
DIRECT DEMOCRACY AFTER *DOBBS*: PARADOX, IRONY AND THE COMING RECALIBRATION

Jane S. Schacter*

Direct democracy has come to the forefront of the abortion debate. Since Dobbs v. Jackson Women’s Health Organization, the seismic Supreme Court decision overruling Roe v. Wade and Casey v. Planned Parenthood, a number of high-profile ballot measures about abortion have drawn both public attention and substantial turnout. The result in every such election since Dobbs has favored the pro-choice side, even in some culturally conservative states. Surveys of public opinion in the wake of Dobbs suggest that there is significant support for abortion rights and opposition to highly restrictive laws in most states. This misalignment between public opinion and abortion law is precisely the circumstance that direct democracy, and especially the initiative, is well situated to mitigate. Yet, paradoxically, precisely where direct democracy seems most needed, it is being most aggressively resisted by legislative opponents of abortion rights. In this Article, I examine this paradox, along with the reconfigured counter-majoritarian difficulty that has emerged since Dobbs. It is now state legislatures in many states, and not courts, that are frustrating democratic resolution of abortion policy. All of this suggests the need to recalibrate institutional debates about abortion.

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* William Nelson Cromwell Professor, Stanford Law School. For helpful comments on earlier versions of this article, thanks to the participants in this symposium and to the participants in the Statutory Interpretation and Legislation Workshop at UC Berkeley Law School. I am also grateful for research assistance at various stages from Sarah Corning, Sally Marsh, Ross Snyder, and Nora Swidey, and for research support from Stanford’s Bill Lane Center for the American West.

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I. INTRODUCTION

The Supreme Court’s dramatic ruling in *Dobbs v. Jackson Women’s Health Organization*¹ jolted constitutional law when it overruled *Roe v. Wade*² and *Planned Parenthood v. Casey*,³ but it also jolted American elections. Direct democracy, in particular, is having a post-*Dobbs* moment. Within mere weeks of the decision, access to abortion became a highly salient issue with a ballot measure in Kansas that sought to override a state supreme court ruling protective of abortion rights.⁴ Candidate elections have been affected too,⁵ but plebiscites more directly determine access to abortion and they will be my focal point.

All seven post-*Dobbs* ballot measures that have been put to voters as of May 1, 2024, have been won by the pro-choice side.⁶ Abortion as an issue for direct democracy is not itself new; between 1970 and 2023, there were some 65 ballot measures on the subject, and measures supporting abortion rights were far more likely to pass than those opposing such rights.⁷ But several things *are* new. First, the post-*Dobbs* state constitutional amendments enshrining abortion rights in California, Michigan, Ohio, and Vermont are the first such amendments ever passed.⁸ Second, these plebiscites, along with those in Kansas, Kentucky, and Montana rejecting anti-abortion proposals in 2022, have been more nationally

1. 597 U.S. 215, 302 (2022).

2. 410 U.S. 113, 116 (1973).

3. 505 U.S. 833, 901 (1992).

4. Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html> [https://perma.cc/Z8AX-N8GU].

5. See, e.g., Elaine Kamarck & William A. Galston, *It Wasn’t Just “the Economy Stupid”—It Was Abortion*, BROOKINGS (Nov. 10, 2022), <https://www.brookings.edu/articles/it-wasnt-just-the-economy-stupid-it-was-abortion/> [https://perma.cc/73AE-HQTC] (exploring the degree to which abortion was a “powerful driver” of the vote in the 2022 midterms). This is not entirely new. The degree to which attitudes about abortion influence voting behavior has long been noted. See, e.g., Alan I. Abramowitz, *It’s Abortion, Stupid: Policy Voting in the 1992 Presidential Election*, 57 J. POL. 176, 176 (1995) (finding that the abortion issue had a significant influence on voting decisions in the 1992 election).

6. Kate Zernike, *Ohio Continues a Winning Streak for Abortion Rights*, N.Y. TIMES (Nov. 7, 2023), <https://www.nytimes.com/2023/11/07/us/politics/ohio-abortion-amendment.html> [https://perma.cc/8A5D-5ZPN]. Abortion policy and politics in the post-*Dobbs* world are dynamic and evolving rapidly. The developments addressed in this Article are current as of May 1, 2024.

7. For a listing of all abortion-related measures put to voters since 1970, see *History of Abortion Ballot Measures*, BALLOTEDIA, https://ballotpedia.org/History_of_abortion_ballot_measures (last visited May 21, 2024) [https://perma.cc/866F-UU2P].

8. *Id.* (“[In] 2022, voters in California, Michigan, and Vermont were the first to decide ballot measures to establish state constitutional rights to abortion.”).

prominent than pre-*Dobbs* abortion-related ballot measures.⁹ That should be no surprise. Before *Dobbs* jettisoned *Roe* and *Casey*, those rulings set a floor of national protection, such that ballot measures had far more limited power to shape the policy terrain. Pre-*Dobbs* measures tended to focus on either symbolic expressions of resistance to *Roe* (as in amendments proposing fetal personhood that were flatly unconstitutional at the time) or interstitial regulatory questions (on issues like public funding or parental consent).¹⁰ To be sure, measures in the latter category that passed did impair access to abortion, but when *Dobbs* gave states the untrammelled authority to ban abortion, plebiscites became far more consequential.

Third, the unbroken string of victories for the abortion rights side since *Dobbs*—even in culturally conservative states—has been surprising. In a time of sharp partisan polarization and the familiar politics of red, blue, and purple states, victories for the abortion rights side in places like Kansas, Kentucky, Montana, and Ohio have broken from prevailing political trends.¹¹ Finally, and most relevant for my analysis, there is a yawning gap between restrictive abortion laws and public opinion in many states in the country, including in states with an active ballot measure process.¹² This gap contrasts sharply with previous findings. A study by Kevin Arceneaux done twenty years before *Dobbs* found, precisely, that “states with initiatives and referenda are more responsive to public opinion on abortion policy.”¹³ Arceneaux reached no conclusion about the explanation for this increased responsiveness, but there are various possibilities.¹⁴ It may be the result of the direct influence of ballot measures, which literally codify the view of the majority that votes. Or the dynamic may be more indirect: the mere *threat* of an initiative can induce legislative conformity because legislators will not want voters to usurp or punish them. Or, more diffusely, perhaps states making frequent use of direct democracy simply have a culture of greater responsiveness to public attitudes.¹⁵ In any event, the current state of affairs in many states diverges from Arceneaux’s finding.

9. See generally Tom Bonier, *American Elections Are About Abortion Now*, N.Y. TIMES (Nov. 10, 2023), <https://www.nytimes.com/2023/11/10/opinion/abortion-presidential-election-biden.html> [<https://perma.cc/7F3F-XPNW>] (arguing that abortion has become “the dominant issue in American politics,” and noting that “[s]tates with abortion on the ballot in the form of ballot measures have seen the biggest effect”).

10. *History of Abortion Ballot Measures*, *supra* note 7 (listing subjects of all abortion-related measures put to voters).

11. Mark Murray & Alexandra Marquez, *Here’s What’s Driving America’s Increasing Political Polarization*, NBC NEWS (June 15, 2023, 2:06 PM), <https://www.nbcnews.com/meet-the-press/meetthepressblog/s-driving-americas-increasing-political-polarization-rena89559> [<https://perma.cc/3TTZ-6CHZ>] (noting the increasing Democratic support for abortion rights as part of analysis of recent polarization).

12. See *infra* Table 1.

13. Kevin Arceneaux, *Direct Democracy and the Link Between Public Opinion and State Abortion Policy*, 2 ST. POL. & POL’Y Q. 372, 372 (2002).

14. *Id.* at 383.

15. On the general issue of whether direct democracy states have greater policy congruence with public opinion, the literature is not conclusive. Some scholars have found increased congruence, e.g., Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99, 99 (1996) (finding congruence with respect to public opinion on parental consent laws for abortion); John G. Matsusaka, *Popular Control of Public Policy: A Quantitative Approach*, 5 Q.J. POL. SCI. 133, 136 (2010) (finding greater congruence across

In this Article, I survey the post-*Dobbs* landscape of ballot measures and consider what we might learn from them about direct democracy and its intersection with the constitutional debate about abortion rights. In the sections that follow, I suggest three takeaways—a paradox, an irony, and, ultimately, the need for recalibration. The paradox arises from the striking divergence between abortion law and public opinion in many states.¹⁶ A gap of this sort is precisely what direct democracy is best positioned to close by allowing voters to override a state legislature that is unresponsive to their views. But the polarization, partisanship, and lack of accountability that have crucially shaped state legislatures in recent years have allowed legislators in many states to evade or actively resist ballot measures—aggressively and unabashedly so. Hence, the paradox: where ballot measures are most needed to align public policy with public opinion, they are being most energetically obstructed by legislators.

The second takeaway relates to the irony of the constitutional debate about abortion in the post-*Dobbs* era. For decades, abortion opponents emphasized the so-called countermajoritarian difficulty in opposing *Roe*.¹⁷ The decision was offered up as Exhibit A of judicial activism run amok. Abortion rights, on that familiar argument, lacked legitimacy because they were protected by the judicial, and not the political, process. Strikingly, in the wake of *Dobbs*, we find ourselves in another debate about countermajoritarianism, but this time it is elected representatives who are blocking popular views from prevailing.¹⁸ The irony is un-subtle.

Finally, my conclusion is that all of this suggests a need for recalibration of basic ideas of legitimacy. Debates about whether direct democracy is, in the words of Justice Scalia, the “most democratic of all procedures”¹⁹ have long swirled around ballot measures, especially those affecting basic rights and historically disadvantaged groups. Many constitutional theorists have worried that such measures enable a kind of majoritarian tyranny.²⁰ Post-*Dobbs* ballot measures on abortion do not fit in obvious ways with this traditional frame of reference. Likewise, familiar debates about judicial legitimacy focused on *Roe* have assumed an appointed judiciary without plausible judicial accountability.

issues in direct democracy states). Others question this conclusion. See, e.g., Edward L. Lascher Jr., Michael G. Hagen & Steven A. Rochlin, *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, 58 J. POL. 760, 760 (1996) (rejecting the idea of increased congruence); CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* 52–89 (2016) (criticizing the efficacy of direct democracy and raising questions about voter myopathy that can lead to policy packages that, in the aggregate, do not fit with voter preferences).

16. See *infra* Section III.A.

17. See *infra* Section III.B.

18. Miriam Seifter has incisively explored the phenomenon she calls “countermajoritarian legislatures.” See generally Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323 (2021) (exploring the sources and implications of the countermajoritarian aspects of the Senate and Electoral College).

19. *Romer v. Evans*, 517 U.S. 620, 647 (Scalia, J., dissenting).

20. For leading contributions to this literature, see Derrick A. Bell Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 1 (1978); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1579–84 (1990).

In many states, by contrast, judges are elected and they regularly make crucial decisions about ballot measures and state constitutions.²¹ Elected judges thus have a central role in shaping the law in this area. The scrambling of these various institutional dynamics underscores the need to recalibrate the way we frame and assess legitimacy in relation to direct democracy, the abortion debate, and, indeed, some larger questions about institutional legitimacy that structure constitutional law.

In Part II, I begin by describing the post-*Dobbs* landscape, mapping the terrain in terms of abortion policy, public opinion, and available mechanisms of direct democracy.²² In Part III, I turn to an analysis of the paradox and irony of abortion-related ballot measures after *Dobbs*.²³ In Part IV, I conclude and briefly address the need for recalibration.²⁴

II. MAPPING THE POST-DOBBS LANDSCAPE

A. *Post-Dobbs Abortion Law in the States*

Dobbs ushered in an explosion of new abortion laws in the states, with the availability of legal abortion sharply curtailed in many parts of the country. The proliferation of new restrictions began immediately after the decision was announced, with many states having so-called trigger laws that became effective once *Roe* and *Casey* were overruled.²⁵ As might be expected, most laws enacted after *Dobbs* ban or restrict abortion, but some states moved in the opposite direction and added new protections.²⁶ As of May 1, 2024, twenty-one states outlawed abortion or barred access at an earlier gestational age than would have been permitted under *Roe* and *Casey*.²⁷

The Guttmacher Institute, among others, tracks every state's abortion laws.²⁸ The Guttmacher system classifies abortion laws on a scale ranging from

21. *Judicial Election Methods by State*, BALLOTPEdia, https://ballotpedia.org/Judicial_election_methods_by_state (last visited May 21, 2024) [<https://perma.cc/RfZ7-E8V8>].

22. *See infra* Section II.A.

23. *See infra* Part III.

24. *See infra* Part IV.

25. Natasha Ishak, *Trigger Laws and Abortion Restrictions, Explained*, VOX, <https://www.vox.com/2022/6/25/23182753/roe-overturned-abortion-access-reproductive-rights-trigger-laws> (June 25, 2022, 6:45 PM) [<https://perma.cc/RQJ6-W2LZ>] (explaining that 13 states had automatic trigger laws and others were prepared to legislate against abortion).

26. *Abortion Policy in the Absence of Roe*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe> (last visited May 21, 2024) [<https://perma.cc/P3G4-4VP6>].

27. *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (May 1, 2024, 4:40PM) [<https://perma.cc/7FDA-HZZ8>].

28. *Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER INST., <https://states.guttmacher.org/policies/> (last visited May 21, 2024) [<https://perma.cc/9KBD-U5Q9>]. For examples of other online maps, see, e.g., *Tracking Abortion Bans Across the County*, *supra* note 27; Danica Jefferies, JoElla Carmen & Nigel Chiwaya, *Abortion Law Tracker: See Where the Procedure Is Currently Legal, Banned or Restricted in the U.S.*, NBC NEWS, <https://www.nbcnews.com/data-graphics/abortion-state-tracking-trigger-laws-bans-restrictions-rcna36199> (Dec. 29, 2023, 12:54 PM) [<https://perma.cc/7VS7-8N8N>].

least to most protective of access.²⁹ The seven rankings, and the corresponding meanings of each, are as follows. I have added a number to each rating for ease of reference:

- *Most restrictive*: State bans abortion with only very limited exceptions (1)³⁰
- *Very restrictive*: State has multiple restrictions and an early gestational age ban (2)
- *Restrictive*: State has multiple restrictions and a later gestational age ban (3)
- *Some restrictions/protections*: State either has a few restrictions or protections, or has a combination of restrictive and protective policies (4)
- *Protective*: State has some protective policies (5)
- *Very protective*: State has most of the protective policies (6)
- *Most protective*: State has all or almost all of the protective policies (7)

As the Guttmacher Institute's posted map reflects, the states break down as follows:

- **Sixteen states** are now *most restrictive* (Alabama, Arkansas, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia)
- **Five states** are *very restrictive* (Arizona, Georgia, Nebraska, North Carolina, and Utah)
- **Seven states** are *restrictive* (Iowa, Kansas, Ohio, Pennsylvania, Virginia, Wisconsin, and Wyoming)
- **Four states** have *some restrictions/some protections* (Delaware, Nevada, New Hampshire, and Rhode Island)
- **Ten states** are *protective* (Alaska, Colorado, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, and Washington)³¹
- **Six states** are *very protective* (California, Maryland, Minnesota, New Jersey, New Mexico, and New York)
- **Two states** are *most protective* (Oregon and Vermont)

29. *Interactive Map: U.S. Abortion Policies and Access After Roe*, *supra* note 28.

30. There are semantic questions as to when a state may be said to have banned abortion entirely when it preserves at least some exceptions. The New York Times, for example, classifies as a "ban" some policies that the Guttmacher Institute taxonomy referenced in the text calls a "ban with only very limited exceptions." See *Tracking Abortion Bans Across the Country*, *supra* note 27. In some instances, this variation carries over to how individual states are classified, but the terminological differences are of no real conceptual significance to my analysis. Moreover, as to what constitutes a ban, post-*Dobbs* events have illustrated that the exceptions that do exist in some laws have often been too vague to promote confident reliance by litigation-averse medical professionals. See Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html> [<https://perma.cc/U5PY-5945>]. Indeed, in a high-profile test of the scope of an exception, the Texas Supreme Court chose a narrow interpretation. *In re State*, 682 S.W.3d 890, 894 (Tex. 2023).

31. In addition to these states, the Guttmacher taxonomy classifies the District of Columbia as "protective." *Interactive Map: U.S. Abortion Policies and Access After Roe*, *supra* note 28.

Thus, as of May 2024, twenty-one states in all—well over one-third of the states—had laws in the two most restrictive categories, and others may soon follow.³² And more than half the states already fall into one of the three most restrictive Guttmacher categories.

B. *Public Opinion on Abortion in the States*

On the national level, the trends in public opinion are unmistakable and have led to an apparent consensus. The conclusions were concisely summarized on the one-year anniversary of *Dobbs*:

For the first time, a majority of Americans say abortion is “morally acceptable.” Most now believe abortion laws are too strict. They are significantly more likely to identify, in the language of polls, as “pro-choice” over “pro-life,” for the first time in two decades. . . .

The New York Times reviewed polls from groups that have been asking Americans about abortion for decades, including Gallup, Public Religion Research Institute, Pew Research, Ipsos, KFF, and other nonpartisan polling organizations. All pointed to the same general trends: growing public support for legalized abortion and dissatisfaction with new laws that restrict it³³

In line with this analysis, multiple national polls done in the year following *Dobbs* reflected robust support for access to abortion. Indeed, national polls regularly show support at or over 60% for the proposition that abortion should be legal in all or most circumstances.³⁴

It is important to acknowledge at the outset that polls may miss the complexity and nuance in individuals’ views of precisely when abortion should be legal. It is simply hard to capture in a survey question the spectrum of restrictions that an individual may support. There are likely some framing effects in how the

32. For example, the Iowa Supreme Court heard oral argument in April 2024 about whether to permit the state’s 6-week ban to be enforced. effect. Annie Gowen, *Iowa Supreme Court Weighs Whether 6-Week Abortion Ban Can Take Effect*, WASH. POST (Apr. 11, 2024, 5:57 PM), <https://www.washingtonpost.com/nation/2024/04/11/iowa-abortion-ban-court/> [<https://perma.cc/2H78-JH6Q>].

33. Kate Zernike, *How a Year Without Roe Shifted American Views on Abortion*, N.Y. TIMES (June 24, 2023), <https://www.nytimes.com/2023/06/23/us/roe-v-wade-abortion-views.html> [<https://perma.cc/7KNS-7ZNH>].

34. See, e.g., Geoff Mulvihill & Linley Sanders, *Few U.S. Adults Support Full Abortion Bans, Even in States That Have Them, an AP-NORC Poll Finds*, ASSOCIATED PRESS (July 11, 2023, 11:04 PM), <https://apnews.com/article/abortion-poll-roe-dobbs-ban-opinion-fcfd5a799ac3be617d99999e92eabe> [<https://perma.cc/VVV5-SLF8>] (“Overall about two-thirds say abortion should generally be legal”); PEW RSCH. CTR., *NEARLY A YEAR AFTER ROE’S DEMISE, AMERICANS VIEW OF ABORTION ACCESS INCREASINGLY VARIES BY WHERE THEY LIVE* 5 (2023), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2023/04/PP_2023.04.26_abortion-access_REPORT.pdf [<https://perma.cc/8WB4-CBEW>] (“About six-in-ten Americans (62%) continue to say abortion should be legal in all or most cases, compared with 36% who say it should be illegal in all or most.”); Domenico Montanaro, *Poll: Americans Want Abortion Restrictions, But Not as Far as Red States Are Going*, NPR (Apr. 26, 2023, 5:00 PM), <https://www.npr.org/2023/04/26/1171863775/poll-americans-want-abortion-restrictions-but-not-as-far-as-red-states-are-going> [<https://perma.cc/EFD2-CB8N>] (reporting on NPR/PBS NewsHour/Marist poll finding that “61% said they mostly support abortion rights, 37% count themselves as opposed. That support is at or near record highs in the Marist survey and other surveys taken over the last 20 years or so”).

question is asked. Two things, however, seem clear. First, there is a partisan divide, with Republicans far less likely to support abortion rights, albeit the partisan gap may not be as large as expected, given the decades of partisan combat on the issue.³⁵ Second, high support for allowing abortion “in all or most circumstances” cannot be readily reconciled with the policy adopted by the many states that have effectively outlawed abortion or imposed strict bans so early in pregnancy that it is likely before there is awareness of a pregnancy.³⁶

Two surveys report on recent attitudes about abortion on a state-by-state basis, for all fifty states. Key results appear in Table 1 below, matched to the severity of the state’s current restriction on abortion.

TABLE 1: ABORTION RESTRICTIONS & PUBLIC OPINION BY STATE

State	Public Opinion on Abortion				Severity of Abortion Restriction
	PRRI Feb. 2023 Abortion should be <u>legal</u> in most or all cases	CES 2022 Always allow abortion as a matter of choice	PRRI Feb. 2023 Abortion should be <u>illegal</u> in all circumstances	CES 2022 Abortion should be <u>illegal</u> in all circumstances	
Alabama	55	44	12	23	1 - Most restrictive
Alaska	68	70	9	16	5 - Protective
Arizona	62	60	7	17	2 - Very restrictive
Arkansas	43	49	14	25	1 - Most restrictive
California	69	68	10	17	6 - Very protective
Colorado	64	61	9	19	5 - Protective
Connecticut	75	73	4	11	5 - Protective
Delaware	69	67	10	12	4 - Some restrictions/ protections
Florida	64	57	8	18	1 - Most restrictive
Georgia	57	57	12	23	2 - Very restrictive
Hawaii	75	72	7	14	5 - Protective
Idaho	49	51	14	18	1 - Most restrictive
Illinois	70	62	7	17	5 - Protective
Indiana	61	50	10	23	1 - Most restrictive
Iowa	61	56	5	16	3 - Restrictive
Kansas	60	55	9	21	3 - Restrictive
Kentucky	50	48	13	27	1 - Most restrictive
Louisiana	53	51	14	24	1 - Most restrictive
Maine	76	59	5	13	5 - Protective
Maryland	76	67	7	15	6 - Very protective

35. See, e.g., Montanaro, *supra* note 34 (noting that in NPR/PBS NewsHour/Marist survey, “[a] third of Republicans also qualify themselves as mostly supporting abortion rights, not an insignificant share in a party that has made opposition to abortion rights a litmus test for political candidates”).

36. Compare sources cited *supra* note 30 (cataloguing bans in numerous states), with sources cited *supra* note 34 (reporting polls finding more than 60% of Americans support abortion rights).

State	Public Opinion on Abortion				Severity of Abortion Restriction
	PRRI Feb. 2023 Abortion should be <u>legal</u> in most or all cases	CES 2022 Always allow abortion as a matter of choice	PRRI Feb. 2023 Abortion should be <u>illegal</u> in all circumstances	CES 2022 Abortion should be <u>illegal</u> in all circumstances	
Massachusetts	79	72	3	9	5 - Protective
Michigan	66	57	7	17	5 - Protective
Minnesota	63	57	5	18	6 - Very protective
Mississippi	49	45	13	27	1 - Most restrictive
Missouri	59	54	11	22	1 - Most restrictive
Montana	64	56	11	17	5 - Protective
Nebraska	54	47	11	23	2 - Very restrictive
Nevada	80	64	4	13	4 - Some restrictions/ protections
New Hamp.	69	68	10	11	4 - Some restrictions/ protections
New Jersey	75	68	5	16	6 - Very protective
New Mexico	66	63	8	19	6 - Very protective
New York	71	69	7	16	6 - Very protective
No. Carolina	62	57	11	22	2 - Very restrictive
North Dakota	56	46	9	22	1 - Most restrictive
Ohio	66	57	6	20	3 - Restrictive
Oklahoma	45	55	10	23	1 - Most restrictive
Oregon	75	66	5	14	7 - Most protective
Pennsylvania	61	59	9	17	3 - Restrictive
Rhode Island	70	74	9	12	4 - Some restrictions/ protections
So. Carolina	50	50	11	23	1 - Most restrictive
South Dakota	42	56	12	25	1 - Most restrictive
Tennessee	49	48	14	26	1 - Most restrictive
Texas	57	55	14	22	1 - Most restrictive
Utah	42	49	5	14	2 - Very restrictive
Vermont	61	74	9	18	7 - Most protective
Virginia	71	60	5	18	3 - Restrictive
Washington	77	64	4	15	5 - Protective
West Virginia	57	45	14	24	1 - Most restrictive
Wisconsin	64	58	7	17	3 - Restrictive
Wyoming	55	60	12	18	3 - Restrictive

The Public Religion Research Institute (“PRRI”) poll reported in Table 1 was published in February 2023.³⁷ The Cooperative Election Survey (“CES”), designed by political scientists, was administered in connection with the 2022 midterms.³⁸ Both polls asked questions about support for access to abortion, along with support for banning abortion.³⁹ On support for abortion rights, PRRI asked about support for abortion “in all or most circumstances,” a question phrased similarly to one asked in some of the national polls referenced above.⁴⁰ CES asked a more categorical question: should abortion *always* be allowed as a matter of choice?⁴¹ One might expect lower rates of agreement to a question that does not allude to “in most circumstances,” and there is some evidence of diminished support, but in many states, the results for the two questions are not all that far from one another.⁴² Of the fifty states, only six did not show majority support in the PRRI polls for access to abortion in all or most circumstances.⁴³ And only nine showed less than majority support for CES’s more sweeping proposition that abortion should *always* be allowed as a matter of choice.⁴⁴

More relevant for our purposes, even in the sixteen states with the most restrictive policies on the Guttmacher scale, there is considerable support for abortion rights.⁴⁵ Thirteen of these sixteen reflect majority support for access to abortion in one or both polls, and the three states that do not show majority support on either poll are not far behind.⁴⁶ Moreover, both PRRI and CES tested support for a total ban, which is functionally the policy in the sixteen states with the harshest restrictions. No state among these sixteen shows more than 27%

37. PRRI, ABORTION ATTITUDES IN A POST-ROE WORLD 10 (2023), <https://www.prii.org/wp-content/uploads/2023/02/PRRI-Feb-2023-Abortion-D-1.pdf> [<https://perma.cc/R2MR-X6L8>] (reporting on results of 50 state survey taken between March and December 2022 and finding that “[m]ajorities of residents in 43 states and the District of Columbia say that abortion should be legal in most or all cases, and in 13 of those states and in DC, more than seven in ten residents support legal abortion”).

38. *Cooperative Election Study*, HARV. UNIV., <https://cces.gov.harvard.edu/> (last visited May 21, 2024) [<https://perma.cc/YW5Q-ATWE>] (reporting on results of 50 state survey taken in connection with 2022 midterm elections). The findings on abortion can be accessed here: *Policy Support by State*, COOP. ELECTION STUDY, <https://cooperativeelectionstudy.shinyapps.io/policystates/> (last visited May 21, 2024) [<https://perma.cc/VL94-LJL6>].

39. See PRRI, *supra* note 37, at 4; *Policy Support by State*, *supra* note 38.

40. PRRI, *supra* note 37, at 4.

41. *Policy Support by State*, *supra* note 38.

42. Indeed, on occasion, a *higher* percentage in a state agreed with CES’s formulation than the one framed by PRRI. Compare PRRI, *supra* note 37, at 10 fig. 1.5 (showing 45% support in Oklahoma and 42% support in South Dakota), with *Policy Support by State*, *supra* note 38 (showing 55% support in Oklahoma and 56% support in South Dakota).

43. These states are Arkansas, Idaho, Mississippi, Oklahoma, South Dakota, Tennessee, and Utah. PRRI, *supra* note 37, at 10 fig. 1.5.

44. These states are Alabama, Arkansas, Kentucky, Mississippi, Nebraska, North Dakota, Tennessee, Utah, and West Virginia. *Policy Support by State*, *supra* note 38.

45. Compare *Interactive Map: US Abortion Policies and Access After Roe*, *supra* note 28, with PRRI, *supra* note 37, at 10 fig. 1.5.

46. All but Tennessee, Mississippi and Arkansas. PRRI, *supra* note 37, at 10 fig. 1.5; *Public Opinion by State*, *supra* note 38.

support for such a ban on either poll,⁴⁷ and many show considerably less. In sum, the gap between policy and public opinion in most of these sixteen states is stark.

C. *Available Mechanism of Direct Democracy in the States*

The disconnect in many states between public policy and public opinion on abortion brings us to the available mechanisms of direct democracy. Conventionally, direct democracy is thought to subsume three devices—initiative, referendum, and recall.⁴⁸ Only the first two are relevant here, and both have already figured into post-*Dobbs* events.

The Appendix to this Article enumerates the mechanisms of direct democracy in all fifty states.⁴⁹ There are significant differences, none more fundamental than the difference between initiative and referendum, which, as we will see in the next section, looms especially large in the post-*Dobbs* era.⁵⁰ Initiatives allow voters to *initiate* a measure—that is, to collect signatures to qualify a measure for the ballot. In most states, a measure goes to the voters when the specified signatures are collected, though in some, the state legislature must be given a chance to act before the electorate can vote.⁵¹ By contrast, *referendum* requires that legislators take some action before the question is *referred* to voters for approval or rejection.⁵² A few states have a so-called “veto referendum” that allows voters to collect signatures and qualify a measure to veto legislative action.⁵³ Even in that circumstance, however, the electorate’s ability to act is contingent on the legislature having passed a law that voters can then consider for a popular veto.⁵⁴

The other distinction reflected in the Appendix is between statutory and constitutional forms of initiative and referendum.⁵⁵ For our purposes, ballot measures that relate to the state constitution are the most relevant category and are my focus. Abortion has long been debated as a constitutional issue, and measures of this sort cannot simply be amended by the legislature. They thus offer the most enduring form of change. As the Appendix reflects, however, the initiative is made available to voters as a means to change the state constitution in a minority of states. The referendum is much more commonly used. Every state but one provides that voters must ratify a constitutional amendment through

47. PRRI, *supra* note 37, at 11 fig. 1.6. Louisiana reflected 26% support on the CES poll. *Public Opinion by State*, *supra* note 38.

48. Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107, 113 (1995).

49. *See infra* Appendix.

50. Schacter, *supra* note 48, at 113 nn.22–23.

51. *See infra* Appendix. This is the so-called indirect initiative. Schacter, *supra* note 48, at 113 n.22.

52. Schacter, *supra* note 48, at 113 n.23.

53. *Veto Referendum*, BALLOTPEdia, https://ballotpedia.org/Veto_referendum (last visited Mar. 26, 2024) [<https://perma.cc/RGQ3-6XCD>].

54. Twenty-three states allow a veto referendum. *Id.* All but two—Maryland and New Mexico—also allow some form of an initiative, so the availability of the veto device typically corresponds to states that otherwise allow voters more autonomy in setting the agenda for ballot measures. *See infra* Appendix.

55. *See infra* Appendix.

a referendum after the legislature approves the measure.⁵⁶ By contrast, only eighteen states also permit voters alone to amend the state constitution by initiative.⁵⁷ I look at referendum procedures more closely in Part III.

D. Post-Dobbs Ballot Measures in the States

It became quickly apparent after *Dobbs* was decided that ballot measures were going to be a major force shaping the post-*Roe* landscape, although not all of them were initiatives. *Dobbs* was decided on June 24, 2022.⁵⁸ Just over five weeks later, Kansas voters went to the polls to vote on a constitutional referendum.⁵⁹ In that case, the state legislature had previously approved an amendment to wipe out the protections for abortion rights that the state supreme court had interpreted the constitution to provide.⁶⁰ The state supreme court decision at issue had come down when *Roe*, as modified by *Casey*, was still good law, and it extended protection *greater than* what *Roe* and *Casey* afforded.⁶¹ In the shadow of *Dobbs*, and presumably to the surprise of the legislators who approved the measure to go to voters, the measure went down decisively, with nearly 59% voting against an amendment saying that the state constitution afforded no right to an abortion.⁶² Both the strong turnout for an August referendum and the margin of victory drew tremendous attention,⁶³ but it was hardly a one-off. Each of the five additional ballot measures on abortion in 2022 was won by the pro-choice side, and none was especially close.⁶⁴ As in Kansas, voters in Kentucky and Montana voted on anti-abortion referenda put forward by Republican legislators.⁶⁵ Kentucky voters rejected by a margin of 52–48% an amendment to the state constitution, providing that it would afford no protection for abortion.⁶⁶ The Montana referendum was statutory, and voters rejected by a 53–47% margin statutory protections for what it called infants “born alive.”⁶⁷ By contrast, the California and Vermont constitutional referenda in 2022 protected abortion rights and were approved by Democratic state legislators.⁶⁸ Both passed by very large margins.⁶⁹

Alone among the 2022 measures, Michigan’s Proposal 2 was an initiative that appeared on the ballot after supporters of abortion rights collected sufficient signatures and, later, survived high-stakes litigation in the state supreme court

56. *See infra* Appendix.

57. *See infra* Appendix.

58. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

59. Smith & Glueck, *supra* note 4.

60. *Id.*; *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019).

61. *Schmidt*, 440 P.3d at 493, 496.

62. Smith & Glueck, *supra* note 4.

63. *Id.*

64. *History of Abortion Ballot Measures*, *supra* note 7.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

about whether the measure could be placed on the ballot.⁷⁰ Challengers argued signature petitions did not meet technical requirements and were not readable by those asked to sign.⁷¹ Two of the justices ruling in the case were up for re-election at the time,⁷² and each voted as might have been predicted by the party that nominated them. The proposal passed by a wide margin and ultimately created a state constitutional right to abortion.⁷³

In 2023, attention turned to the state of Ohio, which saw not one but two ballot measures relevant to abortion. In August 2023, legislators used their referendum power to approve and send to the voters a measure that would require a 60% supermajority to amend the state constitution.⁷⁴ Its scheduling was controversial because, only months earlier, the legislature itself had sharply limited such off-cycle scheduling.⁷⁵ The supermajority proposition was widely understood as motivated by a desire to defeat the abortion rights amendment measure that would appear on the November ballot, and was debated as such a proxy measure.⁷⁶ It was defeated by a margin of 57–43%, with “no” votes carrying the day.⁷⁷ Voters reached the same bottom line result in November when they approved the abortion rights amendment to the state constitution; this time, it was “yes” votes that carried by an almost-identical margin.⁷⁸

Since *Dobbs*, Republican legislators have apparently taken note of where public opinion appears to be, even in red states. As of May 2024, no constitutional referenda explicitly opposing abortion rights had been placed on the ballot in any state for 2024, though there have been proposals in a few states.⁷⁹ If anti-abortion rights legislatures hold back on advancing measures of this kind, it will mark some change from recent history. The Kansas and Kentucky referenda in 2022 were presumably drafted with an expectation that the electorates in those

70. *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W. 2d 854, 854 (Mich. 2022).

71. *Id.* at 854–55.

72. Andrew Demillo, *Abortion Ruling Intensifies Fight Over State Supreme Courts*, AP NEWS (Sept. 30, 2022, 11:11 AM), <https://apnews.com/article/abortion-2022-midterm-elections-legislature-illinois-5d9a6dd81dedd9355c0287b34ebb6c9f> [<https://perma.cc/FY3B-M5W5>].

73. *History of Abortion Ballot Measures*, *supra* note 7.

74. Nick Evans, *Ohio Lawmakers Send 60% Supermajority Amendment to the Ballot*, OHIO CAP. J. (May 11, 2023, 5:00 AM), <https://ohiocapitaljournal.com/2023/05/11/ohio-lawmakers-send-60-supermajority-amendment-to-the-ballot/> [<https://perma.cc/C97D-JNK4>].

75. *Id.*

76. Daniel Strauss & Jeff Zeleny, *Ohio Special Election Becomes Proxy for Abortion Rights Fight*, CNN (Aug. 8, 2023, 7:00 AM), <https://www.cnn.com/2023/08/08/politics/ohio-special-election-abortion-rights/index.html> [<https://perma.cc/6JM2-ZGHH>].

77. *Ohio Issue 1, 60% Vote Requirement to Approve Constitutional Amendments Measure (2023)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Issue_1_60%25_Vote_Requirement_to_Approve_Constitutional_Amendments_Measure_\(2023\)](https://ballotpedia.org/Ohio_Issue_1_60%25_Vote_Requirement_to_Approve_Constitutional_Amendments_Measure_(2023)) (last visited May 21, 2024) [<https://perma.cc/W4BF-RGH3>].

78. *Ohio Issue 1, Right to Make Reproductive Decisions Including Abortion Initiative*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Issue_1_Right_to_Make_Reproductive_Decisions_Including_Abortion_Initiative_\(2023\)](https://ballotpedia.org/Ohio_Issue_1_Right_to_Make_Reproductive_Decisions_Including_Abortion_Initiative_(2023)) (last visited May 21, 2024) [<https://perma.cc/W6TL-HNVH>]. Voters supporting access to abortion had to switch from a no to a yes vote on the second of these ballot propositions. *Id.* The virtually identical margins suggest that voters were not confused.

79. Iowa and Pennsylvania, for example, have seen proposals for constitutional referenda. *2023 and 2024 Abortion-related Measures*, BALLOTPEDIA, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures (last visited May 21, 2024) [<https://perma.cc/9GMP-J3W3>].

states would follow the lead of the voters in other red states that have, in recent years, used constitutional referenda to pass anti-abortion amendments. Before *Dobbs*, the voters in Tennessee, West Virginia, Alabama, and Louisiana all approved legislatively-referred constitutional amendments rejecting a right to abortion.⁸⁰

In contrast, it is now blue state legislatures that are pursuing pro-abortion rights constitutional referenda.⁸¹ Following the 2022 lead of California and Vermont, Maryland and New York voters will see a constitutional referendum on abortion rights in 2024.⁸² Public opinion in both states strongly favors abortion rights.⁸³ On the initiative side, several possible constitutional initiatives on abortion are in the early stages in a number of other states, with Florida having qualified its constitutional initiative to appear on the November 2024 ballot.⁸⁴

III. PARADOX AND IRONY

A. *Paradox*

As we saw in Table 1, the gap between public opinion and abortion policy in many states is stark. Most states show majority support for making abortion “lawful in all or most circumstances,” yet more than half the states fall into the “most” restrictive, “very restrictive,” or “restrictive” category of abortion laws under the Guttmacher taxonomy.⁸⁵ If we focus more specifically on the sixteen states with the “most restrictive” abortion laws, we see no more than 27% support for a ban, and often much lower, along with evidence of significant support in most of these states for access to abortion in all or most circumstances.⁸⁶

Only seven of these “most restrictive” states provide for constitutional initiatives.⁸⁷ And in one of them—Mississippi—the state supreme court sidelined the state’s initiative process in 2021 based on a technical problem,⁸⁸ so only six of these states currently allow for constitutional initiatives: Arkansas, Florida,

80. Becky Sullivan, *With Roe Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR (June 29, 2022, 5:00 AM), <https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions> [https://perma.cc/BUB2-KU95].

81. *2023 and 2024 Abortion-related Measures*, *supra* note 79.

82. *Id.*; *History of Abortion Ballot Measures*, *supra* note 7; *2024 Abortion-related Ballot Measures and State Context*, BALLOTPEdia, https://ballotpedia.org/2024_abortion-related_ballot_measures_and_state_context (last visited May 14, 2024) [https://perma.cc/L89G-DQQ2].

83. *See supra* Table 1.

84. *See 2024 Abortion-Related Ballot Measures*, *supra* note 82. Several efforts for 2024 are reviewed in Rachel M. Cohen, *The Next Wave of Abortion Rights Ballot Measures Looks Different from the Last*, VOX (July 12, 2023, 6:00 AM), <https://www.vox.com/policy/23784409/abortion-ballot-measure-ohio-reproductive-rights-2024> [https://perma.cc/J2CJ-8BRL].

85. *See supra* Table 1.

86. *See supra* Table 1.

87. *See infra* Appendix.

88. The 1992 amendment to the state constitution requires that signatures for initiatives be gathered from all five congressional districts in the state. Initiative Measure 65: *Mayor Butler v. Watson*, 338 So.3d 599, 609 (Miss. 2021) (citing MISS. CODE ANN. § 23-15-1037 (amended 2022)). On that basis, the state’s high court suspended the initiative process. *Id.* at 615.

Missouri, North Dakota, Oklahoma, and South Dakota.⁸⁹ In the other ten “most restrictive” states, the referendum is the only route to a ballot measure on abortion rights.⁹⁰

The public opinion gap in many states with restrictive abortion laws owes, at least in part, to the combination of gerrymandering and stark partisan sorting that has shaped federal and state political institutions in recent years.⁹¹ In the context of winner-take-all legislative elections, those forces can lead to state legislatures that simply do not reflect majority will and that have structural insulation from political accountability to the statewide electorate.⁹² Miriam Seifter has explored the rise of such “countermajoritarian state legislatures”—bodies that are controlled by a party that is either in the statewide popular minority or that benefits from a degree of control disproportionate to its thin statewide majority.⁹³

In theory, direct democracy is well situated to respond to this problematic state of political affairs and to realign public opinion and policy on abortion in these states. Ballot measures can fight the tides of partisanship and polarization that generate this gap through an intriguing mixture of aggregation and disaggregation. The *aggregation* relates to deciding issues on a statewide basis, thus escaping the gerrymandering and partisan sorting that shapes the political geography of the state. The *disaggregation* relates to issues: allowing voters to decide on issues on an individual (retail) basis rather than the partisan package (wholesale) offered in candidate elections can change key political dynamics. It has at least the capacity to overcome affective polarization and tribalism by allowing voters to consider issues versus which team, red or blue, to support.

The paradox is this: In many of the states where direct democracy is most needed to align policy and public opinion on abortion, ballot measures are being most strenuously and steadily resisted by state legislatures. And that resistance is encouraged by the forces of partisan sorting and gerrymandering, which work to embolden these efforts by insulating legislators from electoral accountability for them.

This kind of legislative resistance to public opinion on abortion plays out differently in the context of referendum versus initiative. Consider referendum first. Recall that legislatively-referred constitutional amendments reflect the

89. See *supra* notes 87–88 and accompanying text.

90. See *supra* Table 1; *infra* Appendix.

91. See Seifter, *supra* note 18, at 1765; Karlan, *supra* note 18, at 2355. Leading underlying work on this phenomena includes ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 15 (2018); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 230 (2009); MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 4–5, 8 (2009); JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 175–96 (2019).

92. In the context of abortion policy after *Dobbs*, these dynamics are deftly captured in David Landau and Rosalind Dixon, *Dobbs, Democracy and Dysfunction*, 2023 *WIS. L. REV.* 1569, 1580–81 (2023). The authors include a table that matches states with the most restrictive abortion bans to the “gerrymandering threat level” of that state, based on a published index. Most of the states with highly restrictive abortion policies have high levels of gerrymandering threat. *Id.*

93. Seifter, *supra* note 18, at 1741, 1762–69.

dominant way that constitutions are amended in the states.⁹⁴ Every state in the country, with the exception of Delaware, provides for a constitutional referendum that requires voters to ratify constitutional changes already approved by the state legislature.⁹⁵ By contrast, fewer than one-third of states—eighteen in all, including Mississippi—also allow voters alone to change the constitution through the initiative process.⁹⁶ The procedures for legislatively-referred constitutional amendments are far more onerous than for initiative amendments. The referendum amendment must first be approved by the state legislature, sometimes in two separate sessions,⁹⁷ and in thirty-three of the forty-nine relevant states, it requires more than a simple majority at least once in the legislature.⁹⁸ Only after surviving what can be an imposing legislative gauntlet does the measure go to the voters for approval.

The key difference for our purposes lies in the threshold step of this gauntlet: the state legislature plays the role of gatekeeper. It must start the process by approving a constitutional amendment for the voters to ultimately approve. The ways in which this threshold legislative choice can function as a veto-gate is vividly illustrated in the post-*Dobbs* era. As we have seen, in the first few months after the case was decided, culturally conservative legislators in Kansas and Kentucky sent the voters anti-abortion constitutional referenda, and legislators did the same in Montana with a statutory referendum.⁹⁹ All three lost.¹⁰⁰ With the results of post-*Dobbs* ballot measures in those states and elsewhere in the country signaling to anti-abortion legislators that public opinion is not supportive of their views, referenda in states with restrictive abortion laws ground to a halt. Where public opinion is more supportive of abortion rights than legislative preferences, legislators in referendum-only states hold the power to block a public vote on an abortion-related amendment, and have thus far typically chosen to lock the gate.

To be sure, this gatekeeping power is part of the architecture of direct democracy. It reflects an apparent institutional choice to give legislators veto power over constitutional amendments they do not support. That choice might be seen as a feature, not a bug, and explained by concerns about the excesses of direct democracy. Indeed, some scholars have argued that a referendum poses fewer risks than an initiative because it brings with it the procedural safeguards of the legislative process.¹⁰¹ In a leading article, for example, Julian Eule distinguished between “substitutive” and “complementary” direct democracy, with the former

94. See *infra* Appendix.

95. For a summary of the relevant procedures in these states, see *Legislatively Referred Constitutional Amendment*, BALLOTPEdia, https://ballotpedia.org/Legislatively_referred_constitutional_amendment (last visited May 21, 2024) [<https://perma.cc/6A4T-ZWB9>].

96. See *infra* Appendix.

97. *Legislatively Referred Constitutional Amendment*, *supra* note 95.

98. *Id.*

99. Annie Gowen, *How Abortion Rights Organizers Won in Kansas: Horse Parades and Canvassing*, WASH. POST (Aug. 3, 2022), <https://www.washingtonpost.com/nation/2022/08/03/kansas-abortion-amendment/> [<https://perma.cc/6HZL-WVWG>].

100. *Id.*

101. Eule, *supra* note 20, at 1511.

referring to the initiative and the latter the referendum.¹⁰² Eule argued that special judicial scrutiny was required for the initiative but less frequently necessary in the context of referenda. In his view, the Madisonian safeguards and filters supplied by the legislative process made referenda less menacing by reducing the risk that popular majorities would tyrannize minorities or make ill-informed policy choices.¹⁰³

At the very least, however, the context provided by the post-*Dobbs* abortion debate shines a considerably less appealing normative light on the referendum. In states with restrictive abortion laws out of sync with public opinion, the agenda-setting power the referendum entrusts to legislators can function to reinforce the gap between their preferences on abortion and those of their constituents. And, constitutional referenda can problematically empower legislatures not only to set the agenda in this way, but, through a suite of tools, to try to strategically shape the public vote, such as by timing the election in ways perceived to favor the legislature's preferred outcome¹⁰⁴ and drafting language in a calculated way.¹⁰⁵

More importantly, recent history shows legislators actively using their referendum powers to try to suppress and undermine initiatives. Consider, for example, the August 2023 Ohio referendum to require a supermajority to pass initiatives referenced earlier.¹⁰⁶ I examine efforts like these at greater length below, but it is worth pausing to note that the referendum in these scenarios is not simply an alternative to the initiative, but a weapon legislators can deploy to *weaken* the initiative. They may be unsuccessful in persuading voters to go along, as the Ohio legislature was, but they have the power to set the agenda, as well as to time and frame the measure in ways favorable to their cause.¹⁰⁷ Under current political conditions, then, the referendum power can be harnessed to try to restructure the state's political processes in ways that advantage partisan actors. All of this suggests that the fact that the legislature is *given* the referendum power under a state constitution doesn't tell us whether using—or withholding—it in a particular way might be objectionable in terms of democratic theory.

Turning to the initiative itself, it is here that the paradox I have alluded to is clearest. Initiative states are those that permit the constitution to be changed with no legislative role. Since *Dobbs*, however, legislators in several such states have aggressively sought to impair the autonomy granted through the

102. *Id.* at 1510–13.

103. *Id.* at 1549.

104. As noted previously, the 2022 Kansas referendum on abortion rights and the 2023 Ohio referendum on requiring a supermajority to pass initiative amendments were both strategically timed for August votes. *See supra* notes 63–64 and accompanying text.

105. In the 2023 Ohio ballot measures, for example, supporters of abortion rights had to vote “no” on the August supermajority referendum, but yes on the November abortion rights initiative itself. *See discussion supra* Section II.D.

106. *See supra* note 74 and accompanying text.

107. *See supra* note 76–77 and accompanying text.

initiative.¹⁰⁸ To be clear, such attempts are by no means limited to abortion, nor did they begin as a response to *Dobbs*. Instead, they have intensified in recent years as the initiative process has delivered unlikely progressive policy victories in red or purple states, including marijuana legalization, Medicaid expansion, minimum wage increases, and election reform.¹⁰⁹ These attempts have been chronicled and explored in detail by John Dinan,¹¹⁰ Miriam Seifter, and Jessica Bulman-Pozen,¹¹¹ among others. As Dinan points out, efforts to undermine the initiative are not new.¹¹² Instead, they typically arise when there is a policy clash between the party controlling the legislature and the opposing party seeking a forum to press its agenda.¹¹³ But such efforts have become increasingly common, as well as brazen, and can be especially problematic when combined with aggressive attempts to entrench the in-party.¹¹⁴ Systematic 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.¹¹⁵ The idea that a possible future initiative will act as a “gun behind the door” instilling political fear in legislators does not, in other words, seem likely to operate robustly in this setting.¹¹⁶

Most pertinent for our purposes are the attacks on the initiative that have followed *Dobbs*. By spring 2023, for example, bills to limit the initiative process in some form or fashion had been introduced in a host of states with both an

108. Scott S. Greenberger, *As Abortion Measures Loom, GOP Raises New Barriers to Ballot Initiatives*, STATELINE (Feb. 15, 2023), <https://stateline.org/2023/02/15/as-abortion-measures-loom-gop-raises-new-barriers-to-ballot-initiatives/> [<https://perma.cc/6GTH-RLY2>]; see, e.g., Kate Zernike & Michael Wines, *Losing Ballot Issues on Abortion, G.O.P. Now Tries to Keep Them Off the Ballot*, N.Y. TIMES (Apr. 23, 2023), <https://www.nytimes.com/2023/04/23/us/republicans-abortion-voting.html> [<https://perma.cc/4ARW-GHNZ>].

109. See, e.g., Reid J. Epstein & Nick Corasanti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html> [<https://perma.cc/3ZNS-JLJ3>] (cataloguing the many recent measures launched as “part of a running campaign by conservatives to box out progressive policy efforts”).

110. John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Marijuana, Minimum Wage, Medicaid, Elections, and Gambling Initiatives*, 101 NEB. L. REV. 41 (2022).

111. Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 191, 192 (2023). Seifter and Bulman-Pozen have intriguingly argued that the systematic campaign to weaken the initiative might be seen, when motivated by improper purposes, to violate an underlying “right to amend” state constitutions that voters should be understood to have.

112. Dinan, *supra* note 110, at 60.

113. See *id.* at 61. See also John Matsusaka, *Direct Democracy Backsliding? Quantifying the Prevalence and Investigating Causes 1960-2022* (SSRN draft, Oct. 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522377 [<https://perma.cc/SS38-H9UD>] (tracing long lineage of such attempts and suggesting that partisan motivations are not the only ones explaining them).

114. A recent historical analysis found that recent Republican efforts to restrict ballot measures “far out-paced” earlier Democratic efforts motivated by anti-marriage equality measures and are especially likely when Republicans control all branches of government. See Kentiya Orange, Carrie Olson-Manning & Emma Olson Sharkey, *The Ballot Measure Wars*, DEMOCRACY DOCKET 17 (Aug. 2023), <https://www.democracymatters.com/wp-content/uploads/2023/08/The-Ballot-Measure-Wars-8.7.2023.docx.pdf> [<https://perma.cc/5QC7-UYV9>].

115. See *supra* note 91 and accompanying text.

116. See Lascher, et al., *supra* note 15 (tracing and questioning the “gun behind the door” view that is prominent in the literature on direct democracy).

initiative process and a Republican legislature.¹¹⁷ Arkansas, Florida, Idaho, Missouri, Mississippi, North Dakota, Ohio and Oklahoma all considered such proposals, with anti-abortion rights activists expressly citing the 2022 ballot measure results on abortion as a “wake up” call to move on this front.¹¹⁸ These bills took different forms, including measures designed to make the signature-gathering requirements more onerous, to raise the required margin of victory, and even to forbid abortion-related measures from appearing on the ballot.¹¹⁹ Not all of these bills succeeded, but a few examples of recent activity reflect the ways in which efforts to limit the initiative have advanced. For example, just as Ohio attempted to impose a new supermajority requirement in order to thwart the impending abortion rights measure, so in North Dakota, legislators have placed a legislatively-referred constitutional amendment on the 2024 ballot to raise the signature threshold for initiatives and to require the initiative to pass at both the primary and the next general election.¹²⁰ In Arizona, a legislative-referred constitutional amendment would make it significantly more difficult to qualify an initiated amendment by applying the signature requirement to each legislative district (including sparsely-populated and remote ones), rather than statewide.¹²¹

In Arkansas, it is legislation that has been used to try to circumvent the results of ballot measures in ways that throw the political dynamics into sharp relief. In 2020, the Arkansas voters rejected a constitutional referendum amendment that would have raised the number of counties in which signatures must be obtained from the existing fifteen to forty-five, as well as eliminated the “cure” period for signatures, among other things.¹²² In 2022, the voters again rejected a constitutional referendum, this time one to raise to 60% the required margin to pass a constitutional initiative.¹²³ That measure went down by a larger majority than the 2020 amendment; it lost by a 59–41% vote.¹²⁴ Despite having been rejected decisively twice by the voters, the state legislature nevertheless subsequently passed a *statute* in 2023 that increases the signature requirements from fifteen to fifty counties—more than the increase to forty-five counties that voters

117. Alice Miranda Ollstein & Megan Messerly, *Abortion on the Ballot? Not if These Republican Lawmakers Can Help It*, POLITICO, <https://www.politico.com/news/2023/03/19/abortion-on-the-ballot-not-if-these-republican-lawmakers-can-help-it-00087688> (Mar. 19, 2023, 4:21 PM) [<https://perma.cc/H8GA-8875>].

118. *Id.*

119. *Id.* The proposal to ban abortion-related initiatives was part of one designed to reintroduce the initiative in Mississippi. See *supra* note 88.

120. *North Dakota Constitutional Measure 2, Single-Subject Requirement for Initiatives and Require Constitutional Initiatives to Be Passed Twice Amendment (2024)*, BALLOTPEdia, [https://ballotpedia.org/North_Dakota_Single-Subject_Requirement_for_Initiatives_and_Require_Constitutional_Initiatives_to_be_Passed_Twice_Amendment_\(2024\)](https://ballotpedia.org/North_Dakota_Single-Subject_Requirement_for_Initiatives_and_Require_Constitutional_Initiatives_to_be_Passed_Twice_Amendment_(2024)) (last visited May 21, 2024) [<https://perma.cc/R3DC-NX4G>]. The amendment would also impose the single subject rule and raise the signature requirements.

121. *Arizona Signature Distribution Requirement for Initiatives Amendment (2024)*, BALLOTPEdia, [https://ballotpedia.org/Arizona_Signature_Distribution_Requirement_for_Initiatives_Amendment_\(2024\)](https://ballotpedia.org/Arizona_Signature_Distribution_Requirement_for_Initiatives_Amendment_(2024)) (last visited May 21, 2024) [<https://perma.cc/GQ4X-4UAW>].

122. *Arkansas 2020 Ballot Measures*, BALLOTPEdia, https://ballotpedia.org/Arkansas_2020_ballot_measures (last visited May 21, 2024) [<https://perma.cc/AW9Y-TU7G>].

123. *Arkansas 2022 Ballot Measures*, BALLOTPEdia, https://ballotpedia.org/Arkansas_2022_ballot_measures (last visited May 21, 2024) [<https://perma.cc/7HZ5-KCB5>].

124. *Id.*

rejected in the 2020 amendment.¹²⁵ The governor signed the measure into law, and it is now in effect, though subject to a court challenge.¹²⁶ Arkansas' tactic suggests that elected officials may be willing to rather boldly defy voters. Some tactics are less visible, but amount to the same basic plan. South Dakota offers an example. Voters in 2022 defeated a supermajority requirement for initiatives and subsequently voted to expand Medicaid over the objections of lawmakers.¹²⁷ In order to try to obstruct future ballot measures, legislators have imposed onerous requirements for signature gathering, including mandating that petitions used to collect signatures fit on a single page and use fourteen-point font, which leads to giant folded petitions that are cumbersome to carry.¹²⁸ This has been termed the "beach towel" effect.¹²⁹

Moreover, efforts to undermine the initiative process go beyond changing election rules in this way. After 57% of Ohio voters approved the abortion rights amendment in 2023, for example, state legislators threatened a bill to limit state court jurisdiction to enforce the law.¹³⁰ That effort was later quashed by legislative leadership, but executive action and judicial review still loomed as ways to limit the force of the initiative.¹³¹ Post-election efforts to weaken initiatives have been on display in the context of other issues, as illustrated by the Arkansas legislation described above, which imposed by statute what the voters had already turned down at the ballot box.¹³² Other examples are not hard to find. For example, in Missouri, the legislature and Governor refused to implement Medicaid expansion after voters passed it and held out until a state court ordered them to follow the initiative.¹³³ In Florida, voters in 2018 passed by the supermajority required in the state constitution an amendment that broadly re-enfranchised those who have been convicted of a felony.¹³⁴ That supermajority requirement will be in effect when the electorate votes on an abortion rights constitutional amendment in November 2024. But as the passage of the voting rights amendment in 2018 shows, the vote was not the end of the story. The legislature

125. John Lynch, *Secretary of State Files for Dismissal of Lawsuit Challenging Initiated Act Signature Requirement*, ARK. DEMOCRAT GAZETTE (May 13, 2023), <https://www.arkansasonline.com/news/2023/may/13/secretary-of-state-files-for-dismissal-of-lawsuit/> [https://perma.cc/C3K8-8MAB].

126. *Id.*

127. Jack Dura, *South Dakota Voters Asked to Approve Work Requirement for Medicaid Expansion*, AP NEWS (Feb. 27, 2024), <https://apnews.com/article/south-dakota-legislature-medicaid-expansion-3e10f0145f77f3a4f35bae63f8558e0f> [https://perma.cc/9HED-MVJ9].

128. Seth Tupper, *Republican-Backed Bills Complicate Citizen Lawmaking*, S.D. PUB. BROAD. (Mar. 26, 2021), <https://www.sdpb.org/blogs/politics-public-policy/republicanbacked-bills-complicate-citizen-lawmaking/> [https://perma.cc/VNJ7-4Z78].

129. *Id.*

130. Amanda Becker, *Ohio's Abortion Protections Take Effect, but the Fight Over Access Continues*, 19TH NEWS (Dec. 7, 2023, 1:02 PM), <https://19thnews.org/2023/12/ohios-abortion-protections-take-effect-issue-1-fight-access/> [https://perma.cc/9JTA-36JT].

131. *Id.*

132. See Lynch, *supra* note 125.

133. *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (Mar. 20, 2024), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [https://perma.cc/KH7T-8RUT] (explaining obstruction efforts in Missouri).

134. *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. J. (Aug. 7, 2023), <https://www.brennan-center.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [https://perma.cc/RNU9-VSKB].

substantially weakened the measure by enacting provisions for payment of fines that created practical and financial obstacles for ex-offenders to vote.¹³⁵ This effort survived a federal court challenge, and as a result, the amendment lost much of its force.¹³⁶ Along similar lines, voting rights advocates in Ohio have argued that the state legislature and certain Republican officials on a redistricting commission that was created by initiative acted to circumvent the initiative after it passed and drew partisan maps.¹³⁷

Judicial review in state court looms as a potential way to check efforts like these. There are numerous examples of state courts pushing back on attempts to undercut the initiative. For example, a lawsuit ended the obstructionist tactics in the Missouri example above, where elected officials had refused to enforce the ballot measure expanding Medicaid.¹³⁸ Similarly, the Missouri Supreme Court rejected an attempt by the state's Attorney General to prevent an initiative from qualifying by overriding the state Auditor's required fiscal note.¹³⁹ The Idaho Supreme Court recently rejected a legislative attempt to curtail the initiative by imposing onerous signature requirements.¹⁴⁰ Opponents of the Arkansas legislation circumventing the prior public votes against increasing the signature threshold have likewise sued in state court.¹⁴¹ And the Michigan Supreme Court rejected an attempt to bar that state's reproductive rights amendment from appearing on the ballot.¹⁴²

Yet, it is uncertain to what extent courts in the states will consistently rein in efforts of this kind. For one thing, legislatures in many of the same states that have resisted the initiative have also introduced a range of bills designed to limit judicial review, especially in connection with abortion. Some have apparently directly targeted judicial enforcement of abortion rights, either in the form pioneered by Texas S.B. 8 before *Dobbs* or through other means.¹⁴³ Others focus

135. Patricia Mazzei, *Ex-Felons in Florida Must Pay Fines Before Voting*, *Appeals Court Rules*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html> [https://perma.cc/J477-BSRL].

136. *Id.*

137. Jeremy Pelzer & Jake Zuckerman, *New Ohio Redistricting Ballot Proposal Would End Lawmakers' Map-Drawing Power*, CLEVELAND (Aug. 23, 2023, 3:36 PM), <https://www.cleveland.com/open/2023/08/new-ohio-redistricting-ballot-proposal-would-end-lawmakers-map-drawing-power.html> [https://perma.cc/QBD4-2YW9].

138. *Doyle v. Tidball*, 625 S.W.3d 459, 460 (Mo. 2021) (holding that the state must implement an initiative expanding Medicaid that elected officials had resisted).

139. See Rudi Keller, *Missouri Supreme Court Sets Hearing Date for Abortion Rights Petition Case*, MO. INDEP. (June 23, 2023, 4:52 PM), <https://missouriindependent.com/2023/06/23/missouri-supreme-court-sets-hearing-date-for-abortion-rights-petition-case/> [https://perma.cc/PB6F-8TWD] (noting that Attorney General had delayed process to qualify abortion rights initiative for the ballot by claiming an authority over required fiscal note that Auditor claimed was his prerogative alone); *Missouri ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 4 (Mo. 2023) (rejecting Attorney General's claim).

140. *Reclaim Idaho v. Denney*, 497 P. 3d 160, 160 (Idaho 2021) (rejecting burdensome signature requirements).

141. Lynch, *supra* note 125.

142. *Reproductive Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854, 854 (Mich. 2022).

143. For an overview of numerous recent bills of this kind, see Patrick Berry, Michael Milov-Cordoba, Douglas Keith & Alicia Bannon, *Legislative Assaults on State Courts—December 2022 Update*, BRENNAN CTR.

more generally on limiting the enforcement of judicial decisions, reducing judicial budgets, changing judicial selection, or altering judicial term limits. Most attempts of this kind, including the Ohio threat, have thus far been unsuccessful, but the recent proliferation of these bills signals what could open a new chapter in aggressive partisan maneuvering to undercut abortion rights and ballot measures more generally.¹⁴⁴

Another reason for uncertainty about the protective power of judicial review by state courts is that judges are elected in most states, including sixteen of the eighteen states that provide for constitutional amendments by initiatives.¹⁴⁵ That elected status could cut in opposite directions. On the one hand, elected judges who must face the voters might be unwilling to allow legislators to undercut the electorate's initiative powers. Former California Supreme Court Justice Otto Kaus famously said that a judge's need to both review ballot measures and face voters for re-election is like having a "crocodile in the bathtub" that one tries but struggles to ignore while shaving.¹⁴⁶ Other commentators have likewise observed that state judges are likely to be more deferential to voters than federal judges when reviewing initiatives because of their electoral "accountability to the public."¹⁴⁷

On the other hand, elected judges are likely to have links to the partisan regime of the state.¹⁴⁸ Indeed, all but two of the sixteen states that both allow constitutional initiatives and require judges to face voters have a partisan trifecta—that is, have legislative and executive branches controlled by the same party.¹⁴⁹ State judicial elections have themselves become increasingly polarized by partisanship in recent years.¹⁵⁰ Even in states that do not have explicitly partisan elections, partisan appeals, cues, and media framing abound.¹⁵¹ Consider

FOR JUST. (Dec. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2022-update> [https://perma.cc/DZ3L-FMGJ].

144. Melissa Quinn, *Ohio GOP Lawmakers Vow to Target State Judiciary After Passage of Issue 1 Abortion Measure*, CBS NEWS (Nov. 13, 2023, 8:55 AM), <https://www.cbsnews.com/news/ohio-abortion-issue-1-republicans-judiciary/> [https://perma.cc/829H-GT67]. For an overview of recent activity around the country, see Berry et al., *supra* note 143.

145. All but Florida and Massachusetts use some form of judicial election. See Jane S. Schacter, *Polarization, Nationalization and the Constitutional Politics of Supreme Court Elections*, 2022 WIS. L. REV. 1311, 1315–16 nn.24–27 (identifying mode of judicial election for state supreme court justices in the states that elect them).

146. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (2014).

147. See Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOYOLA L. REV. 1239, 1259 (1998) (collecting cases and finding federal courts more willing to invalidate initiatives than state courts); Eule, *supra* note 20, at 1584 (noting that it is "precisely the examination of voter action that puts elected judges at greatest risk").

148. See Schacter, *supra* note 145, at 1313.

149. *State Government Trifectas*, BALLOTPEdia, https://ballotpedia.org/State_government_trifectas (last visited May 21, 2024) [https://perma.cc/N4TR-ENY3]. Nine of these states have a Republican trifecta: Arkansas, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma and South Dakota. Five have a Democratic trifecta: California, Colorado, Illinois, Michigan, and Oregon. Arizona and Nevada provide for judicial elections but do not have a trifecta. Florida and Massachusetts do not elect judges but do have a trifecta—a Republican one for Florida and a Democratic one for Massachusetts.

150. See Schacter, *supra* note 145, at 1311.

151. *Id.*

the high-profile election in spring 2023 for control of the Wisconsin Supreme Court. After candidate Janet Protasewicz won, it was a common observation that “Democrats” had secured control of the court, even though candidates in that state do not run with any party identification.¹⁵² As is common in judicial elections, moreover, pro- and anti-abortion rights groups contributed significantly to opposing sides in that campaign.¹⁵³ Protasewicz, the winner, expressly said in ads that she supported “a woman’s freedom to make her own decision on abortion.”¹⁵⁴ That election, like many other state supreme court races, had many of the earmarks of an ordinary candidate election.¹⁵⁵ Consider, as well, the decision of the Michigan Supreme Court in September 2022 rejecting a procedural challenge that would have prevented the abortion rights initiative amendment from appearing on the ballot.¹⁵⁶ Justices in that state do not run with a partisan label, but are nominated by parties.¹⁵⁷ The fact that justices then standing for re-election voted as would have been predicted by the party that nominated them was noted in media coverage of the high-profile decision.¹⁵⁸

In a recent analysis of state supreme court elections, James Gibson and Michael Nelson underscored the partisan links between courts and elected officials. They found a correlation between one-party control of the political branches and that same party holding a majority on the state supreme court.¹⁵⁹ They concluded that judicial elections can work to keep all of a state’s “institutions on the same partisan page.”¹⁶⁰ Links between state courts and partisan politics do not definitively tell us how aggressive these courts will be in protecting judicial independence. At the very least, though, the ways in which judicial elections have become

152. Kyle Kondik & J. Miles Coleman, *With Protasewicz Win, Democrats Flip the Wisconsin Supreme Court*, SABATO’S CRYSTAL BALL (Apr. 5, 2023), <https://centerforpolitics.org/crystalball/articles/with-protasewicz-win-democrats-flip-the-wisconsin-supreme-court/> [<https://perma.cc/U52J-PKJS>]; see also Susan Milligan, *Democrats Win Big in Wisconsin Supreme Court Race, Chicago Mayoral Contest*, U.S. NEWS & WORLD REP. (Apr. 5, 2023, 9:56 AM), <https://www.usnews.com/news/elections/articles/2023-04-05/democrats-win-big-in-wisconsin-supreme-court-race-chicago-mayoral-contest> [<https://perma.cc/ZT2X-LT8T>].

153. On the Wisconsin Supreme Court election, see Alex Ebert, *Abortion Ads Help Drive Most Expensive Court Race in US History*, BLOOMBERG GOV’T (Mar. 24, 2023, 5:06 AM), <https://about.bgov.com/news/abortion-ads-help-drive-most-expensive-court-race-in-us-history/> [<https://perma.cc/U994-2WEP>] (noting high spending by pro- and anti-abortion rights groups). See Schacter, *supra* note 145, at 1311.

154. Joseph Ax & Daniel Trotta, *With Abortion Rights in the Balance, Wisconsin Elects Liberal to Supreme Court*, REUTERS (Apr. 5, 2023, 5:04 PM), <https://www.reuters.com/world/us/with-abortion-balance-wisconsin-voters-choose-new-high-court-judge-2023-04-04/> [<https://perma.cc/CVY3-6N8B>]; see also Sara Burnett, Todd Richmond & Harm Verhuizen, *Abortion Issue Helps Fuel Protasewicz Victory in Wisconsin Supreme Court Race*, PBS WIS. (Apr. 5, 2023), <https://pbswisconsin.org/news-item/abortion-issue-helps-fuel-protasewicz-victory-in-wisconsin-supreme-court-race/> [<https://perma.cc/A2E6-6G9E>] (quoting Marquette political scientist Charles Franklin as saying: “Abortion was very salient. You look at the content of (Protasewicz’s) campaign and how clear her position was and the results being lopsided, it certainly points to that as a key driver.”).

155. See Schacter, *supra* note 145, at 1311.

156. See *id.* at 1315.

157. See Demillo, *supra* note 72.

158. See *id.*

159. JAMES L. GIBSON & MICHAEL J. NELSON, *JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS* 186, 186–92 (2021).

160. *Id.* at 192.

more like ordinary elections raises questions about the insulation of state courts from the efforts of political actors to rein in initiatives on abortion and beyond.¹⁶¹

B. Irony

The fracture between public opinion and legislative preferences in abortion-restrictive states has implications that reach beyond the efficacy and potential of direct democracy. It also reflects a striking irony that relates to judicial review—of both ballot measures and ordinary legislation. I focus on two facets of this irony.

The first is that it is abortion, of all issues, that has taken center stage in political efforts to resist public opinion and thwart public policy preferences. No case better captured anxieties and attacks rooted in the so-called “countermajoritarian difficulty” than *Roe*. Like *Brown v. Board of Education*¹⁶² in its time, *Roe*, over time, became shorthand for a certain style of attack on judicial review that castigated judges for illegitimate policymaking in the guise of constitutional law.¹⁶³ The linchpin of this claim is that democratic processes should decide abortion policy. Conspicuously, however, it is those most in sync with this critique of *Roe* who today are seeking to thwart or avoid ballot measures on the issue.

The battle against *Roe* as a countermajoritarian menace was a prominent part of the decades-long campaign to overrule the case. Failed Supreme Court nominee and conservative icon Robert Bork was among those most prominently lambasting *Roe* on this basis, calling it “the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century.”¹⁶⁴ When the Court declined to overrule *Roe* in *Casey*, Justice Antonin Scalia similarly lamented the Court’s “almost czarist arrogance”¹⁶⁵ and proclaimed that the “Imperial Judiciary lives.”¹⁶⁶ Indeed, Justice Alito’s majority opinion in *Dobbs* was premised on a similar view of *Roe*.¹⁶⁷ It began by quoting Justice Byron White’s claim in his *Roe* dissent that the decision was an “exercise of raw judicial

161. *See id.* at 187.

162. 347 U.S. 483, 486 (1954).

163. Criticisms of this sort were more likely to come from the right than the left, but over time, observers from both sides lamented aspects of *Roe* on institutional grounds, with left leaning critics principally lamenting the backlash they thought it caused. For a review of the various attacks on *Roe*, and skepticism about them, see generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 374, 374 (2007). It was by no means inevitable that *Roe* would become a symbol of the countermajoritarian difficulty. For an account stressing the ways in which this framing strategically evolved only after earlier attacks failed, see generally Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024).

164. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 116 (1990).

165. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

166. *Id.* at 996.

167. *See* discussion *infra* notes 167–68 and accompanying text.

power,”¹⁶⁸ and ended by lamenting that *Roe* and *Casey* had “arrogated” authority properly belonging to “the people and their elected representatives.”¹⁶⁹

The irony is unsubtle, and the institutional implications relatively clear. In the context of post-*Dobbs* abortion debates, the moniker “countermajoritarian” is better affixed to many abortion-restricting state legislatures than to courts. Indeed, in this respect, post-*Dobbs* ballot measures on abortion, and the resistance to them in several states, throw into relief the “countermajoritarian legislatures” identified by Seifter.¹⁷⁰ The misalignment of public opinion and policy, and the vigorous attempts by legislatures to subvert ballot measures, underscore the ways that this switch has influenced the broader political ecosystem that shapes constitutional law. It is not unelected judges today, but elected officials, who in many states seek to thwart democratic resolution of the abortion debate.¹⁷¹

In states where voters’ only recourse to eliminate a restrictive abortion law is via a constitutional referendum, the state legislature has an easy path to doing so; it can simply refuse to let voters have their say on a constitutional amendment. In states where a constitutional initiative is possible, the legislature’s ability to maintain countermajoritarian policy is less assured, so legislators have had to use a more active and aggressive toolkit to marginalize public opinion. As we have seen, the tools for doing so include using the referendum to try to weaken the initiative or enacting legislation to burden the qualification requirements or required victory margin for initiatives.¹⁷² And, as we have also seen, there might be another tool deployed to the same end: legislative attempts to sideline state courts in applying constitutional initiatives passed by the voters.¹⁷³

This irony, moreover, is underscored by comparison to another recent episode in which ballot measures played a central role in responding to a contentious social issue with constitutional dimensions. For a decade and a half, direct democracy played a central role in the battle over same-sex marriage. The national debate was ignited by a 1993 decision by the Hawaii Supreme Court that seemed likely to legalize same-sex marriage.¹⁷⁴ A massive backlash ensued, and intensified once the Massachusetts Supreme Judicial Court did, in fact, recognize marriage equality under the state constitution in 2003.¹⁷⁵ Over time, voters in thirty-one states approved such constitutional amendments.¹⁷⁶

These similarities notwithstanding, there are significant points of contrast. Many of the anti-marriage equality amendments were referenda, as opposed to

168. *Dobbs*, 597 U.S. at 228 (quoting *Roe v. Wade*, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

169. *Id.* at 302. For a trenchant analysis of this theme in the *Dobbs* majority opinion, and its roots in decades of political debate, see generally Murray & Shaw, *supra* note 163 (noting the centrality of the “democratic deliberation” argument to the *Dobbs* opinion and tracing its evolution).

170. Seifter, *supra* note 18, at 1734.

171. *See id.* at 1735.

172. *See* discussion *supra* Section III.A.

173. *See* discussion *supra* Section III.A.

174. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

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

176. Jane S. Schacter, Commentary, *What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice-Versa)*, 52 HOUS. L. REV. 1147, 1156 (2015).

initiatives, because there was nothing like the gap between legislative preferences and public opinion that shapes post-*Dobbs* abortion policy. For much of the time between 1998–2012, when anti-marriage equality constitutional amendments were passing frequently at the ballot box, legislators and voters were aligned in their views.¹⁷⁷ Direct democracy was not needed to bend legislators to the public will.

A second contrast to the post-*Dobbs* ballot measures is that the same-sex marriage debate was characterized by the *same* kind of institutional struggle waged by foes of *Roe*. Attacks on judicial activism were an animating part of the movement to bar marriage equality.¹⁷⁸ Activists opposed to the *Goodridge* ruling centered their attacks on “activist judge[s]” who “flout public opinion.”¹⁷⁹ The same theme was sounded by George W. Bush, who backed a proposed federal constitutional amendment to limit marriage in the midst of a reelection campaign, citing the need to act “because ‘activist judges’ had made aggressive efforts to redefine marriage.”¹⁸⁰ When Congress held hearings on Bush’s proposed amendment, they were titled “Judicial Activism v. Democracy.”¹⁸¹ In opposing same-sex marriage, cultural conservatives—today’s opponents of ballot measures protecting abortion rights—were waving the banner of popular sovereignty and championing the legitimacy of plebiscites to settle the same-sex marriage issue.¹⁸² Correspondingly, proponents of same-sex marriage and LGBTQ equality, who, as a matter of ideology and partisan preference, are far more likely to be sympathetic to abortion rights, were on the other side, pressing the case that ballot measures enable and embody “the tyranny of the majority.”¹⁸³ Such

177. *Id.* at 1154–58 (tracing rise of anti-marriage equality ballot measures, among other policy responses); 1162–70 (tracing trajectory of public opinion).

178. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1208 (2009).

179. *Id.*

180. *Id.*

181. *Id.*

182. See, e.g., Brief of Major Religious Organizations as Amici Curiae in Support of Respondents at 17, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14–556, 14–562, 14–571, 14–574), 2015 WL 1534341 (noting that “millions of voters” had cast ballots about same sex marriage and arguing that the “Constitution’s answer to factional politics and heated tensions over social issues is frank, robust debates and decision-making through legitimate democratic institutions, not judicial censorship”); Brief of 57 Members of U.S. Congress as Amici Curiae in Support of Respondents at 12–15, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14–556, 14–562, 14–571, 14–574), 2015 WL 1545072 (amicus brief on behalf of conservative members of the Congress calling for voters at the ballot box, not courts, to resolve the marriage issue).

183. Brief of Constitutional Accountability Center as Amici Curiae in Support of Petitioners at 2, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14–556, 14–562, 14–571, 14–574), 2015 WL 1057625 (addressing the fact that voters had enacted the anti-same sex marriage measures under review and arguing that “[p]reventing tyranny of the majority at the state level has been a consistent theme of our Constitution from the Founding on”) (citations omitted); Brief of Elected Officials and Former Officeholders of Michigan, Ohio, Kentucky, and Tennessee, and the Michigan and Ohio Democratic Parties, as Amici Curiae in Support of Petitioners at 15, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14–556, 14–562, 14–571, 14–574), 2015 WL 1022685 (“Our founding fathers were not devotees of untempered majority rule. They well ‘recogniz[ed] the occasional tyrannies of governing majorities.’”) (alteration in original). For a broader overview of how these the competing frames operated in the same-sex marriage debate, see JOSEPH MELLO, *THE COURTS THE BALLOT BOX AND GAY RIGHTS* 164 (2016). Reviewing the dynamics that shaped the debate, Mello concluded:

progressive skepticism about ballot measures harming disadvantaged groups and jeopardizing fundamental rights has been a mainstay in legal scholarship.¹⁸⁴ Strikingly, the abortion debate, like debates about the minimum wage, Medicaid expansion, and felon disenfranchisement, has at the very least challenged categorical assumptions about the ideological and political valence of ballot measures and, more generally, about who is helped and who harmed by initiative and referenda.

IV. CONCLUSION: THE COMING RECALIBRATION

The post-*Dobbs* era has occasioned a dramatic change of venue for the abortion debate. Elections have become ground zero, with ballot measures figuring especially centrally.¹⁸⁵ As we have seen, the arrival of these newly salient and newly consequential abortion plebiscites has unsettled longstanding institutional dynamics and revealed new ones.¹⁸⁶ I will close by suggesting that these new dynamics call for recalibrating longstanding debates about direct democracy and the constitutional politics of abortion more generally.¹⁸⁷

First, the issues explored here throw into relief questions about the kind of popular sovereignty facilitated by direct democracy. How should ballot measures be assessed in terms of legitimacy? A few decades ago, the wave of ballot measures rejecting same-sex marriage led cultural conservatives to praise the plebiscite and progressives to lament it as jeopardizing crucial constitutional values of autonomy and equality.¹⁸⁸ The tables have dramatically turned in the current abortion debate and have cast a different light on ballot measures.¹⁸⁹ Relatedly, the referendum has been traditionally praised by some as superior to the

Those on the right often construct romanticized nations of the common man as a repository of wisdom and a defender of core values” whereas those on the left tend to “believe that the majority has inherent biases against members of oppressed minority groups and that allowing a majority to vote directly on issues of minority rights will typically result in discriminatory laws.”

184. As previously noted, Derrick Bell and Julian Eule authored leading articles arguing that ballot measures are especially dangerous for politically disadvantaged groups because they permit voters, shrouded by the secret ballot, to enact measures that harm such groups, free from the kinds of deliberation, filters and Madisonian safeguards that apply to legislative measures. *See* discussion *supra* note 20 and accompanying text. Some political scientists have made findings that support the claim that direct democracy harms disadvantaged groups. *See, e.g.*, Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245 (1997) (finding that ballot measures undercutting civil rights passed at a higher rate than ballot measures generally); DANIEL C. LEWIS, *DIRECT DEMOCRACY AND MINORITY RIGHTS: A CRITICAL ASSESSMENT OF THE TYRANNY OF THE MAJORITY IN THE AMERICAN STATES* 29 (2013) (analyzing data and arguing that “direct democracy states are more likely to adopt an anti-minority policy like a same-sex marriage ban than states with purely representative democratic governments”). On the other hand, in the case of same-sex marriage, as public support rose, the risk posed by ballot measures receded. So the story cannot be understood solely in terms of direct versus representative democracy.

185. *See* discussion *supra* Section II.D.

186. *See* discussion *supra* Part III.

187. For generative work on the links between *Dobbs* and ideas of democracy, see generally Landau and Dixon, *supra* note 92; Murray & Shaw, *supra* note 163; and Nelson Tebbe, Essay, *Does Dobbs Reinforce Democracy?*, 108 IOWA L. REV. 2363 (2023).

188. *See* discussion *supra* Section III.B.

189. *See* discussion *supra* Section III.B.

initiative because it better strikes a balance between popular sovereignty and the deliberative safeguards offered by the legislative process.¹⁹⁰ But the current debate shines a harsh light on the referendum, as legislatures in states hostile to abortion have used it to deny voters a voice on the constitutional right to abortion and, more controversially, to push ways to weaken or limit the initiative.

Second, the rise of abortion plebiscites reveals new fault lines in debates about courts and judicial legitimacy. The terrain has shifted in fundamental ways. Before *Dobbs*, the constitutional debate about abortion was deeply intertwined with controversies about the appropriate power of unelected judges.¹⁹¹ Critics emphasized claims of judicial activism in their attack on *Roe* and lamented that the Supreme Court had taken the issue away from the people.¹⁹² Since *Dobbs*, however, it is the Supreme Court that has been attacked for activism in overruling longstanding precedent,¹⁹³ and opponents of abortion have been actively seeking to keep the issue from a decision by the people at the ballot box. This brand of countermajoritarianism implicates not classic questions of judicial activism versus judicial restraint, but issues of gerrymandering and larger questions of “democratic backsliding” in the states.¹⁹⁴

The rise of new anxieties about functionally unaccountable legislatures blocking popular will does not mean, however, that courts will or should drop entirely out of the debate. As we have seen, state courts have a vital role to play in direct democracy. They are commonly called upon to decide key questions, including whether a measure can appear on the ballot and with what language, and whether legislative alterations to the direct democratic process violate the state constitution. Likewise, state courts will be called upon to interpret and apply abortion rights measures that voters add to state constitutions. And they will decide questions like these in the bright public spotlight that accompanies abortion-related controversies. Because many of these judges are elected, however, debates about their legitimacy are likely to be framed very differently from the decades of controversy about the Supreme Court occasioned by *Roe* and traceable to the Warren Court. New questions are likely to shape this debate: How, if at all, should the fact that judges are elected affect debates about their decisions in relation to these issues and beyond? Is it meaningful or appropriate to expect elected judges to be responsive to public views of constitutional issues? If so, what form might such responsiveness take? If not, how should we think about judicial elections, which have, in general, become more partisan, high-profile contests that increasingly include explicit debates about constitutional issues, including abortion? It seems inevitable that some of these elections will become embroiled in the dynamics of partisan politics.

190. See discussion *supra* Section III.B.

191. See discussion *supra* Section III.B.

192. See discussion *supra* Section III.B.

193. See generally, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

194. See generally Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967 (2023) (developing a “state democracy index” and finding that Republican control of institutions of government to be associated with a reduction in several indicators of a healthy democracy).

In sum, debates about abortion in the context of direct democracy are likely to look very different than past debates. The new institutional dynamics that frame these debates will call upon observers to develop new metrics for assessing legitimacy. Let the recalibration begin.

APPENDIX: FORM OF DIRECT DEMOCRACY BY STATE

	Citizen Initiatives		Legislative Referendums		
	Constitutional	Statutory (direct or indirect)	Veto	Statutory	Constitutional
Alabama	N	N	N	N	Y
Alaska	N	Y	Y	N	Y
Arizona	Y	Y	Y	Y	Y
Arkansas	Y	Y	Y	Y	Y
California	Y	Y	Y	Y	Y
Colorado	Y	Y	Y	Y	Y
Connecticut	N	N	N	N	Y
Delaware	N	N	N	Y	N
Florida	Y	N	N	N	Y
Georgia	N	N	N	N	Y
Hawaii	N	N	N	N	Y
Idaho	N	Y	Y	Y	Y
Illinois	Y	N	N	Y	Y
Indiana	N	N	N	N	Y
Iowa	N	N	N	N	Y
Kansas	N	N	N	N	Y
Kentucky	N	N	N	Y	Y
Louisiana	N	N	N	N	Y
Maine	N	Y	Y	Y	Y
Maryland	N	N	Y	Y	Y
Massachusetts	Y	Y	Y	Y	Y
Michigan	Y	Y	Y	Y	Y
Minnesota	N	N	N	N	Y
Mississippi	Y	N	N	N	Y
Missouri	Y	Y	Y	Y	Y
Montana	Y	Y	Y	Y	Y
Nebraska	Y	Y	Y	Y	Y
Nevada	Y	Y	Y	Y	Y
New Hamp.	N	N	N	N	Y
New Jersey	N	N	N	N	Y
New Mexico	N	N	Y	Y	Y
New York	N	N	N	N	Y
No. Carolina	N	N	N	N	Y
North Dakota	Y	Y	Y	Y	Y
Ohio	Y	Y	Y	Y	Y
Oklahoma	Y	Y	Y	Y	Y
Oregon	Y	Y	Y	Y	Y
Pennsylvania	N	N	N	N	Y
Rhode Island	N	N	N	N	Y
So. Carolina	N	N	N	N	Y

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South Dakota	Y	Y	Y	Y	Y
Tennessee	N	N	N	N	Y
Texas	N	N	N	N	Y
Utah	N	Y	Y	Y	Y
Vermont	N	N	N	N	Y
Virginia	N	N	N	N	Y
Washington	N	Y	Y	Y	Y
West Virginia	N	N	N	N	Y
Wisconsin	N	N	N	N	Y
Wyoming	N	Y	Y	N	Y

