

EDITING DIRECT DEMOCRACY: DOES LIMITING THE SUBJECT MATTER OF BALLOT INITIATIVES OFFEND THE FIRST AMENDMENT?

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Citizens of twenty-four states make law alongside their legislatures by means of the ballot initiative process. In many of these states, constitutional provisions limit the subjects open to the initiative process to insulate certain areas of governance, like taxes and appropriations, from the volatility of direct democracy. Some states have recently adopted or considered subject matter restrictions that lack this pragmatic, nonpartisan rationale. These restrictions seek to close the initiative process to certain political outcomes, signifying a possible trend toward forestalling political change—and shaping state political agendas—by redefining the subject matter bounds of state initiative processes. Litigants have challenged these restrictions on First Amendment grounds, but the circuits have disagreed on the basic question of whether subject matter restrictions implicate the First Amendment at all. This Note argues that subject matter restrictions burden expressive conduct composed of non-speech and speech elements: respectively, lawmaking and political agenda setting through ballot qualification. Accordingly, it proposes that courts apply intermediate scrutiny to restrictions on the subject matter of initiatives, affirming those that insulate state constitutional rights but invalidating those that simply calcify the electoral gains of transient political majorities.

INTRODUCTION

The United States Constitution rejects direct democracy at the federal level¹ but abides it in the states.² Exploiting this grace, twenty-four state constitutions vest legislative power in a representative legislature

1. See The Federalist No. 10, at 46 (James Madison) (George W. Carey & James McClellan eds., 2001) (“[T]he public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose.”); J. Allen Smith, *The Spirit of American Government* 32 (Cushing Stout ed., 1965) (“[The Framers of the Constitution] had no faith in the wisdom or political capacity of the people. Their aim and purpose was . . . to eliminate as far as possible the direct influence of the people on legislation and public policy.”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1522–30 (1990) (discussing Framers’ fear of direct democracy and efforts to establish workable representative democracy instead).

2. When the Supreme Court first addressed this issue, it chose not to invoke the Guarantee Clause, U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”), and held instead that direct democracy in the states poses a nonjusticiable political question. See *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133–51 (1912). But see Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 *U. Colo. L. Rev.* 709, 725–28 (1994) (suggesting that state courts invalidate initiatives hostile to minority rights as incompatible with republican government).

and also, in the form of the initiative, in state citizens at large.³ This power allows citizens to propose a law or constitutional amendment, place it on the ballot, and vote to adopt it into law, all without aid or interference by their legislature.⁴ Its use has surged in recent decades,⁵ steered by corporate and special interests and an “initiative industry” of campaign management firms.⁶ Reformers have sought to rein in the excesses of modern initiative campaigns, notably by banning the use of paid petition circulators.⁷ But initiative proponents have successfully challenged such regulations on First Amendment grounds, as in *Meyer v. Grant*, in which the Supreme Court confirmed that advocacy of an initia-

3. See, e.g., Ariz. Const. art. IV, pt. 1, § 1, subsec. 1 (“The legislative authority of the State shall be vested in the Legislature . . . but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature . . .”); Cal. Const. art. IV, § 1 (“The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”); Mass. Const. amend. art. XLVIII, pt. I, § 150 (“Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative . . .”). The Initiative, Referendum and Recall Procedures Act of 1979 grants the initiative power to District of Columbia citizens, D.C. Code § 1-1001.16 (2001), and many local governments also offer it, see David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* 298–311 (1989); M. Dane Waters, *Initiative and Referendum Almanac* 32–33 tbl.1 (2003) [hereinafter Waters, *Almanac*]. For a list of initiative states, see Nat’l Conference of State Legislatures, *Initiative and Referendum in the 21st Century* 63 (2002), available at http://www.ncsl.org/programs/legismgt/irtaskfc/LandR_report.pdf (on file with the *Columbia Law Review*) [hereinafter NCSL, *Initiative and Referendum*].

4. See *infra* notes 48–59 and accompanying text (describing initiative procedures). Initiatives are also known as measures, propositions, and, inaccurately, referendums. See *infra* note 21 (contrasting initiative with referendum and recall).

5. See Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* 35–38 (2002) [hereinafter Ellis, *Delusions*] (discussing “modern initiative revolution”); Initiative & Referendum Inst., *Initiative Use 1* (2006), available at [http://www.iandrinstitute.org/IRI%20Initiative%20Use%20\(2006-11\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%20Use%20(2006-11).pdf) (on file with the *Columbia Law Review*) (noting that, between 1990 and November 2006, 680 initiatives appeared on state ballots). In November 2006, seventy-six initiatives appeared on ballots nationwide, the third highest number in the last hundred years. Nat’l Conference of State Legislatures, *Ballot Measure Results: A Bad Night for Many, a Great Night for a Few*, Nov. 8, 2006, at <http://www.ncsl.org/statevote/06ballotmeasures.htm> (on file with the *Columbia Law Review*).

6. E.g., Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in *Citizens as Legislators* 1, 12 (Shaun Bowler et al. eds., 1998) (“An ‘initiative industry’ has evolved, . . . [c]omposed of law firms that draft legislation, petition management firms that guarantee ballot access, direct-mail firms, and campaign consultants who specialize in initiative contests across several states . . .”); see also *infra* notes 44–47 and accompanying text.

7. See Frederick J. Boehmke, *The Indirect Effect of Direct Legislation* 159–62 (2005) (describing recent reform efforts); Ellis, *Delusions*, *supra* note 5, at 193 (“Crowded ballots, misleading titles, simplistic campaigns, the influence of money, poor public policy, and interminable court battles are a constant spur to the reform-minded.”); Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies*, in *Dangerous Democracy?: The Battle over Ballot Initiatives in America* 143, 143 (Larry J. Sabato et al. eds., 2001) [hereinafter Gerber, *Logic of Reform*] (describing goals and logic of initiative reform); see also *infra* note 47.

tive's passage is core political speech as protected by the Constitution as advocacy of a candidate's election.⁸

This Note asks whether restrictions on the subject matter open to a state initiative process raise similar First Amendment concerns. These state constitutional exclusions—or “selective carve-outs”⁹—typically insulate important areas of governance, such as taxation and the judiciary, from the putative dangers of direct democracy.¹⁰ But not all subject matter restrictions share this pragmatic, nonpartisan rationale.¹¹ For example, the Utah legislature, fearing that conservationists would rewrite state wildlife laws by initiative, recently railroaded into the state constitution the effectively exclusionary mandate that all wildlife initiatives pass by a supermajority vote, unlike initiatives on all other subjects.¹² Other states have since considered similar restrictions, signifying a possible trend toward forestalling political change—and shaping state political agendas—by redefining the subject matter bounds of state initiative processes.¹³

Three recent First Amendment challenges to such dubious restrictions have produced a circuit split. The Tenth and D.C. Circuits have held that subject matter restrictions on an initiative process “restrict[] no First Amendment right” because they limit only “legislative authority—as opposed to . . . legislative advocacy,”¹⁴ and the First Amendment protects no “right to make law, by initiative or otherwise.”¹⁵ But the First Circuit has disagreed, writing: “[W]e cannot see how, given the Supreme Court's analysis in *Meyer*, subject-matter exclusions from a state initiative process ‘restrict[] no speech.’”¹⁶ It has held instead that use of an initiative pro-

8. 486 U.S. 414, 425 (1988) (noting that First Amendment protection is “at its zenith” with respect to initiative advocacy); see *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (applying *Meyer*).

9. *Wirzburger v. Galvin*, 412 F.3d 271, 278 (1st Cir. 2005), cert. denied, 546 U.S. 1150 (2006).

10. For example, the Wyoming Constitution provides that “[t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, enact local or special legislation, or enact that prohibited by the constitution for enactment by the legislature.” Wyo. Const. art. 3, § 52, subsec. g. Most states disallow initiatives concerning at least one of these subjects. See Nat'l Conference of State Legislatures, Initiative Subject Restrictions, at <http://www.ncsl.org/programs/legismgt/elect/SubRestrict.htm> (updated Aug. 3, 2006) (on file with the *Columbia Law Review*) [hereinafter NCSL, Initiative Subject Restrictions].

11. See *infra* notes 107–122 and accompanying text.

12. See *infra* notes 114–119 and accompanying text.

13. See *infra* notes 120–122 and accompanying text.

14. *Marijuana Policy Project v. United States*, 304 F.3d 82, 85, 87 (D.C. Cir. 2002). The district court had granted summary judgment for the plaintiffs, proponents of a medical marijuana initiative which the D.C. Board of Elections had refused to certify for placement on the ballot. *Marijuana Policy Project v. D.C. Bd. of Elections & Ethics*, 191 F. Supp. 2d 196, 216 (D.D.C. 2002).

15. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc), cert. denied, 127 S. Ct. 1254 (2007).

16. *Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005), cert. denied, 546 U.S. 1150 (2006).

cess is expressive conduct composed of speech and nonspeech elements, and directed courts to assess the constitutionality of subject matter restrictions under intermediate scrutiny.¹⁷

This Note argues that restrictions on the subject matter open to a state initiative process burden expressive conduct protected by the First Amendment. Expanding on the First Circuit's logic, it proposes a new conception of the speech that inheres in ballot status, rooted in the power of that status to amplify a political message, pressure political actors, and otherwise shape the agenda of state politics. It then suggests a standard, based in the suitability of insulating state constitutional rights from direct democracy, that courts applying intermediate scrutiny can use to distinguish constitutionally permissible subject matter restrictions from those whose partisan motivation betrays an insubstantial supporting state interest.

Part I reviews the history and current character of initiative use in the United States. It then discusses the Supreme Court's holding in *Meyer v. Grant* that regulation of initiative campaigns implicates political speech protected by the First Amendment. Part II examines the subject matter restrictions currently in place in the initiative states and contrasts their traditional pragmatic function with the partisan aims of some recent restrictions. It then analyzes the conflicting reasoning of the three circuit courts that recently have heard First Amendment challenges to subject matter restrictions. Part III argues that use of an initiative process is expressive conduct composed of speech (agenda setting) and nonspeech (lawmaking) elements. It elaborates on the nature of the agenda-setting speech element, explains how subject matter restrictions burden that expression, and answers the main arguments against characterizing use of an initiative process as expressive conduct: the propriety of popularly imposed constitutional limits on the scope of state democracy, and the impropriety of characterizing ballots as forums for political expression. It concludes by proposing a standard for applying intermediate scrutiny to subject matter restrictions that preserves only those restrictions that shelter state constitutional rights from the volatility of direct democracy.

I. USE AND REGULATION OF THE INITIATIVE PROCESS

This Part establishes the historical and legal setting for First Amendment challenges to restrictions on the subject matter of state initiative processes. Part I.A surveys the history and contemporary character of initiative use in the United States. Part I.B discusses regulation of initiative campaigns and the Supreme Court's holdings that such regulation burdens political speech. Litigants have relied on these campaign regulation precedents to argue that subject matter restrictions similarly impact the speech rights of initiative advocates.

17. *Id.* at 279.

A. *Initiative Use in the United States*

1. *The Progressive Moment.* — The Populists and Progressives first advocated broad direct democracy in the states.¹⁸ As devised by these stewards, popular lawmaking was an instrument as much of economic reform as political revolution.¹⁹ The Populists emerged in the 1890s as champions of impoverished farmers, whose economic fate they blamed on the privileges granted to industrial corporations by corrupt state legislatures.²⁰ In addition to substantive reforms, they demanded the initiative and referendum²¹ as means of “temporarily bypassing their legislatures and enacting needed laws on behalf of the downtrodden farmer, debtor, or laborer.”²² In 1898, Populists succeeded in amending the South Dakota Constitution to grant citizens use of these democratic tools.²³ But only after Progressives like Theodore Roosevelt and Woodrow Wilson endorsed direct democracy did the movement shed its fringe status.²⁴ The Progressives dampened the seeming radicalism of direct democracy by portraying it as a supplemental, sensible check on the power of legisla-

18. See Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890–1940*, at 4–5 (2002). But see Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 41 (1989) (discussing traditional “town hall” meetings in New England towns); Goebel, *supra*, at 27 (noting increasing prevalence of popular approval of constitutions and constitutional amendments in nineteenth century); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 *Mich. L. & Pol’y Rev.* 11, 19–20 & n.23 (1997) (observing that new Western states referred questions such as location of state capital and university to citizens).

19. See Goebel, *supra* note 18, at 4–5.

20. See *id.* at 20–24; Cronin, *supra* note 18, at 43–45; see also Persily, *supra* note 18, at 30 (discussing “new interest groups spawned by industrialization and internal migration”).

21. The three forms of direct democracy are the initiative, referendum, and recall. The initiative process allows citizens to propose and adopt laws or state constitutional amendments. The referendum process allows citizens to reject or affirm laws passed by the legislature at the legislature’s request or by directly instigating a vote. The recall process allows citizens to remove officials by instigating an election. See, e.g., Mathew Manweller, *The People Versus the Courts: Initiative Elites, Judicial Review and Direct Democracy in the American Legal System* 30–31 (2005); Eule, *supra* note 1, at 1510–12. The referendum became less valuable once Progressives controlled legislatures, see Goebel, *supra* note 18, at 138–39, and the initiative, used more frequently, has become “more important and powerful.” *The Battle over Citizen Lawmaking: A Collection of Essays* 261 (M. Dane Waters ed., 2001) [hereinafter *Battle over Citizen Lawmaking*].

22. Cronin, *supra* note 18, at 45; see Goebel, *supra* note 18, at 34–35 (noting belief that “[d]irect democracy would provide the perfect means to stop the state from granting special privileges”).

23. Steven L. Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America* 16–32 (2003). Utah and Oregon followed a few years later. Ellis, *Delusions*, *supra* note 5, at 32.

24. Cronin, *supra* note 18, at 50–53; see Persily, *supra* note 18, at 24–29 (discussing Progressive embrace of initiative and referendum). The Progressives sought the same end as the Populists—elimination of legislative corruption—but, as largely middle-class intellectuals, were motivated by idealism rather than desperation. See Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 259 (1955).

tures.²⁵ Wilson, for instance, described it as “the safeguard of politics,”²⁶ not “a substitute for representative institutions, but only . . . a means of stimulation and control.”²⁷ Such rhetoric compelled twenty-four mostly Western states, between 1898 and 1918, to provide in their constitutions for the initiative, the referendum, or both.²⁸

2. *Modern Revival.* — Use of the initiative waned over the next few decades²⁹ but has surged since the late 1960s.³⁰ The success of Proposition 13, a 1978 California initiative that capped state property taxes, is often cited as the inception of modern initiative politics.³¹ By the end of that year, a rash of imitative tax-cutting legislation, both direct and conventional, had passed in states across the nation,³² and over the next few years “virtually every state that lacked the initiative power [gave]

25. See Ellis, *Delusions*, supra note 5, at 31–34; Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 *Santa Clara L. Rev.* 1037, 1039–45 (2001) (contrasting Populist and Progressive conceptions of direct democracy). But see Sherman J. Clark, *Tales of Popular Sovereignty: Direct Democracy in America*, 97 *Mich. L. Rev.* 1560, 1569 (1999) (book review) (arguing that initiative “trumps” rather than supplements legislative authority).

26. Cronin, supra note 18, at 38.

27. Ellis, *Delusions*, supra note 5, at 33 (omission in original).

28. See Goebel, supra note 18, at 68–109 (providing state-by-state account of implementation of direct democracy); Schmidt, supra note 3, at 217–85 (same). But see Ellis, *Delusions*, supra note 5, at 177 (questioning “mythic narrative” of states’ adoption of direct democracy). See generally Piott, supra note 23 (detailing implementation of initiative and referendum in sixteen states). Appropriately, the initiative acquired a Western metaphorical identity as the “gun behind the door” and “spur in the flanks,” respectively threatening and agitating legislatures. Donovan & Bowler, supra note 6, at 2; see Goebel, supra note 18, at 5 (discussing special susceptibility of Western states to direct democracy).

29. Ellis, *Delusions*, supra note 5, at 34–35, 37; Goebel, supra note 18, at 186 (noting that, during 1950s, initiatives seemed “anachronistic relics of an altogether different era”); see Schmidt, supra note 3, at 21–23.

30. The revival was initially driven by growing social activism and distrust of government. Goebel, supra note 18, at 187–89; see David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 25–27 (1984) [hereinafter *Magleby, Direct Legislation*] (analogizing 1960s activists’ embrace of initiative to that of Progressives). Over the next decade, new states adopted the initiative and the U.S. Senate even considered a national initiative. Goebel, supra note 18, at 188–89; David Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 *U. Colo. L. Rev.* 13, 42–43 (1995) [hereinafter *Magleby, Let the Voters Decide?*] (discussing national initiative efforts).

31. See, e.g., Peter Schrag, *Paradise Lost: California’s Experience, America’s Future* 129–87 (1998) (discussing Proposition 13’s adoption and effects). But see Ellis, *Delusions*, supra note 5, at 36 (disputing Proposition 13’s mythic status). Proposition 13 established, first, that an initiative could pass despite effectively universal opposition by political, business, and media leaders (who had forecast its dire impact on state finances), and second, that direct democracy could serve conservative as well as progressive policies. See Goebel, supra note 18, at 189–93; Magleby, *Direct Legislation*, supra note 30, at 190–91.

32. Richard Briffault & Laurie Reynolds, *Cases and Materials on State and Local Government Law* 595–96 (6th ed. 2004); see Schmidt, supra note 3, at 125–45 (celebrating post-Proposition 13 “tax revolt”).

serious thought to adopting it.”³³ The power of initiatives to shape the policy and political agenda of a state, overlooked for decades, had become overt.³⁴

Since the 1990s, more initiatives have appeared on state ballots than ever before.³⁵ The intensity of initiative use varies among the twenty-four states that enable it: Ballots in Arizona, California, Colorado, North Dakota, Oregon, and Washington featured sixty percent of all initiatives considered in the United States between 1990 and 2000,³⁶ while in other states, such as Florida, Idaho, and Utah, citizens hardly use the initiative at all.³⁷ About forty percent of initiatives pass,³⁸ though courts invalidate many successful initiatives on procedural or substantive grounds.³⁹ The process is generally popular among voters.⁴⁰ Yet few initiatives address subjects that voters consider important political issues. Rather, initiatives “tend to reflect the concerns of ideological or reform groups that have been unsuccessful in getting their way with the legislature, or who desire to elevate their issue as a result of the media attention that comes with getting a measure on the ballot.”⁴¹ Most criticism of the contemporary initiative process derives from this apparent incongruence.

33. Ellis, *Delusions*, supra note 5, at 41; see Magleby, *Let the Voters Decide?*, supra note 30, at 17. The New York Senate, for example, commissioned a report on the advisability of an initiative process. See N.Y. Senate Research Serv., *The Popular Interest Versus the Public Interest . . . A Report on the Popular Initiative 1–2* (1979) (citing Proposition 13 as impetus for “renewed interest in the popular initiative”).

34. See Jim Shultz, *The Initiative Cookbook: Recipes and Stories from California’s Ballot Wars 2* (1998) (observing that Proposition 13 restored “romance of the initiative as a source of real political power”).

35. See supra note 5.

36. Ellis, *Delusions*, supra note 5, at 38.

37. Philip L. Dubois & Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons* 30–31 (1998).

38. *Id.* at 32. In states in which initiative use is heaviest, the passage rate approaches this average. *Id.*

39. See Eule, supra note 1, at 1558–84 (discussing such cases); infra notes 48–55 and Part II.A (describing procedural requirements and substantive requirements, respectively, for initiative passage). For an example, see *Thomas v. Bailey*, 595 P.2d 1, 9 (Alaska 1979) (holding that Alaska Homestead Act, a voter initiative that would have distributed thirty million acres of public land to state citizens, constituted an appropriation in violation of state constitution).

40. Magleby, *Direct Legislation*, supra note 30, at 9 (noting voter approval in abstract despite many specific complaints); see The Speaker’s Comm’n on the Cal. Initiative Process, *Final Report 29–30* (2002), available at <http://www.cainitiative.org/pdf/initiativereportfinal07feb2002.pdf> (on file with the *Columbia Law Review*) (finding that majority of Californians approve of initiative process); David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* 208–09 (2000).

41. Magleby, *Let the Voters Decide?*, supra note 30, at 35; see Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 *Mont. L. Rev.* 35, 40 (2003) [hereinafter *Ellis, Signature Gathering*] (“Those who write initiatives control the political menu, and thereby shape voter choice.”); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 *U. Chi. L. Sch. Roundtable* 17, 18 (1997) (noting that interest groups “generally frame the terms of the debate concerning ballot measures”); infra notes 184–204 (describing motivations other than lawmaking behind many initiatives). But see

3. *Modern Complaints.* — Critics of modern direct democracy have added to longstanding anxieties about voter competence⁴² and minority rights⁴³ new misgivings about the ubiquity of corporate and interest group influence on initiative campaigns.⁴⁴ These critics lament the emergence of an “initiative industry” of signature gathering and campaign management firms that assess the viability of potential initiatives, manage leagues of paid petition circulators, and draft potential legislation.⁴⁵ They stress the irony that the price of waging modern initiative campaigns leaves them open only to wealthy corporations and special interest groups, the very targets of Populist and Progressive agitation.⁴⁶ Accordingly, reform of the initiative process is a constant topic of discussion, particularly within state legislatures.⁴⁷

Susan A. Banducci, Searching for Ideological Consistency in Direct Legislation Voting, *in* Citizens as Legislators, *supra* note 6, at 132, 132–48 (finding that political leanings of initiatives on ballot approximate public opinion at large). On the subject matter of initiatives generally, see Caroline J. Tolbert, Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same, *in* Battle over Citizen Lawmaking, *supra* note 21, at 35, 41–52 [hereinafter Tolbert, Public Policy].

42. See Magleby, Direct Legislation, *supra* note 30, at 197–98 (lamenting voter ignorance). But see Cronin, *supra* note 18, at 60–89 (deeming voters sufficiently competent); Richard J. Briffault, Distrust of Democracy, 63 Tex. L. Rev. 1347, 1360–66 (1985) (reviewing Magleby, Direct Legislation, *supra* note 30) (challenging view of legislators as comparatively intelligent, informed, and rational).

43. See Cronin, *supra* note 18, at 90–99; Donovan & Bowler, *supra* note 6, at 18 (discussing stigmatizing effect of campaigns); Linde, *supra* note 2, at 725–26; James Wenzel et al., Direct Democracy and Minorities: Changing Attitudes About Minorities Targeted by Initiatives, *in* Citizens as Legislators, *supra* note 6, at 228, 228–48; Cody Hoesly, Note, Reforming Direct Democracy: Lessons From Oregon, 93 Cal. L. Rev. 1191, 1209–12 (2005); *infra* note 281.

44. See, e.g., Boehmke, *supra* note 7, at 9–10 (listing criticisms). See generally Broder, *supra* note 40 (indicting initiative process as utterly corrupted).

45. See Broder, *supra* note 40, at 43–89, 163–97; Ellis, Delusions, *supra* note 5, at 49–61; Larry L. Berg & C.B. Holman, The Initiative Process and Its Declining Agenda-Setting Value, 11 Law & Pol’y 451, 454–61, 465 (1989) (“The initiative industry has developed to such an extent that all the services needed for a place on the ballot simply can be purchased.”); Todd Donovan et al., Political Consultants and the Initiative Industrial Complex, *in* Dangerous Democracy?: The Battle over Ballot Initiatives in America, *supra* note 7, at 101, 101–34 (noting that “[c]ampaign professionals have . . . become institutionalized”).

46. See, e.g., Elisabeth R. Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation 4 (1999) (“Contemporary observers argue that just as wealthy interests manipulated state legislatures early in this century, their modern counterparts manipulate direct legislation today.”). But see generally *id.* (concluding that equations of money and influence are exaggerated). In response, initiative advocates contend that campaign management firms and special interest groups influenced direct lawmaking even in its early years, and that the same forces affect candidate elections and lawmaking by legislatures. See Goebel, *supra* note 18, at 192–99; Daniel A. Smith, Special Interests and Direct Democracy: An Historical Glance, *in* Battle over Citizen Lawmaking, *supra* note 21, at 59, 63–66 [hereinafter Smith, Special Interests]; Briffault, *supra* note 42, at 1360–66.

47. For examples of the reports generated by such discussion, see generally NCSL, Initiative and Referendum, *supra* note 3; The Speaker’s Comm’n on the Cal. Initiative

B. Initiative Campaign Regulation Under the First Amendment

1. *Basic Initiative Procedures.* — To place an initiative on a ballot, a state citizen must satisfy a number of procedural requirements.⁴⁸ The first step to ballot status is certification. A citizen drafts a potential statute or constitutional amendment and submits it to a state official or review board.⁴⁹ That official or board assigns a title and ballot summary to the initiative and, in some states, analyzes its constitutionality and fiscal impact.⁵⁰ Once labeled and certified, an initiative may appear on petition forms for collection of signatures.⁵¹

State constitutions and statutes impose elaborate requirements on the signature gathering process across three variables: quantity, time, and geography.⁵² For an initiative to attain ballot status, its petition must receive a number of signatures corresponding to a percentage of votes cast in a specified recent election.⁵³ Signature gatherers also must usually complete their task within a certain time period.⁵⁴ Some states also require geographic diversity by demanding that gatherers meet a signature threshold in a majority of state counties.⁵⁵

Process, *supra* note 40. Initiative reform efforts have continued apace in recent years. In 1999, the year *Buckley* was decided, thirty-one state legislatures considered a total of 150 bills regarding the initiative process. Jennie Drage, *State Efforts to Regulate the Initiative Process, in Battle over Citizen Lawmaking*, *supra* note 21, at 229, 230–35; see Andrew M. Gloger, IRI Report: Paid Petitioners After *Prete* 4–5 (2006), available at <http://www.iandrinstitute.org/REPORT%202006-1%20Paid%20Petitioners.pdf> (on file with the *Columbia Law Review*); *supra* note 7.

48. These requirements vary among the states and appear both in constitutional and statutory form. For a thorough overview, see NCSL, *Initiative and Referendum*, *supra* note 3, at 22–43.

49. See, e.g., Colo. Const. art. V, § 1, subsec. 5 (requiring submission to “the legislative research and drafting offices”); Wash. Rev. Code Ann. § 29A.72.010 (West 2005) (requiring submission to secretary of state).

50. See, e.g., Alaska Const. art. XI, § 4 (requiring lieutenant governor to “prepare a ballot title and proposition summarizing the proposed law”). A few states also require preelection judicial review. See generally James D. Gordon III & David B. Magleby, *Preelection Judicial Review of Initiatives and Referendums*, 64 *Notre Dame L. Rev.* 298 (1989) (comparing procedural and substantive challenges).

51. See, e.g., Mich. Comp. Laws Ann. § 168.482 (West Supp. 2007) (detailing fonts and format for petition form).

52. See Stephen P. Nicholson, *Voting the Agenda: Candidates, Elections, and Ballot Propositions 41* (2005) (arguing that such constraints aim to gauge public interest but “the ‘initiative industry’ means that the electorate’s opinion of an issue’s importance is of little significance in qualifying it for the ballot”).

53. See, e.g., Or. Const. art. IV, § 1, subsec. 2(b) (requiring signatures equal to six percent of votes cast in last election).

54. Proponents of California initiatives, for example, must collect the required number of signatures within 150 days, Cal. Elec. Code § 336 (West 2003), and finish at least 131 days before the election, Cal. Const. art. II, § 8, subsec. c.

55. See, e.g., Nev. Const. art. 19, § 2, subsec. 2 (requiring signatures of ten percent of recent voters in each of seventy-five percent of state counties); Caroline J. Tolbert et al., *Election Law and Rules for Using Initiatives, in Citizens as Legislators*, *supra* note 6, at 27,

Finally, if an initiative proponent has met these requirements, a state officer verifies the validity of submitted petition signatures and certifies the initiative for inclusion on the ballot.⁵⁶ Typically, if a statutory initiative receives a majority of votes, it quickly becomes law.⁵⁷ In no state may the governor veto a successful initiative,⁵⁸ but legislatures may amend successful statutory initiatives in prescribed circumstances.⁵⁹

2. *Reform and Its Fate in Court.* — Since the 1970s, state legislatures have sought to reform initiative politics by limiting campaign spending and moderating the industrialism of the signature gathering process.⁶⁰ The resultant regulations have proved vulnerable to challenges on First Amendment grounds.

When the Supreme Court invalidated limits on federal campaign expenditures in 1976,⁶¹ almost half of the initiative states had limits on initiative campaign contributions or expenditures by interest groups.⁶² In 1978, the Court confirmed in *First National Bank of Boston v. Bellotti* that expenditure limits are as constitutionally infirm in the realm of direct democracy as in that of candidate elections.⁶³ Then, in *Citizens Against Rent Control v. City of Berkeley*, the Court invalidated an ordinance limiting contributions to initiative campaign committees, holding that “there is no significant state or public interest in curtailing debate and discussion of a ballot measure.”⁶⁴ These two cases, which rejected expenditure and con-

29–31 [hereinafter Tolbert et al., Election Law] (noting “antiurban bias” created by such requirements).

56. E.g., Joseph F. Zimmerman, *The Initiative: Citizen Law-Making* 42–45 (1999).

57. *Id.* at 48–50; see, e.g., Utah Code Ann. § 20A-7-511 (2003) (converting initiative into law within five days).

58. Manweller, *supra* note 21, at 34; see, e.g., Ariz. Const. art. IV, pt. 1, § 1.6, subsec. A (“The veto power of the Governor shall not extend to an initiative measure approved by a majority of the votes cast thereon . . .”).

59. Dubois & Feeney, *supra* note 37, at 78–81; Manweller, *supra* note 21, at 34; see, e.g., N.D. Const. art. III, § 8 (allowing legislative repeal or amendment within seven years of initiative’s effective date only by supermajority vote).

60. Paul Jacob, *Silence Isn’t Golden: The Legislative Assault on Citizen Initiatives*, in *Battle over Citizen Lawmaking*, *supra* note 21, at 97, 98–99. More intemperate activists cast these regulations as “thinly veiled attempts to slowly kill” the initiative and hoard lawmaking power. Angelo Paparella, *The Barriers to Participation: The Consequences of Regulation*, in *Battle over Citizen Lawmaking*, *supra* note 21, at 121, 130.

61. *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976). The Court affirmed the constitutionality of limits on individual political contributions. *Id.*

62. Smith, *Special Interests*, *supra* note 46, at 66–67.

63. 435 U.S. 765, 767–68 (1978); see *id.* at 790 (“The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”).

64. 454 U.S. 290, 299 (1981); see *id.* at 302–03 (Blackmun & O’Connor, JJ., concurring) (noting that state interests in preventing corruption and maintaining voter confidence in government, which had justified contribution limits in *Buckley*, were not compelling with respect to direct democracy).

tribution limits on First Amendment grounds, effectively blocked the campaign finance avenue of initiative reform.⁶⁵

Thus thwarted, states turned to regulation of the identity and activities of signature gatherers as a means of purifying the initiative process. By the mid-1980s, six states had banned the use of paid signature gatherers,⁶⁶ whom they deemed more likely than volunteers to behave fraudulently.⁶⁷ In 1988's *Meyer v. Grant*, the Supreme Court considered the constitutionality of a Colorado statute that criminalized paying for circulation of an initiative petition.⁶⁸ Justice Stevens, writing for a unanimous Court, held that the law unjustifiably restricted political speech in violation of the First Amendment.⁶⁹ The Court identified two manifestations of this restricted speech.⁷⁰ First, the one-on-one advocacy required to collect a signature is "interactive communication concerning political change that is appropriately described as 'core political speech.'" ⁷¹ The law burdened this speech, the Court reasoned, because "it limits the number of voices who will convey [a] message and the hours they can speak, and, therefore, limits the size of the audience they can reach."⁷² The second

65. See Ellis, *Delusions*, supra note 5, at 63. But see generally Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. Cal. L. Rev. 885 (2005) (arguing that initiative campaign finance reform may still be possible).

66. Magleby, *Direct Legislation*, supra note 30, at 38–39. But see *Hardie v. Fong Eu*, 556 P.2d 301, 303–04 (Cal. 1976) (finding similar ban unconstitutional restriction of freedom of expression and association).

67. See Cronin, supra note 18, at 242; Dubois & Feeney, supra note 37, at 104–06; Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 *Hastings Const. L.Q.* 175, 188–94 (1989) (discussing instances of fraud involving paid signature gatherers).

68. 486 U.S. 414 (1988); see Paul Grant, *The First Amendment Limits State Regulation of Initiatives and Referenda*, in *Battle over Citizen Lawmaking*, supra note 21, at 189, 189–91 (describing background and outcome of *Meyer*).

69. *Meyer*, 486 U.S. at 428. The Court found the state interest in preventing fraud insufficient. *Id.* at 426.

70. See Kris W. Kobach, *Taking Shelter Behind the First Amendment: The Defense of Popular Initiative*, in *Battle over Citizen Lawmaking*, supra note 21, at 167, 175 (describing these as "the speech of the proponent to the public through his circulators" and "through the ballot").

71. *Meyer*, 486 U.S. at 422. But see Ellis, *Delusions*, supra note 5, at 64–65 (describing Court's view of substantive political discussion between signature gatherer and citizens as "rose-colored").

72. *Meyer*, 486 U.S. at 422–23. The Court also held that the availability of alternative means of speech was irrelevant because "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424. Drawing a distinction between speech and legislative procedure also relevant to subject matter restrictions, Tolbert et al. argue that Colorado's ban merely "establishe[d] that the state's ballot allocation will be unaffected by the speech activity in question." Tolbert et al., *Election Law*, supra note 55, at 36. In other words, the ban degrades not speech, but only the consequence of the petition, "a legally efficacious document that triggers state action." *Id.*; see also Lowenstein & Stern, supra note 67, at 185 (arguing that ban actually "regulate[d] the state's conduct, namely, the circumstances in which the State will place propositions on the ballot").

manifestation of political speech identified by the Court is the “statewide discussion” resulting from placement of an initiative on the ballot.⁷³ By making ballot qualification more difficult, the Court held, the ban “has the inevitable effect of reducing the total quantum of speech on a public issue.”⁷⁴ This second ground for invalidation is important because it recognizes a First Amendment right to enjoyment of the discursive yield of ballot status: speech of enhanced credibility and range.⁷⁵

States responded to *Meyer* with variations on the same theme. For example, five states banned per-signature payment of petition circulators, citing fraud concerns, while allowing payment per hour or by salary.⁷⁶ Nebraska forbade petition circulators to gather signatures in counties in which they did not reside.⁷⁷ Colorado skirted *Meyer* by requiring petition circulators, inter alia, to wear identification badges, to disclose their names and the amount of money received for their work, and to be registered voters in the state.⁷⁸ The Supreme Court considered these regulations in *Buckley v. American Constitutional Law Foundation, Inc.*, a sequel to *Meyer*.⁷⁹ Most dramatically, eight Justices held that the ban on circulators unregistered to vote in Colorado was analogous to the ban on paid circulators in *Meyer* and therefore unconstitutional.⁸⁰ The Court reiterated its belief that such a ban injures speech in two ways: by reducing the number of voices carrying a proponent’s message and by hindering a proponent’s “‘ability to make the matter the focus of statewide discussion’”

73. *Meyer*, 486 U.S. at 423.

74. *Id.*

75. This point is controversial. As Ellis writes, “[i]f Stevens’ logic were to be followed, then all effective restrictions on ballot access—including geographical distribution requirements, short circulation windows, or high signature requirements—would be unconstitutional.” Ellis, *Delusions*, supra note 5, at 64; see also Kobach, supra note 70, at 184–87 (analyzing potential of Court’s “propitious words”); infra note 130. This Note argues that Justice Stevens’s reasoning would not invalidate all, or even many, subject matter restrictions on initiative processes. See infra Part III.B.

76. Ellis, *Delusions*, supra note 5, at 70; Gerber, *Logic of Reform*, supra note 7, at 147–50; see, e.g., Wash. Rev. Code Ann. § 29A.84.280 (West 2005) (“The legislature finds that paying a worker [per signature] . . . encourages the introduction of fraud in the signature gathering process.”). A few courts struck down these laws in the 1990s. See, e.g., *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 473–75 (S.D. Miss. 1997) (finding state’s fraud-based justifications for its statutes unconvincing).

77. See *Nebraska ex rel. Stenberg v. Beerman*, 485 N.W.2d 151, 153 (Neb. 1992) (invalidating this requirement); see also *Bernbeck v. Moore*, 126 F.3d 1114, 1117 (8th Cir. 1997) (invalidating its replacement).

78. See Kobach, supra note 70, at 173.

79. 525 U.S. 182 (1999).

80. *Id.* at 194–96 (applying strict scrutiny and finding Colorado’s justifications inadequate). Nine Justices agreed that the badge requirement was unconstitutional because its denial of anonymity was likely to reduce the amount of the “‘interactive communication’” extolled in *Meyer*. *Id.* at 186 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)); see supra notes 71–72 and accompanying text. Six Justices agreed that the disclosure requirement also unjustifiably violated the First Amendment. *Buckley*, 525 U.S. at 204 (holding that it “forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts” without compelling justification (citation omitted)).

by qualifying for the ballot.⁸¹ Dissenting alone on this point, Chief Justice Rehnquist warned that the Court's rekindling of this logic (which he termed, inexplicably, "the unfortunate dicta in *Meyer*") would imperil all regulations that "diminish[] the pool of petition circulators or mak[e] a proposal less likely to appear on the ballot."⁸²

Meyer and *Buckley* remain the Supreme Court's principal statements on the subject of First Amendment rights and the initiative process.⁸³ Read alongside *Bellotti* and *Berkeley*, they establish that states may not regulate that process without implicating their citizens' freedom of political expression, which arises in at least two forms: the "interactive communication" attending signature gathering and campaigning for passage, and the "ability to make [a] matter the focus of statewide discussion" by qualifying for ballot placement.⁸⁴ This principle is the starting point, and these precedents are the analytical foundation, for resolving the instant question of the validity of restrictions on the subject matter of initiatives.

II. SUBJECT MATTER RESTRICTIONS UNDER THE FIRST AMENDMENT

This Part examines current restrictions on the subject matter of initiatives and the circuit split concerning their impact on speech rights. Part II.A contrasts the pragmatic purpose of most subject matter restrictions with their recent use for questionable partisan ends. Part II.B analyzes the disagreement among the circuits as to whether such restrictions burden political speech protected by the First Amendment.

81. *Buckley*, 525 U.S. at 195 (quoting *Meyer*, 486 U.S. at 423).

82. *Id.* at 228; see Ellis, *Delusions*, *supra* note 5, at 68–70 ("In the immediate aftermath of . . . *Buckley*, initiative reformers wailed that 'the Supreme Court ruling robs states of the ability to fix a defective system,' while initiative activists exulted that states would now have to keep their dirty mitts off signature gatherers." (citation omitted)).

83. Courts have struggled to define the reach of the speech rights recognized in *Meyer* and *Buckley*. The *Buckley* Court acknowledged that only by "hard judgments" could courts "guard against undue hindrances to political conversations" while allowing states "considerable leeway to protect the integrity and reliability of the initiative process." *Buckley*, 525 U.S. at 191–92 (citation omitted); see *id.* at 208 (Thomas, J., concurring) (questioning feasibility of such balancing). Courts making these "hard judgments" have often invalidated state initiative regulations, see, e.g., *Chandler v. City of Arvada*, 292 F.3d 1236, 1243–44 (10th Cir. 2002) (finding ban on nonresident petition circulators tailored too broadly to serve its compelling interest); *Idaho Coal. United for Bears v. Cenarrusa*, 234 F. Supp. 2d 1159, 1165–66 (D. Idaho 2001) (invalidating geographical distribution requirement and ban on per-signature payment of petition circulators); *Heller v. Give Nev. a Raise, Inc.*, 96 P.3d 732, 733 (Nev. 2004) (en banc) (invalidating requirement that circulators submit affidavits vouching for validity of collected signatures), but courts have rejected First Amendment challenges in a fair number of cases, see, e.g., *Prete v. Bradbury*, 438 F.3d 949, 962–63 (9th Cir. 2006) (sustaining ban on per-signature payment after finding no severe burden on speech); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616–17 (8th Cir. 2001) (sustaining residency requirement for circulators and distinguishing *Buckley*).

84. See *supra* notes 69–75 and accompanying text.

A. *Prevalence and Function of Subject Matter Restrictions*

The twenty-four initiative states regulate the substance of their direct democracy in addition to its procedures. This regulation takes three forms: single subject rules, subject repetition waiting periods, and subject matter exclusions.

1. *Single Subject Rules and Subject Repetition Waiting Periods.* — Single subject rules require simply that an initiative concern only one topic.⁸⁵ These restrictions, present in seventeen states,⁸⁶ exist to reduce voter confusion and to inhibit logrolling, the legislative practice of cobbling together unrelated proposals to secure passage of those insufficiently popular to succeed on their own.⁸⁷ Most courts enforce single subject rules laxly when hearing challenges to ballot-qualified or successful initiatives, largely because deference to the will of the “sovereign people” is easy to defend.⁸⁸ Recently, courts in a few states have applied these rules more aggressively, rendering them “serious obstacle[s] to the use of the initiative process.”⁸⁹ But even initiative advocates acknowledge the benefits of restricting an initiative to a single subject and criticize the rules mostly for the latitude they grant judges over successful direct legislation.⁹⁰

85. See generally Anne G. Campbell, *In the Eye of the Beholder: The Single Subject Rule for Ballot Initiatives*, in *Battle over Citizen Lawmaking*, supra note 21, at 131, 131 (describing and cataloging single subject rules); Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. Contemp. Legal Issues 579 (2004) (same).

86. See Campbell, supra note 85, at 136–39; Dubois & Feeney, supra note 37, at 127–29. Some state constitutions explicitly restrict initiatives to one subject. See, e.g., Cal. Const. art. 2, § 8, subsec. d. In other states, courts have deemed the restriction implicit in light of corresponding constitutional restrictions on acts of the legislature. See, e.g., *In re Initiative Petition No. 347 State Question No. 639*, 813 P.2d 1019, 1026–28 (Okla. 1991).

87. Campbell, supra note 85, at 133–36; see also Dubois & Feeney, supra note 37, at 129 (discussing abusive, multisubject “ham-and-egg” initiatives in California).

88. See Campbell, supra note 85, at 147–61; Marilyn E. Minger, Comment, *Putting the “Single” Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. Davis L. Rev. 879, 899–900 (1991) (listing “artifices” used by California Supreme Court “to sidestep serious review of complex initiative measures”); see also *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997) (“A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.”); Eule, supra note 1, at 1584–86 (noting danger of courts appearing to “protect the people from themselves” by invalidating successful initiatives).

89. M. Dane Waters, President, Initiative & Referendum Inst., *The Initiative Process in America: An Overview of How It Works Around the Country*, Testimony to the Speaker’s Commission on the Initiative Process 6 (Dec. 18, 2000) (transcript available at http://www.cainitiative.org/pdf/initiative_process_iri.pdf) (on file with the *Columbia Law Review*) [hereinafter Waters, Testimony]; see Ellis, *Delusions*, supra note 5, at 142–47; Hoesly, supra note 43, at 1234 n.313 (collecting cases).

90. See Manweller, supra note 21, at 94–97; Campbell, supra note 85, at 163–64 (“As it stands now, the initiative power is at the mercy of the court’s conception of ‘oneness’ . . .”); Waters, Testimony, supra note 89, at 6 (noting Initiative & Referendum Institute’s support for single subject rules in principle).

Subject repetition waiting periods have occasioned even less controversy. These restrictions, present in five state constitutions, prohibit reintroduction of failed initiatives for a certain number of years.⁹¹ They serve to “reduce ballot clutter” and entail judicial analysis similar to that required by single subject challenges.⁹²

2. *Subject Matter Exclusions.* — Subject matter exclusions differ fundamentally from single subject rules and subject repetition waiting periods. Rather than regulating the manner in which subjects are presented, they remove particular subjects entirely from the initiative process.⁹³ Unlike many campaign regulations, these exclusions appear in state constitutions because they define the scope of the legislative power “reserved” by the people through those instruments.⁹⁴ Eleven states either forbid initiatives to concern budget matters, such as taxes and appropriations, or severely restrict the operation of initiatives on those subjects.⁹⁵ Three states forbid initiatives to affect the organization of the state judiciary.⁹⁶ The most restrictive states are Massachusetts (no initiatives concerning religion; courts or access to them; local matters; appropriations; public school funding; just compensation; trial by jury; freedom from unreasonable searches, bail, and martial law; freedom of speech, press, elections, and assembly; or the initiative process itself),⁹⁷ Mississippi (no initiatives

91. NCSL, Initiative and Referendum, *supra* note 3, at 16–17; see, e.g., Neb. Const. art. III, § 2 (“The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years.”).

92. Zimmerman, *supra* note 56, at 166; see N.Y. Senate Research Serv., *supra* note 33, at 65–66 (noting as goals “to discourage persistent petitioners and to curb nuisance questions”). But see Hoesly, *supra* note 43, at 1235–36 (disputing this justification). Instead of deciding whether one initiative’s elements comprise a single proposal, courts decide whether two initiatives are so similar as to constitute the same proposal. See, e.g., *In re Initiative Petition No. 271*, 373 P.2d 1017, 1019 (Okla. 1962).

93. For an overview, see NCSL, Initiative Subject Restrictions, *supra* note 10.

94. See *supra* note 3 (quoting state constitutions); see also *infra* note 131 (distinguishing these structural limitations from procedural regulations).

95. NCSL, Initiative and Referendum, *supra* note 3, at 20; see, e.g., Alaska Const. art. XI, § 7 (“The initiative shall not be used to dedicate revenues [or] make or repeal appropriations”); Mo. Const. art. 3, § 51 (“The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby”); Ohio Const. art. II, § 1e (excluding changes to property taxation from initiative process). Florida requires initiatives proposing a tax or fee to pass by a supermajority vote, Fla. Const. art. XI, § 7; such a supermajority requirement is effectively a total exclusion. Cf. *infra* notes 115, 119 (discussing supermajority requirement in Utah Constitution). California’s lack of a budget matters exclusion has allowed the accumulation of successful initiatives to insulate much of the state budget from the legislature’s control. See Dubois & Feeney, *supra* note 37, at 81, 83, 224–25 (discussing merits of excluding budget matters).

96. See Alaska Const. art. XI, § 7; Mass Const. amend. art. XLVIII, pt. II, § 2; Wyo. Const. art. 3, § 52, subsec. g.

97. Mass. Const. amend. art. XVIII, § 2; *id.* at amend. art. XLVIII, pt. II, § 2; see also *Paisner v. Attorney Gen.*, 458 N.E.2d 734, 736, 738–39 (Mass. 1983) (upholding rejection of initiative that would change “internal proceedings” of legislature); Alexander Gray, Jr. &

affecting the state bill of rights; state pensions; the “right to work;” or the initiative process itself),⁹⁸ and Illinois (no initiatives concerning subjects other than the structure and procedures of the legislature).⁹⁹ In contrast, ten states, including those with the heaviest initiative use, exclude no subjects from the initiative process not also excluded from their legislatures’ authority.¹⁰⁰

The principle behind excluding certain subjects is the same as that behind rejecting direct democracy entirely in favor of representative government. If, as Madison wrote, “temporary errors and delusions” beset the people at “particular moments,” causing them to “call for measures which they themselves will afterwards be the most ready to lament and condemn,”¹⁰¹ then surely that irrationality is also more apt to overtake them with respect to particular subjects.¹⁰² Accordingly, the hybrid democracies of the initiative states insulate those subjects to contain whatever damage popular errors and delusions might inflict on the work-

Thomas Kiley, *The Initiative and Referendum in Massachusetts*, 26 *New Eng. L. Rev.* 27, 79 (1991) (noting failed proposal to exclude constitution’s entire declaration of rights from initiative process).

98. Miss. Const. art. 15, § 273, subsec. 5. This “emasculated” version of the initiative power, adopted in 1992, “bears little resemblance to the populist instrument used in California or in Oregon.” Ellis, *Delusions*, supra note 5, at 39. To date, only two initiatives have qualified for the ballot. Initiative & Referendum Inst., Mississippi (2006), at <http://www.iandrinstitute.org/Mississippi.htm> (on file with the *Columbia Law Review*).

99. Ill. Const. art. XIV, § 3. This highly focused initiative power preserves direct democracy’s core function as a “means of stimulation and control” of the legislature. See Ellis, *Delusions*, supra note 5, at 33; Samuel Issacharoff et al., *The Law of Democracy: Legal Structure of the Political Process* 939 (3d ed. 2007) (noting that, during 1990s, almost all initiative states passed a term limits initiative); G. Alan Tarr, *Understanding State Constitutions* 160–61 (1998) (discussing use of initiative to address “contentious economic and social issues avoided by legislatures”); Tolbert et al., *Election Law*, supra note 55, at 39–40 (noting justification of legislative intransigence); Briffault, supra note 42, at 1368 (arguing that initiatives are most worthwhile in “those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures and regulation of the political process, taxation, and spending”).

100. NCSL, *Initiative Subject Restrictions*, supra note 10 (illustrating this openness in Arizona, California, Colorado, and Oregon). Subjects removed from the initiative process, but also from the domain of the legislatures, include private, local, special, and unconstitutional legislation. See, e.g., Mont. Const. art. III, § 4, subsec. 1 (“The people may enact laws by initiative on all matters except appropriations of money and local or special laws.”).

101. *The Federalist* No. 63 (James Madison), supra note 1, at 327.

102. See Eule, supra note 1, at 1553 (citing “racism, sexism, nativism, and self-interest” as popular proclivities that continue to justify Framers’ rejection of direct democracy); Linde, supra note 2, at 721–23 (noting “exploitation of emotional social issues” and subjects inspiring “identification with one or rejection of another social group for reasons transcending an ordinary political disagreement about policy”); cf. Judy Fahys, *Prop 5’s Formula for Success: Spend Well . . . and Spin Well*, *Salt Lake Trib.*, Nov. 8, 1998, at A1 [hereinafter Fahys, *Formula for Success*] (describing appeal in Utah campaign to distrust of “meddlesome outsiders from the East Coast and California”).

ings of government.¹⁰³ Subject matter exclusions thus “balance the idealism of pure democracy with the practical necessities of modern government.”¹⁰⁴ For example, in the judgment of the people of nine states, responsible management of complex state budgets is such a practical necessity.¹⁰⁵ Where the intemperance of direct democracy could endanger the security of the state, fiscal or otherwise,¹⁰⁶ reducing the scope of the reserved legislative power is inoffensive.

In practice, this rationale fails to justify some subject matter restrictions. Massachusetts’s long list of exclusions, which has been criticized as “undesirable,”¹⁰⁷ “unnecessary,”¹⁰⁸ and “hav[ing] nothing to do with the integrity, reliability, or mechanics of the initiative process,”¹⁰⁹ was implemented “not only to prevent enactment, but also to prevent the inevitable heated electoral dialogue about these matters, which itself tends to denigrate the rights protected.”¹¹⁰ For example, the drafters at the 1917 Massachusetts constitutional convention hoped that excluding matters relating to religion would “limit the public electoral dialogue and lawmaking power to secular, political subjects.”¹¹¹ The hostility of these exclusions to mere public debate on a subject hardly resembles Madison’s fear of the implementation of “violent passions” into law.¹¹²

Further, recent restrictions on initiatives concerning wildlife protection lack the apolitical pragmatism of those excluding subjects like fiscal policy and the judiciary. Conservation groups used the initiative process

103. See Schrag, *supra* note 31, at 272 (arguing that, as scope of initiative process increases, “the general ability to govern, to shape predictable outcomes” decreases).

104. Note, *Limitations on Initiative and Referendum*, 3 *Stan. L. Rev.* 497, 509 (1951) [hereinafter *Note, Limitations*]; see *id.* at 498 (“No [initiative proponent] would maintain that all legislative activity should be subject to popular election. If governments are to function there must be some areas in which representative action will be final.”); cf. Eule, *supra* note 1, at 1554 (noting unwillingness of even critics of representative government “to leave all decision-making to mere aggregation of electoral preferences”).

105. See Robert G. Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 *New Eng. L. Rev.* 455, 461–67 (discussing rationale for exclusion); Hoesly, *supra* note 43, at 1236–37 (observing that “[f]iscal initiatives have long brought instability and inefficiency to government”); *supra* note 95; cf. Schrag, *supra* note 31, at 10–12 (noting constraining effect of California’s initiatives and “sharp decline in the quality of public services”). But see John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 *St. Pol. & Pol’y Q.* 248, 258 (2005) (deeming initiative “scapegoat” for unrelated budget woes).

106. Three states also disallow citizens to use referendums to obstruct legislative acts concerning peace, health, safety, or emergencies. See Alaska Const. art. XI, § 7; N.D. Const. art. III, § 5; S.D. Const. art. III, § 1.

107. Zimmerman, *supra* note 56, at 164.

108. Hoesly, *supra* note 43, at 1236.

109. Brief of Plaintiffs-Appellants at 26, *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (No. 04-1625).

110. Stewart, *supra* note 105, at 460 n.26; see *supra* note 97 (discussing Massachusetts’s exclusions); Gray & Kiley, *supra* note 97, at 54–82 (describing judicial interpretation of bounds of these restrictions).

111. Stewart, *supra* note 105, at 478.

112. *The Federalist* No. 63 (James Madison), *supra* note 1, at 327.

successfully throughout the 1990s to reform hunting laws in many Western states.¹¹³ Fearing expansion of these efforts to Utah,¹¹⁴ rural conservatives in that state's legislature rushed before voters a constitutional amendment imposing a de facto exclusion of wildlife initiatives in the form of a subject-based supermajority passage requirement.¹¹⁵ The National Rifle Association and like groups funded a deceptive advertising campaign in support of the amendment's passage, but it received little support from the press.¹¹⁶ The conservative *Deseret News*, for example, described the amendment as "anti-democra[ti]c" because it would "chang[e] the rules of government for one special-interest group"¹¹⁷ and advised voters not "to make an exception for wildlife issues," which "are no more important than myriad others."¹¹⁸ Nonetheless, the amendment passed, calcifying Utah's statutory regime for conservation issues.¹¹⁹ Other states have since considered similar restrictions, including outright exclusions.¹²⁰ This supermajority requirement does not insulate from direct democracy a subject area crucial to government functioning or especially likely to provoke popular errors, delusions, or passions.¹²¹ Rather, it manipulates the electoral process to serve the "ruling passion" of a tem-

113. Wayne Pacelle, *The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process*, in *Battle over Citizen Lawmaking*, supra note 21, at 109, 109–14 (noting that in the 1990s "the animal protection movement carefully used the initiative process to codify basic protections for animals"); see *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1085 (10th Cir. 2006).

114. See *Walker*, 450 F.3d at 1085–86; Issacharoff et al., supra note 99, at 900–01.

115. See Utah Const. art. VI, § 1, subsec. 2(A)(ii) ("Notwithstanding [the majority of votes otherwise required], legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting."); *Walker*, 450 F.3d at 1110 (Lucero, J., concurring in part and dissenting in part) (quoting state agency conclusion that provision makes passing wildlife initiatives "virtually impossible"); Dubois & Feeney, supra note 37, at 111–12 (assessing dramatic effect of hypothetical supermajority requirements on passage rates); Pacelle, supra note 113, at 116–17; see also Editorial, *Wildlife Amendment off Base*, *Deseret News*, Aug. 21, 1998, at A12 [hereinafter Editorial, *Wildlife Amendment*] (noting that legislature, in its rush, bypassed state Constitutional Revision Commission).

116. Pacelle, supra note 113, at 116; Judy Fahys, *Foes Say Prop. 5 Robs Majority of Its Voice, but Cash Makes Backers Easily Heard*, *Salt Lake Trib.*, Oct. 19, 1998, at A1 (observing that "major [media] outlets have panned Prop. 5"); Fahys, *Formula for Success*, supra note 102 (noting that nineteen percent of those voting to install supermajority requirement did not understand its effect).

117. Editorial, *Vote No on Prop 5, Yes on All Else*, *Deseret News*, Nov. 1, 1998, at AA1.

118. Editorial, *Wildlife Amendment*, supra note 115.

119. See Zack Van Eyck & Lucinda Dillon, *Utah Voters Approve Prop. 5 by 60-40 Margin*, *Deseret News*, Nov. 4, 1998, at A1; see also *Walker*, 450 F.3d at 1086 ("Since then, no group or individual has pursued a wildlife initiative in Utah.")

120. See Pacelle, supra note 113, at 116–17 (noting Alaska and Arizona); NCSL, *Initiative and Referendum*, supra note 3, at 61–62 (noting Missouri and Wyoming); cf. Waters, *Almanac*, supra note 3, at 527 (noting that Oklahoma now requires more signatures for animal protection initiatives than for others).

121. See supra notes 101–106 and accompanying text.

porary majority in a manner analogous to partisan gerrymandering and feared by Madison in his discussion of the danger of factions.¹²²

Because these subject matter restrictions lack the pragmatic impetus typical of most exclusions from the initiative process, and because they certainly hinder citizens' "ability to make [a] matter the focus of state-wide discussion" through ballot qualification, in apparent contravention of the speech right recognized in *Meyer*,¹²³ litigants have challenged them recently as impermissible restraints on political expression protected by the First Amendment.

B. *First Amendment Challenges to Subject Matter Restrictions*

The three circuit courts that have considered the impact of subject matter restrictions on speech rights have disagreed sharply.¹²⁴ The D.C. Circuit in *Marijuana Policy Project v. United States*¹²⁵ and the Tenth Circuit in *Initiative & Referendum Institute v. Walker*¹²⁶ have held that subject matter restrictions raise no First Amendment concerns, because *Meyer*'s protection of speech rights in initiative campaigns does not extend to limitations of the scope of the process. The First Circuit in *Wirzburger v. Galvin*, however, relied on *Meyer* in holding that subject matter restrictions burden not core political speech but, more moderately, expressive conduct composed of speech and nonspeech elements.¹²⁷ Applying intermediate scrutiny under *United States v. O'Brien*, the Supreme Court case governing regulation of expressive conduct, the First Circuit sustained the subject matter restrictions at issue.¹²⁸ But it noted that restrictions that serve no important state interest would fail intermediate scrutiny and thus impermissibly burden protected speech, a result unreachable under *Marijuana Policy Project* and *Walker*.¹²⁹

1. *Distinguishing Procedural Regulation from Scope Limitation.* — Chief Justice Rehnquist warned in his *Buckley* dissent that, "[u]nder the Court's interpretation of *Meyer*, any ballot initiative regulation is unconstitutional if it . . . makes it more difficult for a given issue to ultimately appear on

122. See The Federalist No. 10 (James Madison), *supra* note 1, at 45–46 (arguing that factions, groups of citizens united by "[a] common passion or interest," can injure minority interests when they achieve a majority and suggesting means of controlling their effects); see also *Walker*, 450 F.3d at 1110–12 (Lucero, J., concurring in part and dissenting in part) (expounding gerrymandering analogy).

123. See *Meyer v. Grant*, 486 U.S. 414, 423 (1988); *supra* notes 73–75 and accompanying text.

124. Note that the Second, Third, and Fourth Circuits contain no initiative states. See NCSL, Initiative and Referendum, *supra* note 3, at 63.

125. 304 F.3d 82, 86–87 (D.C. Cir. 2002).

126. 450 F.3d at 1102.

127. *Wirzburger v. Galvin*, 412 F.3d 271, 276–77 (1st Cir. 2005), cert. denied, 546 U.S. 1150 (2006).

128. *Id.* at 279.

129. See *id.* at 278–79.

the ballot.”¹³⁰ This prediction inspired litigants to use *Meyer* to argue that restrictions on the subjects open to an initiative process impermissibly restrict political expression in violation of the First Amendment. But these claims have stumbled on a potent distinction: Subject matter restrictions are not statutory regulations of procedure, but structural, constitutional limits on the scope of the initiative power.¹³¹

Courts have embraced this distinction and restricted *Meyer* to procedural regulation of campaigns. For example, in *Skrzypczak v. Kauger*, the Tenth Circuit held that “nothing in *Meyer* suggest[s] that there is a protected right to have a particular initiative on the ballot” because *Meyer* protects only the exercise, and not the existence or extent, of the initiative power.¹³² The speech rights of initiative proponents or interested citizens remain intact as long as they may speak publicly about an initiative’s subject matter, regardless of whether a state has denied it ballot status.¹³³ The Eighth and Ninth Circuits have interpreted *Meyer* similarly, distinguishing impermissible restriction of the *capacity* to communicate (in *Meyer*, by circulating petitions) from permissible restriction of the *consequence* of that communication, a structural, usually constitutional matter.¹³⁴ The Eleventh Circuit has likewise rejected a *Meyer*-based challenge

130. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 231 (1999) (Rehnquist, C.J., dissenting); see also *id.* at 228; *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988); *Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th Cir. 1996) (discussing conclusions that might be drawn from *Meyer*’s language); *supra* note 82.

131. As the Nebraska District Court put it:

[T]here is an important categorical difference between granting and defining the right to an initiative process in the state constitution and statutory procedures enacted to implement the right so defined by the state constitution. . . . *Meyer v. Grant* . . . does not prohibit Nebraska citizens from creating self-imposed constitutional limitations when defining the scope of the right they are creating.

Dobrovolny v. Moore, 936 F. Supp. 1536, 1541–42 (D. Neb. 1996), *aff’d*, 126 F.3d 1111 (8th Cir. 1997); see also *Nebraska ex rel. Lemon v. Gale*, 721 N.W.2d 347, 360 (Neb. 2006) (sustaining constitutionality of subject repetition waiting period and describing it as “self-imposed limitation on the constitutionally reserved power of initiative which defines its scope”). Similarly, the Ninth Circuit described a subject matter exclusion as “a delegation to the legislature by the people of a part of their reserved power” in *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999).

132. 92 F.3d 1050, 1053 (10th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); see also *Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1211 (10th Cir. 2002) (“[T]he right to free speech and the right to vote are not implicated by the state’s creation of an initiative procedure, but only by the state’s attempts to regulate speech associated with [the] initiative procedure . . .”), *cert. denied*, 537 U.S. 814 (2002).

133. *Skrzypczak*, 92 F.3d at 1053.

134. The Eighth Circuit sustained an Arkansas law requiring signatures of 38% of county voters to qualify an initiative changing a county’s “wet/dry” status, but signatures of only 15% for all other initiatives, because it imposed no “burden [on] the ability of supporters of local-option elections to make their views heard.” *Wellwood v. Johnson ex rel. Bryant*, 172 F.3d 1007, 1009 (8th Cir. 1999). In *Caruso v. Yamhill County*, the Ninth Circuit distinguished limits on “political speech” from regulations of the “voting process,” reversing the district court’s reliance on *Meyer* and *Buckley*. 422 F.3d 848, 855–56 (9th Cir. 2005); *cert. denied*, 547 U.S. 1071 (2006); see *Stone*, 173 F.3d at 1175–76.

to Florida's single subject rule, though it appeared willing to apply strict scrutiny to "regulations that were content based or had a disparate impact on certain political viewpoints."¹³⁵

2. *The D.C. Circuit Rejects a First Amendment Challenge.* — The D.C. Circuit confronted a viewpoint-specific subject matter restriction in *Marijuana Policy Project v. United States*.¹³⁶ In response to a medical marijuana initiative that qualified for the 1998 D.C. ballot, Congress approved the Barr Amendment, which forbids enactment in the District of any law "reduc[ing] penalties" for marijuana-related offenses.¹³⁷ The district court held that the Barr Amendment impermissibly burdened core political speech, but the D.C. Circuit reversed, holding flatly that "the First Amendment imposes no restriction on the withdrawal of subject matters from the initiative process."¹³⁸ It may "protect[] public debate about legislation," the court wrote, but it "confers no right to legislate on a particular subject."¹³⁹ Freedom of political expression is secure as long as advocates of reducing marijuana penalties may speak publicly in support of their cause, activity to which the Barr Amendment was indifferent, at least facially.¹⁴⁰ *Marijuana Policy Project* thus maintained the distinction between procedural regulations and scope limitations, classing subject matter restrictions among the latter as allocations of topical jurisdiction between the District's legislature (Congress) and its citizen legislators.¹⁴¹ This conceptual divide allowed the court to deny *Meyer* and the First Amendment any dominion over subject matter restrictions on the initiative process.

135. *Biddulph*, 89 F.3d at 1498, 1500. Whether the court would deem a subject matter exclusion such a "regulation" deserving strict scrutiny, as opposed to a scope limitation, is unclear.

136. 304 F.3d 82 (D.C. Cir. 2002).

137. *Id.* at 84; see 2002 District of Columbia Appropriations Act, Pub. L. No. 107-96, § 127, 115 Stat. 923, 953 (2001); Guy Taylor, Appellate Court Knocks Medicinal Marijuana off Ballot, Wash. Times, Sept. 20, 2002, at B1 (describing impetus for restriction).

138. *Marijuana Policy Project*, 304 F.3d at 86 (citing *Skrzypczak*, 92 F.3d at 1053). The district court reasoned that the Barr Amendment went even further than the regulations in *Meyer* and *Buckley* because it entirely prohibited "plaintiffs . . . from circulating a petition to have their initiative placed on the ballot." *Marijuana Policy Project v. D.C. Bd. of Elections & Ethics*, 191 F. Supp. 2d 196, 208–09 (D.D.C. 2002). It also passed briefly on the government's novel fallback argument that the Barr Amendment, if it burdened speech, burdened only "expressive conduct" and therefore entailed intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968). *Marijuana Policy Project*, 191 F. Supp. 2d at 210 (finding this argument insufficiently developed).

139. *Marijuana Policy Project*, 304 F.3d at 85; see *id.* at 83 ("[T]he legislative act—in contrast to urging or opposing the enactment of legislation—implicates no First Amendment concerns . . ."). Otherwise, the court suggested, federal preemption of state law could be held to restrict the political speech of state citizens. *Id.* at 85.

140. *Id.* at 85. But cf. *supra* notes 110–111 and accompanying text (noting that Massachusetts's subject matter exclusion was intended, in part, to prevent "heated electoral dialogue").

141. *Marijuana Policy Project*, 304 F.3d at 86.

3. *Wirzburger and the First Circuit's Expressive Conduct Theory*. — In 2005, the First Circuit explicitly rejected the bulk of the D.C. Circuit's reasoning in *Marijuana Policy Project*. It held in *Wirzburger v. Galvin* that excluding certain subjects from a state initiative process restricts “expressive conduct” and entails intermediate scrutiny under *United States v. O'Brien*, a Supreme Court case concerning the government's capacity to regulate public destruction of draft cards.¹⁴² It became the first circuit court to acknowledge a speech right—though not an insuperable one—in placing an initiative on a certain subject on the ballot in states where the process is generally available. The case involved Massachusetts's exclusion from its initiative process of initiatives “relat[ing] to religion, religious practices or religious institutions” or affecting the state constitution's ban on public aid to private schools.¹⁴³ The plaintiffs argued that the exclusions violated *Meyer* and *Buckley* by impeding their ability to “mak[e] the ideas for political change expressed in their initiative a matter of statewide discussion on the ballot.”¹⁴⁴ In response, Massachusetts cited *Marijuana Policy Project's* precept that the First Amendment “confers no right to legislate on a particular subject” and argued for rationality review.¹⁴⁵

The First Circuit held that the subject matter exclusions do restrict protected speech, writing: “A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative.”¹⁴⁶ For support, the court cited *Meyer* for the broad proposition that an initiative process “involves core political speech” and concluded, “[W]e cannot see how, given the Supreme Court's analysis in *Meyer*, subject-matter exclusions . . . ‘restrict[] no speech.’”¹⁴⁷ In extending *Meyer's* protection to subject matter restrictions, the First Circuit ignored the distinction between procedural regulation and scope limitation deemed dispositive in

142. *Wirzburger v. Galvin*, 412 F.3d 271, 275–79 (1st Cir. 2005), cert. denied, 546 U.S. 1150 (2006).

143. Mass. Const. amend. art. XLVIII, pt. II, § 2 (“Religious Exclusion”); *id.* at amend. art. XVIII, § 2 (“Anti-Aid Exclusion”); see *supra* notes 97, 107–112 and accompanying text (discussing these restrictions).

144. Brief of Plaintiffs-Appellants, *supra* note 109, at 29–31; see *supra* notes 73–75. The Attorney General invoked the exclusions in refusing to place on the ballot plaintiffs' initiative permitting use of private school vouchers at religious schools. *Wirzburger*, 412 F.3d at 274–75; Brief of Plaintiffs-Appellants, *supra* note 109, at 2–4. The plaintiffs also challenged the restrictions on equal protection grounds, see *Wirzburger*, 412 F.3d at 282–85, but that strategy failed here and has failed elsewhere mainly because litigants have been unable to define the affected “suspect class.” See, e.g., *Gordon v. Lance*, 403 U.S. 1, 7 (1971) (rejecting challenge to supermajority requirement for bond referendum on this ground); *Wellwood v. Johnson ex rel. Bryant*, 172 F.3d 1007, 1010 (8th Cir. 1999).

145. *Wirzburger*, 412 F.3d at 278 (quoting *Marijuana Policy Project*, 304 F.3d at 85).

146. *Id.* at 276 (“Clearly, plaintiffs have been prevented from engaging in the sort of activity that implicates the First Amendment.”); see *id.* at 277 (“[W]e accept that use of the initiative process can facilitate dissemination of initiative proponents' views . . .”).

147. *Id.* at 276, 279 (citation omitted).

Marijuana Policy Project.¹⁴⁸ It reasoned essentially that both subject matter restrictions and bans on paid signature gatherers burden First Amendment rights because both hinder citizens' ability to "spur[] public debate on an issue"¹⁴⁹—in other words, to "make [a] matter the focus of statewide discussion."¹⁵⁰

Yet the court shied from holding that subject matter restrictions directly burden core political speech, the result obliged by wholesale extension of *Meyer*. Instead, it held that they aim not to suppress speech but to regulate conduct necessarily attendant to that speech: the "act of generating laws and constitutional amendments about certain subjects by initiative."¹⁵¹ Subject matter restrictions do "eliminate a valuable avenue of expression about those subjects," but only incidentally in the course of regulating noncommunicative conduct.¹⁵² Accordingly, the court assessed the exclusions under *United States v. O'Brien*, the principal case concerning regulation of "expressive conduct," or conduct comprising speech and nonspeech elements (here, respectively, "spurring public debate" and "generating law").¹⁵³ *O'Brien* held that regulation of expressive conduct is constitutional if it satisfies four aspects of intermediate scrutiny: (1) It must be within the state's power; (2) it must "further[] an important or substantial governmental interest"; (3) that interest must be "unrelated to the suppression of free expression"; and (4) "the incidental restriction" of speech must be "no greater than is essential to the furtherance of that interest."¹⁵⁴

The court briskly dispatched the four *O'Brien* requirements and held that Massachusetts's subject matter exclusions did not violate the First Amendment.¹⁵⁵ It concluded that the exclusions were within the state's

148. *Id.* at 278 ("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.'" (citations omitted)). Throughout its opinion, the court refers to the Religious Exclusion and the Anti-Aid Exclusions as mere "regulations."

149. *Id.* at 276.

150. *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

151. *Wirzburger*, 412 F.3d at 277 (emphasis omitted); see *id.* at 275 ("[A] state initiative procedure, although it may involve speech, is also a procedure for generating law, and is thus a process that the state has an interest in regulating, apart from any regulation of the speech involved in the initiative process.").

152. *Id.* at 277 (finding that "the speech restriction is no more than an unintended side-effect").

153. *Id.* at 276–79. But see *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101–02 (10th Cir. 2006) (identifying speech element in *Wirzburger* as "one-on-one communications," the other type of speech identified in *Meyer*). In *O'Brien*, the Court held that burning a draft card could be expressive conduct composed of speech (communication of a political message) and nonspeech (physical destruction of the card) elements and established a permissive standard for assessing the constitutionality of regulation of the nonspeech element. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

154. *O'Brien*, 391 U.S. at 377.

155. *Wirzburger*, 412 F.3d at 279.

constitutional power and intended not to suppress speech but to regulate conduct.¹⁵⁶ As for a narrowly tailored, “important or substantial” state interest, the court wrote:

Massachusetts certainly has a substantial interest in maintaining the proper balance between promoting free exercise and preventing state establishment of religion . . . [and] in restricting the means by which these fundamental rights can be changed. . . . [W]e see no other way in which Massachusetts could achieve its interest in safeguarding these fundamental freedoms in its Constitution from popular initiative¹⁵⁷

The court failed to explain why insulating the state constitution’s fundamental freedoms is necessarily an important state interest under *O’Brien*.¹⁵⁸ By validating this interest so summarily, the court left unclear how to determine whether a constitutional provision is sufficiently fundamental to create an important state interest in its insulation from an initiative process, thereby permitting exclusion of its subject matter in accord with the First Amendment. Presumably, less pragmatic and more political subject matter restrictions would serve less important state interests, and hence be more likely to fail intermediate scrutiny.¹⁵⁹ But the court ignored this line-drawing problem entirely.¹⁶⁰

4. *The Tenth Circuit Rejects Wirzburger*. — Utah’s baldly partisan subject matter restriction, which requires wildlife initiatives to pass by a supermajority of votes (a de facto exclusion),¹⁶¹ attracted a constitutional challenge soon after its adoption in 1999. In 2006, the Tenth Circuit considered the matter en banc in *Initiative & Referendum Institute v. Walker*.¹⁶² The plaintiffs, mostly wildlife advocacy groups, advanced two theories of why the supermajority requirement violates the First Amendment: a core political speech theory under *Meyer* and an expressive conduct theory following *Wirzburger*.¹⁶³ The court rejected both theories and

156. *Id.* But see *supra* notes 110–111 and accompanying text (discussing motivation behind exclusions).

157. *Wirzburger*, 412 F.3d at 279.

158. See *id.*

159. See *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006) (en banc) (presuming that First Circuit would have found other subject matter restrictions “less worthy”), cert. denied, 127 S. Ct. 1254 (2007).

160. See *id.* at 1103 (“On what basis could a federal court conclude that the people are justified in erecting barriers to the adoption of referenda allowing financial aid to private religious schools but not to those involving general banking laws or wildlife management practices?”); Hoesly, *supra* note 43, at 1236 (“It is difficult to justify why certain issues, such as certain individual rights, should be held immune from initiatives and others should not.”). For an answer to the Tenth Circuit’s question, see *infra* Part III.B.

161. See Utah Const. art. VI, § 1, subsec. 2(A)(ii) (“[L]egislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.”); *supra* notes 113–122 and accompanying text.

162. *Walker*, 450 F.3d at 1082.

163. *Id.* at 1098–99.

held that the requirement restricts no First Amendment right, but merely structures the lawmaking process.¹⁶⁴

In rejecting the core political speech theory, the Tenth Circuit relied on the distinction between procedural regulation and scope limitation.¹⁶⁵ “Although the First Amendment protects political speech incident to an initiative campaign,” the court wrote, “it does not protect the right to make law, by initiative or otherwise.”¹⁶⁶ Though the improbability of a wildlife initiative passing might chill efforts at ballot qualification, many “structural feature[s] of government . . . make[] some political outcomes less likely than others—and thereby discourage[] some speakers from engaging in protected speech”—without implicating First Amendment rights.¹⁶⁷ In essence, the court held that the First Amendment requires only that the views of wildlife conservation advocates be heard, not codified.¹⁶⁸

In rejecting the expressive conduct theory, the court “disagree[d] with *Wirzburger*’s premise that a state constitutional restriction on the permissible subject matter of citizen initiatives implicates the First Amendment in any way.”¹⁶⁹ The court reasoned that the initiative proponents in Utah, like those in Massachusetts and the District of Columbia, remained free to advocate for their causes, and could even do so by circulating petitions with the text of a potential law—that speech, however, would simply lack legislative effect.¹⁷⁰ The court also criticized the wisdom and feasibility of applying intermediate scrutiny to subject matter restrictions. Because intermediate scrutiny could result in judicial invalidation, applying it “would be an especially egregious interference with

164. *Id.*

165. See *id.* at 1102 (characterizing subject matter restrictions as “structural principles of government making some outcomes difficult or impossible to achieve”); *id.* at 1099–1100 (“The distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not.”); cf. *supra* notes 131–135 and accompanying text (reviewing other circuits’ treatment of distinction).

166. *Walker*, 450 F.3d at 1099; see also *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002).

167. *Walker*, 450 F.3d at 1100–01 (noting legislative supermajority requirements for impeachment, treaty ratification, tax levies, and more obscure examples).

168. *Id.* at 1101.

169. *Id.* at 1102 (analyzing supermajority requirement as *de facto* total exclusion).

170. *Id.* This logic rests on the court’s characterization of the speech element of the expressive conduct in *Wirzburger* as “one-on-one communications.” See *id.* at 1101–02. But the First Circuit seemed rather to invoke the “statewide discussion” manifestation of speech identified in *Meyer*. See *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005) (“A state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue . . .”). If so, the fact that subject matter restrictions do not inhibit the “one-on-one” speech of initiative proponents cannot be dispositive, because they *do* inhibit the capacity of proponents to make their views a matter of “statewide discussion” by attaining the distinction of ballot status. See *infra* notes 210–215 and accompanying text.

the authority of ‘We the People’ to . . . determin[e] which subjects should be insulated from democratic change.”¹⁷¹ The court then argued that, even if application of intermediate scrutiny were wise, it could hardly be principled. Noting *Wirzburger*’s ambiguity on this point, the court found no basis for judges to deem insulating religious freedoms, but not banking or wildlife laws, to be an important or substantial governmental interest, and concluded that the relative importance of excluding a given subject was a matter for the people and their legislature to resolve.¹⁷²

In dissent, Judge Lucero sided with the First Circuit and accused the majority of sanctioning a discriminatory election law akin to partisan gerrymandering.¹⁷³ Rejecting the majority’s portrayal of the supermajority requirement as a mere structural constraint, he wrote:

[T]he First Circuit reasons in *Wirzburger* that initiative elections are so suffused with speech that any attempt to control the outcome of an election affects the speech rights of those competing in the election. . . . [I]t is no more than foolhardy formalism to say that election laws that rig the outcome of elections do not infringe on speech rights.¹⁷⁴

What the majority saw as “We the People” delineating the scope of their democracy, Judge Lucero deemed partisan “rigging” of future election results. He argued also that applying intermediate scrutiny is not only feasible—insulation of complex subjects or those involving minority interests, for example, could satisfy the “substantial state interest” prong—but desirable as well, given the judiciary’s crucial duty to vet potentially “anti-democratic” laws.¹⁷⁵

5. *Unanswered Questions.* — *Marijuana Policy Project, Wirzburger*, and *Walker* amount to a circuit split on a straightforward question: Do restrictions on the subject matter open to a state initiative process burden political expression protected by the First Amendment? This question has required courts to consider the reach of the Supreme Court’s holding in *Meyer v. Grant* that initiative regulations that hinder citizens’ “ability to make [a] matter the focus of statewide discussion” by achieving ballot status restrict core political speech.¹⁷⁶ The D.C. and Tenth Circuits have restricted *Meyer* to procedural regulations, disengaging First Amendment

171. *Walker*, 450 F.3d at 1103.

172. *Id.*; see *infra* Part III.B (offering a principled solution to this line-drawing problem).

173. *Walker*, 450 F.3d at 1111 (Lucero, J., concurring in part and dissenting in part) (“What a majority of the voters in Utah have done in this case and what a legislature engaged in partisan gerrymandering does is identical. A current majority enshrines its gains in law against sways in popular opinion . . . through election laws designed to channel results and to squelch dissent.”); see *id.* at 1114 (stressing need to protect “[f]uture majorities” from being “strangled by the dead hands of the past”).

174. *Id.* at 1112. In characterizing the subject matter restriction as an “election law,” Judge Lucero ignored or rejected the distinction between scope limitation and procedural regulation.

175. *Id.* at 1113–14.

176. 486 U.S. 414, 414 (1988).

rights from matters of democratic structure and scope.¹⁷⁷ The First Circuit, however, has used *Meyer* to locate a speech right in the “public debate” stimulated when an initiative attains ballot status.¹⁷⁸ It has judged use of the process to be expressive conduct, given its concomitant, noncommunicative purpose of making law, and analyzed subject matter restrictions under intermediate scrutiny.¹⁷⁹ That novel conclusion, however, raises a further question: If subject matter restrictions do burden protected speech in the form of expressive conduct, on what basis should courts sustain or invalidate those restrictions under intermediate scrutiny? The Tenth Circuit has claimed that courts would overstep their bounds and competence by assessing the importance of the state interest behind a subject matter restriction,¹⁸⁰ and the First Circuit did not explain why it considered insulating a state constitution’s “fundamental freedoms” to be an important state interest.¹⁸¹ But Judge Lucero’s dissent in *Walker* did suggest some preliminary principles that could guide a court’s application of intermediate scrutiny.¹⁸²

To determine whether the Constitution offers any recourse to state citizens “marginalized” and “silenced” by politically motivated subject matter restrictions,¹⁸³ the following Part explores and answers these two questions.

III. SUBJECT MATTER RESTRICTIONS AS BURDENS ON EXPRESSIVE CONDUCT

This Part argues that restrictions on the subject matter open to a state initiative process burden expressive conduct composed of speech and nonspeech elements: respectively, agenda setting and lawmaking. Part III.A elaborates on the nature of the agenda-setting speech element and discusses the impact of subject matter restrictions on that political expression. It then addresses the principal arguments against recognizing such a speech right: the impropriety of characterizing ballots as forums for political expression and the propriety of popularly imposed constitutional limits on the scope of state democracy. Part III.B proposes a standard by which courts can determine whether a substantial state interest supports a subject matter restriction, and accordingly whether a restriction offends the First Amendment.

A. *Use of the Initiative Process Is Expressive Conduct Composed of Speech (Agenda Setting) and Nonspeech (Lawmaking) Elements*

1. *The Speech Element of Ballot Qualification: Agenda Setting.* — The D.C. and Tenth Circuits rejected challenges to subject matter restrictions

177. See supra Parts II.B.2, II.B.4.

178. See supra Part II.B.3.

179. See *id.*

180. See supra notes 171–172 and accompanying text.

181. See supra notes 158–160 and accompanying text.

182. See supra note 175 and accompanying text.

183. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006).

principally on the ground that the First Amendment affords no right to make law, and hence no right to make law on a particular subject.¹⁸⁴ But making law is only one among many reasons why a citizen or group might seek to place an initiative on a ballot. The strictly instrumentalist conception of the initiative process to which the D.C. and Tenth Circuits adhere¹⁸⁵ ignores the dramatic power of an initiative that attains ballot status to shape the agenda of state and even national politics.¹⁸⁶ This agenda-setting function comprises pressuring political actors, influencing candidate elections, fostering interest group and political party growth, and simply introducing an otherwise overlooked political position into the arena of public debate.¹⁸⁷ Importantly, these effects of ballot qualification occur regardless of an initiative's success on Election Day—that is, regardless of whether a proponent succeeds in using the initiative process to make law.¹⁸⁸

Political scientists have long recognized the agenda-setting function of initiative processes, but legal scholars have yet to regard it as a trigger of First Amendment protection. Stephen P. Nicholson, in a recent book on the topic, summarizes the political science view: “[T]he initiative is an agenda-setting institution that focuses attention and informs citizens about what is important. . . . ‘[It] make[s] political discussions more than mere grumbling or cocktail party small talk.’”¹⁸⁹ Use of the initiative process to this end dates to its resurgence in the late 1960s, when activists qualified initiatives more to rally supporters and “creat[e] a platform for the discussion of certain issues” than to achieve “the passage of concrete

184. *Id.* at 1099; *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002).

185. See Daniel A. Smith & Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* 1–8 (2004) (describing Progressives’ “instrumental justifications for the initiative”); cf. Michael A. Baer & Dean Jaros, *Participation as Instrument and Expression: Some Evidence from the States*, 18 *Am. J. Pol. Sci.* 365, 369–71 (1974) (contrasting expressive and instrumental views of voting in candidate elections); Adam Winkler, *Note, Expressive Voting*, 68 *N.Y.U. L. Rev.* 330, 358–59 (1993) (criticizing Supreme Court’s “instrumental power approach” to voting in candidate elections).

186. See Nicholson, *supra* note 52, at 2–3 (defining “agenda” as “the one or more policy issues that matter to voters in a given electoral environment”). For discussion of the national agenda-setting impact of ballot initiatives, see Boehmke, *supra* note 7, at 156; Schmidt, *supra* note 3, at 162–63.

187. See *infra* notes 189–204 and accompanying text.

188. See Elisabeth R. Gerber, *Pressuring Legislatures Through the Use of Initiatives: Two Forms of Indirect Influence*, in *Citizens as Legislators*, *supra* note 6, at 191, 191 [hereinafter Gerber, *Pressuring Legislatures*] (“Groups may propose initiatives without ever intending to pass the laws they propose.”); see also Ellis, *Delusions*, *supra* note 5, at 92–93 (noting dramatic effect of failed initiatives on state political agenda).

189. Nicholson, *supra* note 52, at 32 (quoting John T. Rourke et al., *Direct Democracy and International Politics: Deciding International Issues Through Referendums* 166 (1992)); see *id.* at 32–41.

laws.”¹⁹⁰ These issues included the Vietnam War, nuclear weapons, and nuclear power.¹⁹¹

The contemporary ballot has even greater power to elevate and lend credibility to a political stance, regardless of whether voters convert that stance into law. Intense media coverage of initiative campaigns, occasioned by their engaging immoderation, enhances the range and, more importantly, the prominence and significance of an initiative proponent’s political expression.¹⁹² For example, in the 2004 elections, voters in states where ballots featured a gay marriage initiative were considerably more likely to label the issue “important” than those in states where ballots lacked such an initiative.¹⁹³ Conversely, as David Magleby has noted, “[i]ssues not appearing on the ballot will have a hard time competing for attention” because “the initiative tends to dominate the agenda of state politics.”¹⁹⁴ Ballot status stimulates popular interest in an initiative and the political expression it embodies, an effect that some scholars have characterized as educative.¹⁹⁵ Further, achieving ballot status impacts the political conversation in a state by mobilizing supporters and detractors

190. Goebel, *supra* note 18, at 188; see *id.* (“[D]irect democracy offered them a new forum to shape the political agenda, to attract newspaper publicity, and to initiate discussions on new issues.”).

191. *Id.*; see Nicholson, *supra* note 52, at 61–90 (describing “Nuclear Freeze Campaign”); Schmidt, *supra* note 3, at 157–69 (same); Joseph A. Moore, Note, The Election Ballot as a Forum for the Expression of Ideas—*Georges v. Carney*, 32 DePaul L. Rev. 901, 907–08 (1983) (noting certain failure of Vietnam peace proposals).

192. See Broder, *supra* note 40, at 235; Cronin, *supra* note 18, at 226; Schmidt, *supra* note 3, at 202–03 (advising initiative proponents how to use “free” media coverage attendant to ballot status); Zimmerman, *supra* note 56, at 90 (noting use of initiative campaigns to create favorable public opinion toward issue); Magleby, Let the Voters Decide?, *supra* note 30, at 29–30; Tolbert, Public Policy, *supra* note 41, at 41 (“Ballot initiatives now dominate media headlines, shape candidate elections and national party politics.” (citation omitted)). But see Nicholson, *supra* note 52, at 34 (noting that media inattention causes some initiatives to “reside in obscurity”).

193. Jeanne Cummings, Wedge Issue: Minimum Wage, Wall St. J., May 1, 2006, at A4 (concluding that “[v]oter initiatives . . . can elevate an issue that normally might not register strongly with voters”).

194. Magleby, Direct Legislation, *supra* note 30, at 192; see Nicholson, *supra* note 52, at 137 (“[M]ost issues placed on the agenda by direct legislation would not have been on the agenda absent placing the matter on the ballot.”). This cynical argument contradicts the traditional view that ballot initiatives reflect rather than determine the interests of voters, but the impact of interest groups on the modern initiative process has severely undermined the traditional perspective. See Magleby, Direct Legislation, *supra* note 30, at 182–84; Nicholson, *supra* note 52, at 39–41 (concluding that initiatives are “exogenous” in that they trigger rather than represent issues considered important by voters).

195. See Dubois & Feeney, *supra* note 37, at 25 (describing initiative as “an educational tool” even when unlikely to succeed); Caroline J. Tolbert et al., Enhancing Civil Engagement: The Effect of Direct Democracy on Political Participation and Knowledge, 3 St. Pol. & Pol’y Q. 23, 24 (2003) [hereinafter Tolbert et al., Civic Engagement] (arguing that “educative effects of the initiative process” may be as important as lawmaking function). But see Cronin, *supra* note 18, at 226 (noting brevity of “educational debate”). See generally Smith & Tolbert, *supra* note 185 (assessing initiative process as means of political education).

of certain viewpoints, fostering the expansion of interest group membership, and lowering financial barriers to the creation and growth of interest groups.¹⁹⁶

In addition to influencing the public political consciousness, an initiative that attains ballot status also sets the agenda of state legislatures and candidate elections. A ballot initiative, regardless of its eventual success, pressures sitting legislatures and other political actors not only to take a stance on the issue posed, but also to take political action.¹⁹⁷ Legislatures often “jump on [the] bandwagon []” of a popular initiative¹⁹⁸ and even “attempt to anticipate the initiative agenda in hopes of modifying or capturing it.”¹⁹⁹ The old analogy of the initiative as a “gun behind the door,” spurring the legislature into action, sums up this function.²⁰⁰ Further, initiatives that qualify for the ballot have a tremendous impact on candidate elections.²⁰¹ Candidates and political parties trade openly on the distinctive magnetism of ballot initiatives, structuring their campaigns around “wedge issues” and, in recent years, “pack[ing] ballots with hot-button issues designed to frame the debate and drive voters to the polls.”²⁰² In the 2004 elections, for example, Republicans used gay mar-

196. Boehmke, *supra* note 7, at 3, 144, 148 (contrasting political environments of initiative and noninitiative states); see Tolbert et al., *Civic Engagement*, *supra* note 195, at 35 (“[E]xposure to ballot initiatives also increases a person’s propensity to donate money to interest groups in midterm elections.”).

197. See Gerber, *Pressuring Legislatures*, *supra* note 188, at 191–92 (arguing that interest groups “use initiatives to exert pressure [in the] hope that other actors will then pass or block legislation in response to the interest group’s proposal” and discussing initiative use as political signaling mechanism); *id.* at 205 (noting that initiative process allows “politically important groups to promote their political interests”); cf. Jeffrey A. Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, in *Citizens as Legislators*, *supra* note 6, at 149, 149–52 (discussing frequency and impact of politicians’ endorsements). Because legislatures in nearly all states can amend or repeal successful initiatives, see *supra* note 59 and accompanying text, there must be independent value in initiatives’ influence on legislative action. Cf. Elisabeth R. Gerber et al., *Stealing the Initiative: How State Government Responds to Direct Democracy* 4–5 (2001) (arguing that initiatives’ direct impact is small because they depend on legislative implementation).

198. Dubois & Feeney, *supra* note 37, at 78–81 (noting that fears that legislatures would sabotage successful initiatives have proven unfounded).

199. Magleby, *Direct Legislation*, *supra* note 30, at 192 (concluding that “those who threaten the legislature with an initiative have power not only over the initiative agenda but over the legislative agenda as well”). But cf. *Biddulph v. Mortham*, 89 F.3d 1491, 1496–97 (11th Cir. 1996) (using instrumentalist characterization of initiatives to reject challenge to regulations under Petition Clause of First Amendment); Grant, *supra* note 68, at 195 (describing Petition Clause argument in *Buckley*).

200. See Ellis, *Delusions*, *supra* note 5, at 35; *supra* note 28.

201. See generally Nicholson, *supra* note 52, at 42–131 (analyzing impact of ballot initiatives on congressional elections, elections in other jurisdictions, and candidates and political parties).

202. Andrew Romano et al., *Did Ballot Measures Send a Message?*, Nov. 8, 2006, at <http://www.msnbc.msn.com/id/15627955/site/newsweek> (on file with the *Columbia Law Review*); see also Ellis, *Delusions*, *supra* note 5, at 79–90 (noting politicians using initiatives “to create a public image”); Magleby, *Direct Legislation*, *supra* note 30, at 192–93 (naming politicians who have used initiatives to advance their careers); Nicholson, *supra* note 52, at

riage initiatives as wedges and turnout mechanisms; Democrats did the same in 2006 with minimum wage initiatives.²⁰³ Given these diverse agenda-setting effects, placing an initiative on a ballot can hardly be deemed exclusively a lawmaking act.²⁰⁴

The uniquely potent effects on a state political agenda triggered by an initiative attaining ballot status are the effects of political expression. In fact, initiatives—which involve inserting and elevating issues in the arena of political discussion, rallying supporters, pressuring political actors, and influencing candidate elections—are “form[s] of political speech near the very center of democratic values.”²⁰⁵ As Justice Breyer writes, the First Amendment seeks particularly to safeguard “speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials.”²⁰⁶ Since placing an initiative on the ballot “affect[s] the political process and the kind of society in which we live,”²⁰⁷ subject matter restrictions should face the same stringent judicial review that other barriers to speech face in this area. Further, like donating money to a candidate, placing an initiative on a ballot—possible virtually through financial outlay alone²⁰⁸—signals the intensity of an advocate’s political convictions.²⁰⁹ It is a dynamic act of political communication, the purpose and

91–131 (discussing “strategic use” of illegal immigration and affirmative action initiatives as wedge issues in California candidate elections); cf. Donovan & Bowler, *supra* note 6, at 18 (arguing that initiatives hostile to minority interests threaten minorities principally because stigmatizing campaigns introduce issue into agenda).

203. Questions, Questions, *Economist*, Oct. 14, 2006, at 30, 30–31; see also John Holusha, Voters in 7 States Back Bans on Gay Marriage, *Int’l Herald Trib.*, Nov. 9, 2006, at 6 (“[Gay marriage bans and wage increases], intended to appeal to the two parties’ conservative and liberal bases, were put before voters in this election, at the same time as races for major office, to help draw those voters to the polls.”); Saving Ballot Initiatives from Abuse, *Christian Sci. Monitor*, Oct. 20, 2006, at 8 (noting use of initiatives to “‘frame’ a candidate in the public eye”); Paul Taylor, Wedge Issues on the Ballot, July 26, 2006, at <http://pewresearch.org/pubs/40/wedge-issues-on-the-ballot> (on file with the *Columbia Law Review*) (analyzing impact of wedge initiatives).

204. See Gordon & Magleby, *supra* note 50, at 312 (noting initiative process’s “secondary purpose of expressing popular will and sending messages to government”).

205. *Id.*

206. Stephen J. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 42 (2005); see also *id.* at 46–47 (arguing that First Amendment protects expression necessary to “encourage [citizens’] informed participation in the electoral process”).

207. *Id.* at 42; cf. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (“[A]n election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression.” (citations omitted)).

208. See Nicholson, *supra* note 52, at 40–41; *supra* note 45 and accompanying text.

209. Arguably, placing an initiative on a ballot is more expressive than contributing to a candidate’s campaign is associative because the former expenditure advances a specific political viewpoint, while the latter is but a “general expression of support” that “does not communicate [its] underlying basis.” *Buckley v. Valeo*, 424 U.S. 1, 21 (1976); see also *id.* at 244–45 (Burger, C.J., dissenting) (treating campaign contributions as acts of expression).

impact of which extend beyond generation of law to manipulation of the subject matter of general political concern.

The Supreme Court endorsed the agenda-setting conception of the initiative process in *Meyer v. Grant* when it held that a ban on paid petition circulators restricts speech not only by limiting one-on-one advocacy, but also by “limiting [the] ability to make the matter the focus of statewide discussion,” thus “reducing the total quantum of speech on a public issue.”²¹⁰ When the First Circuit held in *Wirzburger* that use of the initiative process contains a speech element, it seemed to invoke this agenda-setting function of ballot status, noting that “[a] state initiative process provides a uniquely provocative and effective method of spurring public debate on an issue.”²¹¹ But, by neglecting further to define the speech element of use of an initiative process, the First Circuit left open the opportunity for the Tenth Circuit in *Walker* to misidentify that alleged element as “one-on-one communications.”²¹² This substitution allowed the Tenth Circuit easily to reject the First Circuit’s expressive conduct theory, because subject matter restrictions clearly do not restrict one-on-one communications between an initiative proponent and the public.²¹³

Defining the speech element as the ability to influence the agenda of state politics nullifies that argument. To be sure, a ban on wildlife initiatives does not prevent an advocate from airing advertisements on the issue, or even from circulating petitions that lack legal effect.²¹⁴ But the ban does prevent that advocate from shaping the state political agenda in the manner and to the extent uniquely possible by qualifying for the ballot.²¹⁵ That agenda-setting element of using the initiative process— independent of the process’s lawmaking function, to which the First Amendment grants no right—permits characterizing such use as expressive conduct protected by the First Amendment.

2. *The Nonspeech Element of Ballot Qualification: Lawmaking.* — Of course, placing an initiative on a ballot is not solely an act of expres-

210. 486 U.S. 414, 423 (1988); see also *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194–95 (1999) (reiterating *Meyer*’s “statewide discussion” language); *Kobach*, supra note 70, at 175 (noting that *Meyer* concerned “speech of the proponent to the public through the ballot”); supra notes 68–75, 79–82 and accompanying text.

211. *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005); see supra notes 146–150 and accompanying text.

212. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101–02 (10th Cir. 2006); see supra notes 165–172 and accompanying text.

213. See supra notes 133–134, 140 and accompanying text.

214. See supra note 72 (discussing theoretical legality of circulating inefficacious petitions).

215. See *Meyer*, 486 U.S. at 424 (holding that availability of other means of speech is irrelevant because paid petition circulators were “the most effective, fundamental, and perhaps economical avenue of political discourse”); supra note 72; cf. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) (arguing that individuals have right “to utilize an appropriate and effective medium for the expression of [their] views”).

sion.²¹⁶ It is, in the First Circuit's words, "also a procedure for generating law, and is thus a process that the state has an interest in regulating, apart from any regulation of the speech involved."²¹⁷ The Progressives espoused this instrumental view of the initiative process, at least principally,²¹⁸ and the enabling provisions of state constitutions, which speak of reserved legislative power, reflect it.²¹⁹ Though responsible for "a multitude of changes in the political environment in a state" other than modification of its code and constitution,²²⁰ the initiative process is unquestionably a means of lawmaking and a proponent's use of it is unquestionably a lawmaking act.

3. *Subject Matter Restrictions Burden Expressive Conduct.* — Use of a state initiative process therefore comprises speech (agenda setting) and nonspeech (lawmaking) elements. The act of placing an initiative on a ballot is simultaneously communicative in its effect on political opinion and policymaking and noncommunicative in its conceptually dominant but often subordinate role as one step of a legislative process. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct," a state may constrain that expressive conduct only in accord with the fairly lax standard set by the Supreme Court in *United States v. O'Brien*.²²¹ Therefore, that standard governs any legal impediment to an initiative's qualification for the ballot and enjoyment of the attendant agenda-setting effect on state politics.²²²

Outright exclusion of a subject from an initiative process is such an impediment, as is de facto exclusion of a subject in the form of a prohibitive supermajority requirement.²²³ An outright subject matter exclusion, such as Massachusetts's exclusion of initiatives "relat[ing] to religion,"²²⁴ denies proponents of initiatives on that subject the same ability to influ-

216. Were that so, ballot initiatives would be indistinguishable from the nonbinding advisory questions which Illinois allows citizens to place on its ballot. See *infra* notes 259–262 and accompanying text.

217. *Wirzbarger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005). Glen Staszewski anticipated *Wirzbarger* when he argued that "allow[ing] greater regulation of initiative proponents than petition circulators under the First Amendment [is logical] because the former group's role is not limited to advocating ideas, but also extends to lawmaking itself." Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 *Vand. L. Rev.* 395, 480 n.288 (2003).

218. See Smith & Tolbert, *supra* note 185, at 4–8 (describing Progressives' conception of initiatives as means of "link[ing] latent public opinion to substantive policies").

219. See *supra* note 3 and accompanying text.

220. Boehmke, *supra* note 7, at 149.

221. 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); *supra* note 154 and accompanying text.

222. See *Wirzbarger*, 412 F.3d at 278–79 (applying this test).

223. See Tolbert et al., *Election Law*, *supra* note 55, at 36 (arguing that *Meyer's* "statewide discussion" language would make content restrictions especially offensive to First Amendment).

224. See *supra* note 143.

ence the agenda of state politics as those with other political concerns.²²⁵ De facto exclusions such as Utah's supermajority requirement for wildlife initiatives have the same effect on political speech because, though they do not directly impede ballot access,²²⁶ they limit speech on certain political subjects by discouraging advocates from seeking ballot status.²²⁷ Though her speech consists of agenda setting, not lawmaking, a wildlife advocate depends on the prospect of legislative effect to imbue her initiative with the gravity necessary to influence the agenda.²²⁸ That influence hinges on the authenticity of the underlying conduct, just as the communicative element of burning a draft card or flag hinges on the card, flag, and fire.²²⁹ Further, attributing a chilling effect to Utah's subject-based supermajority requirement does not require depicting supermajority requirements generally as antidemocratic or even undesirable, as the Tenth Circuit suggests.²³⁰ If such a requirement serves an important state interest unrelated to suppression of speech, it emerges from *O'Brien* scrutiny intact and unimpugned.

Importantly, classifying use of the initiative process as expressive conduct does not require invalidation of all or even many restrictions on that process. Any campaign regulation that satisfies the strict standard of *Meyer* and *Buckley*²³¹ necessarily satisfies intermediate scrutiny under

225. In most initiative states, a frustrated proponent could seek to repeal a subject matter restriction by constitutional initiative, but the First Amendment does not tolerate a legal regime that channels protected speech through such a burdensome and inefficient route. See *supra* notes 72, 215. Presumably, subject matter restrictions would not bar such constitutional initiatives, since they would directly concern the initiative process rather than a substantive area such as wildlife, religion, or drug penalties. But see *supra* note 97 and accompanying text (noting that Massachusetts Constitution does not allow initiatives that modify initiative process itself).

226. But cf. Waters, *Almanac*, *supra* note 3, at 527 (noting that Oklahoma now requires animal protection initiatives to gather more signatures than other types of initiatives).

227. See *supra* note 115.

228. See *Wirzburger v. Galvin*, 412 F.3d 271, 277 (1st Cir. 2005) ("The communicative power of an initiative stems precisely from the fact that it is not just speech; it is a process that can lead to the creation of new laws or constitutional amendments.").

229. See *Texas v. Johnson*, 491 U.S. 397, 405 (1989); *United States v. O'Brien*, 391 U.S. 367, 369–70 (1968); cf. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (discussing sources of expressive value).

230. See *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100–01 (10th Cir. 2006); *Initiative & Referendum Inst. v. Walker*, 161 F. Supp. 2d 1307, 1314 (D. Utah 2001) ("[S]uper-majority requirements do not occlude any viewpoint or content from public political discourse; they merely put additional burdens on those who would change existing laws."). Conceiving of use of the initiative process as expressive conduct—whereby initiative proponents use the process to do more than to "change existing laws"—renders this strictly instrumental defense inadequate.

231. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) ("[T]he First Amendment requires us to be vigilant in . . . guard[ing] against undue hindrances to political conversations and the exchange of ideas."). But see *Utah Safe to Learn—Safe to Worship Coal., Inc. v. State*, 94 P.3d 217, 233 (Utah 2004) (noting U.S. Supreme Court's willingness to sustain "reasonable, nondiscriminatory" election laws

O'Brien.²³² As for subject matter restrictions, the intermediate level of scrutiny prescribed by *O'Brien*, which requires an “important or substantial governmental interest” to justify a burden on expressive conduct,²³³ does not by itself “predetermine the outcome of the case,” as do rationality review and strict scrutiny, but rather obliges highly fact-specific analysis.²³⁴ Case-by-case examination of the state interests behind subject matter restrictions will usually produce decisions like *Wirzburger*, in which the First Circuit identified a state interest sufficient to sustain the restriction.²³⁵ After all, most subject matter restrictions serve the pragmatic end of assuring the security and stability of important areas of governance.²³⁶ Only those lacking that justification, like those that “enshrine[] . . . present views into perpetuity”²³⁷ in service of a temporary majority’s “ruling passion,”²³⁸ risk invalidation.

4. *Arguments Against an Expressive Conduct Theory*. — Two main arguments against characterizing use of the initiative process as expressive conduct persist notwithstanding recognition of its role in helping to shape the political agenda.

The first counterargument, articulated by the Tenth Circuit, is that limits on the scope of a democratic process differ fundamentally from regulations of election procedures,²³⁹ and that only the latter are within the purview of the First Amendment.²⁴⁰ This argument errs by portraying the asserted speech right to ballot qualification on content-neutral terms (unless an important state interest justifies discrimination) as an asserted speech right to make law. Undeniably, constitutions exist to disallow legislation on certain subjects.²⁴¹ Accordingly, the propriety of scope limitation shields subject matter restrictions against an asserted First Amendment right to make law on a certain subject. But it has less force when subject matter restrictions also limit federally protected political speech—agenda setting—in the course of limiting the substantive

justified by “important regulatory interests” (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992))).

232. Campaign regulation entails stricter judicial scrutiny because campaign speech, unlike the agenda-setting speech attendant to placing an initiative on the ballot, lacks the coincident lawmaking element which permits application of the fairly permissive *O'Brien* standard. See *supra* note 217.

233. *O'Brien*, 391 U.S. at 376–77.

234. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 *Geo. Wash. L. Rev.* 298, 315–25 (1998).

235. See *supra* notes 155–160 and accompanying text; see also *infra* Part III.B.

236. See *supra* notes 101–106 and accompanying text.

237. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1110 (10th Cir. 2006) (Lucero, J., concurring in part and dissenting in part).

238. *The Federalist* No. 10 (James Madison), *supra* note 1, at 45–46.

239. See *Walker*, 450 F.3d at 1102–03.

240. See *supra* notes 131–135 and accompanying text.

241. See *Walker*, 450 F.3d at 1112 (Lucero, J., concurring in part and dissenting in part); cf. U.S. Const. amend. VIII (forbidding imposition of “cruel and unusual punishment”).

scope of the state code.²⁴² A state need not open its initiative process to all subjects,²⁴³ and, of course, need not offer the process at all.²⁴⁴ But “if it creates such a [process], the state cannot place restrictions on its use that violate the federal Constitution,” regardless of whether those restrictions limit its scope or its procedures.²⁴⁵

Essentially, though a wildlife advocate, for example, “can claim no constitutionally-protected right to place issues before the . . . electorate,” and though “any opportunity to do so must be subject to compliance with state constitutional requirements,”²⁴⁶ those state requirements are likewise subject to compliance with the First Amendment, which trumps them only in the rare cases in which they serve no important state interest.²⁴⁷ Subject matter restrictions limit more than the scope of legislative authority²⁴⁸ because the initiative process is more than a means of making law.²⁴⁹ Its agenda-setting communicative function renders the dis-

242. See *Walker*, 450 F.3d at 1112 (Lucero, J., concurring in part and dissenting in part) (distinguishing “substantive ban[s],” which do not implicate speech rights, from “regulat[ions] [of] conduct containing speech and non-speech elements”).

243. See *Wirzburger v. Galvin*, 412 F.3d 271, 277 (1st Cir. 2005) (denying that “a state must provide an opportunity for its residents to propose constitutional amendments or laws on all subjects” by initiative).

244. E.g., *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) (“[*Meyer and Buckley*] teach that *where the people reserve the initiative or referendum power*, the exercise of that power is protected by the First Amendment.” (emphasis added)); *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) (“[T]he right to a state initiative process is not a right guaranteed by the United States Constitution, but is a right created by state law.”).

245. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993); cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that public education, “*where the state has undertaken to provide it*, is a right which must be made available to all on equal terms” (emphasis added)).

246. *Dobrovolny*, 126 F.3d at 1113.

247. In other words, the Constitution does not require states to offer an initiative process and, where the process is offered, grants no absolute right to use it free of subject matter restrictions. It does, however, grant the right to use the initiative process, where offered, free of subject matter restrictions that serve unimportant or insubstantial state interests. See *supra* Part III.A.3. That subject matter restrictions appear in state constitutions, rather than as statutes, presents no obstacle or heightened bar to judicial invalidation in the name of the First Amendment. See *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 355–56 (1855).

248. See *Marijuana Policy Project v. United States*, 304 F.3d 82, 85, 87 (D.C. Cir. 2002) (sustaining subject matter restriction because it limits only “legislative authority—as opposed to . . . legislative advocacy”).

249. See *supra* notes 184–209 and accompanying text. The traditional legislative process is also more than a means of making law. See, e.g., Andrew Ward, *A Hard Day’s Night on Capitol Hill*, July 18, 2007, at <http://www.ft.com/cms/s/da6779c8-3568-11dc-bb16-0000779fd2ac.html> (on file with the *Columbia Law Review*) (“Democrats had little hope of securing a big enough majority to overcome Republican obstructionism . . . [but] succeeded in using the debate [on a troop withdrawal bill] to showcase the party’s opposition to the war and embarrass Republicans by forcing them to defend it.”). In fact, some federal courts have described legislative voting as protected speech. See *Clarke v. United States*, 886 F.2d 404, 411–13 (D.C. Cir. 1989) (concluding that “[a] legislator’s vote is inherently expressive” because “[i]t serves the function not only of mechanically

tion between scope limitation and procedural regulation beside the point and brings subject matter restrictions within the reach of the First Amendment.

The second argument against characterizing use of the initiative process as expressive conduct is that ballots are not forums for political speech, but instruments of political action. This argument derives from the Supreme Court's statement, in a case concerning third party ballot access, that "[b]allots serve primarily to elect candidates, not as forums for political expression,"²⁵⁰ and from the Ninth Circuit's brisk summation of that point: "A ballot is a ballot, not a bumper sticker."²⁵¹ With respect to initiatives, a dissenting opinion in a recent Utah Supreme Court case puts it best:

Free and robust public debate is merely a means to achieve success or failure in the initiative process, not simply the result of successfully placing an initiative on the ballot. Although successfully placing an initiative on the ballot potentially sets the stage for public debate, there is no free speech right to place an initiative on the ballot.²⁵²

This argument errs by portraying public debate as a mere side effect of qualifying an initiative for the purpose of making law, when that debate is often the primary intended result of an affirmative act of political expression—ballot qualification.²⁵³ Surely, some initiative proponents may seek principally to make law and are indifferent to the agenda-setting effect of their conduct, but conduct that may be expressive need not

disposing of proposed legislation, but of registering the 'will, preference, or choice' of an individual legislator" (quoting *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir. 1988)) and speculating that Supreme Court would agree in light of *Texas v. Johnson*, 491 U.S. 397 (1989); *Miller v. Hull*, 878 F.2d 523, 532 (1st Cir. 1989) ("[W]e have no difficulty finding that the act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the first amendment."). Thus, though the First Amendment does not guarantee a legislator's right to vote successfully (that is, to make law), see *supra* note 184 and accompanying text, it may protect her ability to vote unencumbered by subject-based procedural restraints. See *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (listing such restraints). Extending intermediate scrutiny beyond subject matter restrictions on the initiative process to those on the traditional legislative process would cause little disruption if, as this Note proposes, courts apply that standard deferentially to invalidate only restrictions that do not insulate state constitutional rights from direct democracy. See *infra* Part III.B.

250. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). But see *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression." (citations omitted)).

251. *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002).

252. *Gallivan v. Walker*, 54 P.3d 1069, 1111 (Utah 2002) (Thorne, J., dissenting); see *Ellis, Signature Gathering*, *supra* note 41, at 74 (advancing similar logic).

253. In other words, the act of qualifying an initiative is "exogenous" to public debate: It sets, rather than reflects, the political agenda. See *Nicholson*, *supra* note 52, at 39–41; *supra* note 41.

be expressive in all instances.²⁵⁴ Further, cases denying ballot access to third-party candidates on the ground that ballots serve only instrumental ends are plainly inapposite.²⁵⁵ The text of a ballot initiative is a unit of political expression amplified by inclusion on a ballot, whereas a candidate's name is inherently unexpressive, requiring conventional advocacy to express the ideas behind it.²⁵⁶ Moreover, the Court's language on this point—"Ballots serve *primarily* to elect candidates"²⁵⁷—hardly precludes an expressive conduct theory based on the simultaneous presence of speech and nonspeech elements in ballot access in initiative states.

Undoubtedly, "[t]he ballot is not a traditional public forum for the expression of ideas and opinions, like streets or parks"²⁵⁸ This bare fact has led the Seventh Circuit twice to reject First Amendment challenges to procedural requirements of Illinois's advisory question process, which allows citizens to place nonbinding questions on the ballot as measures of public opinion.²⁵⁹ But that court has maintained that, though the First Amendment guarantees no right to use the ballot as forum, Illinois may not impose access restrictions "jiggered in a way that discriminates against particular advocates or viewpoints."²⁶⁰ Subject matter re-

254. See, e.g., *Johnson*, 491 U.S. at 404–05 (noting that, though American flag is "[p]regnant with expressive content," not all "action taken with respect to our flag is expressive"); *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (per curiam) (examining nature of activity and "factual context and environment in which it was undertaken" to determine whether conduct is expressive).

255. See *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 606 (7th Cir. 2006) ("*Except in states that authorize referenda, initiatives, or other modes of direct democracy*, the purpose of a ballot is to list candidates for public office rather than to list policy positions or survey public opinion." (emphasis added) (citing *Timmons*, 520 U.S. at 363)); *Mass. Pub. Interest Research Group v. Sec'y of Commonwealth*, 375 N.E.2d 1175, 1182 (Mass. 1978) (noting inapplicability of ballot access cases with respect to qualification of initiatives). But see *Caruso v. Yamhill County*, 422 F.3d 848, 855–56 (9th Cir. 2005) (applying ballot access standards in initiative case).

256. But see *Moore*, supra note 191, at 901 (noting that "[c]andidates who are closely identified with a particular issue or cause often have placed their names on the ballot to provide voters with an opportunity to . . . 'send a message' to their leaders").

257. *Timmons*, 520 U.S. at 363 (emphasis added) (citation omitted).

258. *Orr*, 463 F.3d at 606. But see *Georges v. Carney*, 691 F.2d 297, 303 (7th Cir. 1982) (Cudahy, J., dissenting) (arguing that it "defies common sense" to conclude that Illinois can "simultaneously provide an avenue of political expression and burden its use with conditions that . . . can never be met"). Subject matter restrictions, whether de facto or outright, are analogous to such unfulfillable conditions. See supra note 115.

259. See *Orr*, 463 F.3d at 606–08; *Georges*, 691 F.2d at 300 (holding that, because "[d]irect democracy is not an interference with the marketplace of ideas," procedural restrictions on its use do not implicate speech rights).

260. *Orr*, 463 F.3d at 606; see *Georges*, 691 F.2d at 301 (noting that "case would be different" if state itself placed advisory questions on ballots, thus rendering procedural impediments to citizen-initiated questions potentially viewpoint-discriminatory); cf. *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

strictions, particularly those with partisan origins, are so jiggered.²⁶¹ They burden expressive conduct composed of speech (agenda setting) and nonspeech (lawmaking) elements, and accordingly comport with the Constitution only if supported by an “important or substantial governmental interest.”²⁶² Presumably, a viewpoint-discriminatory interest would not meet that standard. Part III.B explores what interests might suffice, and hence what subject matter restrictions might survive.

B. *A Rights-Based Standard for Applying Intermediate Scrutiny to Subject Matter Restrictions*

Because restrictions on the subject matter of a state initiative process burden expressive conduct, courts must assess their constitutionality under the intermediate scrutiny standard of *United States v. O'Brien*.²⁶³ That standard provides that regulation of expressive conduct is constitutional if, inter alia, “it furthers an important or substantial governmental interest” that is “unrelated to the suppression of free expression.”²⁶⁴ Subject matter restrictions “eliminate a valuable avenue of expression” only incidentally in the course of defining the subject matter open to legislation.²⁶⁵ Thus, the constitutionality of a subject matter restriction rests on whether it serves an important state interest, an inquiry similar to that mandated by the Supreme Court with respect to candidate ballot access restrictions, which must be “reasonable [and] nondiscriminatory” and serve “important regulatory interests.”²⁶⁶

Contrary to the protestations of the Tenth Circuit,²⁶⁷ this inquiry is both appropriate and administrable. Regarding appropriateness, federal

261. See *Marijuana Policy Project v. D.C. Bd. of Elections & Ethics*, 191 F. Supp. 2d 196, 212–14 (D.D.C. 2002), rev’d sub nom., *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002); Brief of Plaintiffs-Appellants, supra note 109, at 27–29.

262. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

263. *Id.*; see also *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (instructing courts to apply *O'Brien* when regulation that burdens expressive conduct is unrelated to expression).

264. *O'Brien*, 391 U.S. at 377. The test also requires that a regulation be “within the constitutional power of the Government” and that “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of th[e] interest.” *Id.* Arguably, the “no greater than essential” prong also provides a means of invalidating subject matter restrictions under intermediate scrutiny, as the availability of judicial review suggests that states need not risk burdening speech by removing certain initiatives from the process at the front end. See supra note 39 and accompanying text. After all, judicial review is arguably less drastic and antidemocratic than removing an issue altogether. This tack, however, would require states to rely on private actions to invalidate successful initiatives, a potentially ineffective mechanism.

265. *Wirzburger v. Galvin*, 412 F.3d 271, 277 (1st Cir. 2005).

266. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); see also *Burdick v. Takushi*, 504 U.S. 428, 434–40 (1992) (sustaining ban on write-in voting under *Anderson* standard).

267. See *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1103 (10th Cir. 2006) (“We can imagine few tasks less appropriate to federal courts than deciding which state constitutional limitations serve ‘important governmental interests’ and which do not.”).

courts regularly apply the amorphous intermediate scrutiny standard,²⁶⁸ as Judge Lucero noted in dissent, and their intervention is “most essential” where the fundamental workings of democracy are at stake.²⁶⁹ Administrability presents a more difficult question. The only court to apply the test, the First Circuit, failed to explain why it deemed “safeguarding . . . fundamental freedoms” an important state interest,²⁷⁰ prompting Judge McConnell sensibly to ask, in criticizing *Wirzburger*: “On what basis could a federal court conclude that the people are justified in erecting barriers to the adoption of [initiatives] allowing financial aid to private religious schools but not to those involving general banking laws or wild-life management practices?”²⁷¹ Ideally, courts could hold that a subject matter restriction motivated by partisanship rather than pragmatism necessarily furthers no important state interest, but such inquiries into motive are “hazardous,” unprincipled, and disfavored.²⁷² Some other standard must separate important from unimportant state interests.

In his dissent, Judge Lucero mentioned two important state interests that could justify a subject matter restriction: insulation of complex issues and protection of minority interests.²⁷³ As discussed below, the complexity of an issue is an ineffective determinant of whether a state may constitutionally exclude it from its initiative process. But insulation of minority interests, if understood more broadly as insulation of all state constitutional rights, effectively distinguishes pragmatic subject matter restrictions from undesirable partisan restrictions, and accordingly provides a principled basis for application of intermediate scrutiny.

1. *Insulation of Complex Issues as an Important State Interest.* — The notion that a state has an important interest in excluding complex issues, but not simple issues, from its initiative process is neither administrable nor constructive. On the surface, some initiatives are more straightforward than others,²⁷⁴ but nearly all initiatives have broad policy implications, whether they require voters to delve into intricate budget matters or simply to decide whether English should be a state’s official language.²⁷⁵ To sustain a subject matter restriction, a court would have to declare an issue too complex for exposure to voters. That logic casts the

268. See Wexler, *supra* note 234, at 315–21; cf. Note, Limitations, *supra* note 104, at 498 (noting that “courts draw the lines” and “follow their own inclinations” in delimiting allowable limitations on initiatives).

269. *Walker*, 450 F.3d at 1113–14 (Lucero, J., concurring in part and dissenting in part).

270. See *Wirzburger*, 412 F.3d at 279; *supra* notes 156–160 and accompanying text.

271. *Walker*, 450 F.3d at 1103; see Hoesly, *supra* note 43, at 1236 (“It is difficult to justify why certain issues . . . should be held immune . . . and others should not.”).

272. *United States v. O’Brien*, 391 U.S. 367, 383–84 (1968).

273. *Walker*, 450 F.3d at 1113 (Lucero, J., concurring in part and dissenting in part).

274. See Hoesly, *supra* note 43, at 1234 n.312 (noting wide variance in initiative length in California).

275. Further, even if certain subjects are more complex than others, presumably those subjects are more worthy of political discourse and popular agenda setting.

people as a legislature-in-training and subject matter restrictions as training wheels, an outlook incongruent with original and contemporary conceptions of the character and purpose of the initiative process.²⁷⁶ Madison feared the people's intemperance, not their opacity.²⁷⁷ Even assuming that courts can deem some subjects more complex than others, simple subjects are arguably more apt to inspire "violent passions" among the voting public, rendering insulation of complex issues counterproductive.²⁷⁸ Moreover, distinguishing permissible from impermissible subject matter restrictions on the basis of complexity would not necessarily result in invalidation of partisan restrictions like Utah's supermajority requirement for wildlife initiatives. A court could as easily pronounce the subject of "hunting" simple, and hence immune from exclusion, as it could pronounce the subject of "wildlife management" complex, and hence constitutionally excludable.

2. *Insulation of State Constitutional Rights as an Important State Interest.* — Instead, courts should hold that only subject matter restrictions that insulate state constitutional rights from the volatility of direct democracy further an important state interest under *O'Brien*.²⁷⁹ State constitutional rights are necessarily important, by virtue of their constitutional status, and nonpartisan, as implied by their removal from "the vicissitudes of ordinary democratic politics."²⁸⁰ A provision securing them performs a

276. See supra notes 18–28 and accompanying text.

277. The Federalist No. 63 (James Madison), supra note 1, at 327; see supra text accompanying notes 101–106.

278. See The Federalist No. 63 (James Madison), supra note 1, at 327; Tarr, supra note 99, at 160–61; Briffault, supra note 42, at 1355 (contrasting "salien[ce]" of California's Proposition 13 with that of more complex initiatives); supra note 102.

279. Under this standard, single subject rules and subject repetition waiting periods survive intermediate scrutiny because they serve the important state interest of protecting orderly exercise of a state constitutional right: use of the reserved initiative power. For further discussion of single subject rules and subject repetition waiting periods, see supra Part II.A.1.

280. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006). One difficulty of this standard stems from the great variance in the length of state constitutions. See Briffault & Reynolds, supra note 32, at 51. States with longer constitutions will likely be able to exclude more subjects from their initiative processes because their constitutions recognize more rights, the insulation of which is an important state interest sufficient to justify their exclusion. But courts in other states are free to interpret broadly the rights therein to permit excluding more subjects. Cf. Gray & Kiley, supra note 97, at 79–82 (noting breadth of subject matter exclusions tied to Massachusetts Constitution's declaration of rights). The District of Columbia, however, has no constitution to which courts could turn to determine whether a subject matter restriction serves an important state interest. Lacking an equivalent repository of important, nonpartisan individual rights and affirmative legislative duties, D.C. citizens are unprotected against encroachments on the integrity of their initiative process. This arguably unfair result is nonetheless fitting, as the D.C. initiative process is the product of a statute, not a constitution, and as D.C. citizens cannot exercise the First Amendment right to engage in campaign speech related to federal candidate elections, either. See Gov't of the District of Columbia, DC Voting Rights and Representation, at <http://about.dc.gov/statehood.asp> (last visited Sept. 20, 2007) (on file with the *Columbia Law Review*)

countermajoritarian function sufficiently important to justify burdening expressive conduct.²⁸¹

This broad standard preserves current pragmatic restrictions while guarding against future adoption of improvident partisan restrictions. It dictates that exclusion of initiatives concerning a state bill of rights, as in Massachusetts and Mississippi, furthers an important state interest and accordingly survives intermediate scrutiny.²⁸² Exclusion of initiatives concerning the affirmative duties imposed by a constitution on state and local governments also furthers an important state interest because state citizens possess an enforceable right to governmental performance of those duties.²⁸³ So, for example, Arizona may exclude from its process all initiatives concerning “the establishment and maintenance of a general and uniform public school system” because its constitution grants citizens the right to affirmative performance of those duties by the legislature.²⁸⁴ Likewise, Wyoming may exclude initiatives that “dedicate revenues[or] make or repeal appropriations” if it concludes that effective performance of the legislature’s constitutionally imposed duties, such as “sale, disposal, leasing or care” of state land, requires unimpeded control over the state budget.²⁸⁵

This standard would almost always lead courts to invalidate partisan subject matter restrictions as unsupported by an important state inter-

(explaining that “DC residents are denied voting representation in the US Senate and the US House of Representatives”); *supra* note 3 (describing D.C.’s Initiative Procedures Act).

281. Thus, this standard permits the exclusion of initiatives injurious to minority interests envisioned by Judge Lucero and other recent commentators. See *Walker*, 450 F.3d at 1111 (Lucero, J., concurring in part and dissenting in part); *supra* note 43. But see Briffault, *supra* note 42, at 1364–65 (suggesting that postelection judicial scrutiny can protect minority rights, as voters “can no more infringe upon constitutionally protected rights than can the representative legislature”).

282. See *supra* notes 97–98 and accompanying text. Thus, the First Circuit correctly found that the Religious and Anti-Aid Exclusions, see *supra* note 143, in “safeguarding . . . fundamental freedoms,” further an important state interest. See *Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005). This standard does not require courts to deem certain rights “fundamental”; any right’s presence in a state constitution is enough to create an important state interest in insulating it from the initiative process.

283. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189, 202 (Ky. 1989) (noting court’s duty to compel legislature to fulfill its “constitutional mandate” and permitting private enforcement action); Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 Rutgers L.J. 1057, 1084–85 (1993) (“Interpreting clauses which confer positive rights entails a similar process as . . . interpret[ing] . . . negative rights provisions. . . . Therefore, just as it is appropriate for a court to determine that a legislature has gone too far, it is appropriate for a court to determine that a legislature has not gone far enough.”).

284. *Ariz. Const. art. XI, § 1.*

285. *Wyo. Const. art. 3, § 52, subsec. g; id. at art. 18, § 4*; see also NCSL, *Initiative and Referendum*, *supra* note 3, at 19 (noting that ill-considered initiatives “can make it difficult for the legislature to continue to fund existing state services and programs”); *supra* notes 95, 105.

est.²⁸⁶ For example, Utah's supermajority requirement for wildlife initiatives serves no important state interest because it insulates no state constitutional right: The Utah Constitution neither grants citizens a right to hunt or enjoy wildlife nor imposes on the legislature an affirmative duty to act with respect to the subject.²⁸⁷ Because Utah citizens have attached no constitutional significance to the subject of wildlife, no important state interest justifies insulating it from the volatility of direct democracy and burdening expressive conduct in doing so.²⁸⁸ A partisan restriction that excludes "matters of public health" from the initiative process, intended as a bulwark against the tide of antismoking initiatives, would present a closer question.²⁸⁹ Washington's constitution, for example, appears to grant no right on the subject, but it does impose on the legislature the affirmative duty to protect persons in "employments dangerous to life or deleterious to health."²⁹⁰ If a court deemed performance of that duty a constitutional right possessed by state citizens, it could find an important state interest in insulating the subject and consequently sustain the restriction under intermediate scrutiny. Inevitably and appropriately, "courts draw the lines" in such situations.²⁹¹

286. In rejecting *Wirzburger*, the Tenth Circuit hinted that a finding of expressive conduct would produce this result. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006). The standard would also result in courts invalidating subject matter restrictions that exclude initiatives concerning the "instrumentalities" of government—the legislative procedures that the legislature itself would be unwilling to adopt out of self-interest. See Briffault, *supra* note 42, at 1367–73; Catherine Engberg, Note, Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?, 54 *Stan. L. Rev.* 569, 594–95 (2001). Excluding such initiatives would insulate no state constitutional right and accordingly serve no important state interest.

287. But see Utah Const. art. XVIII, § 1 (requiring legislature to prevent destruction of forests).

288. Whether Oklahoma may exclude wildlife issues from its process is a closer call—its constitution creates a Department of Wildlife Conservation, but, because the department lacks a mandate and has no affirmative duty to act, no right seems associated with the subject. See Okla. Const. art. XXVI.

289. See Ron Scherer, This Fall, New Push Against Big Tobacco, *Christian Sci. Monitor*, Aug. 28, 2006, at 2 (discussing increasing popularity of antismoking initiatives).

290. Wash. Const. art. II, § 35. Of course, legislating on matters of public health is well within the state's police power, but, because the legislature has no affirmative duty to exercise that power, state citizens have no constitutional right to their legislature's performance of that duty.

291. See Note, Limitations, *supra* note 104, at 498 (noting that courts will determine precise bounds of "areas in which representative action will be final"). This line drawing exercise, which asks courts to determine whether state constitutions create a cognizable "right," resembles the inquiry demanded by suits brought under 42 U.S.C. § 1983 (2000) that allege violation of a federal statutory right. See *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (listing three factors for courts to consider "when determining whether a particular statutory provision gives rise to a federal right"); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced . . .").

In short, a court assessing the constitutionality of a particular subject matter restriction should determine whether it insulates a state constitutional right from the intemperance of direct democracy.²⁹² If it insulates such a right, it necessarily “furthers an important or substantial governmental interest.”²⁹³ If it furthers such an interest, it very likely survives the *O’Brien* intermediate scrutiny standard for regulations of “conduct composed of speech and nonspeech elements.”²⁹⁴ If the subject matter restriction survives that standard, it comports with the First Amendment despite its adverse impact on an initiative proponent’s power to influence a state’s political agenda. But if it fails *O’Brien* scrutiny, the restriction impermissibly burdens expressive conduct protected by the First Amendment and obliges judicial invalidation.

CONCLUSION

This Note has argued that restrictions on the subject matter open to a state initiative process burden expressive conduct composed of speech (agenda setting) and nonspeech (lawmaking) elements. It has rejected the view that subject matter restrictions implicate no First Amendment concerns and explored the unique influence that placing an initiative on a ballot has on the political agenda of a state, an effect of initiative use entirely apart from generation of law. It has proposed a standard for assessing whether a subject matter restriction furthers an important state interest—and accordingly is constitutional—based in the interest of states in insulating their constitutional rights from the volatility of initiative lawmaking. In recognizing that direct democracy is more than direct legislation, this Note has offered a means of preventing the erosion of state initiative processes by partisan subject matter restrictions.

The power of subject matter restrictions to shape the bounds of public debate and foreclose disfavored policy decisions remains largely untapped. But continued restraint seems unlikely in light of the legal survival of Utah’s de facto exclusion of wildlife initiatives and the imitative restrictions considered by other states. Because initiative reform is popular among citizens and legislators, observers should be wary of attempts to institute antidemocratic restraints on lawmaking and expression in the

292. For guidance as to whether a state constitutional provision creates a positive right or legislative duty under this standard, a federal court should examine its treatment by state courts, and, if necessary, certify the question to the state supreme court. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79–80 (1997) (holding that federal court should have certified to Arizona Supreme Court question of state constitutional amendment’s meaning); *Doe v. Sundquist*, 106 F.3d 702, 708 (6th Cir. 1997) (citing “respect for the right of a state court system to construe that state’s own constitution”); cf. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (holding that scope of federal due process protection turns, in part, on state law definition of property interests).

293. See *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

294. See *id.* In exceptional circumstances, a subject matter restriction might fail on one of the other prongs, if it is overbroad or explicitly aimed at suppression of speech. See *supra* note 264.

guise of corrective measures. Even opponents of direct democracy as an institution should prefer its full abolition to its piecemeal degradation, as its principal faults—hostility to minority interests and neglect of organic, rather than manufactured, public concerns—grow more prominent as its scope is narrowed. By carefully examining proposed subject matter restrictions and acknowledging the federal constitutional right at stake, citizens and courts can protect direct democracy, where it exists, in its most effective form.