NOTES

PROTECTING DIRECT DEMOCRACY

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INTRODUCTION

State ballot initiatives have become increasingly popular mechanisms for safeguarding abortion rights since the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*.[1] Following a string of recent victories for abortion rights groups in states such as Kansas, Kentucky, Montana, Ohio, and Michigan, opponents have sought to make it harder to pass and use citizen-approved ballot measures to guarantee abortion access.[2]

The rise in the prevalence of state ballot initiatives coincides with a circuit split on the appropriate level of judicial scrutiny to apply to procedural and substantive regulations imposed on such initiatives. The split originates from the inherent federalism conflict over which entity is best suited to control and regulate state elections. The Constitution vests States with the power to govern their own elections, and the Supreme Court has thus given States "considerable leeway to protect the integrity and reliability of the initiative process."[3] However, the Supreme Court has expressly recognized that ballot initiatives are not subject to unrestrained state control. In *Meyer v. Grant*, the Court held that initiative petition circulation involves "core political speech" and states therefore may not "limit discussion of political issues raised in initiative petitions" or otherwise restrict the exercise of the initiative in a manner that unduly burdens the First Amendment.[4] The circuits differ, though, in how to apply *Meyer* to neutral procedural regulations.

The First, Sixth, and Ninth Circuits hold that the First Amendment requires heightened scrutiny of the State's interests when issuing procedural regulations that inhibit a person's ability to place an initiative on the ballot.[5] Conversely, five other circuits hold that regulations making the initiative process more challenging do not implicate the First Amendment.[6] The Supreme Court has identified the circuit split; when concurring on a grant of stay in 2020, Chief Justice Roberts wrote that "the Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election

[1] Emily Bazelon, *Is There a Popular Backlash to the Supreme Court's Dobbs Decision?*, N.Y. TIMES MAGAZINE, Sept. 17, 2023, https://www.nytimes.com/2023/09/12/magazine/abortion-laws-states.html [https://perma.cc/B8HY-E8JV].

[2] Fredreka Schouten, *Abortion foes take aim at ballot initiatives in next phase of post-Dobbs political fights*, CNN, (Apr. 1, 2023), https://www.cnn.com/2023/04/01/politics/abortion-opponents-ballot-initiatives-ohio/index.html [https://perma.cc/2LKA-NSBV].

[3] Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 191 (1999).

[4] Meyer v. Grant, 486 U.S. 414, 424-25 (1988).

[5] *See* Thompson v. DeWine, 959 F.3d 804, 808 (6th. Cir. 2020) (per curiam); Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012); Wirzburger v. Galvin, 412 F.3d 272, 274, 276-77 (1st Cir. 2005).

[6] *See*, *e.g.*, Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 938 (7th Cir. 2018); Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (en banc); Dobrovolny v. Moore, 126 F. 3d 1111, 1113 (8th Cir. 1997).

administration."[7] However, the court declined to address the issue when presented with a relevant petition for certiorari in 2021.[8] State efforts to hinder the ballot initiative process have surged since the Court's 2021 cert denial and subsequent decision in *Dobbs*, heightening the importance of resolving the split. While this Note focuses on ballot questions concerning abortion and reproductive rights, those are not the only areas of controversial and vital initiatives. Initiatives concerning worker classification, cannabis, criminal justice reform, and other fundamental issues are playing out in many states today.[9] Their significance further supports the need for heightened scrutiny over state efforts to restrict the initiative process.

This Note proceeds in three parts. Part I explains the ballot initiative process and surveys post-*Dobbs* initiatives and state efforts to minimize their success. Using Ohio's 2023 effort as an illustration, this Part establishes the issue's relevance and likelihood of reoccurrence. Part II provides an overview of First Amendment election law doctrine, a detailed discussion of the differing circuit approaches to the question and highlights the Supreme Court's recognition of the issue. Part III demonstrates why the Supreme Court should resolve the circuit split by adopting heightened scrutiny as the nationwide standard. It does so through four key methodologies, demonstrating the breadth of justifications for this Note's conclusion. Part III-A presents purposive arguments rooted in the history of the First Amendment to show how heightened scrutiny aligns with key First Amendment purposes. Part III-B provides textual and public meaning arguments to demonstrate how courts can evaluate animus and viewpoint discrimination in state regulations. Part III-C demonstrates that there are no stare decisis concerns with adopting heightened scrutiny and that this standard respects Supreme Court precedent on the issue. Part III-D presents pragmatic policy arguments for adopting heightened scrutiny. Each Part III section acknowledges and addresses counterarguments in turn.

This Note does not take a position on which specific form of heightened scrutiny should apply to initiative regulations for three reasons. First, the circuit split is chiefly over the foundational question of whether to apply the First Amendment at all. Second, the form of scrutiny generally applied to election regulations under the First Amendment — the *Anderson-Burdick* framework — is a sliding scale that does not fit into a clear tier of scrutiny but rather opens the door for courts to apply varying degrees of review based on specific factual circumstances.[10] Third, the Supreme Court has recently shifted away from interpreting the Constitution through strict tiers of scrutiny, signaling that arguments made on those grounds alone will be less persuasive to the Roberts

[7] Little v. Reclaim Idaho, 140 S.Ct. 2616, 2616 (2020) (granting application for stay).

[8] Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020) *cert. denied*, 141 S.Ct. 2512 (2021)..

[9] *2024 ballot measures*, BALLOTPEDIA, https://ballotpedia.org/2024_ballot_measures [https://perma.cc/L76V-AT3C] (last visited Dec. 5, 2024).

[10] *See* discussion *infra* Part II.

Court.[11] Instead, this Note provides courts with the tools to analyze a range of possible arguments that will likely be raised by advocates seeking to defeat restrictions on the initiative process. Because rational basis review will hardly ever allow a court to strike down a state election regulation, adopting heightened scrutiny over state limitations on ballot initiatives will prevent states from hindering the democratic process. Which form of scrutiny is most appropriate and persuasive will depend on future circumstances.

Much has been written and said about *Dobbs* and its impact on democracy.[12] Less has been written about how the success of pro-choice activists at the ballot box will impact the legal framework surrounding those efforts.[13] This Note fills that gap by demonstrating why heightened scrutiny of initiative regulations is both a more legally sound test and will better allow federal courts to protect reproductive health and safeguard the exercise of democracy from state legislatures and interest groups that seek to diminish it.

I. POLITICAL BACKGROUND: POST-DOBBS BALLOT INITIATIVES

The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health*[14] to overrule *Roe v. Wade*[15] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[16] was largely justified through an appeal to and

[11] *See, e.g.*, New York State Rifle and Pistol Association, Inc. v. Bruen, 597 U.S. 1, 24 (2022) (rejecting tiers of scrutiny in Second Amendment analysis); Andrew Willinger, *Does Bruen Herald the End of Constitutional Strict Scrutiny Amendments?*, DUKE CTR. FOR FIREARMS L. (Aug. 26, 2022), https://firearmslaw.duke.edu/2022/08/does-bruen-herald-the-end-of-constitutional-strict-scrutiny-amendments [https://perma.cc/9TQD-S6Z7] ("*Bruen* entirely repudiates tiers of scrutiny in the Second Amendment context."); Jonathan Scruggs, *From Guns to Websites: Clarifying Tiers of Scrutiny for Free-Speech Cases*, THE FEDERALIST SOC'Y (Jul. 14. 2022), https://fedsoc.org/commentary/fedsoc-blog/from-guns-to-websites-clarifying-tiers-of-scrutiny-for-free-speech-cases [https://perma.cc/66SL-8CN3] ("The Constitution doesn't mention anything about tiers or balancing. It is atextual, ahistorical, and very discretionary. Justices and scholars alike have criticized it, including Justices Thomas, Kennedy, and Kavanaugh, and Professors Eugene Volokh and Joel Alicea."); R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN'S L. REV. 4, 1119 (2019) ("Tiered scrutiny review has decayed to the point to which its use is no longer justifiable."); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFS. (2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny [https://perma.cc/6PWL-P8C3] ("That framework ought to be abandoned. The tiers of scrutiny have no basis in the text or original meaning of the Constitution.").

[12] *See* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024).

[13] *Id.* at 776 (discussing state ballot initiatives following Dobbs and writing that: "These dynamics are striking and worthy of further scholarly attention.").

[14] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[15] 410 U.S. 113 (1973).

[16] 505 U.S. 833 (1992).

invocation of democracy.[17] Writing for the majority, Justice Alito proclaimed that it was "time to heed the Constitution and return the issue of abortion to the people's elected representatives."[18] Political activists on both sides of the issue, but particularly those in states with conservative legislatures, responded to Justice Alito's words with a wave of state and federal advocacy.[19] Following *Dobbs*, fifteen predominately conservative states enacted near-total abortion bans, and two more established limits at just six weeks of pregnancy.[20] As pro-life activists advanced state-level initiatives, federal legislators unsuccessfully introduced legislation in the House and Senate to guarantee national abortion access.[21] Given the limited prospects for federal success, however, pro-choice activists have increasingly relied on state ballot initiatives and voter referenda to protect reproductive rights.[22]

Ballot initiatives are a process by which citizens can propose statutes or constitutional amendments, collect a set number of signatures, and then place those proposals directly on the ballot for voters to decide. Currently, twenty-six states and Washington D.C. provide some form of citizen-initiated ballot measures.[23] While each state has slightly different requirements, initiatives can generally be a state statute, constitutional amendment, or veto referendum, which asks voters whether to uphold or repeal a previously enacted law. Some states also allow for legislative referrals, where legislatures themselves put laws directly on the ballot.[24]

In 2022, six states voted on ballot measures addressing abortion, the most on record in one year at the time.[25] In August of 2022, Kansas voters—a traditionally conservative electorate—were faced with a proposed state constitutional amendment to allow the state legislature to ban or restrict

[17] Murray & Shaw, *supra* note 12, at 729.

[18] *Dobbs*, 597 U.S. at 232.

[19] William Brangham, *Conservative states continue to restrict abortion following overturn of Roe v. Wade*, PBS (Sept. 15, 2022), https://www.pbs.org/newshour/show/conservative-states-continue-to-restrict-abortion-following-overturn-of-roe-v-wade#:~:text=Yes%20Not%20now-Conservative%20states%20continue%20to%20restrict%20abortion%20following%20overturn%20of%20Roe,Wade&text=Conservative%20states%20continue%20to%20pass,abortion%20ban%20signed%20into%20law [https://perma.cc/8848-5H22].

[20] Bazelon, *supra* note 1.

[21] Women's Health Protection Act, S.4132,117th Cong. (2021-2022).

[22] *Abortion on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/Abortion_on_the_ballot [https://perma.cc/8US8-BB3Y] (last visited Dec. 27, 2024).

[23] *Ballot Initiative*, BALLOTPEDIA, https://ballotpedia.org/Ballot_initiative [https://perma.cc/7HN7-AZ66] (last visited Dec. 27, 2024).

[24] *Id.*

[25] *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2022_abortion-related_ballot_measures [https://perma.cc/U2HT-9SYD] (last visited Dec. 27, 2024).

abortion.[26] Kansans overwhelmingly rejected the referendum by a vote of 59% to 41%, keeping in place a 2019 Kansas Supreme Court decision that allowed abortion up to the twenty-second week of pregnancy.[27]

In November 2022, anti-abortion ballot measures were defeated in two other traditionally conservative states: Kentucky and Montana.[28] The Kentucky initiative, which was placed on the ballot as a legislatively referred constitutional amendment,[29] would have amended the Kentucky Constitution to state that "nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion."[30] The measure was defeated by a vote of 52.35% to 47.65%.[31] The Montana measure came to voters as a legislatively referred state statute[32] and would have required healthcare providers to offer "reasonable care" to preserve the life of an infant born alive after an attempted abortion and enforced criminal and civil penalties against providers for failing to do so.[33] The measure was defeated by voters 52.55% to 47.45%.[34] Also in 2022, voters in traditionally progressive California[35] and

[26] Rachel M. Cohen, *Why the Kansas abortion amendment is so confusing*, VOX (Aug. 2, 2022), https://www.vox.com/23273455/kansas-abortion-roe-dobbs-ballot-initiative-constitutional-amendment [https://perma.cc/XK5G-9E8F].

[27] Dylan Lysen, Laura Ziegler, & Blaise Mesa, *Voters in Kansas decide to keep abortion legal in the state, rejecting an amendment*, NPR (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/77EH-7552].

[28] *2022 Abortion-Related Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2022_abortion-related_ballot_measures [https://perma.cc/6XL6-ZAAK] (last visited Dec. 27, 2024).

[29] *Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Legislatively_referred_constitutional_amendment [https://perma.cc/6W5V-NHA4] (last visited Dec. 27, 2024).

[30] *An Act proposing an amendment to the Constitution of Kentucky Related to abortion*, Ky. Gen., H.B. 91 (2021).

[31] *Kentucky Constitutional Amendment 2, No Right to Abortion in Constitution Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Kentucky_Constitutional_Amendment_2,_No_Right_to_Abortion_in_Constitution_Amendment_(2022) [https://perma.cc/N72C-VZ8X] (last visited Dec. 27, 2024).

[32] *Legislatively Referred State Statute*, *supra* note 29.

[33] *Infant Safety and Care Act*, Mont. Legislature, H.B. 625, 68th Reg. Sess. (2022-2023).

[34] *Montana LR-131, Medical Care Requirements for Born-Alive Infants Measure (2022)*, BALLOTPEDIA, https://ballotpedia.org/Montana_LR-131,_Medical_Care_Requirements_for_Born-Alive_Infants_Measure_(2022) [https://perma.cc/3U6V-TM9Z] (last visited Dec. 27, 2024).

[35] Jackie Fortier, *California voters enshrine right to abortion and contraception in state constitution*, NPR (Nov. 9, 2022), https://www.npr.org/2022/11/09/1134833374/california-results-abortion-contraception-amendment-midterms [https://perma.cc/6RCH-JVLR].

Vermont,[36] as well as the battleground state of Michigan,[37] where abortion rights were not directly threatened, proactively passed ballot measures to affirmatively establish a state constitutional right to abortion. Ohio was the only state to vote on an abortion-related measure in 2023.[38]

A. *"They're Taking Power Away from the People"[39]: State Shenanigans to Limit the Initiative Process*

In February 2023, following pro-choice successes in other states with conservative legislatures, Ohio reproductive rights activists submitted ballot language for a constitutional amendment to enshrine abortion access to be voted on in November 2023.[40] Three months later, in May 2023, the Ohio legislature adopted Senate Joint Resolution No. 2, which created a special August 2023 election where voters would decide whether to raise the passage threshold for citizen-initiated constitutional amendments from a majority to 60%.[41] Conveniently, none of the 2022 abortion-related ballot measures in conservative or battleground states (Kansas, Michigan, Kentucky, Montana) exceeded 60%[42] and 2022 AP VoteCast polling found that 59% of Ohio voters said abortion should generally be legal.[43] Not only did the proposed amendment seek to inhibit the citizen-initiative process by changing the passage threshold, it also heightened the requirements to place measures on the ballot in the first place by requiring that five percent of the electors in each Ohio county sign the petition and eliminating the state's ten-day cure period for insufficient signature numbers.[44] The validity of holding the special election was challenged, but the

[36] Mikaela Lefrak, *Vermont votes to protect abortion rights in state constitution*, NPR (Nov. 9, 2022), https://npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results [https://perma.cc/XB7D-VTL4].

[37] Alice Miranda Ollstein, *Michigan votes to put abortion rights into state constitution*, POLITICO (Nov. 9, 2022), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778 [https://perma.cc/H4YF-BQZA].

[38] *Abortion on the ballot by year*, BALLOTPEDIA, https://ballotpedia.org/Abortion_on_the_ballot#By_year [https://perma.cc/7Q42-FRB8] (last visited Dec. 27, 2024).

[39] Bazelon, *supra* note 1.

[40] Julie Carr Smyth, *Abortion rights groups submit 2023 ballot measure in Ohio*, ASSOCIATED PRESS (Feb. 21, 2023), https://apnews.com/article/abortion-ohio-state-government-michigan-health-7758b37b35cbb87f3185877fcbfc2139 [https://perma.cc/4ZK6-L9CZ] ("In language similar to a constitutional amendment Michigan voters approved in November. . . ").

[41] S.J. Res. 2, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (as enrolled).

[42] *See supra* Part I.

[43] Robert Yoon, *What to expect when Ohio votes on abortion and marijuana*, ASSOCIATED PRESS (Nov. 3, 2023), https://apnews.com/article/ohio-election-abortion-ballot-measure-issue-marijuana-b8a3e625deec79213ea9326b5ca1476a#:~:text=In%202022%2C%2059%25%20of%20voters,recreational%20adult%20use%20of%20marijuana [https://perma.cc/UA2V-MHU].

[44] *See* Ohio S.J. Res. 2, at 5 (as enrolled).

Ohio Supreme Court upheld the election in a four to three vote.[45] The dissent in that decision noted that despite previously essentially eliminating August special elections except for those specifically prescribed by legislation, the Ohio General Assembly here did so by joint resolution because it was politically incapable of passing such legislation.[46]

Ohio Republican legislators officially characterized the effort as "a constitutional protection act aimed at keeping deep-pocketed special interests out of Ohio's foundational documents."[47] A deeper look at their words, however, shows otherwise. Ohio Senate President Matt Huffman told reporters as much in March 2023, saying "[i]f we save 30,000 lives as a result of spending $20 million, I think that's a great thing."[48] Huffman's quote referred to the number of abortions performed annually in Ohio—21,813 in 2021—and the estimated cost of holding the August special election.[49] Ohio Secretary of State Frank LaRose, who is responsible for administering statewide elections but still campaigned extensively on behalf of the amendment,[50] admitted in June 2023 that the amendment proposal was "100%" about abortion.[51] Ultimately, Ohio voters rejected the proposal in August 2023, defeating the amendment by fourteen percentage points.[52] According to some observers, such as Mark Haake, a Republican City Councilor in Mason, Ohio, the resounding defeat was

[45] State *ex rel.* One Pers. One Vote v. LaRose, 243 N.E.3d 1 (Ohio June 16, 2023).

[46] *Id.* at 25 (Brunner, J., dissenting) ("While the legislature could have repealed the prohibition on August special elections via legislation, it attempted to do so but failed. That failure speaks volumes. So instead, it simply adopted a joint resolution in direct violation of the law. But we have long held that '[t]he statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly.'" (citation omitted)).

[47] Julie Carr Smyth & Samantha Hendrickson, *Ohio Constitution question aimed at thwarting abortion rights push heads to August ballot*, ASSOCIATED PRESS (May 10, 2023), https://apnews.com/article/constitutional-access-ohio-house-abortion-ballot-95cae24b996ce943c976dbf06d7d9867 [https://perma.cc/W9UD-9LZJ].

[48] Jeremy Pelzer, *Spoiling abortion-rights amendment a 'great' reason to have August special election, Ohio Senate President Matt Huffman says*, CLEVELAND.COM (Mar. 23, 2023), https://www.cleveland.com/news/2023/03/spoiling-abortion-rights-amendment-a-great-reason-to-have-august-special-election-ohio-senate-president-matt-huffman-says.html [https://perma.cc/NKF5-JQKA].

[49] *Id.*

[50] David Skolnick, *LaRose Campaigns in Support of Issue 1*, TRIB. CHRON. (Aug. 3, 2023), https://www.tribtoday.com/news/local-news/2023/08/larosecampaigns-in-support-of-issue-1/ [https://perma.cc/Q4YP-4D37].

[51] Morgan Trau, *Ohio Sec. of State LaRose admits making constitution harder to amend is '100% about… abortion'*, OHIO CAP. J. (June 5, 2023), https://ohiocapitaljournal.com/2023/06/05/ohio-sec-of-state-larose-admits-making-constitution-harder-to-amend-is-100-about-abortion/ [https://perma.cc/NSS5-ML6L].

[52] Maggie Astor, *4 Takeaways From Ohio's Vote on Abortion and Democratic Power*, N.Y. TIMES (Aug. 9, 2023), https://www.nytimes.com/2023/08/09/us/politics/ohio-abortion-issue-1-takeaways.html [https://perma.cc/2SYM-NQB].

in part due to the proposal's blatantly political motivations: "The complaint that I heard a lot was the hypocrisy of it—'They're taking power away from the people.'"[53] In November 2023, just as conservative lawmakers had sought to prevent, Ohio voters amended the state constitution to provide a state constitutional right to "make and carry out one's own reproductive decisions" by a vote of 56.78% to 43.22%.[54] Had Ohio legislators succeeded in modifying the process in August 2023, Ohio residents would not have the right to make their own reproductive decisions.

Ballot questions are one of the few mechanisms available for voters to speak directly on controversial issues.[55] Unsurprisingly, then, Ohio's 2023 effort is not the only example of state legislators and administrators seeking to undermine initiatives' impact and maintain their own control over state politics. The following examples (all since 2018 alone) demonstrate the range of ways states have sought to minimize the impact of ballot initiatives: expanding signature requirements (Arizona, Arkansas, Idaho, Michigan, North Dakota, Ohio, and Utah); expanding geographic distribution requirements for signature collection (Arizona, Ohio, Idaho, and Michigan have made such proposals to varying degrees of success); increasing the total number of signatures required (North Dakota, 2023); increasing the approval percentage necessary to adopt a ballot measure (Arizona, Ohio, Missouri, Oklahoma, and Florida have considered such proposals to varying degrees of success); attempts to block or amend initiatives after they pass (Ohio, Arizona, and Michigan); and state executive officers relying on technical aspects of the initiative certification process to nullify specific proposals (Florida attorney general, 2024; North Dakota secretary of state, 2022).[56]

Abortion-related ballot measures show no signs of slowing down. Voters decided on ten initiatives addressing state constitutional rights to abortion in the November 2024 election, the most on record in a single year.[57] Seven states—Arizona, Colorado, Maryland, Missouri, Montana, New York, and Nevada—approved questions addressing state constitutional rights to abortion, while

[53] Bazelon, *supra* note 1.

[54] *Ohio Issue 1, Right to Make Reproductive Decisions Including Abortion Initiative (2023)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Issue_1,_Right_to_Make_Reproductive_Decisions_Including_Abortion_Initiative_(2023) (last visited Dec. 27, 2024) [https://perma.cc /AMZ6-RTPN].

[55] Jennifer Brunner, *Is Limiting Abortion a Pretext for Oligarchy? Abortion and the Quest to Limit Citizen-Initiated Ballot Rights in Ohio*, 2023 WIS. L. REV. 1494, 1495 (2023).

[56] Sara Carter & Alice Clapman, *Politicians Take Aim at Ballot Initiatives*, BRENNAN CENT. (Jan. 16, 2024), https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives [https://perma.cc/B2SP-SUW8].

[57] *2023 and 2024 Abortion Related Ballot measures*, BALLOTPEDIA, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures [https://perma.cc/LCK9-QLYR] (last visited Dec. 27, 2024).

voters in Florida, Nebraska, and South Dakota defeated such initiatives.[58] Notably, the Florida proposal received 57.16% of votes in support, but was still defeated because state law requires a 60% vote for approval.[59]

While none of these states assaulted the initiative process to the same degree as Ohio did in 2023, the 2024 ballot initiative cycle was far from seamless. In September 2024, the Utah Supreme Court ordered the state to void an amendment that would have allowed the legislature to repeal or alter voter-approved ballot initiatives.[60] In October 2024, a federal judge in Florida found that the state health department was "trampling" on free speech rights when it threatened TV stations that aired commercials in support of the state's abortion rights initiative.[61]

The New York Times described Ohio's August 2023 special election as "a test of efforts by Republicans nationwide to curb voters' use of ballot initiatives."[62] As pro-choice advocates continue to win at the ballot box, pro-life state officials will likely persist in exploring avenues to undermine their prospects for success.

II. ELECTION REGULATION AND INITIATIVE REVIEW CIRCUIT SPLIT

The rise of ballot initiatives raises the question of what authority courts have to protect them from state efforts to curb their influence. The Constitution provides States the power to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives."[63] The Supreme Court has thus traditionally left questions of voting rights and election administration to the states.[64] State power is not, however, unlimited. Although the text of the Constitution vests election administration with the states, the Court has recognized that voting is a fundamental right entitled to special protections.[65]

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[58] *2024 abortion-related ballot measures and state context*, BALLOTPEDIA, https://ballotpedia.org/2024_abortion-related_ballot_measures_and_state_context [https://perma.cc/XW44-CWHL] (last visited Dec. 27, 2024).

[59] *Florida Amendment 4, Right to Abortion Initiative (2024)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_4,_Right_to_Abortion_Initiative_(2024) [https://perma.cc/5MS7-YYU5] (last visited Dec. 27, 2024).

[60] League of Women Voters of Utah v. Utah State Legislature, 2024 WL 4294102 (Utah Sept. 25, 2024).

[61] Floridians Protecting Freedom, Inc. v. Ladapo, No. 4:24cv419-MW/MAF, 2024 WL 4518291 at *6 (N.D. Fla. Oct. 17, 2024).

[62] Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. TIMES (Aug. 8, 2023), https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html [https://perma.cc/TBD5-NMEE].

[63] U.S. CONST. art. I, § 4, cl. 1.

[64] Burdick v. Takashi, 504 U.S. 428, 433 (1992).

[65] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society"); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966); Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

The Court has found that the right to vote implicates the First Amendment because of the inherent connections between political activism and the freedom to associate: "[It] is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[66] Despite voting's fundamental nature, however, the Court has rejected calls to impose strict scrutiny on all voting regulations, finding that "to require that the regulation be narrowly tailored to advance a compelling state interest. . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[67] The Court has instead settled on a more flexible standard for reviewing laws that burden the right to vote under the First Amendment, known as the *Anderson-Burdick* framework.

When considering a challenge to a state election law, courts must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[68] When those First and Fourteenth Amendment rights are subjected to a "severe" burden, the regulation must be narrowly drawn to serve a compelling government interest (strict scrutiny); when a state election law instead imposes "reasonable, nondiscriminatory restrictions," the State's regulatory interests will generally sufficiently justify the restriction (rational basis review).[69] Many burdens, however, fall somewhere between those two extremes. When a law poses an intermediate burden, courts weigh the restriction against "the precise interests put forward by the State as justifications for the burden imposed by its rule."[70] Heightened scrutiny therefore requires the state to come up with more precise and compelling justifications for its actions than rational basis review and gives courts greater ability to check state abuses of power.

The First Circuit evaluates state initiative procedural regulations not under the *Anderson-Burdick* framework but instead under another First Amendment test known as the *O'Brien* standard.[71] *O'Brien* governs regulations of noncommunicative conduct that nevertheless contain speech elements. According to *O'Brien*, when speech and nonspeech elements are combined in the same conduct, a "sufficiently important governmental interest in regulating

[66] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[67] *Burdick*, 504 U.S at 433; *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates.").

[68] *Anderson*, 460 U.S. at 789.

[69] *Burdick*, 504 U.S. at 434.

[70] *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434.

[71] *See* Wirzburger v. Galvin, 412 F.3d 271, 275-279 (1st Cir. 2005).

the nonspeech element can justify incidental limitations on First Amendment freedoms."[72] *O'Brien* allows the government to regulate noncommunicative conduct through a four-part test: (1) the regulation "is within the constitutional power of the Government;" (2) "it furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[73] Although the *O'Brien* factors differ from the *Anderson-Burdick* framework, both modes of analysis represent forms of heightened scrutiny that give the courts greater power to police government regulation by requiring a detailed weighing of the burdens to voters and government interests.

A final relevant First Amendment theory is that of animus and viewpoint discrimination. Animus refers to the concept that discrimination against a particular group cannot constitute a legitimate governmental interest.[74] The Court's animus doctrine is imprecise at best, but has recently grown in favor among conservative justices, particularly regarding religious freedom claims.[75] Similarly, the Court's viewpoint discrimination doctrine holds that strict scrutiny is to be imposed for regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.[76]

Ballot initiatives occupy a murky status on the spectrum of election regulations. The Constitution does not guarantee the right to an initiative, but once a state has provided such a right, it may not restrict its exercise that unduly burdens First Amendment rights.[77] This rule originates from *Meyer v. Grant*, where the Supreme Court considered a Colorado statute that made it a felony to pay petition circulators collecting signatures for ballot initiatives. The Court subjected the statute to heightened scrutiny after holding that petition circulation "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"[78] Although the Court did not explicitly say what tier of scrutiny it was subjecting the statute to, it carefully weighed the statute's First Amendment burdens against Colorado's offered

[72] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[73] *Id.* at 377.

[74] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581, 628 (2022) ("A broader definition of animus allows for motives other than mere prejudice, including animus arising from moral disapproval or fear.").

[75] *See* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215, 1240–45 (2018) (arguing that the Supreme Court has not settled on a unified definition of animus); *see also* Daniel Mach, *The Supreme Court Cares About Religious Animus – Except When It Doesn't*, ACLU (June 26, 2018), https://www.aclu.org/news/immigrants-rights/supreme-court-cares-about-religious-animus-except-when-it-doesnt [https://perma.cc/U39T-MY2T].

[76] *See infra* Part III-B.

[77] Meyer v. Grant, 486 U.S. 414, 424 (1988).

[78] *Id.* at 421-22.

interests.[79] Ultimately, the Court struck down the Colorado statute, finding that it unduly burdened the plaintiff's ability to "freely [] engage in discussions concerning the need for [the proposal] that is guarded by the First Amendment."[80] *Meyer* establishes clear Supreme Court precedent applying the First Amendment to state regulations of the ballot initiative process. This precedent, however, conflicts with the federalism principle that states retain "considerable leeway to protect the integrity and reliability of the initiative process."[81] This conflict has generated a split among the circuits on how to apply *Meyer* and manage State exercise of their discretionary authority over the initiative process.[82]

1. The Rational Basis Circuits

Today, five Circuits apply rational basis review to ballot initiative regulations, holding that even when regulations make the initiative process more onerous, they only implicate the First Amendment if the State directly restricts political discussion or petition circulation. In *Initiative and Referendum Institute v. Walker*, plaintiffs challenged a Utah statute that subjected initiatives related to wildlife management to a heightened passage standard, requiring a supermajority for passage.[83] The Tenth Circuit held that the supermajority requirement did not implicate freedom of speech protections.[84] In coming to this conclusion, the Tenth Circuit distinguished between laws that regulate or restrict the communicative conduct of persons advocating a position—which are subject to strict scrutiny—and laws that instead determine the process by which legislation is enacted or makes particular speech less likely to succeed—which are not.[85] The Tenth Circuit followed the D.C. and Eighth Circuits in holding that "a state constitutional restriction on the permissible subject matter of citizen initiatives [does not] implicate the First Amendment in any way."[86] The Tenth Circuit also rejected the plaintiffs' arguments for intermediate scrutiny by

[79] *See id.* at 425 ("[T]he burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable.").

[80] *Id.* at 421.

[81] Buckley v. Am. Const. L Found. Inc., 525 U.S. 182, 191 (1999).

[82] Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616 (2020) (granting application for stay).

[83] 450 F.3d 1082, 1085 (10th Cir. 2006).

[84] *Id.*

[85] *Id.* at 1099-1100.

[86] *Id.* at 1102; *see also* Marijuana Policy Project v. United States, 304 F.3d 82, 86 (D.C. Cir. 2002) (rejecting the claim that law barring D.C. voters from passing citizen-initiated legislation related to "controlled substances" violated the First Amendment); Wellwood v. Johnson *ex rel.* Bryant, 172 F.3d 1007, 1008–09 (8th Cir.1999) (upholding Arkansas law requiring 30% of voters to sign a certain type of voting petition but only 15% to sign petitions on other subjects).

distinguishing between laws that restrict expressive conduct and those that make some outcomes more difficult to achieve.[87]

The Seventh Circuit has adopted a similar holding—that States are largely free to regulate the initiative process however they please—but rooted its finding in a different First Amendment theory: viewpoint discrimination.[88] In *Jones*, plaintiffs challenged an Illinois law limiting the number of referenda on any ballot to three ("Rule of Three").[89] After enacting the Rule of Three, the city council in Calumet City, Illinois, placed three propositions on the ballot before citizens could collect signatures themselves.[90] The plaintiffs argued that this violated the First Amendment by effectively barring private proposals from the ballot.[91] The Seventh Circuit, however, upheld the Rule of Three under rational basis review: "[b]ecause the Rule of Three does not distinguish by viewpoint or content, the answer depends on whether the rule has a rational basis, not on the First Amendment."[92] The Court further dispatched with the plaintiff's argument through *Meyer*'s holding that placing proposals on a ballot is not a constitutionally protected right: "This assumes that the ballot is a public forum and that there is a constitutional right to place referenda on the ballot. But there is no such right. Nothing in the Constitution guarantees direct democracy."[93]

The Eighth Circuit has held that it will apply the First Amendment when restrictions affect "the communication of ideas associated with the circulation of petitions" but will not apply the First Amendment to a ballot initiative signature requirement that restricts or makes more difficult the petition circulation process.[94] In narrower opinions, the Second and Eleventh Circuits declined to apply the First Amendment to challenges to state initiative mechanisms that did not clearly engage in viewpoint discrimination or merely limited the efficacy of certain legislative efforts.[95]

2. The Heightened Scrutiny Circuits

Three circuits hold that the First Amendment requires closer scrutiny of the State's interests when a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot.[96] The Sixth Circuit engaged in such an

[87] Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1102 (10th Cir. 2006).

[88] *See* Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 938 (7th Cir. 2018).

[89] *Id.* at 936.

[90] *Id.*

[91] *Id.* at 937.

[92] *Id.*

[93] *Id.*

[94] Dobrovolny v. Moore, 126 F.3d 1111, 1113 (8th Cir. 1997).

[95] Molinari v. Bloomberg, 564 F.3d 587, 601 (2d. Cir. 2009) (finding speech not restricted when state law "puts referenda and City Council legislation on equal footing, permitting the latter to supersede the former); Delgado v. Smith, 861 F.2d 1489, 1498 (11th Cir. 1988).

[96] Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616 (2020) *(*highlighting Sixth and Ninth Circuits); *see also* Wirzburger v. Galvin, 412 F.3d 271, 274–75 (1st Cir. 2005).

analysis concerning a COVID-19-era challenge to Ohio's enforcement of its ballot initiative regulations amidst the pandemic.[97] Plaintiffs argued that Ohio's stay-at-home orders made it too burdensome to obtain the signatures required to place an initiative on the ballot and moved to enjoin the State from enforcing those requirements, asking Ohio to instead accept electronically signed petitions.[98] Although the Sixth Circuit rejected the Plaintiffs' motion, they answered whether the pandemic and associated stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights through the *Anderson-Burdick* framework.[99] After determining that the burden was intermediate rather than severe, the court considered whether "the State has legitimate interests to impose the burden that outweigh it" and found the State's interest to be not only legitimate but compelling.[100] The Sixth Circuit also applied the *Anderson-Burdick* framework to a challenge to a Michigan ballot-initiative-regulation policy in 2020.[101] There, the court found a severe burden based on Michigan's stay-at-home order and applied strict scrutiny to strike down the provision for not being sufficiently narrowly tailored.[102]

The Ninth Circuit has taken a similar approach, adopting the *Anderson-Burdick* test to a Nevada signature requirement for placing an initiative on the ballot in *Angle v. Miller*.[103] The Ninth Circuit reasoned that weighing the burdens was logical to "guard against undue hindrances to political conversations and the exchange of ideas."[104] Following Supreme Court precedent in *Meyer v. Grant*, the Ninth Circuit identified two ways in which restrictions on the initiative process could severely burden core political speech: restricting one-on-one communication between petition circulators and voters and making it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot.[105] Although the Ninth Circuit in *Angle* upheld the law as within the state's power to achieve its important

[97] *See* Thompson v. Dewine, 959 F.3d 804, 809 (6th Cir. 2020).

[98] *Id.* at 807.

[99] *Id.* at 808–809.

[100] *Id.* at 811 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1988)).

[101] Esshaki v. Whitmer, 813 F.App'x 170, 171–172 (6th Cir. 2020).

[102] *Id.* ("In deciding this claim, the district court properly applied the *Anderson-Burdick* test, which applies strict scrutiny to a State's law that severely burdens ballot access and intermediate scrutiny to a law that imposes lesser burdens. The district court correctly determined that the combination of the State's strict enforcement of the ballot-access provisions and the Stay-at-Home Orders imposed a severe burden on the plaintiffs' ballot access, so strict scrutiny applied, and even assuming that the State's interest (i.e., ensuring each candidate has a reasonable amount of support) is compelling, the provisions are not narrowly tailored *to the present circumstances*. Thus, the State's strict application of the ballot-access provisions is unconstitutional as applied here.") (citations omitted).

[103] *See* Angle v. Miller, 673 F.3d 1122, 1132 (9th Cir. 2012).

[104] *Id.* (quoting Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 192 (1999)).

[105] *Id.*

regulatory interests, they applied the First Amendment through the *Anderson-Burdick* framework rather than allowing the state unfettered freedom to regulate the initiative process.[106]

The First Circuit also applies the First Amendment to the state initiative process.[107] Unlike the Sixth and Ninth Circuits, however, the First Circuit does so using the *O'Brien* standard.[108] In *Wirzburger v. Galvin,* the First Circuit found that citizens' use of the initiative process constituted expressive conduct and thus applied *O'Brien* to a Massachusetts ballot-initiative law.[109] The split over what standard of review to apply, even within the circuits that do apply the First Amendment, further emphasizes the need for the Supreme Court to resolve the question.

3. Supreme Court Recognition

The Supreme Court acknowledged this circuit split in a 2020 stay grant regarding the signature certification process for an Idaho ballot initiative.[110] The Court recognized the deep divisions among circuits in evaluating state laws regarding ballot initiatives: "[T]he Circuits diverge in fundamental respects when presented with challenges to the sort of state laws at issue here."[111] Because of this divergence, the Chief Justice, joined by Justices Alito, Gorsuch, and Kavanaugh, wrote that "the Court is reasonably likely to grant certiorari to resolve the split presented by this case on an important issue of election administration."[112]

Curiously, however, the Supreme Court declined to address the issue in 2021 when presented with a cert petition that asked: "[w]hether and how the First Amendment applies to regulations that impede a person's ability to place an initiative on the ballot."[113] As the prevalence of ballot initiatives and state efforts to limit their power and success increases following *Dobbs*, we can expect to see more state regulations that "impede a person's ability to place an initiative on the ballot."[114] If, as Chief Justice Roberts wrote in 2020, the Supreme Court wants to prevent the Circuits from "appl[ying] their conflicting frameworks to reach predictably contrary conclusions,"[115] they should resolve the split at the next opportunity.

[106] *Id.* at 1135.

[107] Wirzburger v. Galvin, 412 F.3d 271, 276 (1st Cir. 2005).

[108] *See id.* at 278.

[109] *Id.* at 276–78.

[110] Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616–17 (2020).

[111] *Id.* at 2616.

[112] *Id.*

[113] Petition for Writ of Certiorari at i, Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2512 (2021).

[114] *See id.*; *supra* Part I.

[115] *Little*, 140 S. Ct. at 2616–17.

III. HEIGHTENED SCRUTINY IS THE APPROPRIATE TEST

The Supreme Court should follow the First, Ninth, and Sixth Circuits and apply the First Amendment to all state action that impedes a person's ability to place a petition on the ballot or successfully win the adoption of an initiative petition. All five major interpretive methodologies—text, public meaning, precedent, and pragmatism—support this conclusion.

Part A of this section outlines why protecting and strengthening the initiative process through heightened scrutiny aligns with three fundamental purposes of the First Amendment: expression and political change, discussion in the public sphere, and the marketplace of ideas. Part A also rebuts the counterargument that direct democracy should not be maximally protected because it was not the form of democracy envisioned by the founders. Part B of this section presents textual and public meaning arguments for striking down statutes that limit the initiative process. Part B demonstrates that some common proposals—such as subject matter restrictions or supermajority requirements—represent facial viewpoint discrimination and should thus be subject to heightened scrutiny. It also uses legislative history and contextual political understandings to demonstrate that the true public meaning of non-facially discriminatory proposals, such as Ohio's 2023 effort, nevertheless demonstrates impermissible animus. Part C of this section argues that heightened scrutiny does not offend the Supreme Court's First Amendment jurisprudence and in fact is a more accurate understanding of how the Court interpreted ballot initiative regulations in *Meyer*. Finally, Part D of this section presents pragmatic arguments for imposing heightened scrutiny as a means of protecting reproductive health and fulfilling the *Dobbs* majority's mandate to leave the issue of abortion to the people.

A. *First Amendment Purposes*

Purposive arguments strongly support applying the First Amendment to regulations that limit the efficacy of ballot initiatives. At first glance, strengthening direct democracy may not seem in line with the views of the founders, who were deeply wary of popular rule.[116] James Madison articulated this fear in *Federalist No. 10*, where he argued that direct democracy would lead to instability and factions.[117] Madison furthered his critiques of direct democracy in *Federalist No. 63*, arguing that a "respectable body of citizens" was necessary to protect "the people against their own temporary errors and delusions" that may lead them to "call for measures which they themselves will afterwards be the most ready to lament and condemn."[118] Some courts have

[116] *See* THE FEDERALIST NOS. 10, 63 (James Madison).

[117] *See* THE FEDERALIST NO. 10, at 43 (James Madison) (Terrence Bell ed. 2003) ("When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.").

[118] THE FEDERALIST NO. 63, at 307 (James Madison) (Terrence Bell ed. 2003).

used this history to argue against robust protections for direct democracy.[119] Although it is true that the founders were fearful of direct democracy, modern democracy would be hardly recognizable to Madison and his contemporaries. States and the federal government have jettisoned key aspects of the founding vision of democracy, from entry requirements such as property ownership, race, or sex to structural elements such as the direct election of Senators.[120] Rather than analyzing whether an aspect of democracy aligns with the founders' conception of our system, it is more appropriate to analyze how it aligns with the Constitution's original purposes.

Because recent judicial analysis of petitioning for ballot initiatives has been subsumed within the First Amendment's speech and association clauses, this section will focus on the purposes behind those clauses.[121] The issue should, however, also prompt discussion of the First Amendment's explicit textual protection of the right to petition.[122] The Supreme Court has declared that the right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights."[123] Historically, both in England and in early America, the right for citizens to come together to petition their government for redress of grievances was so fundamental that it deserved explicit constitutional protection apart from speech and association.[124] Therefore, its exercise through ballot initiatives should be specially protected from state intrusion.

Arguing that direct democracy and the right to a ballot initiative are not worthy of heightened protections because the founders did not support them, as the *Jones* court did,[125] is an incomplete analysis that overlooks key First

[119] *See* Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 937 (7th Cir. 2018) ("The nation's founders thought that direct democracy would produce political instability and contribute to factionalism. There has never been a federal referendum. Nor has any federal court ever concluded that the ballot is a public forum that must be opened to referenda, let alone to as many referenda as anyone cares to propose." (Citing FEDERALIST NO. 10 (James Madison)).

[120] *See, e.g.*, U.S. CONST. amend. XV § 1 (removing voting prohibitions based on race); U.S. CONST. amend. XIX (removing voting prohibitions based on sex); U.S. CONST. amend. XVII (providing for direct election of Senators). These amendments alone do not come close to accurately summarizing the historical battles to earn the right to vote among minority and marginalized groups. For a detailed history of the ongoing quest for suffrage in the United States and its many ebbs and flows, *see generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (Basic Books, 2009).

[121] *See infra* Part II.

[122] U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to petition the Government for a redress of grievances.").

[123] BE & K Const. Co. v. NLRB, 536 U.S. 516, 517 (2002).

[124] *See* Michael Wishnie, *Immigrants and the Right to Petition*, 78 NYU L. REV. 667 (2003) (canvassing history of petitioning and arguing that Petition Clause provides heightened protection for unfettered communications to government, which state and local governments may not obstruct).

[125] *See* Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 937 (7th Cir. 2018).

Amendment purposes. Crucially, it minimizes that the First Amendment was designed to protect expression and promote political change, to promote discussions on the ground in the "public sphere," and to foster a "marketplace of ideas."[126] Because of ballot initiatives' fundamental compatibility with the purposes of the First Amendment, the Court should not allow States to restrict their exercise without subjecting the State's justifications for doing so to heightened scrutiny.

1. Expression and Political Change

Both the Supreme Court and prominent First Amendment scholars have repeatedly recognized that a key purpose of the First Amendment is to bring about political and social change. This purpose can be traced back to the founding. Thomas Jefferson's Bill for Establishing Religious Freedom in Virginia, drafted in 1777, set out four reasons why government can make no law that constrains freedom of speech, conscience, or opinion.[127] Justice Brandeis in 1927 described Jefferson's fourth reason as being that free speech allows the public discussion necessary for democratic self-government: "[P]ublic discussion is a political duty; and that this should be a fundamental principle of the American government."[128] James Madison supported Jefferson's arguments and ultimately guided the bill to passage in 1786.[129] The Virginia statute was a forerunner to the First Amendment and its purposes can thus be imputed to the Amendment itself.[130]

The Supreme Court directly endorsed this purpose in *Roth v. United States*, writing that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social

[126] *See* Anna Skiba-Crafts, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1318 (2009).

[127] Jeffery Rosen, President/CEO, Nat'l Const. Center, Remarks at Celebration of Newly Installed Marble First Amendment Tablet (May 2, 2022) https://constitutioncenter.org/go/firstamendment#:~:text=It%20protects%20freedom%20of%20conscience,the%20Preamble%20to%20the%20Constitution [https://perma.cc/WQ52-HQP8].

[128] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[129] Matthew Harris, *Virginia Statute for Religious Freedom*, FREE SPEECH CENT. AT MIDDLE TENN. STATE UNIV. (Feb. 18, 2024), https://firstamendment.mtsu.edu/article/virginia-statute-for-religious-freedom/#:~:text=from%20religious%20affairs-,Drafted%20by%20Thomas%20Jefferson%20in%201776%20and%20accepted%20by%20the,was%20the%20first%20attempt%20in [https://perma.cc/KFR2-7CCT].

[130] Daniel Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context*, 35 AM. J. LEGAL HIST. 173, 176 (1991) ("In particular, the Supreme Court, as well as lower federal and state courts, have invoked Jefferson's 'Bill for Establishing Religious Freedom' and Madison's 'Memorial and Remonstrance' to inform their church-state pronouncements.").

changes desired by the people."[131] This idea was built off the Court's previous finding in *Stromberg v. California* that "the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."[132] Self-expression, according to the Court in *Burson v. Freeman*, is "the essence of self-government."[133] Scholars, too, have argued that a central goal of the First Amendment is to protect the success of self-government.[134]

Ballot initiatives are a near paradigmatic mechanism of self-government and thus support a key purpose of the First Amendment. Citizens directly enacting a statute, constitutional amendment, or otherwise directly exercising their legislative will is clearly intended to bring about political and social change.[135] Ballot initiatives are a direct mechanism for exercising self-government and are thus closely aligned with a key purpose of the First Amendment. Therefore, they deserve of special protections under the First Amendment. Heightened scrutiny provides these special protections by forcing states to develop specific justifications beyond mere regulatory interests for their restrictions.

2. Discussion in the Public Sphere

A second primary purpose of the First Amendment is to promote informal political discussions among private citizens as a mechanism to achieve political and social change—or to maintain the status quo. The Madisonian conception of democracy sought to create a system of "government by discussion" where outcomes would be reached through widespread public conversation.[136] According to this understanding, articulated by the scholar Cass Sunstein, these informal conversations in the public sphere were vital to promote "popular sovereignty by furthering a system of deliberative democracy."[137] The First Amendment was created, in part, to "protect from [government] regulation the communicative processes of 'private' citizens deemed necessary for self-

[131] Roth v. United States, 354 U.S. 476, 484 (1957); *see also* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Mills v. Alabama, 384 U.S. 214, 218 (1966).

[132] Stromberg v. Cal., 283 U.S. 359, 369 (1931).

[133] Burson v. Freeman, 504 U.S. 191, 196 (1992) (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[134] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 9-28 (Oxford University Press, 1960); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV., 591, 592 (1982); Thomas P. Crocker, Displacing *Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2591 (2007).

[135] Skiba-Crafts, *supra* note 126, at 1320 (2009).

[136] CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvi (1993).

[137] William Marshall, *Free Speech and the "Problem" of Democracy*, 89 NW. U. L. REV. 191, 195 (1994) (reviewing CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)).

governance."[138] Because political speech is essential for the functioning of democracy, it must not only be protected but encouraged.[139] This philosophy of the First Amendment–promoting the free exchange of ideas among citizens—has been repeatedly emphasized and relied upon by the Supreme Court.[140]

Ballot initiatives are a natural extension of the informal political communication of which Madison conceived.[141] While it is true that the mechanics of specific questions occur within a structured framework created by individual states, that official framework—the placing of an initiative on the ballot for certification by a Secretary of State and voting by citizens—represents only the final stages of an initiative's lifecycle.

Ballot initiative campaigns are filled with paradigmatic examples of informal political communication. Initiatives generally begin on the back of an overwhelming swell of public support for an issue, or the recognition that elected officials do not have voters' true interests in mind. Often called the incubation period, this initial stage consists of community events, research, and informal discussions to develop policies and narratives capable of reaching a critical mass.[142] These discussions develop into the circulation of petitions and collecting signatures for such petitions. Individual organizers going door-to-door and town square to town square talking to other citizens to solicit their support is as close to "government by discussion" as exists today.[143] Momentum often leads to media campaigns and advertisements, increasing interest and support for an idea. Only after all of this has occurred and tens of thousands (depending on the state) of voters have signed a petition can an initiative even reach the ballot, at which point its campaign further ramps up.[144]

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[138] Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1125 (1993).

[139] *Faculty Bibliography: Cass R. Sunstein, Democracy and the Problem of Free Speech (The Free Press 1993)*, HARV. L. SCH., https://hls.harvard.edu/bibliography/democracy-and-the-problem-of-free-speech/ [https://perma.cc/HK6S-E8MR] (last visited Dec. 27, 2024).

[140] *See e.g.*, Brown v. Hartlage, 456 U.S. 45, 52-53 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); Mills v. Alabama, 384 U.S. 214, 218-19 (1966) ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971) ("[T]he First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

[141] Skiba-Crafts, *supra* note 126, at 1320 (2009).

[142] *BISC's 360 Ballot Measure Lifecycle*, BALLOT INITIATIVE STRATEGY CTR., https://ballot.org/biscs-360-ballot-measure-lifecycle/ [https://perma.cc/525G-9KCZ] (last visited Dec. 27, 2024).

[143] Sunstein, *supra* note 136 at xvi.

[144] *See* Skiba-Crafts, *supra* note 126, at 1320; *BISC's 360 Ballot Measure Lifecycle*, *supra* note 142.

When the government restricts the subject matter of possible ballot measures,[145] it fails to live up to the First Amendment's purpose of promoting political discussions. By foreclosing the possibility of conducting a ballot initiative on a certain subject, the government prevents citizens from engaging in the free exchange of ideas, "deliberative democracy," and "government by discussion" that define the initiative process.[146] To allow these discussions informally but prevent them the instant they have the concrete ability to effectuate political and social change flies in the face of promoting political discussions. It thus fulfills a key purpose of the First Amendment to demand a thorough analysis of the state's interests in burdening political expression through heightened scrutiny.

3. Marketplace of Ideas

One of the most common conceptions of the First Amendment is the "marketplace of ideas" model. The marketplace theory first appeared in a Supreme Court opinion in 1919, when Justice Holmes wrote in dissent that "the best test of truth is the power of thought to get itself accepted in the competition of the market."[147] The theory of a competitive market of ideas has deeper historical roots than Justice Holmes, though, first originating with English philosophers John Milton and John Stuart Mill.[148] Proponents of the marketplace view argue that the First Amendment serves to facilitate the unfettered exchange of ideas because, like goods in a traditional marketplace, competition leads to the best results.[149] Since Justice Holmes introduced the theory to American jurisprudence, it has permeated judicial[150] and scholarly[151] discussions of the First Amendment. In the Court's most significant ballot initiative ruling, *Meyer v. Grant*, the court relied upon the First Amendment concept of an "unfettered interchange of ideas" in its holding that ballot-petition

[145] *See supra* Part I; *infra* Part III-B.

[146] Sunstein, *supra* note 136 at xvi.

[147] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[148] Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 3 (1984).

[149] Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 726-27 (1983) ("'The marketplace of ideas theory is based on the view that government should not interfere with robust debate or the free flow of information because competition among ideas advances knowledge and leads to better decisions.").

[150] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 52-53 (1982); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Miami Herald Publishing Co. v. Tornillo, 417 U.S. 241, 248 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

[151] *See*, *e.g.*, Stanley Ingber, *supra* note 148; T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-8 (1966); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 82-89 (1948).

circulation involved core political speech.[152] Given its deep historical roots, significant role in First Amendment jurisprudence, and presence in *Meyer,* any new First Amendment rule or standard must be compatible with the marketplace theory.

Ballot initiatives are a near paradigmatic example of the marketplace theory in action. Initiatives directly pit ideas against one another and ask voters to choose the one they prefer. They increase the availability and awareness of certain political ideas. By directly putting them into effect, initiatives provide a clear return for the most supported ideas. Ballot campaigns are costly and burdensome to run, incentivizing proponents to advocate for only the best ideas. Thrusting specific ideas into the public sphere and asking citizens to affirmatively say which ones are the best and most deserving of their support clearly mimics the market framework.[153]

Opponents may seek to "justify restrictions on the ballot initiative process as interventions designed to correct market imperfections."[154] There is merit to the argument that an unrestrained market is more dangerous than one where the government can intervene to "equalize" opportunities for market participation. The Court has occasionally adopted this approach, as developed in *Austin v. Michigan State Chamber of Commerce*, limiting certain speakers who are seen as particularly loud or powerful to prevent them from drowning out other voices.[155] This argument should not lead the Supreme Court to allow restrictions on ballot initiatives, however. The Court has moved away from the *Austin* theory of allowing restrictions to equalize the playing field on speech issues. The Court's most significant recent First Amendment election decision, *Citizens United*, overruled *Austin* and relied on the idea of an open marketplace of ideas in prohibiting the government from restricting independent expenditures for political campaigns by corporations.[156] Allowing government intervention to dictate issues that reach the ballot (subject matter restrictions) or the ways in which proponents can place those issues on the ballot (process restrictions) directly contravenes the purpose of the First Amendment to promote a marketplace of ideas and the Roberts Court's understanding of that theory as providing a free, unrestrained market.

To comply with three chief purposes of the First Amendment as understood by the founders and generations of judges and scholars, the rights of citizens to place the ideas they want on the ballot should be protected and encouraged. The

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[152] Meyer v. Grant, 486 U.S. 414, 421 (2005) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[153] *See* Skiba-Crafts, *supra* note 126, at 1322 .

[154] *Id.*

[155] *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658-660 (1990) (upholding limitation on corporate contributions to mitigate political influence of corporations).

[156] *See* Citizens United v. FEC, 558 U.S. 310, 354 (2010) ("Austin interferes with the 'open marketplace' of ideas protected by the First Amendment.").

Court should not allow states to restrict those citizen-driven efforts without subjecting such restrictions to heightened scrutiny and weighing the precise interests put forward by the State as justifications for the burden imposed by its rule.

B. *Text and Public Meaning Demonstrate Viewpoint Discrimination and Animus*

It is not sufficient, however, to rely on purposive arguments alone. In considering whether to adopt a new heightened standard, the Court will also examine the text and public meaning of the statutes in question. While we cannot yet know the exact text of the initiative restriction that may reach the Supreme Court, past and currently pending proposals provide a helpful roadmap of the language—and its true meaning—that conservative activists will utilize to prevent pro-choice success at the ballot. If the text explicitly says, or the public meaning clearly indicates, that the statute targets certain views or demonstrates animus towards certain populations, that may provide an additional avenue for the Supreme Court to exercise heightened scrutiny over a statute.

Ohio's 2023 effort provides a prime example of this. As discussed in Part I, the Ohio legislature referred a constitutional amendment to voters on the ballot for a special election in August 2023.[157] The text of the amendment was as follows:

A "yes" vote supported amending the Ohio Constitution to:

- increase the voter approval threshold for new constitutional amendments to 60%;
- require citizen-initiated constitutional amendment campaigns to collect signatures from each of the state's 88 counties, an increase from half (44) of the counties.
- eliminate the cure period of 10 days for campaigns to gather additional signatures for citizen-initiated constitutional amendments when the original submission did not have enough valid signatures.

A "no" vote opposed amending the Ohio Constitution, thus:

- maintaining that a simple majority (50%+1) vote is required for voters to approve new constitutional amendments;
- continuing to require campaigns to collect signatures from each of at least 44 (of 88) counties; and
- continuing to allow campaigns to have 10 additional days to collect signatures when their original submissions contained too few valid signatures. [158]

[157] *See supra* Part I.

[158] *Ohio Issue 1, 60% Vote Requirement to Approve Constitutional Amendments Measure (2023)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Issue_1,_60%25_Vote_Requirement

On its face, the amendment appears to be a neutral state law aimed at managing its electoral system and administering its own elections, which would be squarely in Ohio's Article I power.[159] Neither animus nor viewpoint discrimination are implicit in the statutory text either. For a strict textualist, such as Justice Gorsuch, the inquiry may end there.[160] For other Justices more interested in the legislative history and discerning the original public meaning of a statute, the context for the amendment and the words of its proponents may be illuminating.

As detailed in Part I of this Note, Ohio legislators and elected officials were transparent that the proposed amendment was "100%" about abortion, particularly the impending November 2023 abortion-related ballot measure.[161] That legislative history demonstrates clear animus, which the Supreme Court has defined as "a bare . . . desire to harm a politically unpopular group."[162] Animus cannot constitute a legitimate governmental interest, a statute must have some other purpose.[163] While Ohio legislators presented other arguments about governmental interests, such as keeping "deep-pocketed special interests out of Ohio's foundational documents," as demonstrated in Part I, their true purpose was to prevent the political success of abortion advocates.[164] Beyond the legislators' specific words, the broader political context of the proposal makes clear that its intent was to specifically target abortion. It created a special election to pre-empt a previously scheduled election on the abortion issue and followed a run of pro-choice success in peer states. The true meaning and purpose of the proposal was clear to all observers.[165] Applying heightened

_to_Approve_Constitutional_Amendments_Measure_(2023) [https://perma.cc/2XRZ-T2N2] (last visited Dec. 27, 2024).

[159] OHIO CONST., Art. I, § 4, cl. 1.

[160] Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, n.10 (2020) ("*See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 131–32 (2019) ('"[T]extualism offers a known and knowable methodology for judges to determine impartially . . . what the law is.'" *Id.* at 132.). Justice Gorsuch was clear about his preference for textualism during his confirmation hearing. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 131 (2017) (statement of Judge Neil M. Gorsuch)").

[161] Morgan Trau, supra note 51.''

[162] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* Andrew T. Hayashi, *The Law and Economics of Animus*, 89 U. CHI. L. REV. 581, 628 (2022) ("A broader definition of animus allows for motives other than mere prejudice, including animus arising from moral disapproval or fear.").

[163] Moreno, 413 U.S. at 534.

[164] *See supra* Part I.

[165] *See* Julie Carr Smyth &Samantha Hendrickson, *Ohio Constitution question aimed at thwarting abortion rights push heads to August ballot*, ASSOCIATED PRESS (May 10, 2023), https://apnews.com/article/constitutional-access-ohio-house-abortion-ballot-95cae24b996ce943c976dbf06d7d9867; Jeremy Pelzer, *Spoiling abortion-rights amendment a 'great' reason to have August special election, Ohio Senate President Matt Huffman says*,

scrutiny to Ohio's 2023 proposal and thoroughly examining the state's offered interests likely could have struck it down as being motivated by impermissible animus.

However, while the Supreme Court has recently embraced a broader conception of animus, particularly regarding First Amendment religious freedom claims, the doctrine is murky at best.[166] As one scholar writes, "[a]nimus is inherently subjective and fleeting, localized in the mind of an individual."[167] Furthermore, questions remain about how much legislative history is required to demonstrate animus. The inquiry into governmental neutrality is a fact-specific one that considers several factors, including "legislative or administrative history, including contemporaneous statements made by members of the decision making body."[168] The Court has not provided clear lines dictating how much weight to give each factor or how much legislative history is sufficient to demonstrate animus rather than neutrality.[169] Questions remain whether the threshold for finding animus is one contemporaneous statement, statements from a majority of legislators, every legislator, or somewhere in between. While Ohio's 2023 effort was likely clear enough to satisfy a 'know it when you see it' test, other statutes may not be. Because of the difficulty in proving animus and the lack of doctrinal clarity on how much legislative history is required to sufficiently demonstrate it, courts should also examine viewpoint discrimination claims when evaluating future statutes.

The Supreme Court's viewpoint discrimination doctrine holds that strict scrutiny is to be imposed for regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.[170] The same level of

CLEVELAND.COM (Mar. 23, 2023), https://www.cleveland.com/news/2023/03/spoiling-abortion-rights-amendment-a-great-reason-to-have-august-special-election-ohio-senate-president-matt-huffman-says.html [https://perma.cc/3TUG-LJCY].

[166] Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215, 1240-45 (2017) (arguing that the Supreme Court has not settled on a unified definition of animus).

[167] Joy Milligan, *Animus and Its Distortion of the Past*, 74 ALA. L. REV, 725, 726 (May 2023).

[168] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 639 (2018) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993)) (Listing relevant factors as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.").

[169] *See Masterpiece*, 584 U.S. at 619. In *Masterpiece*, the Court merely found that "[i]n view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs." *Id.* at 639. Beyond analogizing from the factual record, this provides no explicit guidance or rule for future applications.

[170] *See* Turner Broad. Sys. v. Fed. Commc'n Comm'n, 512 U.S. 622, 642 (1994); Simon & Schuster Inc. v. Members of NY State Crime Victims Bd., 502 U.S. 105, 112, 115, 125–

rigorous scrutiny is applied to laws that compel speakers to utter or distribute speech bearing a particular message.[171] Speech regulations that are unrelated to the content of the speech, however, are subject to an intermediate level of scrutiny.[172] The difficult task for courts, then, is determining whether a regulation is content based or content neutral. In making that determination, the "principal inquiry . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[173] This does not require an explicit showing of a content-based purpose. Furthermore, if a law discriminates on its face based on content, the mere assertion of a content-neutral purpose is not sufficient to save the law.[174]

One could argue that the Ohio statute imposes differential burdens upon speech because of its content. By specifically raising the approval threshold for ballot questions to a level above where abortion supporters polled and the vote share pro-choice causes had earned in other states, the Ohio legislature sought to make it effectively impossible for abortion rights supporters to win a ballot initiative. Ultimately, however, the statute likely does not discriminate based on content or viewpoint because it is not specifically targeted to abortion rights or supporters.[175] Had the statute explicitly increased the approval threshold to 60% or implemented the signature policy changes for reproductive rights questions only, it may be a different story. On those facts, combined with the legislative history clearly demonstrating that the legislature adopted the regulation because of 'disagreement' with the message, there would likely be a strong viewpoint discrimination claim.[176] While such direct targeting may seem unlikely, it would not be unprecedented. Utah imposes a two-thirds requirement on initiatives related to hunting, Arizona a 60% requirement for tax approvals, and Washington a 60% threshold for lottery related initiatives.[177]

More likely, however, is that states will seek to eliminate abortion as a subject matter from the ballot altogether. Of the twenty-six states that provide for citizen-initiated ballot measures, seven states currently have subject restrictions.[178] Massachusetts prevents, among other things, initiatives related to religion or religious institutions.[179] These subject matter restrictions have

126 (1991) (Kennedy, J., concurring in judgment); Perry Ed. Assn. v. Perry Loc. Educators' Assn., 460 U.S. 37, 45 (1983).

[171] *See* Riley v. Nat'l Fed'n for Blind of N.C., Inc., 487 U.S. 797, 797-98 (1998).

[172] *See Turner Broad. Sys.*, 512 U.S. at 642.

[173] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[174] *See Turner Broad. Sys.*, 512 U.S. at 642-43.

[175] *See* Rosen, *supra* note 127.

[176] *See* Post, *supra* note 138.

[177] *Supermajority Requirements for Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/Supermajority_requirements_for_ballot_measures [https://perma.cc/VK3Z-BTPN] (last visited Dec. 27, 2024).

[178] *Id.*

[179] *Id.*

been the subject of litigation in circuits on both sides of the split. The D.C. Circuit in 2002 held that a statute preventing the District from using ballot initiatives on any law reducing penalties associated with marijuana did not constitute viewpoint discrimination and did not implicate any form of heightened scrutiny.[180] The judges reasoned that voters were still free to argue against and speak about the issue, they just lost the ability to vote for it in a ballot initiative. Because there is no constitutional right to vote on a particular proposition, there is no constitutional violation. The court reasoned that the amendment "silences no one; it merely shifts the focus of debate … from the … ballot initiative … to Congress."[181] The Tenth Circuit reached a similar holding in *Initiative & Referendum Institute v. Walker,* where it found that the First Amendment protected only political speech, not the right to make law.[182]

The First Circuit, however, used the *O'Brien* standard to apply heightened scrutiny to Massachusetts' prohibition on ballot initiatives related to religious issues.[183] Although the First Circuit ultimately upheld the subject matter restriction, its application of heightened scrutiny is notable. The Supreme Court should follow the First Circuit and expose all subject matter restrictions to heightened scrutiny as viewpoint and content based legislation.

The First Circuit responded directly to the D.C. Circuit in *Wirzburger*, writing that "we cannot agree with the D.C. Circuit's finding that subject-matter exclusions from the initiative process 'restrict no speech' nor with its conclusion that this type of selective carve-out 'implicates no First Amendment concerns.'"[184] For the First Circuit, the analysis was relatively simple: *Meyer* holds that an initiative process is core political speech and thus "manifests elements of protected expression."[185] The law in question therefore directly restricted and regulated protected expression, implicating the First Amendment.[186] The First Circuit then applied *O'Brien* intermediate scrutiny rather than strict scrutiny because the statute at issue regulated which type of laws or amendments could be passed by initiative without any reference to who may speak or what message they may convey.[187]

The First Circuit is correct to find that restrictions on the subject matter available to a state initiative process burden protected political expression. The D.C. and Tenth Circuits may be correct that the First Amendment does not explicitly protect the right to make law because it is a nonspeech activity. Ending the inquiry there though, as a dissenting judge in the Tenth Circuit case

[180] *See* Marijuana Pol'y Project v. U.S., 304 F.3d 82, 85-86 (D.C. Cir. 2002).

[181] *Id.* at 86.

[182] Initiative and Referendum Inst. v. Walker, 450 F. 3d 1082, 1099 (10th Cir. 2006) (en banc).

[183] *See* Wirzburger v. Galvin, 412 F.3d 271, 278-279 (1st Cir. 2005).

[184] *Id.* at 278 (quoting *Marijuana Pol'y Project*, 304 F.3d at 85, 83).

[185] Meyer v. Grant, 486 U.S. 414, 403 (2005).

[186] *Wirzburger*, 412 F.3d at 278-79.

[187] *Id.*

wrote, is "no more than foolhardy formalism."[188] Initiative elections are so intertwined with speech that controlling the outcome of an election—or preventing the campaign from ever even beginning—inherently affects the speech rights of those participating in the election. Were one to accept the D.C. and Tenth Circuit's conclusion that lawmaking is a non-speech activity, it would still be incorrect to see that as the end of the analysis. The First Amendment clearly protects the right to engage in expressive conduct. "When 'speech' and 'nonspeech' elements are combined in the same course of conduct," a state may constrain that expressive conduct only in accordance with the *O'Brien* standard.[189] The use of a state initiative process comprises both speech (agenda setting, signature collecting, etc.) and nonspeech (lawmaking) elements.[190] Therefore, the *O'Brien* heightened scrutiny standard, not mere rational basis review, must govern any content-based exclusion from an initiative's qualification for the ballot.

The First Circuit in *Wirzburger* held that Massachusetts' religious restriction did not fail the *O'Brien* standard because it found an important state interest in safeguarding the fundamental constitutional freedom of religion from popular initiatives.[191] That justification, however, would not hold up in the abortion context. State legislatures would have a difficult time establishing an important state interest in eliminating abortion rights alone from the initiative process. Most subject matter restrictions relate to specifically vested powers: dedicating revenue, creating courts, making appropriations, or protecting pre-existing constitutional rights.[192] The nature of a ballot initiative in this arena would likely be to specifically establish that abortion is a constitutional right. It therefore cannot be a pre-existing constitutional right or specifically vested power that the state has an important interest in safeguarding.

Textual and public meaning analyses support applying heightened scrutiny to legislation impacting the ballot initiative process. Where the text of a measure does not explicitly or implicitly discriminate based on viewpoint or content, the legislative history and political context surrounding its adoption can be used to demonstrate impermissible animus that will not survive judicial scrutiny. Potential state efforts to prevent abortion success at the ballot may well explicitly discriminate based on content in their text, though. If they do so through an

[188] Initiative and Referendum Inst. v. Walker, 450 F. 3d 1082, 1112 (10th Cir. 2006) (en banc) (Lucero, J., dissenting).

[189] United States v. O'Brien, 391 U.S. 367, 376-77 (1968); *see* Texas v. Johnson, 491 U.S. 397, 406 (1989) (noting that expressive conduct is more susceptible to regulation than written or spoken communication).

[190] John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1440 (2007).

[191] *Wirzburger*, 412 F.3d at 279.

[192] *Subject Restrictions for Ballot Initiatives*, BALLOTPEDIA, https://ballotpedia.org/Subject_restrictions_for_ballot_initiatives [https://perma.cc/M86X-S4C6] (last visited Dec. 27, 2024).

outright prohibition on initiatives related to the subject or by instituting a subject-specific supermajority requirement, the Supreme Court should follow the First Circuit and review such restrictions under heightened scrutiny.

C. *Heightened Scrutiny Respects Supreme Court Precedent*

Stare decisis is one of the most fundamental principles in American law and must be considered in any legal analysis, particularly one that seeks to impose a new standard or rule on an existing area of law. Stare decisis instructs courts to defer to its past decisions on the same issue and overturn their own precedent only when faced with compelling circumstances to do so.[193] The value of precedent as a mode of interpretation has shrunk recently.[194] For better or worse, the Roberts Court has not been afraid to overturn settled law and consider stare decisis in new ways.[195] Nevertheless, considering how applying a standard to a new situation abides by or differs from existing case law remains a crucial aspect of legal analysis. Here, precedent does not pose a barrier to applying heightened scrutiny to state regulations of the ballot initiative process.

The Supreme Court has never directly addressed the issue of what standard of review to apply to ballot initiative restrictions.[196] Thus, applying heightened scrutiny would not directly overturn any of the Court's precedent. Opponents of adopting heightened scrutiny would likely argue, though, that such a move would overrule the Court's jurisprudence granting states the sole power to govern their own elections and holding that there is no constitutional right to an initiative procedure.[197] Ending the analysis after determining that election administration is a traditional state power would be short-sighted. Instead, applying heightened scrutiny to ballot initiative manipulation would respect the Court's initiative rulings.

As the Court said in *Buckley*, while states have considerable leeway in managing their own elections, the First Amendment "requires vigilance in making those judgments."[198] The Court made this analysis explicit in *Meyer*. In *Meyer*, the Court reasoned that using a petition to achieve political change clearly invokes the First Amendment, which was designed to promote the "unfettered interchange of ideas for the bringing about of political and social

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[193] *See* Melissa Murray, *The Supreme Court, 2019 Term — Comment: The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 309-10 (2020) (discussing stare decisis in lower courts and at the Supreme Court).

[194] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[195] Murray & Shaw, *supra* note 12, at 749.

[196] *See* Little v. Reclaim Idaho, 140 S.Ct. 2616, 2616-17 (2020).

[197] *See* Buckley v. Am. Const. L. Found. Inc., 525 U.S. 182, 183 (1998) ("States have considerable leeway to protect the integrity and reliability of the ballot-initiative process, as they have with respect to election processes generally."); Meyer v. Grant, 486 U.S. 421, 424 (1988) (finding no constitutional right to an initiative procedure).

[198] *Buckley*, 525 U.S. at 183.

changes desired by the people."[199] Because it invokes the First Amendment, the Court held that petition circulation for means of a ballot initiative is "core political speech."[200] The Court's finding that petition circulation constitutes core political speech was rooted in its own precedent. That decision was largely based on extending a previous recognition that soliciting charitable donations involves protected speech and regulation of solicitation infringed on that speech.[201] Furthermore, the Court in *Meyer* dismissed the argument that because initiatives are not constitutionally required states can limit their exercise however they see fit: "the power to ban initiatives entirely [does not] include[] the power to limit discussion of political issues raised in initiative petitions."[202]

In *Meyer*, the court struck down the regulation at issue because the state failed to sufficiently justify the burden its statute imposed on this protected communication.[203] While the court did not specify what standard of review it used to come to that ruling, the close examination of the burdens and competing state justifications that the court undertook more closely resembles heightened scrutiny than rational basis review. Colorado's two justifications for the statute were "making sure that an initiative has sufficient grass roots support to be placed on the ballot" and "protecting the integrity of the initiative process."[204] Both of these interests are certainly legitimate. Were the Supreme Court applying rational basis review, Colorado's regulatory interests would have likely been sufficient to justify the restriction.[205] By carefully analyzing Colorado's offered justifications, weighing them against the burdens imposed by the statute, and coming out against Colorado, the court's analysis far more closely resembles heightened scrutiny under the *Anderson-Burdick* framework.[206] Therefore, it is a natural extension of the court's leading ballot initiative precedent to apply heightened scrutiny, not rational basis review, to state efforts that do just what *Meyer* says they cannot: limit discussion of political issues raised in initiative petitions.

[199] *Meyer*, 486 U.S. at 421 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[200] *Id.* at 422.

[201] *Id.* at 422 n.5 ("Our recognition that the solicitation of signatures for a petition involves protected speech follows from our recognition in Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), that the solicitation of charitable contributions often involves speech protected by the First Amendment and that any attempt to regulate solicitation would necessarily infringe that speech.").

[202] *Id.* at 425.

[203] *Id.* at 426.

[204] *Id.* at 425.

[205] *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[206] *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. at 434.

D. *Pragmatic Policy Arguments Favor Heightened Scrutiny in the Post-Dobbs Era*

History, tradition, and precedent cannot be the only considerations in shaping the law. Legal doctrines must also be evaluated in light of their effect on the real-world consequences to those impacted by each decision. Justice Stephen Breyer was particularly known for embracing this pragmatic approach to judicial review.[207] Without pragmatism, the law becomes insular and disconnected and fails to center the most important element of democracy: the people. As Justice Breyer put it, "[pragmatism] disavows a contrary constitutional approach, a more 'legalistic' approach that places too much weight upon language, history, tradition, and precedent alone while understanding the importance of consequences."[208] Pragmatism and consideration of consequences strongly support stringent judicial review of state efforts to manipulate the ballot initiative process.

Granting state legislatures the near unfettered ability to keep abortion off the ballot—which rational basis review effectively does—will have devastating consequences for pregnant people across the country. The dissenters in *Dobbs* warned that "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[209] That warning has become a reality. Fourteen states currently have near-total bans on abortion and many other states have such restrictive gestational limits as to make abortion practically impossible.[210] The devastating health effects of those bans are well-documented.[211] Ballot initiatives have proven to be an effective way to protect access to abortions and safe reproductive health care.[212] Restricting initiatives

[207] *See* Cass Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L. J. 1719, 1720 (2006) ("One of Breyer's major innovations lay in an insistence on evaluating traditional doctrines not in a vacuum, but in light of the concrete effects of regulation on the real world.").

[208] *Pragmatic Justice*, HARV. L. TODAY, (Jan 27. 2022) https://hls.harvard.edu/today/pragmatic-justice/.

[209] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 362 (2022) (Breyer, Sotomayor, Kagan, dissenting).

[210] *Tracking Abortion Bans Across the Country*, N.Y. TIMES, (Jan. 8, 2024) https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/6TQE-KZPD].

[211] *See, e.g.*, Nadine El-Bawab et al., *Fighting for Their Lives: Women and the Impact of Abortion Restrictions in Post-Roe America*, ABC NEWS, (Dec. 14, 2023), https://abcnews.go.com/US/fighting-lives-women-impact-abortion-restrictions-post-roe/story?id=105563174 [https://perma.cc/KA6M-VC73]; Isabelle Chapman, *Nearly Two Years After Texas' Six-Week Abortion Ban, More Infants are Dying*, CNN, (July 20, 2023), https://www.cnn.com/2023/07/20/health/texas-abortion-ban-infant-mortality-invs/index.html [https://perma.cc/Y847-46VE]; Marty Schladen, *While In Effect, Ohio's Abortion Ban Led to Chaos, Suffering, and Worse Health Care, Doctor Says*, OHIO CAP. J., (Nov. 4, 2022), https://ohiocapitaljournal.com/2022/11/04/obstetrician-ohio-abortion-law-stymies-doctors-endangers-patients/ [https://perma.cc/U22F-KUWY].

[212] *See supra* Part I.

will limit access to abortion and have destructive consequences for pregnant people. Courts should take these consequences into account and more strictly review state efforts to restrict such initiatives. Heightened scrutiny will better protect reproductive health than rational basis review. Ultimately, that should be what matters most.

That is not, however, what matters most to many judges, including a majority of Supreme Court justices. Arguing for heightened scrutiny merely to protect abortion access will not persuade the judges responsible for stripping abortion of its constitutional protections in the first place. Another pragmatic argument that builds off Justice Alito's own words in *Dobbs* may be more successful, however.

Justice Alito justified the *Dobbs* decision largely through an appeal to democracy. The majority insisted that *Roe* and *Casey* disrupted democratic deliberation over abortion by imposing the Court's will on the issue, and that *Dobbs* was merely "return[ing] the issue of abortion to the people's elected representatives."[213] While this argument was a weak and disingenuous one in support of overturning *Roe* and *Casey*,[214] it strongly supports heightened scrutiny of state efforts to restrict or limit the ballot initiative process.

If the *Dobbs* majority is serious about democracy being the proper forum for determining abortion policy, then they should be serious about protecting democracy from un-democratic restrictions. Justice Scalia wrote in his *Casey* dissent, which Justice Alito cited in the *Dobbs* majority, "[t]he permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[215] Citizen-initiated ballot measures are a near paradigmatic example of citizens attempting to persuade one another on an issue and then voting. They are a purely democratic exercise and are therefore squarely the forum that Justices Alito, Scalia, and others have written is best suited to resolving the abortion issue. Restrictions of this fundamental exercise of democracy should thus not be permitted without passing heightened judicial scrutiny. A categorical restriction on abortion-related initiatives, for instance, would fully prevent citizens from "trying to persuade one another."[216] Ohio Republicans in 2023 blamed their failure in part on the perception that they were "taking power away from the people."[217] Taking decision-making power away from the people is

[213] *Dobbs*, 597 U.S. at 232.

[214] *See* Murray & Shaw, *supra* note 12, at 748.

[215] *Dobbs*, 597 U.S. at 232 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).

[216] *Casey*, 595 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part).

[217] Emily Bazelon, *The Surprising Places Where Abortion Rights Are On the Ballot, and Winning*, N.Y. TIMES (Sept. 12, 2023), https://www.nytimes.com/2023/09/12/magazine/abortion-laws-states.html [https://perma.cc/G9YB-7GHN].

incompatible with Justice Alito's mandate to return the issue of abortion to the people.

Opponents would argue that Justice Alito in *Dobbs* specifically wrote of returning the abortion question to "the people's *elected representatives*."[218] He did not speak of returning it to the citizens themselves through direct initiatives. Under this argument, allowing elected representatives to freely manage their elections on the abortion issue as they see fit would satisfy Justice Alito's invocation of democracy. This argument, though, is yet another example of "foolhardy formalism."[219] First, Justice Scalia's statement that Justice Alito cited for his proposition spoke of citizens persuading one another, not merely of elected representatives. Justice Alito concluded the argument by writing "[t]hat is what the Constitution and the rule of law demand."[220] This sentence immediately followed his quotation of Scalia; the word "that" therefore refers to Justice Scalia's reference to citizens, not Justice Alito's reference to "elected representatives." Second, to interpret democracy as exercised only by elected representatives contradicts the Supreme Court's ballot initiative jurisprudence. The Court has made clear that once a state creates an initiative process, it may not impermissibly restrict its exercise.[221] Democracy thus does not have to include ballot initiatives, but once such initiatives are created, they must be treated the same as all other forms of democracy. Excluding them from that understanding of democracy would be illogical.

Granting state legislators an unfettered ability to restrict the ballot initiative process would have damaging consequences for the health of pregnant people and for democracy. These consequences must be considered in determining the appropriate level of scrutiny to review such restrictions. To achieve what the Supreme Court mandated in *Dobbs*, the Court must subject ballot restrictions to heightened scrutiny.

CONCLUSION

Roe and *Casey* are gone and will not be coming back any time soon. But that does not mean that courts are gone as a tool for protecting abortion access. When the Supreme Court overturned decades of precedent in 2022, it claimed that democracy demanded that result. In ways beyond the scope of this Note, such as through rampant partisan gerrymandering, the Court itself has sanctioned many efforts to thwart the democracy it claimed to prioritize.[222] One area that remains nearly purely democratic, however, is statewide ballot initiatives. It is in those initiatives that the impact of democracy has been felt most profoundly since *Dobbs*. In the eyes of many conservative state legislators, such as those in

[218] *Dobbs*, 597 U.S. at 232 (emphasis added).

[219] Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1112 (10th Cir. 2006) (Lucero, J., dissenting).

[220] *Dobbs*, 597 U.S. at 232.

[221] Meyer v. Grant, 486 U.S. 414, 424 (1988).

[222] *See* Murray & Shaw, *supra* note 12, at 776.

Ohio, citizens have been too responsive to the Court's mandate. Rather than listen to the wishes of those voters, they have sought to make democracy less democratic. The Supreme Court should follow its own reasoning in *Dobbs* and protect the exercise of direct democracy by subjecting restrictions on the initiative process to heightened scrutiny.

The Court has recognized that it will likely consider this issue soon.[223] Conservative state legislators will likely give them the opportunity to do so imminently. By presenting purposive, textual, public meaning, animus-based, and pragmatic arguments, this Note offers an ideologically diverse range of mechanisms for judges to analyze future restrictions on the exercise of this vital political tool.

[223] Little v. Reclaim Idaho, 140 S.Ct. 2616, 2616 (2020).