

## NOTE

### CONDITIONS ON TAKING THE INITIATIVE: THE FIRST AMENDMENT IMPLICATIONS OF SUBJECT MATTER RESTRICTIONS ON BALLOT INITIATIVES

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*Nearly half of U.S. states offer a ballot initiative process that citizens may use to pass legislation or constitutional amendments by a popular vote. Some states, however, impose substantive restrictions on the types of initiatives citizens may submit to the ballot for a vote—precluding, for example, initiatives lowering drug penalties or initiatives related to religion. Circuit courts are split on whether and how such restrictions implicate the First Amendment.*

*This Note argues that—rather than limiting “expressive conduct” protected only minimally by the First Amendment, or limiting pure conduct that does not garner any First Amendment protection—subject matter restrictions on ballot initiatives constrain “core political speech” and so should receive strict First Amendment scrutiny. It asserts that the rationales underlying the First Amendment counsel for the recognition of initiatives as pure speech, and that ballot initiatives fit into the specific doctrinal category of “core political speech.”*

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#### INTRODUCTION

In several states, voters have the opportunity to make law directly through the use of the ballot initiative, a tool of “direct democracy.”<sup>1</sup> Citizens have registered their opinions at the ballot box to legislate collectively on issues such as bilingual education, gun control, abortion, cigarette taxes, physician-assisted suicide, and same-sex marriage.<sup>2</sup> But in some states that offer an initiative process, initiatives on certain topics are impeded by extra procedural requirements or are prohibited altogether. Utah, for example, subjects any ballot initiative affecting wildlife management (hunting) to a unique two-thirds majority requirement.<sup>3</sup> Massachusetts citizens may not put an initiative related to religion on the ballot;<sup>4</sup> citizens of the District of Columbia may not submit an initiative to decrease penalties for marijuana use.<sup>5</sup>

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1. Ballot initiatives can produce either statutes or constitutional amendments.

2. JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING 111–19* (1999); INITIATIVE & REFERENDUM INSTITUTE, *STATEWIDE INITIATIVES SINCE 1904–2000*, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904–2000.pdf> (last visited Feb. 14, 2009).

3. UTAH CONST. art. VI, § 1.

4. MASS. CONST. amend. art. XLVIII, pt.2, § 2.

5. *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002).

This Note considers whether and how restrictions on the subject matter of ballot initiatives implicate the First Amendment.<sup>6</sup> It addresses the question by examining the nature of the ballot initiative—meaning the actual appearance of an initiative on the ballot for a vote<sup>7</sup>—in relation to First Amendment theory and doctrine. Constraints on initiative subject matter could be construed as 1) direct restrictions on “core political speech” likely to be struck down; 2) restrictions on “expressive conduct” subject only to very relaxed First Amendment review, as the First Circuit has held; or 3) regulations on pure conduct that do not restrict First Amendment-protected expression at all, as the Eighth, Tenth, and D.C. Circuits have held.<sup>8</sup>

This Note argues that state-imposed restrictions on the subject matter of ballot initiatives do implicate the First Amendment, and, specifically, that they constrain “core political speech” and so should be subject to strict scrutiny.<sup>9</sup> Part I puts the issue in context, providing background on ballot initiatives, discussing subject matter restrictions, and describing the different conclusions courts have reached about the First Amendment implications of these restrictions. Part II applies broad First Amendment theory to ballot initiatives, asserting that the basic principles underlying the amendment suggest that it should protect ballot initiatives. This Part argues that the protection of ballot initiatives as speech is congruent with the fundamental aims of the First Amendment, given the amendment’s special focuses on political speech and self-governance, on exchanges occurring in the public sphere, and on maintaining a “marketplace” of ideas. Part III applies specific First Amendment case law to subject matter restrictions on ballot initiatives. It argues that such restrictions are appropriately characterized under current doctrine as limitations on “core political speech,” rather than as the type of neutral election regulations that are considered innocuous under the First

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6. The First Amendment implications of subject matter restrictions on ballot initiatives are particularly significant as both initiative use and subject matter restrictions increase. *See infra* notes 13, 39 and accompanying text.

7. In a Note entitled *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, J. Michael Connolly takes a different approach, evaluating the First Amendment implications of subject matter restrictions by considering the restrictions’ effect on the speech *surrounding* initiatives, including the petitioning process that citizens must undertake before submitting an initiative to the ballot. *See* J. Michael Connolly, Note, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 148–51 (2008).

8. *See infra* Section I.C. A court’s conclusion that subject matter restrictions implicate the First Amendment does not automatically mean they violate it. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803–04 (1984). In fact, the one circuit court that found that the First Amendment applied to subject matter restrictions on ballot initiatives upheld the restrictions. *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005). This Note concludes that subject matter restrictions on ballot initiatives should garner strict First Amendment scrutiny, but does not address whether they actually violate the First Amendment in any given instance, or consider exactly how the strict scrutiny standard should be applied.

9. Although none of the circuit courts have taken this approach, it has substantial support in the case law and First Amendment principles more generally.

Amendment—and so should be protected from government interference with their content.

I. BALLOT INITIATIVES, SUBJECT MATTER RESTRICTIONS, AND THE  
CIRCUIT SPLIT ON WHETHER AND HOW RESTRICTIONS  
IMPLICATE THE FIRST AMENDMENT

This Part provides background on how subject matter restrictions on ballot initiatives operate in order to frame the question of whether and how such restrictions implicate the First Amendment. Section I.A briefly explains the initiative process, the history behind the development of the initiative in the United States, and some benefits and drawbacks of initiative use. Section I.B describes subject matter restrictions, distinguishing substantive restrictions from procedural or structural limitations and outlining some of the motivations behind subject matter restrictions. Section I.C frames the legal question, laying out the conclusions and arguments of the courts in the circuit split.

A. *Ballot Initiatives*

Ballot initiatives allow citizens to submit a proposed statute or constitutional amendment to a popular vote for enactment, bypassing the legislature.<sup>10</sup> The ballot initiative arose in the western United States in the early 1900s, promoted by Populists who were disillusioned with representative democracy and believed direct democracy would increase citizen involvement in politics, make government more democratic, and circumvent the influence of special interests and money.<sup>11</sup> Currently, twenty-four states and the District of Columbia maintain ballot initiative procedures.<sup>12</sup>

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10. “Direct” initiatives send statutes or constitutional amendments directly to a popular vote for adoption, while “indirect” initiatives require the legislature’s approval before the citizens have the opportunity to pass them by popular vote. DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 35–36 (1984) [hereinafter *MAGLEBY, DIRECT LEGISLATION*]; Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47, 50–51 (1995). Other forms of direct democracy include the advisory initiative, which invites popular vote on an issue simply to demonstrate public opinion to the legislature, see Charles M. Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 246 (1975), and the referendum, in which a measure passed by the legislature requires subsequent approval by a popular vote in order to be enacted. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 14 (1995). In the United States, the initiative exists at the state and local levels, but not the federal level. Collins & Oesterle, *supra*, at 49–50. A federal ballot initiative process has been considered, but not implemented. See Magleby, *Let the Voters Decide?*, *supra*, at 17–18 & n.23. This Note considers subject matter restrictions on statewide direct initiatives, both statutory and constitutional.

11. See *MAGLEBY, DIRECT LEGISLATION*, *supra* note 10, at 20–25, 27–28; Collins & Oesterle, *supra* note 10, at 56; Dina E. Conlin, Note, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 SUFFOLK U. L. REV. 1087, 1090 (2004).

12. M. Dane Waters, *Introduction to THE BATTLE OVER CITIZEN LAWMAKING*, at xv (M. Dane Waters ed., 2001); INITIATIVE AND REFERENDUM INSTITUTE, STATE-BY-STATE LIST OF

Use of the process has increased over the last few decades and continues to rise.<sup>13</sup>

To place an initiative on the ballot, citizens must fulfill certain procedural requirements.<sup>14</sup> Generally, initiative proponents first must get the proposed statutory or constitutional text certified by the appropriate state official.<sup>15</sup> Proponents then have a limited period during which to collect a specified number of signatures by circulating petitions.<sup>16</sup> If enough of the collected signatures are validated by the clerk or registrar, the secretary of state will approve the initiative to appear on the ballot in the next election.<sup>17</sup> Some states explain the initiatives to voters through a mailed pamphlet or publication in the newspaper before the election.<sup>18</sup> If a majority of voters approves an initiative at the ballot, it will pass into law.

In the 2008 elections there were fifty-nine state initiatives on ballots across the country.<sup>19</sup> Initiatives approved by voters in 2008 included a ban on affirmative action in public institutions (Nebraska), an English-only requirement for government meetings involving public business (Missouri), same-sex marriage bans (California, Florida, and Arizona), the legalization of medicinal marijuana use (Michigan), and a prohibition on farms' confinement of egg-laying hens, calves raised for veal, and pregnant pigs (California).<sup>20</sup>

The ballot initiative has been touted for several benefits. In addition to countering the potential influence of special interests on legislators, initiatives can circumvent legislative gridlock.<sup>21</sup> Initiatives may also serve as a check on representatives, making them more responsive to their

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INITIATIVE AND REFERENDUM PROVISIONS, [http://www.iandrinstute.org/statewide\\_i&r.htm](http://www.iandrinstute.org/statewide_i&r.htm) (last visited Feb. 26, 2009).

13. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 25–27; Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 983–84, 995 (2001); Conlin, *supra* note 11, at 1088, 1093–94; Magleby, *Let the Voters Decide?*, *supra* note 10, at 17–18; David S. Broder, *Ballot Battle: Collecting Signatures for a Price*, WASH. POST, Apr. 12, 1998, at A1.

14. See MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 53–58; ZIMMERMAN, *supra* note 2, at 31–50.

15. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 54; ZIMMERMAN, *supra* note 2, at 31–33. This official can be the secretary of state, attorney general, or lieutenant governor. *Id.* at 31.

16. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 56; ZIMMERMAN, *supra* note 2, at 40. States impose varying restrictions on the petitioning process. ZIMMERMAN, *supra* note 2, at 40–42.

17. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 56; ZIMMERMAN, *supra* note 2, at 42–45.

18. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 56–58; ZIMMERMAN, *supra* note 2, at 45–47.

19. Jennie Drage Bowser, *Ballot Measures Preview 2008*, ST. LEGIS. MAG. Oct. 28, 2008, [http://www.ncsl.org/statevote/2008\\_ballot\\_update.htm](http://www.ncsl.org/statevote/2008_ballot_update.htm).

20. *Id.*

21. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 28; Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 431 (1998).

constituents.<sup>22</sup> Direct lawmaking can be especially influential in areas of legislation that involve a potential conflict of interest for legislators, such as campaign finance and lobbying rules, election regulations, term limits, and lawmakers' salaries.<sup>23</sup> Initiatives may also encourage public debate and improve voter turnout.<sup>24</sup>

On the other hand, criticisms—of both the procedure and its results—abound. Perhaps the biggest concern is the potential for money to drive the initiative process. The availability of the procedure has given rise to a full-fledged industry around the drafting of initiatives, circulation of petitions, and advertising;<sup>25</sup> the balance of financial resources often determines the results.<sup>26</sup> Ballot initiatives also lack what many think are positive features of decision making by a representative body: compromise,<sup>27</sup> the opportunity to refine and modify proposed legislation,<sup>28</sup> transparency and accountability,<sup>29</sup> the weighing of priorities across issues,<sup>30</sup> and the consideration of multiple alternatives before adopting a rule.<sup>31</sup> By displacing the legislature, lawmaking by initiative may also forego much consideration of legislation's long-term effects<sup>32</sup> and the benefits of checks like bicameralism and the executive

22. John B. Anderson & Nancy C. Ciampa, *Ballot Initiatives: Recommendations for Change*, FLA. BAR J., Apr. 1997, at 71; Frickey, *supra* note 21, at 431.

23. ZIMMERMAN, *supra* note 2, at 135–36; Collins, *supra* note 13, at 990.

24. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 28; ZIMMERMAN, *supra* note 2, at 136; Anderson & Ciampa, *supra* note 22, at 71.

25. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 76; Frickey, *supra* note 21, at 432–33; Broder, *supra* note 13. A related complaint is that out-of-state forces are increasingly driving initiative campaigns. See Ryan K. Manger, Note, *Buckley v. American Constitutional Law Foundation: Can the State Preserve Direct Democracy for the Citizen, Or Will It Be Consumed by the Special Interest Group?*, 19 ST. LOUIS U. PUB. L. REV. 177, 182 (2000); Jennie Drage Bowser, *Ballot Measure Results: A Bad Night for Many, A Great Night for a Few*, ST. LEGIS. MAG., Nov. 8, 2006, <http://www.ncsl.org/statevote/06ballotmeasures.htm>.

26. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 29; Anderson & Ciampa, *supra* note 22, at 72–73; Collins, *supra* note 13, at 998. This is ironic given that ballot initiatives were originally expected to skirt the influence of money on lawmaking. See Collins & Oesterle, *supra* note 10, at 56.

27. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 29–30, 184; Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1739 (1998); Elizabeth R. Leong, Note, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677, 689–90 (1997).

28. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 184, 186; Collins & Oesterle, *supra* note 10, at 77; Linde, *supra* note 27, at 1739.

29. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 188; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1553 (1990); Frickey, *supra* note 21, at 441; Linde, *supra* note 27, at 1744.

30. Sherman J. Clark, Commentary, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 436 (1998).

31. K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1185 (1995) (“Ballot initiatives provide voters with a simple yes-or-no choice to respond to issues that have myriad approaches.”).

32. See MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 187.

veto.<sup>33</sup> In addition, popular decision making may not be adequate for more complicated legislative issues.<sup>34</sup> Related to this, a ballot listing multiple initiatives can seem overwhelmingly complex,<sup>35</sup> perhaps deterring voter participation.<sup>36</sup> Finally, laws passed by ballot initiatives are often harmful to minorities.<sup>37</sup> Although many of these concerns are valid—indeed, compelling—this Note does not address the propriety of ballot initiatives themselves, but rather the constitutionality of subject matter restrictions on them, given initiatives' existence.

### B. Subject Matter Restrictions

Some of the states that invite ballot initiatives will not allow initiatives on just any issue, and so limit what types of laws or amendments citizens may bring to a vote independently of the legislature.<sup>38</sup> These subject matter restrictions are on the rise,<sup>39</sup> and may become even more popular in the future as legislatures react to the sometimes undesirable effects of initiatives.<sup>40</sup> Currently, thirteen of the states with ballot initiatives either exclude particular subjects from the process altogether or impose unique burdens on initiatives regarding certain subjects.<sup>41</sup> A common obstacle is a supermajority requirement, like the one Utah applies to initiatives on hunting.<sup>42</sup> Although heightened requirements for initiatives on certain subjects do not technically preclude initiatives on those subjects, they often amount to (and are designed to be) “de facto” exclusions.<sup>43</sup> This Note's analysis will not distinguish between total exclusions and heightened procedural requirements.

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33. Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 735 (1994).

34. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 29, 197–98.

35. Eule, *supra* note 29, at 1516–17; Magleby, *Let the Voters Decide?*, *supra* note 10, at 19.

36. MAGLEBY, DIRECT LEGISLATION, *supra* note 10, at 197–98; DuVivier, *supra* note 31, at 1194; *see also* ZIMMERMAN, *supra* note 2, at 143.

37. Collins, *supra* note 13, at 985, 989; Stanley H. Friedelbaum, *Initiative and Referendum: The Trials of Direct Democracy*, 70 ALB. L. REV. 1003, 1017 (2007); Leong, *supra* note 27. For example, past initiatives have targeted gays and lesbians, religious minorities, and racial minorities. Collins, *supra* note 13, at 989; *see also supra* note 20 and accompanying text.

38. Magleby, *Let the Voters Decide?*, *supra* note 10, at 25.

39. John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1439 (2007).

40. *See* Steve C. Briggs, Op-Ed., *Colorado's Constitutional Contradictions: Initiative Process Runs Amok*, DENVER POST, Apr. 6, 2003, at E1; *supra* notes 25–37 and accompanying text.

41. ZIMMERMAN, *supra* note 2, at 29. The states with subject matter restrictions are Alaska, California, Illinois, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, South Dakota, and Wyoming. *Id.* The District of Columbia's ballot initiative process is also subject to restrictions on initiative content. *See supra* note 5 and accompanying text.

42. *See* UTAH CONST. art VI, § 1.

43. Gildersleeve, *supra* note 39, at 1469; *see infra* notes 55–57 and accompanying text.

Limitations on initiatives' subject matter fall into two broad categories.<sup>44</sup> Some restrictions simply preclude initiatives that concern the procedures or structure of government. For example, some states exclude initiatives affecting the judiciary in certain ways,<sup>45</sup> initiatives regarding taxation or appropriations,<sup>46</sup> or initiatives that would create separate laws for different geographic areas within the state.<sup>47</sup> Other restrictions are more topical, precluding initiatives on specific policy matters external to the functioning of government—for example, religion,<sup>48</sup> pensions for public employees,<sup>49</sup> or the right to work.<sup>50</sup> This Note is concerned with the second category—limitations on the substantive policy areas that may compose the subject of a ballot initiative. It will not address restrictions that immunize the structure and procedures of government from the ballot initiative process.<sup>51</sup> These restrictions may also have First Amendment ramifications, but probably implicate First Amendment concerns less directly than the substantive restrictions do.

While procedural and structural subject matter restrictions are often best explained by a desire to insulate the prescribed functions and roles of government entities from popular control,<sup>52</sup> substantive restrictions are frequently driven by legislative aversion to a specific outcome.<sup>53</sup> The

44. See Linde, *supra* note 27, at 1755 (“[We] must distinguish initiatives that entrench ordinary laws beyond legislative change from initiatives that alter the structure of government itself.”); Gildersleeve, *supra* note 39, at 1439, 1450–55. For a comprehensive list of subject matter exclusions (but not supermajority requirements), see NATIONAL CONFERENCE OF STATE LEGISLATURES, INITIATIVE SUBJECT RESTRICTIONS (Aug. 3, 2006), <http://www.ncsl.org/programs/legismgt/elect/SubRestrict.htm>.

45. MASS. CONST. amend. art. XLVIII, pt. 2, § 2; PHILIP L. DUBOIS & FLOYD FEENEY, LAW-MAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 82 (1998); ZIMMERMAN, *supra* note 2, at 29–30.

46. DUBOIS & FEENEY, *supra* note 45, at 83; ZIMMERMAN, *supra* note 2, at 29–30.

47. MASS. CONST. amend. art. XLVIII, pt. 2, § 2.

48. *Id.*

49. MISS. CONST. art. XV, § 273, subsec. 5.

50. *Id.*

51. A few other types of restrictions affect ballot initiatives' subject matter, but also fall outside the scope of this Note. One is restrictions on initiatives that would not legitimately constitute a statute or constitutional amendment. *Foster v. Clark*, 790 P.2d 1 (Or. 1990) (invalidating ballot initiative when content was administrative and not legislative); DUBOIS & FEENEY, *supra* note 45, at 81 (highlighting bans on initiatives proposing legislation that the legislature itself would not be permitted to adopt). Another is review of ballot initiatives (either pre- or post-election) for constitutionality. See Friedelbaum, *supra* note 37, at 1010–25. Review of initiatives' constitutionality may also implicate speech interests, a question raised in *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996). Other types of restrictions not addressed by this Note are single-subject requirements and initiatives that have already appeared on the ballot but failed. See, e.g., DUBOIS & FEENEY, *supra* note 45, at 81–82.

52. See Gildersleeve, *supra* note 39, at 1456.

53. See Connolly, *supra* note 7, at 153–56; Gildersleeve, *supra* note 39, at 1453–55; *infra* notes 54–61 and accompanying text (discussing the motivations behind the District of Columbia, Utah, and Massachusetts subject matter restrictions). This is a general observation, not an absolute rule. Substantive restrictions may also sometimes be motivated by relatively neutral policy concerns about leaving law on a certain subject to the mercy of the initiative process. Arkansas, for example,

legislative history of the District of Columbia's prohibition on initiatives that would lower drug penalties, for instance, reveals that this substantive exclusion was the direct result of the legislature's policy preference at the time it was enacted. A sponsor of the exclusion stated in floor debate that "[w]e are sure as heck not going to make it legal to do drugs in the District of Columbia."<sup>54</sup> Utah's supermajority requirement for initiatives on wildlife management—despite applying to initiatives both restricting and promoting hunting—was also “baldly partisan,” driven by the policy predilections of the legislature that implemented it.<sup>55</sup> Legislators feared that environmentalists from the northeast planned to bring an initiative limiting bear and cougar hunting,<sup>56</sup> and as the Utah Senate sponsor of the supermajority requirement stated in floor debate, the rule's purpose was “definitely [to] discourage anyone from putting anti-hunting and anti-fishing regulations on the ballot.”<sup>57</sup> Similarly, Massachusetts's subject matter restrictions—banning initiatives related to religion or that would change a constitutional provision that precludes government funding for private schools—grew out of the state legislature's aversion to supporting Catholic schools.<sup>58</sup> At the time the exclusion was enacted, public schools were effectively Protestant and the legislature sought to prevent citizens from securing funding for competing Catholic schools.<sup>59</sup> The school-funding restriction was enacted four days after a Catholic newspaper published an editorial encouraging Catholics to

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cited a desire for stability in alcohol distribution to explain its heightened signature requirement for an initiative changing a wet county to a dry one or vice versa (requiring thirty-eight percent of registered voters to sign, compared to fifteen percent for other initiatives). *Wellwood v. Johnson ex rel. Bryant*, 172 F.3d 1007, 1010–11 (8th Cir. 1999). And it may be the case that some procedural or structural subject matter restrictions were initially passed to avoid a specific anticipated outcome opposed by that particular legislature.

Neither is intent a determinative factor in this Note's First Amendment analysis. J. Michael Connolly hinges the First Amendment significance of subject matter restrictions on the motivations of the legislature enacting the restrictions. Connolly, *supra* note 7. According to Connolly, if a restriction is intended to prevent specific electoral results, it is viewpoint based and should receive strict scrutiny; other subject matter restrictions are simply content based and so should receive intermediate scrutiny. *Id.* at 131–32, 151–53. Distinguishing among restrictions based on the legislature's motivations is problematic, however. Courts may often be guessing about legislative intent. Justice Scalia has suggested that “it is virtually impossible to determine the singular ‘motive’ of a collective legislative body,” and that the First Amendment, by its terms, is concerned with the effects of laws, rather than the motivations behind them. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment). This Note describes the intent behind subject matter restrictions mainly for the sake of background, and its analysis does not distinguish among substantive subject matter restrictions based on the original intent of the legislature that adopted them.

54. 145 CONG. REC. H10086 (1999). Other legislative supporters emphasized that allowing initiatives decreasing drug penalties would make the city “a drug haven,” *id.*, and disparaged drug users, asserting that “drug addiction is an illness of the soul as much as the body.” *Id.* at H10083.

55. Gildersleeve, *supra* note 39, at 1449–63.

56. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1085–86 (10th Cir. 2006).

57. *Petition for Writ of Certiorari* at 3, *Initiative & Referendum Inst. v. Herbert*, 2006 U.S. Briefs 89717 (No. 06-534) (internal quotation marks omitted).

58. *Brief Amicus Curiae of the Institute for Justice in Support of Petition for Writ of Certiorari* at 10, 15, *Wirzburger v. Galvin*, 2005 U.S. Briefs 519B (No. 05-519).

59. *Id.* at 4–6.

attempt to remove the private-school funding ban, presumably through the initiative process.<sup>60</sup> And the sponsor of the general religious exclusion argued at the 1917–18 state constitutional convention that the provision “was necessary to protect the initiative and referendum against the religious fanatics.”<sup>61</sup>

### C. Circuit Split on First Amendment Implications

When federal circuit courts began to consider whether and how subject matter restrictions on ballot initiatives implicated the First Amendment, the most relevant Supreme Court case law involved the First Amendment significance of restrictions on those circulating initiative petitions.<sup>62</sup> In *Meyer v. Grant*, the Court struck down a prohibition on paying individuals to circulate petitions, finding that it restricted “core political speech.”<sup>63</sup> In *Buckley v. American Constitutional Law Foundation*, the Court used the same theory to strike down requirements that circulators be registered voters, wear name-tags, and report their names, addresses, and payment.<sup>64</sup> These two cases considered what protection the First Amendment affords the speech surrounding the initiative process (not the protection the First Amendment might provide for an actual initiative on the ballot). Against the backdrop of these two cases, four circuit courts have addressed the First Amendment significance of subject matter restrictions on ballot initiatives.

There are various ways in which the First Amendment could apply to subject matter restrictions, each with corresponding ramifications for the level of scrutiny judges would apply in a First Amendment challenge.<sup>65</sup> First,

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60. Petition for Writ of Certiorari at 11, *Wirzburger v. Galvin*, 2005 U.S. Briefs 519B (No. 05-519).

61. *Id.* at 10 (internal quotations omitted). *But cf.* *Wirzburger v. Galvin*, 412 F.3d 271, 285 (1st Cir. 2005) (“No evidence has been offered that the exclusion was motivated by the same Anti-Catholic animus that impelled the passage of the original Anti-Aid Amendment.”).

62. Initiative proponents must collect a certain number of signatures in order to be able to submit an initiative to the ballot. *See supra* notes 16–17 and accompanying text.

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

64. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999).

65. This Note evaluates subject matter restrictions as potential restrictions on the freedom of speech, rather than as restrictions on the freedom to associate or to petition the government, although these rights might be implicated as well. *See Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999); *Biddulph v. Mortham*, 89 F.3d 1491, 1496–97, 1500 n.10 (11th Cir. 1996); *Delgado v. Smith*, 861 F.2d 1489, 1495 (11th Cir. 1988), *cert. denied*, 492 U.S. 918 (1989); *Initiative & Referendum Inst. v. Walker*, 161 F. Supp. 2d 1307, 1309 (D. Utah 2001). Courts have also considered the constitutionality of subject matter restrictions on ballot initiatives without regard to the First Amendment. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969) (evaluating initiative restrictions with a differential impact on minorities under the Equal Protection Clause of the Fourteenth Amendment). This Note, like the cases in the circuit split described below, addresses the First Amendment rights of initiative *proponents*, though the restrictions may also implicate voters’ right to receive the information (and to potentially be able to vote on it). *See* Petition for Writ of Certiorari at 21, *Initiative & Referendum Inst. v. Herbert*, 2006 U.S. Briefs 89717 (No. 06-534) (“The Court should grant certiorari [in part] to . . . clarify the extent to which voting is a form of political expression protected by the First Amendment.”); C. Edwin Baker, *Scope of the First Amendment*

subject matter restrictions might implicate the First Amendment by directly limiting “core political speech,” as this Note argues. “Core political speech,” described by the Court as “interactive communication concerning political change,”<sup>66</sup> is a subcategory of the speech (as opposed to “expressive conduct”) protected by the First Amendment. Government restrictions on “core political speech” are subject to strict scrutiny, and will survive only if they are supported by a compelling government interest and burden constitutional rights no more than necessary to achieve that interest.<sup>67</sup> No circuit has held that subject matter restrictions on ballot initiatives limit “core political speech.”<sup>68</sup>

Second, restrictions might be construed as limiting “expressive conduct,” as the First Circuit has held. “Expressive conduct” is activity that includes both expressive and pure conduct elements.<sup>69</sup> Such activity receives limited First Amendment protection.<sup>70</sup> Interpreted as limitations on “expressive conduct,” subject matter restrictions would be subject to intermediate scrutiny under *United States v. O’Brien*, meaning they will survive only if they are within the constitutional power of the government, further a substantial government interest unrelated to the suppression of speech, and are narrowly tailored to meeting that interest.<sup>71</sup> In *Wirzburger v. Galvin*, the First Circuit found that Massachusetts’s exclusion of initiatives related to religion or overturning the state’s ban on government funding for private schools limited “expressive conduct.”<sup>72</sup> Applying the *O’Brien* test, the court upheld the restrictions, easily deeming them no more restrictive than necessary to guard the state’s substantial asserted interest in protecting its citizens’

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*Freedom of Speech*, 25 UCLA L. REV. 964, 1006 (1978); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 464 (1980).

66. *Meyer*, 486 U.S. at 422.

67. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

68. A few courts have suggested that ballot initiatives are “core political speech,” or that content-based restrictions on them should be subject to strict scrutiny, but in cases that did not involve subject matter restrictions. See *Biddulph*, 89 F.3d at 1500 (upholding Florida’s requirements that ballot initiatives be confined to a single subject and have a clear title); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (rejecting initiative proponents’ claim that Michigan’s disqualification of many of the signatures they had collected violated their First and Fourteenth Amendment rights); *Wyman v. Sec’y of State*, 625 A.2d 307, 311 (Me. 1993) (finding that the secretary of state violated an initiative proponent’s First Amendment rights when he refused to furnish initiative petition forms because he personally believed the proposed legislation was unconstitutional).

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

70. See *id.* at 377.

71. *Id.* Another possibility is that the restrictions limit speech in a public forum and so trigger public-forum analysis. However, the Seventh Circuit has stated, in the context of advisory ballot questions, that the ballot is not a traditional public forum. *Protect Marriage III. v. Orr*, 463 F.3d 604, 606 (7th Cir. 2006); see also *Marijuana Policy Project v. United States*, 304 F.3d 82, 86–87 (D.C. Cir. 2002) (concluding that ballot initiative voting is not a public forum).

72. 412 F.3d 271, 274–75 (1st Cir. 2005).

religious freedom.<sup>73</sup> Restrictions on “expressive conduct” are overwhelmingly likely to be upheld.

Third, subject matter restrictions might not affect any expression protected by the First Amendment, and so would fail to trigger any First Amendment review at all, as the Eighth, Tenth, and D.C. Circuits have held. In *Wellwood v. Johnson ex rel Bryant*, the Eighth Circuit held that Arkansas’s elevated signature requirement for submitting a ballot initiative to change a “dry” county to a “wet” one or vice versa did not implicate the First Amendment.<sup>74</sup> Three years later, in *Marijuana Policy Project v. United States*, the D.C. Circuit declined to apply any First Amendment review to a prohibition on initiatives that would lower drug penalties in the District of Columbia.<sup>75</sup> In *Initiative and Referendum Institute v. Walker*, the Tenth Circuit found that Utah’s special two-thirds majority requirement for ballot initiatives related to hunting burdened neither “core political speech” nor “expressive conduct” and so warranted no First Amendment review.<sup>76</sup>

The circuit courts asserted several reasons (though not all were asserted by every circuit) for their conclusions that subject matter restrictions on ballot initiatives implicate the First Amendment only minimally (First Circuit), or not at all (Eighth, Tenth, and D.C. Circuits). First, they maintained that subject matter restrictions do not actually affect advocates’ ability to promulgate a message. The Eighth Circuit, for example, stated that Arkansas’s differential signature requirements, despite making it harder to get a certain type of initiative on the ballot, did not interfere with initiative proponents’ general ability to “make their views heard.”<sup>77</sup> The D.C. Circuit emphasized that citizens wishing to decrease marijuana penalties “remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties.”<sup>78</sup> The Eighth, Tenth, and D.C. Circuits maintained that any political expression ballot initiatives involve is connected to the petitioning process addressed in *Meyer* and *ACLF*, rather than an initiative’s

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73. *Id.* at 279.

74. 172 F.3d 1007, 1009–10 (8th Cir. 1999).

75. 304 F.3d at 83. This restriction took a different form from most subject matter restrictions, resulting from a rider to the District of Columbia appropriations act in which Congress prohibited the D.C. Council from implementing any law reducing marijuana penalties. *Id.* Because the Council maintains a ballot initiative process as part of its legislative authority, the rider had the effect of excluding initiatives that would reduce marijuana penalties in the District of Columbia. *See id.* at 82–85.

76. 450 F.3d 1082, 1085, 1098–99 (10th Cir. 2006). The plaintiffs also claimed that the restrictions amounted to impermissible content discrimination or overbreadth under the First Amendment, but the court rejected these contentions summarily because their success would require that the restrictions affect protected speech or expression. *Id.* at 1103–05.

77. *Wellwood*, 172 F.3d at 1009.

78. *Marijuana Policy Project*, 304 F.3d at 85. This reasoning seems a bit distorted, since the court was purportedly determining whether use of the initiative process itself is a First Amendment-protected activity. *See id.* at 86 (“[A] ballot initiative could be used to increase marijuana penalties, but opponents, including the MPP, may utilize all of their First Amendment-protected tools to resist such efforts.”).

ability to appear on the ballot.<sup>79</sup> The D.C. and Tenth Circuits denied that *Meyer* and *ACLF* might bear on the constitutionality of subject matter restrictions, emphasizing that these cases addressed limitations on petition circulators rather than prohibitions on initiatives on certain subjects.<sup>80</sup> The Tenth Circuit stressed that subject matter restrictions affect the speech *surrounding* the initiative process only incidentally.<sup>81</sup>

Second, circuit courts concluding that subject matter restrictions warrant no First Amendment review framed the restrictions as structural features of government, contrasting them with regulations on speech. This was particularly central in *Marijuana Policy Project*, where the court explained that the subject matter restriction simply required proponents to appeal to Congress instead of using D.C.'s initiative process.<sup>82</sup> The Tenth Circuit also characterized Utah's supermajority requirement for wildlife management initiatives as a structural provision, likening it to the supermajority requirements that apply to certain legislation enacted by state legislatures.<sup>83</sup>

Finally, the First, Tenth, and D.C. Circuits emphasized that subject matter restrictions affected the ability to *legislate* more than the ability to *advocate*, distinguishing firmly between the results of expression and expression itself.<sup>84</sup> The D.C. and First Circuits argued that, although the First Amendment protects legislative advocacy, it “confers no right to legislate on a particular subject.”<sup>85</sup> The Tenth Circuit found that the passage of an initiative lacks the expressive element that would be present in the type of “expressive conduct” envisioned by the *O'Brien* jurisprudence.<sup>86</sup> And even the First Circuit focused on the fact that subject matter restrictions target an effect independent of speech—the resulting legislation—in holding that ballot initiatives are “expressive conduct” rather than “core political speech.”<sup>87</sup> It noted that initiatives involve both speech and nonspeech elements, and that the exclusions targeted “the *act* of generating laws and constitutional

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79. See *Walker*, 450 F.3d at 1099–1100; *Marijuana Policy Project*, 304 F.3d at 86; *Wellwood*, 172 F.3d at 1009.

80. *Walker*, 450 F.3d at 1099–1100; *Marijuana Policy Project*, 304 F.3d at 86.

81. *Walker*, 450 F.3d at 1100. The Tenth Circuit had also made this argument in *Skrzypczak v. Kauger*, where the plaintiff challenged the Oklahoma Supreme Court's determination that an initiative on abortion could not be placed on the ballot because the proposal was unconstitutional. 92 F.3d 1050, 1051, 1053 (10th Cir. 1996). The plaintiff remained free to advocate against abortion and had no First Amendment right to have any particular proposition on the ballot, the court said. *Id.* at 1053. (The opinion focused on standing but has generally been viewed as a decision on the merits. *Walker*, 450 F.3d at 1094.)

82. 304 F.3d at 85–86.

83. *Walker*, 450 F.3d at 1100–01.

84. *Walker*, 450 F.3d at 1099; *Wirzburger v. Galvin*, 412 F.3d 271, 277 (1st Cir. 2005); *Marijuana Policy Project*, 304 F.3d at 85.

85. *Wirzburger*, 412 F.3d at 277; *Marijuana Policy Project*, 304 F.3d at 85.

86. *Walker*, 450 F.3d at 1102.

87. *Wirzburger*, 412 F.3d at 275–76.

amendments,” only incidentally restricting speech.<sup>88</sup> The First Circuit did recognize an expressive aspect to the initiative process, stating that it “provides a uniquely provocative and effective method of spurring public debate on an issue of importance to the proponents of the proposed initiative.”<sup>89</sup> However, it also shared the concerns of the other three circuits and so applied only intermediate First Amendment review.

## II. THE PURPOSES UNDERLYING THE FIRST AMENDMENT SUPPORT THE RECOGNITION OF BALLOT INITIATIVES AS PROTECTED SPEECH

This Part argues that analyzing the ballot initiative instrument as pure speech, the approach that no circuit court has adopted, is consistent with the principles that underlie the First Amendment. Section II.A establishes that the First Amendment aim of protecting speech regarding political change and facilitating self-governance makes it particularly appropriate to apply the First Amendment to subject matter restrictions on ballot initiatives. Section II.B asserts that use of the ballot initiative is relevantly analogous to face-to-face discussion in the “public sphere,” the intended locus of First Amendment protection. Section II.C contends that the unrestricted operation of the ballot initiative process is the type of interchange envisioned by the “marketplace of ideas” model that has permeated First Amendment doctrine and scholarship. This Section advocates for an unregulated model of the marketplace of ideas, and emphasizes that insulating ballot initiatives from restrictions on their subject matter is consistent with that ideal.

### A. Ballot Initiative Procedures Implicate Primary Objects of First Amendment Protection

Ballot initiatives’ aims of achieving political change and facilitating self-government, combined with their expressive nature,<sup>90</sup> put them within the sphere of activities the First Amendment was designed to protect. There is some consensus that the amendment serves primarily to protect expression promoting political change. The Supreme Court has emphasized this purpose, stating, for example, in *Roth v. United States* that “[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>91</sup> The ballot initiative instrument, which enables citizens to enact a

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88. *Id.* at 277–79; *see also id.* at 277 (“While [the exclusions] eliminate a valuable avenue of expression about those subjects, the speech restriction is no more than an unintended side-effect of the exclusions.”).

89. *Id.* at 276.

90. *See infra* Section III.C.1–2.

91. 354 U.S. 476, 484 (1957); *see also* *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional

new statute or constitutional amendment independently of the legislature, is obviously intended to bring about political change.

Ballot initiatives also directly further self-government,<sup>92</sup> which aligns them especially closely with the purposes of the First Amendment. Scholars and courts have frequently stated that a central goal of the Constitution's protection of expression is the success of self-government. Free-speech scholar Alexander Meiklejohn, for example, notes that the First Amendment serves to ensure the free flow of information so that citizens can determine the direction of government without interference.<sup>93</sup> The Supreme Court, too, has embraced the capacity to self-govern as a First Amendment value, emphasizing, for instance, that speech about government is especially worthy of protection because it goes beyond simple self-expression and is "the essence of self-government."<sup>94</sup> Speech is plainly more than self-expression in the context of ballot initiatives, where its immediate object is to accomplish legal changes driven by citizens.<sup>95</sup>

### B. Ballot Initiatives Are Analogous to Face-to-Face Discussion in the "Public Sphere"

The political discussion privileged by the First Amendment typically involves ad hoc conversations among private citizens "on the ground."<sup>96</sup> These informal exchanges in the "public sphere" are thought to foster "government by discussion" or "deliberative democracy."<sup>97</sup> The First Amendment is

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system."). Scholars have echoed this view. *See, e.g.*, ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 9–28 (1960); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592 (1982).

92. The mechanism ballot initiatives provide for citizens to propose legislative or constitutional changes and potentially pass them into law make them a tool of self-governance. *See* Collins & Oesterle, *supra* note 10, at 56.

93. MEIKLEJOHN, *supra* note 91, at 75 ("The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them. Under the compact on which the Constitution rests, it is agreed that men shall not be governed by others, that they shall govern themselves."). Some scholars also describe the First Amendment as fostering "collective self-determination." *See, e.g.*, Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587, 2591 (2007).

94. *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

95. *See supra* text accompanying note 10. Ballot initiatives' self-governing aspect also magnifies their communicative impact. As the First Circuit stated in *Wirzburger*, "[t]he 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." *Wirzburger v. Galvin*, 412 F.3d 271, 277 (1st Cir. 2005).

96. *See Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

97. William Marshall, *Free Speech and the "Problem" of Democracy*, 89 *NW. U. L. REV.* 191, 194–95 (1994) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

intended, in part, to “protect from [government] regulation the communicative processes of ‘private’ citizens deemed necessary for self-governance.”<sup>98</sup>

Ballot initiatives, although they occur within—or at least are structured by—an “official” government framework, rather than a grassroots setting, and despite their departure from face-to-face discussion, should be protected on the same level as informal political speech occurring in the “public sphere.” Ballot initiatives are a natural extension of this informal political communication. Casual discussion of political views develops into exchanges about the content and form of an initiative, into the circulation of petitions, into communication through media, and finally, into the presence of an initiative on the ballot.<sup>99</sup> It is incongruous for the government to steadfastly insulate the first phase of communication because it wants to promote independent self-governance, but to foreclose political communication categorically by subject once it starts to actually bring about self-governance. Citizens of the District of Columbia, for example, may speak, write, and debate all they want about lowering drug penalties, protected by the First Amendment, but may not propose this idea in the ballot initiative setting.

The First Amendment protects informal discussions among citizens in order to prevent the government from suppressing ideas developed to promote political change—but the government does just that when it excludes certain subjects from the ballot initiative process. The traditional conception of political speech occurring among private individuals in informal settings should not preclude the recognition of ballot initiatives as protected speech. The rationales motivating the protection of face-to-face political communication in the public sphere also support the protection of ballot initiatives.<sup>100</sup>

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98. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1125 (1993). Conversely, when a speaker is no longer speaking as a private citizen, but in a public government context (for example, as an elected official), she no longer falls within the scope of First Amendment protection as it applies to foster self-governance. *Id.* at 1125–26. One might conclude that because ballot initiatives are not situated within this grassroots arena, they are not appropriately characterized as speech about which the First Amendment should be especially concerned. Direct democracy is, in fact, increasingly moving away from its traditional or ideal form of face-to-face conversation, as classic town meetings are supplanted by ballot initiatives that take place among millions of dispersed citizens. See Frickey, *supra* note 21, at 432; see also MAGLEBY, *DIRECT LEGISLATION*, *supra* note 10, at 22; Anderson & Ciampa, *supra* note 22, at 73. But the following discussion establishes that ballot initiatives warrant the same First Amendment protection as informal political conversations.

99. See *infra* Section III.C.1 for a discussion of the presence of an initiative on the ballot as public discussion.

100. Recognition of ballot initiatives as speech on the same level as informal political discussions in the public sphere also reflects tangible changes in how U.S. society operates. Many sources suggest that the occurrence of political speech in the traditionally imagined fora is dwindling. See, e.g., Crocker, *supra* note 93, at 2589–90; Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 547–48 (2001). Other venues are becoming more important, as face-to-face discussions are replaced by communication over the internet and through the media. See Crocker, *supra* note 93, at 2589–90 (“[T]he decline of the public sphere [has been] brought about by the increased organization of modern life. Quite apart from rising concerns over security, modern life has diminished the role of traditional places where the public might gather and mingle, such as town greens, parks, sidewalks, and pedestrian streets. Justice Anthony Kennedy has noted this problem: ‘Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of

### C. The Ballot Initiative Device Creates a “Marketplace of Ideas”

The unrestricted use of ballot initiatives also mirrors the “marketplace of ideas” model that permeates First Amendment doctrine and scholarship, suggesting that subject matter restrictions invoke First Amendment concerns.<sup>101</sup> A prominent view of the First Amendment has been that its protection of speech serves to facilitate the unhindered exchange of ideas, like goods in a marketplace.<sup>102</sup> As with the traditional economic free market, the evaluation of arguments is thought to yield the best results when all potential ideas are available for consideration and people are unrestricted in their evaluation of competing propositions.<sup>103</sup> The uninhibited exchange of ideas, in turn, furthers the First Amendment aim of fostering social and political change.<sup>104</sup> Accordingly, political speech in particular has been envisioned in terms of a “marketplace of ideas.”<sup>105</sup> Justice Holmes was the first to articulate the concept, stating that the U.S. Constitution rests on the theory that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>106</sup>

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ideas and shaping of public consciousness occur in mass and electronic media.’”) (quoting *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 802–03 (1996) (Kennedy, J., dissenting)); Pinaire, *supra*, at 547–48. Ballot initiatives, too, are an alternative means for the citizenry to exchange political ideas as in-person communication becomes less prevalent. The doctrine better preserves First Amendment values when it is sensitive to societal shifts that alter how traditionally protected activities are carried out.

101. Baker, *supra* note 65, at 968, 973.

102. *Id.*; Redish, *supra* note 91, at 593; *see also, e.g.*, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting); *Brown v. Hartlage*, 456 U.S. 45, 53 (1982); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

103. Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 726–27 (1983) (“The marketplace of ideas theory is based on the view that government should not interfere with robust debate or the free flow of information because competition among ideas advances knowledge and leads to better decisions. . . . [I]ndividuals can only choose their ends and values if they are exposed to the broadest possible set of information, knowledge, and ideas.”).

104. Baker, *supra* note 65, at 971; *see also supra* Section II.A; *infra* Section III.C.2. Several scholars have noted that citizens’ meaningful participation in political decision making requires full information. *See, e.g.*, MEIKLEJOHN, *supra* note 91, at 75; Emerson, *supra* note 65, at 423–24. Complete access to ideas depends on government neutrality toward political speech and information. *See Baker, supra* note 65, at 970.

105. Pinaire, *supra* note 100, at 493.

106. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). The Court has invoked this notion in several cases since. *See, e.g., Brown*, 456 U.S. at 53 (“The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign.”); *Citizens Against Rent Control*, 454 U.S. at 295 (“The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.”); *N.Y. Times*, 376 U.S. at 270 (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . .”); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . and that the fitting remedy for evil counsels is good ones.”).

Ballot initiatives clearly exemplify the “marketplace of ideas” paradigm—perhaps even better than individual political discussions among citizens do. Initiatives certainly enhance the availability and awareness of political ideas, having an “educative” effect.<sup>107</sup> They also create a space for competition that provides clear returns for the most-favored ideas. Not only do citizens evaluate opposing propositions and choose the one they prefer, arriving at the “truth” or best choice—but they consume them, in a manner of speaking, by affirmatively putting them into effect. This creates an incentive for proponents to advocate the most attractive ideas. It is hard to imagine a scenario that more closely reflects the market framework.

Within the marketplace model, some might try to justify subject matter restrictions on ballot initiatives as interventions designed to correct market imperfections. Indeed, some scholars reject the ideal of a pure free market for political speech and advocate instead for government regulation of such speech to remedy perceived deficiencies in the market.<sup>108</sup> The main reason given for government intervention in the marketplace of political ideas is to “equalize” opportunities for participation in the market—essentially, to level the playing field.<sup>109</sup> This usually involves limiting speakers who are seen as particularly loud or powerful and so threaten to drown out other voices.<sup>110</sup> The Court has adopted this approach occasionally, accepting limits on certain speakers when the limits served to enhance other speakers’ ability to participate meaningfully in political debate.<sup>111</sup> The Court is more likely to tolerate such constraints when they merely limit the degree of speech, rather than precluding the opportunity to speak altogether.<sup>112</sup>

Supporters of the market-interference view find it more favorable to First Amendment values than the unrestrained market is. Professors

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107. Gildersleeve, *supra* note 39, at 1465.

108. See, e.g., Crocker, *supra* note 93, at 2606–07 (framing the contrast as between autonomy and the “public debate principle,” which invites intervention to equalize the playing field in political-speech contexts); Pinaire, *supra* note 100, at 490, 501 (contrasting a “liberty” conception of the marketplace of ideas with “equality” and “civility” conceptions).

109. See Baker, *supra* note 65, at 981–85; Pinaire, *supra* note 100, at 519–20, 527.

110. See Pinaire, *supra* note 100, at 526–27. Cass Sunstein has been a strong proponent of this view, advocating for government limits on dominant voices to promote the diversity of viewpoints heard and to ensure that individuals’ decision making is informed. Post, *supra* note 98, at 1124; Marshall, *supra* note 97, at 195–96 (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

111. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658–60 (1990) (upholding a limitation on corporate contributions to state electoral candidates in order to mitigate the political influence of corporations, who have a special state-conferred ability to amass large amounts of money); *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (upholding a network television station’s obligation to provide a qualified electoral candidate “reasonable access” to air time and noting that this promoted First Amendment values by enhancing candidates’ ability to communicate their ideas).

112. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (upholding a limitation on campaign contributions where they did not preclude the *opportunity* for expression but only limited the amount of a contribution, and emphasizing that regulation, by equalizing the amount of money that supporters could contribute, enhanced the fairness of the process).

Frederick Schauer and Richard H. Pildes endorse such a positivist approach to the First Amendment:

[I]t is not self-evident that the values of democratic deliberation, collective self-determination, guarding against the abuse of power, searching for truth, and even self-expression are better served by treating government intervention as the unqualified enemy than by allowing the state a limited role in fostering the proliferation of voices in the public sphere or of increasing the importance of message and effort by decreasing the importance of wealth.<sup>113</sup>

Others adhere to the original market approach, maintaining a laissez-faire philosophy that rejects government regulation of speech even to further alleged First Amendment ideals. This conception privileges the unhindered flow of ideas, presuming that government inaction will allow the best results to emerge.<sup>114</sup> It aims to maximize the number of speakers and amount of overall speech, rather than keeping speakers in check to preserve a certain balance, maintaining that this will create the most productive market.<sup>115</sup> The Court has echoed this idea in several political speech cases.<sup>116</sup>

The unregulated marketplace is more consistent with First Amendment principles than the regulated marketplace is. Regulations on the market of political speech are problematic in two significant ways. First, regulations seeking to make the political speech arena more fair or democratic necessarily have a role in shaping the political agenda.<sup>117</sup> Such regulations could simply cater to the current government's preferences: "in the guise of correcting private manipulation, the government may distort the debate in a way that manipulatively serves its own purposes."<sup>118</sup> Even when the government has a more benign approach, its judgments about how to circumscribe speech are inherently subjective: when the regulations are designed to promote diversity or equality, these values are chosen and defined by politicians.<sup>119</sup> And even viewpoint-neutral regulations have a strong agenda-setting effect.<sup>120</sup> As Justice Scalia noted, "[t]he premise of our Bill of Rights . . . is that there are some things—even some seemingly *desirable*

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113. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1806 (1999). Schauer and Pildes suggest that rights are properly viewed as tools to achieve societal goals such as the above-mentioned First Amendment interests, rather than as mere defenses of the individual against the government. *Id.* at 1814–15.

114. Baker, *supra* note 65, at 964–65; Pinaire, *supra* note 100, at 502.

115. Pinaire, *supra* note 100, at 502–09.

116. Meyer v. Grant, 486 U.S. 414, 422–423 (1988); Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 295–96 (1981); Buckley v. Valeo, 424 U.S. 1, 19–20 (1976); see also Pinaire, *supra* note 100, at 503–09.

117. Marshall, *supra* note 97, at 205–06 (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

118. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 364 (1991).

119. Post, *supra* note 98, at 1125–26; Marshall, *supra* note 97, at 205–06.

120. Marshall, *supra* note 97, at 206.

things—that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure ‘fair’ political debate.”<sup>121</sup>

Second, government regulation of the market of political speech contravenes the aim of self-governance. It is fundamentally contradictory to impose external restraints on political speech whose privileged status derives from its importance to autonomous decision making.<sup>122</sup> Such regulations create an “internal disequilibrium,” as politicians seek to create a balanced and egalitarian forum for speech and in so doing determine the overall content of that speech.<sup>123</sup> Adjusting the boundaries of self-government to promote a particular set of values has the effect of “decid[ing] in advance the very issue of collective identity that public discourse is meant to be the means of resolving.”<sup>124</sup> Ultimately, government restrictions diminish the core role of the speakers in shaping the course of debate, a process best left to market forces, and undermine true self-governance.

The truly free marketplace, then, is the conception against which subject matter restrictions on ballot initiatives should be judged. Subject matter restrictions on ballot initiatives are inconsistent with the ideal of the unregulated market.<sup>125</sup> The government cannot, in keeping with the true “marketplace of ideas” philosophy, pick and choose what sorts of ideas may be exchanged through the ballot initiative process. Our constitutional protection of speech “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”<sup>126</sup> The First Amendment reflects the principle that a democracy leaves it to the people to judge political arguments.<sup>127</sup> As the Court put it in *Brown v. Hartlage*, “[t]he State’s fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech.”<sup>128</sup> Any danger that citizens will make decisions

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121. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) (emphasis in original).

122. Post, *supra* note 98, at 1128 (“Constitutional solicitude for public discourse . . . presupposes that those participating in public discourse are free and autonomous. Public discourse could not serve the project of self-determination if the opinions and attitudes of speakers were deemed to be merely the effects of external causes.”); Marshall, *supra* note 97, at 204–05.

123. Post, *supra* note 98, at 1133.

124. *Id.* at 1121.

125. Russell Patrick Plato, Note, *Selective Entrenchment Against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability*, 82 N.Y.U. L. REV. 1470, 1498 (2007) (“Subject matter restrictions constitute ‘political lockups’ in the market for political control. The very essence of subject matter restrictions is their ‘anti-competitive’ nature: They raise a barrier to those wishing to enter the constitutional sphere.”) (advocating for an Equal Protection analysis in the judicial review of subject matter restrictions on state constitutional initiatives).

126. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

127. *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978).

128. *Brown*, 456 U.S. at 60.

contrary to their own interests is one that was “contemplated by the Framers of the First Amendment.”<sup>129</sup>

Even if we were to accept the propriety of market regulations, subject matter restrictions on ballot initiatives do not reflect even the least objectionable rationales for such restrictions. The restrictions do not function to curb one overpowering voice, or to enhance certain underrepresented voices; rather, they eliminate voices from the process altogether. They are not mere limits on degree, but qualitative restrictions that wholly exclude certain ideas.<sup>130</sup> Subject matter restrictions do nothing to improve the diversity or fairness of political exchanges, but simply seek to predetermine the potential results of those interactions.

Subject matter restrictions, in fact, violate a fundamental principle of the First Amendment—that the government may not impose its own preferences on citizens’ political decision making. Subject matter restrictions suppress opinions contrary to a transient legislative majority.<sup>131</sup> The First Amendment, however, prohibits the government from suppressing speech it disagrees with.<sup>132</sup> As the Framers emphasized, the United States’ structure of government locates sovereignty in the people, and correspondingly, “the censorial power is in the people over the Government, and not in the Government over the people.”<sup>133</sup> When citizens express their opinions through ballot initiatives, “the power of popular sovereignty flows directly into law without the buffer of representation.”<sup>134</sup> It is especially problematic, then, for the government to restrict speech based on its own preferences in the context of ballot initiatives.<sup>135</sup>

### III. BALLOT INITIATIVES QUALIFY AS “CORE POLITICAL SPEECH” UNDER FIRST AMENDMENT DOCTRINE

The preceding Part established that the First Amendment should protect ballot initiatives from government interference with their subject matter because of the close connections between initiatives and the values underlying

129. *Bellotti*, 435 U.S. at 792.

130. Even heightened majority requirements for initiatives on certain subjects tend to have the effect of precluding initiatives on those subjects. *See supra* note 43 and accompanying text.

131. *See supra* Section I.B.

132. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”); *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94 (1972).

133. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 Annals of Congress 934 (1794) (statement of James Madison)).

134. M. Sean Radcliffe, Comment, *Pre-Election Judicial Review of Initiative Petitions: An Unreasonable Limitation on Political Speech*, 30 TULSA L.J. 425, 425 (1994).

135. It is perhaps in part because of subject matter restrictions’ conflict with First Amendment and other constitutional principles that their supporters have not sought to defend them as permissible limitations on speech, but have stretched—hard—to position them outside of “speech” altogether, so that they do not implicate the First Amendment at all.

the First Amendment. This Part argues that ballot initiative procedures, including the elements some courts have described as conduct, actually constitute “core political speech” under First Amendment case law, such that subject matter restrictions on initiatives trigger strict scrutiny—a level of review that provides robust protection for initiative proponents’ First Amendment rights. Section III.A gives an overview of the Court’s treatment of restrictions on speech in the political and electoral contexts. This Section lays out the two major categories the Court has developed to characterize regulations that affect political and election-related speech: neutral rules concerning mechanical aspects of the electoral process, and rules that directly affect “core political speech.” Section III.B asserts that subject matter restrictions on ballot initiatives do not regulate neutral mechanical aspects of the political process, and that even if the restrictions were to be construed as doing so, strict scrutiny review would be appropriate because the restrictions impose a severe burden on expression. Section III.C argues that the ballot initiative process—specifically, the actual presence of an initiative on the ballot—is appropriately treated as “core political speech” under the relevant doctrine, and, accordingly, that subject matter restrictions should be subject to strict scrutiny review.

*A. Two Standards for Analyzing Regulations that Affect  
Political and Election-Related Speech*

Supreme Court doctrine has distinguished between two broad species of limitations on speech in the political and electoral contexts: procedural limitations and direct restrictions.<sup>136</sup> The Court’s characterization of a restriction determines the level of review it will receive, and, correspondingly, the likelihood that the Court will uphold the restriction.

The first type of restriction is a regulation on neutral, mechanical aspects of the electoral process—one that targets “procedural or administrative aspects of elections,”<sup>137</sup> such as the timing of filing deadlines for presidential candidates to get on the ballot,<sup>138</sup> voters’ ability to submit write-in votes,<sup>139</sup>

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136. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345–46 (1995); Michael Carlin, Note, *Buckley v. American Constitutional Law Foundation, Inc.: Emblem of the Struggle Between Citizens’ First Amendment Rights and States’ Regulatory Interests in Election Issues*, 78 N.C. L. REV. 477, 492–93 (2000). This distinction is independent of the distinction between “expressive conduct” and ordinary speech (including “core political speech”), although both distinctions are linked to a disparity in levels of review. The speech/expressive conduct dichotomy is centered on the nature of the *expression* being affected by the regulation, while the distinction between neutral election regulations and direct limitations on “core political speech” depends on the nature of the *regulation*.

137. Carlin, *supra* note 136, at 493.

138. *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (upholding challenge by voters and presidential candidate to Ohio’s early filing deadline for independent candidates).

139. *Burdick v. Takushi*, 504 U.S. 428 (1992) (challenge by voter to Hawaii’s prohibition on write-in voting).

the permissibility of fusion (multiparty) candidates on the ballot,<sup>140</sup> signature thresholds for admission to the ballot,<sup>141</sup> or the amount of time that a candidate must be disaffiliated from her previous party before being listed as an independent candidate.<sup>142</sup> These regulations govern the logistics of the election itself, as distinguished from expressive activity external to (usually occurring prior to) the voting process.

In assessing the permissibility of these logistical restrictions under the First Amendment, the Court considers the nature and magnitude of the burden on expression and compares that burden to the state's interest in enacting the regulation.<sup>143</sup> These restrictions receive substantial deference from courts: election regulations that are "reasonable" and "nondiscriminatory" can normally be justified by "important" regulatory interests of the government.<sup>144</sup> In the rare instance where an election regulation imposes a "severe" burden on First Amendment rights to expression (or the right to vote), it is subject to strict scrutiny.<sup>145</sup>

The second type of regulation is a rule that directly affects "core political speech," rather than targeting a mechanical feature of the electoral process.<sup>146</sup> These restrictions constrain political expression by limiting its quantity, controlling its content, or proscribing it altogether. Regulations falling into this category include limits on campaign expenditures,<sup>147</sup> a ban on certain corporations' financial contributions to influence particular ballot referenda,<sup>148</sup> a prohibition on anonymous political pamphlets,<sup>149</sup> and restrictions on ballot initiative petition circulators.<sup>150</sup> Rather than addressing the mechanics of elections, this type of regulation directly governs individuals' or organizations' ability to engage in political expression regarding

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140. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (challenge by political party desiring to nominate a candidate of another party to Minnesota's ban on multiparty candidates).

141. *Storer v. Brown*, 415 U.S. 724 (1974) (remanding on the question of whether California's five-percent petition signature requirement placed an unconstitutional burden on independent presidential candidates' ballot access).

142. *Id.* (challenge to California's one-year disaffiliation requirement as applied to former Democratic party members who sought access to the general election ballot as independent candidates).

143. *Timmons*, 520 U.S. at 358–59; *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789; *see also Anderson*, at 790–93.

144. *Timmons*, 520 U.S. at 358–59; *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788.

145. *Timmons*, 520 U.S. at 359; *Burdick*, 504 U.S. at 434. Whether a burden is severe usually turns on whether it applies in a content-neutral manner. *See infra* notes 160–164 and accompanying text.

146. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

147. *Buckley v. Valeo*, 424 U.S. 1 (1976).

148. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

149. *McIntyre*, 514 U.S. 334.

150. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *Meyer v. Grant*, 486 U.S. 414 (1988).

elections. These regulations garner strict scrutiny, surviving only when they are narrowly tailored to a compelling government interest.<sup>151</sup>

B. *Subject Matter Restrictions on Ballot Initiatives—Regulations of Neutral Mechanical Aspects of the Electoral Process?*

Subject matter restrictions on ballot initiatives should not be categorized as neutral regulations of elections. They *are* “ballot access restrictions” of sorts, as are some of the rules the Court has found to be neutral election regulations.<sup>152</sup> However, the *subject matter* of ballot initiatives is not a procedural feature of the electoral process. Rather, subject matter restrictions circumscribe, based on substance, the pool of initiatives permitted to *use* the electoral process. Nor is it plausible to describe subject matter restrictions as “neutral,” particularly in the context of a First Amendment inquiry.<sup>153</sup> They are not generally applicable, but single out certain initiatives for prohibition based on the content of the idea proposed.<sup>154</sup>

However, even if subject matter restrictions on ballot initiatives *could* be considered a neutral regulation of election mechanics, they should nonetheless be subject to strict scrutiny.<sup>155</sup> Subject matter restrictions on ballot initiatives do not reflect the rationales that support upholding many “reasonable, nondiscriminatory” regulations of the electoral process. The low level of scrutiny often applied to this type of regulation is driven by the Court’s recognition of the need for *some* rules to ensure the integrity, effectiveness, and order of elections.<sup>156</sup> The Court has upheld regulations aimed at avoiding voter confusion and deception, preventing election machinery from becoming clogged, and ensuring that the winner is indeed the majority’s choice and has sufficient support to be effective in office.<sup>157</sup> Regulations in this category serve to protect the electoral *process*.<sup>158</sup> Subject matter restrictions

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151. *McIntyre*, 514 U.S. 334; *see ACLF*, 525 U.S. 182; *Meyer*, 486 U.S. 414; *Bellotti*, 435 U.S. 765; *Valeo*, 424 U.S. 1.

152. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (prohibition on fusion (multiparty) candidates on the ballot); *Burdick v. Takusi*, 504 U.S. 428 (1992) (prohibition on write-in votes); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (filing deadline for candidates to get on the ballot); *Storer v. Brown*, 415 U.S. 724 (1974) (party disaffiliation and signature requirements).

153. The First Amendment privileges content neutrality, usually prohibiting discrimination based on subject matter or viewpoint. *See Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94, 96 (1972).

154. *See infra* Section III.C.3.

155. Sometimes even a neutral regulation of the electoral process will be found to impose a severe burden, and so will garner strict scrutiny. *See supra* note 145 and accompanying text.

156. *Timmons*, 520 U.S. at 358 (1997); *Burdick*, 504 U.S. at 433 (1992); *Storer*, 415 U.S. at 730 (1974).

157. *See, e.g., Storer*, 415 U.S. at 732, 735, 736.

158. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

on ballot initiatives are aimed not at the electoral process, but at the electoral results.<sup>159</sup>

Further, subject matter restrictions on ballot initiatives are content discriminatory. Courts have found even relatively mechanical election regulations to impose a “severe” burden, and so to be subject to strict scrutiny, when the logistical regulations discriminate based on content or speaker.<sup>160</sup> In *Burson v. Freeman*, for example, the Court applied strict scrutiny to a regulation prohibiting campaign-related speech near polling places on Election Day because the law defined the proscribed speech with reference to its subject matter.<sup>161</sup> In *Anderson v. Celebrezze*, the Court applied strict scrutiny to an early filing deadline for independent presidential candidates to get on the ballot, noting that a regulation imposes a particularly acute burden when it limits political participation by a particular group united by viewpoint or associational preference.<sup>162</sup> The Court characterized this type of discrimination as restricting the “availability of political opportunity” in an “unfair” way.<sup>163</sup> In *Timmons v. Twin Cities Area New Party*, however, the burden posed by another procedural regulation, a prohibition on fusion candidates, was not “severe” because the regulation did not exclude any particular group from participation in the political process.<sup>164</sup> Subject matter restrictions on ballot initiatives certainly discriminate based on content and preclude certain groups from participating in the political process, and so impose a “severe” burden on expression.<sup>165</sup>

Ultimately, subject matter restrictions operate differently from most neutral regulations of election mechanics. The latter can be justified, according to the Court, because they 1) are “generally applicable and evenhanded,” 2) are designed to prevent distortions in the electoral process, 3) serve

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159. See *supra* Section I.B. Even subject matter restrictions motivated by relatively neutral concerns necessarily regulate the results of elections, rather than features of how the process operates.

160. See *Timmons*, 520 U.S. at 361; *Burson v. Freeman*, 504 U.S. 191, 197–98 (1992) (upholding the regulation in spite of the exacting level of review); *Anderson*, 460 U.S. at 792–93.

161. *Burson*, 504 U.S. at 197–98. The *Burson* Court emphasized that the First Amendment endangers a regulation prohibiting certain subjects of expression even when it is viewpoint neutral. *Id.* at 197.

162. *Anderson*, 460 U.S. at 792–93.

163. *Id.* (citing *Clements v. Fashing*, 457 U.S. 957 (1982)). The content discrimination was compounded by the Court’s observation that a candidate serves as a “rallying point for like-minded citizens” to express their views on issues. *Id.* at 787–88.

164. *Timmons*, 520 U.S. at 361; see also *Republican Party of N.C. v. Martin*, 980 F.2d 943, 960 (4th Cir. 1992).

165. See *supra* Section I.B; *infra* Section III.C.3. The *Timmons* Court did deny any right to use the ballot to send a “particularized message,” 520 U.S. at 363, seemingly undermining the recognition of a “severe” burden on the First Amendment right to bring ballot initiatives unhindered by subject matter restrictions. However, the Court went on to emphasize that under the fusion-candidate prohibition, the party could still use its participation in the election to communicate ideas to voters and its preferred candidate would still appear on the ballot (albeit as another party’s candidate), *id.*,—benefits that would elude a group seeking to propose an initiative on a particular prohibited subject.

legitimate government objectives unrelated to First Amendment values,<sup>166</sup> and 4) do not discriminate against a particular group.<sup>167</sup> Subject matter restrictions on ballot initiatives, which suppress initiatives on certain topics and prevent particular results, possess none of these saving characteristics.

### C. *The Ballot Initiative Qualifies as “Core Political Speech”*

An initiative on the ballot for a vote, even considered independently from surrounding communication such as that involved in petitioning, embodies the characteristics that courts have found define “core political speech.” Some of the courts in the circuit split did consider whether subject matter restrictions on ballot initiatives affected “core political speech”; however, they only contemplated the preliminary petitioning and advocacy efforts as such (and tended to find that those were not formally affected by the restrictions), not the presence of the initiative on the ballot itself.<sup>168</sup> This Section argues that ballot initiatives constitute “core political speech,” and so should be subject to strict scrutiny, for several reasons: 1) they are a form of public discussion,<sup>169</sup> 2) they involve communication about government affairs and directly facilitate self-government,<sup>170</sup> and 3) the regulations in question limit expression based on its content.<sup>171</sup> It will then refute arguments that the ballot initiative process does not fall into the doctrinal category of “core political speech.”

#### 1. *Public Discussion*

An activity qualifies as “core political speech” if it constitutes public discussion about political affairs.<sup>172</sup> Nearly all of the courts involved in the circuit split considered whether ballot initiatives (in the sense of the actual presence of an initiative on the ballot for a vote) genuinely constitute “speech,” or whether they are exclusively a form of conduct—the act of

166. *Anderson*, 460 U.S. at 788 n.9.

167. *Storer v. Brown*, 415 U.S. 724, 732 (1974) (involving potential discrimination against independent candidates).

168. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1101 (10th Cir. 2006); *Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002); *Wellwood v. Johnson ex rel. Bryant*, 172 F.3d 1007, 1009 (8th Cir. 1999); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996).

169. *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988); *Buckley v. Valeo*, 424 U.S. 1, 49, 52 (1976); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

170. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *Meyer*, 486 U.S. at 421–22; *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978); *Valeo*, 424 U.S. at 14.

171. *McIntyre*, 514 U.S. at 345–46; *Bellotti*, 435 U.S. at 784–85.

172. *Meyer*, 486 U.S. at 421–22; *Valeo*, 424 U.S. at 49, 52; *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). It is more difficult to establish that ballot initiatives comprise “public discussion” than that they involve communication about government affairs or that subject matter restrictions on them discriminate based on content.

making law. All but the First Circuit found that they were exclusively conduct.<sup>173</sup>

The First Circuit found that ballot initiatives involve some expression, but are primarily a form of conduct—and concluded that they should accordingly be evaluated as “expressive conduct” rather than “core political speech.”<sup>174</sup> The ballot initiative mechanism does clearly combine lawmaking, a form of conduct, with fundamental political expression. The problem is that these elements are too intertwined to legitimately be conceived of as separable.<sup>175</sup> The lawmaking or “conduct” element is not a neutral action unrelated to the speech,<sup>176</sup> but also has a close relationship to First Amendment concerns.<sup>177</sup> The conduct element is a central feature of the expressive nature of an initiative on the ballot,<sup>178</sup> and the First Amendment’s protection of speech is motivated by speech’s political effects.<sup>179</sup> In the context of ballot initiatives, at least, the potential for expression to translate into lawmaking, admittedly a form of “conduct,” does not justify imposing a lower standard of First Amendment review—in fact, it makes imposing a higher standard even more crucial. For the government to prohibit communication that can result in laws *because* it can result in laws contravenes a central purpose of the First Amendment’s protection of speech. In addition, the “expressive conduct” category and the corresponding intermediate scrutiny standard have been plagued by various theoretical and practical problems.<sup>180</sup> Actual speech, then, is a more appropriate characterization of ballot initiatives.

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173. See *supra* Section I.C.

174. One commentator also takes this approach, arguing for the recognition of ballot initiatives as “expressive conduct” because of their combination of conduct (lawmaking) and expressive elements. John Gildersleeve’s argument that ballot initiatives have an expressive nature focuses on their agenda-setting effect. Gildersleeve, *supra* note 39, at 1463–69. He goes on to propose that the insulation of complex issues and of state constitutional rights be considered “important” state interests under the intermediate scrutiny standard. *Id.* at 1476–80.

175. See *infra* text accompanying notes 193–195 (explaining the expression inherent in initiative proponents’ offer of a proposal to the voters for their response).

176. Cf. *United States v. O’Brien*, 391 U.S. 367, 382 (1968) (finding that burning a draft card was “expressive conduct” because it involved an “independent noncommunicative impact” in addition to the symbolic expression of a message).

177. See *supra* Section II.A.

178. An initiative proponent “depends on the prospect of legislative effect to imbue her initiative with the gravity necessary to influence the agenda.” Gildersleeve, *supra* note 39, at 1470.

179. Although he argues for an “expressive conduct” analysis, Gildersleeve acknowledges that the lawmaking function of ballot initiatives, although “conceptually dominant,” is frequently “subordinate” to their expressive nature. *Id.* at 1469.

180. See *Baker*, *supra* note 65, at 1010 (arguing that the distinction between speech and conduct is problematic, since, for one thing, conduct can be just as expressive as speech); Emerson, *supra* note 65, at 422–32 (noting that all of the proffered schemes for deciding what type of conduct the First Amendment should protect are “exceedingly vague” and problematic). It would also be plausible, for example, to characterize the circulation of initiative petitions as “expressive conduct,” since it involves both the communication of a message and the act of gathering signatures. See *Marijuana Policy Project v. D.C. Bd. of Elections & Ethics*, 191 F. Supp. 2d 196, 210 (D.D.C. 2002). In addition, the intermediate scrutiny test is manipulable. The government interest can be conceived of at different levels of abstraction, even throughout the process of applying the *O’Brien* test, making it

Ballot initiatives clearly involve speech in the most literal sense, since their execution relies on actual words on the ballot. In *McIntyre v. Ohio Elections Commission*, it was relevant to the Court's description of the regulated activity as "core political speech" that the regulation governed what information could be *written* in political pamphlets.<sup>181</sup> Subject matter restrictions on ballot initiatives also affect written words that would communicate ideas. However, this is true of ballot-access restrictions in general, and typically has not prompted courts to consider them automatic restrictions on "core political speech."<sup>182</sup> Rather than relying on the mere fact that ballot initiatives operate via actual written words, this Note focuses on their significance as speech on a more abstract (and, in light of the purposes of the First Amendment and "core political speech" doctrine, more relevant) level, including the behest to voters to consider the issue and respond with their vote, and the ability for the initiative to take effect as a law.

The nature of the communication that ballot initiatives trigger between proponents and voters supports initiatives' status as "core political speech." A ballot initiative involves discussion of a particular political issue throughout the process.<sup>183</sup> This includes the identification of an area of common concern, agreement on a desired legislative change, the circulation of petitions, and discussion in the media.<sup>184</sup> Most significantly here, if the initiative makes it on to the ballot, its proponents then communicate their desire for political change to the voters en masse, inviting them to respond with their own views by voting yes or no. Technically, all of these steps except the last one could occur, relatively unhindered, even with a subject matter exclusion in effect.<sup>185</sup> However, subject matter exclusions completely preclude the possibility of expressing particular proposed legislative changes to the voters through the ballot. Not only is this the sole practical way of reaching a broad swath of citizens and having them weigh in on an issue, but it constitutes an important form of "public discussion" as established below.

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possible for courts to essentially apply rational basis review instead of intermediate scrutiny. *Plato*, *supra* note 125, at 1480; *see also* Gildersleeve, *supra* note 39, at 1460.

181. 514 U.S. 334, 345–47 (1995).

182. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 369–70 (1997) (prohibition on fusion candidacies); *Burdick v. Takushi*, 504 U.S. 428, 433, 441–42 (1992) (prohibition on write-in votes).

183. *See* *Collins & Oesterle*, *supra* note 10, at 56–57.

184. *See* *Petition for Writ of Certiorari at 14–16, Skrzypczak v. Kauger*, 1996 U.S. Briefs 953 (No. 96-953); *MAGLEBY, DIRECT LEGISLATION*, *supra* note 10, at 130–34, 138; *Conlin*, *supra* note 11, at 1101. Even when they are ultimately unsuccessful, ballot initiatives garner a lot of media attention. *Magleby, Let the Voters Decide?*, *supra* note 10, at 28; *Gildersleeve*, *supra* note 39, at 1465. In *Meyer*, the Court found it significant that the restriction on paid petition circulators limited the "ability to make the matter the focus of statewide discussion" by making it less likely that the initiative would make it to the ballot. *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

185. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100, 1102 (10th Cir. 2006); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002); *Wellwood v. Johnson ex rel. Bryant*, 172 F.3d 1007, 1009 (8th Cir. 1999).

The two Supreme Court cases addressing restrictions on the expression *accompanying* the initiative process support the characterization of an initiative's presence on the ballot as "public discussion." In *Meyer v. Grant*, the Court struck down a prohibition on paying initiative petition circulators,<sup>186</sup> and in *Buckley v. American Constitutional Law Foundation*, it invalidated requirements that circulators be registered to vote and wear identification badges, and that their names, addresses, and compensation be reported.<sup>187</sup> An initiative's actual entry onto the ballot embodies the same features that led the *Meyer* and *ACLF* Courts to label the attendant petitioning processes "core political speech" and apply strict scrutiny to regulations on petition circulation.<sup>188</sup> It emphasized in both cases that the petition efforts—presumably involving initiative proponents speaking with individual citizens and attempting to procure their support for the initiative—involved "interactive communication concerning political change."<sup>189</sup> The presence of an initiative on the ballot also constitutes "communication," involves "political change," and is "interactive."<sup>190</sup>

Ballot initiatives are a channel of communication. The words on the ballot transmit a message from the proponents to the voters about the proponents' views, their desire for certain legislation, and some information about the proposed change.<sup>191</sup> The message also reaches people who hear (from the media or by word of mouth) that the initiative reached the ballot, whether or not they turn out to vote. The message transmitted by an initiative on the ballot can have a strong impact on public discourse, "inserting

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186. *Meyer*, 486 U.S. 414.

187. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999).

188. Many would argue, and some of the courts in the circuit split have concluded, that cases like *Meyer* and *ACLF* were limited to the communications that accompany a ballot initiative effort and do not support the recognition of the ability to get an initiative on the ballot, itself, as "core political speech." *Walker*, 450 F.3d at 1085, 1086, 1100; *Marijuana Policy Project*, 304 F.3d at 86; *Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th Cir. 1996). This Note does not claim that all aspects of ballot initiatives are automatically "core political speech" simply because the Court recognized ballot initiative petition circulation as such. It argues, rather, that the Court's analysis in *Meyer* and *ACLF* supports the independent conclusion that the legal ability to put an initiative on the ballot for a vote constitutes "core political speech" because it creates public discussion, involves government affairs, and is regulated based on content. It seems likely that subject matter restrictions on ballot initiatives also dampen the speech surrounding the process and leading up to the initiative. However, this alone is unlikely to support a First Amendment claim, since it does not create the type of "chilling" effect that can sometimes sustain a finding of unconstitutional overbreadth. *See Republican Party of N.C. v. Martin*, 980 F.2d 943, 960 (4th Cir. 1992) ("Election practices that do not threaten to penalize protected speech, but that may have some effect on the decision whether to seek candidacy or engage in debate, are not overly broad."); Brief in Opposition to Petition for Writ of Certiorari at 6–7, *Initiative & Referendum Inst. v. Herbert*, 2006 U.S. Briefs 89717 (No. 06-534). This Note focuses on the restrictions' effect on initiatives themselves.

189. *ACLF*, 525 U.S. at 186; *Meyer*, 486 U.S. at 422.

190. An initiative on the ballot clearly focuses on political change. *See infra* Section III.C.2. The following text will establish that it is communicative and interactive.

191. John Gildersleeve notes that the lawmaking function of ballot initiatives, although "conceptually dominant," is frequently "subordinate" to their expressive role. Gildersleeve, *supra* note 39, at 1469. Another commentator has suggested that the initiative process may in fact be the most effective way of communicating political ideas. Radcliffe, *supra* note 134, at 436–37.

and elevating issues in the arena of political discussion,” and can even shape political agendas on the state and national level.<sup>192</sup> This effect can play out in full force only once the initiative reaches the ballot. As one commentator stated, “the intrinsic benefit of political debate, especially in the context of direct democracy, occurs in the free exchange of ideas as a proposal is pro- pounded, attacked, defended, and *voted upon*.”<sup>193</sup>

Ballot initiatives also embody the “interactive” element of the *Meyer* analysis. On a structural level, the initiative, once on the ballot for a vote, involves reciprocal communication. The proponents offer a proposal to the voters, asking their approval; the voters then respond, expressing their opinion back to the proponents and to the rest of society. Merriam-Webster defines “interactive” as “1: mutually or reciprocally active; 2: involving the actions or input of a user . . . .”<sup>194</sup> The communication involved in ballot initiatives closely matches these definitions. Some might maintain that the “interactive” element from *Meyer* requires one-on-one, face-to-face discussions, which the operation of ballot initiatives on Election Day, admittedly, lacks.<sup>195</sup> The *Meyer* Court found it relevant that petitioning involved “expression of a desire for political change” and a “discussion of the merits of the proposed change.”<sup>196</sup> An initiative’s presence on the ballot clearly involves the first but probably lacks the second, at least in the sense of a personal interaction. But face-to-face communication about the merits of a proposed change is not a necessary element. Activities deemed “core political speech” in other cases, particularly campaign spending, did not require literal personal discussion of the issues’ merits to constitute “core political speech.”<sup>197</sup>

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192. Gildersleeve, *supra* note 39, at 1467; *see also id.* at 1465 (“The contemporary ballot has . . . power to elevate and lend credibility to a political stance, regardless of whether voters convert that stance into law.”).

193. Radcliffe, *supra* note 134, at 437 (emphasis added).

194. MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriamwebster.com> (last visited Feb. 14, 2009). The *Meyer* Court did not consider the dictionary definition of the word, but the Court has often referred to dictionaries in other cases. *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 128 (1998); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 61 (1993); *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 n.11 (1944).

195. *See* Gildersleeve, *supra* note 39, at 1468 (“[S]ubject matter restrictions clearly do not restrict one-on-one communications between an initiative proponent and the public.”).

196. *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

197. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976). Another concern is that “public discussion” may not encompass such focused advocacy. But in *Buckley v. Valeo*, the Court noted that a regulation limiting expenditures in political campaigns burdened core First Amendment expression irrespective of the fact that the spending aimed to vigorously promote a particular candidate, rather than facilitate abstract discussion. 424 U.S. at 47–48 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)). That ballot initiatives channel expression toward one tangible goal does not remove them from the realm of communication about government affairs that deserves First Amendment protection.

## 2. Discussion of Government Affairs

The presence of an initiative on the ballot is archetypal of a basic defining feature of “core political speech”—a focus on political matters. The First Amendment itself functions in large part to protect political discussion, which operates as a check on government through its contribution to political change.<sup>198</sup> The Court has consistently echoed this purpose in its “core political speech” cases.<sup>199</sup> Finding that a regulation limiting political campaign expenditures impermissibly restricted political speech in *Buckley v. Valeo*, the Court stressed the importance of the unlimited exchange of ideas in promoting political and social change.<sup>200</sup> In *First National Bank of Boston v. Bellotti*, striking down a regulation that barred certain corporate contributions to influence the outcome of particular ballot referenda as an unconstitutional restriction on political speech, the Court emphasized that the activity involved the discussion of government affairs—an area in which First Amendment protection is crucial.<sup>201</sup> In *Meyer v. Grant*, the circulation of petitions for a ballot initiative was protected “core political speech” in part because it concerned political change around an issue of public concern (the deregulation of the trucking industry).<sup>202</sup> In *McIntyre v. Ohio Elections Commission*, the distribution of leaflets advocating a political viewpoint was deemed “the essence of First Amendment expression” and upheld as “core political speech.”<sup>203</sup>

Submitting a ballot initiative for a vote is straightforwardly political in its substance, its goals, and the method through which it operates. The subject of a ballot initiative—proposed legislation—is innately political. Initiatives are brought in order to influence the government; in fact, one goal is often to criticize the legislature’s handling of an issue.<sup>204</sup> Protection of ballot initiatives as “core political speech,” then, is consistent with the First Amendment’s role as a check on representative government.<sup>205</sup> Typically, this influence would occur ad hoc, through informal discussion among citizens that might eventually translate to pressures on their elected representatives.<sup>206</sup> Ballot initiatives, though, create a direct bridge between this type of public discussion and legislative change, allowing the citizenry to accomplish change on its own. It is perhaps even more important that this

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198. *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also supra* Section II.A.

199. *Meyer*, 486 U.S. at 421–22; *Bellotti*, 435 U.S. at 776–77; *Valeo*, 424 U.S. at 14; *see also* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *supra* Section II.A.

200. 424 U.S. at 14.

201. 435 U.S. at 776–77.

202. 486 U.S. at 421–22.

203. 514 U.S. at 347.

204. Collins & Oesterle, *supra* note 10, at 57; DuVivier, *supra* note 31, at 1193; William Lawton Teague, Jr., Comment, *Pre-Election Constitutional Review of Initiative Petitions: A Pox on Vox Populi?*, 17 OKLA. CITY U. L. REV. 201, 218 (1992).

205. Redish, *supra* note 91, at 592.

206. *See generally* MEIKLEJOHN, *supra* note 91, at 9–28.

distilled, structured form of public discussion, which takes place through the development, submission, and placement on the ballot of a proposal for legislative change, be free from government interference with its content.

### 3. Regulation Based on Content

Subject matter restrictions on ballot initiatives are especially burdensome to “core political speech” because they regulate communication about government affairs with regard to its content, restricting potential initiatives’ access to the ballot based on the message they convey.<sup>207</sup> Because subject matter restrictions preclude challenges to the status quo on certain subjects, they may also be viewpoint discriminatory.<sup>208</sup> (Some, such as D.C.’s prohibition on initiatives that would reduce, but not those that would increase, penalties for drug use, certainly are.<sup>209</sup>) The First Amendment does not generally tolerate regulations that distinguish based on content,<sup>210</sup> and courts have been particularly apt to find “core political speech” curtailed when regulations operate with reference to the specific ideas expressed. In *Bellotti*, for example, the expression fell within the scope of First Amendment protection in part because the restriction at issue singled out communication surrounding ballot questions on particular subjects.<sup>211</sup>

In circuit cases that upheld generally applicable regulations on initiative petition signature requirements and on the format of ballot initiatives without considering initiatives “core political speech,” the courts emphasized that the regulations were content neutral—one even explicitly noting that rules that did distinguish based on content would be subject to strict scrutiny.<sup>212</sup>

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207. Arguing that ballot initiatives amount to “core political speech” because a certain type of restriction on them happens to discriminate based on content might seem to put the cart before the horse. However, the effect of restrictions is an important motivating factor in First Amendment doctrine, and several cases also consider the nature of the restrictions in their characterization of the activity as speech. *See, e.g., McIntyre*, 514 U.S. 334; *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

208. *See Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 770 (2d Cir. 1999), *aff’d*, 531 U.S. 533 (2001). J. Michael Connolly proposes looking to intent to determine whether subject matter restrictions on ballot initiatives are viewpoint discriminatory or merely content discriminatory. *See supra* note 53. For reasons mentioned above, this approach is problematic. *See id.*

209. *See Marijuana Policy Project v. D.C. Bd. of Elections & Ethics*, 191 F. Supp. 2d 196, 213 (D.D.C. 2002).

210. The Court stated in *Police Department of Chicago v. Mosley* that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” 408 U.S. 92, 95 (1972); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

211. *Bellotti*, 435 U.S. at 784–85 (citing *Mosley*, 408 U.S. at 96). In *McIntyre v. Ohio Elections Commission*, where the problematic distinction was between election-related speech and non-election-related speech, content discrimination also played a role in implicating the First Amendment. 514 U.S. at 345–46 (regulation treating communication differently based on whether it included the name and address of the speaker and whether it sought to influence voters in an election).

212. *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) (considering signature requirements equal to ten percent of registered voters on submission date); *Biddulph v. Mortham*, 89

#### 4. Counterarguments

There are several potential objections to categorizing ballot initiative mechanisms as “core political speech”: that the presence of an initiative on the ballot is fundamentally about the action of lawmaking and so does not embody any expressive element; that any expression that would occur through an initiative on the ballot can still occur in another forum if the initiative is excluded from the ballot; and that because states have the authority to retract the entire initiative process, they may also constitutionally remove any subject from initiative lawmaking. All of these arguments are flawed.

Some have argued that subject matter restrictions on ballot initiatives are designed to prevent the result of speech—lawmaking—rather than speech itself,<sup>213</sup> and so are not truly restrictions on speech. But fear of communication’s potential results does not remove it from the realm of expression protected by the First Amendment. As long as speech is not coercive, the government may not restrict it simply because it is effective.<sup>214</sup> Ballot initiatives are unique in the extent to which they channel expression into concrete results (whether an initiative passes or fails),<sup>215</sup> but the fact that the expression has an established means through which it may influence the law is not a defensible reason to limit it. In fact, much of the value we attribute to speech derives from its potential to convince.<sup>216</sup> As the Court stated in *Bellotti*, “the fact that advocacy may persuade the electorate is hardly a reason to suppress it.”<sup>217</sup> It is especially objectionable for the government to restrict speech because of an undesired predicted effect on voters,<sup>218</sup> as it does when it restricts the subject matter of ballot initiatives.

Another argument opposing the recognition of subject matter restrictions as limitations on “core political speech” is that a subject matter exclusion

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F.3d 1491, 1500 (11th Cir. 1996) (single-subject, accurate title, and explanatory-statement requirements); *see also* *Protect Marriage III. v. Orr*, 463 F.3d 604, 606 (7th Cir. 2006) (upholding a generally applicable regulation on advisory ballot questions in part because it was content neutral); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296–97 (6th Cir. 1993) (requirement that petition signatures be found valid in order to be counted). *But see* *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (maintaining that a generally applicable restriction on the circulation of ballot initiative petitions affected “core political speech” and so triggered strict scrutiny); *Meyer v. Grant*, 486 U.S. 414 (1988) (same). The distinction between content-discriminatory and content-neutral restrictions is similar to that between substantive and procedural or structural subject matter restrictions discussed in Section I.B, *supra*.

213. *See* *Wirzburger v. Galvin*, 412 F.3d 271, 277 (1st Cir. 2005) (“While [the restrictions] eliminate a valuable avenue of expression about those subjects, the speech restriction is no more than an unintended side-effect of the exclusions.”); *see also supra* Section I.C.

214. Strauss, *supra* note 118, at 334–35.

215. Robyn R. Polashuk, Comment, *Protecting the Public Debate: The Validity of the Fairness Doctrine in Ballot Initiative Elections*, 41 UCLA L. REV. 391, 402 (1993) (“Unlike the typical public controversy in which informed debate may not have any concrete consequence, ballot measures create laws and amend constitutions.”).

216. *See* *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 305–06 (1981); *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976); *see also* Strauss, *supra* note 118, at 337.

217. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

218. Strauss, *supra* note 118, at 338.

does not wholly preclude expression on a given subject—it merely prohibits it in a certain context.<sup>219</sup> Would-be initiative proponents, the argument goes, remain free to speak, petition (unofficially), advocate, and even lobby their legislators about the issue—they just cannot submit a ballot initiative.<sup>220</sup> But this does not negate the ballot initiative’s status as “core political speech.” The Court has struck down many restrictions on “core political speech” despite the fact that speech on the same issue could be pursued through other channels.<sup>221</sup> Neither the campaign expenditures in *Buckley v. Valeo* nor the ballot initiative petitions in *ACLF*, for example, were the only means of getting a specific idea across. Significantly, the *Meyer* Court stated “[t]hat appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection.”<sup>222</sup> The setting in which speech occurs can be as important as the content.<sup>223</sup> The *Meyer* Court did not see an acceptable alternative in forcing the petitioners to communicate their message through another channel, noting that the regulations “restrict[ed] access to the most effective, fundamental, and perhaps economical avenue of political discourse.”<sup>224</sup> The unique opportunity that ballot initiatives themselves provide to raise an issue to the level of statewide recognition, solicit a response from voters, and potentially put an idea into effect as law makes their context especially significant under the First Amendment.<sup>225</sup> Given the “dramatic power of an initiative that attains ballot status to shape the agenda of state and even national politics,”<sup>226</sup> initiatives provide a unique communicative opportunity even when they do not succeed.

Finally, those who believe subject matter restrictions are unreviewable under the First Amendment argue that states’ power to ban or revoke the ballot initiative process altogether also allows them to ban subsets of poten-

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219. Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1085, 1086, 1100 (10th Cir. 2006); Marijuana Policy Project v. United States, 304 F.3d 82, 85 (D.C. Cir. 2002); Skrzypczak v. Kauger, 92 F.3d 1050, 1053 (10th Cir. 1996).

220. Walker, 450 F.3d at 1085, 1086, 1100; Marijuana Policy Project, 304 F.3d at 85; Skrzypczak, 92 F.3d at 1053.

221. See Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995); Bellotti, 435 U.S. 765; Valeo, 424 U.S. 1.

222. Meyer v. Grant, 486 U.S. 414, 424 (1988).

223. Crocker, *supra* note 93, at 2588.

224. Meyer, 486 U.S. at 424; see also Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (“While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.”) (citation omitted); 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 of importance to the proponents of the proposed initiative.”).

225. See Gildersleeve, *supra* note 39, at 1468 (“[A] ban does prevent [an] advocate from shaping the state political agenda in the manner and to the extent uniquely possible by qualifying for the ballot.”).

226. *Id.* at 1464.

tial initiatives.<sup>227</sup> The Court rejected this argument in *Meyer v. Grant*, however, stating that once the state creates the opportunity for citizens to enact ballot initiatives, it must maintain it in a manner that complies with the Constitution.<sup>228</sup> Procedural restrictions on initiatives may not always pose a constitutional threat, particularly when they are generally applicable. However, regulations that distinguish among initiatives with regard to their subject matter necessarily implicate the First Amendment.<sup>229</sup> Considering a procedural restriction on the certification of advisory ballot questions (which are largely analogous to ballot initiatives) in *Protect Marriage Illinois v. Orr*, the Seventh Circuit found that because the Constitution provides no right to the advisory ballot question process in general, the state is free to impose procedural rules such as those designed to prevent ballot clutter.<sup>230</sup> However, the court emphasized that its holding would not permit regulations that discriminated against specific advocates or viewpoints.<sup>231</sup> Initiative proponents do not have a First Amendment right to bring ballot initiatives in general, but they do have a First Amendment right not to be denied use of the process based on the subject matter of the initiative.

#### CONCLUSION

Ballot initiatives should qualify as protected speech, such that state restrictions on their content should trigger strict scrutiny review under the First Amendment. The ballot initiative mechanism is appropriately protected by the First Amendment because of initiatives' deeply political nature, their parallels with public discussion among citizens in the public sphere, their centrality to the self-governing activities the First Amendment seeks to protect, and their structural similarity to the "marketplace of ideas." Ballot initiatives' interactive, communicative nature and focus on political ideas also put them firmly within the doctrinal category of "core political speech." Subject matter restrictions on initiatives directly constrain "core political speech" based on content and so should be subject to strict scrutiny,

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227. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099–1100 (10th Cir. 2006); *Marijuana Policy Project v. United States*, 304 F.3d 82, 85–86 (D.C. Cir. 2002); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996).

228. *Meyer*, 486 U.S. at 424–25. The Court distinguished *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which did hold that the state's power to wholly ban an activity—casino gambling—gave it the power to ban advertisements of the activity. *Meyer*, 486 U.S. at 424–25. It emphasized that *Posadas* concerned only tangentially protected commercial speech, while *Meyer* involved "core political speech." *Id.* States may not grant citizens a venue for political expression, at least, and then restrict the use of it based on content. *See also* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547–48 (2001); *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981); *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993).

229. *See supra* Section III.C.3; *see also* *Protect Marriage Ill. v. Orr*, 463 F.3d 604 (7th Cir. 2006).

230. *Protect Marriage Ill.*, 463 F.3d 604.

231. *Id.* at 606 ("If a state can thus ban advisory questions from the ballot altogether, it can impose requirements designed to avoid ballot clutter, provided the requirements are not jiggered in a way that discriminates against particular advocates or viewpoints.").

surviving only when a court finds they achieve a compelling government interest and burden constitutional rights no more than necessary to fulfill that interest.