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THE PROMISE AND PERIL OF DIRECT DEMOCRACY AFTER *DOBBS*

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In Dobbs v. Jackson Women’s Health Organization, the Supreme Court deconstitutionalized the right to choose abortion, announcing that it was leaving the power to regulate abortion “to the people and their elected representatives.” In the wake of Dobbs, state-level “elected representatives” quickly got to work, resulting in dramatic changes to the abortion access landscape. But increasingly, “the people” have also sought to shape the law directly: voters, using mechanisms like ballot initiatives and referenda, have gone to the ballot box to register their views on reproductive freedom. Many of those initiatives have preserved or expanded access to abortion, demonstrating the potential for direct democracy to counteract troubling facets of the current landscape. In the face of increasingly minoritarian institutions and some courts’ abandonment of their traditional rights-protecting and democracy-enhancing functions, direct democracy seems full of promise.

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As this Article reminds, however, direct democracy has a checkered past, which must inform any evaluation of its current potential. For as much as direct democracy has been used to achieve progressive ends, it has also been used to limit minority rights. Indeed, over the last sixty years, those seeking to counteract the gains of the Civil Rights Movement have repeatedly and sometimes successfully turned to direct democracy to do so. This Article reviews that history, which spans issues ranging from affirmative action to same-sex marriage, and mines it for lessons for today.

Several insights emerge from this historical excavation, all of which should inform our understanding of the recent turn to direct democracy to channel popular support for reproductive rights. One insight is that direct democracy can threaten minority rights; there is scant reason to believe that direct democracy will reliably protect the interests of unpopular or historically subordinated groups. But a second insight is that the direct democracy of today differs in critical ways from the direct democracy of even fifty years ago, in part because of the deteriorating health and strength of democratic institutions and the upending of a constitutional order that once gave relatively robust protection to equality-related rights.

Building on these insights, this Article maintains that both the promise and peril of direct democracy must be evaluated in the context of the broader constitutional and democratic landscape. Today’s use of direct democracy to secure reproductive rights poses a challenge to institutions that have failed to channel the popular will. In addition, direct democracy has come to the fore at a moment when the foundations of judicial enforcement of fundamental rights and equal protection are being reexamined. Direct democracy’s success in securing abortion rights represents an important countercurrent to these developments. But meaningfully, this dynamic landscape may contain the groundwork for reexamining—and perhaps reorganizing—the existing equal protection framework. Direct democracy’s success in securing abortion rights may, paradoxically, hasten that transformation.

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INTRODUCTION

*Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.*¹

*But the people of the various States may evaluate those interests differently.*²

In *Dobbs v. Jackson Women’s Health Organization*,³ the Supreme Court overruled *Roe v. Wade*⁴ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵ on the view that a right to abortion was neither

¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022).

² *Id.*

³ *Id.* at 2228.

⁴ 410 U.S. 113 (1973).

⁵ 505 U.S. 833 (1992).

explicit in the text of the Constitution nor rooted in the history and traditions of this country.⁶ In casting aside a half century of precedent, the *Dobbs* majority noted that it was merely returning the power to weigh the competing interests at stake in abortion “to the people and their elected representatives.”⁷

In the wake of *Dobbs*, the abortion access landscape has changed dramatically as states have moved to clarify their positions on the right to access abortion. But meaningfully, it is not just state legislatures that are asserting their positions on abortion access. Increasingly, voters are also directly registering their views on reproductive freedom at the ballot box.⁸

From blue states like Vermont and New York to red states like Kansas and Missouri, voters have turned to direct democracy to enshrine abortion rights in state constitutions—with considerable success.⁹ Unsurprisingly, direct democracy’s success in protecting reproductive freedom has provoked considerable resistance and efforts to curb direct democracy’s reach. In some states, officials have sought to limit—or block entirely—direct democratic action in support of abortion rights.

Direct democracy, then, has been an important site of mobilization, contestation, and conflict in the post-*Dobbs* era. In many ways, direct democracy’s deployment as a vehicle for protecting reproductive rights accords with its origins in the Progressive Era, when it was frequently used to circumvent captured state legislatures and courts to secure various economic and employment protections for working men and women.¹⁰

But if direct democracy’s early history accords with its contemporary promise as a safeguard of reproductive freedom, its more recent history gestures toward its perils. Rather than advancing progressive causes, direct democracy has more recently been deployed to limit the rights and trample the interests of minorities. For example, after the passage of the Civil Rights Act of 1964, a majority of Californians enacted a ballot

⁶ *Dobbs*, 142 S. Ct. at 2242.

⁷ *Id.* at 2259.

⁸ See Laura Kusisto & Jennifer Calfas, Abortion-Rights Supporters Prevail in Midterm Ballot Measures, *Wall St. J.*, https://www.wsj.com/articles/abortion-rights-supporters-prevail-in-midterm-ballot-measures-11667986139?mod=article_inline (last updated Nov. 9, 2022, at 18:36 ET) (detailing the outcomes of 2022 abortion-related ballot measures).

⁹ See Ballot Tracker: Outcome of Abortion-Related State Constitutional Amendment Measures in the 2024 Election, KFF [hereinafter KFF Ballot Tracker], <https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/> [<https://perma.cc/F99S-27U2>] (last updated Nov. 6, 2024).

¹⁰ See *infra* Section II.A.

measure that counteracted federal antidiscrimination protections by adding a right to discriminate to the state constitution.¹¹ In 2006 and 2010, respectively, in the wake of a Supreme Court decision blessing the limited use of race in higher education admissions,¹² both Michigan and Arizona enacted ballot initiatives banning affirmative action measures in public employment, education, and contracting.¹³ And in 2008, after a Supreme Court of California decision recognizing a state constitutional right to same-sex marriage, Californians enacted Proposition 8, which amended the state constitution to permit legal recognition of only opposite-sex marriages.¹⁴

These episodes have prompted scholars to raise practical and theoretical concerns about direct democracy as a vehicle for policymaking. On this account, direct democracy's independence from representative government is a double-edged sword. While direct democracy allows voters to evade captured legislatures, it also bypasses structural mechanisms designed to protect minority interests, allowing voters to impose majority will without the typical governmental checks that exist in more traditional policymaking venues. Further, direct democracy's susceptibility to capture by moneyed interests, coupled with its lack of transparency and limited opportunities for deliberation, amplifies concerns that it may enable the "tyranny of the majority."¹⁵

¹¹ Proposition 14 was explicitly designed to override the state's fair housing act, which had been passed in 1963. Ariela Gross, *A Grassroots History of Colorblind Conservative Constitutionalism*, 44 *Law & Soc. Inquiry* 58, 63 (2019). It was later invalidated in *Reitman v. Mulkey*, 387 U.S. 369, 375–76, 381 (1967).

¹² *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

¹³ Suzanne Lowe, Mich. Senate Fiscal Agency, September 2006 Ballot Proposal 06-2: An Overview 2 (2006), <https://sfa.senate.michigan.gov/Publications/BallotProps/Proposal06-2.pdf> [<https://perma.cc/6CPN-HDHJ>]; Michigan Proposal 2: Affirmative Action Ban Initiative (2006), Ballotpedia [hereinafter Michigan Proposal 2], [https://ballotpedia.org/Michigan_Proposal_2_Affirmative_Action_Ban_Initiative_\(2006\)](https://ballotpedia.org/Michigan_Proposal_2_Affirmative_Action_Ban_Initiative_(2006)) [<https://perma.cc/DSE2-79LV>] (last visited Nov. 4, 2025); H.R. Con. Res. 2019, 49th Leg., 1st Reg. Sess. (Ariz. 2009) (codified at Ariz. Const. art. II, § 36); Arizona Proposition 107: Affirmative Action Amendment (2010), Ballotpedia, [https://ballotpedia.org/Arizona_Proposition_107_Affirmative_Action_Amendment_\(2010\)](https://ballotpedia.org/Arizona_Proposition_107_Affirmative_Action_Amendment_(2010)) [<https://perma.cc/SH4D-JQBR>] (last visited Nov. 4, 2025); see also Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291, 298–99, 312–14 (2014) (plurality opinion) (upholding Proposal 2 amidst claims that it was racially discriminatory).

¹⁴ See *Hollingsworth v. Perry*, 570 U.S. 693, 701 (2013).

¹⁵ See 1 Alexis de Tocqueville, *Democracy in America* 410 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

This recent history and the concerns it prompts stand in stark contrast to the current moment, when direct democracy is hailed as a means of *safeguarding* rights imperiled by the actions of conservative courts and legislatures. Indeed, the proliferation of gerrymandering and other efforts to distort the mechanisms of representative democracy, in tandem with judicial actions to curtail or limit rights, has led to renewed interest among progressives in initiatives, referenda, and other mechanisms of direct democracy.¹⁶ At the same time, conservatives who once embraced direct democracy as a counterweight to the legislative and judicial imposition of minority rights now labor mightily to restrict access to direct democracy—particularly when it comes to abortion.

How should we understand these developments? In a distorted democratic landscape where institutions are increasingly minoritarian and some courts have abandoned their traditional rights-protecting and democracy-enhancing functions, *should* progressives embrace direct democracy as a necessary corrective to gerrymandering and institutional capture? What can the turn to direct democracy tell us about the relationship between majoritarianism, minority rights, democracy, and the institutional role of the courts today?

This Article takes up these important questions. Using direct democracy mobilization over abortion rights as a point of entry, we examine direct democracy's status as a safety valve for the preservation of reproductive rights against its complicated history. The contrast between direct democracy's past and present yields important insights that gesture toward broader questions about the health and strength of democratic institutions. As we maintain, direct democracy cannot be evaluated in the abstract; its promise—and perils—must be considered in light of the current electoral landscape, which, as a result of the Supreme Court's interventions, is decidedly less representative and less democratic than in previous epochs.¹⁷

Just as importantly, direct democracy's appeal as a mechanism for preserving reproductive rights speaks directly to a shifting jurisprudential

¹⁶ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491–92 (2019) (describing partisan gerrymandering in North Carolina and Maryland); see, e.g., Proposed Amendments for 2020: Proposed Constitutional Amendment #1, Va. Dep't of Elections, <https://www.elections.virginia.gov/proposed-constitutional-amendment-2020/> [<https://perma.cc/KU5L-TVXA>] (last visited Nov. 4, 2025) (proposing the creation of a bipartisan districting commission).

¹⁷ See Melissa Murray & Katherine Shaw, *Dobbs* and Democracy, 137 Harv. L. Rev. 728, 776–77 (2024).

landscape that has rescinded fundamental rights and limited protections for underrepresented groups. On this account, part of direct democracy's appeal as a means of securing abortion rights relates to *Dobbs* itself—and its potential to completely revamp the constitutional order, with respect to both fundamental rights and our understanding of equal protection.

This Article proceeds as follows. Parts I and II lay a foundation for an examination of direct democracy. Specifically, Part I provides a taxonomy of the forms of direct democracy, and Part II recounts direct democracy's nineteenth-century origins as a counterweight to federal and state efforts to limit economic regulation and labor protections, as well as its post-Civil Rights Movement evolution as a vehicle for civil rights backlash.

Part III pivots to consider scholarly and juridical responses to the dangers that direct democracy may pose to minority interests. In particular, this Part considers the Supreme Court's efforts to weigh the benefits of direct democracy as an expression of popular will against equality concerns and the courts' institutional obligation to protect minority interests.

Part IV returns to the subject of this Article: abortion and direct democracy. As this Part observes, throughout the last half century, when direct democracy measures were successful in countering civil rights gains, they were far less successful in either advancing *or* curtailing reproductive rights—that is, until the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*. In *Dobbs*'s wake, direct democracy has emerged as a potent means of preserving—and even expanding—abortion rights at the state level. The disjunction between direct democracy's lackluster history as a vehicle for abortion policymaking and its potent current use to preserve abortion rights speaks to recent constitutional developments that have eroded traditional safeguards for individual rights.

With this insight in mind, Part V considers the shifting dynamics of the electoral and constitutional firmament that make direct democracy especially appealing at this moment. As this Part explains, direct democracy has emerged as a response to critical changes in the electoral landscape—changes that have made representative government less responsive to popular will. Direct democracy speaks to these democratic deficits by allowing the people to register their preferences for reproductive freedom directly, unmediated by the structural impediments of representative government.

But perhaps more profoundly, direct democracy also responds to the seismic changes in the constitutional order that *Dobbs* has wrought, as well as the changes that the decision may, in time, underwrite. *Dobbs* fundamentally altered the landscape of fundamental rights and substantive due process by rescinding the abortion right and further cementing a “history and tradition”-focused method of constitutional interpretation; it has also laid a foundation for a profound shift in the structure of equal protection and women’s status within it. In this regard, the emerging turn to direct democracy to secure abortion rights may reflect both practical realities and increasing anxiety about a new, emerging constitutional order.

In view of these developments, Part VI shifts from the theoretical and conceptual to the practical. Recognizing direct democracy’s appeal in this shifting electoral and jurisprudential landscape, we offer a series of prescriptions aimed at optimizing direct democracy’s promise as a vehicle for securing reproductive freedom while minimizing its likely perils. A brief conclusion follows.

I. THE FORMS OF DIRECT DEMOCRACY

To lay a foundation for what follows, this Part briefly describes the key forms of direct democracy available in the states today. As a threshold matter, democracy at the state level differs significantly from democracy at the federal level: in many state systems, voters engage in self-governance in a far more direct fashion than the federal system allows.¹⁸ Beyond that initial distinction, there is considerable variation in the forms of direct democracy employed by the states. A nuanced understanding of the range of state mechanisms of direct democracy helps clarify its potential and limitations.¹⁹ Accordingly, Section I.A offers a brief

¹⁸ Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 *Mich. L. Rev.* 859, 861–62 (2021) (noting that, unlike the federal Constitution, state constitutions “seek to prevent legislative favoritism and allow the people to engage in direct self-rule through initiatives and referenda”).

¹⁹ See generally Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* (2022) (emphasizing that the allocation of decision-making authority is central to constitutional law and highlighting the role of state courts and constitutions in American law); Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018) (examining how state constitutions and courts have served as laboratories of innovation in protecting individual rights); Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights* (2013)

taxonomic account of the principal forms of direct democracy. Section I.B then considers the state actors and processes that attempt to mediate between the people’s impulses and policy outputs.²⁰

A. Taxonomy

The first, and in many ways the most direct, form of direct democracy is the initiative power—that is, the power of voters to directly propose, and with sufficient support to enact, laws. In some states, the initiative power extends only to statutes;²¹ in others, it may be used exclusively to propose and enact constitutional amendments;²² and in most, it is a mechanism for producing both statutory and constitutional changes.²³ Although initiatives *can* be the most “direct” of the direct democracy forms, in several states, the initiative power is “indirect,” meaning a proposal must first go to the state legislature, which then has the opportunity to enact it. In those states, the proposal only goes before the voters if the legislature fails to enact it.²⁴

(exploring how state constitutions have historically enshrined positive rights related to education, labor, and environmental protections).

²⁰ We should note that although our focus here is on state-level direct democracy, similar mechanisms are also available in many cities, counties, and other localities. See, e.g., Nestor M. Davidson, *Local Constitutions*, 99 *Tex. L. Rev.* 839, 866–67 (2021) (describing local direct democracy); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 *Mich. L. Rev.* 930, 931–33 (1988) (same).

²¹ For examples of state constitutional provisions granting the people the right to propose laws by initiative, see Alaska Const. art. XI, § 1; Idaho Const. art. III, § 1; Me. Const. art. IV, pt. 3, §§ 18(1)–(2), 19; Utah Const. art. VI, § 1(2)(a) (effective Nov. 23, 2026); Wash. Const. art. II, § 1(a); Wyo. Const. art. III, § 52.

²² See, e.g., Fla. Const. art. XI, § 3; Ill. Const. art. XIV, § 3; Miss. Const. art. XV, § 273(3). But see *In re Initiative Measure No. 65: Mayor Butler v. Watson*, 338 So. 3d 599, 615 (Miss. 2021) (en banc) (holding the Mississippi constitutional initiative power inoperable).

²³ Bulman-Pozen & Seifter, *supra* note 18, at 876; Allie Boldt, *State Democracy Rsch. Initiative*, Univ. of Wis. L. Sch., *Direct Democracy in the States: A 50-State Survey of the Journey to the Ballot 5* (2023), <https://statedemocracy.law.wisc.edu/wp-content/uploads/sites/1683/2023/11/Direct-Democracy-In-the-States-Full-Report.pdf> [<https://perma.cc/Q7WP-N95G>] (listing Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota as states with both statutory and constitutional initiatives).

²⁴ Boldt, *supra* note 23, at 1. Some indirect-initiative states, like Maine, further empower the legislature. Where the Maine legislature has failed to enact an initiative and the initiative is therefore slated to be voted on by the people, the legislature may include a “[d]irect initiative of legislation”—that is, a substitute for the popular initiative—to go before the voters at the same time. Me. Const. art. IV, pt. 3, § 18(2); see also Boldt, *supra* note 23, at 92–93 (detailing the statewide ballot measures in Maine, including indirect statutory initiatives, veto referenda, and legislatively referred amendments).

The second key form of direct democracy is the referendum, also called the veto referendum. Essentially the inverse of the initiative, the referendum empowers voters to *override* the legislature by proposing a popular vote on a measure the legislature has already enacted.²⁵ In this regard, the referendum gives the people an opportunity to reject or “veto” legislation.²⁶ Critically, some states make certain categories of enactments—appropriations or emergency bills, for example—ineligible for the veto referendum.²⁷ Many states also limit the window of time following the legislature’s passage of a law in which this veto power can be invoked.²⁸ In a small number of states, veto referenda are available *except* where the state legislature has passed the law with a sufficiently high vote margin.²⁹

The third and most common form of direct democracy is the “legislatively referred amendment,” which authorizes voters to approve or reject a state constitutional amendment that the state legislature proposes.³⁰ Every state constitution except Delaware’s provides for this form of constitutional amendment.³¹ Although it is most common, the legislatively referred amendment is arguably the least “direct” form of direct democracy, as it places voters in a purely reactive posture vis-à-vis the legislature. It is also the most similar to the federal system, which, under Article V of the Constitution, permits constitutional amendment following passage of a proposed amendment by a two-thirds

²⁵ Boldt, *supra* note 23, at 1.

²⁶ Oregon is one state with an unrestricted veto referendum. Or. Const. art. IV, § 1(3)(a) (describing the referendum as the power “to approve or reject . . . any Act, or part thereof, of the Legislative Assembly”).

²⁷ For example, Maryland excepts veto referenda as to laws “making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution.” Md. Const. art. XVI, §§ 1–2. Ohio permits veto referenda on “any law” including “any law appropriating money,” but excepts “emergency laws necessary for the immediate preservation of the public peace, health or safety.” Ohio Const. art. II, §§ 1c–1d. See generally Boldt, *supra* note 23 (categorizing statewide ballot measures and initiatives).

²⁸ Alaska is one example; there, a veto referendum petition must be submitted within ninety days of adjournment of the legislative session in which the act was passed. Alaska Const. art. XI, § 5.

²⁹ See, e.g., Utah Const. art. VI, § 1(2)(a)(i)(B) (effective Nov. 23, 2026) (excepting laws passed by a two-thirds supermajority vote from being subject to the referendum power); Ariz. Const. art. IV, pt. 1, § 1(3) (creating a similar exception, but only for certain emergency laws passed with a legislative supermajority).

³⁰ Boldt, *supra* note 23, at 1.

³¹ *Id.* In Delaware, the only way to amend the state constitution is by a two-thirds supermajority vote in favor in each legislative house, repeated in two consecutive general assemblies. Del. Const. art. XVI, § 1.

supermajority vote in each house of Congress and ratification in three-fourths of the states.³² In addition, although less germane to our discussion here, some states provide for the possibility of recall—a mechanism by which a state’s voters may remove or replace an elected (and sometimes appointed) official before the ordinary expiration of that official’s term in office.³³ Indeed, the recall has been deployed against state officials in the context of criminal justice,³⁴ education,³⁵ and other policies. Although it has yet to be used to target officials because of their approach to abortion rights, it is conceivable, in this post-*Dobbs* landscape, that such developments may occur.

B. Policing the People

The variation across jurisdictions extends well beyond the forms of direct democracy. As this Section discusses, states take different approaches in their efforts to mediate the people’s ability to enact policy through the mechanisms of direct democracy.

Some of this variation involves the front end of the direct democracy process—*how* proposals are included on the ballot and enacted into law. States employ a range of rules encompassing the permissible topics for direct democracy, the process for qualifying an initiative or referendum for the ballot, the threshold required for passage (that is, majority or supermajority), and the role of state actors like attorneys general, who in

³² U.S. Const. art. V.

³³ Bulman-Pozen & Seifter, *supra* note 18, at 878. California has been the site of especially significant state-level recall efforts in recent decades, with voters successfully recalling Governor Gray Davis and replacing him with Arnold Schwarzenegger in 2003, and trying but failing to recall and replace Governor Gavin Newsom in 2020. See Recall History in California (1913 to Present), Off. of Cal. Sec’y of State, <https://www.sos.ca.gov/elections/recalls/recall-history-california-1913-present> [<https://perma.cc/4VS2-VZQT>] (last visited Feb. 16, 2026) (listing 181 recall attempts of state elected officials in California). The state has also seen high-profile recalls at the local level. One especially noteworthy effort was the recall of Judge Aaron Persky after he imposed what many felt was an unduly light sentence on sexual assault defendant Brock Turner. See generally Recent Election, Sexual Assault Law—Judicial Recall—California Judge Recalled for Sentence in Sexual Assault Case, 132 Harv. L. Rev. 1369 (2019).

³⁴ See, e.g., Piper French, Voters Dismiss Two of California’s Leading Progressive Prosecutors, *Bolts Mag.* (Nov. 8, 2024), <https://boltsmag.org/california-progressive-prosecutors-gascon-price-lose-elections/> [<https://perma.cc/N3ZR-FKJL>] (reporting that one “progressive prosecutor” in California—Pamela Price of Alameda County—was ousted following a recall campaign).

³⁵ Michelle Adams, *The Containment: Detroit, the Supreme Court, and the Battle for Racial Justice in the North* 109–11 (2025) (discussing efforts to recall Detroit school officials).

many instances are empowered to review or even redraft ballot language and accompanying materials.

Front-end limits on the types of issues that are eligible for inclusion on the ballot include various versions of the “single subject” rule, which mandates that initiatives or propositions be limited to a “single subject” rather than encompassing multiple topics.³⁶ A recent episode in Florida is instructive on this point. There, opponents of a proposed constitutional amendment to protect abortion rights argued that the proposed amendment violated the “single subject” rule. The proposed amendment would have permitted abortion up until the point of fetal viability, or “when necessary to protect the patient’s health.”³⁷ Opponents argued that the pre-viability and health protections were separate topics and thus could not be combined in a single proposal.³⁸ The Supreme Court of Florida rejected that argument on the view that “viability and maternal health are interconnected matters related to the subject of abortion.”³⁹

In addition to substantive limits, states also impose threshold requirements for putting proposals before voters. All states require proponents to gather some number of signatures before an initiative may be qualified for the ballot, though the number of signatures required varies from jurisdiction to jurisdiction.⁴⁰ There is also significant variation in the geographic requirements for signature gathering. In nearly half of initiative states, signatures can be gathered statewide.⁴¹ The rest impose geographic limits on signature gathering. For example, some states require proponents to gather signatures from individuals hailing from all

³⁶ See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 *Colum. L. Rev.* 687, 689–92 (2010) (proposing a new judicial approach to the “single subject” rule to better advance the goals of direct democracy).

³⁷ Amendment to Limit Government Interference with Abortion 23-07, Fla. Div. of Elections, <https://constitutionalinitiatives.dos.fl.gov/Home/InitDetail?account=83927&seqnum=1> [<https://perma.cc/3GNF-DWCH>] (last visited Feb. 1, 2026) (proposing an amendment to create a new section under Article I of the Florida Constitution).

³⁸ Advisory Op. to the Att’y Gen. re Limiting Gov’t Interference with Abortion, 384 So. 3d 122, 129 (Fla. 2024) (per curiam).

³⁹ *Id.* at 130.

⁴⁰ See Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 *Duke L.J.* 275, 311 (2022); Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 *U. Pa. L. Rev.* 239, 243 (2004) (explaining that, initially, “[s]ignature thresholds were intended to serve as a signal of significant grassroots support for an issue before it was elevated to the ballot”).

⁴¹ For a detailed list of each state’s requirements to qualify a question for the ballot, see John Dinan, *The Council of State Gov’ts, The Book of the States*, at tbl. 1.5 (2023), <https://bookofthestates.org/tables/2023-1-5/> [<https://perma.cc/YU9X-TM99>].

or a supermajority of the state's counties.⁴² Notably, post-*Dobbs*, a number of states have tried to impose more stringent requirements regarding the number or geographic distribution of signatories.⁴³ States also impose on initiative proponents specific filing requirements that are keyed to the signature collection process.⁴⁴

Once proposals are on the ballot, thresholds for enactment vary. In many states, a simple majority is required to enact a proposal.⁴⁵ However, some states require more support, either some or all of the time. In Arizona, any tax-related ballot measure requires approval by sixty percent of voters.⁴⁶ In Florida, initiatives that seek to amend the state's constitution require a sixty-percent vote.⁴⁷ In Colorado, the threshold for constitutional amendment is fifty-five percent.⁴⁸

Likewise, practice varies widely when it comes to the role of state agencies like ballot boards, and public officials like the secretary of state,

⁴² *Id.*

⁴³ For example, ongoing litigation is challenging a statute passed in Arkansas that dramatically increases the number of counties from which signatures must be collected. See Arkansas Act 236 Challenge, Democracy Dkt. (citing Complaint, *King v. Thurston*, No. 60CV-23-1816 (Ark. Cir. Ct. Mar. 10, 2023)), <https://www.democracydocket.com/cases/arkansas-act-236-challenge/> [<https://perma.cc/GZV5-5DYT>] (last updated July 21, 2025, at 11:25 ET) (discussing *King v. Thurston*, the case challenging Arkansas Act 236). For a general discussion of state legislatures imposing more onerous signature and other requirements, see Sara Carter, Alice Clapman & Alexi Comella, Politicians Take Aim at Ballot Initiatives, Brennan Ctr. for Just. (Jan. 16, 2024), <https://www.brennancenter.org/our-work/research-reports/politicians-take-aim-ballot-initiatives> [<https://perma.cc/YS7T-2FTV>].

⁴⁴ Paperwork and filing-fee requirements were deployed to prevent an abortion initiative from going before the voters in the state of Arkansas in November 2024. See *Cowles v. Thurston*, 2024 Ark. 121, at 2–4, 695 S.W.3d 60, 62 (holding that petitioners failed to comply with the statutory filing requirements and affirming the Secretary of State's decision to reject the petition).

⁴⁵ See Dinan, *supra* note 41.

⁴⁶ See Ariz. Const. art. IV, pt. 1, § 1(5)–(6), (13)–(14); *id.* art. XXI, § 1.

⁴⁷ This supermajority requirement was met in 2018 when voters approved broad restoration of voting rights for individuals with felony convictions. Tim Mak, Over 1 Million Florida Felons Win Right to Vote with Amendment 4, NPR (Nov. 7, 2018, at 02:46 ET), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4> [<https://perma.cc/2GKE-J8W3>]. However, more recently, a proposed constitutional amendment related to abortion rights failed with fifty-seven percent of the vote. Regan McCarthy, Florida's Amendment to Protect Abortion Rights Fell Short of Passing by Just 3% Votes, NPR (Nov. 9, 2024, at 07:58 ET), <https://www.npr.org/2024/11/09/nx-s1-5183891/floridas-amendment-to-protect-abortion-rights-fell-short-of-passing-by-just-3-votes> [<https://perma.cc/9FVF-BRED>].

⁴⁸ Colo. Const. art. XIX, § 2(1)(b) (“In order to make it more difficult to amend this constitution, a constitutional amendment shall not become part of this constitution unless the amendment is approved by at least fifty-five percent of the votes cast thereon . . .”).

in the development or approval of ballot language.⁴⁹ In Ohio, for example, the architects of a 2023 reproductive freedom ballot initiative drafted the proposed constitutional amendment in broad terms, guaranteeing “[e]very individual . . . a right to make and carry out one’s own reproductive decisions.”⁵⁰ By its terms, the proposed amendment encompassed not only abortion until the point of fetal viability, but also contraception and fertility treatment, among other things.⁵¹ Critically, the state ballot board

⁴⁹ Boldt, *supra* note 23, at 10 (explaining that the Maine legislature “has the authority to draft the ballot question for legislatively referred amendments as well as legislative alternatives to statutory initiatives, whereas the Secretary of State drafts the question for initiatives and veto referendums”). In South Dakota, the Attorney General develops language for all ballot measures, including legislatively referred amendments. *Id.* In Nevada, “the Nevada Legislative Counsel Bureau prepares the ballot question for a legislatively referred amendment, but the Secretary of State prepares the statement for initiatives and veto referendums, in consultation with the Attorney General.” *Id.*; see also, e.g., Michael R. Wickline, *Griffin Rejects Proposed Ballot Language for Constitutional Amendment to Expand State’s Obligation to Public Education*, *Ark. Democrat-Gazette* (Jan. 9, 2024), <https://www.arkansasonline.com/news/2024/jan/09/griffin-rejects-proposed-ballot-language-for/> (reporting that the Arkansas Attorney General rejected ballot language for a proposed constitutional amendment that would require Arkansas to provide an adequate education to all public school students and require schools that receive state or local funds to meet state academic and accreditation standards).

⁵⁰ Initiative Petition: The Right to Reproductive Freedom with Protections for Health and Safety 1 (2023), <https://ohioattorneygeneral.gov/getattachment/cf27c10f-b153-4731-ae9e-e3555a326ed9/The-Right-to-Reproductive-Freedom-with-Protections-for-Health-and-safety.aspx> [<https://perma.cc/Y49G-AW9T>].

⁵¹ The text of the proposed amendment provided, in relevant part:

Be it Resolved by the People of the State of Ohio that Article I of the Ohio Constitution is amended to add the following Section:

Article I, Section 22. The Right to Reproductive Freedom with Protections for Health and Safety

- A. Every individual has a right to make and carry out one’s own reproductive decisions, including but not limited to decisions on:
 - 1. contraception;
 - 2. fertility treatment;
 - 3. continuing one’s own pregnancy;
 - 4. miscarriage care; and
 - 5. abortion.
- B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:
 - 1. An individual’s voluntary exercise of this right or
 - 2. A person or entity that assists an individual exercising this right,
 unless the State demonstrates that it is using the least restrictive means to advance the individual’s health in accordance with widely accepted and evidence-based standards of care.

However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant

subsequently revised the ballot language, both limiting its sweep and replacing “fetus” with “unborn child,” prompting the ballot initiative’s sponsors to file suit challenging the revised language. Ultimately, the state supreme court rejected the challenge and upheld the revised language.⁵²

In addition to variation in the role that state officials may play in placing proposals on the ballot, states also vary as to the information provided to voters—whether on ballots themselves or in other voter materials.⁵³ Some states provide quite minimal descriptions, whereas others offer more extensive information about proposed measures, including details about the proposal’s likely fiscal impact.⁵⁴ Some states provide separate voter information pamphlets, while others provide no information beyond the ballot’s language.⁵⁵ For example, Alabama’s Fair Ballot Commission—an eighteen-member body that includes, among others, the Governor, Commissioner of Agriculture and Industries, Speaker of the House, and appointed attorneys and non-attorneys—must publish a ballot statement at least sixty days prior to a vote on a legislatively referred amendment, including the full text of the amendment, a summary and copy of any implementing legislation, and a “plain language summary” that also specifies any impact on taxes and the specific category of taxes affected.⁵⁶ By contrast, the Wyoming Secretary of State is only required to publish a proposed amendment’s text and “print a reasonable number of pamphlets” containing the amendment’s text so that the pamphlets may be provided “upon request to any person or organization.”⁵⁷ In a similar vein, some states permit public comment

patient’s treating physician it is necessary to protect the pregnant patient’s life or health.

Id. at 7.

⁵² See *State ex rel. Ohioans United for Reprod. Rts. v. Ohio Ballot Bd.*, 174 Ohio St. 3d 285, 2023-Ohio-3325, 237 N.E.3d 1, at ¶ 44 (per curiam) (“We reject relators’ argument. . . . [Relators’] argument asserts that ‘unborn child’ is a divisive term that elicits a moral judgment whereas the terms ‘fetus’ and ‘fetal viability’ are more neutral and scientific. But this argument does not establish that the ballot board’s language constitutes improper persuasion.”).

⁵³ See, e.g., *Bonta v. Superior Ct.*, 324 Cal. Rptr. 3d 400, 404 (Ct. App. 2024) (discussing voter information materials for Proposition 5 in California).

⁵⁴ Boldt, *supra* note 23, at 7.

⁵⁵ Id. at 9 (noting that voter information pamphlets are required in Alabama, Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Maine, Massachusetts, Montana, Nebraska, Nevada, New Jersey, Oregon, Rhode Island, South Dakota, Utah, and Washington).

⁵⁶ Ala. Code § 17-6-81(a)–(b) (2026).

⁵⁷ Wyo. Stat. Ann. §§ 22-20-104(a), -105 (2025).

submissions or summaries of arguments for or against a measure in voter information pamphlets.⁵⁸ Oregon allows the provision of a “racial and ethnic impact statement” for proposed state measures that are “likely to have an effect on the criminal justice system.”⁵⁹

State courts may also play a role in policing the processes of direct democracy—though again, there is considerable variation across jurisdictions. Courts can be important players at the front end of the process, when they may be asked to weigh in regarding the inclusion or phrasing of a ballot initiative or referendum. Additionally, courts may be called upon to resolve back-end questions regarding obstacles to the implementation of an enacted measure, as well as the meaning, operation, or lawfulness of an initiative or referendum.

Against this basic orientation, the next Part turns to history, describing the emergence, initial operation, and subsequent developments in the use of direct democracy.

II. DIRECT DEMOCRACY: ORIGINS AND EVOLUTION

The United States Constitution makes no explicit provisions for direct democracy. Indeed, in Federalist No. 10, James Madison dismissed the prospect of direct popular engagement in governance with an appeal to the advantages of representative government

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose.⁶⁰

⁵⁸ Boldt, *supra* note 23, at 7 (noting that among states that provide voters information pamphlets or other supplemental materials with details about ballot measures are some that “allow members of the public to submit comments and/or arguments for or against a measure and compile these comments in the pamphlet”).

⁵⁹ Or. Rev. Stat. § 137.685(1)(a) (2025); *id.* § 251.185(1)(e) (requiring the Secretary of State to print in the voters’ pamphlet “[a]ny racial and ethnic impact statement prepared for the measure under ORS 137.685”).

⁶⁰ The Federalist No. 10, at 54–55 (James Madison) (Clinton Rossiter ed., 1961); see also William N. Eskridge, Jr. & Victoria F. Nourse, Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism, 96 N.Y.U. L. Rev. 1718, 1760

Despite its absence from the federal Constitution (and Founding-era misgivings about its desirability), direct democracy established a toehold in the American political landscape early on. Even before the ratification of the federal Constitution, early state constitutions allowed eligible voters (at the time mostly white men) to engage in a degree of direct decision-making.⁶¹ In New England, popular decision-making in local “town meetings” became part of the region’s mythology. In Massachusetts⁶² and New Hampshire,⁶³ ratification of state constitutions was conditioned upon the results of popular referenda—the draft constitutions, once approved by the legislatures, were then “referred” to eligible voters for approval or rejection.⁶⁴ In states like Georgia, Pennsylvania, Massachusetts, and New Hampshire, new constitutions could only be amended upon voter approval.⁶⁵ And some state constitutions subjected all new laws concerning certain issues—most commonly, the location of state capitals, the expansion of the right to vote, and state debt—to popular referendum.⁶⁶

Despite the U.S. Constitution’s silence on the issue, some aspects of federal governance were also submitted to the people for approval. For example, as part of the protocol for admitting new states to the Union,

(2021) (“The Constitution established our government as a republic of representatives, not as a populist democracy.”); Charles R. Kesler, *The Founders’ Views of Direct Democracy and Representation*, in *Democracy: How Direct? Views from the Founding Era and the Polling Era* 1, 5 (Elliott Abrams ed., 2002) (“[T]he Founders . . . distrusted direct democracy precisely because it could not be kept deliberative and because it displayed an unfortunate tendency to become tyrannical.”).

⁶¹ David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* 3–4 (1989) (identifying early voting initiatives); Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 41 (1989) (same). For an account of even earlier (though limited) proto-direct democracy in the form of the colonial New England town meeting, see generally Joseph F. Zimmerman, *The New England Town Meeting: Democracy in Action* (1999).

⁶² John Adams & the Massachusetts Constitution, Mass. Ct. Sys., <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> [<https://perma.cc/UK9U-BT55>] (last visited Nov. 4, 2025) (detailing the drafting history of the 1780 Constitution of the Commonwealth of Massachusetts).

⁶³ New Hampshire ratified a temporary constitution without voter approval in 1776, but it did not ratify a permanent constitution until 1784. Lorianne Updike Toler, *In the Room Where the Constitution Happens*, 25 U. Pa. J. Const. L. 1418, 1437–38, 1484 (2023).

⁶⁴ In both Massachusetts and New Hampshire, voters rejected the initial drafts of constitutions approved by their state legislatures. Cronin, *supra* note 61, at 41.

⁶⁵ Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol’y Rev. 11, 19 (1997).

⁶⁶ *Id.*

Congress required prospective states to seek popular approval of their proposed state constitutions.⁶⁷

Still, the features that mark modern direct democracy—voters’ authority to veto or otherwise negate legislative enactments, and their prerogative to introduce statutes and constitutional amendments—were wholly absent in these early iterations. Direct democracy as we know it is of a relatively recent vintage—the product of the progressive and populist movements of the late nineteenth and early twentieth centuries.

To contextualize a broader discussion of the mechanisms and outputs of direct democracy, this Part considers the origins of modern direct democracy. The contemporary understanding of direct democracy is rooted in the Progressive Era, where it emerged in response to widespread dissatisfaction with the aggregation and consolidation of wealth—and the view that moneyed interests had captured and controlled state legislatures. As Section II.A observes, during this period, the interest in direct democracy focused principally on limiting corporate influences, counteracting the power of state legislatures, and empowering workers and voters. But even as direct democracy sought to advance these ends, there were early glimmers of the populist perils that would, in time, rival and even overshadow its promise. Section II.B pivots to more recent times, canvassing direct democracy’s deployment as part of the political backlash to civil rights gains.

A. Origin Stories: Direct Democracy in the Progressive Era

While glimmers of direct democratic engagement in electoral politics had existed in the United States since the colonial period, the true potential of direct democracy as a vehicle for voter-led change did not fully emerge until the 1890s with the rise of the progressive labor movement. Direct democracy’s oft-recounted origin story involves labor organizer and editor James Sullivan who, on a trip to Switzerland, took notice of the initiative and referendum mechanisms in the Swiss electoral system.⁶⁸ Only a few decades earlier in 1869, Switzerland had rewritten

⁶⁷ *Id.* at 18–19.

⁶⁸ See Richard J. Ellis, *The Opportunist: James W. Sullivan and the Origins of the Initiative and Referendum in the United States*, 11 *Am. Pol. Thought* 1, 2–3 (2022) [hereinafter *Ellis, The Opportunist*] (describing Sullivan’s contributions to direct democracy).

its constitution to provide for direct voter engagement through referendum and initiative.⁶⁹

Switzerland's experience with direct democracy strongly influenced Sullivan, who wrote a series of articles in *The New York Times* and *The Chautauquan* endorsing wider adoption and use of the referendum and initiative processes.⁷⁰ In 1892, Sullivan expanded his advocacy efforts, publishing a short book, *Direct Legislation by the Citizenship Through the Initiative and Referendum* (“*Direct Legislation*”).⁷¹ His work touted the benefits of the referendum and initiative processes, and he noted their alignment with decision-making and governance processes within the labor movement. Sullivan's writing struck a chord with many in organized labor.⁷² Indeed, shortly after the publication of *Direct Legislation*, the American Federation of Labor (“AFL”) supported the initiative and referendum as an official part of its platform, and Samuel Gompers, the AFL's leader, sent Sullivan across the country to galvanize support for direct democracy.⁷³

Sullivan paired his labor-focused advocacy with an appeal to a broader audience. In 1892, the same year that he published *Direct Legislation*, Sullivan helped to establish the People's Power League, an advocacy group dedicated to direct democracy.⁷⁴ Though the League was nonpartisan, it found a committed ally in the Populist Party (also known as the “People's Party”). At its 1892 convention, the Populists adopted a statement signaling interest in direct democracy, and by 1896, a commitment to the initiative and referendum as a central vehicle for policymaking was one of the fundamental planks of the Populist platform.⁷⁵

⁶⁹ Richard J. Ellis, Reimagining Democracy: The Socialist Origins of the Initiative and Referendum in the United States, 22 *J. Gilded Age & Progressive Era* 143, 150 (2023).

⁷⁰ Ellis, *The Opportunist*, supra note 68, at 18–19, 26.

⁷¹ *Id.* at 2.

⁷² See *id.* at 17–43 (describing Sullivan's immersion in the labor community, the provocative framing and language of *Direct Legislation*, and Sullivan's connections to powerful labor figures, including Henry George and Samuel Gompers).

⁷³ Thomas Goebel, “A Case of Democratic Contagion”: Direct Democracy in the American West, 1890–1920, 66 *Pac. Hist. Rev.* 213, 219 (1997) [hereinafter Goebel, *Democratic Contagion*].

⁷⁴ Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890–1940*, at 38 (2002) [hereinafter Goebel, *Government by the People*].

⁷⁵ See Steven L. Piott, *Giving Voters a Voice: The Origins of the Initiative and Referendum in America* 13 (2003).

Populism's connections to direct democracy were amplified when William Jennings Bryan, nominally a Democrat but a close ally of the Populists,⁷⁶ adopted the direct democracy cause as his own. Known as the "Great Commoner," Bryan embraced the initiative and referendum as a critical aspect of populism "[b]ecause the people have found that there is more virtue in the citizen than there is in his representative . . . because the legislature is subjected to a temptation that does not come to the citizen."⁷⁷ Bryan was an effective advocate for direct democracy; following his whistle-stop speaking tours in Arkansas and Oklahoma, which collectively drew over 100,000 attendees, both states adopted the initiative and referendum.⁷⁸ Bryan also played a role in Montana's and Nebraska's decisions to adopt the initiative and referendum.⁷⁹

While the Populist Party declined as a national force following Bryan's 1896 presidential election defeat, the forces that drove the party's—and Bryan's—rise continued to attract voters to the direct democracy cause.⁸⁰ As the excesses of the Gilded Age became increasingly visible, the interest in populism and direct democracy also increased. During this period, much of the electorate became convinced that monopolies and trusts had captured state-level politics, coercing legislatures at the expense of workers, consumers, and families. For many, direct democracy was a compelling counterweight to the influence of wealthy corporations. Through devices like the referendum, voters could veto laws designed to benefit capital, imposing a crucial check on captured state legislatures. The initiative process was similarly appealing because voters could draft and enact laws themselves, circumventing the legislature where progressive bills could easily be defeated.⁸¹ It is perhaps

⁷⁶ The Populists nominated Bryan as their presidential candidate in 1896, making him the nominee of both the Democratic Party and the Populist Party. Lewis L. Gould, William McKinley: Campaigns and Elections, Univ. of Va. Miller Ctr., <https://millercenter.org/president/mckinley/campaigns-and-elections> [<https://perma.cc/VC5B-HFK3>] (last visited Nov. 4, 2025) (providing an overview of the campaign and election of 1896).

⁷⁷ Piott, *supra* note 75, at 59 (second alteration in original) (citation omitted).

⁷⁸ See *id.* at 72–73, 131–32.

⁷⁹ *Id.* at 59, 246–47.

⁸⁰ See Schmidt, *supra* note 61, at 8–9.

⁸¹ See Piott, *supra* note 75, at 1–26; Goebel, *Democratic Contagion*, *supra* note 73, at 215–16; Schmidt, *supra* note 61, at 8; Ellis, *The Opportunist*, *supra* note 68, at 10–11; see also Doris Kearns Goodwin, *The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism* 445–46 (2013) (describing state legislatures captured by the railroads); Richard Briffault, *Distrust of Democracy*, 63 *Tex. L. Rev.* 1347, 1348 (1985) (reviewing David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984)) ("Much as antitrust law was designed to break the economic power of these

unsurprising that the initiative and referendum processes were initially adopted in Western states⁸² where powerful industries like mining, railroads, and lumber exercised outsized political influence and frequently clashed with workers.⁸³

Notably, in the states where direct democracy vehicles were adopted, they were deployed principally to drive progressive-minded reform efforts, including increased rights for workers and families.⁸⁴ For example, voters in Colorado⁸⁵ and Oregon⁸⁶ approved initiatives establishing an eight-hour workday for select groups. Colorado passed two eight-hour day initiatives—one protecting miners and smelters, and another establishing an eight-hour day for women.⁸⁷ In 1914, Arkansas approved an initiative banning child labor for children under fourteen.⁸⁸ Several states established insurance programs for workers and their families. Oregon adopted a workers' compensation initiative,⁸⁹ while Colorado approved an initiative to provide state-funded support for widows and indigent mothers.⁹⁰ Arizona established pensions for the elderly and mothers.⁹¹ It is worth noting that the same moneyed interests to which direct democracy responded during this period had also made considerable inroads in the courts, including the Supreme Court, which

combinations and restore free competition, the initiative, with the allied reforms of the direct primary, the popular election of Senators, the referendum, and the recall, was intended to break the stranglehold these combinations had on the political process by bringing the people directly into lawmaking.”).

⁸² For full lists, see Magleby, *supra* note 81, at 38–40; Cronin, *supra* note 61, at 126–27.

⁸³ See Goebel, *Democratic Contagion*, *supra* note 73, at 227–28.

⁸⁴ The impact of direct democracy cannot be measured solely through successful initiatives and referenda. As a second-order effect, direct democracy may act as a “gun behind the door,” a phrase coined by Woodrow Wilson, to scare the legislature from straying too far from the will of the people. Goebel, *Government by the People*, *supra* note 74, at 55. Additionally, initiatives and referenda may educate voters about issues that would have otherwise gone unnoticed. See generally Daniel A. Smith & Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* (2004) (analyzing national survey data and state initiative usage to demonstrate a slight increase in political knowledge, interest, and discussion in states with initiatives on the ballot).

⁸⁵ Piott, *supra* note 75, at 123–24 (women and mine and smelter workers).

⁸⁶ *Id.* at 49 (public works projects).

⁸⁷ *Id.* at 123–24.

⁸⁸ *Id.* at 134.

⁸⁹ *Id.* at 47.

⁹⁰ *Id.* at 123.

⁹¹ *Id.* at 146.

famously invalidated progressive-leaning governmental actions during this period.⁹²

In addition to expanding the rights of workers and families, progressives used direct democracy to regulate corporate interests. Oregonian initiatives frequently targeted the railroads and railway transport companies, with the successful passage of initiatives to tax the gross earnings of rail transport companies and to prohibit the railroads from giving free passes to politicians, journalists, and other powerful figures.⁹³ Two years later, when the Oregon legislature passed a bill to circumvent the ban on free passes, Oregon voters struck down the bill via referendum.⁹⁴ In California, voters limited the rates that banks could charge consumers on loans.⁹⁵ Oklahomans passed an initiative to restructure the state board of agriculture to be composed entirely of farmers.⁹⁶ Colorado voters approved multiple initiatives establishing civil service protections.⁹⁷ To be sure, this catalog of direct democracy efforts during this period is partial and likely understates its broader impact on consumers. Indeed, shortly after their voters adopted the initiative and referendum, legislatures in a number of states established commissions to regulate public utility companies,⁹⁸ railroads,⁹⁹ and food and drugs.¹⁰⁰

Notably, during this period, direct democracy was also deployed to achieve election reform and greater political accountability. Five states established direct primaries for state offices.¹⁰¹ Four states—California, Oregon, Washington, and Arkansas—abolished the poll tax via initiative.¹⁰² In 1912, eight years before the Nineteenth Amendment was

⁹² The most famous instance of this dynamic is undoubtedly the Court's decision in *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (striking down a New York law prohibiting bakeshops from allowing employees to work more than ten hours in one day or sixty hours in one week).

⁹³ Piott, *supra* note 75, at 43–44; see also Goodwin, *supra* note 81, at 455 (discussing railroads' use of free passes to incentivize and reward favorable news coverage).

⁹⁴ Tony Howard Evans, *Oregon Progressive Reform, 1902–1914*, at 137, 149–50, 180–81 (1966) (Ph.D. dissertation, University of California, Berkeley) (ProQuest).

⁹⁵ M. Dane Waters, *The Initiative and Referendum Almanac: A Comprehensive Reference Guide to the Initiative and Referendum Process* 157 (2d ed. 2018).

⁹⁶ Piott, *supra* note 75, at 79.

⁹⁷ *Id.* at 124.

⁹⁸ *Id.* at 107 (Maine).

⁹⁹ *Id.* at 44 (Oregon).

¹⁰⁰ *Id.* at 65 (Oklahoma).

¹⁰¹ The five states are South Dakota, Oregon, Montana, Maine, and Arkansas. *Id.* at 31, 42, 59–60, 107, 134.

¹⁰² Waters, *supra* note 95, at 153, 596, 740, 990.

ratified, Arizona¹⁰³ and Oregon¹⁰⁴ passed initiatives enfranchising women. Perhaps seeing the writing on the wall, the Montana¹⁰⁵ and South Dakota¹⁰⁶ legislatures amended their state constitutions to give women the vote only a few years later. In Oregon¹⁰⁷ and Montana,¹⁰⁸ the initiative process was used to establish presidential primaries and enact corrupt-practices laws that limited campaign expenditures. For their part, Arkansas voters adopted an initiative that limited legislators' salaries,¹⁰⁹ while Colorado and Oregon voters blessed initiatives that allowed voters, upon obtaining signatures from twenty-five percent of the electorate, to recall state officials.¹¹⁰ Direct democracy also shaped electoral politics at the federal level. Oregon, Montana, and Oklahoma passed initiatives providing for direct election of U.S. senators¹¹¹—efforts that paved the way for the eventual ratification of the Seventeenth Amendment.¹¹²

Even the courts and justice system came within the ambit of Progressive Era direct democracy. Oregon adopted an initiative requiring a grand jury, rather than some other body or actor, to issue criminal indictments.¹¹³ Colorado voters deployed the initiative process to establish juvenile courts¹¹⁴ and, more controversially, to authorize voters to veto Colorado Supreme Court decisions that declared laws unconstitutional.¹¹⁵

Because of its success in producing popular reforms that limited the influence of wealth and corporations, direct democracy was subject to intense backlash. Corporations and special interests turned to the courts to push back on direct democracy, though with mixed results. State courts,

¹⁰³ Piott, *supra* note 75, at 146.

¹⁰⁴ *Id.* at 48–49.

¹⁰⁵ *Id.* at 60.

¹⁰⁶ *Id.* at 31.

¹⁰⁷ *Id.* at 44–47.

¹⁰⁸ *Id.* at 59–60.

¹⁰⁹ *Id.* at 133.

¹¹⁰ *Id.* at 44–45, 123. California's notorious recall process was implemented by its legislature, not via initiative. *Id.* at 167–68.

¹¹¹ *Id.* at 44–45, 59–60, 79.

¹¹² U.S. Const. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .”).

¹¹³ Waters, *supra* note 95, at 919.

¹¹⁴ Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 *J. Pol’y Hist.* 349, 356 (2002).

¹¹⁵ Piott, *supra* note 75, at 123. The Colorado Supreme Court subsequently struck down the judicial veto amendment. *People v. Max*, 198 P. 150, 155 (Colo. 1921); *People v. W. Union Tel. Co.*, 198 P. 146, 149 (Colo. 1921).

themselves subject to the criticisms of corporate capture,¹¹⁶ were more likely to be receptive to entreaties to limit direct democracy's impact. For example, the South Dakota Supreme Court ruled that the state's legislature could immunize any law from the referendum process by designating it an "emergency" measure.¹¹⁷ Between 1903 and 1913, the South Dakota legislature thwarted voter action on legislation by designating approximately forty percent of all laws "emergency" measures.¹¹⁸ In a similar vein, between 1912 and 1915, the Arkansas Supreme Court issued three decisions that severely limited direct democracy's impact,¹¹⁹ including a decision holding that voters could introduce only three constitutional amendments in a two-year span.¹²⁰

But using state courts to limit direct democracy's reach was only one arrow in the quiver of groups eager to limit the power of voter-led initiatives. They soon set their sights on eliminating direct democracy entirely with an appeal to the federal Constitution and the U.S. Supreme Court. In 1912, the issue presented itself squarely at the Court. The facts of *Pacific States Telephone & Telegraph Co. v. Oregon*¹²¹ reflected direct democracy's populist appeal as an antidote to wealth and corporate power. In 1906, Oregon voters enacted an initiative that levied a two-percent tax on the Pacific States Telephone and Telegraph Company's revenue.¹²² The utility refused to pay the tax, prompting Oregon to sue for its collection. The utility answered the lawsuit by arguing, inter alia, that the initiative—and direct democracy more generally—was unconstitutional because it undermined the "Republican Form of

¹¹⁶ See Goebel, *Government by the People*, supra note 74, at 62 ("The judiciary ranked second only to corrupt legislatures as the object of radical and reformist attack.").

¹¹⁷ See Piott, supra note 75, at 30–31; *State ex rel. Lavin v. Bacon*, 85 N.W. 605, 608 (S.D. 1901).

¹¹⁸ Piott, supra note 75, at 30–31.

¹¹⁹ See *id.* at 134 (citing *Hodges v. Dawdy*, 149 S.W. 656, 661–62 (Ark. 1912) (striking down an entire provision of Arkansas's Amendment 10—an amendment that gave citizens the power of initiative and referendum—under the absurd results canon)); *id.* at 134–35 (citing *State ex rel. Little Rock v. Donaghey*, 152 S.W. 746, 748 (Ark. 1912) (holding that the passage of Amendment 10 did not alter the previously existing rule that only three constitutional amendments could be submitted in any two-year period)); *id.* at 135 (citing *Hildreth v. Taylor*, 175 S.W. 40, 45 (Ark. 1915) (construing Amendment 10 to require a prospective amendment to obtain approval from the majority of total votes cast in the election, not the majority of votes cast on that question)).

¹²⁰ *Donaghey*, 152 S.W. at 748.

¹²¹ 223 U.S. 118 (1912).

¹²² *Id.* at 135–36.

Government” guaranteed under Article IV of the U.S. Constitution.¹²³ Writing for a unanimous Court, Chief Justice White concluded that only Congress was empowered to enforce Article IV’s Guarantee Clause, rendering the utility’s lawsuit a nonjusticiable political question.¹²⁴ Chief Justice White’s opinion, which also lauded the rights and prerogatives of states to govern themselves, was widely viewed as a tacit endorsement of direct democracy’s constitutionality.¹²⁵ Although direct democracy’s reach had been curbed in some jurisdictions, this scuffle at the high court made clear that, as a matter of federal constitutional law, avenues would remain for voters to make their voices heard—directly—in governance.

The trouble, of course, was that when the voters raised their voices to be heard, a variety of messages might be produced. Although much of the initial interest in direct democracy fueled progressive policymaking, like the eight-hour workday and child labor laws, other voter-enacted measures bore a more illiberal cast, reflecting nativist and anti-immigrant sentiments.¹²⁶ For example, in 1914, Arizona voters enacted an initiative restricting the hiring of noncitizens.¹²⁷ Similarly, in 1920, California voters passed an “Alien Land Law” that prevented Japanese immigrants from leasing real property.¹²⁸

¹²³ *Id.* at 136–37; U.S. Const. art. IV, § 4.

¹²⁴ *Pac. Tel.*, 223 U.S. at 149–51.

¹²⁵ See Norman R. Williams, *Direct Democracy, the Guarantee Clause, and the Politics of the “Political Question” Doctrine: Revisiting Pacific Telephone*, 87 *Or. L. Rev.* 979, 980 (2008) (“[T]he U.S. Supreme Court’s refusal to adjudicate the constitutionality of direct democracy opened the door to the adoption and use of direct democracy throughout the nation.”).

¹²⁶ It is noteworthy that during this period, many state legislatures passed laws limiting Black voters’ access to the ballot or disfranchising Black voters entirely. See generally Glenda Elizabeth Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896–1920* (2d ed. 2019) (analyzing the suffrage movement in the context of Black women’s political activism during the Jim Crow Era).

¹²⁷ Sidney P. Osborn, *Ariz. Sec’y of State, Initiative and Referendum Publicity Pamphlet: State of Arizona 81* (1914), <https://azmemory.azlibrary.gov/nodes/view/102782> [<https://perma.cc/W3TJ-JL3X>] (“An Act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona, and to provide penalties and punishments for the violation thereof.”); Arizona Measure Nos. 318–319: Require Employers to Have at Least 80% U.S. Citizen Employees Initiative (1914), *Ballotpedia*, [https://ballotpedia.org/Arizona_Measure_Nos._318-319_Eighty_Percent_Citizenship_Labor_Initiative_\(1914\)](https://ballotpedia.org/Arizona_Measure_Nos._318-319_Eighty_Percent_Citizenship_Labor_Initiative_(1914)) [<https://perma.cc/7FW6-LQ5N>] (last visited Nov. 4, 2025).

¹²⁸ Cal. Proposition 1: Alien Land Law (1920), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1149&context=ca_ballot_props [<https://perma.cc/HM5G-V8RC>]; California Proposition 1: Alien Property Initiative (1920), *Ballotpedia*, [https://ballotpedia.org/California_Proposition_1_Alien_Property_Initiative_\(1920\)](https://ballotpedia.org/California_Proposition_1_Alien_Property_Initiative_(1920)) [<https://perma.cc/6KJA-KB7B>] (last visited Nov. 4, 2025). For an in-depth history of the passage of the California Alien Land Law,

Likewise, ballot initiatives were used in several states to target minority religions and to promote Protestant Christianity. In 1922, Oregon voters, animated by anti-Catholic sentiment, enacted a ballot measure mandating public school attendance.¹²⁹ The U.S. Supreme Court ultimately invalidated the measure on the ground that it violated the fundamental right of parents to raise their children in the manner of their choosing.¹³⁰ Just a few years later, in 1928, Arkansas voters passed an initiative banning the teaching of evolution.¹³¹ Two years later, Arkansas voters approved a ballot measure mandating Bible reading in public schools.¹³²

Viewed in its entirety, this history underscores the promise—and peril—of direct democracy. From the start, direct democracy was understood as a means of allowing the people to counteract the corrosive forces of money and influence in politics. But even in its infancy, direct democracy’s promise coexisted alongside the prospect of deeply problematic majoritarian impulses. Direct democracy allowed the people a voice, but the people’s voice could sound in a register that exacerbated the exclusion and isolation of minority groups.

As the following Section details, by the mid-twentieth century, these two impulses would manifest as voters deployed direct democracy once again—this time to counteract civil rights gains and societal change.

B. Direct Democracy and Civil Rights

Direct democracy’s first epoch drew to a close as the postwar era dawned, and interest in direct democracy dimmed. However, by the 1960s, the successes of various civil rights movements, coupled with the increasing diversity, pluralism, and secularism of American society,

see generally Brian J. Gaines & Wendy K. Tam Cho, On California’s 1920 Alien Land Law: The Psychology and Economics of Racial Discrimination, 4 *State Pol. & Pol’y Q.* 271 (2004); Rose Cuison Villazor, Rediscovering *Oyama v. California*: At the Intersection of Property, Race, and Citizenship, 87 *Wash. U. L. Rev.* 979, 984–86 (2010).

¹²⁹ Kristin Dimick, The Ku Klux Klan and the Anti-Catholic School Bills of Washington and Oregon, Univ. of Wash.: Seattle C.R. & Lab. Hist. Project (2006), https://depts.washington.edu/civilr/kkk_i49.htm [<https://perma.cc/32BB-MQAA>].

¹³⁰ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

¹³¹ Arkansas Act 1: Ban on Teaching Human Evolution in Public Schools and Colleges Initiative (1928), Ballotpedia, [https://ballotpedia.org/Arkansas_Ban_on_Teaching_Evolution_Act_1_\(1928\)](https://ballotpedia.org/Arkansas_Ban_on_Teaching_Evolution_Act_1_(1928)) [<https://perma.cc/X3SD-29GY>] (last visited Nov. 4, 2025).

¹³² Initiative & Referendum Inst., Statewide Initiatives, <https://iandrinstitute.org/New%20RI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Arkansas.pdf> [<https://perma.cc/65YU-48CU>] (last visited Nov. 4, 2025).

spurred renewed interest in direct democracy. As this Section details, during this period, direct democracy served as a potent means for voters to counteract the legislative and judicial expansion of civil rights, the impact of migration, and the rise of secularism.

1. Civil Rights Backlash

The Supreme Court's 1954 decision in *Brown v. Board of Education*¹³³ was among the first major victories for the Civil Rights Movement. In *Brown*, the Court unanimously overruled *Plessy v. Ferguson*,¹³⁴ repudiating the principle of "separate but equal" on which the South's Jim Crow regime was built.¹³⁵ As documented, the *Brown* decision sparked considerable backlash as Southern states vowed to resist the Court's integration mandate.¹³⁶ But in addition to Massive Resistance, the Southern Manifesto, and other less coordinated acts of violence and oppression, Southerners deployed the tools at their disposal to oppose efforts to dismantle Jim Crow. Among the arrows in the quiver of Southern resistance were the mechanisms of direct democracy. In 1956, for example, Arkansas voters passed a referendum directing the state government to pass laws opposing the *Brown* decision.¹³⁷ Ultimately, the referendum was largely symbolic. The Court repeatedly confirmed the constitutionality of *Brown* and its integration mandate in subsequent decisions, and the Eisenhower Administration deployed federal troops to integrate Little Rock Central High in 1957.¹³⁸ Still, the 1956 referendum clearly communicated popular hostility to integration and the burgeoning movement for Black civil rights.

¹³³ 347 U.S. 483 (1954).

¹³⁴ 163 U.S. 537 (1896).

¹³⁵ 347 U.S. at 494–95.

¹³⁶ See Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 *Yale L.J.F.* 99, 117–18 (2023) (emphasizing the role that the "Southern Manifesto" and other anti-integration initiatives played in mobilizing resistance to *Brown* (emphasis omitted)); see also Melissa Murray, *Making History*, 133 *Yale L.J.F.* 990, 991–93 (2024) (discussing popular and official resistance to *Brown*).

¹³⁷ Waters, *supra* note 95, at 128–29. The text of the Arkansas referendum reads: "To cause the General Assembly to take appropriate action and pass laws opposing in every Constitutional manner the unconstitutional desegregation decisions of May 17, 1954, and May 3, 1955, of the U.S. Supreme Court." *Id.*

¹³⁸ See *Cooper v. Aaron*, 358 U.S. 1, 12, 16–20 (1958) (discussing federal troop deployment and reaffirming both *Brown*'s integration mandate and the supremacy of judicial review); see also Murray, *supra* note 136, at 994 (discussing *Cooper*).

Although direct democracy did not initially succeed in disrupting *Brown* and its integration mandate, by the late 1960s and 1970s, as integration gained steam throughout the country, voters again turned to direct democracy to register their objections to the pace and methods of social change. With *Brown* and its progeny, the Court sought to eliminate de jure segregation “root and branch.”¹³⁹ Nevertheless, localities across the country continued to grapple with the challenges of complying with the Court’s demand for integration in a landscape plagued by de facto residential segregation. In 1971, the issue reached the Court in *Swann v. Charlotte-Mecklenburg Board of Education*, where the Court ordered school districts to achieve integration and racial balance, even if doing so required affirmative measures, like redrawing school district boundaries and implementing forced busing plans.¹⁴⁰ As busing emerged as a key strategy for achieving integration, voters across the country turned to direct democracy to register and act upon their objections to this method of integration.

In 1972, just a year after the Court’s decision in *Swann*, Californians banned busing via initiative.¹⁴¹ Colorado voters did the same in 1974,¹⁴² and voters in Washington followed suit in 1978.¹⁴³ After the Supreme

¹³⁹ *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (“School boards . . . operating state-compelled dual systems [are] nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination [is] eliminated root and branch.”).

¹⁴⁰ 402 U.S. 1, 15–16, 28–30 (1971).

¹⁴¹ Cal. Proposition 21: Assignment of Students to Schools (1972), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1771&context=ca_ballot_props [https://perma.cc/B99L-N EHX] (“Add section to Education Code providing: ‘No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school.’ Repeals section establishing policy that racial and ethnic imbalance in pupil enrollment in public schools shall be prevented and eliminated.”); see also *New Ban on Busing in California Challenged in Suit* by A.C.L.U., N.Y. Times, Nov. 12, 1972, at 38 (describing the ACLU’s lawsuit challenging Proposition 21’s constitutionality).

¹⁴² Legis. Council, Colo. Gen. Assembly, *An Analysis of 1974 Ballot Proposals 21* (1974), <https://co.electionstats.com/eng/files/serve/197> [https://perma.cc/Q8GT-DULP] (“An amendment to Section 8 of Article IX of the Constitution of the State of Colorado, to prohibit the assignment or the transportation of pupils to public educational institutions in order to achieve racial balance of pupils at such institutions.”); Colorado Amendment No. 8: Prohibition of Bussing Students to Achieve Racial Balance Initiative (1974), Ballotpedia, [https://ballotpedia.org/Colorado_Amendment_No._8_Prohibition_of_Bussing_Students_to_Achieve_Racial_Balance_Initiative_\(1974\)](https://ballotpedia.org/Colorado_Amendment_No._8_Prohibition_of_Bussing_Students_to_Achieve_Racial_Balance_Initiative_(1974)) [https://perma.cc/JDQ9-GTAJ] (last visited Nov. 5, 2025).

¹⁴³ Elections Search Results: November 1978 General, Off. of Wash. Sec’y of State, https://www.sos.wa.gov/elections/results_report.aspx?e=35&c=&c2=&t=&t2=&p=&p2=&y= [https://perma.cc/9AA6-MUSN] (last visited Nov. 5, 2025) (prohibiting school authorities from

Court of California held the 1972 initiative banning busing unconstitutional,¹⁴⁴ anti-busing activists again turned to direct democracy, successfully enacting a modified busing ban through the initiative process.¹⁴⁵ Even after the U.S. Supreme Court imposed limits on busing plans in 1974's *Milliken v. Bradley*,¹⁴⁶ direct democracy persisted as a means for voters to express their opposition to busing as a tool of integration.¹⁴⁷

The interest in direct democracy as a means of undermining civil rights gains was not confined to public education and busing. On the heels of the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, civil rights advocates and activists trained their energies on eradicating racial discrimination in local housing markets. For example, throughout the 1960s, Martin Luther King, Jr., staged open housing marches to call attention to racial discrimination in local housing markets and the poor housing conditions forced upon Black residents as a result of housing discrimination.¹⁴⁸ King's call to end housing discrimination bore fruit; by 1966, President Lyndon B. Johnson introduced a federal fair housing bill to Congress.¹⁴⁹ Although the bill did not succeed at that time, the groundwork had been laid. States and localities had enacted

“assigning students to other than the nearest or next-nearest school”); see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461, 470 (1982) (invalidating a state law prohibiting school boards from using busing to remedy segregation).

¹⁴⁴ *Santa Barbara Sch. Dist. v. Superior Ct.*, 530 P.2d 605, 613, 615 (Cal. 1975) (en banc).

¹⁴⁵ Cal. Proposition 1: School Assignment and Transportation of Pupils (1979), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1860&context=ca_ballot_props [<https://perma.cc/6Z7V-W3VE>]; see also Wallace Turner, *Californians Favor Propositions to Halt Busing and Limit Spending*, *N.Y. Times*, Oct. 29, 1979, at A17 (describing the racial polarization of the electorate and voter confusion surrounding the proposition).

¹⁴⁶ 418 U.S. 717, 746–47 (1974).

¹⁴⁷ Indeed, in 1989, voters in Seattle, Washington, passed an initiative limiting school tax revenue unless the Seattle school district ended mandatory busing. *Ballot Initiatives: 1985–1989 Ballot Initiatives*, *Seattle Mun. Archives*, <https://www.seattle.gov/cityarchives/seattle-facts/ballot-initiatives> [<https://perma.cc/HWX8-7FSX>] (last visited Nov. 5, 2025).

¹⁴⁸ See Pierre deVise, *Housing Discrimination in the Chicago Metropolitan Area: The Legacy of the Brown Decision*, 34 *DePaul L. Rev.* 491, 494–95 (1985) (describing Martin Luther King, Jr.'s organizing against housing discrimination in Chicago).

¹⁴⁹ James R. Ralph Jr. & Mary Lou Finley, *In Their Own Voices: The Story of the Movement as Told by the Participants*, in *The Chicago Freedom Movement: Martin Luther King Jr. and Civil Rights Activism in the North* 13, 44–46 (Mary Lou Finley, Bernard LaFayette Jr., James R. Ralph Jr. & Pam Smith eds., 2016); Leonard S. Rubinowitz, *The Chicago Freedom Movement and the Federal Fair Housing Act*, in *The Chicago Freedom Movement: Martin Luther King Jr. and Civil Rights Activism in the North*, supra, at 115, 117–18.

protections against housing discrimination,¹⁵⁰ and it seemed quite likely that federal fair housing legislation eventually would be enacted.¹⁵¹

The open housing movement's success sparked a series of direct democracy efforts aimed at staving off neighborhood integration under the guise of protecting the rights of property owners and landlords. In 1964, California voters repealed their state's fair housing law by an overwhelming margin.¹⁵² Four years later, Maryland voters used the referendum to repeal their state's fair housing law.¹⁵³ As those statewide efforts were underway, voters elsewhere used direct democracy to pursue similar goals at the local level. In 1964, Detroit voters amended the city charter to create a homeowners' "bill of rights" that would stymie housing integration by allowing residents "the right to choose [their] own friends and associates" and the freedom to sell or rent property to anyone "for [their] own reasons."¹⁵⁴ That same year, voters in Akron, Ohio, effectively repealed their city's fair housing ordinance by requiring that "[a]ny ordinance . . . which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property . . . on the basis of race, color, religion, national origin or ancestry" must first be approved by a majority of the voters before becoming effective.¹⁵⁵ In 1967, voters in Jackson, Michigan,¹⁵⁶ and

¹⁵⁰ William J. Collins, *The Political Economy of State Fair Housing Laws Before 1968*, 30 *Soc. Sci. Hist.* 15, 16–18 (2006).

¹⁵¹ Indeed, in 1968, just two months after King's assassination in Memphis, Tennessee, Congress enacted the Fair Housing Act. See Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

¹⁵² *Anti-Rights Plan Winning on Coast; California Trend Appears to Back Proposition 14*, *N.Y. Times*, Nov. 4, 1964, at 34 (discussing support for Proposition 14, which created a state constitutional right to refuse to sell, lease, or rent residential properties).

¹⁵³ *Maryland Prohibit Housing Discrimination: Question 4 (1968)*, Ballotpedia, [https://ballotpedia.org/Maryland_Prohibit_Housing_Discrimination_Question_4_\(1968\)](https://ballotpedia.org/Maryland_Prohibit_Housing_Discrimination_Question_4_(1968)) [<https://perma.cc/P5DZ-QETF>] (last visited Nov. 5, 2025); see also *Spaulding v. Blair*, 403 F.2d 862, 863, 865 (4th Cir. 1968) (describing the initiative and upholding its constitutionality prior to the referendum vote).

¹⁵⁴ See *N.A.A.C.P. Joins Attack on Detroit Housing Law; Court Action Seeks to Upset Statute as Restrictive of Negroes' Right to Buy*, *N.Y. Times*, Dec. 22, 1964, at 21 (describing the ordinance and legal challenges to its constitutionality). The ordinance was ultimately struck down as unconstitutional. Sidney Fine, *Michigan and Housing Discrimination, 1949–1968*, 23 *Mich. Hist. Rev.* 81, 107 (1997).

¹⁵⁵ *Hunter v. Erickson*, 393 U.S. 385, 387 (1969) (quoting Akron City Charter § 137 (1964)); see also Transcript of Oral Argument at 4, *Hunter*, 393 U.S. 385 (No. 63) (describing the passage of the referendum). The Supreme Court held that the Akron referendum violated the Equal Protection Clause. *Hunter*, 393 U.S. at 393.

¹⁵⁶ See Fine, *supra* note 154, at 105–06.

Springfield, Ohio,¹⁵⁷ enacted similar measures aimed at thwarting housing integration.

These episodes make clear the potential of direct democracy to blunt the impact of broader public policies aimed at securing civil rights. And, as the use of direct democracy in the context of housing integration shows, these voter-driven efforts to thwart civil rights often were themselves framed in the vernacular of civil rights. The use of direct democracy to restrict affirmative action in education, employment, and contracting is instructive on this point.

Federal affirmative action programs emerged in the 1960s to complement other civil rights initiatives by creating formal pathways for previously excluded minorities to gain access to employment, education, and contracting opportunities. Over a period of thirty years, from the 1970s through the early 2000s, affirmative action programs were challenged in federal court—and narrowly survived. Frustrated in their efforts to challenge affirmative action in the courts, opponents of the measures turned instead to direct democracy, where they could appeal directly to voters and, as importantly, couch their opposition to affirmative action in the language of civil rights.

In 1996, the same year that the U.S. Supreme Court declined to review an affirmative action challenge against the University of Texas,¹⁵⁸ California enacted Proposition 209.¹⁵⁹ The measure was presented to the state's voters as a "Prohibition Against Discrimination or Preferential

¹⁵⁷ State-by-State Review of 1967 Elections, CQ Almanac (1967), <https://library.cqpress.com/cqalmanac/document.php?id=cqal67-1311489>.

¹⁵⁸ See *Hopwood v. Texas (Hopwood II)*, 78 F.3d 932, 944 (5th Cir.) ("We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."), *cert. denied*, 518 U.S. 1033 (1996).

¹⁵⁹ Cal. Proposition 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (1996) [hereinafter Cal. Proposition 209], https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2128&context=ca_ballot_props [<https://perma.cc/WE/N4-CMKF>] (eliminating state and local government affirmative action programs). Proposition 209 survived a constitutional challenge, *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 711 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997), but Californians in 2020 voted to maintain Proposition 209 and its opposition to affirmative action, despite a campaign in which supporters of affirmative action outspent opponents 19-1, Michael Powell & Ilana Marcus, *The Failed Affirmative Action Campaign That Shook Democrats*, N.Y. Times (June 11, 2023), <https://www.nytimes.com/2023/06/11/us/supreme-court-affirmative-action.html> (discussing shifting voter coalitions in the affirmative action debate).

Treatment by State and Other Public Entities,”¹⁶⁰ and its passage made California the first state in the nation to ban affirmative action.¹⁶¹

But California would not be the last state to do so. Two years later, in 1998, Washington voters passed an initiative banning affirmative action,¹⁶² and they reaffirmed that ban in 2019 via a referendum that overrode the legislature’s attempt to reinstate affirmative action.¹⁶³ In 2006, three years after the U.S. Supreme Court narrowly blessed the University of Michigan Law School’s “holistic” use of race in its admissions protocol,¹⁶⁴ Michiganders banned affirmative action via initiative.¹⁶⁵ Two years later, in 2008, fifty-eight percent of Nebraska voters enacted an initiative which prohibited the consideration of “individuals or groups based upon race, sex, color, ethnicity, or national origin in operating public employment, education or contracting.”¹⁶⁶ Arizona followed suit in 2010 with the Arizona Civil Rights Initiative.¹⁶⁷

To date, Colorado is the only state to have rejected a ballot measure banning affirmative action. In 2008, Coloradans narrowly rejected a proposed initiative to prohibit race- and gender-based affirmative action

¹⁶⁰ See Cal. Proposition 209, *supra* note 159.

¹⁶¹ Shirin Ali, California Tried to Warn Us, *Slate* (Nov. 4, 2023, at 05:50 ET), <https://slate.com/news-and-politics/2023/11/affirmative-action-scotus-history-harvard-california-michigan.html> [<https://perma.cc/TXS2-NX3Q>].

¹⁶² Elections Search Results: November 1998 General, Off. of Wash. Sec’y of State, https://www.sos.wa.gov/elections/results_report.aspx?e=10&c=&c2=&t=&t2=&p=&p2=&y= [<https://perma.cc/4ZSV-TG9E>] (last visited Nov. 5, 2025) (documenting Washington state election results).

¹⁶³ History of Referendum Measures, Off. of Wash. Sec’y of State, https://www2.sos.wa.gov/elections/initiatives/statistics_referendummeasures.aspx [<https://perma.cc/YH4J-RDNP>] (last visited Nov. 5, 2025); see also Joseph O’Sullivan, With Nearly All Ballots Counted, Voters Reject Washington’s Affirmative-Action Measure, *Seattle Times* (Dec. 28, 2019, at 14:06 ET), <https://www.seattletimes.com/seattle-news/politics/with-nearly-all-ballots-counted-voters-reject-washingtons-affirmative-action-measure/> [<https://perma.cc/V9NZ-6YVL>] (describing the dynamics of the race and the resulting rejection of affirmative action).

¹⁶⁴ *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (concluding that the Equal Protection Clause did not prohibit a narrowly tailored use of race in admissions to further a school’s compelling interest in obtaining the educational benefits that flow from diversity).

¹⁶⁵ Tamar Lewin, Michigan Rejects Affirmative Action, and Backers Sue, *N.Y. Times*, Nov. 9, 2006, at P16.

¹⁶⁶ Official Results of Nebraska General Election, Off. of Neb. Sec’y of State 66 (2008), <https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/elections/2008/2008%20General%20Canvass%20Book.pdf> [<https://perma.cc/M54S-J5LH>].

¹⁶⁷ State of Arizona Official Canvass: 2010 General Election, Off. of Ariz. Sec’y of State 14 (2010), <https://apps.azsos.gov/election/2010/General/Canvass2010GE.pdf> [<https://perma.cc/7EBE-SUPC>].

by public entities.¹⁶⁸ It was the first state to vote to retain such preferences¹⁶⁹—a result that some have attributed to voter confusion over the initiative’s language,¹⁷⁰ as well as the effect of Barack Obama’s victory in Colorado in that year’s presidential election.¹⁷¹

2. *Gay Rights Backlash*

As the preceding Subsection makes clear, direct democracy proved an effective weapon for resisting—and retrenching—the gains made during the Civil Rights Movement. Notably, the backlash to civil rights was often, ironically, framed in the vernacular of rights—that is, initiatives and referenda were pitched as efforts to assert, preserve, and protect the rights of property owners, parents, and other constituencies affected by judicial decisions and legislative interventions on behalf of civil rights.

Critically, the success of direct democracy to counteract civil rights provided a potent template for deploying direct democracy to resist other burgeoning rights movements, including the gay rights movement. In the twentieth and early twenty-first centuries, opponents of gay rights leveraged direct democracy to prevent members of the LGBTQ+ community from obtaining full equality. The first such effort was Anita Bryant’s infamous crusade to repeal a Miami, Florida, ordinance that prohibited sexual orientation discrimination in employment, housing, and public accommodations.¹⁷² Bryant’s “Save Our Children” campaign passed by a more than two-to-one margin and garnered the largest voter turnout for a special election in Miami-Dade County’s history.¹⁷³ It also

¹⁶⁸ Dan Frosch, *Vote Results Are Mixed on a Ban on Preference*, N.Y. Times, Nov. 8, 2008, at A19.

¹⁶⁹ *Id.*

¹⁷⁰ Amy N. Farley, Matthew N. Gaertner & Michele S. Moses, *Democracy Under Fire: Voter Confusion and Influences in Colorado’s Anti-Affirmative Action Initiative*, 83 Harv. Educ. Rev. 432, 456 (2013) (examining Colorado voters’ perception of and confusion around the initiative).

¹⁷¹ Reeves Wiedeman, *Analysis: How Colorado Became the First State to Reject a Ban on Affirmative Action*, Chron. of Higher Educ. (Nov. 10, 2008), <https://www.chronicle.com/article/analysis-how-colorado-became-the-first-state-to-reject-a-ban-on-affirmative-action-113935/>.

¹⁷² B. Drummond Ayres Jr., *Miami Votes 2 to 1 to Repeal Law Barring Bias Against Homosexuals*, N.Y. Times, June 8, 1977, at A1; see also Rick Perlstein, *Reaganland: America’s Right Turn 1976–1980*, at 85–98 (2020) (discussing Anita Bryant’s crusade as a part of a national anti-gay movement).

¹⁷³ See Fred Fejes, *Gay Rights and Moral Panic: The Origins of America’s Debate on Homosexuality* 143–44 (2008) (analyzing the 1977 campaign against the Miami-Dade County, Florida, gay rights movement).

spawned dozens of anti-gay initiatives and referenda, many of which were successful in limiting gay rights.¹⁷⁴ As direct democracy evolved to counteract the movement for gay rights, popular appeals primarily took two forms: (1) assaults on laws that protected against sexual orientation discrimination as conferring “special rights” on sexual minorities; and (2) bans on same-sex marriage.¹⁷⁵

i. Nullifying “Special Rights”

As in the civil rights context, opponents of LGBTQ+ rights deployed the referendum to repeal recently enacted laws that prohibited discrimination based on sexual orientation. Beyond their reliance on this method, gay rights opponents also sought to frame their repeal campaigns as an effort to *preserve* rights. Just as opponents of busing and housing integration framed their direct democracy campaigns as attempts to preserve and protect the rights of parents and homeowners, those opposed to gay civil rights emphasized that the challenged antidiscrimination laws conferred “special rights” on the gay community at the expense of other constituents. Tapping into a logic that also had stoked resentment toward affirmative action and other “privileges” for minority groups, those opposed to gay civil rights insisted that their campaign to repeal recently enacted antidiscrimination laws was simply a modest attempt to ensure equal rights for all.¹⁷⁶

This special rights / equal rights framing was remarkably successful. Although an initial effort to use direct democracy to limit gay rights failed

¹⁷⁴ See *id.* at 144–45.

¹⁷⁵ Arkansas’s 2008 initiative preventing same-sex couples from adopting children is a notable ban that falls outside these two categories. See Off. of Ark. Sec’y of State, Historical Initiatives & Referenda Election Results (1938–2020), at 23, https://www.sos.arkansas.gov/uploads/elections/Initiatives_and_Amendments_1938-2020.pdf [<https://perma.cc/CNY9-4T6D>] (last visited Nov. 5, 2025); see also Charlie Daniels, Ark. Sec’y of State, An Act Providing that an Individual Who Is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less than Eighteen Years Old (2007), https://web.archive.org/web/20120219080149/http://www.sos.arkansas.gov/elections/elections_pdfs/proposed_amendments/2007-293_Adopt_or_Foster_parent.pdf [<https://perma.cc/3XYX-GBN2>] (detailing the proposed measure).

¹⁷⁶ See Leah Litman, *Lawless: How the Supreme Court Runs on Conservative Grievance, Fringe Theories, and Bad Vibes* 58–65 (2025) (cataloging efforts to recast antidiscrimination initiatives as themselves constituting discrimination against those who wish to deny LGBTQ+ equality). See generally Samuel A. Marcossan, The “Special Rights” Canard in the Debate Over Lesbian and Gay Civil Rights, 9 *Notre Dame J.L. Ethics & Pub. Pol’y* 137 (1995) (documenting the strategies of those opposing gay rights laws and exploring the concept of special rights).

to qualify for the ballot in California in 1978,¹⁷⁷ similar measures, framed as checks on “special rights,” passed in several other states. In 1988, Oregon voters approved a referendum that rescinded a 1987 executive order prohibiting sexual orientation discrimination within the executive branch of the state government.¹⁷⁸ In 1992, in response to the enactment of antidiscrimination ordinances in left-leaning cities like Denver, Boulder, and Aspen, fifty-three percent of Colorado voters amended the state constitution to prevent the state and its municipalities from passing laws aimed at protecting gay and lesbian individuals.¹⁷⁹ Although the U.S. Supreme Court later struck down the amendment in *Romer v. Evans*,¹⁸⁰ direct democracy continued to be an attractive vehicle for limiting LGBTQ+ civil rights. In 1994, a bare majority—just 50.4%—of Idaho voters rejected an initiative to prevent sexual orientation from being denominated a minority status.¹⁸¹ Just four years later, Maine voters enacted a referendum to repeal a state law that protected against sexual

¹⁷⁷ Off. of Cal. Sec’y of State, Initiatives by Title and Summary Year (1912–July 1, 2025), <https://elections.cdn.sos.ca.gov/ballot-measures/pdf/initiatives-by-title-and-summary-year.pdf> [<https://perma.cc/U7WR-VDMH>] (last visited Nov. 5, 2025); Cal. Proposition 6: School Employees. Homosexuality—Initiative Statute (1978), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1843&context=ca_ballot_props [<https://perma.cc/Q63T-K4GZ>] (detailing the proposed initiative); see also Nicholas Goldberg, How 2.8 Million California Voters Nearly Banned Gay Teachers from Public Schools, *L.A. Times* (Aug. 4, 2021, at 14:01 PT), <https://www.latimes.com/opinion/story/2021-08-04/gearhart-briggs-initiative-ban-gay-teachers-proposition-6> (describing the battle over Proposition 6 and Harvey Milk’s role in defeating it).

¹⁷⁸ Legislation and Ballot Measures: Oregon Measure 8 (1988), Or. State Univ.: LibGuides, <https://guides.library.oregonstate.edu/politicsandpolicies/Measure8> [<https://perma.cc/Z3XU-G8E8>] (last updated June 16, 2025, at 14:42 ET) (describing the revoked ban on sexual orientation discrimination in the state executive branch). In 1992, the Oregon Court of Appeals struck down Measure 8 as codified by the state legislature as unconstitutional. *Merrick v. Bd. of Higher Educ.*, 841 P.2d 646, 648, 650–51 (Or. Ct. App. 1992).

¹⁷⁹ Joan Biskupic, Court Strikes Down Colorado’s Anti-Gay Amendment, *Wash. Post*, May 21, 1996, at A1.

¹⁸⁰ 517 U.S. 620, 627, 635–36 (1996) (holding that the Colorado amendment violated the Equal Protection Clause because it put gays and lesbians in a “solitary class” and withdrew from gays and lesbians, but not others, special legal protections).

¹⁸¹ Idaho Initiative 1: Policies Regarding Homosexuality Initiative, Off. of Idaho Sec’y of State, https://canvass.sos.idaho.gov/eng/ballot_questions/view/64/ [<https://perma.cc/83HH-7UGL>] (last visited Nov. 5, 2025). Messaging discipline and strong organization fueled the surprising gay rights victory in Idaho. The LGBTQ+ community effectively cast the initiative’s sponsors as angry outsiders who didn’t possess Idaho values. See Amy L. Stone, *Gay Rights at the Ballot Box 68–72* (2012) (describing the dynamics of the so-called model campaign that arose from the involvement of professional pollsters in Idaho).

orientation discrimination.¹⁸² As in the Maine vote, voters in cities like Boulder, Miami, Eugene, Wichita, and St. Paul also deployed local referendum mechanisms to repeal antidiscrimination laws designating sexual orientation as a protected class.¹⁸³

More recently, direct democracy has been used to challenge laws prohibiting discrimination on the basis of gender identity and sexual orientation. In 2015, voters in Houston, Texas, repealed an antidiscrimination ordinance that protected against, among other things, gender-identity discrimination,¹⁸⁴ as did voters in Springfield, Missouri, that same year.¹⁸⁵

ii. Same-Sex Marriage

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court ruled that the right to marry includes the right to marry a person of the same sex.¹⁸⁶ However, in the years prior to *Obergefell*, those opposed to marriage equality turned to direct democracy—in addition to legislation—to counteract judicial decisions recognizing same-sex marriage. During the 1990s and 2000s, measures opposing same-sex marriage appeared on dozens of state ballots. For example, in 1998, after the Supreme Court of Hawaii ruled in 1993 that a prohibition on same-sex marriage amounted to unconstitutional sex discrimination under the state's constitution,

¹⁸² Bureau of Corps., Elections & Comm'ns, Off. of Me. Sec'y of State, Special Election Tabulation Municipal Precinct Breakdown for the Election of February 10, 1998: Official Vote for People's Veto Question 1 (1998), https://lldc.mainelegislature.org/Open/Elections>Returns/1998/19980210/elec_19980210d.pdf [<https://perma.cc/6DAC-QMYM>] (repealing Maine legislation that had banned discrimination based on sexual orientation for employment, housing, public accommodations, and credit).

¹⁸³ See Stone, *supra* note 181, at 8, 13–20 (describing local ballot measures).

¹⁸⁴ Manny Fernandez & Mitch Smith, Houston Voters Reject Broad Anti-Discrimination Ordinance, N.Y. Times (Nov. 3, 2015), <https://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html>; Joshua E. Ulibarri & Meryl O'Bryan, How Pollsters Approach Initiative Work, *in* Waters, *supra* note 95, at 860, 862–63; see also Gillian Frank, The Anti-Trans Bathroom Nightmare Has Its Roots in Racial Segregation, Slate (Nov. 10, 2015, at 16:55 ET), <https://slate.com/human-interest/2015/11/anti-trans-bathroom-propaganda-has-roots-in-racial-segregation.html> [<https://perma.cc/BYZ3-QG3K>] (describing segregationists' emphasis on bathrooms in stoking fears about racial integration).

¹⁸⁵ Josh Altic, Race for LGBT Ordinance in Springfield, Missouri, Ends with Votes in Favor of Repeal a Nose Ahead, Ballotpedia (Apr. 7, 2015), https://ballotpedia.org/Race_for_LGBT_ordinance_in_Springfield,_Missouri_ends_with_votes_in_favor_of_repeal_a_nose_ahead [<https://perma.cc/KW9N-RE3Z>] (describing the repeal of Ordinance 6141, which included sexual orientation and gender identity in the city's nondiscrimination policy).

¹⁸⁶ 576 U.S. 644, 681 (2015).

Hawaii voters enacted a constitutional amendment giving the state legislature the authority to ban same-sex marriage.¹⁸⁷ California,¹⁸⁸ Nebraska,¹⁸⁹ and Nevada¹⁹⁰ soon followed suit, banning same-sex marriage via initiative in 2000.

In 2003, the U.S. Supreme Court issued its decision in *Lawrence v. Texas*, invalidating laws criminalizing same-sex sodomy and prompting questions about the inevitability of judicial recognition of a right to same-sex marriage.¹⁹¹ A year later, six states used the initiative process to enact bans on state recognition of same-sex marriage.¹⁹² In 2008 and 2009, in

¹⁸⁷ John F. Kowal, *The Improbable Victory of Marriage Equality*, Brennan Ctr. for Just. (Sep. 29, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality> [<https://perma.cc/675K-4QLA>] (discussing the social movements and legal campaigns that led to the Supreme Court's historic decision for marriage equality); Sasha Issenberg, *The Engagement: America's Quarter-Century Struggle Over Same-Sex Marriage* 88–89, 93, 297 (2021); Off. of Elections, State of Haw., *General Election November 3, 1998: Summary Report 4* (1998), <https://files.hawaii.gov/elections/files/results/1998/general/histatewide.pdf> [<https://perma.cc/4UG4-5DQ3>] (documenting the ballot measure).

¹⁸⁸ Bill Jones, Cal. Sec'y of State, *Statement of Vote*, at xxx (2000), <https://elections.cdn.sos.ca.gov/sov/2000-primary/sov-complete.pdf> [<https://perma.cc/YLN3-A88S>]; Cal. Proposition 22: *Limit on Marriages* (2000), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2187&context=ca_ballot_props [<https://perma.cc/9A9Z-QMUJ>] (documenting Proposition 22, which amended the California Family Code to provide that “only marriage between a man and a woman is valid or recognized in California”).

¹⁸⁹ Scott Moore, Neb. Sec'y of State, *Official Report of the Board of State Canvassers of the State of Nebraska: General Election 109* (2000), <https://sos.nebraska.gov/sites/default/files/doc/elections/2000/2000%20General.pdf> [<https://perma.cc/63Q9-ADF6>]; Scott Moore, Neb. Sec'y of State, *Informational Pamphlet on Initiative Measures Appearing on the 2000 General Election Ballot 4–6* (2000), <https://sos.nebraska.gov/sites/default/files/doc/elections/2000/2000%20Initiative%20Measures.pdf> [<https://perma.cc/89NZ-YVTR>] (documenting a ballot measure that prohibited the recognition or performance of same-sex marriages).

¹⁹⁰ Barbara K. Cegavske & Rsch. Div. of the Legis. Couns. Bureau, *Political History of Nevada 564* (12th ed. 2016), <https://www.nvsos.gov/sos/home/showpublisheddocument/11651/63820706962370000> [<https://perma.cc/SN9V-ZH5P>] (documenting a ballot measure that amended the state constitution to prohibit legal recognition of same-sex marriages).

¹⁹¹ See 539 U.S. 558, 578 (2003).

¹⁹² The six states are Arkansas, Montana, Michigan, North Dakota, Ohio, and Oregon. *Historical Initiatives & Referenda Election Results (1938–2020)*, supra note 175; Charlie Daniels, Ark. Sec'y of State, *Proposed Constitutional Amendment No. 3: An Amendment Concerning Marriage* (2004), https://web.archive.org/web/20041221181354/http://www.sos.arkansas.gov/elections/elections_pdfs/2004/amendments/04amendsforballot3.pdf [<https://perma.cc/G4EH-AZ7S>]; Bob Brown, Mont. Sec'y of State, *2004 Statewide General Election Results* (2004), <https://sosmt.gov/Portals/142/Elections/archives/2000s/2004/2004-GenState.pdf?dt=1523477333219> [<https://perma.cc/4R24-C3UE>]; *2004 Michigan Election Results*, Mich. Voter Info. Ctr., <https://mvic.sos.state.mi.us/votehistory/> [<https://perma.cc/Z7PU-JEPG>] (last updated Jan. 1, 2024, at 00:00 ET); *Notice: State Proposals—November 2, 2004 General Election*, Libr. of Mich. Digit. Repository, <https://cdm16110.contentdm.oclc.org/digital/collection/p16110coll7/id/104554/rec/27> [<https://perma.cc/CV7P-YDFX>] (last visited

the wake of judicial rulings recognizing same-sex marriage in Massachusetts¹⁹³ and Iowa,¹⁹⁴ Florida and Maine voters turned to direct democracy to enact bans on state recognition of same-sex marriages.¹⁹⁵ In 2008, California voters again took to the polls to register their views regarding same-sex marriage—this time, in the wake of a Supreme Court of California decision holding the state’s voter-enacted ban on same-sex marriage, passed in 2000, unconstitutional as a matter of state law.¹⁹⁶ Almost immediately after the state’s high court issued its decision in *In re Marriage Cases*, opponents of same-sex marriage began gathering the signatures needed to put before the voters an amendment to the state’s constitution that would constitutionalize a prohibition on state recognition of same-sex marriages. The proposed amendment appeared on the ballot as Proposition 8 and garnered 52.3% of the vote.¹⁹⁷ In several additional states, voters enacted bans on same-sex marriage via legislatively referred constitutional amendments.¹⁹⁸

Nov. 5, 2025); Official 2004 General Election Results, N.D. Election Offs., Cnty. Auditors & Sec’y of State, <https://results.sos.nd.gov/ResultsSW.aspx?text=All&type=SW&map=CTY&eid=26> [<https://perma.cc/466K-U25R>] (last updated Nov. 18, 2004, at 03:30 ET); Full Text of the Measure Appearing on the November 2, 2004 General Election Ballot, N.D. Election Offs., Cnty. Auditors & Sec’y of State, <https://results.sos.nd.gov/resultsBQImageViewer.aspx?ID=78> [<https://perma.cc/ZC2Q-4QK4>] (last visited Nov. 5, 2025); Statewide Issue History, Off. of Ohio Sec’y of State, <https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/statewide-issue-history/> [<https://perma.cc/43AM-CPY2>] (last visited Nov. 5, 2025); Bill Bradbury, Or. Sec’y of State, November 2, 2004 General Election 44 (2004), <https://records.sos.state.or.us/ORSOSWebDrawer/RecordView/8411085> [<https://perma.cc/AG9U-SSDF>].

¹⁹³ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

¹⁹⁴ *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009).

¹⁹⁵ Florida Marriage Protection Amendment 510, Fla. Div. of Elections, <https://constitutionalliaitatives.dos.fl.gov/Home/InitDetail?account=41550&seqnum=1> [<https://perma.cc/PNJ4-E8VX>] (last visited Feb. 1, 2026) (documenting the ballot measure that prohibited legal recognition of same-sex marriage in Florida); 2009 Tabulations of the Vote, Off. of Me. Sec’y of State, <https://web.archive.org/web/20150808050446/http://www.maine.gov/sos/cec/elec/results/2008-09/referendumbycounty.html> [<https://perma.cc/SM3S-AJJB>] (capture dated Aug. 8, 2015).

¹⁹⁶ *In re Marriage Cases*, 183 P.3d 384, 409, 453 (Cal. 2008).

¹⁹⁷ Debra Bowen, Cal. Sec’y of State, Statement of Vote 13 (2008), https://elections.cdn.sos.ca.gov/sov/2008-general/sov_complete.pdf [<https://perma.cc/HR6C-B3TW>]; see also Press Release, Pub. Pol’y Inst. of Cal., Post-Election Survey: Proposition 8 Results Expose Deep Rifts Over Same-Sex Marriage (Dec. 3, 2008), <https://www.ppic.org/press-release/post-election-survey-proposition-8-results-expose-deep-rifts-over-same-sex-marriage/> [<https://perma.cc/52XZ-WVEQ>] (detailing the demographic and partisan divides in the vote over Proposition 8).

¹⁹⁸ Todd Donovan, Direct Democracy and Campaigns Against Minorities, 97 Minn. L. Rev. 1730, 1748–53 (2013) (documenting the use of ballot measures to oppose marriage equality).

While direct democracy proved useful to those opposed to marriage equality, it was far less effective in securing marriage rights for same-sex couples. During the period preceding *Obergefell*, only three direct democracy measures—in Maine, Maryland, and Washington—succeeded in securing the right to marry for same-sex couples.¹⁹⁹

3. *Immigration Backlash*

Unlike marriage policies, which are understood to be within the purview of state governments, it is an article of faith that direct control over immigration is the province of Congress and the federal government. Despite the federal character of immigration law, it has nonetheless been the subject of intense direct democracy engagement at the state level. Notably, unlike efforts to counteract the Civil Rights Movement or the burgeoning gay rights movement, the effort to limit the rights of immigrants cannot be attributed solely to contemporary civil rights gains. Instead, one might argue that, as in the nineteenth century, when direct democracy also served as a vehicle for anti-immigrant policies,

¹⁹⁹ Previous Election Results: Referendum Election, Off. of Me. Sec’y of State, <https://www.maine.gov/sos/elections-voting/election-results-data/previous-election-results> [https://perma.cc/954N-CV5V] (last visited Nov. 5, 2025); Charles E. Summers, Jr., Me. Sec’y of State, *Maine Citizen’s Guide to the Referendum Election 3, 5–7* (2012), <https://www.maine.gov/sos/sites/maine.gov.sos/files/inline-files/CITIZENS%20GUIDE.pdf> [https://perma.cc/T2CU-ELTR] (documenting a Maine ballot measure overturning a state ban on same-sex marriage); 2012 Presidential General Election Results, Md. State Bd. of Elections, https://elections.maryland.gov/elections/2012/results/general/gen_qresults_2012_4_00_1.html [https://perma.cc/NKH5-TR8V] (last updated Nov. 28, 2012, at 08:56 ET) (documenting a Maryland ballot measure approving state recognition of same-sex marriages); November 06, 2012 General Election Results, Off. of Wash. Sec’y of State, <https://results.vote.wa.gov/results/20121106/referendum-measure-no-74-concerns-marriage-for-same-sex-couples.html> [https://perma.cc/J3HJ-RFTL] (last updated Nov. 27, 2012, at 16:55 ET); Off. of Wash. Sec’y of State, *State of Washington Voters’ Pamphlet 19* (2012), <https://www.sos.wa.gov/sites/default/files/2022-05/Voters%2520Pamphlet%25202012.pdf> [https://perma.cc/W6CV-7VJS] (documenting a Washington ballot measure approving state recognition of same-sex marriages); see also Erik Eckholm, *Supporters of Same-Sex Marriage See Room for Victories*, N.Y. Times, Oct. 31, 2012, at A14 (finding a 4-1 spending advantage in 2012 for supporters of same-sex marriage); Sasha Aslanian, *Foes of Same-Sex Marriage Outspent 10 to 1 in Minn.*, Minn. Pub. Radio News (June 14, 2013, at 20:37 ET), <https://www.mprnews.org/story/2013/06/14/foes-of-same-sex-marriage-outspent-10-to-1-in-minn> [https://perma.cc/M2GU-7PNT] (noting a 10-1 spending advantage in 2013 for supporters of legalizing gay marriage in Minnesota); Randal Edgar, *Same-Sex Marriage Supporters in R.I. Significantly Outspent Opponents*, Providence J. (Aug. 23, 2013, at 22:01 ET), <https://www.providencejournal.com/story/news/politics/courty/2013/08/24/20130823-same-sex-marriage-supporters-in-r-i-significantly-outspent-opponents-ece/35404182007/> (noting an up to 8-1 spending advantage in 2013 for supporters of legalizing gay marriage in Rhode Island).

contemporary efforts to deploy direct democracy to limit immigrants' rights might be rooted in anxieties over the nation's changing demographic composition.²⁰⁰

Of course, anxiety over demographic change does not tell the whole story. In this modern iteration, direct democracy's deployment to limit the rights of immigrants is also undergirded by concerns about crime, public resources, and, in particular, antipathy to immigration that occurs outside legal processes. Indeed, state or local direct democracy measures dealing with immigration and immigrants' rights have included efforts to restrict the substantive rights of undocumented persons. For example, in 1994, California voters passed Proposition 187, which denied social services—including access to public schools and health care in nonemergency settings—to undocumented immigrants.²⁰¹

To be sure, Proposition 187 was viewed as a drastic—and dramatic—step. Notably, a federal district court declared nearly all of the measure unconstitutional,²⁰² and the Governor of California declined to appeal the decision.²⁰³ Modern opposition to immigration has included efforts to limit language rights—in particular, limiting the use of foreign languages in the public sphere and establishing English as the official language of the state or municipality. In 1986, California used direct democracy to make English its official language.²⁰⁴ Two years later, voters in

²⁰⁰ See Reva Siegel & Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Goal*, *Time* (Dec. 13, 2019, at 16:35 ET), <https://time.com/5748503/trump-abortion-immigration-replacement-theory/> [<https://perma.cc/Q2K9-ZTY3>].

²⁰¹ Cal. Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=2103&context=ca_ballot_props [<https://perma.cc/72B2-J4MC>] (documenting a California ballot measure “[m]ak[ing] illegal aliens ineligible for public social services, public health care services (unless emergency under federal law), and public school education at elementary, secondary, and post-secondary levels”); Cal. Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting., Univ. of Cal. L. S.F., https://repository.uclawsf.edu/ca_ballot_props/1104/ [<https://perma.cc/2MZM-P4F4>] (last visited Nov. 8, 2025).

²⁰² *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

²⁰³ Rene Sanchez, *Divisive Prop. 187 Is Voided: Ruling Stands Against Calif. Anti-Alien Law*, *Wash. Post*, July 30, 1999, at A3.

²⁰⁴ Cal. Proposition 63: Official State Language (1986), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1967&context=ca_ballot_props [<https://perma.cc/T49Y-QMSJ>]; Cal. Proposition 63: Official State Language. Initiative Constitutional Amendment, Univ. of Cal. L. S.F., https://repository.uclawsf.edu/ca_ballot_props/968/ [<https://perma.cc/N6CK-GD8K>] (last visited Nov. 8, 2025).

Colorado²⁰⁵ and Florida²⁰⁶ established English as their respective states' official language, followed by Utah in 2000.²⁰⁷ Two additional states made English their official language through legislatively referred constitutional amendments.²⁰⁸

In a similar vein, numerous states and localities have approved ballot measures restricting the use of languages other than English in schools and in government communications. In 1980, voters in Miami-Dade County, Florida, a locus of Cuban and Latin American migration, passed a ballot measure forbidding the local government from using any language other than English in its official communications.²⁰⁹ A few years later, in 1983, San Francisco voters passed a referendum directing the city's board of supervisors to urge Congress and the president to overturn federal voting laws requiring bilingual ballots.²¹⁰ A year later, Californians passed a nearly identical statewide referendum.²¹¹ Arizonans in 1998 passed a referendum that proscribed state employees' use of

²⁰⁵ Constitutional Amendment 1: General Election Results, Off. of Colo. Sec'y of State, <https://historicalelectiondata.coloradosos.gov/contest/9665> [<https://perma.cc/J9B3-TASM>] (last visited Nov. 5, 2025).

²⁰⁶ Fla. Div. of Elections, November 8, 1988 General Election: Official Results, <https://results.elections.myflorida.com/DetailRpt.Asp?ELECTIONDATE=11/8/1988&RACE=A11&PARTY=&DIST=&GRP=&DATAMODE=> [<https://perma.cc/K5PC-9MJL>] (last visited Nov. 5, 2025).

²⁰⁷ Proclamation, Michael O. Leavitt, Utah Governor, Governor's Proclamation Stating the Outcome of Voting on Initiative Petitions on the Ballot for the 2000 General Election, Declaring as Effective the Laws Passed by the People, and Stating the Effective Dates of Those Laws. (Nov. 28, 2000), <https://rules.utah.gov/wp-content/uploads/p2000-11-28.pdf> [<https://perma.cc/HW95-RS98>].

²⁰⁸ The two states are Oklahoma and Arizona. See H.R.J. Res. 1042, 52d Leg., Reg. Sess. (Okla. 2009); State of Arizona Official Canvass: 2006 General Election, Off. of Ariz. Sec'y of State 14 (2006), <https://apps.azsos.gov/election/2006/General/Canvass2006GE.pdf> [<https://perma.cc/3SMF-R73C>].

²⁰⁹ The Miami-Dade County Commission repealed the ordinance in 1993. William Booth, Dade County Repeals Ordinance Declaring English Official Language, *Wash. Post*, May 19, 1993, at A3.

²¹⁰ John Jacobs, Supporters Spread Word on English-Only Ballot, *Wash. Post*, Nov. 12, 1983, at A8.

²¹¹ Cal. Proposition 38: Voting Materials in English Only (1984), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1927&context=ca_ballot_props [<https://perma.cc/55ZH-R3KB>] (proposing a requirement that all election materials be provided in English only); Cal. Proposition 38: Voting Materials in English Only., Univ. of Cal. L. S.F., https://repository.uclawsf.edu/ca_ballot_props/928/ [<https://perma.cc/74UU-SWKQ>] (last visited Nov. 8, 2025).

languages other than English.²¹² Alaska voters approved a similar initiative in 1998.²¹³

In the late 1990s, efforts to ban bilingual education through ballot initiatives intensified—as did the influence of moneyed interests in direct democracy. Ironically, direct democracy, which had initially been viewed as an antidote to wealth and corporatism’s influence in politics, emerged as a potent vehicle for advancing the interests of the investor class. In California and Arizona, for example, technology entrepreneur Ron Unz orchestrated and financed ballot initiatives to ban bilingual education in public schools, framing the bans as an effort to boost test scores and literacy rates.²¹⁴

And meaningfully, even as direct democracy was deployed to channel anti-immigrant sentiment, in time, it also emerged as a vehicle for *counteracting* anti-immigrant measures. Again, California is instructive on this point. In 1998, amidst considerable anti-immigrant fervor, California voters passed an initiative severely restricting public schools from providing instruction in non-English languages.²¹⁵ Almost twenty years later, in 2016, the tenor of the debate had shifted, and California voters repealed the restrictions via the referendum process.²¹⁶ Likewise,

²¹² State of Arizona Official Canvass: General Election, Off. of Ariz. Sec’y of State 12 (1988), <https://azmemory.azlibrary.gov/nodes/view/102684> [<https://perma.cc/J732-EF97>] (documenting an Arizona ballot measure designating English as the official state language). The Arizona Supreme Court ultimately invalidated the measure. *Ruiz v. Hull*, 957 P.2d 984, 987 (Ariz. 1998) (en banc) (holding that the constitutional amendment violated the First Amendment and the Equal Protection Clause).

²¹³ Election Summary Report: State of Alaska 1998 General Election, Alaska Div. of Elections (Dec. 1, 1998), <https://web.archive.org/web/20250515231325/https://www.election.s.alaska.gov/results/98GENR/results.htm> [<https://perma.cc/Z47F-VDJH>]. In 2014, the state legislature gave Alaska’s Native languages the same status as English. Jennifer Canfield, *Once Forbidden, Alaska’s Native Languages Now Official State Languages*, KTOO (Oct. 24, 2014), <https://www.ktoo.org/2014/10/24/forbidden-alaskas-native-languages-now-official-state-languages/> [<https://perma.cc/F3RD-5B7A>].

²¹⁴ See generally William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. Rev. 487, 499–519 (2002) (providing an in-depth history of the Unz initiatives).

²¹⁵ Cal. Proposition 227: English Language in Public Schools (1998), https://repository.ucla.wsf.edu/cgi/viewcontent.cgi?article=2150&context=ca_ballot_props [<https://perma.cc/W5JN-DJNL>] (documenting a California ballot measure “[r]equir[ing] all public school instruction [to] be conducted in English”).

²¹⁶ Corey Mitchell, *California Voters Repeal Ban on Bilingual Education*, *Educ. Week* (Nov. 8, 2016), <https://www.edweek.org/teaching-learning/california-voters-repeal-ban-on-bilingual-education/2016/11> [<https://perma.cc/3SUV-GK2Q>] (discussing Proposition 58, which reversed the long-time ban and lifted restrictions on bilingual education).

in 2002, Massachusetts voters enacted a similar ban on bilingual education,²¹⁷ which the state's voters repealed in 2017.²¹⁸

4. Responses to Secularism

Just as increased immigration prompted a sense of demographic disruption among some Americans, the recognition of abortion rights, the untethering of sex from marriage, and a shift toward religious pluralism have fueled the sense among more traditional Christians that they too are losing ground in society. Judicial decisions and legislative enactments at the state and federal levels have exacerbated the sense that religious pluralism and secularism—as opposed to more traditional Christian morality—are now public policy imperatives.²¹⁹ For many Christians, these “[s]weeping changes in gender roles and sexual mores throughout the twentieth century [have] sparked a sense of ‘cultural dislocation.’”²²⁰

Given this climate in which direct democracy has allowed voters to signal their antipathy for social change, it is unsurprising that some Christian conservatives also have turned to direct democracy as a vehicle for preserving religion in public life. In recent decades, voters in several states have approved ballot initiatives involving religious exercise—measures that have either mandated public prayer or targeted minority religions. In 1984, West Virginia voters approved a legislatively referred constitutional amendment requiring a daily moment of silence for school prayer.²²¹ To counteract religious pluralism, Oklahoma voters in 2010

²¹⁷ William Francis Galvin, Sec’y of Commonwealth of Mass., Massachusetts Elections Statistics: 2002, at 458–59 (2002), <https://uselectionatlas.org/DOC/MA/MA%20Election%20Statistics%202002.pdf> [<https://perma.cc/H9ER-MGXA>] (documenting a Massachusetts ballot measure that replaced the state’s bilingual education system with a requirement that all subjects be taught in English).

²¹⁸ Corey Mitchell, Massachusetts Law Paves the Way for More Bilingual Education, *Educ. Week* (Nov. 27, 2017), <https://www.edweek.org/teaching-learning/massachusetts-law-paves-the-way-for-more-bilingual-education/2017/11> [<https://perma.cc/8FDZ-QZZ9>].

²¹⁹ See Melissa Murray, *Stare Decisis and Remedy*, 73 *Duke L.J.* 1501, 1535–36 (2024).

²²⁰ Hannah Bailey, Note, A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court Are Transforming the Free Exercise Clause, 73 *Syracuse L. Rev.* 199, 205 (2023) (quoting Randall Balmer, *American Fundamentalism: The Ideal of Femininity*, in *Fundamentalism and Gender* 47, 54 (John Stratton Hawley ed., 1994)).

²²¹ W. Va. Const. art. III, § 15a. This provision was held unconstitutional in 1985. *Walter v. W. Va. Bd. of Educ.*, 610 F. Supp. 1169, 1178 (S.D. W. Va. 1985).

approved a legislatively referred constitutional amendment that barred federal courts from relying on Sharia law and international law.²²²

* * *

Taken together, the use of direct democracy in response to both demographic change and an increasingly secular and pluralist society harkens back to a subset of the Progressive Era ballot initiatives and referenda—those used to entrench “American values” in the face of social change. When viewed in tandem with direct democracy’s deployment to counteract civil rights and the burgeoning gay rights movement, the tableau becomes even more stark. Direct democracy’s promise of involving and engaging voters in the work of policymaking also gestures toward its perils: the tyranny of the majority and the trampling of minority rights.

These perils have not gone unnoticed—or unremarked upon. As the next Part discusses, critics have identified these problematic aspects of direct democracy. Notably, these critiques have fueled litigation that has prompted courts to think seriously about how to balance direct democracy’s promise of popular engagement with its inherent risk of emboldening majorities and subordinating vulnerable minorities.

III. RESPONDING TO DIRECT DEMOCRACY

The history that we have outlined points to the perils of direct democracy. As these examples make clear, too often direct democracy and majoritarian rule have been marshaled to circumvent government action to protect and advance minority rights. In a seminal 1978 article, Professor Derrick Bell made this point emphatically. Surveying mid-twentieth-century referenda on a range of topics from zoning to affirmative action, Bell concluded that “the growing reliance on the referendum and initiative poses a threat to individual rights in general and in particular creates a crisis for the rights of racial and other discrete

²²² H.R.J. Res. 1056, 52d Leg., Reg. Sess. (Okla. 2010); Summary Results: General Election, Okla. State Election Bd., <https://oklahoma.gov/elections/elections-results/election-results/2010-election-results/10gen.html> [<https://perma.cc/V8XJ-5F6S>] (last visited Jan. 4, 2026). A federal district court invalidated Oklahoma’s amendment as unconstitutional. *Awad v. Zirrax*, 966 F. Supp. 2d 1198, 1204 (W.D. Okla. 2013) (ruling that the amendment violated the Establishment Clause).

minorities.”²²³ To be sure, Bell recognized that campaigns for elected office could also feature appeals to racial resentment or animus.²²⁴ But as he explained, such influences might be mitigated by the fact that “[p]ublic officials, even those elected on more or less overtly racist campaigns, may prove responsive to minority pressures for civil rights measures once in office or, at least, be open to the negotiation and give-and-take that constitutes much of the political process.”²²⁵

By contrast, direct democracy, which “enables the voters’ racial beliefs and fears to be recorded and tabulated in their pure form,” often lacks these mitigating influences.²²⁶ As Bell observed, “No political factors counsel restraint on racial passions emanating from longheld and little considered beliefs and fears.”²²⁷ In the absence of such political factors, direct democracy, in Bell’s view, functions as “a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.”²²⁸

Bell did not suggest jettisoning direct democracy entirely. Instead, given the increasing use of direct democracy in states and localities, he sought to identify some of the dangers of direct democracy and to encourage courts to “use existing constitutional principles to recognize legitimate interests in direct legislation, yet protect minority rights against majoritarian abuse.”²²⁹ Concerned that direct democracy could exacerbate the effect of facially neutral laws that nonetheless had a disparate impact on minorities, Bell argued that the U.S. Supreme Court should revisit its “refus[al] to alter or strike down laws which, although neutral in form, function to promote racial discrimination.”²³⁰ He also maintained that because statewide referenda effectively functioned as a species of “at-large elections,” courts should closely scrutinize them to ensure that they did not dilute voting power, particularly the voting power of racial minorities.²³¹ He cautioned that more searching judicial scrutiny was warranted—and indeed necessary—“when the majority attempts through

²²³ Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 2 (1978).

²²⁴ *Id.* at 13.

²²⁵ *Id.*

²²⁶ *Id.* at 14–15.

²²⁷ *Id.* at 14.

²²⁸ *Id.* at 15.

²²⁹ *Id.* at 2.

²³⁰ *Id.* at 23.

²³¹ *Id.* at 25–26.

the direct ballot to take away something the minority obtained through the representative system.”²³²

To be sure, Bell was hardly the only voice identifying the challenges of direct democracy.²³³ Other scholars built upon Bell’s critiques, detailing direct democracy’s threat to civil liberties and minority rights and noting that in the absence of the safeguards and checks that representative government imposed, important rights would be “acutely vulnerable to oppression by an anonymous majority of voters.”²³⁴

Unsurprisingly, the identification of these dangers, and the concomitant call for intervention to safeguard minority rights, prompted a series of legal challenges that proceeded in both state and federal courts. Beginning in the 1960s, the U.S. Supreme Court sustained several challenges to laws adopted via state ballot initiatives or referenda, concluding that those laws contravened the guarantees of the Equal Protection Clause. The first of these, *Reitman v. Mulkey*, involved a challenge to a 1964 California state referendum that, in an effort to override state antidiscrimination laws, amended the California constitution to allow real property owners “to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.”²³⁵ The Court ruled in favor of the plaintiffs, concluding that the

²³² *Id.* at 26.

²³³ See, e.g., Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 *Am. J. Pol. Sci.* 245, 246 (1997) (discussing direct democracy’s impact on minorities and civil rights); Bruce Cain, The Contemporary Context of Ethnic and Racial Politics in California, *in* *Racial and Ethnic Politics in California* 9, 23–24 (Bryan O. Jackson & Michael B. Preston eds., 1991) (discussing the harms of direct democracy to the political interests of racial minorities); Todd Donovan & Shaun Bowler, Direct Democracy and Minority Rights: An Extension, 42 *Am. J. Pol. Sci.* 1020, 1021 (1998) (contending that “direct democracy can be far more injurious to minorities when practiced in smaller communities than when used in larger places”); Donovan, *supra* note 198, at 1732 (addressing the harms of direct democracy for minority groups); Sylvia R. Lazos Vargas, Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship, 60 *Ohio St. L.J.* 399, 402–03 (1999) (critiquing initiatives as vehicles for majority vote on the content of minorities’ democratic citizenship).

²³⁴ Marc Slonim & James H. Lowe, Judicial Review of Laws Enacted by Popular Vote, 55 *Wash. L. Rev.* 175, 176 (1979); see also Gamble, *supra* note 233, at 261–62 (discussing the tyrannical effect of direct democracy in the absence of a filtering representation system); Donovan & Bowler, *supra* note 233, at 1021, 1023 (arguing that larger political systems make it more difficult for cohesive majorities to tyrannize minority groups); Erwin Chemerinsky, Two Cheers for State Constitutional Law, 62 *Stan. L. Rev.* 1695, 1701–02 (2010) (observing that the initiative process can undo state constitutional provisions intended to advance liberty and equality).

²³⁵ 387 U.S. 369, 371 (1967) (quoting Cal. Const. art. I, § 26 (repealed 1974)).

challenged provision “d[id] not just repeal an existing law forbidding private racial discriminations,” but was specifically “intended to authorize, and d[id] authorize, racial discrimination in the housing market” in violation of the Equal Protection Clause.²³⁶ Despite this frank assessment, the Court spent little time parsing direct democracy’s role in enacting a law that “significantly encourage[d] and involve[d] the State in private discriminations.”²³⁷

Two years later, in *Hunter v. Erickson*, the Court struck down an amendment to the city charter of Akron, Ohio, that suspended an extant fair housing ordinance and required an affirmative vote of both the city council and a majority of the city’s voters to make any future changes to local fair housing laws.²³⁸ As in *Reitman*, the *Hunter* Court concluded that the challenged amendment authorized racial discrimination in violation of the Equal Protection Clause.²³⁹ However, in so doing, the Court was more attentive to the amendment’s direct democracy provenance. As the Court observed, “The proposal for the charter amendment had been placed on the ballot at a general election upon petition of more than 10% of Akron’s voters, and the amendment had been duly passed by a majority.”²⁴⁰

According to the city, the amendment did not instantiate a right to discriminate, as had been the case in *Reitman*; it merely reflected citizens’ preferences regarding the disposition of real property.²⁴¹ The Court saw it differently, noting that the amendment not only involved “an explicitly racial classification treating racial housing matters differently from other racial and housing matters,” but also subjected laws prohibiting discrimination in the housing market—and no other laws—to a more onerous two-step process of enactment.²⁴² According to the Court, although “a State may distribute legislative power as it desires and . . . the

²³⁶ Id. at 380–81.

²³⁷ Id. at 381.

²³⁸ 393 U.S. 385, 389–90, 393 (1969); see also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 468 (1982) (explaining that the amendment at issue in *Hunter* “changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council”).

²³⁹ *Hunter*, 393 U.S. at 393.

²⁴⁰ Id. at 387.

²⁴¹ See id. at 389.

²⁴² Id. at 389–90.

people may retain for themselves the power over certain subjects,” these nods to legislative and popular authority did not justify “a legislative structure which otherwise would violate the Fourteenth Amendment.”²⁴³ Nor did the fact that the amendment was enacted “through popular referendum immunize it.”²⁴⁴ Recognizing that “[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed,” the Court made clear that direct democracy could not be used to “dilute any person’s vote or give any group a smaller representation than another of comparable size.”²⁴⁵

In a separate concurrence, Justice John Marshall Harlan underscored the point. As he explained, merely subjecting a contentious issue to resolution through the processes of direct democracy does not, by itself, offend the Equal Protection Clause if the process reflects “neutral principles.”²⁴⁶ But in *Hunter*, Akron’s use of the referendum process did not reflect neutral principles; instead, the challenged provision had “the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest.”²⁴⁷

Over a decade later, in 1982’s *Washington v. Seattle School District No. 1*, the Court cemented this position when it struck down a Washington initiative that transferred authority to impose desegregation busing plans from localities to the state.²⁴⁸ In invalidating the law, the Court emphasized both the initiative’s intended goal of undermining busing as a means of achieving greater racial balance in public schools *and* its imposition of an arduous revision process to reinstate local control over busing.²⁴⁹ As the Court explained, the initiative only impacted efforts to achieve racial integration—all other (nonracial) student assignment decisions remained within local school board control.²⁵⁰ In so doing, the initiative impermissibly “worked a major reordering of the State’s educational decisionmaking process” to the detriment of racial minorities.²⁵¹

²⁴³ Id. at 392.

²⁴⁴ Id.

²⁴⁵ Id. at 392–93.

²⁴⁶ Id. at 394 (Harlan, J., concurring).

²⁴⁷ Id. at 395.

²⁴⁸ 458 U.S. 457, 480 (1982).

²⁴⁹ Id. at 471 (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)); id. at 474.

²⁵⁰ Id. at 474.

²⁵¹ Id. at 479.

In *Hunter* and *Reitman*, the Court embraced equal protection principles as a limit on voters' ability to use direct democracy to enact laws that impaired minority rights or made it more difficult for minorities to use the political process to vindicate their interests. But even as the Court invalidated racially discriminatory laws enacted via direct democracy in *Reitman* and *Hunter*, in *Seattle School District*, it made clear that the use of direct democracy does not, by itself, offend the Constitution or the Equal Protection Clause.²⁵² Indeed, even in circumstances where direct democracy resulted in laws that drew distinctions between groups, those laws were not constitutionally suspect unless they drew distinctions on the basis of suspect categories or were otherwise animated by discriminatory animus.²⁵³ In this regard, the Court appeared to import the principles that undergirded its recently developed disparate impact jurisprudence²⁵⁴ to its consideration of direct democracy measures.

On this logic, within a few years of its decisions in *Reitman* and *Hunter*, the Court rejected claims that directly enacted laws impermissibly impaired the rights of minorities, taking the view that the laws were neither facially discriminatory nor motivated by a racially discriminatory purpose. Moreover, in these cases, the Court appeared to affirmatively embrace direct democracy as an expression of popular will.

James v. Valtierra is illustrative.²⁵⁵ In *James*, the Court considered a challenge to Article XXXIV of California's constitution, a ballot initiative that required the selection of low-income public housing sites to be

²⁵² Notably, the Court has not hesitated to reject ballot measures that contravene other federal constitutional or statutory provisions. For example, in 1995, the Court struck down an Arkansas ballot measure that amended the state constitution to prohibit those who had already served three terms in the House or two terms in the Senate from further congressional service. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995). As the Court explained, Article I's Qualifications Clause prescribes eligibility for congressional membership and cannot be supplemented by individual states. *Id.* at 827, 837. Likewise, in 2013, the Court invalidated an Arizona ballot initiative requiring proof of citizenship when registering to vote on the ground that superseding federal election regulations, which did not require such information, preempted the state law. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 5–6, 20 (2013).

²⁵³ See *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 302–07 (2014) (plurality opinion) (recounting the trajectory of cases from *Reitman* through *Seattle School District*).

²⁵⁴ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987); *Feeney*, 442 U.S. at 278–79; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 270–71 (1977); *Washington v. Davis*, 426 U.S. 229, 244–45 (1976).

²⁵⁵ 402 U.S. 137 (1971).

approved by the voters in community referenda.²⁵⁶ Although the challengers relied on *Hunter* to argue the provision's discriminatory impact on low-income minorities, the *James* Court distinguished *Hunter* on the ground that, although the policy at issue distinguished on the basis of income, it drew no facial *race-based* distinctions.²⁵⁷ But meaningfully, the *James* Court went further, noting with apparent approval California's "repeated use of referendums to give citizens a voice on questions of public policy" and observing, in the course of its discussion of the plaintiffs' equal protection challenge, that "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."²⁵⁸

Similarly, in *Nordlinger v. Hahn*, the Court rejected an equal protection challenge to a California ballot initiative that imposed strict limits on property tax rates and the rates of annual property tax assessments.²⁵⁹ According to its challengers, the initiative benefited existing homeowners while significantly disadvantaging those who purchased homes *after* the initiative's enactment. In so doing, the initiative effectively created disparate tax rates for newer and older homeowners.²⁶⁰ Although the Court acknowledged that the initiative may have frustrated the "American dream" of home ownership for many younger, poorer families, it nevertheless upheld the initiative on the view that it did not involve a facial racial distinction and was not animated by racially discriminatory purposes.²⁶¹ In the absence of evidence that the initiative process had been used to disadvantage minorities, the Court declined to "upset the will of the people of California."²⁶²

Taken together, these cases make clear essential facets of the Court's consideration of direct democracy and its outputs. According to the Court, direct democracy does not, by itself, offend equality principles. Indeed, the Court recognized that direct democracy could be a potent—and more immediate—mechanism for involving the electorate in policymaking. As Justice Black observed in the oral argument in *Reitman*, allowing voters to enact laws through ballot measures "is as near to a democracy as you

²⁵⁶ Id. at 138–39.

²⁵⁷ Id. at 141.

²⁵⁸ Id.; see also *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976) (describing direct democracy as a "basic instrument of democratic government").

²⁵⁹ 505 U.S. 1, 5–6, 17–18 (1992).

²⁶⁰ Id. at 6–8.

²⁶¹ Id. at 17–18.

²⁶² Id. at 18.

can get.”²⁶³ Indeed, the Court has cited the fact of state-level direct democratic activity as evidence that the people were “engaged in serious, thoughtful examinations” of pressing issues.²⁶⁴

That said, the Court has also been clear-eyed about the dangers that direct democracy might pose—particularly to underrepresented minority groups. As *Reitman* and *Hunter* make clear, in circumstances where direct democracy implicated race and “racial issues,” the Court, consistent with equal protection principles, continued its practice of applying more rigorous scrutiny to the outputs of direct democracy. In both cases, the electorate’s use of direct democracy to limit antidiscrimination protections or otherwise subjugate underrepresented minorities raised red flags. In this regard, despite its recognition of direct democracy’s virtues, the Court clearly understood that direct democracy also might be deployed in ways that, as Professor Derrick Bell argued, dilute the political power of minority groups and make it harder for them to enact—and sustain—legislation supportive of their interests.²⁶⁵

In more recent cases, the Court’s efforts to strike the delicate balance between respecting direct democracy as a permissible expression of majority will while also policing its propensity to subjugate underrepresented minorities have been more mixed. In 1996’s *Romer v. Evans*, the Court invalidated a statewide Colorado referendum that both repealed municipal ordinances prohibiting sexual orientation discrimination *and* prohibited any future state or local government action to protect the “named class” of lesbian and gay individuals.²⁶⁶ As the *Romer* Court explained, the “exceptional” and “invalid” provision bore no rational relation to any legitimate government interest, and its imposition of a “broad and undifferentiated disability on a single named group” suggested impermissible animus against the group.²⁶⁷ Though it declined to denominate gay men and lesbians a suspect class, the Court

²⁶³ Transcript of Oral Argument at 17, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483), reprinted in 64 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 651, 668 (Philip B. Kurland & Gerhard Casper eds., 1975).

²⁶⁴ *Washington v. Glucksberg*, 521 U.S. 702, 717–19 (1997) (referencing failed ballot initiatives that would have authorized forms of physician-assisted suicide in Washington (1991) and California (1993), among others, and a uniquely successful initiative in Oregon (1994) that legalized the procedure for competent, terminally ill adults).

²⁶⁵ Bell, *supra* note 223, at 13 (emphasizing that direct democracy might blunt growing Black political power).

²⁶⁶ 517 U.S. 620, 623–24 (1996).

²⁶⁷ *Id.* at 632.

wrote forcefully that if “the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest” sufficient to withstand a challenge under the Equal Protection Clause.²⁶⁸

But in a high-profile case involving affirmative action, *Schuette v. Coalition to Defend Affirmative Action*,²⁶⁹ the Court appeared less attuned to the minority group interests at stake in a statewide ballot initiative concerning affirmative action. In 2006, on the heels of a Supreme Court decision blessing the limited use of race-based affirmative action in higher education admissions,²⁷⁰ Michigan voters approved Proposal 2.²⁷¹ The measure amended Michigan’s constitution to prohibit the use of affirmative action in public employment, education, and contracting.²⁷² Challengers filed suit on the ground that the ballot measure restructured the political process to make it more difficult for racial minorities to prevail in policymaking over affirmative action.²⁷³ Specifically, they argued that before the ballot measure, “minority groups could petition university officials to implement affirmative action programs, or at least consider race among a host of nonacademic factors in making admissions decisions.”²⁷⁴ By contrast, upon the ballot measure’s enactment, minorities were only able to “secure programs that account for race in the assembly of a student body” by enacting “another constitutional

²⁶⁸ *Id.* at 634 (alteration in original) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). But see *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296, 301 (6th Cir. 1997) (upholding a Cincinnati, Ohio, ballot measure that prohibited the city from enacting laws granting “special privileges” to homosexuals).

²⁶⁹ 572 U.S. 291 (2014).

²⁷⁰ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

²⁷¹ Michigan Proposal 2, *supra* note 13.

²⁷² Mich. Dep’t of State, State Proposals: November 7, 2006 General Election 5 (2006), http://www.michigan.gov/-/media/Project/Websites/sos/Z_Archived/01luck/ED138_State_Prop_1106.pdf?rev=b0ec6267905e4406b42e9f8fc582d729 [<https://perma.cc/NH7D-ABXL>].

²⁷³ *Coal. to Def. Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 953 (E.D. Mich. 2008) (rejecting plaintiffs’ equal protection challenge on the view that the challenged ballot measure was facially neutral and that plaintiffs had not established that it was enacted with discriminatory intent), *aff’d in part, rev’d in part*, 652 F.3d 607 (6th Cir. 2011), *aff’d in part, rev’d in part en banc*, 701 F.3d 466 (6th Cir. 2012), *rev’d sub nom.*, *Schuette*, 572 U.S. 291.

²⁷⁴ *Id.*

amendment”—a “daunting process” that “impose[d] a unique and heavy burden upon them as a class.”²⁷⁵

In a fractured plurality decision, the Court upheld the Michigan ballot initiative—and appeared to retreat from the minority-protective posture it took in *Reitman*, *Hunter*, and *Seattle School District*.²⁷⁶ Writing for a three-member plurality, Justice Kennedy distinguished the Michigan initiative from those cases on the ground that they involved political restrictions designed “to encourage infliction of injury by reason of race.”²⁷⁷ By contrast, Justice Kennedy reasoned that the principal question in *Schuette* was *who* was empowered to resolve debates about the use of racial preferences, not *how* those debates should be resolved. As he explained, “Democracy does not presume that some subjects are either too divisive or too profound for public debate.”²⁷⁸ In this circumstance, where “Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power,” there was no constitutional violation for the Court to address.²⁷⁹ The Equal Protection Clause did not prohibit the state and its voters from deploying direct democracy to resolve the affirmative action debate—even in circumstances where minority groups would face an uphill battle if they sought to reverse the action.

In a vehement dissent, Justice Sotomayor disagreed, insisting that the pertinent question was not who was empowered to decide the affirmative action question, but whether direct democracy, which left minority voices vulnerable to the vicissitudes of the majority, was the proper forum for resolving the issue.²⁸⁰ Lamenting what she viewed as the Court’s abdication of its duty to protect minority interests, she noted pointedly that “[t]he Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities.”²⁸¹

* * *

As the foregoing discussion suggests, direct democracy’s propensity for diluting and subordinating minority interests to majority will long has

²⁷⁵ *Id.*

²⁷⁶ *Schuette*, 572 U.S. at 298–99, 313–14 (plurality opinion).

²⁷⁷ *Id.* at 314.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 311.

²⁸⁰ *Id.* at 341–42 (Sotomayor, J., dissenting).

²⁸¹ *Id.* at 391.

been a subject of concern—among both scholarly critics and the courts. In view of these concerns, critics have called upon the courts to exercise their duty to protect the interests of “discrete and insular minorities” by intervening to police direct democracy to ensure that it is not used as a vehicle for subordinating minority rights. And courts, historically, have done so, albeit unevenly. Even as courts have credited direct democracy as a means of expressing democratic will, they also have invoked equal protection principles to invalidate ballot measures that bear the hallmarks of impermissible animus against a disfavored group or that make it unduly difficult for minorities to vindicate their interests in the political process.

The question, of course, is whether judicial skepticism of direct democracy and its outputs is likely to persist in a changing constitutional order in which the tenets—and subjects—of equal protection are evolving. The Parts that follow take up this question in the context of abortion. To set the stage, Part IV returns to the subject of this Article—abortion and direct democracy—and canvasses the use of direct democracy in the specific context of reproductive rights, pre- and post-*Dobbs*. Part V then considers direct democracy’s appeal in a post-*Dobbs* landscape in which both substantive due process and equal protection principles have been called into question.

IV. ABORTION AND DIRECT DEMOCRACY

Since it first emerged in the United States, citizens have deployed direct democracy to address some of the most vexing and contentious social issues, from affirmative action to same-sex marriage. It is unsurprising, then, that direct democracy has featured in the fraught debate over abortion rights. In the Sections that follow, we survey direct democracy’s role in the abortion debate, from initial responses to *Roe v. Wade* to the more recent effort to counteract the impact of *Dobbs v. Jackson Women’s Health Organization*.

A. Responding to Roe

Beginning in the 1970s, abortion has been the subject of dozens of proposed ballot measures, from efforts to enshrine abortion rights in state constitutions to measures aimed at securing fetal personhood to measures aimed at requiring parental consent for a minor’s abortion, as well as measures seeking to guarantee—or prohibit—public funding for abortion

services.²⁸² The use of direct democracy to address abortion rights predates the Supreme Court’s 1973 decision in *Roe v. Wade*. Indeed, in 1970, three years before *Roe* was decided, Washington voters approved Referendum 20, the first pro-abortion measure to appear on a state ballot.²⁸³ Notably, the measure, which passed with over fifty-six percent of the vote and provided a right to abortion in the first “four lunar months” of pregnancy, was a bipartisan effort of the state legislature and the then-Republican governor.²⁸⁴ Campaign strategists framed the referendum as a healthcare issue rather than as a question of women’s choice—a rhetorical frame that seemed to resonate with voters.²⁸⁵ The Washington referendum’s success, however, did not translate to other states and other ballot measures. In 1972, just a year before *Roe*, ballot measures aimed at protecting abortion up to twenty weeks failed in Michigan²⁸⁶ and North Dakota.²⁸⁷

If the early 1970s featured efforts to use ballot measures to secure abortion rights, then the Court’s decision in *Roe*, recognizing a right to abortion, inaugurated a new phase in the relationship between direct

²⁸² See History of Abortion Ballot Measures, Ballotpedia, https://ballotpedia.org/History_of_abortion_ballot_measures [<https://perma.cc/WR9P-YDSQ>] (last visited Nov. 5, 2025) (providing a comprehensive overview of abortion ballot measures). There have been ten abortion initiatives on the ballot in Colorado alone. *Id.*

²⁸³ Wash. Referendum 20: Changes in Abortion Law (1970) [hereinafter Wash. Referendum 20], <https://www2.sos.wa.gov/assets/elections/voters%20pamphlet%201970.pdf> [<https://perma.cc/2T2G-AX9T>] (describing proposed Washington Referendum 20, which legalized abortion for women “not quick with child” and within the “four lunar months after conception”); see also History of Referendum Bills, Off. of Wash. Sec’y of State, https://apps.sos.wa.gov/elections/initiatives/statistics_referendumbills.aspx [<https://perma.cc/RMX6-T4PE>] (last visited Nov. 5, 2025) (showing Referendum 20 election results).

²⁸⁴ Wash. Referendum 20, *supra* note 283; Angie Weiss, Washington’s 1970 Abortion Reform Victory: The Referendum 20 Campaign, Univ. of Wash.: Seattle C.R. & Lab. Hist. Project (2013), <https://depts.washington.edu/civilr/referendum20.htm> [<https://perma.cc/QJ4T-LGB9>].

²⁸⁵ Weiss, *supra* note 284.

²⁸⁶ Laws Proposed by Initiative Petition and Submitted to the People, 1964–2014, in Michigan Manual 2015–2016, at 522, 522 (2016) [hereinafter Michigan Manual], [https://www.legislature.mi.gov/\(S\(uek3ntzq3ftcyswup1jswy0n\)\)/documents/2015-2016/michiganmanual/2015-MM-P0522-p0526.pdf](https://www.legislature.mi.gov/(S(uek3ntzq3ftcyswup1jswy0n))/documents/2015-2016/michiganmanual/2015-MM-P0522-p0526.pdf) [<https://perma.cc/8SFC-5GZD>]. Anti-abortion forces mustered a tremendous grassroots organization and political campaign that effectively killed the referendum. See Laurence H. Tribe, Abortion: The Clash of Absolutes 50 (1992).

²⁸⁷ State Bd. of Canvassers, Off. of N.D. Sec’y of State, Official Abstract of Votes Cast at the General Election Held November 7, 1972 (1972), <https://vip.sos.nd.gov/pdfs/Abstracts%20by%20Year/1970%20through%201978%20Statewide%20Election%20Results/1972/General%20Election%2011-07-1972.pdf> [<https://perma.cc/U75Y-UJPN>] (last visited Nov. 5, 2025).

democracy and reproductive freedom. In the 1980s, as opposition to *Roe* and abortion access intensified, anti-abortion activists deployed direct democracy to limit abortion access with mixed results.²⁸⁸ Voters in Colorado, Michigan, and Arkansas narrowly approved measures to prohibit the use of state funds for abortions,²⁸⁹ although similar measures failed in Oregon (thrice), Alaska, Washington, Rhode Island, and Massachusetts.²⁹⁰

In the 1990s, anti-abortion activists turned their attention to parental notification requirements. In 1998, Colorado voters adopted a ballot measure that required parental notification for a minor's abortion.²⁹¹ Measures that went further, however, were less successful with voters. For example, a Maine initiative that sought to ban what the initiative's proponents termed "partial-birth abortions" failed.²⁹² Despite the Maine initiative's failure, throughout the 1990s, abortion opponents continued to turn to direct democracy in their attempts to restrict so-called "partial-birth abortions."²⁹³

Despite abortion opponents' failure to convince voters to prohibit certain procedures, direct democracy proved useful to them in other ways.

²⁸⁸ Molly E. Carter, Note, *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of a Majority*, 91 B.U. L. Rev. 305, 312–13 (2011) (discussing the history of pro- and anti-abortion groups shaping abortion policy through direct democracy in the 1980s and thereafter).

²⁸⁹ Colo. Initiative No. 3: Prohibit Public Funding of Abortions (1984), <https://www.leg.state.co.us/lcs/ballothistory.nsf/835d2ada8de735e787256ffe0074333d/6f17c468971b2fc387256ffd006a496e?OpenDocument> [<https://perma.cc/Q6BA-XKXJ>]; Referenda on Legislation Enacted by the Legislature, 1964–2014, *in* Michigan Manual, *supra* note 286, at 523, 523; Off. of Ark. Sec'y of State, *supra* note 175.

²⁹⁰ See History of Abortion Ballot Measures, *supra* note 282. Voters rejected prohibitions on the use of state funds for abortion in Oregon in 1978, 1986, and 2018; Alaska in 1982; Washington in 1984; and Rhode Island and Massachusetts in 1986. *Id.* The latter two ballot initiatives would have also established a state constitutional right to life at conception and prohibited abortions to the maximum extent permitted under the U.S. Constitution. R.I. Const. Convention: Voters' Guide to Fourteen Ballot Questions for Constitutional Revision 19 (1986), https://ballotpedia.s3.amazonaws.com/images/5/59/1986_Rhode_Island_Constitutional_Convention_Questions.pdf [<https://perma.cc/JR8W-89ZG>]; H.R. 5338, 1985–1986 Leg., Reg. Sess. (Mass. 1986).

²⁹¹ Colo. Ballot No. 12: Parental Notification for Abortion (1998), <https://www.leg.state.co.us/lcs/ballothistory.nsf/835d2ada8de735e787256ffe0074333d/672a6cada222424487256ffd006a49ad?OpenDocument> [<https://perma.cc/S256-44MB>].

²⁹² Citizen Initiated Legislation: 1911–Present, Law & Legis. Digit. Libr., Me. State Legislature, <https://www.maine.gov/legis/lawlib/lldl/citizeninitiated/> [<https://perma.cc/XVJ9-6Y8B>] (last visited Nov. 5, 2025).

²⁹³ Carter, *supra* note 288, at 313 (noting that pro-life advocates' attempts to ban partial-birth abortions through direct democracy became prevalent in the late 1990s).

Many in the medical community vehemently objected to the use of the term “partial-birth abortion,” arguing that its application to a common—and sometimes necessary—abortion procedure was both misleading and inflammatory.²⁹⁴ In this regard, the repeated efforts to place bans on the procedure before the voters may have helped both to normalize the use of the term and entrench antipathy for the procedures it described. By the 2000s, the use of the term was widespread, and critically, legislative bans on procedures labeled “partial-birth abortions” succeeded at both the state and federal levels.²⁹⁵

In the 2000s and 2010s, anti-abortion activists expanded their efforts to chip away at abortion access. Between 2004 and 2012, voters approved new parental notification requirements for minors in Florida,²⁹⁶ Alaska,²⁹⁷ and Montana.²⁹⁸ In 2014, fifty-three percent of Tennessee voters approved language that explicitly disclaimed any state-level constitutional

²⁹⁴ See Am. Med. Ass’n Policy No. H-5.982, Late-Term Pregnancy Termination Techniques (2022), https://policysearch.ama-assn.org/policyfinder/detail/*?uri=%2FAMADoc%2FHOD.xml-0-4533.xml [<https://perma.cc/2C93-CGKY>] (noting that “[t]he term ‘partial birth abortion’ is not a medical term” and explaining that “[t]he AMA will use the term ‘intact dilatation and extraction’ (or intact D&X)”).

²⁹⁵ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) (upholding the federal ban on so-called “partial-birth abortion”); *Women’s Med. Pro. Corp. v. Taft*, 353 F.3d 436, 438 (6th Cir. 2003) (upholding a similar Ohio state ban).

²⁹⁶ Parental Notification of a Minor’s Termination of Pregnancy, Fla. Div. of Elections, <https://constitutionalinitiatives.dos.fl.gov/Home/InitDetail?account=10&seqnum=59> [<https://perma.cc/KA6E-LF5N>] (last visited Feb. 1, 2026) (requiring parents of a minor to be notified if their child is seeking an abortion).

²⁹⁷ Alaska Div. of Elections, The Parental Involvement Initiative (2010), https://web.archive.org/web/20221115222119/https://www.elections.alaska.gov/petitions/09PIMA/09PIMA_severed.pdf [<https://perma.cc/34WS-NFKD>] (requiring parental notification forty-eight hours before a minor’s abortion, except where the parent provides prior written consent). In a 2016 decision, the Alaska Supreme Court invalidated the statute. See *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1144 (Alaska 2016) (“In effect, the State may not affirmatively tip the scale against the right to choose an abortion absent compelling reasons to do so.” (quoting *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 622 (N.J. 2000))).

²⁹⁸ 2012 Ballot Issues: LR-120 (HB 627), Off. of Mont. Sec’y of State, https://sosmt.gov/elections/ballot_issues/2012-2/ [<https://perma.cc/SLY3-NNVR>] (last visited Jan. 4, 2026) (requiring parental notification prior to a minor’s abortion).

protections for a right to an abortion.²⁹⁹ Alabama voters followed suit with a similar amendment in 2018.³⁰⁰

But, critically, in the 2000s and 2010s, more ambitious anti-abortion initiatives were largely unsuccessful when channeled through the mechanisms of direct democracy. Four fetal personhood initiatives, which would have defined “person” to include “any human being from the moment of fertilization” for the purposes of state constitutional rights and criminal law, failed to garner a majority in Colorado (three separate times)³⁰¹ and Mississippi.³⁰² In 2006 and 2008, South Dakotans rejected two referenda that proposed prohibiting all abortions except those medically necessary to save the life of the pregnant patient.³⁰³ The two measures received just forty-four percent and forty-five percent of the vote, respectively.³⁰⁴

²⁹⁹ Tenn. Sec’y of State, Constitutional Amendment 1: No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment 3–4 (2014), https://sos-tn-gov-files.s3.amazonaws.com/20141104_CountyTotals_01.pdf [<https://perma.cc/7N2Y-BA8J>] (amending the state constitution to deny recognition or protection of a right to abortion, and to disclaim any requirement for state funding for abortion).

³⁰⁰ Proclamation, Kay Ivey, Ala. Governor, Alabama Proposed Amendment No. 2, <https://governor.alabama.gov/assets/2018/12/2018-12-03-Post-Election-Proclamation-Statewide-Amendments.pdf> [<https://perma.cc/CLG2-7C9T>] (last visited Nov. 5, 2025) (documenting approval of an Alabama ballot measure that “recognize[s] and support[s] the sanctity of unborn life and the rights of unborn children, including the right to life” as a matter of state policy). In 2019, the Alabama Governor signed House Bill 314, the Human Life Protection Act, prohibiting all abortions in the state except those necessary to prevent a serious health risk to the woman. See Kate Smith, Alabama Governor Signs Near-Total Abortion Ban Into Law, CBS News, <https://www.cbsnews.com/news/alabama-abortion-law-governor-kay-ivey-signs-near-total-ban-today-live-updates-2019-05-15/> [<https://perma.cc/2QWV-9EU4>] (last updated May 16, 2019, at 18:20 ET).

³⁰¹ See History of Abortion Ballot Measures, *supra* note 282 (documenting rejection of fetal personhood measures in 2008, 2010, and 2014).

³⁰² Miss. Initiative No. 26: Definition of ‘Person’ (2011), <https://www.sos.ms.gov/content/documents/elections/Definition%20of%20Person-PW%20Revised.pdf> [<https://perma.cc/YFE4-YVT7>] (defining a person as “every human being from the moment of fertilization, cloning, or the functional equivalent thereof”); C. Delbert Hosemann, Jr., Miss. Sec’y of State, Official Tabulation of Vote for Statewide Initiative Measure No. 26 (2011), <https://www.sos.ms.gov/links/elections/results/statewide/Statewide%20Initiative%20Measure%2026%20-%20General%20Election%202011%20Results.pdf> [<https://perma.cc/PSN3-QQ3L>] (providing election results).

³⁰³ 2006 South Dakota Ballot Question Attorney General Explanations, S.D. Sec’y of State (2006), https://sdsos.gov/elections-voting/election-resources/election-history/2006/2006_ballot_question_attorney_general_explanations.aspx [<https://perma.cc/H8Q9-7NGZ>]; S.D. Sec’y of State, 2008 South Dakota Ballot Questions: Initiated Measure 11 (2008), <https://sdsos.gov/elections-voting/assets/BallotQuestions.pdf> [<https://perma.cc/2BXX-B7FN>].

³⁰⁴ History of Abortion Ballot Measures, *supra* note 282.

Notably, during this period, direct democracy produced some hopeful results for proponents of reproductive freedom. In many states, pro-choice activists turned to direct democracy to stave off any future legislative backsliding. In Nevada, voters enacted an initiative that prohibited the state legislature from amending or repealing the state's abortion statute without first sending proposed changes to the voters.³⁰⁵ Voters in Washington and Maryland expanded the permitted timeframe for abortion to the point of fetal viability.³⁰⁶ Meaningfully, these would be the only pro-choice proposals to go before voters until after the Court's decision in *Dobbs* roughly three decades later.

B. Responding to Dobbs

The Supreme Court's 2022 decision in *Dobbs* marked a sea change in the use of direct democracy in the debate over abortion rights. In the years preceding *Dobbs*, anti-abortion forces were more likely to deploy direct democracy to limit access to abortion incrementally. However, this all changed in 2021 when the Court, after considering the petition for

³⁰⁵ Nev. Sec'y of State, Nevada Ballot Questions 11 (1990) <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1990.pdf> [<https://perma.cc/CLQ8-BGZR>] (upholding a previously enacted statute permitting abortion up to twenty-four weeks gestation). Question 7 was a statute affirmation, that is, a citizen-initiated ballot measure that prevents the legislature from repealing or amending a statute in the future without a direct vote of the electorate. Nevada is the only state with this type of ballot measure, and there have only been two passed in state history (Question 7 and another in 1956). See Nev. Const. art. XIX, § 1(3) (explaining that if a veto referendum is held and voters sustain the law in question, the legislature may not at any future time modify or repeal that law; and that the only way that the law can be changed is by putting the question to a subsequent popular vote); see also John Dinan, *The Constitutional Politics of Abortion Policy After Dobbs: State Courts, Constitutions, and Lawmaking*, 84 Mont. L. Rev. 27, 67–68 (2023) (discussing the campaign to insulate the Nevada statute permitting abortion from any possibility of legislative appeal).

³⁰⁶ Off. of Wash. Sec'y of State, Voters Pamphlet: State General Election 16–17 (1991), https://www.sos.wa.gov/sites/default/files/2025-05/SL_voterspamphlet_1991_ed13.pdf [<https://perma.cc/5Y2C-7PSX>] (preventing the state from denying or interfering with a woman's right to have an abortion before fetal viability, or to protect her life or health); Yearly Summary of Initiatives to the Legislature, Off. of Wash. Sec'y of State, <https://www2.sos.wa.gov/elections/initiatives/yearly-summary-of-initiatives-to-the-legislature.aspx> [<https://perma.cc/7C3A-Z9NA>] (last visited Nov. 5, 2025) (providing election results); Maryland Question 6: Changes to Abortion Law Referendum (1992), Ballotpedia, [https://ballotpedia.org/Maryland_Question_6_Changes_to_Abortion_Law_Referendum_\(1992\)](https://ballotpedia.org/Maryland_Question_6_Changes_to_Abortion_Law_Referendum_(1992)) [<https://perma.cc/L79Q-QCYE>] (last visited Nov. 5, 2025) (documenting a successful Maryland ballot measure preventing the state from “interfer[ing] with the decision of a woman to terminate a pregnancy” prior to fetal viability (citation omitted)).

months, granted certiorari and heard oral argument in *Dobbs*.³⁰⁷ The Court's new conservative supermajority's appetite to confront directly the question of *Roe*'s continued vitality, in tandem with the tenor of the oral argument, gave the clear impression that the embattled precedent was on its last legs.³⁰⁸

Many advocates turned to direct democracy in anticipation of *Roe*'s likely demise. Indeed, even before the Court announced its decision in *Dobbs* on June 24, 2022, activists and lawmakers were well on their way to proposing abortion rights measures in California, Michigan, and Vermont.³⁰⁹ The announcement of the *Dobbs* decision in June 2022 further catalyzed interest in direct democracy. In Kansas, an August 2022 special election featured a ballot measure aimed at stripping protections for abortion rights from the state's constitution. Still smarting from *Dobbs*, Kansans flooded the polls in the off-cycle election, defeating the measure by a wide margin.³¹⁰ And in the November 2022 midterm elections, voters in California, Michigan, and Vermont turned out in force

³⁰⁷ *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619, 2619–20 (2021) (mem.); Katherine Shaw, Hidden Harms: Abortion and the Shadow Docket, 2024 Sup. Ct. Rev. 91, 100–01; see also Karen M. Tani, The Supreme Court, 2023 Term—Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court, 138 Harv. L. Rev. 1, 6–7 (2024) (noting that in *Dobbs*, the Court made a concerted choice to grant certiorari, as the lower court “grudgingly” adhered to extant precedent, “leaving no error to correct under then-governing law”).

³⁰⁸ Melissa Murray, Sotomayor Saw She Couldn't Sway Her Colleagues. So She Talked to Us Instead., Wash. Post (Dec. 3, 2021), https://www.washingtonpost.com/outlook/abortion-sotomayor-dobbs-oral-arguments/2021/12/03/ba6fc4b8-53d5-11ec-8927-c396fa861a71_story.html [<https://perma.cc/WPC5-BXAS>] (noting that as the oral argument progressed, it seemed evident that the votes to preserve *Roe* “simply weren't there”).

³⁰⁹ Sarah Cwiek, Reproductive Rights Coalition Launches Petition Drive for Abortion Access Ballot Proposal, Mich. Pub. (Mar. 8, 2022, at 18:09 ET), <https://www.michiganpublic.org/politics-government/2022-03-08/reproductive-rights-coalition-launches-petition-drive-for-abortion-access-ballot-proposal> [<https://perma.cc/F32H-VSEE>] (noting a petition drive for an abortion access ballot proposal in Michigan); Vt. Proposal 5: Declaration of Rights; Right to Personal Reproductive Liberty (2022), <https://legislature.vermont.gov/bill/status/2022/P.R.5?> [<https://perma.cc/MT2F-C6KN>] (highlighting the status of a Vermont bill on the right to personal reproductive liberty); Dani Anguiano, ‘We Can’t Trust Scotus’: California Pledges to Protect Abortion Rights, The Guardian (May 4, 2022, at 13:00 ET), <https://www.theguardian.com/us-news/2022/may/03/california-abortion-rights-roe-v-wade-scotus?> [<https://perma.cc/64HK-P8YN>] (describing the proposal of an amendment in California that would “enshrine the right to choose” in the state's constitution (citation omitted)).

³¹⁰ Dylan Lysen, Laura Ziegler & Blaise Mesa, Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment, NPR (Aug. 3, 2022, at 02:18 ET), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/X2C9-NZPA>].

to cast ballots in favor of reproductive freedom. Critically, all three midterm ballot measures enshrined reproductive freedoms and autonomy in the constitutions of their respective states.³¹¹

In that same midterm election, direct democracy was deployed to stanch the drive toward even greater restrictions on reproductive freedom. In Kentucky and Kansas, voters distanced themselves from the *Dobbs* decision by rejecting initiatives that would have extinguished abortion rights under their respective state constitutions.³¹² Kentucky was not the only red state where voters opted to preserve abortion access through direct democracy. In a 2023 off-cycle election, nearly fifty-seven percent of Ohio voters voted to amend the state’s constitution to protect abortion rights despite protracted and multifront resistance from state officials.³¹³ In November 2024, even as voters returned Donald Trump to the presidency, voters in ten states cast their votes on various abortion-related

³¹¹ Cal. Proposition 1: Constitutional Right to Reproductive Freedom. Legislative Constitutional Amendment (2022), <https://lao.ca.gov/ballot/2022/Prop1-110822.pdf> [<https://perma.cc/U28N-6DU7>]; Cal. Sec’y of State, Statement of Vote: November 8, 2022 General Election, <https://elections.cdn.sos.ca.gov/sov/2022-general/sov/complete.pdf> [<https://perma.cc/LC92-TYEM>] (last updated 2023); Mich. Proposal 22-3, Bureau of Elections, State of Mich., <https://web.archive.org/web/20221212012243/https://www.michigan.gov/sos/-/media/Project/Websites/sos/BSC-Announcements/Proposal/Proposal-22-3-Ballot-Language.pdf?hash=EF30BEBB703151E63C8893BB042791F4&rev=3c3ba8f917494ffc3097b64d1986df0> [<https://perma.cc/HLH7-YM8Z>] (capture dated Dec. 12, 2022); 2022 Michigan Election Results, Mich. Voter Info. Ctr., <https://mvic.sos.state.mi.us/votehistory/Index?type=C&electionDate=11-8-2022> [<https://perma.cc/9UK5-7KQ6>] (last updated Jan. 1, 2024, at 00:00 ET); Proclamation, Philip B. Scott, Vt. Governor, https://outside.vermont.gov/dept/sos/Elections_Division/election_info_resources/elections_results_data/2022_vermont_constitution_article22_amendment5.pdf [<https://perma.cc/QP6X-RLNF>] (last visited Nov. 5, 2025); Official Report of the Canvassing Committee: Vermont Statewide Public Questions General Election, https://outside.vermont.gov/dept/sos/Elections_Division/election_info_resources/elections_results_data/2022_general_election_official_report_canvassing_committee_vermont_statewide_public_questions.pdf [<https://perma.cc/D2HX-ZQ4D>] (last visited Feb. 1, 2026).

³¹² Off. of Ky. Sec’y of State, Official 2022 General Election Results 253–57 (2022), <https://elect.ky.gov/results/2020-2029/Documents/1.17.2023%20Certified%20General%20Election%20Results.pdf> [<https://perma.cc/2867-YQ7Z>]; 2021 Kan. Sess. Laws 1963–64 (proposing an amendment to the Kansas state constitution providing that the constitution “does not create or secure a right to abortion”); Off. of Kan. Sec’y of State, 2022 Primary Election Official Vote Totals, <https://sos.ks.gov/elections/22elec/2022-Primary-Official-Vote-Totals.pdf> [<https://perma.cc/YKJ6-XHKE>] (last visited Nov. 5, 2025) (rejecting the amendment).

³¹³ See Statewide Issue History, *supra* note 192; Melissa Murray & Kate Shaw, One of the Most Brazen Republican Schemes Around Abortion Is Happening in Ohio, *N.Y. Times* (Aug. 7, 2023), <https://www.nytimes.com/2023/08/07/opinion/abortion-democracy-ohio.html> (highlighting the special election orchestrated by Ohio lawmakers to make it more difficult to amend the state constitution).

measures, with abortion prevailing in seven of the ten, including a ballot measure in deep-red Missouri.³¹⁴

As this history makes clear, direct democracy has long been a part of the debate over reproductive rights. And while it has not been particularly successful in either curbing or preserving abortion rights, the post-*Dobbs* landscape heralds an entirely new dynamic—one in which direct democracy has emerged as a potent tool for securing reproductive freedom.

Taken together, these developments prompt important questions about direct democracy and its relationship to reproductive rights. Why, at this juncture, is direct democracy so attractive—and so effective—in the fight to shore up protections for reproductive freedom? To what dynamics in the broader constitutional order does the deployment of direct democracy respond? And, going forward, does the history of direct democracy as a force for progressive change *and* retrenchment urge caution? In the Part that follows, we explore these questions.

V. DIRECT DEMOCRACY, *DOBBS*, AND THE NEW CONSTITUTIONAL ORDER

The present moment offers a fruitful opportunity to reflect on direct democracy's appeal in the fight to secure reproductive freedom. In this Part, we assess the increasing appeal of direct democracy in view of a changing electoral landscape and shifting judicial norms that may render direct democratic engagement both attractive and urgent. Indeed, this dynamic context offers a useful lens through which to consider a vexed set of questions emerging in constitutional law, including whether and how to determine minority group status, how to gauge political power, and how to figure the relationship between majoritarianism, minority rights, and democracy. With this in mind, Section V.A considers the new electoral landscape and the Supreme Court's role in cultivating it. As we explain, through a series of decisions that have distorted the electoral landscape, the Court has cultivated an environment in which the political processes of representative government are less likely to yield outcomes that reflect majoritarian preferences, prompting voters to seek alternatives for vindicating their interests.

Section V.B also focuses on the Court—specifically, the changed jurisprudential landscape that the Court inaugurated with its decision in

³¹⁴ KFF Ballot Tracker, *supra* note 9.

Dobbs v. Jackson Women’s Health Organization. As many commentators have noted, *Dobbs* reflects a shift in the jurisprudence surrounding the identification and vindication of fundamental rights. But as we explain, *Dobbs* has also laid the groundwork for a sea change in our understanding of equal protection and women’s status in the constitutional order. Understanding these changes in both the electoral and jurisprudential landscapes, we argue, is critical to understanding both the promise and perils of the turn to direct democracy as a vehicle for safeguarding reproductive freedom.

A. Direct Democracy in a Changed Electoral Landscape

In Part II, we noted direct democracy’s Progressive Era origins as a popular response to unresponsive legislatures and the outsized influence of corporations and moneyed interests in the political process.³¹⁵ Over time, direct democracy assumed a more illiberal cast as it was marshaled to counter legislative and judicial actions aimed at securing minority rights and civil rights.³¹⁶ We discuss this history to emphasize that, across time, direct democracy has been deployed in response to developments in representative government and traditional politics.

A similar dynamic attends the use of direct democracy post-*Dobbs*. The difference, of course, is that direct democracy is now responding to an entirely different electoral landscape—one that is riddled with distortions that make it more difficult for the ordinary voter to see her interests reflected in policymaking. As we have argued elsewhere, gerrymandering has made traditional representative government far from responsive to popular will.³¹⁷

In many states, extreme partisan gerrymandering means that many state legislatures do not reflect even a baseline representativeness when it comes to their state electorates.³¹⁸ Certainly “deliberation” may still occur under such conditions, but it is likely to be superficial and ineffective in reflecting the will of constituents. As a number of scholars have noted, this distorted context is unlikely to produce the kind of meaningful deliberation that proponents of republican theory advocate.³¹⁹

³¹⁵ See *supra* Section II.A.

³¹⁶ See *supra* Section II.B.

³¹⁷ Murray & Shaw, *supra* note 17, at 766, 780–82.

³¹⁸ *Id.* at 766, 781–83.

³¹⁹ See, e.g., Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. Rev. 582, 612 (2014) (noting the deliberative deficiencies of direct democracy).

Recent developments in the abortion debate evince the challenges of true representation in gerrymandered state legislatures. State legislatures that are gerrymandered to consolidate Republican control often enact draconian laws restricting reproductive freedom—even in circumstances where a majority of the state’s voters favor some measure of reproductive freedom.³²⁰ By contrast, because direct democracy often operates statewide, it allows all of a state’s eligible voters to directly register their preferences, unmediated by skewed legislative districts and the interests of their elected representatives. Accordingly, in circumstances where legislatures are gerrymandered and produce laws that restrict abortion rights, direct democracy efforts may be more likely to effectively channel popular preferences on the question of reproductive freedom.

This insight helps explain the disjunction in abortion policy in states like Kansas and Indiana. In August 2022, on the heels of the Court’s decision in *Dobbs*, the Indiana legislature, which has been significantly gerrymandered to consolidate Republican control, enacted one of the nation’s most draconian abortion bans.³²¹ But just a few days earlier in Kansas, another state with a Republican-gerrymandered legislature, voters rejected a ballot measure aimed at stripping abortion protections from the state constitution.³²² In the space of just a few days, two traditionally red states took wildly divergent positions on abortion.

What explains the difference between the outcomes in these traditionally “red” states? On the one hand, in Kansas, the availability of a direct democracy mechanism provided a means for voters to register their preferences for reproductive freedom directly—and the legislature triggered that mechanism by referring a proposed constitutional

³²⁰ See generally Miriam Seifter, *Counter-majoritarian Legislatures*, 121 *Colum. L. Rev.* 1733 (2021) (arguing that at the state level, legislatures are usually the least majoritarian branch).

³²¹ Arika Herron, *Indiana Adopts Near-Total Abortion Ban as Governor Signs SB 1 into Law*, *Indianapolis Star* (Aug. 6, 2022, at 18:07 ET), <https://www.indystar.com/story/news/politics/2022/08/05/indiana-abortion-law-passed-final-vote-to-come/65391000007> [<https://perma.cc/2YQP-4JQ3>] (describing Indiana’s Senate Bill 1, which “prohibits abortion at any stage . . . except in cases of rape, incest, fatal fetal anomalies,” or when the pregnant person’s life is in danger).

³²² Matthew A. Baum, Alauna Safarpour & Kristin Lunz Trujillo, *4 Reasons Why Abortion Laws Often Clash with the Majority’s Preferences in the US*, from *Constitutional Design to Low Voter Turnout*, *The Conversation* (Aug. 25, 2022, at 11:02 ET), <https://theconversation.com/4-reasons-why-abortion-laws-often-clash-with-the-majoritys-preferences-in-the-us-from-constitutional-design-to-low-voter-turnout-188180> [<https://perma.cc/G4RY-54VR>].

amendment to the voters.³²³ By contrast, Indiana's gerrymandered legislature did not offer voters any opportunity for direct engagement on this question, meaning voter preferences on abortion remain mediated through the mechanisms of representative government³²⁴—that is, a state legislature that has been configured to dilute certain political interests while prioritizing others.³²⁵

Critically, the proliferation of gerrymandering has not occurred organically. The Supreme Court's decision in *Rucho v. Common Cause*, which declared partisan gerrymandering a nonjusticiable political question,³²⁶ essentially blessed the practice, emboldening political parties to consolidate their authority over state legislatures in increasingly brazen ways.

Relatedly, the Court's decisions rolling back restrictions on campaign finance have dramatically distorted the electoral landscape in ways that privilege wealth. In 2010's *Citizens United v. FEC*,³²⁷ the Court famously overruled *Austin v. Michigan State Chamber of Commerce*³²⁸ and much of *McConnell v. FEC*,³²⁹ both of which upheld campaign finance restrictions aimed at limiting corporate influence in candidate elections. As many critics have observed, the maximalist vision of the First Amendment that underwrote *Citizens United* fuels the influx of corporate money and wealth into the political process.³³⁰

³²³ Id. (discussing the disjunction between public opinion on abortion and restrictive abortion policies).

³²⁴ Polling in Indiana shows that a majority of Hoosiers view the legislative ban as too restrictive. Niki Kelly, Hoosier Voters Oppose Strict Abortion Ban, New Poll Finds, Ind. Cap. Chron. (June 24, 2024, at 08:00 ET), <https://indianacapitalchronicle.com/2024/06/24/hoosier-voters-oppose-strict-abortion-ban-new-poll-finds/> [<https://perma.cc/WYQ3-V2CU>] (showing that sixty-four percent of Indiana voters believe abortion should be legal in all or most cases); see Jane S. Schacter, Direct Democracy After *Dobbs*: Paradox, Irony and the Coming Recalibration, 2024 U. Ill. L. Rev. 1497, 1510 (discussing public support for abortion rights).

³²⁵ Baum et al., *supra* note 323.

³²⁶ 139 S. Ct. 2484, 2499–2500 (2019).

³²⁷ 558 U.S. 310, 365–66 (2010) (striking down limits on corporate spending in federal elections).

³²⁸ 494 U.S. 652 (1990), *overruled by*, *Citizens United*, 558 U.S. 310.

³²⁹ 540 U.S. 93 (2003), *overruled by*, *Citizens United*, 558 U.S. 310.

³³⁰ See David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 Yale L. & Pol'y Rev. 236, 276–78 (1991) (arguing that the distortive effects of wealth in politics justifies campaign finance reform); see also Kathleen M. Sullivan, Free Speech and Unfree Markets, 42 UCLA L. Rev. 949, 959–63 (1995) (discussing tensions between free speech and the marketplace).

Notably, the Court has facilitated the proliferation of these antidemocratic influences at the same time that it has rejected Congress's primacy as the key institutional guardian and enforcer of rights guaranteed by the Reconstruction Amendments. Whereas the Court once took an expansive view of Congress's power to enforce the provisions of the Fourteenth and Fifteenth Amendments,³³¹ the Court has in more recent cases curtailed Congress's authority to implement those Amendments and expanded its own. This was particularly striking in *City of Boerne v. Flores*, in which the Court concluded that Congress's authority to enforce the Fourteenth Amendment is limited to remedying or preventing conduct that the Court had recognized as unconstitutional.³³² In the Court's view, Congress lacks the authority to determine the substance of the constitutional rights it was charged with enforcing.³³³

In *Shelby County v. Holder*, the Court further asserted its primacy in the interpretation and enforcement of the Reconstruction Amendments, holding the Voting Rights Act's ("VRA") preclearance coverage formula an impermissible exercise of Congress's authority to enforce the Fifteenth Amendment.³³⁴ In invalidating the preclearance formula, the Court gave remarkably short shrift to Congress's overwhelming conclusion, after weighing extensive evidence of the continued disenfranchisement of minority voters, that conditions on the ground demanded the continued use of the VRA's preclearance regime.³³⁵ This Term, the Court may be

³³¹ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 646–48, 651 (1966) (upholding a provision of the Voting Rights Act as a permissible expression of Congress's Section 5 authority to enforce the Fourteenth Amendment's provisions, likening it to Congress's power to enforce the Fifteenth Amendment).

³³² 521 U.S. 507, 519, 532 (1997) (arguing that the scope of Congress's authority is limited to remedying unconstitutional conduct and rejecting the Religious Freedom Restoration Act as a permissible expression of Congress's authority under Section 5 of the Fourteenth Amendment).

³³³ *Id.* at 519.

³³⁴ 570 U.S. 529, 553–54, 557 (2013) (declaring the Voting Rights Act's preclearance coverage formula unconstitutional).

³³⁵ See *id.* at 536 ("[V]oting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures . . . continue to satisfy constitutional requirements."). But see *id.* at 565–66 (Ginsburg, J., dissenting) (documenting congressional hearings on the issue of continued voter disenfranchisement in jurisdictions covered by the preclearance regime); *Nw. Aus. Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (discussing the "sizable record" Congress amassed); *Shelby County v. Holder*, 679 F.3d 848, 865–73 (D.C. Cir. 2012) (describing the "extensive record" supporting Congress's conclusion that "serious and widespread intentional discrimination persisted in covered jurisdictions"), *rev'd*, 570 U.S. 529 (2013).

poised to further weaken voting rights in *Louisiana v. Callais*, a challenge to Section 2 of the VRA. There, the Court may discredit Congress's exercise of its authority to enforce the Reconstruction Amendments to protect minority voting rights in favor of the Court's cramped vision of the Fourteenth and Fifteenth Amendments.³³⁶

Taken together, these Court-led developments have contributed to an increasingly polarized and distorted electoral landscape. Polarization, by itself, prompts important insights about direct democracy's appeal in the present moment. Given the highly polarized environment of traditional electoral politics, direct democracy may offer the electorate one of the few opportunities to engage on issues in terms that have been stripped—at least on their face—of a partisan valence. But just as importantly, in a landscape where polarization may lead to representative government being configured to prioritize certain interests and positions over others, voters may clamor for an opportunity to register their preferences directly.

In this polarized and distorted landscape, direct democracy efforts that proceed under the auspices of state constitutions may be especially well suited to address issues that are more difficult to resolve in representative institutions. Indeed, as Professors Jessica Bulman-Pozen and Miriam Seifter explain, state constitutions provide for direct democracy “as a means of protecting the people, including the popular majority, from government malfeasance.”³³⁷

B. Direct Democracy in a Changing Constitutional Order

As the foregoing Section makes clear, the Supreme Court has cultivated a distorted electoral landscape, and post-*Dobbs*, voters have responded to that distorted landscape by pursuing direct democracy to vindicate their interests in reproductive freedom. But critically, the Court's role in fueling interest in direct democracy goes beyond these structural forces that have distorted the electoral landscape. As we maintain here, through its decision in *Dobbs*, the Court also reshaped the *jurisprudential* landscape. And meaningfully, these efforts to reconfigure the nature of, and protections for, individual rights have also helped fuel interest in direct democracy.

³³⁶ See Brief for Appellant at 2, *Louisiana v. Callais*, 145 S. Ct. 2608 (2025) (No. 24-109).

³³⁷ Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 *Yale L.J.F.* 191, 203–04 (2023).

The *Dobbs* decision has, of course, sparked significant commentary, much of it focused on the decision's implications for constitutional interpretation and the identification and recognition of fundamental rights.³³⁸ As commentators have noted, “in one fell swoop,” the *Dobbs* majority overruled almost fifty years of precedent and rescinded the constitutional right to choose an abortion.³³⁹ In so doing, the Court emphasized that “[t]he Constitution makes no express reference to a right to obtain an abortion,”³⁴⁰ and such a right is neither “deeply rooted in the Nation’s history and traditions”³⁴¹ nor implicit in the concept of “ordered liberty.”³⁴²

The *Dobbs* majority’s crabbed account of fundamental rights and its insistence on “history and tradition” as the preferred method of constitutional interpretation have not only provoked criticism but have also helped fuel interest in direct democracy at the state level. As an initial matter, the *Dobbs* majority instructed voters to debate the abortion issue in state legislatures—equating legislative activity with democratic deliberation.³⁴³ However, because state legislatures are often imperfect institutions for accommodating popular engagement on the abortion issue, direct democracy has proven an attractive alternative for deliberating on—and advancing—reproductive freedom. Unmediated by

³³⁸ See, e.g., Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 *Tex. L. Rev.* 1127, 1129, 1144 (2023) [hereinafter Siegel, *Memory Games*] (examining originalism’s role in the reversal of key Supreme Court cases and arguing that originalism is not a neutral method, as its adherents claim); Siegel, *supra* note 136, at 111 (exploring the roots of the “history and tradition” method used in *Dobbs* and identifying its connection to the legal opposition to *Brown v. Board of Education*); Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 *Stan. L. Rev.* 1091, 1105 (2023) (analyzing *Dobbs*’s potential implications for a nationwide abortion ban); Murray & Shaw, *supra* note 17, at 772–74 (noting the antidemocratic contours of the *Dobbs* Court’s reliance on history and tradition); Melissa Murray, *Children of Men: The Roberts Court’s Jurisprudence of Masculinity*, 60 *Hou. L. Rev.* 799, 843–44 (2023) (discussing the antidemocratic implications of the Court’s reliance on history).

³³⁹ See Marc Spindelman, *Washington v. Glucksberg’s Original Meaning*, 72 *Clev. St. L. Rev.* 981, 1022 (2024) (noting that *Dobbs*, “in one fell swoop,” eliminated “*Roe*, *Casey*, and constitutional abortion rights after nearly fifty years of practice, recognition, and reaffirmation”); Murray & Shaw, *supra* note 17, at 731 (noting that *Dobbs* laid “waste to nearly fifty years’ worth of precedent”).

³⁴⁰ 142 S. Ct. 2228, 2245 (2022).

³⁴¹ *Id.* at 2253.

³⁴² *Id.* at 2257.

³⁴³ *Id.* at 2283–84. But see Murray & Shaw, *supra* note 17, at 763, 765 (questioning whether state legislatures do, in fact, exemplify democratic deliberation).

the preferences of elected legislators, voters can register their own preferences. In so doing, voters have a meaningful opportunity to instantiate their own vision of individual rights, counteracting the Court's overruling of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—if only at the state level.

In a similar vein, the Court's reliance on history and tradition as a means of determining fundamental rights also helps explain direct democracy's appeal. As scholars like Professor Reva Siegel maintain, the focus on history and tradition as guideposts for constitutional interpretation grounds constitutional meaning in a timeframe in which women and people of color—the very constituencies most likely to be adversely impacted by restrictions on reproductive freedom—were excluded from meaningful democratic engagement and participation.³⁴⁴ On this account, looking to the past to divine constitutional meaning in the present ensures these groups' exclusion from the deliberative process. By contrast, direct democracy allows these groups, whose views are unlikely to be accounted for by courts' use of a history and tradition method of interpretation, to participate directly in the process of democratic deliberation.

In this regard, direct democracy allows the electorate to respond in real time to the Court's efforts to recast the fundamental rights landscape. But meaningfully, direct democracy also provides a means for voters to respond to *other* shifting constitutional dynamics in the Court's jurisprudence. Although many commentators have focused on the way in which the *Dobbs* majority changed the understanding of fundamental rights,³⁴⁵ the decision's impact extends to other constitutional domains.

³⁴⁴ See Siegel, *Memory Games*, *supra* note 338, at 1196 (“*Dobbs* is antidemocratic because it locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies.”); Siegel, *supra* note 136, at 108 (“*Dobbs* defines the Constitution’s liberty guarantee through lawmaking in 1868 from which women and minorities were excluded, and the democratic processes it sanctions perpetuate these same political inequalities”); see also Murray & Shaw, *supra* note 17, at 773 (arguing that “the *Dobbs* majority’s method of analysis and interpretation bound the contemporary meaning of the Constitution to a body of law and authority in whose enactment and creation neither women nor people of color played any part”).

³⁴⁵ See, e.g., Darren Lenard Hutchinson, *Thinly Rooted: Dobbs, Tradition, and Reproductive Justice*, 65 *Ariz. L. Rev.* 385, 408 (2023) (“*Dobbs* represents a dramatic shift in substantive due process methodology.”); Murray, *supra* note 338, at 802 (“[I]t was immediately clear that the decision completely reoriented the reproductive rights landscape, imposing broad consequences on women and pregnant people throughout the country.”); Tang, *supra* note 338, at 1100 (“Two aspects of the Court’s analysis stand out: the critical

As we argue here, *Dobbs* may also be understood as sowing the seeds for a significant sea change in our understanding of equal protection jurisprudence.

For years, scholars have argued that the Equal Protection Clause—as much as the Due Process Clause—is a proper doctrinal home for the abortion right.³⁴⁶ Indeed, in *Dobbs*, amici, including the United States, offered rationales rooting the right to choose an abortion in terms of women’s equality.³⁴⁷ The *Dobbs* majority, however, was unpersuaded by these arguments. In a short passage preceding the opinion’s consideration of whether “the right to obtain an abortion is part of the ‘liberty’ protected by the Fourteenth Amendment’s Due Process Clause,”³⁴⁸ Justice Alito paused to “briefly address one additional constitutional provision that . . . [might serve] as yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause.”³⁴⁹ Noting that “[n]either *Roe* nor *Casey* saw fit to invoke this theory,”³⁵⁰ Justice Alito pronounced the prospect of rooting the abortion right in equal protection guarantees as “squarely foreclosed by our precedents.”³⁵¹

In so doing, Justice Alito cited an earlier Court decision: *Geduldig v. Aiello*.³⁵² In *Geduldig*, the Court considered an equal protection challenge to a California insurance program that excluded pregnancy from disability

moment in time at which history and tradition must be assessed, and the kind of evidence relevant to proving whether a right is deeply rooted.”).

³⁴⁶ See, e.g., Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *Emory L.J.* 815, 833–36 (2007) (arguing that equality is a proper doctrinal home for reproductive rights); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. Pa. L. Rev.* 955, 1007 (1984) (advocating for the use of equality principles as a basis for abortion rights).

³⁴⁷ Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae in Support of Respondents at 7, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for the United States as Amicus Curiae Supporting Respondents at 24, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (“In addition, a woman’s ‘right to control [her] reproductive [life]’ is central to her ability to ‘participate equally in the economic and social life of the Nation.’” (alterations in original) (citation omitted)).

³⁴⁸ *Dobbs*, 142 S. Ct. at 2245.

³⁴⁹ *Id.* (citations omitted).

³⁵⁰ *Id.* Notably, the *Casey* plurality *did* invoke equality principles in affirming *Roe*. Specifically, in *Casey*, the controlling plurality decision acknowledged that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion).

³⁵¹ *Dobbs*, 142 S. Ct. at 2245.

³⁵² *Id.* at 2245–46 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

coverage. In a short opinion, a 6-3 majority concluded that the exclusion did not constitute sex-based discrimination in violation of the Equal Protection Clause.³⁵³ As the majority explained, the insurance program did not discriminate on the basis of gender; it “merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities.”³⁵⁴ On the majority’s logic, “it [did] not follow that every legislative classification concerning pregnancy is a sex-based classification” because “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics.”³⁵⁵ Absent evidence that the program distinguished on the basis of pregnancy in order to discriminate on the basis of sex, such distinctions did not trigger heightened scrutiny in the manner of sex-based distinctions that traded on impermissible sex stereotypes.³⁵⁶ Concluding that the challenged insurance program merely distinguished between pregnant persons and nonpregnant persons—as opposed to distinguishing between men and women—the Court held that “[t]he fiscal and actuarial benefits of the program thus accrue to members of both sexes.”³⁵⁷

In focusing the equal protection inquiry on *Geduldig*, Justice Alito overlooked an array of other precedents that not only were decided after *Geduldig* but also embraced a more expansive vision of constitutional sex equality. In addition to *Casey*, which explicitly linked the abortion right to women’s equality, the Court also decided *United States v. Virginia*, which invalidated the Virginia Military Institute’s all-male admissions policy,³⁵⁸ and *Nevada Department of Human Resources v. Hibbs*, which upheld the Family and Medical Leave Act (“FMLA”) as a permissible expression of Congress’s Section 5 authority to vindicate the Equal Protection Clause’s prohibition on sex-based discrimination.³⁵⁹ As Professor Reva Siegel has written, *Virginia* and *Hibbs* reflect an elaboration of the Court’s sex equality jurisprudence.³⁶⁰ In *Virginia*, the Court clarified the intermediate scrutiny standard that applies to sex-based classifications by explaining that the state may recognize “inherent

³⁵³ *Geduldig*, 417 U.S. at 490, 494.

³⁵⁴ *Id.* at 496 n.20.

³⁵⁵ *Id.*

³⁵⁶ *See id.*

³⁵⁷ *Id.* at 497 n.20.

³⁵⁸ 518 U.S. 515, 534 (1996).

³⁵⁹ 538 U.S. 721, 724–28 (2003).

³⁶⁰ Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. Ill. L. Rev. 991, 1043–46.

differences” between the sexes so long as “such classifications [are not] used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”³⁶¹ On this account, laws predicated on gender-differentiated family roles or sex-role stereotypes—like those that insist on women’s natural propensity for motherhood and nurturing—were impermissible under the Equal Protection Clause.³⁶²

The Court’s decision in *Hibbs* affirmed this more robust vision of sex equality under the Equal Protection Clause. There, the Court, in a decision authored by Chief Justice Rehnquist, recognized that sex-discriminatory state action need not be cleanly divided between those actions that are validly premised on biological differences and those that are premised on invalid sex stereotypes.³⁶³ As the *Hibbs* Court recognized, sex-discriminatory state action might reflect *both* inherent biological sex differences *and* sex stereotypes about social roles within and outside of the family.³⁶⁴ Indeed, at issue in *Hibbs* was the question of state regulation that provided more pregnancy and family leave to female employees than to male employees. Because pregnancy and family leave involved *both* consideration of inherent differences *and* impermissible sex role stereotypes, the *Hibbs* majority concluded that the FMLA’s gender-neutral family leave provisions redressed sex stereotyping that figured women, and not men, as family caregivers, “and as such, was a permissible expression” of Congress’s authority to legislate in furtherance of the Equal Protection Clause’s guarantees.³⁶⁵

Taken together, *Virginia* and *Hibbs* announced a significant shift in the Court’s approach to sex equality under the Equal Protection Clause—one that “br[oke] with the physiological naturalism of cases like *Geduldig*.”³⁶⁶ While *Geduldig* insisted that pregnancy and pregnancy-related conditions, including abortion, involved consideration of inherent biological differences and thus did not implicate the Equal Protection

³⁶¹ 518 U.S. at 533–34 (citation omitted).

³⁶² Siegel, *supra* note 360, at 1043.

³⁶³ *Hibbs*, 538 U.S. at 730–31. For an insightful discussion of Chief Justice Rehnquist’s shifting thinking on sex-based discrimination, see generally Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 *Stan. L. Rev.* 1871 (2006).

³⁶⁴ See 538 U.S. at 730–31.

³⁶⁵ Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 *Colum. J. Gender & L.* 67, 75–76 (2023).

³⁶⁶ *Id.* at 77.

Clause, *Virginia* and *Hibbs* rejected this earlier understanding.³⁶⁷ Instead, as some scholars maintain, *Virginia* and *Hibbs* repudiated—and superseded—*Geduldig*, making clear that laws that distinguish in the context of pregnancy *can* involve impermissible sex-based stereotypes and, in so doing, raise equal protection concerns.³⁶⁸

Given these developments, it is curious that Justice Alito’s brief consideration of the applicability of the Equal Protection Clause to abortion restrictions does not even mention *Virginia* and *Hibbs*. Nor did Justice Alito consider *Casey*’s association of the abortion right with women’s equality—an oversight that the *Dobbs* dissenters characterized as “hermetically seal[ing]” off the Fourteenth Amendment’s guarantees of liberty and equality from each other.³⁶⁹ As Marc Spindelman notes, this view allowed the Court “to avoid grappling with the equality facets of *Roe*’s privacy and *Casey*’s liberty decisions.”³⁷⁰

The *Dobbs* majority’s elision of *Virginia* and *Hibbs* goes beyond the obvious neglect of the imbrication of equality, liberty, and privacy that undergirded at least *Casey*. In bypassing these two most recent equality precedents, the *Dobbs* majority confined the equal protection inquiry to 1974, when *Geduldig* was decided. In this regard, *Dobbs* might be understood as rescinding the equal protection settlement that the Court later arrived at in *Virginia* and *Hibbs*, decided well after *Geduldig*.³⁷¹

Meaningfully, in both *Virginia* and *Hibbs*, the Court rejected a simplistic vision of sex classifications that condoned those rooted in

³⁶⁷ See Siegel, *supra* note 360, at 1043. Indeed, as one scholar has observed, *Geduldig* was a “constitutional relic” whose “burial began soon after it was decided.” Cary Franklin, *History and Tradition’s Equality Problem*, 133 *Yale L.J.F.* 946, 984 (2024).

³⁶⁸ See Franklin, *supra* note 367, at 984 (“In more recent equal protection decisions, the Court has explicitly repudiated *Geduldig*’s reasoning.”); Siegel et al., *supra* note 365, at 69 (maintaining that *Geduldig* “has been superseded by *United States v. Virginia* and *Nevada Department of Human Resources v. Hibbs*” (footnote omitted)); see also Siegel, *supra* note 363, at 1891–97 (arguing that *Hibbs* requires *Geduldig* to be read more narrowly).

³⁶⁹ 142 S. Ct. 2228, 2329 (2022) (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.).

³⁷⁰ Marc Spindelman, *Dobbs’ Sex Equality Troubles*, 32 *Wm. & Mary Bill Rts. J.* 117, 127 (2023).

³⁷¹ Some argue that *Virginia*’s insistence that the state proffer an “exceedingly persuasive justification” for a sex-based classification was an effort to redefine intermediate scrutiny, the traditional standard of review for sex-based classifications, to make it “indistinguishable from strict scrutiny.” *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting). If one subscribes to the view that *Virginia* established a standard of review more akin to strict scrutiny for sex-based classifications, then *Dobbs*’s neglect of *Virginia* might also be understood as entrenching the traditional conception of intermediate scrutiny as the prevailing standard for sex-based classifications.

inherent biological differences while invalidating those rooted in impermissible sex-based stereotypes. In fact, as both cases acknowledged, rationales that sounded in the register of “biological difference” could nonetheless be shot through with sex-role stereotypes. On this account, laws that restrict abortion could not simply be understood as rooted in the biological fact of pregnancy but rather should be interrogated to determine whether they were underlaid by impermissible women-protective rationales. *Dobbs* rejected this new settlement in favor of the pre-*Virginia* status quo.

Just as importantly, the *Dobbs* majority went beyond simply eliding *Virginia* and *Hibbs* and their more robust vision of equal protection. As we maintain, the decision also invited reconsideration of the entire hierarchy of equal protection and women’s status within it. After overruling *Roe* and *Casey* and explaining why these two precedents were not entitled to stare decisis, the *Dobbs* majority noted that returning the abortion question to the states “allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.”³⁷² After all, Justice Alito observed, “Women are not without electoral or political power.”³⁷³

As we have argued elsewhere, Justice Alito’s equation of women’s political power with their numerosity among registered voters is unduly facile, neglecting the myriad ways in which the legacy of women’s disenfranchisement and subordination continues to shape their participation in political life.³⁷⁴ Despite its thin account of political power, Justice Alito’s observation is worth parsing—as is his subsequent observation that “the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.”³⁷⁵ In our view, these assertions are no mere asides. Justice Alito’s invocation of women’s political power gestures toward the entire structure of equal protection theory and practice—and, as we maintain, it invites a reappraisal of this structure and women’s status within it.

³⁷² 142 S. Ct. at 2277.

³⁷³ *Id.*

³⁷⁴ Murray & Shaw, *supra* note 17, at 768–71.

³⁷⁵ *Dobbs*, 142 S. Ct. at 2277.

The architecture of modern equal protection theory is scaffolded on the logic of footnote 4 of *United States v. Carolene Products Co.*³⁷⁶ There, the Court explained, *inter alia*, that more rigorous judicial scrutiny is required in circumstances where government action discriminates against “discrete and insular minorities” who are unable to vindicate their interests in majoritarian political processes.³⁷⁷ Accordingly, a central question in equal protection jurisprudence has been how to determine if a group *is* a “discrete and insular” minority whom the courts are obliged to protect.³⁷⁸ The Court has set forth various criteria for determining those groups that qualify as “discrete and insular minorities” for purposes of equal protection. Groups that have been denominated a protected class have some combination of (1) a history of past discrimination; (2) the absence of political power that can be translated into policies advantageous to their interests; and (3) the presence of an immutable trait that defines the group, but that is irrelevant to the group’s ability to contribute to or participate in society.³⁷⁹

Since 1976’s *Craig v. Boren*, women have been characterized as a quasi-suspect class.³⁸⁰ But critically, women have always posed an ill fit in the equal protection calculus. They are not a numerical minority—indeed, they are a bare majority of the American population. Still, despite their numerosity, they have suffered a history of discrimination and, because of disenfranchisement and social role expectations, have lacked political power and capital. Further, though the biological differences that distinguish women as a group have been understood as immutable characteristics, these differences do not affect women’s ability to contribute meaningfully to society. With these criteria in mind, the Court has, despite women’s numerosity, denominated the group a quasi-suspect class—that is, a minority group—for purposes of equal protection.

But *Dobbs* may call this constitutional settlement into question. In noting that women are not without electoral and political power, Justice Alito was not simply encouraging women to restore abortion rights using state-level electoral processes; he was arguably intervening in a long-

³⁷⁶ 304 U.S. 144, 152 n.4 (1938) (identifying the circumstances that prompt a “narrower scope for operation of the presumption of constitutionality”).

³⁷⁷ *Id.* at 153 n.4.

³⁷⁸ See Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 *Wash. U. L. Rev.* 2063, 2078–79 (2022).

³⁷⁹ *Id.* at 2079.

³⁸⁰ 429 U.S. 190, 197–98 (1976).

running debate about whether and how to denominate a particular group a protected class for equal protection purposes.

Indeed, Justice Alito's observation recalls Justice Scalia's dissent in *United States v. Virginia*.³⁸¹ There, Justice Scalia charged the majority with a jurisprudential sleight of hand. Noting that "[i]t is well settled" that intermediate scrutiny, which "lies '[b]etween th[e] extremes of rational basis review and strict scrutiny,'" is the standard for determining the constitutionality of sex-based classifications,³⁸² Justice Scalia accused the majority of smuggling in a more exacting constitutional standard through its repeated invocation of the phrase "exceedingly persuasive justification."³⁸³

In Justice Scalia's view, the prospect of the *Virginia* majority ratcheting up the standard of review for sex-based classifications was galling. First, as he explained, it was only through resort to the "exceedingly persuasive justification" that the majority arrived at "th[e] conclusion that [Virginia Military Institute]'s single-sex composition is unconstitutional."³⁸⁴ Moreover, "if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard . . . , but for reducing it to rational-basis review."³⁸⁵ As Justice Scalia continued, under footnote 4's logic, "[i]t is hard to consider women a discrete and insular minorit[y] unable to employ the political processes ordinarily to be relied upon, when they constitute a majority of the electorate."³⁸⁶ To underscore this point, Justice Scalia declared that "the suggestion that [women] are incapable of exerting that political power smacks of the same paternalism that the [*Virginia* majority] so roundly condemn[ed]."³⁸⁷

Justice Alito's equal protection logic in *Dobbs* mirrors Justice Scalia's disquisition in *Virginia* in key ways. Like Justice Scalia, Justice Alito disclaimed the prospect of a sex-based classification and then provided a rationale that would undermine women's status as a quasi-suspect class. As with Justice Scalia's *Virginia* dissent, these two moves, whether in

³⁸¹ 518 U.S. 515, 566–603 (1996) (Scalia, J., dissenting).

³⁸² *Id.* at 570 (second and third alteration in original) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

³⁸³ *Id.* at 571 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

³⁸⁴ *Id.* at 573.

³⁸⁵ *Id.* at 574–75 (emphasis added).

³⁸⁶ *Id.* at 575 (alteration in original).

³⁸⁷ *Id.*

combination or independently, point to a single outcome: the courts' applying rational basis review, the lowest standard of constitutional scrutiny, to the alleged constitutional injury.

This is all to say that *Dobbs* may signal a profound shift in the constitutional firmament. As we know, the decision has completely reconfigured the landscape of fundamental rights. But as importantly, it may also have profound implications for equal protection. In a single paragraph, the *Dobbs* Court blithely rejected the argument that abortion restrictions reflect impermissible sex-role stereotyping, and in so doing, ignored recent precedents insisting on more exacting constitutional scrutiny for classifications based on sex.

In this climate, it is easy to see direct democracy's appeal. At a time when constitutional protections appear to be up for renegotiation and precedent may be unceremoniously dismissed—or overruled entirely—direct democracy offers voters the opportunity to counteract a jurisprudential landscape that appears hostile to, or dismissive of, certain interests and constituencies.

But even as these shifts in the jurisprudential landscape have helped fuel the interest in direct democracy, they may also point toward direct democracy's frailties as a means of securing lasting protections for reproductive freedom and women's rights. As Part III discussed, while courts have embraced direct democracy as an expression of the people's will, they have also recognized that direct democracy presents risks to the rights and interests of underrepresented groups. In this regard, courts have relied on equal protection's logic to serve as a guardrail for direct democracy. In cases like *Reitman v. Mulkey* and *Hunter v. Erickson*, the Court intervened, invalidating valid ballot measures because they were imbricated with impermissible racial animus.³⁸⁸ In a similar vein, in *Romer v. Evans*, the Court struck down Colorado's Amendment 2 on the ground that it evinced "a bare desire" to harm gay men and lesbians.³⁸⁹

By the same token, cases like *Schuette v. Coalition to Defend Affirmative Action*, in which the Court concluded that a ballot measure posed no harm to minorities because it was race-neutral and bore no evidence of discriminatory intent, also reflect equal protection's limits in this increasingly crabbed jurisprudential landscape.³⁹⁰ Over the last thirty years, a number of scholars have argued that equal protection no longer

³⁸⁸ See supra notes 235–47 and accompanying text.

³⁸⁹ See supra notes 266–68 and accompanying text.

³⁹⁰ See supra notes 276–79 and accompanying text.

protects minority interests in the way it once did, citing the evolving disparate impact jurisprudence and the need to establish discriminatory intent, as well as increasing skepticism of race-conscious remedies.³⁹¹ As these scholars argue, the shifting terrain of equal protection, which now requires clear evidence of discrimination to prevail on a disparate impact claim and looks skeptically on *all* racial classifications, even those intended for benign purposes, has made it more difficult for underrepresented groups to prevail on equal protection claims.

Meaningfully, these critiques of modern equal protection jurisprudence are also applicable in the context of direct democracy. Recall *Schuette*, where those challenging a Michigan affirmative action ballot measure made strong claims that the ballot measure purposefully altered the policy landscape to make it more difficult for minorities to reinstate affirmative action policies.³⁹² Although some members of the Court agreed that the ballot measure imposed considerable obstacles to minority groups seeking to reinstate affirmative action programs,³⁹³ the Court concluded that because there was no obvious racial animus underlying the initiative, there was no constitutional violation.³⁹⁴ In this regard, *Schuette*, like *Dobbs*, gestures toward an evolving equal protection landscape—one that, going forward, may not provide the same guardrails that once shielded underrepresented groups from direct democracy's worst impulses.

Taken together, these insights present a disturbing tableau. At a time when changes in the electoral and jurisprudential landscapes have fueled an increasing appetite for direct democracy, other jurisprudential developments may be foreclosing doctrinal pathways that earlier served as guardrails for protecting minority interests from the tyranny of the majority. With these shifts in mind, the Part that follows offers a series of prescriptions, both structural and jurisprudential, for addressing these potentially perilous aspects of modern direct democracy.

³⁹¹ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1139–44 (1997) (arguing that the Supreme Court's interpretation of the Equal Protection Clause has resulted in minimal protection against discrimination for minority groups); Ian Haney-López, *Intentional Blindness*, 87 *N.Y.U. L. Rev.* 1779, 1784–88 (2012) (challenging the notion and effectiveness of equal protection).

³⁹² 572 U.S. 291, 353–57 (2014) (Sotomayor, J., dissenting).

³⁹³ *Id.* at 338.

³⁹⁴ *Id.* at 314 (plurality opinion).

VI. DESIGNING DIRECT DEMOCRACY

As we have shown, the turn to direct democracy raises pressing questions about the shape of the new constitutional order. In this new order, federal courts have receded—and may recede further—from the role of providing meaningful protections for individual rights, discrete and insular minorities, and the political process. At the same time, direct democracy has come to the fore. In the context of abortion and reproductive freedom, it has proven able to more effectively channel popular will than existing mechanisms of representative democracy while also protecting rights in a way once understood as the purview of courts.³⁹⁵

Because voter-initiated direct democracy is only available (statewide, at least) in approximately half of the states,³⁹⁶ it cannot serve as a complete substitute for the traditional role of federal courts, with their power to announce the scope of federal constitutional protections that transcend state borders. But if direct democracy is to play an increasingly central role in this new constitutional order, it is imperative to consider how to best align its operation with the broader goals of channeling the will of the people while also protecting, and even expanding, rights.

It is worth emphasizing, as we have tried to do throughout this Article, that direct democracy is far from an unalloyed good. It is susceptible to co-optation for profoundly illiberal ends, and it may elide opportunities for the kinds of meaningful deliberation, compromise, and consensus that characterize democratic republicanism.³⁹⁷ Sensitive to these concerns, this Part begins by identifying features of direct democracy that should be examined and, in some instances, reformed in order to safeguard direct democracy's potential in the context of reproductive freedom. It then considers some of the dangers—both theoretical and practical—that the turn to direct democracy poses. We conclude by sounding cautionary notes. As we explain, direct democracy has been so successful in preserving and expanding abortion rights at the state level that it runs the risk of being co-opted by abortion opponents. Specifically, abortion opponents could seek to use direct democracy as a device to promote the concept of fetal personhood, which would nullify all other efforts to

³⁹⁵ See Bulman-Pozen & Seifter, *supra* note 337, at 204 (noting that direct democracy under state constitutions may “complicate the assumed relationship between majority rule and minority rights”).

³⁹⁶ Boldt, *supra* note 23, at 4.

³⁹⁷ See Smith, *supra* note 319, at 612; *supra* Part III.

protect and enhance reproductive freedom. But even if abortion opponents do not marshal direct democracy for their own purposes, direct democracy's success in the context of reproductive rights could be used as a metric for gauging political power. In this regard, women, the group that has collectively benefited from securing abortion rights at the ballot box, may find that in winning abortion rights through the popular will, they may be susceptible to losing the constitutional status that has served as a shield against other forms of sex-based discrimination.

A. Expanding and Improving Access to Direct Democracy

First, realizing direct democracy's potential to broadly secure rights requires increasing the number of states where direct democracy is available. As we have discussed, during direct democracy's first epoch, states steadily amended their constitutions to provide for direct democracy as a policymaking mechanism. But no new states have joined these ranks in recent years; indeed, there have been moves in the opposite direction. In Mississippi, a 2021 state supreme court decision declared the existing system of direct democracy "inoperable."³⁹⁸ To date, direct democracy has not been restored in Mississippi,³⁹⁹ and, more troublingly, lawmakers in a recent legislative session pursued a proposal that would restore direct democracy but expressly prohibit the new system's use for any abortion-related measures.⁴⁰⁰ This effort failed, and Mississippi, the state from which *Dobbs v. Jackson Women's Health Organization* arose and where in 2022 only 14.4% of state legislators were women,⁴⁰¹ continues to lack access to direct democracy on abortion or any other subject. Regardless of what the future holds for Mississippi, states with pro-democracy legislative and executive branch leadership but without

³⁹⁸ In re Initiative Measure No. 65: Mayor Butler v. Watson, 338 So. 3d 599, 607 (Miss. 2021) (en banc).

³⁹⁹ See Kayode Crown, Mississippi Ballot Initiative Effort Revived in Senate, but Obstacles Remain, Miss. Free Press (Mar. 27, 2023), <https://www.mississippifreepress.org/mississippi-ballot-initiative-effort-revived-in-senate-but-obstacles-remain/> [<https://perma.cc/RN76-5C7F>] (discussing efforts to restore an effective ballot initiative process).

⁴⁰⁰ See Michael Goldberg, Mississippi Ballot Initiative Proposal Would Not Allow Changes to Abortion Laws, AP News, <https://apnews.com/article/mississippi-ballot-initiative-abortion-2da2169722fc76035d2200f9d3cc3e4c> [<https://perma.cc/RRF6-R5LN>] (last updated Jan. 24, 2024, at 20:33 ET) (discussing political debates in the Mississippi legislature regarding the new proposal).

⁴⁰¹ See Mississippi, Ctr. for Am. Women & Pol., <https://cawp.rutgers.edu/data/state-state-information/mississippi?tab=StateLegislature> [<https://perma.cc/HD8H-D9B2>] (last visited Feb. 1, 2026).

statewide direct democracy could choose to adopt direct democracy through constitutional amendment or ordinary legislation.

States that do not use statewide direct democracy but do allow for more localized versions of direct participation could seek to use those mechanisms more actively, both to advance abortion-related measures and to familiarize the public with the act of issue-oriented direct participation.⁴⁰² Iowa, for example, has no statewide direct democracy beyond legislatively referred amendments, but state law is understood to grant cities and villages “home rule” powers and to permit local ordinances to be enacted via initiative.⁴⁰³ Advocates in states like Iowa could mobilize to press abortion-related initiatives at the local level—even if only for their symbolic or expressive value in states that currently have statewide bans or severe limitations on abortion.⁴⁰⁴

Of course, expanding direct democracy as a mechanism for meaningful rights protection will have real impact only if direct democracy is actually accessible to the electorate. As recent events in Ohio make clear, there is a genuine danger that those opposed to direct democracy will erect obstacles to its use.⁴⁰⁵ Immediately after *Roe v. Wade* fell, Ohio’s dormant trigger ban sprang to life, severely limiting abortion access in the Buckeye State.⁴⁰⁶ The ban’s constitutionality was immediately challenged in state court.⁴⁰⁷

As that legal challenge was pending, a coalition of voters came together under the banner of “Ohioans for Reproductive Freedom” to enact a voter referendum that would amend Ohio’s constitution to include an explicit

⁴⁰² See supra notes 291–95 and accompanying text (discussing symbolic and rhetorical success of failed “partial-birth abortion” ballot initiatives).

⁴⁰³ See Iowa Legis. Servs. Agency, Legislative Guide to Iowa Local Government Initiative and Referendum 1 (2008).

⁴⁰⁴ Cf. Kaitlin Ainsworth Caruso, Abortion Localism and Preemption in a Post-*Roe* Era, 27 Lewis & Clark L. Rev. 585, 623, 626, 641–42, 644–45 (2023) (examining the concept of abortion localism and states’ efforts to shape future local abortion policy).

⁴⁰⁵ See Schacter, supra note 324, at 1520 (noting the irony of abortion opponents, who assailed *Roe* as antidemocratic but are now “seeking to thwart or avoid ballot measures on the [abortion] issue”).

⁴⁰⁶ See Susan Tebben, Ohio Appeals Court Sends Lawsuit Related to Abortion Ban Back to Trial Court, Ohio Cap. J. (Jan. 12, 2026, at 04:50 ET), <https://ohiocapitaljournal.com/2026/01/12/ohio-appeals-court-sends-lawsuit-related-to-abortion-ban-back-to-trial-court/> [<https://perma.cc/38LC-24GZ>] (describing how the law was enacted in 2019 and went into effect once the Supreme Court overturned *Roe v. Wade* in 2022)

⁴⁰⁷ *Preterm-Cleveland v. Yost*, Hamilton C.P. No. A2203203 (Oct. 12, 2022) (addressing a constitutional challenge to Ohio’s six-week abortion ban).

right to reproductive autonomy.⁴⁰⁸ Because polling indicated that a majority of Ohioans favored abortion rights,⁴⁰⁹ organizers were confident that, in the upcoming November 2023 election, the proposed amendment would easily satisfy Ohio’s fifty-percent threshold for enactment.

Upon seeing the coalescing popular movement to sideline the courts and legislature and secure reproductive freedom, Ohio Republicans took action. With the assistance of a lobbying campaign funded by Illinois billionaire Richard Uihlein, state lawmakers worked with the Republican Secretary of State to propose their own state constitutional amendment.⁴¹⁰ This new proposed amendment did not directly address the issues of abortion and reproductive freedom. Instead, it sought to raise the required threshold to amend the Ohio constitution from a simple majority to a supermajority of sixty percent.⁴¹¹ Critically, this proposed amendment would be presented to voters *before* those voters would consider the reproductive freedom amendment.⁴¹²

While those backing the threshold change insisted that it was intended to protect Ohioans—and their electoral process—from the influence of out-of-state special interest groups, the Ohio Secretary of State admitted that the effort was “100%” aimed at blocking the reproductive freedom amendment.⁴¹³ Indeed, when the Republican legislature failed to secure the support required to place its threshold amendment before the voters in that year’s May special election, lawmakers scheduled an *additional*

⁴⁰⁸ Press Release, ACLU of Ohio, Introducing Ohioans for Reproductive Freedom, a Cohort to Secure Explicit Abortion Access in the State Constitution (Dec. 12, 2022, at 10:00 ET), <https://www.acluohio.org/en/press-releases/introducing-ohioans-reproductive-freedom-cohort-secure-explicit-abortion-access-state> [https://perma.cc/8NVB-88SH].

⁴⁰⁹ See The Ohio Pulse Poll, Baldwin Wallace Univ. Cmty. Rsch. Inst. 33, 36–37 (2022), https://www.bw.edu/Assets/community-research-institute/october_ohio_issues_poll%20final.pdf [https://perma.cc/EK89-MTG6] (polling on abortion access preferences).

⁴¹⁰ Caitlin Huey-Burns & Michael Kaplan, GOP Megadonor Pours Millions into Effort to Hinder Ohio Abortion Amendment, CBS News (July 28, 2023, at 08:52 ET), <https://www.cbsnews.com/news/gop-megadonor-pours-millions-into-effort-to-hinder-ohio-abortion-amendment/> [https://perma.cc/BWS5-UPRF] (discussing financial support for anti-abortion campaigns).

⁴¹¹ S.J. Res. 2, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

⁴¹² For a discussion of this saga, see Jennifer Brunner, *Is Limiting Abortion a Pretext for Oligarchy? Abortion and the Quest to Limit Citizen-Initiated Ballot Rights in Ohio*, 2023 Wis. L. Rev. 1493, 1495–99 (examining how raising the threshold for constitutional amendments may represent an oligarchic effort against abortion rights).

⁴¹³ Maeve Walsh, *Issue 1 Is ‘100%’ About Blocking Abortion Measure*, Frank LaRose Says, NBC4 News (June 6, 2023, at 05:50 ET), <https://www.nbc4i.com/news/local-news/issue-1-is-100-about-blocking-abortion-measure-frank-larose-says/> [https://perma.cc/Y6QF-RC4E].

special election to consider the threshold issue. Critically, this special election would take place in August, three months before the reproductive freedom amendment would be presented to voters on the November ballot. Strikingly, the intense interest in holding the August special election came just a year after Ohio legislators voted to eliminate ad hoc special elections, citing low turnout at such elections, needless expense, and overlapping filing deadlines.⁴¹⁴ Ultimately, these efforts were unsuccessful: fifty-seven percent of Ohio voters rejected the proposed threshold change⁴¹⁵ and voters later enshrined abortion protections in the state constitution.⁴¹⁶

Although the Ohio effort to sideline abortion-related direct democracy mobilization failed, similar tactics have been successful in other states. In March 2023, after the 2022 midterm elections in which abortion-related ballot measures succeeded in preserving and securing abortion rights, Arkansas's Republican-controlled legislature substantially increased the number of counties from which signatures must be collected to qualify an initiative for the ballot.⁴¹⁷ The move was widely regarded as a hedge against popular efforts to expand reproductive rights in the state,⁴¹⁸ which bans abortion unless necessary to preserve the pregnant patient's life.⁴¹⁹

Undeterred, a state group leading the push for reproductive freedom gathered more than 101,000 signatures from fifty counties in support of a proposed amendment that would provide abortion access up to eighteen

⁴¹⁴ Nick Evans, House Leaders Tee Up Supermajority Amendment Measure for Floor Vote, *Ohio Cap. J.* (May 10, 2023, at 05:00 ET), <https://ohiocapitaljournal.com/2023/05/10/house-leaders-tee-up-supermajority-amendment-measure-for-floor-vote/> [<https://perma.cc/9NWX-DP2F>]; Adam Edelman, Ohio Banned August Elections. Then the GOP Planned One that Could Help Preserve an Abortion Ban., *NBC News* (May 27, 2023, at 05:00 ET), <https://www.nbcnews.com/politics/elections/ohio-banned-august-elections-gop-planned-one-help-preserve-abortion-ba-rcna85635> [<https://perma.cc/T73U-Z32A>].

⁴¹⁵ See *Statewide Issue History*, *supra* note 192.

⁴¹⁶ Ohio Const. art. I, § 22.

⁴¹⁷ H.B. 1419, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (codified at Ark. Code Ann. § 7-9-126(e) (West 2023)).

⁴¹⁸ Cf. Barbara Rodriguez & Grace Panetta, 'They Want Us to Be Scared': Protesters Target Organizers for Abortion Ballot Measure in Arkansas, *19th News* (June 14, 2024, at 05:00 ET), <https://19thnews.org/2024/06/arkansas-abortion-ballot-measure-harassment/> [<https://perma.cc/MBE8-APDG>] (reporting on the harassment and "doxing" of organizers seeking to place an abortion-rights measure on the Arkansas ballot amid efforts to limit reproductive freedoms in the state).

⁴¹⁹ Ark. Code Ann. § 5-61-304(a).

weeks of pregnancy.⁴²⁰ Despite these efforts, in July 2024, the Republican Secretary of State rejected the group’s petitions, citing their failure to submit statements regarding their use of paid signature gatherers, as required under Arkansas law.⁴²¹

The ballot proponents filed suit, charging that “[t]he Secretary’s unlawful rejection of petitioners’ submission prevents the people of Arkansas from exercising their right to adopt, or reject, the Amendment.”⁴²² In a narrow 4-3 opinion, the Arkansas Supreme Court upheld the state’s rejection of the petitions⁴²³—a ruling so unprecedented that the court’s chief justice decried it as “an anomaly in Arkansas jurisprudence.”⁴²⁴ Joining the chorus of dissenters, another justice insisted that the majority’s ruling violated “Regnat Populus—The People Rule— . . . the motto of Arkansas,” and “strip[ped] every Arkansan of [the initiative] power.”⁴²⁵

As these episodes make clear, advocates must be vigilant of state efforts to thwart their attempts to use direct democracy to protect reproductive freedom.⁴²⁶ Battles over signature gathering, ballot language, and other procedural aspects of direct democracy often result in litigation. In circumstances where state courts are presented with

⁴²⁰ Andrew DeMillo, Arkansas Election Officials Reject Petitions Submitted for an Abortion-Rights Ballot Measure, AP News, <https://apnews.com/article/abortion-arkansas-ballot-measure-9375891a74f6e6cb13110ac07eb8c529> [<https://perma.cc/8DET-BK4>] (last updated July 10, 2024, at 22:06 ET); Ark. Att’y Gen., The Arkansas Reproductive Healthcare Amendment (Nov. 9, 2023), https://talkbusiness.net/wp-content/uploads/2023/11/Request_for_Review_2023-11-09_BT_AR_Reproductive_Healthcare_Amendment-2-1.pdf [<https://perma.cc/W33S-7CRL>].

⁴²¹ DeMillo, *supra* note 420.

⁴²² Original Action Complaint ¶ 4, *Cowles v. Thurston*, 2024 Ark. 121, 695 S.W.3d 60 (No. CV-24-455).

⁴²³ *Cowles*, 2024 Ark. 121 at 2, 695 S.W.3d at 62 (upholding the Arkansas Secretary of State’s rejection of the Arkansas Abortion Amendment of 2024 petition, pointing to paid canvassers’ failure to comply with statutory requirements).

⁴²⁴ *Id.* at 12, 695 S.W.3d at 67 (Kemp, C.J., dissenting).

⁴²⁵ *Id.* at 14, 695 S.W.3d at 68 (Baker, J., dissenting) (quoting Republican Party of Ark. v. State ex rel. Hall, 400 S.W.2d 660, 662 (Ark. 1966)); *id.* at 15, 695 S.W.3d at 69. As Jane Schacter notes, these efforts to thwart direct democracy “have become increasingly common, as well as brazen, and can be especially problematic when combined with aggressive attempts to entrench the in-party.” Schacter, *supra* note 324, at 1514. As troublingly, “[s]ystematic partisan gerrymandering and widespread partisan sorting turbocharge these efforts by thwarting the political accountability that might ordinarily follow efforts to ignore or suppress public opinion.” *Id.*

⁴²⁶ See John G. Matsusaka, Direct Democracy Backsliding, 1955–2024, 6 J. Pol. Insts. & Pol. Econ. 249, 250 (2025).

questions about how to resolve such disputes, they should consider them in light of their state constitutions' threshold commitment to democracy, which in many states includes direct democracy.

The Michigan Supreme Court's ruling in a case involving the typeface of Michigan's "Reproductive Freedom for All" initiative is instructive. When state officials refused to place the initiative on the ballot because of "insufficient spacing" in its printed text, the Michigan Supreme Court issued a writ of mandamus directing state officials to prepare and certify the amendment for the 2022 ballot.⁴²⁷ In a separate concurrence, Chief Justice McCormack condemned the state's effort to "disenfranchise millions of Michiganders" by "identif[y]ing a technicality that allow[ed] them to do so, a game of gotcha gone very bad."⁴²⁸ As this episode makes clear, state courts may be important players in ensuring meaningful access to direct democracy.

B. Ensuring Meaningful and Informed Participation

In addition to safeguarding the mechanisms of direct democracy, there must also be efforts to ensure that direct democracy results in meaningful participation and informed deliberation. Critics of direct democracy have long voiced concerns about its ability to channel voters' will and ensure that public policy outputs reflect informed voter choice. As studies have shown, in candidate elections, partisan affiliation is an especially important means of providing voters with valuable information about the range of policy positions that a candidate holds.⁴²⁹ Because direct democracy typically proceeds in the absence of traditional heuristic cues like partisan affiliation (that is, no "R" or "D" appears next to an initiative or referendum), voters lack a familiar shorthand for assimilating ballot initiatives and referenda into their familiar political frames. Accordingly, they may struggle to cast meaningful and informed votes on initiatives and referenda.⁴³⁰

⁴²⁷ *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854, 855 (Mich. 2022) (mem.) (holding that the petition met the "full text" requirement under the Michigan Constitution and applicable statutes and thus should be placed on that ballot).

⁴²⁸ *Id.* at 856 (McCormack, C.J., concurring).

⁴²⁹ See, e.g., Logan Dancey & Geoffrey Sheagley, *Heuristics Behaving Badly: Party Cues and Voter Knowledge*, 57 *Am. J. Pol. Sci.* 312, 313 (2013) (examining voters' knowledge of their representatives' votes).

⁴³⁰ See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 *UCLA L. Rev.* 1141, 1143 (2003) (observing that some "[v]oters do not know basic facts about ballot measures, seem confused

This information gap may be compounded by the language in which ballot measures are presented. For example, Proposition 209, the California constitutional amendment that prohibited affirmative action in public education and employment, was presented as a “civil rights initiative,” causing some voters to mistakenly regard it as supportive of affirmative action and other efforts to assist racial minorities.⁴³¹ In other cases, ballot measures may be confusingly worded, leading voters to misapprehend the impact of a “yes” or “no” vote. Nebraska’s November 2024 experience with competing abortion-related initiatives is a powerful example of this phenomenon. The state’s ballot featured two competing initiatives—one that would protect and one that would curtail abortion access.⁴³² Unsurprisingly, the two measures led to voter confusion.⁴³³ As one organizer reported, “We hear all the time how confusing the two measures are and folks are very afraid of accidentally checking the wrong one”⁴³⁴ In the end, the initiative that would have protected access to abortion narrowly failed, while the initiative retaining the state’s twelve-week ban passed.⁴³⁵

about the issues, and appear unduly influenced by superficial advertising”); see also Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 *Am. Pol. Sci. Rev.* 63, 63 (1994) (analyzing the lack of voter information on major political issues); Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 *Geo. L.J.* 1443, 1499 (2014) (considering disclosure as a way of “enhanc[ing] the electorate’s access to quality information about the contours of political influence in our democracy”).

⁴³¹ Jerome Karabel & Lawrence Wallack, *Proponents of Prop. 209 Misdled California Voters*, *Christian Sci. Monitor* (Dec. 5, 1996, at 12:12 ET), <https://www.csmonitor.com/1996/1205/120596.opin.opin.2.html> [<https://perma.cc/R5X4-CJWE>]; Richard Frankel, *Proposition 209: A New Civil Rights Revolution?*, 18 *Yale L. & Pol’y Rev.* 431, 446–47 (2000).

⁴³² Robert B. Evnen, *Neb. Sec’y of State, Informational Pamphlet on Initiative and Referendum Measures Appearing on the 2024 General Election Ballot 1*, 31 (2024), <https://sos.nebraska.gov/sites/default/files/doc/elections/2024/2024%20Ballot%20Measures%20Pamphlet.pdf> [<https://perma.cc/6BMU-EJGA>].

⁴³³ Maeve Sheehy, *Nebraska Confuses Voters with Dueling Abortion Ballot Measures*, *Bloomberg Gov’t* (Nov. 1, 2024, at 05:34 ET), <https://news.bgov.com/bloomberg-government-news/nebraska-confuses-voters-with-dueling-abortion-ballot-measures> [<https://perma.cc/W8SU-LDXQ>].

⁴³⁴ Rachel Cohen Booth, *Nebraska Is the Only State with Two Abortion Measures on the Ballot. Confusion Is the Point.*, *Vox* (Oct. 15, 2024, at 07:00 ET), <https://www.vox.com/2024-elections/377639/nebraska-abortion-ballot-measure-trimester-ban-election-reproductive-free-dom> [<https://perma.cc/WZC7-YJMT>].

⁴³⁵ Robert B. Evnen, *Neb. Sec’y of State, The Nebraska Board of State Canvassers Official Report: General Election November 5, 2024*, at 74, 79 (2024), <https://sos.nebraska.gov/sites/default/files/doc/elections/2024/2024%20General%20Canvass%20Book.pdf> [<https://perma.cc/R4LQ-AVDL>].

For proponents of ballot initiatives or referenda, the goal should be simple: ensuring that ballot language is accessible and clear. This includes wording questions with straightforward and nontechnical language and perhaps enforcing a rule that prohibits or limits the appearance on a single ballot of multiple conflicting initiatives on the same topic. Perhaps as importantly, proponents should seek to ensure that both sponsors and opponents of ballot initiatives clearly identify themselves so that voters may consider a measure's support and opposition in its full context.

In addition, it is worth pausing to more fully evaluate one strain of longstanding critiques of ballot initiatives in the context of abortion-related initiatives—that is, the absence of partisan cues. In the context of abortion where, to date, partisan affiliation has often aligned with one's position on abortion, the absence of partisan affiliation on ballot questions may actually be a hindrance to informed voting. This may be especially true in the context of misleadingly worded or competing initiatives. One possible response to this may reside in Professor Michael Kang's proposal for "disclosure-plus"—that is, active disclosure of a ballot measure's most important supporters and opponents, which would supply voters with valuable information they could use to evaluate proposed measures.⁴³⁶ Even under the Supreme Court's cramped vision of permissible campaign finance regulation, this method of disclosure should comfortably survive any constitutional scrutiny.⁴³⁷

Finally, the need to address the campaign finance landscape surrounding direct democracy is longstanding and remains pressing. As Professor Derrick Bell noted in his influential 1978 article, "The success or failure of ballot-box legislation . . . may depend less on the merits of the issue than on who is financing the campaign."⁴³⁸ Several years later, Justice White noted the "[s]taggering disparities" that had "developed between spending for and against various ballot measures"⁴³⁹—a development to which the Court itself contributed with its decisions in 1978's *First National Bank of Boston v. Bellotti*, which allowed corporate expenditures in ballot initiative campaigns,⁴⁴⁰ and 1981's *Citizens Against Rent Control v. City of Berkeley*, which struck down limits on

⁴³⁶ Kang, *supra* note 430, at 1176–79.

⁴³⁷ See *id.* at 1179.

⁴³⁸ Bell, *supra* note 223, at 20.

⁴³⁹ *Citizens Against Rent Control / Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 307 (1981) (White, J., dissenting).

⁴⁴⁰ 435 U.S. 765, 795 (1978).

contributions to ballot measure campaign committees.⁴⁴¹ In both cases, the Court reasoned that the anti-corruption interests that justified limiting contributions or expenditures in *candidate* elections were inapt in the context of direct democracy, where, by definition, there was no candidate to corrupt.⁴⁴²

That logic has, of course, now been adopted in the context of candidate elections as well. But direct democracy may, in fact, be *more* susceptible to capture and manipulation by wealthy interests, in part because money may influence direct democracy at different points in the electoral process. From the effort to gather signatures to put a measure on the ballot to the campaign expenditures to enact or defeat a measure, some research suggests that the better-resourced side typically prevails at the ballot box.⁴⁴³ Historically, this has been true when significant expenditures are made to defeat a particular measure rather than support it.⁴⁴⁴

The current Supreme Court's expansive conception of the First Amendment in the context of campaign finance would likely pose an insuperable obstacle to any effort to place substantive limits on expenditures in the context of direct democracy. But again, reimagining a disclosure regime that would provide voters with meaningful information about the interests supporting or opposing initiatives is a regulatory technique that should be taken seriously, given the centrality of direct democracy to current abortion debates.

⁴⁴¹ 454 U.S. at 300.

⁴⁴² *Id.* at 298; *Bellotti*, 435 U.S. at 790.

⁴⁴³ Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 *Tex. L. Rev.* 1845, 1849 (1999); Kang, *supra* note 430, at 1147–48.

⁴⁴⁴ See John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 *U. Mia. L. Rev.* 377, 395–96 (1985); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. Rev.* 505, 511, 518 (1982) (examining California ballot initiatives between 1968 and 1980, and finding that where initiatives featured “one-sided spending,” which the study “defined as spending on either the affirmative or the negative side that exceeds \$250,000 and that is at least twice as high as the spending on the opposite side,” the better-funded position prevailed sixty-four percent of the time overall). In circumstances where one-sided spending was deployed to oppose a proposition, it succeeded in defeating the proposition ninety percent of the time. *Id.* at 518–19; see also Garrett, *supra* note 443, at 1849 (describing money as a “necessary component” in qualifying an issue for the ballot); Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 *Colum. L. Rev.* 731, 750 n.87 (2000) (arguing that voters in state elections are swayed by the input of financial resources, not a party's endorsement); Kang, *supra* note 430, at 1148 (concluding “that spending advantages are nearly outcome-determinative when aimed at defeating a ballot measure”).

C. Judicial Review

Finally, preserving some role for judicial review of direct democracy's outputs remains critical. As we have suggested, there is significant evidence that federal courts—in particular, the Supreme Court—are no longer performing their role in protecting fundamental rights, vulnerable groups, or the political process. But judicial review nonetheless remains an important guardrail for ensuring that intermediaries do not vitiate the power and promise of direct democracy.⁴⁴⁵

At present, there is reason to worry about the prospects of meaningful judicial review for direct democracy outputs—particularly where the results of direct democracy are challenged and the state officials charged with defending the challenged measure choose not to defend it. This, of course, is what transpired in California when Proposition 8, which overruled the Supreme Court of California's marriage equality opinion and restricted marriage to opposite-sex couples, was challenged. When state officials declined to defend the ballot measure, its proponents stepped in to do so at both the trial court stage and on appeal.⁴⁴⁶ At all stages of the litigation, whether state law authorized the measure's proponents to defend the initiative was a live question—one that the Supreme Court of California, on certification from the Ninth Circuit, answered in the affirmative.⁴⁴⁷ Still, despite this procedural history, the U.S. Supreme Court disagreed, holding in *Hollingsworth v. Perry* that the measure's proponents lacked Article III standing.⁴⁴⁸

Hollingsworth acknowledged that Proposition 8's proponents had been authorized to defend the law's constitutionality in the district court—an acknowledgement that could be read as permitting ballot initiative proponents to mount initial defenses in litigation.⁴⁴⁹ Moreover, *Hollingsworth* was a closely decided case, and it may well be that the dissenters' view would carry the day should the question return to the Court. But at present, the possibility that state officials hostile to reproductive freedom might refuse to defend a ballot measure that enshrines abortion rights is a real concern in a polarized political climate.

⁴⁴⁵ See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1548–49 (1990).

⁴⁴⁶ Katherine Shaw, *Constitutional Nondefense in the States*, 114 *Colum. L. Rev.* 213, 239–40 (2014).

⁴⁴⁷ *Id.*

⁴⁴⁸ 570 U.S. 693, 700–01 (2013).

⁴⁴⁹ *Id.* at 705.

To safeguard the outputs of direct democracy, states should devise alternative mechanisms for ensuring the defense of ballot initiatives, including the appointment of outside parties or a more formal process deputizing ballot initiative proponents to stand in for state officials.

Beyond these questions of federal court review, state courts may be important players when it comes to safeguarding direct democracy. As Professors Jessica Bulman-Pozen and Miriam Seifter have shown, state constitutions contain a “democracy principle”⁴⁵⁰ that counsels strongly in favor of ensuring that direct democracy is available, meaningful, and immunized from interference from election officials and other state actors. The Michigan Supreme Court appeared to channel these concerns when it rejected the effort to bar the reproductive freedom amendment from the ballot on the basis of typeface errors.⁴⁵¹ The Supreme Court of Missouri struck a similar note when it ruled against efforts to prevent an abortion amendment from being included on the November 2024 ballot; in a 4-3 ruling, the court rejected changes to the initiative, which was then successfully enacted in the November 2024 election.⁴⁵²

In addition, some state courts have adopted more robust views of equal protection than the federal courts, including in the context of abortion. For example, in a 2024 abortion-funding case, the Supreme Court of Pennsylvania concluded that under Pennsylvania’s constitution, *any* “sex-based distinction is presumptively unconstitutional,” requiring the government to “rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy.”⁴⁵³ Such broad conceptions

⁴⁵⁰ Bulman-Pozen & Seifter, *supra* note 18, at 864 (emphasis omitted).

⁴⁵¹ See *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854, 855 (Mich. 2022) (holding that because the challenge was merely to the petition’s “form,” which satisfied “all statutory form requirements,” the Board of State Canvassers “ha[d] a clear legal duty to certify” it); *id.* (McCormack, C.J., concurring) (“The statute governing the form of the petition is designed to ensure that anyone signing a petition understands what they are signing. . . . Each requirement promotes transparency and comprehension. None is designed to be an obstacle without a purpose.”); *id.* at 856–57 (Bernstein, J., concurring) (concurring “because of [his] . . . belief in the importance of elections in our representative democracy” and his “interest in letting the people of Michigan make their own decisions at the ballot box”).

⁴⁵² *Coleman v. Ashcroft*, 696 S.W.3d 347, 352–54 (Mo. 2024) (en banc) (reversing the circuit court judgment and requiring the Secretary of State to ensure Amendment 3 was submitted to voters in the 2024 general election); *Mo. Bd. of State Canvassers, Election Results 36* (2024), <https://www.sos.mo.gov/CMSImages/ElectionResultsStatistics/2024GeneralElection.pdf> [<https://perma.cc/46WC-P4DD>].

⁴⁵³ *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 891 (Pa. 2024).

of state constitutional equality guarantees might inform state court review of efforts to thwart direct democracy, as well as judicial interpretations of direct democracy's outputs.

D. Looming Dangers

Alongside these prescriptions, the history of direct democracy and the prospect of its deployment in the current climate warrant their own moment of reflection.

As discussed in Part V, *Dobbs* inaugurated a profound shift in the constitutional order in terms of its preferred method of interpretation and its skepticism of substantive due process rights.⁴⁵⁴ But, as we maintain, *Dobbs* did more than disrupt the prevailing view of the Fourteenth Amendment's liberty guarantees; it also gestured toward a fundamental reappraisal of equal protection theory.⁴⁵⁵ If, as we argue, the Court is sowing the seeds for reconsidering women's protected status within the equal protection hierarchy, then the success of abortion-related direct democracy measures could be marshalled as evidence that women are a numerical majority who wield significant political power and therefore do not warrant any special protection under the Equal Protection Clause.

Put differently, if the success of post-*Dobbs* abortion-related direct democracy measures makes clear that "[w]omen are not without electoral or political power,"⁴⁵⁶ these results would vindicate Justice Alito's claims about abortion and democratic deliberation. On this account, the fact that women and other supporters of abortion rights have availed themselves of direct democracy with a considerable degree of success may lend credence to long-percolating efforts to reevaluate—and recast—the constitutional order. By winning at the ballot box, women might lose in the constitutional order.

As Professor Serena Mayeri has elaborated, the move to analogize sex to race for purposes of equal protection doctrine was a tactical choice forged in debates over both civil rights and the Equal Rights Amendment.⁴⁵⁷ The litigation effort that Ruth Bader Ginsburg spearheaded as part of the ACLU's Women's Rights Project resulted in

⁴⁵⁴ See *supra* Section V.B. (outlining these shifts).

⁴⁵⁵ See *supra* Section V.B. For further discussion of this element of *Dobbs*, see Spindelman, *supra* note 370, at 132–36.

⁴⁵⁶ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

⁴⁵⁷ Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* 2–7 (2011).

the Court reading women into the Fourteenth Amendment and concluding that laws that draw sex-based distinctions warrant heightened constitutional scrutiny.⁴⁵⁸ But doctrinally, suspect or quasi-suspect class status under the Equal Protection Clause has turned on minority status, political powerlessness, a history of discrimination, and some immutable characteristic.⁴⁵⁹ With these criteria in mind, it seems entirely possible that direct democracy's success in securing abortion rights might be leveraged to underwrite a profound change in the constitutional calculus.

And if, under this calculus, women lose by winning, who prevails in this reordered equal protection structure? As we have elsewhere argued, the *Dobbs* majority opinion gestures toward the prospect of a future Court imbuing the fetus with constitutional protections.⁴⁶⁰ Specifically, footnote 41 of the majority opinion in *Dobbs* explicitly notes the possibility that abortion functions as a species of racial genocide, making abortion restrictions akin to antidiscrimination protections for the fetus.⁴⁶¹ On this logic, although the fetus is capable of suffering the slings of discrimination, it is, as Professor John Hart Ely noted in a 1973 article the *Dobbs* majority repeatedly cited, incapable of "sit[ting] in our legislatures" and representing itself in majoritarian political processes.⁴⁶²

⁴⁵⁸ See Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* 126 (2004) (attributing the Constitution's de facto "ban on sex discrimination" to major shifts in judicial interpretation after the 1970s); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 *Calif. L. Rev.* 1323, 1362–66 (2006) (exploring how social movements and counter-movements shape constitutional interpretation and change); Michael C. Dorf, *Equal Protection Incorporation*, 88 *Va. L. Rev.* 951, 980–85 (2002) (introducing the concept of "equal protection incorporation," the process of identifying suspect and semi-suspect classifications in constitutional text); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv. L. Rev.* 1457, 1459, 1467–68 (2001) (examining methods of constitutional change without amendment).

⁴⁵⁹ Murray, *supra* note 378, at 2079.

⁴⁶⁰ Murray & Shaw, *supra* note 17, at 801–02.

⁴⁶¹ *Dobbs*, 142 S. Ct. at 2256 n.41. For a more detailed account of the "abortion as genocide" argument, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 *Harv. L. Rev.* 2025, 2057–59 (2021).

⁴⁶² John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920, 933–35 (1973) ("Compared with men, very few women sit in our legislatures But no fetuses sit in our legislatures. . . . Compared with men, women may constitute such a 'minority'; compared with the unborn, they do not. I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer." (footnote omitted)); see also Murray & Shaw, *supra* note 17, at 800–01 (addressing the *Dobbs* Court's reliance on John Hart Ely's *The Wages of Crying Wolf* and its reasons therefor).

The suggestion made in Ely's *The Wages of Crying Wolf*, and endorsed *sub silentio* in *Dobbs*, is that the fetus represents *exactly* the sort of politically powerless "discrete and insular minority" on whose behalf courts are obliged to intercede. On this account, even as *Dobbs* gestures toward women's exclusion from protected class status, the fetus is waiting in the wings, positioned to be comfortably lodged in the established equal protection rubric as a rights-bearing minority.

CONCLUSION

In 1964, the Court decided *Lucas v. Forty-Fourth General Assembly of Colorado*, a challenge to a Colorado legislative apportionment scheme that had been enacted through direct democracy.⁴⁶³ Those challenging the apportionment scheme argued that it diluted the vote, impairing the exercise of a fundamental right.⁴⁶⁴ The Court agreed, with Chief Justice Earl Warren writing for the majority that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."⁴⁶⁵

As someone who maintained that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be,"⁴⁶⁶ Chief Justice Warren would likely be astonished at our current legal landscape. The very notion that citizens would turn to the political process, rather than the courts, to secure fundamental rights and protect minorities seems like a world turned upside down.

We recognize that relying on direct democracy—perhaps the most majoritarian of democratic pathways—to serve goals that have long been understood as counter-majoritarian is profoundly unsettling. Indeed, it is all the more unsettling because, at the same moment the Court has directed us to preserve our rights in the political process, its decisions have rendered the prospect of genuine democratic deliberation elusive and ephemeral.⁴⁶⁷

⁴⁶³ 377 U.S. 713, 715–19 (1964) (describing the apportionment scheme and the challenges asserted).

⁴⁶⁴ *Id.* at 715.

⁴⁶⁵ *Id.* at 736 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

⁴⁶⁶ *Id.* at 736–37.

⁴⁶⁷ See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 *Sup. Ct. Rev.* 111, 112–13. See generally Ari Berman, *Minority Rule: The Right-Wing Attack on the Will of the People—And the Fight to Resist It* 263–68, 288–95 (2024) (addressing the Supreme Court's recent antidemocratic posture and contrasting it with state courts which, on his account, have the potential to protect and foster democracy).

But at this moment, when courts have abdicated core aspects of their rights-protecting role, majoritarianism offers some prospect of a safe harbor. As we have noted here, direct democracy is an imperfect vehicle for preserving rights. Indeed, as we have shown, its perils may actually outweigh its possibilities. Yet at a time when rights-preserving avenues are few and far between, direct democracy offers opportunities for mobilization, engagement, and the prospect of safeguarding rights. This Article is an effort to provide new parameters for engaging with direct democracy in this brave new post-*Dobbs* world.