 18.

114. *See Patrice v. Murphy*, 136 Wash. 2d 845, 854, 966 P.2d 1271, 1275 (1998).

115. *See Fray v. Spokane County*, 134 Wash. 2d 637, 640, 652–55, 952 P.2d 601, 602, 608–09 (1998) (ruling that the title “AN ACT Relating to making technical corrections” did not give fair notice that the act took away the substantive right to sue employers under the Law Enforcement Officers’ and Fire Fighters’ Retirement System Act); *see also* WASH. REV. CODE §§ 41.26.005–41.26.921 (2006).

116. *See, e.g., Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 227, 11 P.3d 762, 791 (2000) (ruling that the common meaning of the word “tax” in the title gave inadequate notice of the broad scope of the term “tax” as it was defined in the body of the act).

117. *See Grange*, 153 Wash. 2d at 491–92, 105 P.3d at 18 (2005) (quoting *Young Men’s Christian Ass’n v. State*, 62 Wash. 2d 504, 506, 383 P.2d 497, 499 (1963)).

118. *See Pierce County v. State*, 150 Wash. 2d 422, 436, 78 P.3d 640, 649 (2003) (citing

liberally construe the subject-in-title requirement in favor of the legislation's constitutionality.<sup>119</sup> A court should not strain to interpret a title as constitutional, however, if doing so requires an unreasonable construction of its plain meaning.<sup>120</sup>

In *Swedish Hospital v. Department of Labor and Industries*,<sup>121</sup> for example, the Washington State Supreme Court examined a bill entitled "AN ACT giving workmen's compensation benefits to persons engaged in hazardous and extrahazardous occupations in charitable institutions."<sup>122</sup> The court first analyzed the meaning of the title, and concluded that it gave notice that the legislation affected charitable institutions only.<sup>123</sup> However, the act's provisions encompassed other non-profit institutions as well.<sup>124</sup> Thus, the title did not give adequate notice that the scope of the legislation included non-profit institutions.<sup>125</sup>

In particular, the Washington State Supreme Court voids legislation under the subject-in-title rule when the title of a bill fails to give notice to parties whose rights and liabilities are affected by the bill.<sup>126</sup> For example, in *Patrice v. Murphy*,<sup>127</sup> the court examined a bill titled "AN ACT Relating to court costs."<sup>128</sup> Sections 4 and 5 of the bill imposed a duty upon law enforcement agencies to provide interpreters to deaf persons that are interviewed as victims, witnesses, or suspects.<sup>129</sup> The court held that a title mentioning only court costs provided inadequate notice to the law enforcement community that the scope of its liabilities and duties was expanding.<sup>130</sup> Because the legislature chose a title that did not give adequate notice to parties whose rights and liabilities were

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*Amalgamated Transit*, 142 Wash. 2d at 217, 11 P.3d at 786 (citing cases in which courts held that legislative titles do not need to serve as indexes)).

119. See *Wash. Fed'n of State Employees v. State*, 127 Wash. 2d 544, 555, 901 P.2d 1028, 1034 (1995) (citing cases in which courts held that legislative titles should be construed liberally).

120. See *Amalgamated Transit*, 142 Wash. 2d at 225, 11 P.3d at 790 (citing *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 757, 871 P.2d 1050, 1054 (1994)).

121. 26 Wash. 2d 819, 176 P.2d 429 (1947).

122. *Id.* at 831, 176 P.2d at 435 (emphasis added).

123. See *id.*

124. See *id.*

125. See *id.* at 833, 176 P.2d at 436.

126. See *Patrice v. Murphy*, 136 Wash. 2d 845, 854, 966 P.2d 1271, 1275 (1998).

127. 136 Wash. 2d 845, 966 P.2d 1271 (1998).

128. *Id.* at 849, 966 P.2d at 1273.

129. See *id.* at 849, 966 P.2d at 1272-73.

130. See *id.* at 854-55, 966 P.2d at 1275.

affected by sections 4 and 5 of the bill, those provisions violated the subject-in-title rule.<sup>131</sup>

C. *The Purpose of the Subject-in-Title Rule is Provision of Adequate Notice*

Adequate legislative and public notice is the purpose behind the subject-in-title rule.<sup>132</sup> Subject-in-title provisions originated in the late eighteenth century to prevent the use of misleading legislative titles.<sup>133</sup> As in other states, Washington courts cite legislative and public notice as the purpose behind Article II, section 19.<sup>134</sup>

The subject-in-title rule originated to combat misleading legislative titles,<sup>135</sup> and the majority of states adopted constitutional provisions containing a subject-in-title rule during the nineteenth century.<sup>136</sup> The movement originated in 1795 with the Georgia legislature's enactment of the Yazoo Act.<sup>137</sup> The act authorized the sale of a large portion of public domain lands to named corporations, under the guise of a deceptive title that referenced "payment of the late state troops."<sup>138</sup> The public felt deceived, and Georgia amended its constitution in 1798 to add a subject-in-title requirement.<sup>139</sup>

Washington courts have consistently cited the goal of legislative and public notice as the primary purpose behind the subject-in-title requirement.<sup>140</sup> The framers of Washington's constitution were aware of

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131. *See id.*

132. *See* Wash. State Grange v. Locke, 153 Wash. 2d 475, 491, 105 P.3d 9, 18 (2005) (citing cases holding that the purpose behind the subject-in-title rule is adequate notice).

133. *See* Ruud, *supra* note 83, at 391–92.

134. *See* State *ex rel.* Citizens Against Tolls v. Murphy, 151 Wash. 2d 226, 249, 88 P.3d 375, 387 (2004) (citing cases holding that adequate notice is the purpose of the subject-in-title rule); COOLEY, *supra* note 2, at 172–73.

135. *See* Ruud, *supra* note 83, at 391–92.

136. *See* Denning & Smith, *supra* note 1, at 1024–25 (noting that thirty-four states adopted a subject-in-title provision during the nineteenth century).

137. *See* Ruud, *supra* note 83, at 391–92.

138. *See* Ruud, *supra* note 83, at 391–92, n.10. The title of the Yazoo Act was, "AN ACT supplementary to an Act, entitled, 'an Act for appropriating a part of the unlocated territory of this state, for the payment of the late state troops, and for other purposes therein mentioned,' declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes." 1795 Ga. Laws 1.

139. *See* Ruud, *supra* note 83, at 391–92.

140. *See* State *ex rel.* Citizens Against Tolls v. Murphy, 151 Wash. 2d 226, 249, 88 P.3d 375, 387 (2004) (citing cases holding that adequate notice is the purpose of the subject-in-title rule).

the history of the Yazoo Act.<sup>141</sup> Indeed, in *Harland v. Territory*,<sup>142</sup> decided two years before statehood, the Supreme Court of the Territory of Washington cited the Yazoo Act as the origin of subject-in-title constitutional restrictions.<sup>143</sup> More recently, the Washington State Supreme Court has recognized that legislative and public notice is a primary purpose behind Article II, section 19 of the Washington State Constitution.<sup>144</sup>

In sum, an act violates Article II, section 19 if its subject is not expressed in its title. Courts analyzing a bill under the subject-in-title rule first interpret the language of a bill's title to discern its plain meaning. This plain meaning must give notice of the substance and scope of a law to an inquiring mind, particularly to individuals whose rights and liabilities are affected by the bill. The purpose behind the subject-in-title rule is to require the legislature to provide adequate notice to affected parties when crafting and passing legislation.

### III. ESSB 5395 WAS PASSED TO REQUIRE PAPER RECORDS AND COUNTY AUDITS OF ELECTRONIC VOTING DEVICES

The Washington legislature enacted Engrossed Substitute Senate Bill 5395 (ESSB 5395)<sup>145</sup> during the 2005 session to accomplish two

141. See *Harland v. Territory*, 3 Wash. Terr. 131, 136, 143–44, 13 P. 453, 454, 457 (1887) (Turner, J., writing for the majority). J. Turner later served as a delegate to the Washington State Constitutional Convention after serving as associate justice of the territorial court. See JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, *supra* note 5, at 488.

142. 3 Wash. Terr. 131, 13 P. 453 (1887).

143. See *id.* at 143–44, 13 P. at 457.

144. See *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wash. 2d 819, 830, 176 P.2d 429, 434–35 (1947).

145. E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788–90. See also STATE GOV'T OPERATIONS & ACCOUNTABILITY COMM., WASHINGTON STATE HOUSE OF REPRESENTATIVES OFFICE OF PROGRAM RESEARCH, BILL ANALYSIS: ESSB 5395 1 (2005), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5395&year=2006> (follow “Bill as Passed Legislature” hyperlink). The bill was enacted following minor modifications. See Legislative Digest and History of Bills of the Senate and House of Representatives, 59th Leg., Reg. Sess., at 134 (Wash. 2005); see also S.S.B. 5395, 59th Leg., Reg. Sess. (Wash. 2005) (first substitute bill, as substituted by the Senate Rules Committee), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5395&year=2006> (follow “Substitute Bill” hyperlink); S. 59-5395-S SPAN HESS 009, Reg. Sess. (Wash. 2005), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5395&year=2006> (follow “5395-S AMS SPAN HESS 009 (AMD 50 ADOPTED 3/4/2005)” hyperlink) (amendments to the first substitute bill, passed by the Senate Rules Committee); E.S.S.B. 5395, 59th Leg., Reg. Sess (Wash. 2005), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5395&year=2006> (follow “Engrossed Substitute” hyperlink) (engrossed substitute bill, as passed by the Senate); S. 59-5395-S.E AMH



purposes. First, the bill requires electronic voting devices to produce paper records, and regulates the use, storage and preservation of these records.<sup>146</sup> Second, the bill contains a provision requiring county auditors to conduct an audit of votes cast on electronic voting devices.<sup>147</sup>

Although the title of ESSB 5395 indicates the legislation's purpose of requiring paper records, it does not mention the bill's other purpose of requiring county audits.<sup>148</sup> The title of the legislation is "AN ACT Relating to requiring electronic voting devices to produce paper records; adding a new section to chapter 29A.12 RCW; adding new sections to chapter 29A.44 RCW; adding new sections to chapter 29A.60 RCW; adding a new section to chapter 29A.84 RCW; and prescribing penalties."<sup>149</sup> Committee reports on the legislation, however, indicate two primary purposes—the bill requires that electronic voting devices produce a machine-countable paper record and also requires that county auditors conduct an audit of electronic voting devices the day after an election.<sup>150</sup>

Five provisions of ESSB 5395 together require electronic voting devices to produce paper records, and regulate the use, storage and preservation of these records.<sup>151</sup> Section 1 of ESSB 5395 requires all approved electronic voting devices to produce machine-countable paper records, printed in the language used by the voter.<sup>152</sup> Four other sections of the bill effectuate the production of these paper records by regulating their use, storage and preservation.<sup>153</sup> Section 2 subjects paper records to existing ballot handling and preservation requirements.<sup>154</sup> Section 3 specifies the circumstances in which paper records serve as the official

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SGOA H2919.1, Reg. Sess. (Wash. 2005), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5395&year=2006> (follow "5395-S.E AMH SGOA H2919.1 (CMT AMD ADOPTED 4/13/2005)" hyperlink) (amendments to the engrossed substitute bill, as passed by the House Committee on State Government Operations and Accountability).

146. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788–89.

147. See *id.* at 789.

148. See *id.* at 788.

149. *Id.*

150. See STATE GOV'T OPERATIONS & ACCOUNTABILITY COMM., WASHINGTON STATE HOUSE OF REPRESENTATIVES OFFICE OF PROGRAM RESEARCH, BILL ANALYSIS: ESSB 5395 I (2005), <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/House/5395-S.HBA.pdf>.

151. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788–89.

152. See *id.* § 1 (codified at WASH. REV. CODE § 29A.12.085).

153. See *id.* §§ 2–4, 6 (codified at WASH. REV. CODE §§ 29A.44.045, 29A.60.095, 29A.44.225, 29A.84.545).

154. See *id.* § 2 (codified at WASH. REV. CODE § 29A.44.045).

record of votes cast.<sup>155</sup> Section 4 prohibits a voter from leaving an electronic voting device until the completion of the voting process.<sup>156</sup> Section 6 prescribes penalties for unauthorized removal of paper records from polling places.<sup>157</sup>

The bill also contains a provision requiring county auditors to conduct an audit of votes cast on electronic voting devices.<sup>158</sup> Auditors must perform audits of up to four percent of electronic voting devices before certifying election results.<sup>159</sup> The auditor randomly selects three races or ballot issues from each device, and then compares the electronic results with the results from the paper records.<sup>160</sup>

In sum, the provisions of ESSB 5395 promote two purposes. First, the bill requires electronic voting devices to produce paper records. Second, the bill requires county audits of electronic voting devices. The title of ESSB 5395, however, only mentions the paper record requirement.

#### IV. ESSB 5395 VIOLATES THE SUBJECT-IN-TITLE AND SINGLE-SUBJECT RULES OF THE STATE CONSTITUTION

ESSB 5395 violates both the single-subject and subject-in-title requirements of Article II, section 19. The bill violates the single-subject rule because it has a restrictive title, and the section 5 county audit requirement is not fairly within the scope of this title.<sup>161</sup> The bill also violates the subject-in-title rule because the plain meaning of its title does not give adequate notice of its scope, particularly to county auditors whose duties are affected by section 5.<sup>162</sup>

##### *A. ESSB 5395 Has a Restrictive Title, and Section 5 Is Not Fairly Within the Scope of this Title*

ESSB 5395 violates the single-subject rule because its provision requiring county audits is not fairly within its restrictive title. The bill

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155. *See id.* § 3 (codified at WASH. REV. CODE § 29A.60.095).

156. *See id.* § 4 (codified at WASH. REV. CODE § 29A.44.225) (providing for an exception where the voter is requesting assistance from the precinct election officers).

157. *See id.* § 6 (codified at WASH. REV. CODE § 29A.84.545).

158. *See id.* § 5 (codified at WASH. REV. CODE § 29A.60.185).

159. *See id.*

160. *See id.*

161. *See infra* Part IV.A.

162. *See infra* Part IV.B.

has a restrictive title limiting its scope to the requirement that electronic voting devices produce paper records.<sup>163</sup> Under close scrutiny, section 5's requirement of county audits is outside the express scope of the bill's restrictive title.<sup>164</sup> Passage of ESSB 5395 violates the purpose behind Article II, section 19 because the county audit requirement did not pass on its own merits.<sup>165</sup> Thus, the bill violates the single-subject rule.<sup>166</sup>

### 1. *ESSB 5395 Has a Restrictive Title*

The title of ESSB 5395 is restrictive in nature.<sup>167</sup> A title is restrictive if it carves out a subset of an overarching subject as the focus of the legislation.<sup>168</sup> In contrast, a title is general if it is all-encompassing and embraces a comprehensive subject.<sup>169</sup> The title of ESSB 5395 requires electronic voting devices to produce paper records.<sup>170</sup> Rather than embracing an overarching subject, this title contains two restrictions.<sup>171</sup> First, it carves out a particular subset, electronic voting devices, from a larger topic, voting and elections.<sup>172</sup> Second, it imposes an additional restriction by limiting the measure's scope to the requirement that electronic voting devices produce paper records.<sup>173</sup> Because the legislature carved out a narrow subset of an overarching subject, ESSB 5395 has a restrictive title.<sup>174</sup>

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163. See *infra* Part IV.A.1.

164. See *infra* Part IV.A.2.

165. See *infra* Part IV.A.3.

166. See *State v. Thorne*, 129 Wash. 2d 736, 758, 921 P.2d 514, 524 (1996).

167. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788; see also *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 633–34, 71 P.3d 644, 650–51 (2003) (providing examples of restrictive titles).

168. See *Responsible Wildlife*, 149 Wash. 2d at 633, 71 P.3d at 650 (citing *State v. Broadaway*, 133 Wash. 2d 118, 127, 942 P.2d 363, 369 (1997)).

169. See, e.g., *In re Boot*, 130 Wash. 2d 553, 566, 925 P.2d 964, 970–71 (1996) (“AN ACT Relating to violence prevention”).

170. See E.S.S.B. 5395.

171. See *id.*; see also, e.g., *State v. Broadaway*, 133 Wash. 2d 118, 123, 127–28, 942 P.2d 363, 367, 369 (1997) (holding the title “An Act Relating to increasing penalties for armed crimes” to be a restrictive title because it first carved out an area of criminal offenses, *armed crime*, and then made an additional restriction by limiting the measure's scope to *increased penalties*).

172. See E.S.S.B. 5395.

173. See *id.*

174. See *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 633, 71 P.3d 644, 650 (2003) (citing *Broadaway*, 133 Wash. 2d at 127, 942 P.2d at 369).

By carving out specific limitations, the title of ESSB 5395 is a restrictive title under the Washington State Supreme Court's holding in *State v. Broadaway*.<sup>175</sup> In *Broadaway*, the court held that the title "AN ACT Relating to increasing penalties for armed crimes"<sup>176</sup> was restrictive because it carved out the subset of armed crime from the overarching subject of criminal offenses, and then further limited the scope to increased penalties.<sup>177</sup> Like the legislation in *Broadaway*, ESSB 5395 has two limitations.<sup>178</sup> Under ESSB 5395's title, the legislature limited the bill's scope to electronic voting devices and the scope of regulation on these devices to the production of paper records.<sup>179</sup> Because the legislature chose a narrow and specific title, the courts must categorize the title as restrictive and cannot enlarge its scope.<sup>180</sup>

Moreover, the title of ESSB 5395 is distinguishable from Washington cases classifying titles as general in nature.<sup>181</sup> Principally, in *In re Boot* the court held that the title "AN ACT Relating to violence prevention"<sup>182</sup> was general because it encompassed the broad and comprehensive problem of violence prevention.<sup>183</sup> The title of ESSB 5395 by contrast, is not so broad as to encompass all areas of voting.<sup>184</sup> Unlike the legislation examined in *Boot*, the legislature chose not to use an all-encompassing title such as "AN ACT Relating to voting" or even "AN ACT Relating to election devices."<sup>185</sup> Rather, the legislature chose the restricted subsets

175. See E.S.S.B. 5395; *Broadaway*, 133 Wash. 2d at 126–28, 942 P.2d at 368–69.

176. *Broadaway*, 133 Wash. 2d at 123, 942 P.2d at 367.

177. See *id.* at 127–28, 942 P.2d at 369.

178. See *id.*; E.S.S.B. 5395.

179. See E.S.S.B. 5395.

180. See *Gruen v. State Tax Comm'n*, 35 Wash. 2d 1, 23, 211 P.2d 651, 664 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

181. See E.S.S.B. 5395; *In re Boot*, 130 Wash. 2d 553, 566–68, 925 P.2d 964, 970–72 (1996).

182. *In re Boot*, 130 Wash. 2d at 566, 925 P.2d at 971.

183. See *id.* at 567–68, 925 P.2d at 971–72; see also *Amalgamated Transit Union Local 587 v. State*, 142 Wash. 2d 183, 208, 11 P.3d 762, 781 (2000) (citing the title examined in *In re Boot* as an example of a title that is general in nature).

184. Compare E.S.S.B. 5395 ("AN ACT Relating to requiring electronic voting devices to produce paper records"), with E.S.S.H.B. 2319, 53rd Leg., 1st Spec. Sess., 1994 Wash. Sess. Laws 2196 ("AN ACT Relating to violence prevention").

185. E.S.S.B. 5395's restrictive title contrasts with all-encompassing titles used for other election bills passed during the same legislative session. Compare E.S.S.B. 5395 ("AN ACT Relating to requiring electronic voting devices to produce paper records"), with E.S.S.B. 5499, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 790 ("AN ACT Relating to election reform"), and E.S.S.B. 5743, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 804 ("AN ACT Relating to voter registration

of electronic voting devices and paper records.<sup>186</sup> As such, the title is restrictive in nature.<sup>187</sup>

2. *The Section 5 Auditing Requirement Is Not Fairly Within ESSB 5395's Restrictive Title*

Section 5's auditing requirement is not fairly within the scope of ESSB 5395's restrictive title, and thus the provision is void under the single-subject rule.<sup>188</sup> In contrast to the liberal construction of general titles, courts closely scrutinize restrictive titles,<sup>189</sup> and void provisions not fairly within the title language.<sup>190</sup> Sections within the body of the act must be confined to the particular portion of the subject which is expressed in the title.<sup>191</sup> The title of ESSB 5395 expressly limits the bill's scope to the requirement that electronic voting devices produce paper records.<sup>192</sup> Section 5 imposes additional regulation, however, by requiring that county auditors audit the results of electronic voting devices.<sup>193</sup> Indeed, a legislative committee report on ESSB 5395 treated the requirement of paper records and the requirement of county audits as separate legislative purposes.<sup>194</sup> Because the scope of ESSB 5395's restrictive title only extends to the production of paper records, the section 5 requirement of county audits violates the single-subject rule.<sup>195</sup>

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procedures”).

186. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788.

187. See *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 633, 71 P.3d 644, 650 (2003).

188. Cf. *Blanco v. Sun Ranches, Inc.*, 38 Wash. 2d 894, 900–02, 234 P.2d 499, 503–04 (1951) (providing an example of legislation void under a restrictive title that is analogous to ESSB 5395).

189. See *Cory v. Nethery*, 19 Wash. 2d 326, 331, 142 P.2d 488, 490 (1943) (quoting *DeCano v. State*, 7 Wash. 2d 613, 627, 110 P.2d 627, 634 (1941) (citing cases in which courts closely scrutinized restrictive titles)).

190. See *State v. Broadway*, 133 Wash. 2d 118, 127, 942 P.2d 363, 369 (1997).

191. See *Gruen v. State Tax Comm'n*, 35 Wash. 2d 1, 23, 211 P.2d 651, 664 (1949), *overruled on other grounds by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

192. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788.

193. See *id.* at 789.

194. See STATE GOV'T OPERATIONS & ACCOUNTABILITY COMM., WASHINGTON STATE HOUSE OF REPRESENTATIVES OFFICE OF PROGRAM RESEARCH, BILL ANALYSIS: ESSB 5395 1 (2005), <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/House/5395-S.HBA.pdf> (describing the “Brief Summary of the Engrossed Substitute Bill” as: “Requires that electronic voting devices produce a machine-countable paper record *and* requires county auditors to conduct an audit of electronic voting devices the day after an election.” (emphasis added)).

195. See E.S.S.B. 5395; *Blanco v. Sun Ranches, Inc.*, 38 Wash. 2d 894, 900–02, 234 P.2d 499,

The unconstitutionality of section 5 of ESSB 5395 is analogous to that of other legislative provisions not fairly within restrictive titles.<sup>196</sup> In *Blanco v. Sun Ranches, Inc.*,<sup>197</sup> the Washington State Supreme Court examined a bill titled “AN ACT relating to the protection of employees in factories where machinery is used.”<sup>198</sup> Section 1 of the bill extended its regulations to any operation where machinery was used.<sup>199</sup> The court voided this provision because it was not fairly within a title that expressly limited the bill’s regulations to factories.<sup>200</sup> Similarly, the legislature chose a restrictive title for ESSB 5395 that expressly limits the bill’s scope to the requirement that electronic voting devices produce paper records.<sup>201</sup> Section 5 of ESSB 5395 extends the scope of the legislation by requiring audits of electronic voting devices.<sup>202</sup> As in *Blanco*, courts examining ESSB 5395 have an obligation to invalidate any provision not fairly within the title’s scope.<sup>203</sup> A title expressly limiting a bill’s scope to regulating factories does not encompass a provision regulating other operations.<sup>204</sup> Similarly, a title expressly limiting a bill’s scope to requiring paper records does not encompass a provision requiring county audits of electronic voting device results.<sup>205</sup> Both provisions are void because they attempt to regulate outside of the title’s scope.<sup>206</sup>

### 3. *ESSB 5395 Violates the Purpose of the Single-Subject Rule Because Section 5 Did Not Pass on Its Own Merits*

Passage of ESSB 5395 violates the purpose behind Article II, section 19 because the separate subject in section 5 did not pass on its own merits.<sup>207</sup> The purpose behind the single-subject rule is that each subject

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503–04 (1951).

196. *See Blanco*, 38 Wash. 2d at 900–02, 234 P.2d at 503–04.

197. 38 Wash. 2d 894, 234 P.2d 499 (1951).

198. *Id.* at 901, 234 P.2d at 503–04.

199. *See id.* at 900–01, 234 P.2d at 503.

200. *See id.* at 901–02, 234 P.2d at 504.

201. *See* E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788.

202. *See id.* at 789.

203. *See Blanco*, 38 Wash. 2d at 901–02, 234 P.2d at 504 (holding that courts must invalidate provisions not fairly within the title of a bill).

204. *See id.*

205. *See* E.S.S.B. 5395.

206. *See Blanco*, 38 Wash. 2d at 900–02, 234 P.2d at 503–04.

207. *See* State Fin. Comm. v. O’Brien, 105 Wash. 2d 78, 88, 711 P.2d 993, 998 (1986).

should pass or fail on its own merits.<sup>208</sup> Like other state courts, the Washington State Supreme Court frequently cites to the nineteenth-century concern of logrolling to inform its single-subject analysis.<sup>209</sup> The legislature passed ESSB 5395 under a title indicating that the bill's subject was the requirement of paper records for electronic voting devices.<sup>210</sup> There is no way of knowing whether the separate subject of county audits would have passed on its own merits, or whether it was simply logrolled as an attachment to the paper records subject.<sup>211</sup> Because section 5 of ESSB 5395 adds an additional subject to the bill, the legislation violates the underlying purpose of the single-subject rule.<sup>212</sup>

*B. ESSB 5395 Violates the Subject-in-Title Rule Because Its Title Fails to Indicate that It Requires County Audits of Electronic Voting Devices*

ESSB 5395 violates the subject-in-title rule because it fails to give notice of the section 5 auditing requirement. The plain meaning of its title only gives notice that electronic voting devices must produce paper records.<sup>213</sup> This title does not give notice of the scope and purpose of the law, particularly the new substantive duty imposed by section 5.<sup>214</sup> This inadequate notice violates the underlying purpose behind the subject-in-title rule.<sup>215</sup>

*1. Under the Plain Meaning of Its Title, ESSB 5395 Only Gives Notice that Electronic Voting Devices Must Produce Paper Records*

The plain meaning of ESSB 5395's title only gives notice of the bill's requirement that electronic voting devices must produce paper

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208. *See id.*

209. *See* COOLEY, *supra* note 2, at 170–73; *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 25, 200 P.2d 467, 473 (1948); *Petroleum Lease Props. Co. v. Huse*, 195 Wash. 254, 259, 80 P.2d 774, 776 (1938).

210. *See* E.S.S.B. 5395.

211. *See O'Brien*, 105 Wash. 2d at 88, 711 P.2d at 998.

212. *See id.*

213. *See infra* Part IV.B.1.

214. *See infra* Part IV.B.2.

215. *See infra* Part IV.B.3.

records.<sup>216</sup> Under the standard articulated in *Washington State Grange v. Locke*,<sup>217</sup> courts must strictly limit their interpretation to the words of the title only<sup>218</sup> and give these words their common and ordinary meaning.<sup>219</sup> In determining a word's "ordinary meaning," courts refer to definitions in standard dictionaries.<sup>220</sup> Examining the words in ESSB 5395's title, *The American Heritage Dictionary* defines "require" as "[t]o impose an obligation on; compel."<sup>221</sup> It defines "electronic" as "[o]f or relating to electronics,"<sup>222</sup> "vote" as "[t]he act or process of voting,"<sup>223</sup> and "device" as "[a] contrivance or an invention serving a particular purpose, especially a machine used to perform one or more relatively simple tasks."<sup>224</sup> The meaning of "produce" is "[t]o bring forth; yield."<sup>225</sup> Finally, definitions of "paper" include "[m]ade of paper,"<sup>226</sup> and "record" means "[a]n account, as of information or facts, set down especially in writing as a means of preserving knowledge."<sup>227</sup> Thus, the common and ordinary meaning of ESSB 5395's title is a bill that

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216. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788.

217. 153 Wash. 2d 475, 105 P.3d 9 (2005).

218. See *id.* at 493, 105 P.3d at 19.

219. See *id.* at 492–503, 105 P.3d at 18–19.

220. See *id.* at 495–96, 105 P.3d at 20.

221. THE AMERICAN HERITAGE DICTIONARY 1533 (3d ed. 1992); accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (2002) (defining "require" as "to demand as necessary or essential").

222. THE AMERICAN HERITAGE DICTIONARY, *supra* note 221, at 593; accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 221, at 733 (defining "electronic" as "of or relating to electronics").

223. THE AMERICAN HERITAGE DICTIONARY, *supra* note 221, at 2004; accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 221, at 2565 (defining "voting" as "the act or process of casting a vote").

224. THE AMERICAN HERITAGE DICTIONARY, *supra* note 221, at 511; accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 221, at 618 (defining "device" as "something that is formed or formulated by design").

225. THE AMERICAN HERITAGE DICTIONARY, *supra* note 221, at 1445; accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 221, at 1810 (defining "produce" as "to cause to have existence").

226. THE AMERICAN HERITAGE DICTIONARY, *supra* note 221, at 1309; accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 221, at 1633 (defining "paper" as "made wholly or almost wholly of paper").

227. THE AMERICAN HERITAGE DICTIONARY, *supra* note 221, at 1510–11; accord WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 221, at 1898 (defining "record" as "evidence, knowledge, or information remaining in permanent form").



compels electronic machines invented for the act of voting to generate permanent paper evidence of votes cast.<sup>228</sup>

2. *ESSB 5395 Violates the Subject-in-Title Rule Because the Plain Meaning of Its Title Fails to Give Notice of Section 5's Imposition of Substantive Auditing Duties*

The plain meaning of ESSB 5395's title does not give adequate notice of the section 5 requirement that county auditors perform audits of electronic voting devices. Under the subject-in-title rule, courts declare legislation unconstitutional if the plain meaning of the title fails to give adequate notice of the act's substance<sup>229</sup> or its scope.<sup>230</sup> Courts should not strain to interpret a title as constitutional if doing so requires an unreasonable construction of its plain meaning.<sup>231</sup> The plain meaning of ESSB 5395's title gives notice that it compels electronic voting machines to generate permanent paper evidence of votes cast.<sup>232</sup> This language does not give adequate notice that the bill adds a substantive duty under section 5 for county auditors to audit electronic voting device results.<sup>233</sup> Because the legislature did not use language in ESSB 5395's title that alerts a typical reader of the requirements of section 5, the bill violates the subject-in-title rule.<sup>234</sup>

The notice problems associated with ESSB 5395's title are analogous to those at issue in *Swedish Hospital v. Department of Labor and Industries*.<sup>235</sup> In that case, the court ruled that the title, "AN ACT giving workmen's compensation benefits to persons engaged in hazardous and

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228. See E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788; see also Wash. State Grange v. Locke, 153 Wash. 2d 475, 495–96, 105 P.3d 9, 20 (2005) (relying on *The American Heritage Dictionary* and *Webster's Third New International Dictionary* to discern the common meaning of a legislative title).

229. See, e.g., Fray v. Spokane County, 134 Wash. 2d 637, 652, 654–55, 952 P.2d 601, 608–09 (1998).

230. See, e.g., Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 227, 11 P.3d 762, 791 (2000).

231. See *id.* at 225, 11 P.3d at 790 (citing Soundgarden v. Eikenberry, 123 Wash. 2d 750, 757, 871 P.2d 1050, 1054 (1994)).

232. See *supra* Part IV.B.1.

233. See E.S.S.B. 5395. Cf. Patrice v. Murphy, 136 Wash. 2d 845, 854–55, 966 P.2d 1271, 1275 (1998) (holding that the title "AN ACT Relating to court costs" gave inadequate notice of provisions imposing a duty upon law enforcement agencies to provide interpreters to deaf persons).

234. See *Patrice*, 136 Wash. 2d at 854–55, 966 P.2d at 1275.

235. See 26 Wash. 819, 831–32, 176 P.2d 429, 435–36 (1947).

extrahazardous occupations in charitable institutions,”<sup>236</sup> gave inadequate notice of provisions extending a bill’s protection to non-profit institutions.<sup>237</sup> Similarly, the plain meaning of ESSB 5395’s title gives express notice of the paper record requirement, but gives no notice of the county audit requirement.<sup>238</sup> Ultimately, the common problem shared by these two bills is that their titles use specific and restrictive language, causing the typical inquiring reader to misjudge the scope of the legislation.<sup>239</sup>

ESSB 5395 does not give adequate notice to the county auditors whose duties are expanded under section 5. Under the rule from *Patrice v. Murphy*,<sup>240</sup> courts void legislation under the subject-in-title rule when the title fails to give notice to parties whose rights and liabilities are affected by its provisions.<sup>241</sup> In *Patrice*, the court ruled that the title “AN ACT Relating to court costs”<sup>242</sup> gave inadequate notice of provisions imposing a duty upon law enforcement agencies to provide interpreters to deaf persons.<sup>243</sup> Similarly, ESSB 5395’s title gives inadequate notice to county auditors that the bill imposes a new statutory duty by requiring them to audit results of electronic voting devices.<sup>244</sup> Although the bill’s title gives notice to electronic voting device manufacturers of the bill’s paper record requirement, counties have no notice that the legislation significantly expands their auditing duties.<sup>245</sup>

### 3. *ESSB 5395 Violates the Subject-in-Title Rule by Failing to Give Adequate Notice*

Finally, ESSB 5395 violates the purpose behind the subject-in-title rule.<sup>246</sup> The subject-in-title rule originated to combat misleading legislative titles,<sup>247</sup> and the Washington State Supreme Court has held

236. *Id.* at 831, 176 P.2d at 435.

237. *See id.*

238. *See supra* Part IV.B.1.

239. *See Swedish Hosp.*, 26 Wash. at 830–32, 176 P.2d at 435–36.

240. 136 Wash. 2d 845, 966 P.2d 1271 (1998).

241. *See id.* at 854–55, 966 P.2d at 1275.

242. *Id.* at 853, 966 P.2d at 1274.

243. *See id.* at 853–55, 966 P.2d at 1274–75.

244. *See* E.S.S.B. 5395, 59th Leg., Reg. Sess., 2005 Wash. Sess. Laws 788–89.

245. *See id.*

246. *See* Wash. State Grange v. Locke, 153 Wash. 2d 475, 491, 105 P.3d 9, 18 (2005).

247. *See* Ruud, *supra* note 83, at 391–92.

that legislative and public notice are principle purposes behind the provision.<sup>248</sup> Legislators and members of the public reading the title of ESSB 5395 are on notice that the bill requires electronic voting machines to produce paper records.<sup>249</sup> They are not on notice that the bill also requires audits of election results using electronic voting devices.<sup>250</sup> Thus, the title of ESSB 5395 provides inadequate notice under the subject-in-title rule.

## V. CONCLUSION

ESSB 5395 violates Article II, section 19 of the Washington State Constitution because the scope of the law exceeds the scope of its title. The legislation violates the single-subject rule because section 5's requirement that counties audit electronic voting devices is not fairly within the scope of the bill's restrictive title. The legislation violates the subject-in-title rule because the plain meaning of its title does not give adequate notice of the law's scope and purpose to an inquiring mind, particularly to counties affected by the auditing requirement. While the invocation of Article II, section 19 at first may appear as a triumph of form over function, we must never forget that this provision was enacted in response to practical concerns about the legislative process. As long as Article II, section 19 guarantees that each legislative subject passes on its own merits, and ensures adequate legislative and public notice, it is more than worthy of its place in the Washington State Constitution.

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248. See *Swedish Hosp. v. Dep't of Labor & Indus.*, 26 Wash. 2d 819, 830, 176 P.2d 429, 434–35 (1947).

249. See E.S.S.B. 5395.

250. See *id.* at 788–89.