

**IS LIMITING ABORTION A PRETEXT FOR
OLIGARCHY?***

**ABORTION AND THE QUEST TO LIMIT CITIZEN-
INITIATED BALLOT RIGHTS IN OHIO**

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In the shadow of a ballot issue attempting to enshrine abortion rights in the Ohio Constitution, a supermajority of the Ohio legislature devised an intervening constitutional amendment which set a special election, despite having outlawed special elections earlier in the year. The intervening question before voters was whether to raise the threshold for constitutional amendments from fifty percent plus one to sixty percent. While the scheme was viewed by many as the supermajority’s way to stop the abortion rights amendment from becoming a constitutional right, there is an argument that using emotionally charged issues such as abortion is a pretext for schemes that would preserve and perpetuate oligarchic power.

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* “Oligarchy” has been defined as occurring when “governance, laws, and the administration of justice are determined by the interests of a single person or group of people.” *The Four Pillars of the Rule of Law*, LAW DICTIONARY, <https://thelawdictionary.org/article/four-pillars-rule-of-law/#:~:text=For%20a%20rule%20of%20law,fair%2C%20stable%2C%20and%20understandable> [https://perma.cc/9Y2E-C5XD].

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*Oligarchy is often a precursor to Aristotle's worst form of government, tyranny. Some demagogue will promise to attack the 'special interests' on behalf of the People, demanding the sacrifice of many freedoms to combat corruption.*¹

INTRODUCTION

The abortion debate over the last fifty years, beginning with *Roe v. Wade*,² followed by *Planned Parenthood v. Casey*,³ and culminating in *Dobbs v. Jackson Women's Health Organization*,⁴ has helped fuel a rigid, political polarization in the United States. Some state laws aimed at undermining *Roe* were resolved in *Casey*, and both were tested again and again in state and federal courts⁵ until *Dobbs* was decided by the United States Supreme Court, which ruled that states may regulate any aspect of abortion that is not protected by federal law.⁶

Since *Dobbs*, some states' highly conservative (and often, gerrymandered) legislatures have sought to ban abortion altogether or severely restrict it.⁷ Some of these states have seen the use of citizen-initiated ballot initiatives to enshrine abortion in their state constitutions, such as California, Michigan, and Vermont.⁸ In Kansas, voters rejected a ballot measure that would have amended the state's constitution to contain no right to an abortion.⁹ This was fueled by that state's supreme

1. James G. Wilson, *Noam Chomsky and Judicial Review*, 44 CLEV. ST. L. REV. 439, 459 (1996).

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

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

4. 142 S. Ct. 2228 (2022).

5. See, e.g., *In re Doe*, 19 S.W.3d 249 (Tex. 2000); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

6. *Dobbs*, 142 S. Ct. at 2283–84.

7. See William Brangham, *Conservative States Continue to Restrict Abortion Following Overturn of Roe v. Wade*, PBS NEWS HOUR (Sept. 15, 2022, 6:35 PM), <https://www.pbs.org/newshour/show/conservative-states-continue-to-restrict-abortion-following-overturn-of-ro-v-wade> [https://perma.cc/7YQD-RRQP].

8. Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES, <https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html> (Nov. 10, 2022).

9. Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR,

court ruling in 2019 that a pregnant woman’s right to personal autonomy is a state constitutionally protected right.¹⁰ Ohio now faces the choice of making abortion a state constitutional right in November 2023.¹¹ The use of statewide citizen-initiated ballot measures has allowed ordinary citizens to directly speak on this distinctly personal and controversial issue.

This Essay explores how Ohio legislators placed a proposed state constitutional amendment before the state’s voters at a special election held on August 8, 2023. The measure was an attempt to raise the passage percentage rate and petitioning requirements for citizen-initiated amendments to the state constitution—just months before an Ohio ballot issue election occurs on a proposed state constitutional amendment that would enshrine the right to an abortion in the Ohio Constitution.¹²

Since 1913, Ohio has offered its citizens three ways to speak by direct statewide balloting. Ohioans can, directly through their votes, amend the state’s constitution, propose legislation, or veto legislation.¹³ These processes are known as constitutional amendment, citizen-initiated legislation, and referendum, respectively.¹⁴ These rights appear at the outset of Article II of the Ohio Constitution, and they are described as powers reserved to the people. Article II provides “the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.”¹⁵

Additionally, the Ohio General Assembly may propose state constitutional amendments to the people.¹⁶ But before a proposal is placed

<https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/ZSV7-PS9W>] (Aug. 3, 2022, 2:18 AM).

10. See *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 471 (Kan. 2019).

11. Laura Gersony, *Ohio Abortion Access Amendment Will Appear on November Ballot, State Says*, ABC NEWS (July 25, 2023, 1:50 PM), <https://abcnews.go.com/Politics/ohio-abortion-amendment-gains-signatures-ballot/story?id=100711358> [<https://perma.cc/F3V8-UCDR>].

12. See Becca Damante, *What to Know About Ohio’s Special Election and Abortion Access*, CTR. FOR AM. PROGRESS (Aug. 3, 2023), <https://www.americanprogress.org/article/what-to-know-about-ohios-special-election-and-abortion-access/> [<https://perma.cc/3WL3-NYS9>].

13. OHIO CONST. art. II, § 1.

14. See *id.*

15. *Id.*

16. OHIO CONST. art. XVI, § 1.

on the ballot, it must pass both chambers of the general assembly by a three-fifths supermajority.¹⁷

The August 8, 2023 special election to change citizen access to amending the state constitution was one such measure, adopted as Senate Joint Resolution No. 2.¹⁸ The version of the joint resolution as introduced did not contain a specific election date, but rather concerned the substance of the proposed constitutional language change.¹⁹ By the time the proposal was adopted by the Ohio legislature for ballot placement, it mandated that it be considered at a statewide election to be held August 8, 2023.²⁰ The Ohio General Assembly had previously all but eliminated statutory special elections held in August, but in this measure prescribed such a date, not with legislation, but by joint resolution, contravening precedent interpreting the state constitution that joint resolutions could not be used to legislate. As described in a dissenting opinion on a challenge to the measure's mandated special election:

[W]hat the General Assembly has done is ignore the law. This, it cannot do. While the legislature could have repealed the prohibition on August special elections via legislation, it attempted to do so but failed. That failure speaks volumes. So instead, it simply adopted a joint resolution in direct violation of the law. But we have long held that “[t]he statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly.”²¹

Both the ballot language and the validity of holding the special election were challenged, and the election was upheld by the Ohio

17. *Id.* (“Either branch of the General Assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be filed with the secretary of state at least ninety days before the date of the election at which they are to be submitted to the electors, for their approval or rejection.”).

18. *See* S.J. Res. 2, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (as enrolled).

19. *See* S.J. Res. 2, 135th Gen. Assemb., Reg. Sess. (Ohio 2023) (as introduced).

20. Ohio S.J. Res. 2 (as enrolled).

21. *State ex rel. One Pers. One Vote v. LaRose*, No. 2023-Ohio-1992, slip op. at 40 (Ohio June 16, 2023) (Brunner, J., dissenting) (per curiam) (citations omitted) (quoting *State ex rel. Att’y Gen. v. Kinney*, 47 N.E. 569 (Ohio 1897)).

Supreme Court in a 4-3 vote.²² In a separate challenge, the ballot language was ordered modified by the high court.²³

Perhaps the most controversial part of the proposed amendment was raising the passage threshold from fifty percent plus one to sixty percent.²⁴ The measure also proposed tougher requirements for citizens to achieve ballot placement so that five percent of the required electors in each of Ohio's eighty-eight counties (as opposed to forty-four of the counties) had to sign the petition in order for the proposed constitutional amendment to be placed on the ballot; also, the current ten-day cure period for insufficient numbers of signatures would have been eliminated.²⁵

A concerted bipartisan coalition, "One Person One Vote," campaigned to publicize the proposed amendment's specifics. In one scissor-themed ad, One Person One Vote claimed the proposed amendment would "*shred*[]" citizens' rights.²⁶ Ohio's citizen-initiated constitutional amendments, an expressly and elementally reserved power to the people,²⁷ have existed since Ohio's last constitutional convention held in 1912.

On August 8, 2023, Ohioans voted in higher-than-expected numbers, and decided they liked what they had. They voted down the proposal forty-three percent to fifty-seven percent.²⁸ But, even though many of the backers and opponents of the proposed constitutional amendment campaigned for it as being about abortion, was this August special election really about abortion, or was this a means to another end: oligarchy?

Secretary of State Frank LaRose, who also prepares rules and instructions²⁹ for conducting statewide elections campaigned extensively

22. *See id.* at 8–9 (upholding the validity of the special election).

23. *State ex rel. One Pers. One Vote v. Ohio Ballot Bd.*, No. 2023-Ohio-1928, slip op. at 7–8 (Ohio June 12, 2023) (per curiam) (requiring certain ballot language changes).

24. *See* Ohio S.J. Res. 2, at 5 (as enrolled).

25. *See id.* at 3.

26. *See WATCH: Ohio One Person, One Vote Campaign Launches Ad Against Issue 1*, FAIRNESS PROJECT (June 27, 2023), <https://thefairnessproject.org/blog/2023/06/27/watch-ohio-one-person-one-vote-campaign-launches-ad-against-issue-1/> [<https://perma.cc/763J-UEJN>].

27. OHIO CONST. art. II, § 1.

28. Nick Evans & Megan Henry, *Ohio's Issue 1 Goes Down to Defeat*, OHIO CAP. J. (Aug. 8, 2023, 11:36 PM), <https://ohiocapitaljournal.com/2023/08/08/ohios-issue-1-goes-down-to-defeat/> [<https://perma.cc/XF3P-BWP2>].

29. OHIO REV. CODE ANN. §§ 3501.05(B)–(C) (West 2023).

in favor of adopting the amendment.³⁰ He further indicated that he would campaign “in opposition to the abortion rights constitutional amendment on the Nov[ember] 7 ballot.”³¹ Secretary LaRose serves as one of the state’s five separately elected statewide executive officeholders. He has justified his decision to enter the debate on the ballot issue he is responsible for administering by saying that he “is able to separate his official duties as secretary of state from his personal beliefs on issues.”³² Further, he has cited the fact he was reelected a year earlier and “other secretaries of state have been vocal on issues.”³³ Regarding State Issue 1 on Ohio’s August election ballot, Secretary LaRose opined:

A simple majority to pass a constitutional amendment, which has been in place in Ohio for 111 years, is “a terrible idea,” should never have been established that way and “should have been corrected a long time ago,” LaRose said. “Now we have the opportunity to finally right this wrong.”³⁴

Moreover, LaRose hailed the restrictive proposal for the August election as being one hundred percent about abortion.³⁵ Proponents for adoption of that August election ballot issue, including the secretary of state, retreated from this limited issue approach and then extolled the rubric of protecting the state constitution from out-of-state interests.³⁶ Proponents also postulated that the application of the restrictive proposal of the August election was a means to keep minors from getting abortions without parental consent and to curtail acceptance of transgender adolescents;³⁷ television commercials stoked parental fear of loss of control in these often emotionally charged situations.

30. David Skolnick, *LaRose Campaigns in Support of Issue 1*, WARREN TRIB. CHRON. (Aug. 3, 2023), <https://www.tribtoday.com/news/local-news/2023/08/larose-campaigns-in-support-of-issue-1/> [<https://perma.cc/FX84-MWF7>].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (emphasis omitted).

35. Morgan Trau, *Ohio Sec. of State LaRose Admits Making Constitution Harder to Amend is ‘100% About... Abortion,’* OHIO CAP. J. (June 5, 2023, 5:00 AM), <https://ohiocapitaljournal.com/2023/06/05/ohio-sec-of-state-larose-admits-making-constitution-harder-to-amend-is-100-about-abortion/> [<https://perma.cc/FQL8-MNGN>].

36. Ali Swensen & Samantha Hendrickson, *Out-of-State Funders Fuel Messaging Around Upcoming Ohio Ballot Measure with Abortion Rights Implications*, PBS NEWS HOUR (Aug. 7, 2023, 10:13 AM), <https://www.pbs.org/newshour/nation/out-of-state-funders-fuel-messaging-around-upcoming-ohio-ballot-measure-with-abortion-rights-implications> [<https://perma.cc/FQL8-MNGN>].

37. See Haley BeMiller & Jessie Balmert, *What Ohio Voters Need to Know About Parental Rights and the Issue 1 Debate*, CIN. ENQUIRER,

Republicans control supermajorities in both chambers of the Ohio General Assembly.³⁸ In the words of Republican Ohio Senate President Matt Huffman, “We can kind of do what we want.”³⁹ Huffman has exercised his power by refusing to bring to the floor a bill that would increase abortion access in Ohio.⁴⁰

In this context, it is worth raising and exploring the question of whether fights surrounding abortion, such as Ohio’s recent special election on the rights of citizens to amend their state constitution, are like a Trojan horse for raiding the principles of democratic self-governance in favor of a government of the few.

Perhaps emotional battles surrounding the abortion issue are intentionally aimed to mask the power grab taking place. Perhaps truly and strongly held beliefs about abortion—on either side of the issue—become conveniently weaponized for the aims of amassing and maintaining power. Regardless, the question remains: has the right of a person to have access to and make their own health care decisions become a pawn in a game for social and legal dominance by oligarchs who seek to concentrate power? People on both sides of the abortion issue must soberly see beyond the emotion often surrounding abortion. They must avoid the risk of losing the very mechanisms that permit the autonomy and self-determination at the heart of American democracy and which are inherent in the question of abortion.

In Ohio’s case, voters were able to see the issues involved for what they were and retain what they had reserved for themselves in the first instance more than a century ago—the power and autonomy of citizen-initiated amendments to the Ohio Constitution, or more innately, the inherency of the political power in the people. This Essay is an attempt to explore Ohio’s experience and inform other states in the doing.

<https://www.cincinnati.com/story/news/politics/2023/07/26/ohio-issue-1-parental-rights-at-center-of-vote-yes-ads/70469100007/> [<https://perma.cc/GC3G-ULG8>] (July 27, 2023, 10:03 AM).

38. Samantha Hendrickson, *Republicans Retain Veto-Proof Majority in Ohio House, Senate*, AP (Nov. 9, 2022, 12:53 AM), <https://apnews.com/article/us-supreme-court-ohio-legislature-religion-a53eae689ac8a0b73bb166c610b82c11> [<https://perma.cc/B3SQ-NWWH>].

39. Sam Levine, *The Election that Could Determine the Future of Democracy in Ohio*, GUARDIAN (Aug. 6, 2023, 8:00 AM), <https://www.theguardian.com/us-news/2023/aug/06/ohio-issue-1-vote-democracy-future-republicans> [<https://perma.cc/JBL9-SBZZ>].

40. See *id.*; Anna Staver, *Who’s Matt Huffman? The Lima Man Running the Show at the Ohio Statehouse*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/2022/05/19/meet-matt-huffman-the-lima-republican-who-runs-ohio/7269099001/> (May 20, 2022, 2:37 PM).

I. OHIO'S CITIZEN-INITIATED BALLOT ISSUES TO AMEND
THE STATE CONSTITUTION

A. *Strengths of Ohio Constitutional and Legal Requirements for
Citizen-Initiated Constitutional Amendments*

One of the strengths of Ohio's citizen-initiated amendment power is that it is specifically described in the Ohio Constitution as a "reserved power."⁴¹ This "reserved power" relates to language appearing at the beginning of the state constitution declaring, "*All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary*"⁴²

The relationship of the people of Ohio to their legislature is detailed in the next section: "The people have the right to assemble together, in a peaceable manner, to consult for their common good; *to instruct their representatives; and to petition the general assembly for the redress of grievances.*"⁴³

And to make it doubly clear, the people in their state constitution reserved all unstated powers to themselves: "This enumeration of rights shall not be construed to impair or deny others retained by the people; *and all powers, not herein delegated, remain with the people.*"⁴⁴ Thus, the power held by citizen-initiated ballot action to amend the constitution is superior to legislative power.⁴⁵

To illustrate its contemporary use, a challenge was filed before the Ohio Supreme Court in early June 2023 that the petition proposing the constitutional amendment to enshrine abortion in Ohio's constitution did not contain the text of constitutional sections and laws that would be

41. OHIO CONST. art. II, §§ 1, 1a.

42. OHIO CONST. art. I, § 2 (emphasis added).

43. OHIO CONST. art. I, § 3 (emphasis added).

44. OHIO CONST. art. I, § 20 (emphasis added).

45. See *State ex rel. Schorr v. Kennedy*, 9 N.E.2d 278, 281 (Ohio 1937) (Day, J., dissenting) ("In the writer's opinion, the question in this case is not whether the judiciary has a right to invade the legislative field, but whether the Legislature has the power, arbitrarily, to invade the reserved rights of the people to referendum. The authority extended to the General Assembly to enact laws to go into immediate effect is, by the Ohio Constitution, conditioned by the requirement that they be such as are 'necessary for the immediate preservation of the public peace, health or safety.' To safeguard against legislative invasion of the popular right to referendum, the Constitution was not satisfied with merely requiring a declaration of emergency, but expressly provided for a statement of reasons. This requirement was unquestionably intended as a check upon the Legislature to prevent the evil of legislative encroachment upon the right of referendum reserved to the people. This check should not be released by the courts.")

changed if the proposed amendment passed.⁴⁶ The Ohio Supreme Court, citing the people’s reserved power in the state constitution, among other reasons, struck down the challenge.⁴⁷

Historically, this reserved power had its genesis in 1912 when the difficulty in revising the state’s constitution was recognized and addressed at the state constitutional convention held that year. This is described in another opinion of the state’s high court as follows: “Part of the peculiar history of Ohio is that it was notoriously difficult to amend the Ohio Constitution in the 1800s and leading up to the 1912 Constitutional Convention.”⁴⁸

More than 175 years ago, the only way to revise Ohio’s constitution was by convention, but with the revisions made in the 1912 convention, additional means such as the citizen-initiative amendment process were made available.⁴⁹ The 1912 constitutional revisions themselves had to be adopted by a statewide vote such that the citizen-initiated constitutional amendment was approved in the 1912 election with 57.47% of the vote.⁵⁰ Thus, with the 1912 changes to Ohio’s state constitution, citizens reserved to themselves the powers of autonomy to amend their constitution, to propose legislation, and to effectively veto legislation through the referendum process.⁵¹

“Despite the heated and lengthy debates at the 1912 Convention,”⁵² Ohio’s constitutional initiative did not result in excessive numbers of amendments to Ohio’s constitution. “From 1912 to 2022, voters decided on 71 initiated constitutional amendments, approving 19 (26.76%) and rejecting fifty-two (73.24%). Less than one—0.65—initiated

46. *Giroux v. Comm. Representing the Petitioners*, 2023-Ohio-2786, ¶ 4 (per curiam).

47. *Id.* ¶¶ 2, 18.

48. *State ex rel. One Pers. One Vote v. LaRose*, No. 2023-Ohio-1992, slip op. at 27 (Ohio June 16, 2023) (Donnelly, J., dissenting) (citing 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1371 (1912) (“It was a mistake in the framers of the constitution of 1851, that they made that constitution too difficult to amend, and we have had to resort to various devices to get it amended.”)).

49. Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 311, 322 (2016).

50. Ryan Byrne, *Ohio Issue 1 Is the 270th Proposed Amendment to the Ohio Constitution Since the 1912 Constitutional Convention*, BALLOTPEdia NEWS (July 14, 2023, 10:38 AM), <https://news.ballotpedia.org/2023/07/14/ohio-issue-1-is-the-270th-proposed-amendment-to-the-ohio-constitution-since-the-1912-constitutional-convention/> [<https://perma.cc/G6JK-MB9Y>].

51. See OHIO CONST. art. II, §§ 1a–1e.

52. Steinglass, *supra* note 49, at 312.

constitutional amendment appeared on a ballot each year on average. The average vote on an initiated amendment was 42.79% to 57.21%.”⁵³

B. Weaknesses of Ohio Constitutional and Legal Requirements for Citizen-Initiated Constitutional Amendments

Over time, the greatest weakness of Ohio’s constitutional provisions for these citizen-initiated measures has become the power given to the Ohio General Assembly to enact legislation to facilitate, but not limit or restrict, the initiative under Article II, Section 1g: “The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.”⁵⁴

According to Professor Steven Steinglass, “[f]earful of meddling by the General Assembly, the delegates [of the 1912 constitutional convention] made the provisions of the initiative ‘self-executing.’”⁵⁵ But over time, the legislature has added requirements, making the initiative process more technical and some would say more onerous and burdensome. In 2016, the Ohio Supreme Court discussed whether legislation requiring certain preliminary steps involving pre-circulation reviews by the Ohio attorney general and the Ohio Ballot Board, which essentially cut into time for petition circulation, limited or restricted the constitutional initiative powers reserved to the people in Ohio.⁵⁶ The high court stated that a “statute facilitates the initiative process if the purpose of the requirement is ‘not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the process.’”⁵⁷

The Ohio Supreme Court relied in part on a state appellate decision that reasoned that such requirements “‘arguably help[] potential signers understand the content of the law more efficiently’ . . . and deter[] fraud

53. Byrne, *supra* note 50. A thorough description of the history and requirements of Ohio’s constitutional initiative process is made by Steven Steinglass. His article focuses on the history of constitutional revision and its requirements in Ohio. *See generally* Steinglass, *supra* note 49. State Issue 1 is the only attempt to amend that process since Professor Steinglass’s article was published in 2016. For a statistical history of ballot issue results in Ohio, see *List of Ohio Ballot Measures*, BALLOTPEdia, https://ballotpedia.org/List_of_Ohio_ballot_measures [<https://perma.cc/BVE9-VRZL>].

54. OHIO CONST. art. II, § 1g.

55. Steinglass, *supra* note 49, at 311.

56. *State ex rel. Ethics First—You Decide Ohio Pol. Action Comm. v. DeWine*, 66 N.E.3d 689, 691, 693 (Ohio 2016) (per curiam).

57. *Id.* at 693 (quoting *In re Protest Filed with Franklin Cnty. Bd. of Elections*, 551 N.E.2d 150, 154 (Ohio 1990)).

by circulators who might misrepresent the effect of the law.”⁵⁸ But such “legislative facilitation” seems to have eroded the people’s reserved power over time.

The people of Ohio, in exercising their inherent political power, have on numerous occasions since 1913 used statewide initiatives and referenda to effect the change they wish to see in their government,⁵⁹ having reserved that power to themselves in the state’s Constitution since the 1912 state constitutional convention.⁶⁰ The process of statewide petition drives resulting in statewide ballot measures that either propose laws, stop laws from taking effect, or amend the very document from which Ohio government flows (the Ohio Constitution), has evolved to become a highly technical process: laws enacted to facilitate the process and constitutional amendments proposed by legislature joint resolution and adopted by Ohio voters have added many more steps to ballot access.⁶¹ This writer has suggested that Ohio voters should, through further initiated constitutional amendment, “curb the power of the legislature to restrain their efforts through onerous and oppressive legislation that effectively curbs ballot-issue access in the expression of their freedoms of self-governance.”⁶²

This opinion was expressed largely in the context of the Ohio legislature having gone so far as to repeal legislation that was the subject of a successful referendum petition drive before it could be placed on the ballot for voters to consider. According to Gregory T. Moore, in 2011, the Republican-led Ohio General Assembly passed “a draconian voter suppression bill, HB 194 that rolled back most of the recent reforms enacted by the previously Democratic-controlled legislature.”⁶³ Moore, who had been the campaign manager of a signature drive effort known as Fair Election Ohio, described the effort as “a broad-based coalition

58. *Id.* at 694 (first quoting *Schaller v. Rogers*, 2008-Ohio-4464, ¶ 46 (Ct. App.); then citing *Schaller*, 2008-Ohio-4464 at ¶ 47).

59. See OHIO SEC’Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS, INITIATED LEGISLATION, AND LAWS CHALLENGED BY REFERENDUM, SUBMITTED TO THE ELECTORS (2023), <https://www.ohiosos.gov/globalassets/elections/historical/issuehist.pdf> [<https://web.archive.org/web/20230728124043/https://www.ohiosos.gov/globalassets/elections/historical/issuehist.pdf>].

60. *Id.*

61. See OHIO CONST. art. I, § 1g. See also *Laws Governing the Initiative Process in Ohio*, BALLOTEDIA, https://ballotpedia.org/Laws_governing_the_initiative_process_in_Ohio [<https://perma.cc/5DND-DL3H>].

62. *League of Women Voters v. Ohio Redistricting Comm’n*, 192 N.E.3d 379, 428–29 (Ohio 2022) (Brunner, J., concurring).

63. GREGORY T. MOORE, BEYOND THE VOTING RIGHTS ACT 187 (2022). See also H.B. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

[that] included the Ohio chapter of the Obama for America (OFA) grassroots organization labor leaders, clergy, civil rights, and other advocacy groups.”⁶⁴ Moore explains:

The repeal effort gained support in every region of the state, both urban and rural including deep red counties that had strong republican support. After gaining the necessary 303,000 signatures to get the measure repealed by voters, the republican legislature repealed most of the provisions of its own law in early 2012 fearing a backlash at the polls in November. It marked the first time in Ohio history that a bill subject to a referendum was repealed by the legislature before taking effect.⁶⁵

When adopted legislation is subject to a referendum, its effective date is delayed by the successful filing of the referendum petition “until and unless” it is approved by a majority of the voters at the election upon which ballot issue it is placed.⁶⁶ Thus, to avoid a vote on H.B. 194 by Ohio’s electorate, the legislature “repealed” H.B. 194 before most of its parts ever become effective.

Terri L. Enns of the Ohio State University Moritz College of Law considered the effect of this highly unusual step taken by the Ohio General Assembly:

If, once a referendum process is underway, the General Assembly can defeat the purpose of the referendum by reenacting the same language in subsequent legislation or by repealing the bill, what is the actual power of referendum? The Ohio Supreme Court recently wrote of the significance of the people’s referendum power as “‘of paramount importance . . . , a means for direct political participation, amounting to a veto power, over enactments of representative bodies.’” Permitting the legislature to render that power ineffective by simply re-passing legislation or repealing the

64. *Id.*

65. *Id.*

66. OHIO CONST. art. II, § 1c (“The second aforesated power reserved by the people is designated the referendum, . . . upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the General Assembly. . . . [N]o such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same.”)

challenged bill seems to demote the referendum from its “paramount” status.⁶⁷

She posited that the legislature could later reenact portions of the law contained in H.B. 194—and it did.⁶⁸

As discussed in *Giroux v. Committee Representing the Petitioners*,⁶⁹ opponents of the upcoming abortion amendment vote challenged its ballot placement because the petition for it did not make known which laws and constitutional provisions would be changed by its passage.⁷⁰ This case illustrates yet another attempt to elevate legislative power above the reserved rights of the people to propose by initiative petition amendments to the state constitution. Yet, in the age of judicial textualism and originalism, focusing on original public meaning,⁷¹ this is not surprising. Harkening back to when Ohio adopted its first constitution in 1803, its makers rejected a strong executive branch “in favor of what could fairly be called a system of legislative supremacy.”⁷² In fact, the beginnings of legislative power were so great that the general assembly appointed the secretary of state, the state treasurer, the state auditor, and all judges except justices of the peace; it also had unrestricted power to apportion seats in the general assembly, certain powers to fix the number of seats in each chamber, and the power to create new counties.⁷³ Its power over the judiciary was more indirect:

[T]he Supreme Court was effectively hobbled by circuit-riding responsibility that required it to hold court annually

67. Terri L. Enns, *Thoughts on HB 194 and Ohio’s Referendum Process*, OHIO ST. UNIV.: ELECTION L. @ MORITZ (Apr. 3, 2012), <https://law.osu.edu/electionlaw/comments/index.php?ID=9075> [<https://perma.cc/J84G-38U8>] (cleaned up) (quoting *State ex rel. LetOhioVote.org v. Brunner*, 916 N.E.2d 462, 470 (Ohio 2009)).

68. See, e.g., Substitute S.B. 47, 130th Gen. Assemb., Reg. Sess. (Ohio 2013) (enacting amendment to OHIO REV. CODE ANN. § 3519.16 with the same language from H.B. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), that was repealed by Substitute S.B. 295, 129th Gen. Assemb., Reg. Sess. (Ohio 2012), relating to jurisdiction over challenges to petitions circulated pursuant to OHIO CONST. art. II, § 1g).

69. 2023-Ohio-2786 (per curiam).

70. *Id.* ¶ 4.

71. See generally Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 124. For distilled, more lay person’s definitions of constitutional originalism and textualism, see James Burling, *What Is the Difference Between Originalism vs. Textualism vs. Living Constitutionalism?*, PAC. LEGAL FOUND. (Apr. 27, 2022), <https://pacificlegal.org/originalism-vs-textualism-vs-living-constitutionalism/> [<https://perma.cc/BJS3-JBNL>].

72. Steinglass, *supra* note 49, at 290.

73. *Id.*

in each county. Such a requirement might have been appropriate in 1802 in a rural state that had nine counties, but (as soon became apparent) it would not work for a rapidly growing state in which the General Assembly had broad power to create new counties.⁷⁴

*C. The Effects of Gerrymandering on Citizen-Initiated
Constitutional Amendments*

Gerrymandering⁷⁵ is a handy tool for creating and preserving an oligarchy. In Ohio, it has worked well toward that end. Circumstantial evidence such as “core retention data,” essentially ignoring demographic shifts between a previously declared unconstitutional plan and a new, remedial plan, may demonstrate evidence of legislative intent to preserve the features of a previously unconstitutional district.⁷⁶ A United States District Court cited an instance where “the Supreme Court affirmed the rejection of a remedial plan where the districts ‘retain[] the core shapes of districts that [the trial court] had earlier found to be unconstitutional.’”⁷⁷

The “new” district borders may be found to have been drawn for “incumbency protection.”⁷⁸ And even when non-racial criteria, “such as political considerations, [identifying] where they had invested substantial district resources, and where candidates reside” have been offered as the basis for using core retention data, those stated considerations have been found to have “the impact of perpetuating, rather than completely correcting, the constitutional infirmities of the Enjoined Plan.”⁷⁹ The federal court that rejected these considerations also briefly discussed the

74. *Id.* (footnotes omitted). Ohio now has eighty-eight counties.

75. *Black’s Law Dictionary* defines “gerrymandering” as “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” *Gerrymandering*, BLACK’S LAW DICTIONARY (11th ed. 2019). *See also Adams v. DeWine*, 195 N.E.3d 74, 76 (Ohio 2022) (“Gerrymandering is the antithetical perversion of representative democracy. It is an abuse of power—by whichever political party has control to draw geographic boundaries for elected state and congressional offices and engages in that practice—that strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party.”).

76. *GRACE, Inc. v. Miami*, No. 1:22-CV-24066, 2023 WL 4853635, at *10 (S.D. Fla. July 30, 2023) (citing *Jacksonville Branch of the NAACP v. Jacksonville*, No. 3:22-CV-493, 2022 WL 17751416, at *17 (M.D. Fla. Dec. 19, 2022)).

77. *Id.* at *11 (quoting *North Carolina v. Covington*, 138 S. Ct. 2548, 2551 (2018) (per curiam)).

78. *See id.* at *20.

79. *Id.* at *11.

term “gerrylaunders,”⁸⁰ which refers to an anticompetitive practice that helps those in power to remain in power.⁸¹

Gerrylaunders happens differently from the process of gerrymandering and involves “locking and stocking.”⁸²

Mapmakers lock in prior district configurations, seeking to populate each updated district with as many residents of its predecessor district as population equality requirements will allow. And they stock each updated district with an existing officeholder, keeping that incumbent with most of their constituents, but separate from *other* incumbents for the mutual advantage of all those in power. In short, when mapmakers gerrymander, they try to tilt the playing field; when they gerrylaunders, they try to keep the field tilted.⁸³

When the Ohio Supreme Court invalidated the third plan of the Ohio Redistricting Commission for districts for the Ohio General Assembly, one concurring justice summed it up this way:

[S]ince the adoption of the constitutional reforms mandated by Article XI, these cases have regrettably confirmed that relatively little has changed in how legislative-district plans are drawn. The design of legislative districts remains firmly in the grip of the majority party’s legislative politicians to the exclusion of all others. The Ohio Redistricting Commission is independent in theory only. Indeed, the commission’s plans in these cases have consistently been drafted by the majority party’s political staffers to the exclusion of the minority party and at times even to the virtual exclusion of the majority-party commission members in order to maintain dominance by the majority party. The revised plans were based largely on plans that we previously declared invalid and were withheld until the majority party’s then-newest plan was revealed and perfunctorily adopted at the 11th hour with no time for review or discussion. Yet Secretary of State LaRose’s current stance is not to reexamine the flawed process used to generate district plans but to remain open to the prospect of impeaching a

80. See Robert Yablon, *Gerrylaunders*, 97 N.Y.U. L. REV. 985, 986–87 (2022).

81. *Id.* at 987.

82. *Id.* at 988.

83. *Id.* (footnote omitted).

judicial officer who dared to have the temerity to support and defend the constitutional reforms that Ohioans—like LaRose when he was a state senator—celebrated over partisan tribal politics that value political power over all else.

What appeared to be the start of a transparent redistricting process when the two independent map drawers were engaged by the commission became transparent only in the sense that it exposed the falsehood that some of the commission members had fulfilled their obligations under the Ohio Constitution. As to that, Ohioans are still watching and waiting.⁸⁴

Gerrymandering and gerrylaunders threaten the political power, the expressly reserved power, of the people in states like Ohio. These devices are used by elected officials to hold on to power to create and maintain supermajorities. And, as acknowledged by Ohio's senate president, the work of a supermajority of the leadership of any legislative caucus includes protecting its membership and keeping its supermajority.⁸⁵

By 2010, many supermajorities in state legislatures were already set or close thereto. So, when redistricting occurred,

[T]he story in many states was one of continuity rather than change. In at least a dozen states where the line-drawing process was under unitary partisan control, lawmakers adopted new congressional and/or state legislative maps that maintained preexisting district configurations to a substantial degree. Some of those prior maps were themselves the result of gerrymandering, and lawmakers simply chose to stay the course.⁸⁶

In Ohio, no less than four state legislative maps were rejected after their constitutional review by the Ohio Supreme Court.⁸⁷ In order to allow primary elections to proceed in 2022, a federal district court ordered an August 2, 2022 special election at which primary election voters could nominate their state legislative candidates using a map that

84. *League of Women Voters v. Ohio Redistricting Comm'n*, 199 N.E.3d 485, 509 (Ohio 2022) (Donnelly, J., concurring) (citation omitted).

85. *See* Staver, *supra* note 40 (discussing how “[b]eing outspoken on controversial issues gives senators in swing suburban districts cover” and thus “helps Senate presidents maintain and even grow their caucus”).

86. Yablon, *supra* note 80, at 994–95, 1015 (footnotes omitted) (noting that Ohio's congressional redistricting process required continuity before it was replaced in 2020 by a citizen-initiated constitutional amendment).

87. *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 646 (S.D. Ohio 2022).

had already been adjudged by the Ohio Supreme Court to be unconstitutional under the state's constitution.⁸⁸ Following the August 2022 special election, the general assembly, with the support of the Ohio secretary of state,⁸⁹ drastically narrowed the scope of special elections.⁹⁰

With the specter of an abortion constitutional amendment and well-publicized plans to submit to voters a new plan to scrap Ohio's current redistricting constitutional provisions in favor of a redistricting commission with no elected officials serving on it,⁹¹ a supermajority of Ohio legislators decided that restricting ballot access for citizen-initiated amendments may be beneficial to Ohioans, and perhaps, themselves.⁹² To do this, a special election was needed, but no longer available under the law. So when enough legislators balked at reversing a law outlawing special elections passed less than a year before, the legislature declared that it would create its own special election and set the date for August 8, 2023 by resolution.⁹³ By a 4-3 vote, the members of the Ohio Supreme Court agreed it had the power to do this.⁹⁴ So the stunted redistricting process of 2022 came full circle to another August election—once again about political power.

On August 8, 2023, the voters declared that they had had enough, and State Issue 1 failed resoundingly.⁹⁵

88. *Id.* at 647–48. See also Ellen Morrissey, *Federal Court Enacts Legislative Maps for Ohio's 2022 Elections*, BALLOTPEDIA NEWS (June 1, 2022, 12:14 PM), <https://news.ballotpedia.org/2022/06/01/federal-court-enacts-legislative-maps-for-ohios-2022-elections/> [https://perma.cc/AVH6-8BSC].

89. Susan Tebben, *Ohio House Committee Continues Debate on Nixing August Special Elections*, OHIO CAP. J. (Nov. 30, 2022, 4:43 AM), <https://ohiocapitaljournal.com/2022/11/30/ohio-house-committee-continues-debate-on-nixing-august-special-elections/> [https://perma.cc/YWL3-5S9N].

90. See H.B. 458, 134th Gen. Assemb., Reg. Sess. (Ohio 2023).

91. Haley BeMiller, *Retired Chief Justice Maureen O'Connor Ramps Up Efforts for Redistricting Reform in 2024*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/politics/2023/02/01/maureen-oconnor-aims-for-ohio-redistricting-reform-in-2024/69863312007/> [https://perma.cc/9UWW-CU2N] (Feb. 1, 2023, 2:44 PM).

92. See Ian Cross & Morgan Trau, *Ohio Lawmakers Pass Resolution to Ask Voters to Require 60% Vote to Amend Constitution Ahead of Abortion Vote*, NEWS 5 CLEV., <https://www.news5cleveland.com/news/politics/ohio-politics/house-passes-resolution-to-require-60-supermajority-to-amend-ohio-constitution-ahead-of-nov-abortion-vote> [https://perma.cc/DDP8-UGUY] (June 12, 2023, 5:15 PM).

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

94. *State ex rel. One Pers. One Vote v. LaRose*, No. 2023-Ohio-1992, slip op. at 12, 14 (Ohio June 16, 2023).

95. Evans & Henry, *supra* note 28.

II. APPLYING OHIO'S EXPERIENCE—LESSONS LEARNED

Ohio is still learning, as are most states. Is the abortion issue what really drove the Ohio general assembly to propose that Ohio citizens diminish their ability to propose amendments to their constitution? The big picture suggests it is not the entire story.

When speaking of the powers of the parliament in Great Britain, Edmund Burke stated:

The Parliament of Great Britain sits at the head of her extensive empire in two capacities: one as the local legislature of this island, providing for all things at home The other . . . is what I call her imperial character, in which . . . she superintends all the several inferior legislatures, and guides, and controls them all without annihilating any. As all these provincial legislatures are only coordinate to each other, they ought all to be subordinate to her It is necessary to coerce the negligent, to restrain the violent, and to aid the weak and deficient, by the over-ruling plenitude of her power. She is never to intrude into the place of the others, whilst they are equal to the common ends of their institution. But in order to enable parliament to answer all these ends of provident and beneficent superintendence, her powers must be boundless.⁹⁶

For the people of Ohio, their reserved political power is not unlike that of Great Britain's provincial legislatures of Burke's time. It is clear there is a tension that lies between the inherent right of self-governance and autonomy and the need for the power to govern it. While some in the legislature see the need for the power to govern (and capacity in a supermajority) as boundless,⁹⁷ there are likely some citizens who see that need as negligible. Keeping this line taut balances the power necessary for governance in a state like Ohio. With this in mind, perhaps the stampede to end all access to abortion in Ohio is but a symptom of the apparent and underlying need of the dominant political party of the Ohio legislature to retain its supermajority. On August 8, 2023, they tried to entice Ohioans to give up their inherent political power in order to defeat abortion, but Ohioans rebuffed it.⁹⁸ Not even the suggestion of limiting

96. EMPIRE AND COMMUNITY: EDMUND BURKE'S WRITINGS AND SPEECHES ON INTERNATIONAL RELATIONS, 116 (David P. Fidler & Jennifer M. Welsh eds., 1999) (emphasis omitted).

97. See Staver, *supra* note 40 (quoting Ohio Senate President Matt Huffman as stating "[w]e can kind of do what we want").

98. See Evans & Henry, *supra* note 28.

abortion as the need enticed Ohioans to disturb the political power they reserved to themselves more than a century ago.

Twenty-six states provide for citizen-initiated ballot measures in 2023.⁹⁹ Not all of them permit proposing constitutional amendments, and Ohio, likewise, has a provision for initiated legislation.¹⁰⁰ A strong value of the citizen-initiated process is as a democratic check on supermajorities, a check on any power that could slip unbridled into that “boundless” power described by Burke.¹⁰¹ But, like Burke described, there must be a balanced vigilance to call out perceived erosion of citizens’ reserved political power. Yet, at the same time, prevent its perversion. This is the responsibility of every citizen and elected official. When citizen-initiated proposals are permitted to proceed, safeguarded by such a balance, the common good may be served. On August 8, 2023, Ohio’s voters preserved that common good.

CONCLUSION

Had S.J.R. 2 passed at Ohio’s August 8, 2023 special election, the power of state constitutional amendments initiated by legislative joint resolution would have curbed the use and success of Ohio’s constitutionally reserved powers by and to the people. The proposed constitutional amendment would have required passage of any constitutional amendment thereafter by sixty percent of the electors voting on the measure. And the proposal would have made it vastly more onerous to even begin to undertake citizen-initiated state constitutional amendments, with oppressive signature requirements.

The August 8, 2023 special election proved that Ohio’s veto-proof legislature and a less-than-reserved secretary of state made a grave miscalculation about Ohio voters and how they looked at populist rights such as citizen-initiated petition efforts, fiscal responsibility, and consistency. The use of a special election, adopted with a specified election date as part of a legislative joint resolution, despite less than a year earlier, having been outlawed based in large part on cost to taxpayers, did not escape the attention of a large swath of Ohio voters.

And even though the August 8, 2023 special election was positioned just months before a statewide constitutional amendment election on whether to enshrine in the Ohio Constitution the right to an abortion, the measure fell short, with a bipartisan consensus that soberly

99. *States with Initiative or Referendum*, BALLOTPEdia, https://ballotpedia.org/States_with_initiative_or_referendum [https://perma.cc/TET8-JQRH].

100. See OHIO CONST. art. II, §§ 1–1a.

101. See Fidler & Welsh, *supra* note 96.

placed this proposal far beyond the high emotions that exist in the abortion debate.

In reality, the proposal to change the constitution seemed more closely related to impending efforts to take from elected officials the power of drawing state and congressional legislative maps after they largely ignored the rulings of the Ohio Supreme Court in 2022, and before that, the resounding mandate of Ohio voters for a fairer way to draw legislative maps to stop gerrymandering in Ohio.

While limiting abortion may have been a means to stoke the political fires hot enough to tempt Ohioans to vote away their inherent political power, S.J.R. 2 resoundingly failed on August 8, 2023. Ohio voters unequivocally informed the political oligarchy that Ohioans value their reserved political powers and do not intend to part with them anytime soon. So, when Ohioans vote on future statewide ballot issues, including whether to enshrine abortion as a state constitutional right, *their* collective voice will speak according to a simple majority, as it has been since 1912. Because Ohioans preserved their reserved and inherent powers on August 8, 2023, the path remains clear for them to speak again and again, unfettered by the oligarchic powers that would subject the inherent political power of the many to preserved political power of a few.