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Speaking of Direct Democracy, Judicial Review of State Ballot Initiative Laws Under the First Amendment

Trane J. Robinson

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I. INTRODUCTION

Citizen-led ballot initiatives provide voters an avenue to promulgate new laws or constitutional amendments via direct democracy. With ballot initiatives, voters may bypass their state legislature and express their collective will instead through popular vote—in contrast to our traditional system of representative democracy, where constituents elect lawmakers. Such ballot initiative mechanisms are constitutionally permissive, though not required, but if provided, they must comply with the Constitution. Roughly half of States offer their voters an initiative process.[1] And those States must regulate the mechanics by which proposed initiatives reach the ballot, as they have an interest in preserving "some sort of order, rather than chaos" in their democratic processes.[2] Such laws may risk running headlong into the First Amendment's implicit guarantee of free expression.[3] State laws that regulate the ballot initiative process have triggered First Amendment challenges by popular initiative proponents whose cause did not see the ballot come election day.

Ahead of the 2020 election, the Supreme Court stayed a lower court injunction that adjusted Idaho's signature-gathering requirement for ballot initiatives.[4] Chief Justice Roberts concurred in the grant of stay and wrote separately to describe "the transformative and intrusive nature" of the judicial intervention.[5] He noted, "the Circuits diverge in

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1. *Initiative Process 101*, NAT'L CONF. ST. LEGISLATURES, https://perma.cc/AJ8X-SUAV; *Initiative and Referendum* States, NAT'L CONF. ST. LEGISLATURES, https://perma.cc/EU7J-BLYH. *See* Michael E. Solimine, *Judicial Review of Direct Democracy: A Reappraisal*, 104 KY. L.J. 671, 675 n.24 (2016).

2. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 187 (1999) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

3. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Fourteenth Amendment's Incorporation Doctrine made that proscription apply to state legislatures the same as Congress. *See* Gitlow v. New York, 268 U.S. 652 (1925).

4. Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020).

5. *Id.* at 2618. Justice Sotomayor, joined by Justice Ginsburg, dissented from the Court's grant of stay, urging that it "likely dooms to mootness" the initiative proponents' claims in premature fashion. *Id.* at 2619 (Sotomayor, J., dissenting from the grant of stay).

fundamental respects when presented with challenges to" State regulations of their ballot initiative processes ("gatekeeping laws"[6]), and accordingly "have applied their conflicting frameworks to reach predictably contrary conclusions . . . ."[7] Some jurisdictions "require scrutiny of interests," the Chief Justice explained, while others, "by contrast, have held that regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation."[8] Without purporting to resolve the issue, Chief Justice Roberts added, "reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests" "States retain . . . 'to protect the integrity and reliability of the initiative process.'"[9]

This Comment examines the interplay between State ballot initiative laws and the First Amendment through the circuit conflict identified in *Little v. Reclaim Idaho*.[10] Part II first identifies relevant Supreme Court precedents that guide the courts of appeal. Next, it surveys where the circuits that have weighed in stand—whether they apply no First Amendment scrutiny, rational-basis review, or heightened scrutiny. Part III argues that First Amendment challenges to state gatekeeping laws should be subject to rational-basis review at most when the burden on speech is neither direct nor severe. The structure of the Constitution dictates that the federal judiciary is ill-suited to weigh the sufficiency of a State's election regulation interest. This Comment concludes by presenting a coherent rule derived from precedent that would resolve the circuit conflict.

II. BACKGROUND

A majority of the United States Courts of Appeals have addressed the relationship between the First Amendment and ballot initiative frameworks. The District of Columbia, Second, Seventh, Eighth, and Tenth Circuits apply either no First Amendment scrutiny or the lax rational-basis review to State gatekeeping laws.[11] The First, Sixth, and Ninth Circuits, meanwhile, apply some form of heightened scrutiny.[12] In *Schmitt v. LaRose*, Judge Bush observed, "[t]he Supreme Court has not

6. *See* Schmitt v. LaRose, 933 F.3d 628, 643 n.1 (6th Cir. 2019) (Bush, J., concurring) ("I sometimes refer to [Ohio's legislative authority] statutes as the 'gatekeeper' provisions.").

7. *Little*, 140 S. Ct. at 2616-17 (Roberts, C.J., concurring in the grant of stay).

8. *Id.* at 2616.

9. *Id.* at 2616-17 (quoting *Buckley*, 525 U.S. at 191).

10. 140 S. Ct. 2616 (2020) (Roberts, C.J., concurring in the grant of stay).

11. *See id.*

12. *See id.*

addressed the precise scope of the First Amendment interests, if any, that are implicated by laws that regulate only the mechanics of an initiative process," but the Court has provided guidance.[13]

A. Supreme Court Guidance

In the landmark decision *United States v. O'Brien*,[14] The government prosecuted Paul O'Brien after he burned his Selective Service registration certificate in a public display on the steps of a Boston Courthouse.[15] O'Brien violated the Universal Military Training and Service Act, which proscribed knowingly destroying or mutilating one's registration certificate.[16] O'Brien asserted that the Act unconstitutionally suppressed his freedom of speech.[17]

The Court explained that a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[18] Here, the law's ban on burning draft cards incidentally burdened O'Brien's anti-draft expression. The Supreme Court held a regulation that incidentally restricts speech is constitutional if: "it is within the constitutional power of the Government," "it furthers an important or substantial governmental interest," "the governmental interest is unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[19] That four-part test imparts intermediate scrutiny by weighing free expression interests against governmental interests in upholding laws that restrain conduct but incidentally restrict speech.[20]

Derived from First Amendment challenges related to ballot access, the *Anderson-Burdick* balancing framework "consider[s] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," against the State's "precise interests put forward . . . as justifications for the burden imposed by its rule."[21] In three steps, courts: evaluate the

13. 933 F.3d at 644 (Bush, J., concurring).

14. 391 U.S. 367 (1968).

15. *Id.* at 369.

16. *Id.* at 370.

17. *See id.* at 376.

18. *Id*.

19. *Id.* at 377.

20. Wirzburger v. Galvin, 412 F.3d 271, 279 (1st Cir. 2005) ("[W]e apply the intermediate scrutiny standard set out in *O'Brien*.").

21. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

severity of the restriction imposed,[22] "evaluate the state's interests in and justifications for the regulation,[23] and last, determine the constitutional legitimacy of the restrictions in light of the strength of the stated interests.[24] This test, like *O'Brien*, effectively subjects the challenged State election regulation to intermediate scrutiny.

Anderson v. Celebrezze involved a free association challenge to Ohio's statutorily imposed early filing deadline applied against independent candidates who wished to appear on the ballot.[25] The law burdened individuals' voting and associational rights by limiting independent candidates in a different manner than major-party candidates.[26] At the same time, the Court recognized that "State[s'] important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[27] Here, the Court determined the early deadline provision against independent candidates imposed a burden on voters' associational rights that was sufficiently severe to violate the First Amendment.[28]

In *Anderson*'s lineage, *Burdick v. Takushi* reviewed Hawaii's prohibition on write-in voting under the First and Fourteenth Amendments.[29] Hawaii justified "its ban on write-in voting" by asserting interests "in avoiding the possibility of unrestrained factionalism at the general election," and "winnowing out candidates."[30] Unlike Ohio's early filing provision in *Anderson*, the Court upheld Hawaii's write-in provision. Nevertheless, *Anderson* and *Burdick* are together the genesis of an interest-balancing test courts have applied to State ballot access provisions.

The Supreme Court's decision in *Meyer v. Grant* established that strict scrutiny applies to a ballot initiative regulations targeting speech, not election mechanics; it is a leading case on First Amendment challenges to State ballot initiative laws.[31] In Colorado, proponents of a new state law or constitutional amendment can place their initiative on the general election ballot only if they produce an initiative petition with the requisite number of qualified signatures.[32] But Colorado

22. Schmitt v. LaRose, 933 F.3d 628, 639 (6th Cir. 2019) (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

23. *Id.*

24. *Id.*

25. 460 U.S. at 783.

26. *Id.* at 787.

27. *Id.* at 788.

28. *Id.* at 806.

29. 504 U.S. 428 (1992).

30. *Id.* at 439 (citation and internal quotation marks omitted).

31. 486 U.S. 414 (1988).

32. *Id.* at 415-16.

criminalized the payment of individuals who circulate ballot initiative petitions in an effort to obtain signatures.[33]

Grant argued that the restriction on compensation for circulation unconstitutionally limited political expression.[34] The Supreme Court agreed; the circulation of an initiative petition necessarily involved "core political speech."[35] As such, the regulation limited the number of circulators willing to spread the message and, as a consequence, the size of the audience able to receive the political message. The law also made proponents less likely to amass the requisite number of signatures to earn ballot access.[36] Critically, the criminalization of paying petition circulators burdened initiative proponents' ability to *communicate* the message in order to obtain signatures. Meanwhile, the law did not advance the State's interest in protecting the integrity of the ballot initiative process, which Colorado's minimum signature requirement still protected.[37]

Restrictions upon ballot initiative *advocacy*, the Court explained, are "wholly at odds with the guarantees of the First Amendment."[38] The Colorado statute imposed a severe burden on political speech, triggering strict scrutiny, which the statute could not withstand.[39]

Buckley v. American Constitutional Law Foundation involved another challenge to three of Colorado's ballot initiative process regulations; the Supreme Court reviewed statutes that (1) required initiative petition circulators to be registered voters, (2) required those circulators to wear identification badges, and (3) required paid circulators to report their name and address.[40] Guided by *Meyer*, the Court held all three restrictions "significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests."[41] The laws hindered circulators' ability to spread initiative petitions, and with that, the ideas the petition espoused. The second and third statutes obstructed one's First Amendment right to advocate anonymously—a right exercised by Madison, Hamilton, and Jay, who wrote *The Federalist Papers* under the pseudonym "Publius."[42] Each of the three requirements imposed severe burdens on speech, and none

33. *See id.* at 417 (citing COLO. REV. STAT. § 1-40-110 (1980)).
34. *Id.*
35. *Id.* at 422.
36. *Id.* at 423.
37. *Id.* at 426.
38. *Id.* at 428 (quoting Buckley v. Valeo, 424 U.S. 1, 50 (1976)).
39. *Id*.
40. 525 U.S. 182, 186 (1999).
41. *Id.* at 192.
42. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

promoted State interests that could surmount strict scrutiny.[43]

Neither *Meyer* nor *Buckley* is on all fours with the issue dividing the courts of appeal that this Comment addresses. Those cases contemplate laws that present an impediment to ballot initiative *advocacy*, not the process by which initiatives reach the ballot.[44] *Meyer* and *Buckley* plainly establish, laws that severely burden speech must be narrowly tailored to a compelling government interest. But, when "a challenged election law regulates 'the mechanics of the electoral process,' not speech," the First Amendment is implicated only incidentally, at most.[45] Yet, the Supreme Court has resisted bright line rules in this area: "No litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions."[46]

The next Section surveys circuit-level cases that test the constitutionality of State ballot initiative frameworks, beginning with the jurisdictions that have applied heightened scrutiny.

B. The Heightened Scrutiny Circuits

To apply intermediate scrutiny in this context, courts balance the State's interest in enforcing the challenged law against the incidental burdens imposed on speech. Laws that impose more direct or severe burdens on First Amendment rights, by contrast, are subject to more exacting review, and are distinguishable from challenged laws in the cases that follow.[47]

1. The First Circuit

In *Wirzburger v. Galvin*, two citizens of Massachusetts sought to amend their State Constitution through its popular ballot-initiative mechanism.[48] Their cause was to update Massachusetts's "Anti-Aid Amendment," which "prohibits public financial support for private . . . schools."[49] The initiative would ensure the State's ability to provide benefits to private schools, "regardless of the schools' religious affiliation."[50] Two clauses in the Massachusetts Constitution impeded

43. *See Buckley*, 525 U.S. at 206 (Thomas, J., concurring).

44. *See* Schmitt v. LaRose, 933 F.3d 628, 644 (6th Cir. 2019).

45. *Buckley*, 525 U.S. at 207-08 (Thomas, J., concurring) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995)).

46. *Id.* at 192 (internal quotation marks and citations omitted).

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

48. Wirzburger v. Galvin, 412 F.3d 271,274 (1st Cir. 2005). *See* MASS. CONST. art. 48 (allowing constitutional amendment by popular initiative).

49. *Wirzburger*, 412 F.3d at 274.

50. *Id.*

the initiative from reaching the ballot: the first provision expressly prohibited amendment by popular initiative to the Anti-Aid Amendment; the other provision prevented religiously affiliated ballot initiatives.[51] The initiative-seeking citizens brought First Amendment challenges to both constitutional provisions that independently thwarted ballot access.

The court reasoned that both constitutional provisions have an adverse effect on communicative activity, yet each is "aimed at non-communicative impact."[52] Laws, such as these, that target the State initiative procedure have only a secondary impact on speech, so the court reasoned.[53] The ratifying public of the Massachusetts Constitution adopted two amendments that independently disqualified the proponents' initiative from the popular ballot initiative process.[54] Those amendments set boundaries of scope by excluding certain categories citizen-created laws; nevertheless the amendments incidentally negated speech.

The litigation narrowed on the applicable tier of scrutiny for First Amendment review. The court distinguished this case from *Meyer v. Grant*: where *Meyer* regulated "the *means* that initiative proponents could use to reach their audience of potential petition signers," the Massachusetts provisions prevented "the *act* of generating laws . . . about certain subjects by initiative."[55] Thus, strict scrutiny was inapplicable. The court landed on intermediate scrutiny because, in its view, the Massachusetts ballot initiative process facilitated political expression, yet the laws regulate procedure "such that any effect on speech is purely incidental."[56] The court applied *O'Brien*'s four-part analysis—intermediate scrutiny—because "expression is affected by the regulations of the state initiative process," but only as an unintended consequence.[57]

The court recognized compelling State interests in preventing the establishment of religion and "restricting the means by which these fundamental rights can be changed," and added the laws under review only minimally restricted speech.[58] Thus, the court held, "Massachusetts' exclusions to its initiative process . . . survive

51. *Id.* at 274-75.

52. *Id.* at 275 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 at 790 (2d ed. 1988)).

53. *Id.* at 276-77.

54. *Id.*

55. *Id.* at 277 (emphasis in original).

56. *Id*.

57. *Id.* at 279.

58. *Id*.

intermediate scrutiny."[59]

2. The Ninth Circuit

The Nevada Constitution permits its citizens to enact legislation through a ballot initiative process, conditioned on initiative proponents gathering sufficient signatures from each State congressional district.[60] That requirement—the "All Districts Rule"—ensures adequate geographic distribution of initiative supporters.[61] In Nevada, citizens' interests in Las Vegas could vary substantially from those of citizens who inhabit the more rural areas of the State.

The plaintiffs in *Angle v. Miller* argued Nevada's All Districts Rule facially violated the First Amendment.[62] The court, guided by *Meyer v. Grant*, said the All Districts Rule does not impose a direct burden on speech.[63] Nevada asserted its interest in "making sure that an initiative has sufficient grass roots support to be placed on the ballot."[64] The court granted Nevada "leeway" to regulate its ballot initiative processes provided that restrictions of political speech are not excessive.[65]

The court observed that the First Amendment does not guarantee ballot access to an initiative, but gatekeeping laws that "significantly inhibit the ability of initiative proponents to place initiatives on the ballot" severely burden statewide speech, even if as an incidental consequence.[66] Thus, the court weighed the severity of the burden on ballot access imposed by the All District Rule against the Nevada's election regulation interests—interest balancing of this kind is the hallmark of intermediate scrutiny. The court determined Nevada's interests in regulating its elections and fostering statewide grassroots support for a ballot initiative justified the First Amendment burden.[67]

3. The Sixth Circuit

The Sixth Circuit has historically applied rational-basis review to First Amendment challenges of State ballot initiative regulations, but switched to the *Anderson-Burdick* framework.[68] Recent cases have

59. *Id.* at 276.

60. Angle v. Miller, 673 F.3d 1122, 1126 (9th Cir. 2012). *See* NEV. CONST. art. 19, § 2.

61. *Angle*, 673 F.3d at 1126.

62. *Id.* at 1127.

63. *Id.* at 1133.

64. *Id.* at 1135 (quoting *Meyer v. Grant*, 486 U.S. 414, 425-26 (1988).).

65. *Id.*

66. *Id.* at 1133.

67. *Id.* at 1135.

68. *See* OHIO CONST. art. II, § 1f (reserving the initiative power to "the people of each

raised doubt as to the propriety of that course, a course that began with *Obama for America v. Husted*.[69] Initially, in *Taxpayers United for Assessment Cuts v. Austin*, the Sixth Circuit decided a freedom-of-association challenge to a Michigan statute that conditioned ballot access on a requisite minimum number of initiative petition signatures.[70] Even with the freedom of expression element, the Sixth Circuit applied rational-basis review, not the *Anderson-Burdick* balancing because the law was content-neutral and non-discriminatory.[71] Here, unlike in *Meyer v. Grant*, Michigan's minimum signature law imposed no restriction on advocacy.[72] That distinction was dispositive; the Sixth Circuit found that Michigan's interest in requiring sufficient support before granting ballot access outweighed the secondary effects on speech.[73]

Even though *Obama for America* was not about ballot initiatives, but early in-person voting,[74] it is relevant here for importing the *Anderson-Burdick* balancing framework to First Amendment challenges to voting restrictions in the Sixth Circuit.[75]

Schmitt v. LaRose, by contrast, squarely presented a First Amendment challenge to "the laws [that] regulate the process by which initiative legislation is put before the electorate."[76] The plaintiffs argued that Ohio's gatekeeping laws created an unconstitutional prior restraint on ballot initiative proposals, and therefore "unduly hamper[] their right to political expression."[77] After dispelling the notion that the laws imposed a prior restraint on speech, the majority resorted to the *Anderson-Burdick* balancing framework to parse the constitutionality of Ohio's ballot initiative process. The majority did not explain why Ohio's laws warranted heightened scrutiny; the court simply reasoned: "we generally evaluate First Amendment challenges to state election regulations under the three-step *Anderson-Burdick* framework."[78] The court determined that the ballot-initiative process did not impose a severe restriction on speech, only "at most, a second-order effect on protected speech."[79] The

municipality").

69. 697 F.3d 423 (6th Cir. 2012).

70. Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291, 293 (6th Cir. 1993).

71. *Id.* at 297.

72. *Id.*

73. *Id*.

74. *Id.* at 425.

75. *Id.* at 430; *See also* Daunt v. Benson, 956 F.3d 396, 406 (6th Cir. 2020) (citing Obama for America v. Husted, 697 F.3d 423, 430 (6th Cir. 2012)) ("The Anderson-Burdick test may apply to First Amendment claims as well as to Equal Protection claims").

76. Schmitt v. LaRose, 933 F.3d 628, 638 (6th Cir. 2019).

77. *Id*.

78. *Id.* at 639.

79. *Id.* at 638.

court further concluded that the State's interest in preserving the integrity of the election process, among other interests, justified the minor restrictions.[80] Therefore, the court concluded that Ohio's gatekeeping laws comply with the First Amendment.[81]

Judge Bush concurred in part and in the judgment, but did not join the Court's First Amendment analysis because he would have applied rational-basis review.[82] State-enacted "rules of election mechanics that are content-neutral and do not discriminate against any particular point of view," he explained, do not "run[] afoul of the First Amendment."[83] The Ohio ballot initiative laws, Judge Bush continued, do not interfere with an individual's First Amendment right "to advocate for a proposed initiative," rather they regulate election mechanics.[84] Those laws "ensure that certain eligibility requirements are met before an initiative is formally certified for the ballot and voted on by the people" in their sovereign capacity.[85] He placed the issue raised in *Schmitt* outside the reach of *Anderson-Burdick*, which had been traditionally limited to "laws that burden candidates from appearing on the ballot[86]—not a general "First Amendment challenge to state election regulations."[87] In Judge Bush's judgment, Ohio's content-neutral, non-discriminatory gatekeeping laws are legitimate so long as the State can advance a rational basis.[88]

The Sixth in *Committee to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Board* applied *Anderson-Burdick* balancing to a content-neutral Ohio statute that regulates election mechanics.[89] The plaintiff argued that an Ohio provision limiting an initiative petition to one proposal ("the single-subject rule") violated the First and Fourteenth Amendments. But the court upheld the rule because it was "minimally burdensome and nondiscriminatory," and as such under *Anderson-Burdick*, "are subject to a less-searching examination closer to rational basis."[90]

Subsequent cases have applied *Anderson-Burdick* balancing to election regulation challenges consistent with circuit precedent, but those cases have raised doubt as to the efficacy of using the framework

80. *Id.* at 640-42.
81. *Id.* at 642.
82. *Id.* at 642-43 (Bush, J., concurring in judgment).
83. *Id.*
84. *Id*.
85. *Id*.
86. *Id.* at 644.
87. *Id.* at 639.
88. *Id.* at 651.
89. 885 F.3d 443 (6th Cir. 2018).
90. *Id.* at 448 (quoting Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016)).

so broadly. Jail-confined Ohioans, for example, brought an Equal Protection as well as a First Amendment claim against Ohio's absentee ballot request deadline, as applied to them.[91] Here again, *Obama for America* constrained the court "to apply the Anderson-Burdick framework" to general election regulations.[92] The court admitted it took "some legal gymnastics to quantify the 'burden'" of the State law pursuant to *Anderson-Burdick*, but nevertheless upheld the law against equal protection and free association attacks.[93]

The Sixth Circuit's repeated resort to *Anderson-Burdick* balancing was manifest in *Daunt v. Benson*; on an issue of first impression, the court turned to that analysis because "[a]t bottom, the *Anderson-Burdick* framework is used for evaluating 'state election laws,'"[94] The plaintiffs in *Daunt* challenged certain requirements to sit on Michigan's independent political districting commission as violating their First Amendment rights.[95] Because Michigan advanced compelling interests that justified the only minor burdens on free speech and association, the law comfortably withstood *Anderson-Burdick*'s balancing framework.[96]

Judge Readler concurred in the judgment, but would not have applied the *Anderson-Burdick* framework.[97] Judge Readler argued that *Daunt* "raise[d] a question regarding Michigan's chosen means of self-governance, not its election mechanics," and *Anderson-Burdick* applies only to the latter.[98] The laws governing eligibility for Michigan's independent redistricting commission—"an exercise in regulating the qualifications for public service"[99]—do not implicate limitations on ballot access or election mechanics, Judge Readler added.[100] And he was reluctant to extend *Anderson-Burdick* beyond its intended domain because, particularly due to its sliding-scale balancing-test nature, "affords far too much discretion to judges."[101] Judge Readler would have resolved the challenge before him, and others like it, by resort to "historical understandings and foundational principles," while deferring significantly to "a state's strong interest in self-governance."[102] "[A]

91. Mays v. LaRose, 951 F.3d 775, 779 (6th Cir. 2020).

92. *Id.* at 783.

93. *Id.* at 783 n.4.

94. *Daunt*, 956 F.3d at 407 (quoting Burdick v. Takushi, 504 U.S. 428, 441 (1992)) (alterations omitted).

95. *Id.* at 401.

96. *Id.* at 409.

97. *Id.* at 422 (Readler, J., concurring in judgment).

98. *Id.* at 423.

99. *Id.* at 424.

100. *Id.* at 423.

101. *Id.* at 424.

102. *Id.* at 426.

state's prerogative in organizing its government, including its election system," Judge Readler concluded his concurrence, "is a paramount aspect of state sovereignty, and a cornerstone of federalism."[103]

Finally, returning to ballot initiative regulations, the Sixth Circuit issued an order upholding under the First Amendment Ohio's ballot initiative requirements as applied in light of the onset of the novel COVID-19 pandemic.[104] In particular, initiative proponents sought to enjoin Ohio's ink-signature and witness requirements for certified obtaining ballot initiative support.[105] Faithful to circuit precedent, the panel analyzed the First Amendment challenge of these "nondiscriminatory, content-neutral ballot initiative requirements under the *Anderson-Burdick* framework."[106] The plaintiffs' basic theory: The pandemic ought to tip the interest-balancing scales in their favor, rendering the State interests for imposing ink-signature and witness requirements inadequate.[107] Because Ohio's stay-home order in response to the pandemic "specifically exempted conduct protected by the First Amendment," the Court would not conclude the burdens imposed qualified as "severe."[108] Rather, the court decided by analogizing *Schmitt*, the burden was "intermediate."[109] Because Ohio advanced "compelling and well-established interests" in election administration, their provisions survived the challenge, even in the face of the coronavirus pandemic.[110]

C. The Rational Basis Circuits

Most circuits to address the issue review First Amendment challenges to State gatekeeping laws for a rational relation to a legitimate interest. In contrast to the limitation on ballot initiative advocacy reviewed in *Meyer v. Grant*, gatekeeping laws regulate election mechanics—the process not substance. Based upon that distinction, some courts have concluded that regulations on election mechanics do not implicate the First Amendment whatsoever.[111]

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103. *Id.* at 431.

104. Thompson v. Dewine, 959 F.3d 804, 806-07 (6th Cir. 2020) (per curiam).

105. *Id.* at 806.

106. *Id.* at 808 (citing Schmitt v. LaRose, 933 F.3d 628, 639 (6th Cir. 2019)).

107. *Id.* at 808-09 ("We have regularly upheld ballot access regulations like those at issue. . . . But these are not normal times. So the question is whether the COVID-19 pandemic and Ohio's stay-at-home orders increased the burden that Ohio's ballot-initiative regulations place on Plaintiffs' First Amendment rights.").

108. *Id.* at 809.

109. *Id.* at 811.

110. *Id.*

111. *See, e.g.*, Dobrovolny v. Moore, 126 F.3d 1111, 1112 (8th Cir. 1997); Molinari v.

1. The Eighth Circuit

Nebraskans may amend their Constitution through popular ballot initiative.[112] *Dobrovolny v. Moore* resolved a First Amendment challenge to a ballot access provision that imposed a minimum signature requirement. Oddly, the requisite number of signatures could not be determined until after the petition's due date.[113]

That indeterminacy did not restrict the initiative proponent's "ability to circulate petitions or otherwise engage in political speech."[114] The Nebraska regulation neither hindered political communication nor content, as distinguished from *Meyer v. Grant*.[115] Regardless of whether Nebraska's minimum signature provision rendered ballot access harder to achieve, the claim was not colorable under the First Amendment.[116]

2. The District of Columbia Circuit

The D.C. Home Rule Act established a District of Columbia Council and gave it legislative authority within the District.[117] In 1978, the Council adopted a popular ballot initiative procedure subject to the same limitations that Congress imposed on the Council when Congress delegated its lawmaking authority.[118] The Marijuana Policy Project submitted a ballot initiative proposal that would allow doctors to prescribe medical marijuana to certain patients, but the D.C. Board of Elections and Ethics, in its regulatory capacity over the D.C. ballot initiative process, refused to certify the proposal as ballot eligible.[119] A congressional amendment removed laws that would reduce the penalty associated with use of controlled substances from the scope of the delegated authority created by the D.C. Home Rule Act.[120] Since the proposal exceeded the D.C. Council's authority, it also exceeded the

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Bloomberg, 564 F.3d 587, 596 (2d Cir. 2009).

112. *Dobrovolny*, 126 F.3d at 1112; *See* NEB. CONST. art. II, §§ 1, 2, 4.

113. *Dobrovolny*, 126 F.3d at 1112.

114. *Id.*

115. *Id.* at 1113.

116. *Id.* at 1112 ("While the Nebraska provision may have made it difficult for appellants to plan their initiative campaign and efficiently allocate their resources, the difficulty of the process alone is insufficient to implicate the First Amendment.").

117. Marijuana Policy Project v. United States, 304 F.3d 82, 83 (D.C. Cir. 2002); *See* D.C. CODE MUN. REGS. tit. 1 § 201.01 (LexisNexis 2020).

118. *Marijuana Policy Project*, 304 F.3d at 83. Broadly, the ballot initiative process adopted by the D.C. Council is akin to state municipal ballot initiative processes, like, for example, Ohio's. *See supra*, note 3; *See also* OHIO REV. CODE ANN. § 3501.11(K) (LexisNexis 2020).

119. *Marijuana Policy Project*, 304 F.3d at 84.

120. *Id.* The "Barr Amendment" provides: "None of the funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any . . . or any tetrahydrocannabinols derivative." *Id.*

bounds of the ballot initiative process that the Council created.[121] In *Marijuana Policy Project v. United States*, the proponents argued that the amendment transgressed the First Amendment.[122]

The court noted that the amendment merely retains for Congress the legislative authority to reduce the penalty associated with using marijuana.[123] Congress chose not to delegate that authority to the D.C. Council; that decision does not violate—or perhaps even implicate—the First Amendment.[124] While limits on legislative advocacy raise First Amendment concerns, limits on legislative authority do not because citizens have no right to legislate.[125] The amendment did not restrict proponents of marijuana-related legislation from advocating their view, it "merely removes a subject from [the ballot initiative] process altogether."[126] Without weighing countervailing interests, the court held the amendment "restrict[ed] no First Amendment right."[127]

3. The Tenth Circuit

Utah is another State that enables citizen-led legislative initiatives.[128] A simple majority typically suffices, but initiatives related to wildlife management require a supermajority's approval for popular democracy to create new law.[129] In *Initiative & Referendum Institution v. Walker*, the *en banc* Tenth Circuit upheld Utah's supermajority constitutional provision against a First Amendment challenge because the provision "d[id] not implicate the freedom of speech."[130]

The court distinguished *Meyer v. Grant*, finding that it does not control First Amendment challenges against state "laws that determine the process by which legislation is enacted."[131] Utah's supermajority provision sets a procedure for proposals related to wildlife management to become law. And the supermajority provision cannot transgress the First Amendment by merely making the initiatives it reaches less likely to succeed, as supermajority requirements abound in state and federal constitutional law.[132]

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121. *Id.* at 85.
122. *Id.* at 84.
123. *Id.* at 84-85.
124. *Id.* at 86.
125. *Id.*
126. *Id.* at 87.
127. *Id*.
128. UTAH CONST. art. VI, § 1(2)(a)(i)(A).
129. UTAH CONST. art. VI, § 1(2)(a)(ii).
130. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1085 (10th Cir. 2006) (en banc).
131. *Id.* at 1100.
132. *Id.* Notable supermajority provisions in the Constitution are: the impeachment clause, U.S.

The court rejected the First Circuit's application of the *O'Brien* test.[133] The Tenth Circuit found *O'Brien*'s intermediate scrutiny inapt because the supermajority provision did not restrict expressive conduct comparable to burning a draft card.[134] Rather, the supermajority requirement imposed a "structural principle of government" that made it a taller task to realize certain outcomes—passing popular initiatives related to wildlife management.[135] Echoing other courts, the Tenth Circuit noted laws that reduce the *impact* of speech are markedly distinct from laws that burden the *ability* to speak.[136] The supermajority provision is the former in kind, while the First Amendment prohibits only the latter. After all, "The First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail."[137]

4. The Second Circuit

New York City voters, too, may enact new legislation by popular ballot initiative.[138] New Yorkers mobilized that power to impose a two-term limit on several of the City's public officials.[139] In 2008, then-Mayor Michael Bloomberg signed into effect an amendment to increase the term limit to three.[140] In *Molinari v. Bloomberg*, Molinari argued that the 2008 amendment violated the First Amendment because if City Council can amend legislation enacted by popular ballot initiative, then "voters in the City will be less likely to participate" in the initiative process.[141] Molinary posited that lower voter participation in the ballot initiative process amounts to less speech, therefore the Council's ability to amend the result of a popular initiative violated the First Amendment.

That syllogism was fatally flawed, according to the Second Circuit. The court endorsed the rationale adopted by the Tenth Circuit in *Initiative & Referendum Institution. v. Walker*; Molinary argued for the

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CONST. art. I, § 3, cl. 6, 7, the veto override clause, U.S. CONST. art. I, § 7, cl. 2, and the treaty clause, U.S. CONST. art. II, § 2, cl. 2. Those provisions make impeaching the president, overriding his veto, or consenting to his treaty harder to accomplish than, say, passing a bill through congress, which requires only a simple majority, U.S. CONST. art. I, § 7, cl. 2, but they are not subject to First Amendment challenges on that account.

133. *See Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005). .

134. *Initiative & Referendum Inst.*, 450 F.3d at 1102 (en banc).

135. *Id*.

136. *Id.* ("[T]he problem with protecting the impact on speech, instead of simply protecting speech, is that no one has a right under the First Amendment to be taken seriously.").

137. *Id.* at 1101.

138. Molinari v. Bloomberg, 564 F.3d 587, 591 (2d Cir. 2009).

139. *Id.*

140. *Id*.

141. *Id.* at 595.

right to be listened to, but the First Amendment ensures only his right to speak.[142] New York City voters may be less likely to participate in popular ballot initiatives, making those initiatives less likely to become law. All true, the court agreed, but allowing the City Council to amend a law enacted by popular initiative does not restrict anyone's ability to speak.[143] Molinari, after all, operated under "a state-created right not guaranteed by the U.S. Constitution."[144] The amendment, then, did not implicate the First Amendment.[145] Accordingly, the court expressly rejected Molinary's effort to apply the *Anderson-Burdick* balancing framework because the challenge did not implicate any associational right or restrict ballot access.[146]

5. The Seventh Circuit

In *Jones v. Markiewicz-Qualkinbush*, a mayoral candidate attempted to time-out his political adversary from the ballot by imposing a term limit that she had already surpassed.[147] To pursue his strategy, Jones resorted to the Illinois popular ballot referendum machinery.[148] But the State's "Rule of Three", which "limits to three the number of referenda on any ballot," thwarted Jones, as the maximum number of proposals were ahead of his in line.[149] Jones argued the Rule of Three prevented him from seeking support for his term-limit proposal in violation of the First Amendment.[150]

The Seventh Circuit rejected Jones' claim by reviewing the Rule for a rational basis.[151] The court's analysis explained that ballots are nonpublic forums and citizens have no constitutional right place an issue on the ballot.[152] It noted, The Supreme Court has confirmed that ballots are not "forums for political expression."[153] The court continued, *Meyer v. Grant* held "a state that does open the ballot cannot impose unconstitutional conditions," but the First Amendment by no means guarantees the right to bring initiatives to the voting ballot.[154] That

142. *Id.* at 599-600.
143. *Id.* at 601.
144. *Id.* at 597.
145. *Id.* at 601.
146. *Id.* at 605.
147. 892 F.3d 935, 936 (7th Cir. 2018) (Easterbrook, J.).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 938.
152. *Id.* at 937.
153. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997).
154. *Jones*, 892 F.3d 937-38.

brought the court to the applicable standard: "Because the Rule of Three does not distinguish by viewpoint or content," a rational basis is sufficient to sustain it.[155] The Rule was rationally related to the legitimate State interests in, for example, engendering civic engagement by ensuring the ballot does not get bogged down in the complexities of too many issues.[156] While three proposals at most is not a "magical" limit, "the benefit of *some* limit is plain," and therefore sufficient.[157]

III. DISCUSSION

The Constitution decentralizes governmental power horizontally across three federal branches, as well as vertically, between one national government and fifty sovereign States'. The Tenth Amendment, moreover, crystalizes the division of power between federal and State governments by "reserv[ing] to the Sates respectively," "[t]he powers not delegated to the United States by the Constitution."[158] And the Elections Clause of Article I specifically gives States initial control over the "Times, Places and Manner of holding Elections."[159] As a corollary, States have the power—indeed the constitutional command—to regulate and structure their own federal elections.[160]

States have no constitutional obligation to open their election ballots to citizen-led ballot initiatives. Put differently, the Constitution guarantees no citizen a right to place an initiative on the ballot.[161] Still, many States embrace direct democracy by providing an avenue to promulgate law by popular vote. If a State does provide a ballot initiative process, either by constitutional provision or statute, those laws that regulate mechanics of the ballot initiative process must comply with the Constitution. In particular, those laws must not abridge the freedom of speech guaranteed by the First Amendment, as made applicable to States through the Fourteenth Amendment.[162]

Some State ballot initiative laws have directly restricted political expression—like the Colorado laws struck down in *Meyer v. Grant* and *Buckley v. American Constitutional Law Foundation*. Others, meanwhile, regulate the process by which popular initiatives reach the

155. *Id.* at 938.

156. *Id*.

157. *Id*. (emphasis in original).

158. U.S. CONST. amend. X.

159. U.S. CONST. art. I, § 4, cl. 1.

160. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992).

161. Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 937 (7th Cir. 2018) (Easterbrook, J.) (collecting cases).

162. *See* Molinari v. Bloomberg, 564 F.3d 587, 597 (2d Cir. 2009) (citing Thornhill v. Alabama, 310 U.S. 88, 9 (1940)).

ballot. Part III explains why First Amendment challenges to laws that regulate "'the mechanics of the electoral process,' not speech," in a viewpoint-neutral manner should be subject at most to rational-basis review.[163] Both practical and principled reasons counsel testing challenges of this kind for a rational basis. First, a few distinctions warrant clarification.

A. Meaningful Distinctions

1. Tiers of Scrutiny[164]

Courts have devised three so-called tiers of review to adjudicate constitutional challenges: rational basis, intermediate scrutiny, and strict scrutiny.[165] The tiers of constitutional scrutiny grew from the Supreme Court's Equal Protection Clause jurisprudence; soon after, a Justice Frankfurter concurring opinion lobbied the Court to demand a more compelling state interest for a citizen to "forego . . . his political autonomy."[166] Beginning in the next Term, the Court resorted to the tiers of scrutiny in First Amendment challenges as a matter of course.[167]

A law reviewed for a rational basis is almost certain to be upheld, as it must only rationally relate to a legitimate government interest. Conversely, a law subject to strict scrutiny, the most exacting standard, seldom withstands a constitutional challenge.[168] Somewhere in the middle lies intermediate scrutiny. In applying intermediate scrutiny, courts determine whether the challenged law is substantially related to a sufficiently important government interest.

The tier of constitutional scrutiny applied to a challenged law often determines its fate. In the election law area, legitimate state interests are

163. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 207-08 (1999) (Thomas, J., concurring) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995)).

164. Though it exceeds the scope of this Comment, a rich debate persists in the academy over the propriety and wisdom of the Supreme Court's use of tiers of constitutional scrutiny. *See* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFF., no. 41, Fall 2019, at 72.

165. Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT LAW (Mar. 6, 2018), https://perma.cc/PLC4-SH9D.

166. Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring) (whether the New Hampshire Attorney General transgressed a citizen's First Amendment rights by compelling his response to questions); *See also* Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1408 (2016).

167. Speiser v. Randall, 357 U.S. 513, 529 (1958) ("The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech."). *Speiser* struck down the denial of a veterans' tax exemption for refusal to subscribe to pro-government oaths. *See also* United States v. O'Brien, 391 U.S. 367 (1968).

168. *See* Hon. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1394 n.40 (1995).

several—not least of which is the "interest in the orderly administration of elections," which, "preserv[es] the integrity of the election process, maintain[s] a stable political system, prevent[s] voter fraud, protect[s] public confidence, and reduc[es] administrative costs."[169] But intermediate scrutiny demands more than a legitimate interest; it requires courts to balance constitutional burdens against those interests. In so doing, courts look beyond a mere relation between interest and regulation and determine which interest tips the scale: the government's or the citizen's. It therefore requires courts to inject their own subjective measure of importance into the inquiry. Similarly, the *Anderson-Burdick* framework has been labeled "a quintessential balancing test."[170] In applying intermediate scrutiny or *Anderson-Burdick*, a judge may strike down a law even if it serves legitimate election regulation interests. Accordingly, intermediate scrutiny of State election laws invites freewheeling judicial discretion "[i]n sensitive policy-oriented cases."[171] In addition to often being outcome determinative, the tier of review courts apply fundamentally alters their analytic task: Rational-basis inquiries ask an objective, binary question about rational relation, whereas intermediate scrutiny weighs countervailing interests on a sliding, manipulable scale.

Bearing that in mind, the circuit conflict around the appropriate level of scrutiny to apply to First Amendment challenges to State ballot initiative laws creates disparate analyses of like challenges across jurisdictions. Such disparities are disfavored;[172] indeed, as Chief Justice Roberts intimated, "the Court is reasonably likely to grant certiorari to resolve the split."[173] If the Court does grant certiorari, State sovereignty counsels applying rational-basis review to allow States to administer orderly elections unencumbered by federal courts' balancing of interests.

2. Pinpointing the Circuit Conflict: Severity of the Burden

The Supreme Court has provided *some* clarity to ballot initiative

169. Mays v. LaRose, 951 F.3d 775, 784 (6th Cir.2020).

170. Daunt v. Benson, 956 F.3d 396, 424 (6th Cir. 2020) (internal quotation marks and citation omitted).

171. *Id.*; *Compare* Anderson v. Celebrezze, 460 U.S. 780, 806 (1983) ("[T]he burdens Ohio has placed on the voters' freedom of choice and freedom of association, . . . unquestionably outweigh the State's minimal interest in imposing a March deadline."), *with* Burdick v. Takushi, 504 U.S. 428, 441-42 (1992) ("We think that Hawaii's prohibition on write-in voting, . . . does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters.").

172. *See* SUP. CT. R. 10(a).

173. Little v. Reclaim Idaho, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay).

regulations such that the window for the circuit courts to diverge within is narrow. State regulations that directly restrain the total quantum of core political speech, for example, are subject to strict scrutiny under Supreme Court precedent.[174] The same is true of laws that severely burden speech, even if only incidentally. It stands to reason, then, "lesser burdens trigger less exacting review."[175] While *Meyer v. Grant* makes certain that regulations on ballot initiative *advocacy* warrant strict scrutiny, such regulations are distinct from "laws that determine the process by which [citizen-led] legislation is enacted."[176] Moreover, the Supreme Court has been reluctant to "identify any litmus test for measuring the severity of a burden that a state law imposes . . . ."[177]

The circuit conflict centers around laws that regulate the mechanics of the ballot initiative process, and do not incidentally impose a severe on speech. While "no bright line" separates "severe from lesser burdens,"[178] the circuit conflict does not hinge on that blurred line. The conflict arises after the court has determined that First Amendment burdens are *not* severe. Alas, when state ballot initiative laws regulate procedure but nevertheless impose an incidental, yet non-severe, burden on speech, the question of what standard of First-Amendment review courts should apply remains open. Therein lies the conflict: whether to apply rational-basis review or balance interests.

B. Why the Circuit Split?

A majority of the circuits have weighed in on the circuit conflict. Among them, most circuits apply rational-basis review to challenges to content-neutral ballot initiative provisions. That lax level of review makes sense for laws that regulate election mechanics. Speech is not directly silenced when a content-neutral regulation disqualifies an initiative from the ballot; those laws enable a State's fair and organized administration of elections, as prescribed by the Elections Clause. Furthermore, the Supreme Court endorsed that position in *Anderson*: "the State's important regulatory interests are generally sufficient to justify' the restrictions."[179] Yet other circuits disagree; instead they meet the same First Amendment challenges with intermediate scrutiny. Those

174. Meyer v. Grant, 486 U.S. 414, 420 (1988) ("We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny."); *See also* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999).

175. *Id.*

176. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1100 (10th Cir. 2006) (en banc).

177. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (plurality opinion).

178. *Buckley*, 525 U.S. at 206 (Thomas, J., concurring).

179. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

jurisdictions are more sensitive to incidental restrictions that ballot initiative provisions may impose on political speech.

Some circuit court decisions cannot be reconciled. The First Circuit in *Wirzburger* and the *en banc* Tenth Circuit in *Initiative & Referendum Institution v. Walker* both reviewed state constitutional provisions that made laws related to a given subject matter harder (Tenth Circuit) or impossible (First Circuit) to pass by popular ballot initiative. The difference was one in degree only; both lawsuits "raise[d] the same First Amendment issue."[180] Where the First Circuit applied the intermediate scrutiny standard of *O'Brien*, the Tenth Circuit expressly rejected that approach.[181] The First Circuit determined the Massachusetts provisions "eliminate a valuable avenue of expression about those subjects," thereby placing an incidental restriction on speech.[182] The Tenth Circuit said, "*O'Brien* applies [only] to laws that restrict expressive conduct, . . . not statutes that ma[ke] the expression less persuasive or less likely to produce results."[183] The court believed the provisions only had an incidental impact on the *effect* of speech, which is unprotected since no one has the right to legislate.[184]

The disparate approaches cannot be squared. The Tenth Circuit was more persuasive; it explained how the First Circuit relied on *Meyer v Grant* but stretched it beyond its context.[185] The regulation in *Meyer* unconstitutionally abridged core political speech because it limited the number of people—namely, circulators—who could convey a message. That is a far cry from "reducing speech because it makes particular speech less likely to succeed."[186] "There is no First Amendment right to place an initiative on the ballot."[187] Neither the Massachusetts nor Utah constitutional provisions burdened ballot-initiative advocacy, only process. Thus, a rational relation to the State's election maintenance interest should suffice.

The D.C. Circuit case, *Marijuana Policy Project*, illustrates the distinction. Recall that an amendment to the D.C. Home Rule Act made Congress, not the D.C. Council, the suitable legislative body to enact laws related to reducing the penalty for marijuana use.[188] A heightened-

180. *Initiative & Referendum Inst.*, 450 F.3d at 1102.

181. *Id.*

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

183. *Initiative & Referendum Inst.*, 450 F.3d at 1102.

184. Marijuana Policy Project v. United States, 304 F.3d 82, 85 (D.C. Cir. 2002) ("[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject.").

185. *Initiative & Referendum Inst.*, 450 F.3d at 1100.

186. *Id.*

187. Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012).

188. *Marijuana Policy Project*, 304 F.3d at 83.

scrutiny jurisdiction would conclude that the amendment sets legislative boundaries consistent with the legitimate interests and measure that interest against the incidental burdens on expression it produces. The argument advanced by the plaintiff goes: to remove a topic from the ambit of ballot initiative process is to quell speech on the topic. Not true. It merely removes one avenue to enact legislation. While "the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."[189] The Supreme Court has said, "[T]he function of the election process is 'to winnow out and finally reject all but the chosen candidates.'"[190] So too for ballot initiatives.[191] As such, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."[192] Judge Easterbrook stated the point eloquently: "the ballot is [not] a public forum."[193]

When state laws disqualify certain subject matters from the popular initiative process, proponents of that initiative remain free to lobby their representative lawmakers. But the First Amendment secures no right in popular ballot initiative voters to initiate specific laws.[194] Therefore, when a state or municipality excludes a subject—take as examples, religious funding in Massachusetts and marijuana penalties in Washington—from the ballot initiative process, that statute or constitutional provision should only need to pass rational-basis review. A Sovereign State, after all, is owed "appropriate deference to the policy decisions," it makes geared toward "structuring its government, including how it seeks to administer elections."[195] Any more exacting scrutiny would turn to reality the Supreme Court's admonishment against undermining State election operations by misattributing to election processes a generalized expressive function.[196]

Courts should not apply the *Anderson-Burdick* balancing framework to these laws, either. *Anderson-Burdick* balancing applies to free association challenges of election laws. A state law that regulates ballot initiative mechanics does not impede a voter's ability to associate with any candidate or initiative. The Sixth Circuit applied *Anderson-Burdick*

189. *Id.* at 85.

190. Burdick v. Takushi, 504 U.S. 428, 438 (1992) (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).

191. Meyer v. Grant, 486 U.S. 414, 426 (1988) (recognizing the state interest in "protecting the integrity of the initiative process").

192. *Burdick*, 504 U.S. at 438.

193. *Jones*, 892 F.3d at 937.

194. *See* Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1102 (10th Cir. 2006) (en banc).

195. *Daunt*, 956 F.3d at 426 (Readler, J., concurring) (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) and Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019)).

196. *See Marijuana Policy Project*, 304 F.3d at 85.

in *Schmitt v. LaRose*; it said, "we generally evaluate First Amendment challenges to state election regulations under the three-step *Anderson-Burdick* framework."[197] But that framework is not generally applicable. It applies to election laws that inhibit free association, such as Ohio's former early filing deadline for candidates.[198] Indeed, extending *Anderson-Burdick* beyond its boundaries has vaulted courts into exercises of "legal gymnastics."[199]

And, even if a content-neutral law "reduc[es] the total quantum of speech" *in effect* by disqualifying certain initiatives, thereby disincentivizing advocacy for that initiative,[200] it does not hinder one's ability to associate with the idea that petition supports. That is, a disincentive to advocate for a cause because it is not up for consideration on the ballot is not a *restriction* on advocacy or association in a First Amendment sense. Such a law does not inhibit one's ability, as guaranteed by the First Amendment, to associate with the idea embodied in a failed initiative. The Constitution does not include a "right to use the ballot box as a forum for advocating a policy."[201] The *Anderson-Burdick* framework, then, misfits the task of judicial review of content-neutral State ballot initiative regulations.[202]

The Second Circuit explained why the *Anderson-Burdick* framework is inapplicable to regulations of process. There must be "at least some burden on the voter-plaintiffs' [associational] rights."[203] State election-mechanics laws burden no associational right. New York's law, for example, allowed its City Council to amend a law enacted by popular ballot initiative; that law may thwart ballot initiative popularity, but it does not affect the right to speak or associate with an idea. *Anderson-Burdick*'s balancing framework imparts interest balacing when a State law burdens the right to associate. Rational-basis review is more appropriate for ballot initiative regulations that indiscriminately preserve orderly and fair elections.

Neither *Meyer v. Grant* nor *Anderson* and *Burdick* provide a rationale that applies to content neutral restrictions on ballot initiative processes.[204] Given states' weighty interest in administering orderly

197. Schmitt v. LaRose, 933 F.3d 628, 639 (6th Cir. 2019).

198. *See* Anderson v. Celebrezze, 460 U.S. 780, 782 (1983).

199. *Mays*, 951 F.3d at 783 n.4 (6th Cir. 2020) (Nalbandian, J.).

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

201. *Jones*, 892 F.3d at 937 (7th Cir. 2018) (Easterbrook, J.) (quoting Georges v. Carney, 691 F.2d 297, 300 (7th Cir. 1982)).

202. *See Daunt*, 956 F.3d at 425 (Readler, J., concurring) ("I am thus understandably reluctant to apply *Anderson-Burdick* even in resolving election disputes").

203. Molinari v. Bloomberg, 564 F.3d 587, 604 (2d Cir. 2009).

204. In *Crawford v. Marion County. Election Board*, Justice Scalia argued that *Burdick* controls laws respecting the right to vote, including those governing "voting process." 553 U.S. 181, 204 (2008)

elections, interest balancing should be off limits to laws that neither target core political speech nor severely burden speech as an incident to another election interest.

C. Federal Courts Should Not Balance State Election Interests

The Constitution strikes a delicate balance between national and State authority.[205] "[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes."[206] Several States maintain directly democratic systems that allow their voters to enact laws by popular ballot initiative. Popular initiative mechanisms "are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action."[207] States must administer their elections in an equitable and efficient manner. That prerogative applies no less to popular ballot initiative processes. Respect for the separation of powers counsels against the federal judiciary balancing whether a State's interest in election administration serves a sufficiently substantial governmental interest to justify incidental burdens on the First Amendment.[208] As Justice Scalia exclaimed, "[t]hat sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States."[209]

The reason "state judgments are best made by the States, not unelected federal judges," is deeply rooted in tradition and constitutional structure.[210] America's Founders fiddled with and ultimately discarded the idea of direct democracy. For, they feared the tyranny of the majority.[211] "Pure democrac[ies]," James Madison explained, are conducive to "the mischiefs of faction"; they invite "spectacles of

(plurality opinion) (Scalia, J., concurring in judgment). But Justice Scalia was advancing a "two-track approach" that is slightly different from what has come to be known as "*Anderson-Burdick* balancing." *Id.* In fact, Justice Scalia's concurrence disavowed "detailed judicial supervision of the election process." *Id.* at 208. In any event, *Burdick* does not control laws governing the mechanics of ballot initiatives.

205. *See* U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. amend X.

206. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2673 (2015); Solimine, *supra* note 2, at 679.

207. Doe v. Reed, 561 U.S. 186, 212 (2010) (Sotomayor, J., concurring).

208. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1103 (10th Cir. 2006) (en banc) ("We can imagine few tasks less appropriate to federal courts than deciding which state constitutional limitations serve "important governmental interests" and which do not.").

209. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in judgment) (citing the Elections Clause, U.S. CONST. art. I, § 4, cl. 1).

210. *Daunt*, 956 F.3d at 430 (Readler, J., concurring).

211. *See generally* THE FEDERALIST NO. 51 (James Madison).

turbulence and contention," and are "incompatible with personal security or the rights of property."[212] Those defects were antithetical to the anti-majoritarian system of government the Framers had devised in the summer of 1787. But nor did the Framers outlaw directly democratic forms of governance, so long as they were commensurate with the "guarantee" of "a Republican Form of Government."[213] Rather, the Constitution simply did not speak to citizen-led popular ballot initiatives.

The structure of the Constitution established "the dual-sovereign system" as a "foundational" precept of "our Republic."[214] And the Tenth Amendment enshrined the principle that the "the several States" retain "a residuary and inviolable sovereignty over" the powers not elsewhere enumerated in the Constitution.[215] Because the Constitution neither enumerated nor forbade it, "the right to propose initiatives is an exclusively state-created right that the First Amendment does not guarantee."[216] While, as always, "the Constitution provides a backstop,"[217] tradition counsels according "deference to the policy decisions of a sovereign state in structuring its government, including how it seeks to administer elections."[218] Under the limited form of government the Framers constituted—properly deferential to States' sovereignty where an enumerated right is not severely burdened—"[i]t is for state legislatures to weigh the costs and benefits of" provisions "to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden."[219] In other words, given a rational law free from severe First-Amendment burdens, the federal judiciary usurps its role by purporting to balance State election interests. Such a course necessarily imposes the unrestrained "exercise of judicial will," where instead the States are due deference.[220]

It is one thing to determine a law rationally relates to a legitimate State interest. It is quite different to determine whether that interest is

212. *See generally* THE FEDERALIST NO. 10 (James Madison).

213. U.S. CONST. art. IV, § 4 (Guarantee Clause).

214. *Daunt*, 956 F.3d at 428 (Readler, J., concurring) (citing Printz v. United States, 521 U.S. 898, 918 (1997)).

215. THE FEDERALIST NO. 39 (James Madison).

216. *Jones*, 892 F.3d at 937-38 (7th Cir. 2018) (Easterbrook, J.).

217. Thompson v. Dewine, 959 F.3d 804, 813 (6th Cir. 2020) (per curiam).

218. *Daunt*, 956 F.3d at 426 (Readler, J., concurring) (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 181 (2008) (plurality opinion); *See also id.* at 427 ("or whether the state practice hews more closely to traditional election mechanics, . . . we owe deference to the strong state interests at play, absent a clear constitutional command to the contrary").

219. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring in judgment).

220. June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in judgment) (quoting New Jersey v. T. L. O., 469 U. S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)).

weightier than the incidental burden it imposes on the First Amendment. Certainly, Article III judges are imminently qualified to discern the degree to which a regulation burdens free speech or expression.[221] Holding that constant, it is only half the judge's task when intermediate scrutiny is the standard of review—the judge must still balance State interests against that burden. On what basis might a judge adequately evaluate the magnitude of importance of a State's election administration interest? Justice Scalia likened such a task to attempting to "judg[e] whether a particular line is longer than a particular rock is heavy."[222] "Pretending" to "objectively assign weight to such imponderable values" as a State's constitutionally conferred election interests, Chief Justice Roberts remarked, "would require [federal judges] to act as legislators."[223]

There can be no doubt that thoughtful minds would differ: one judge (or panel) may side with the State interests, the next judge—from another jurisdiction—may just as well go the other way. That is so because "*Anderson-Burdick* leaves much to a judge's subjective determination."[224] As do all balancing tests that "rel[y] on a sliding scale to weigh the burden a law imposes against the corresponding state interests in imposing the law."[225] Such "judicial flexibility in picking winners and losers in sensitive disputes rarely furthers the interests of justice," and often invites "arbitrary results."[226]

Elected State officials, by contrast to federal judges, have intimate knowledge of State interests and are validated by and accountable to the electorate; they are better equipped to decide such policy considerations. When the law under review does not severely burden the First Amendment, federal courts should yield to State legislatures by applying rational-basis review. Yes, jettisoning balancing tests would sacrifice judicial "flexibility."[227] But where flexibility is absent, predictability, judicial restraint, and neutrality emerge—each attribute promotes legitimacy and allows States to govern under ascertainable, intelligible legal standards.[228] For the jurisdictions that have been led astray by

221. Indeed, courts are left to determine whether the reviewed law severely burdens speech, and if so, strict scrutiny is the applicable standard of review. *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 427 (1988).

222. *June Medical Services*, 140 S. Ct. at 2136 (2020) (Roberts, C.J., concurring in judgment) (quoting Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment)).

223. *Id.* (balancing State health regulation against Fourteenth Amendment liberty interest).

224. *Daunt*, 956 F.3d at 424 (Readler, J., concurring).

225. *Id.*

226. *Id.* at 425 (citation omitted).

227. Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016).

228. *Daunt*, 956 F.3d at 424-25 (Readler, J., concurring).

balancing tests, rational-basis review would restore objectivity and uniformity to judicial review of State ballot initiative regulations.

Take Utah's requirement that popular initiative laws related to wildlife management require a supermajority's support to illustrate the point. The State legislature amended the Utah Constitution in 1998 after the people of Utah voted in favor of the proposition imposing a supermajority requirement.[229] Utah's supermajority requirement aimed to prevent east coast special interest groups from controlling Utah's wildlife management.[230] The people substantiated that interest. What qualifies unaccountable judges to reevaluate that product of democracy? The same could be said of Nevada's All Districts Rule. Even though the Ninth Circuit concluded that Nevada's interests outweighed the alleged burden on expression, that policy determination was not properly left to a federal court. The Nevada Constitution already so determined.[231]

In *Buckley*, Justice O'Connor—a champion of federalism—inferred from *Burdick* that a regulation that "impos[es] only indirect and less substantial burdens on communication" "should be subject to review for reasonableness."[232] Indeed, *Burdick* says, "[t]he State has a legitimate interest in preventing these sorts of maneuvers, and the write-in voting ban is a reasonable way of accomplishing this goal."[233] A "reasonable way" of preventing a "legitimate interest" closely resembles the rational-relation requirement of rational-basis review. Justice O'Connor's formulation asks first whether the regulation in question targets communication or election mechanics. If communication is the target, then strict scrutiny applies under *Meyer v. Grant*. If the law regulates election mechanics, determine next whether it imposes a severe burden on speech. If not severe, a reasonable law will survive First Amendment review.[234]

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229. *Initiative & Referendum Inst*., 450 F.3d at 1086.

230. *Id.*

231. *See* NEV. CONST. art. 19, § 2.

232. Buckley v. Am. Constitutional Law Found., 525 U.S. 182,216 (1999) (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor's quote bears providing in full:

> Under the *Burdick* approach, the threshold inquiry is whether Colorado's regulations directly and substantially burden the one-on-one, communicative aspect of petition circulation or whether they primarily target the electoral process, imposing only indirect and less substantial burdens on communication. If the former, the regulation should be subject to strict scrutiny. If the latter, the regulation should be subject to review for reasonableness.

Id. Notwithstanding the intermediate scrutiny test that bears *Burdick*'s name, the *Burdick* Court arguably subjected Hawaii's write-in provisions to a less exacting standard of review that more resembles rational basis.

233. Burdick v. Takushi, 504 U.S. 428, 440 (1992).

234. *See also Mays*, 951 F.3d at 782 (6th Cir. 2020) (Nalbandian, J.) (internal quotation marks omitted) ("When States impose reasonable nondiscriminatory restrictions on the right to vote, courts

That formulation respects State election prerogatives, bearing in mind, "a State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[235] Judges are uniquely qualified to determine whether a law is reasonable; they are not so qualified, however, to qualify the importance of State election interests.

When judges review a First Amendment challenge for a rational relation to a State interest, they perform their essential role. But when a judge balances interests, as is often—but not here—necessary, they undermine State sovereignty. Courts superimpose their own subjective judgment of the importance of a State interest where the court owed the State deference. Interest balancing of content neutral State ballot initiative laws defies principles of federalism by allowing courts to second guess the work of State officials. The separation of powers, undergirded by the Elections Clause, demands otherwise.

IV. CONCLUSION

First principles embedded in the structure of the Constitution and judicial restraint should resolve the circuit conflict centered on the appropriate standard of review for First Amendment challenges to content-neutral State ballot initiative regulations. The Supreme Court flagged the issue in *Little v. Reclaim Idaho*, but has not issued binding precedent.[236] The District of Columbia, Second, Seventh, Eighth, and Tenth Circuits properly apply rational-basis review to gatekeeping laws that do not severely burden speech. The First, Sixth, and Ninth Circuits, however, aggrandize the judicial role by balancing State interests against First Amendment burdens, even when those burdens are not severe.

State election regulations of process demand deference of the federal judiciary. Intermediate scrutiny—where courts balance state election interests against constitutional burdens—tramples on State sovereignty. A three-part test would optimally resolve the circuit conflict.

A State regulation of its ballot initiative process is constitutional if it: (1) targets "the mechanics of the electoral process, not speech;"[237] (2) does not impose a severe burden on the First Amendment;[238] and (3)

apply rational basis review.").

235. *Buckley*, 525 U.S. at 206 (Thomas, J., concurring).

236. Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020).

237. *Id.* at 207-08 (Thomas, J., concurring) (internal quotation marks and citation omitted); *See* Molinari v. Bloomberg, 564 F.3d 587, 597 (2d Cir. 2009) (citing Thornhill v. Alabama, 310 U.S. 88, 9 (1940)).

238. *See Buckley*, 525 U.S. at 216 (O'Connor, J., concurring in the judgment in part and dissenting in part).

reasonably relates to a legitimate election interest.[239]

That test, derived from Justice O'Connor's partial concurrence in *Buckley*, adheres to Supreme Court precedent by asking two threshold questions—familiar questions of intent and impact. Finally, the reasonableness prong elevates State sovereignty by imparting an objective standard akin to rational-basis review.

239. *See Burdick*, 504 U.S. at 440.