Montana Law Review

Volume 64
Issue 1 *Winter 2003*

Article 4

1-2003

Signature Gathering in the Initiative Process: How Democratic Is It?

Richard J. Ellis
Department of Politics, Willamette University, Salem

ARTICLE

SIGNATURE GATHERING IN THE INITIATIVE PROCESS:

HOW DEMOCRATIC IS IT?

Richard J. Ellis*

Elections lie at the heart of America's political system. They are the means by which we choose our leaders and nominate our candidates. Media coverage is election-centered, focused on the campaign and horse race analyses of who is ahead and predictions of who will win. Most citizens do not begin to pay much attention to politics until about a month or two before the election. And of course elected officials are almost always thinking about the next election and raising the money they need to mount the next campaign. We might wish our elected officials spent less time thinking about reelection, or that more voters paid closer attention to politics between elections, or that the media were less focused on the horse race and more attentive to the issues. But in truth, the behavior of the media, candidates, and voters works reasonably well most of the time in scrutinizing the actions of candidates and elected officials. Not perfectly, but reasonably well.

The same is arguably true for initiative elections. To be

* Dept. of Politics, Willamette University, Salem, OR 97301.

sure, when there are eighteen initiatives on a ballot, as there were in Oregon in 2000, it taxes the ordinary voter's ability to make informed decisions. But most of the time voters can use information shortcuts to make good decisions. Few voters will understand the many ramifications of complex proposals, but voters can ask themselves the much simpler question: who is for it and who is against it? The more money is spent in a campaign, the more likely voters will find out which groups are behind a measure and which groups oppose the measure. And so long as voters have an attitude toward those groups – whether they be labor unions or anti-tax groups, Democrats or Republicans, environmental organizations or pro-life groups – voters can generally arrive at a reasonably informed decision.[1]

But there is a crucial difference between candidate campaigns and initiative campaigns. Candidates who appear on the ballot in November are generally there because they won a primary election some months earlier. They are on the ballot, in other words, because voters of a political party elected them to represent the party. And while turnout in primary elections is typically lower than in general elections, candidates must still vie for support in a publicly contested election. Initiatives, in contrast, appear on the ballot without having been selected by the people. Moreover, there is typically little or no media scrutiny of the qualifying phase of initiative campaigns and voters pay virtually no attention to this stage of the process.

The premise of this article is that the signature gathering phase of the initiative process deserves greater scrutiny by voters, by the media, and by state elections officials as well as by scholars. The signature gathering phase of initiative campaigns should be treated with the same seriousness of purpose and intense publicity that is generally accorded contested nomination elections.

I. CONFRONTING TWO OBJECTIONS

Before proceeding with this argument, it is necessary first to confront two possible objections to this line of reasoning. First, isn't signature gathering democracy in action? Indeed isn't it a higher form of democracy since it requires a dedicated band of public-spirited volunteers, committed to their cause, braving the elements in order to obtain the signatures needed for their

1. *See* SHAUN BOWLER AND TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY (1998).

petition? What could be more civic-spirited than giving up one's leisure time to stand outside a supermarket or inside a shopping mall, asking fellow citizens to take a moment out of their busy day to consider a pressing public issue? In a world filled with professional politicians, highly paid lobbyists, selfish interest groups, and privatized citizens, the act of one citizen beseeching another for a signature seems a testament to the true meaning of democracy.

This is the romance of the initiative process, but the reality of the street is often something different. Gathering signatures has increasingly become a business, and like any other business it is run for profit. In states like Oregon and California, where the initiative is used most frequently, the great majority of those people behind petition tables are not idealistic volunteers but are instead interested mercenaries, bounty hunters, paid by the signature, and largely indifferent to the substance of the petition. Many would be as gratified to have you sign a petition that called for a raise in taxes as they would be to get your signature on a petition seeking a reduction in taxes. And they would be happier still if you signed both petitions, and perhaps another two or three or five while you are at it. The price of your signature varies, depending on the outcome of the bidding and bargaining between initiative sponsors, signature companies, independent contractors, and signature solicitors. It may be worth as little as seventy-five cents, but if the initiative sponsor is desperate enough or wealthy enough its value may climb to many times that amount.

So what? We all know that politics is suffused with money. Candidates spend hundreds of thousands and even millions of dollars to run for office. Corporations and labor unions spend cartfuls of cash lobbying the legislature. Why should we grow faint of heart when money is spent in the service of initiatives? "All of politics is run by money," observes Oregon's leading initiative activist Bill Sizemore. "To say it should be different for the people is hypocritical."[2] Lloyd Marbet, a left-wing initiative proponent, agrees with the right-wing Sizemore: "Paying people to petition is no different in my mind than giving money to people to get them elected."[3] These defenders of the initiative process raise an important challenge: Why should we be more

2. John Henrikson, *Voters Get a Grip on Government*, STATESMAN JOURNAL (Salem, Or.), July 8, 1994, at A2.

3. Dan Bender, *Political Foes Ally for Citizens' Rights*, STATESMAN JOURNAL (Salem, Or.), October 2,1995, at A2.

wary about the role of money in the initiative process than in candidate elections? Are those who lambast "the initiative industry complex" simply being hypocritical?

The hypocrisy charge misses the mark for two reasons. First, under current campaign finance laws individuals often are limited in what they can give to a candidate, whereas there are no limits on what individuals can contribute to an initiative, either in the signature gathering phase or in the electoral campaign. If paying people to petition is, as Marbet says, no different from giving money to candidates, then that is an argument for restricting the amount people can contribute to an initiative campaign (or for abolishing laws limiting contributions to candidate campaigns). Second, a candidate from a major party appears on the ballot in the general election only after winning a primary election decided by voters from that candidate's party. In contrast, initiatives generally appear on the ballot without any show of public support apart from the signatures gathered. If signatures gathered are not an indicator of public sentiment but merely a function of money, then critics are right to single out the role of money in the initiative process. If, as Philip Dubois and Floyd Feeney maintain, "political interests with sufficient funding and professional assistance can qualify nearly anything they want for the ballot," then that raises serious questions about the initiative's role as an instrument of popular democracy.[4]

Even if one concedes that ballot access may be bought, one still needs to confront a second objection to focusing critical scrutiny on the signature gathering phase of the initiative process. Many initiative proponents insist it does not really matter how an initiative gets on the ballot because ultimately it is the people who decide. As Dane Waters of the Initiative and Referendum Institute put it when asked about the large number of initiatives Sizemore qualified for the Oregon 2000 ballot: "It's really irrelevant who puts it on the ballot, because Oregonians, and only Oregonians, can vote yes or no."[5] What matters is not so much how a measure came to be on the ballot, but whether voters approve it or not. No matter how an initiative qualifies, if it passes it has demonstrated that it represents the will of the

4. PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 102 (1998).

5. *Outsiders Finance Ballot Measures*, Associated Press State & Local Wire (July 30, 2000). *See also*, PATRICK B. MCGUIGAN, THE POLITICS OF DIRECT DEMOCRACY IN THE 1980S: CASE STUDIES IN POPULAR DECISION MAKING 119 (1985).

people. Voters always have the final say.

The trouble with this account is that it ignores the power bestowed upon the individuals and organizations who frame the issue. As anyone familiar with polling knows, public opinion on many issues is extraordinarily sensitive to question wording. Ask people whether they support spending for the "poor" and their responses are far more favorable than if they are asked about spending on "welfare." Similarly, people have a much more negative reaction to the term "preferential treatment" than they do to "affirmative action." Large majorities agree that a terminally ill person should be helped by a physician to "die with dignity," but many fewer support "physician-assisted suicide." The answer a pollster gets depends in large part on the way the question is posed.[6]

Question wording, for instance, was central to the battle over Proposition 209, a 1996 initiative that banned state affirmative action programs in California. The sponsors were careful not to mention affirmative action; instead the initiative prohibited the state from "discriminating against, or granting preferential treatment to, any individual or group" on the basis of race or gender. Polls showed that overwhelming majorities supported this language, but support plummeted when respondents were asked about outlawing state affirmative action programs for women and minorities. Conscious of the vital difference that wording makes, Republican Attorney General Dan Lungren, a strong critic of affirmative action programs, avoided any mention of affirmative action in the 100 word title and summary of the initiative that appeared on the ballot. Opponents of Proposition 209 took the Attorney General to court, and a Superior Court judge directed Lungren to rewrite the summary because omitting affirmative action misled voters about "the main purpose and the chief point of the initiative."[7] Upon appeal, a District Court rejected the lower court's judgment. The title and summary, the court concluded, conveyed to the public "the general purpose" of the proposition. "We cannot fault the Attorney General," the court concluded, "for

6. *See, e.g.*, Tom W. Smith, *That Which We Call Welfare by Any Other Name Would Smell Sweeter: An Analysis of the Impact of Question Wording on Response Patterns*, 51 PUB. OPINION Q. 75, 75-83 (1987); William A. Lund, Note, *What's in a Name? The Battle Over Ballot Titles in Oregon*, 34 WILLAMETTE L. REV. 143, 143-67 (1998).

7. LYDIA CHAVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION 80, 145-46 (1998).

refraining from the use of such an amorphous, value-laden term" as affirmative action. The decision not to include the words "affirmative action" was among the most critical ingredients in the success of Proposition 209.[8]

The importance of question wording was underlined the following year when a proposition to "end the use of affirmative action for women and minorities" was defeated by voters in Houston, Texas.[9] The original language of the Houston initiative had been virtually identical to Proposition 209, and pre-election polling showed strong support for the measure. However, Houston's mayor, a supporter of affirmative action, persuaded the city council to amend the proposition so that instead of calling for an end to "discrimination and preferential treatment" in public employment and contracting, the measure called for an end to affirmative action in public employment and contracting.[10] After the measure was defeated, the initiative's sponsor, Edward Blum, complained that the city's rewording had "sabotaged" the initiative, and he took the city to court.[11] As in California, the courts were divided. In 1998, a state district judge nullified the election result on the grounds that the revised wording did not fairly convey the original wording of the initiative petition, and required the city to hold a second election, though the judge stopped short of telling the city what language to use.[12] The following year, the Court of Appeals overruled the district judge's ruling, arguing that the new language was not misleading because "by definition, the term 'affirmative action' encompasses minority- or gender-based 'quotas' and preferences." The one thing neither side disputed was that the wording had been a decisive factor in the electoral outcome.[13]

The impact of framing, moreover, is not limited to the phenomenon of question wording effects. Those who write initiatives control the political menu, and thereby shape voter choice. Voters may prefer a particular initiative to the status

8. CHAVEZ, *supra* note 7; for poll results, *see id.* at 20, 99, 104, 106.

9. *Id.* at 247.

10. Julie Mason, *Court Backs Proposition A Ballot Wording*, HOUSTON CHRONICLE, Nov. 27, 1997, at A1.

11. Ron Nissimov, *Judge Rejects Last Fall's Vote*, HOUSTON CHRONICLE, June 27, 1998, at A1.

12. Ron Nissimov, *Judge Shies at Revising Ballot on Affirmative Action Herself*, HOUSTON CHRONICLE, August 14, 1998, at A37.

13. Ron Nissimov, *Affirmative Action Ruling is Overturned*, HOUSTON CHRONICLE, December 22, 1999, at A1.

quo, yet given a wider range of options they may rank that initiative near the bottom. Given a choice between approving or rejecting Measure A, voters may prefer Measure A, but given a choice between Measures A and B they may opt for Measure B and reject Measure A. Take term limits. During the 1990s voters in many states approved strict term limits laws that included lifetime bans. Faced with a choice between no term limits and highly restrictive term limits, voters generally favored restrictive term limits. But voters may not have made the same decision if they had been offered a choice between a term limits measure with a lifetime ban and a term limits measure that allowed legislators to return to office after a specified number of years. The power to determine the choices on the ballot carries with it the power to shape the outcome.

Tax-cutting initiatives provide another telling illustration of this same phenomenon. In Oregon in 1996, voters were offered Measure 47, which dramatically rolled back property taxes. One critic complained that the measure was like "killing an ant with a bazooka." The problem, as the reporter pointed out, is that for taxpayers "a bazooka is the only weapon at their disposal at the moment."[14] Voters were offered the choice between a large rollback in taxes or no change in their taxes. They were not allowed to choose between a large and a more moderate rollback, or between the proposed measure and a system of rebates for low-income or fixed-income property owners. Nor was the alternative of differential tax rates for business and homeowners put to the voters. So while the vote on Measure 47 reflected the majority's preference for lower property taxes (52 percent supported the measure), the precise policies (the extent of the reduction and the restrictions on future increases, the limits on new bonds and replacement fees, and the requirement that property tax levies achieve a 50 percent turnout rate) that were enacted did not reflect the will of the voters so much as the will of the measure's author, Bill Sizemore.[15]

A further reason that voters' approval of an initiative cannot erase concerns about the measure's sponsor is that passage by itself reveals nothing about the issue's salience to voters. In 1996, for example, affirmative action ranked near the bottom of the list of issues that most concerned Californians.

14. James Mayer, *The Property Tax Puzzle: Will Measure 47 Make Oregon's System More Fair?*, OREGONIAN, Sept. 23, 1996, at A8.

15. *Id.* Measure 47 was helped by the arrival of property tax bills in mailboxes only days before ballots and voter guides arrived in the mail.

Citizens expressed far greater concern about jobs, education, the environment, and taxes.[16] In 2000, as in other recent elections, anti-tax initiatives dominated state ballots – appearing in Alaska, California, Colorado, Massachusetts, Oregon, South Dakota, and Washington[17] – even though polls consistently showed that voters were far less concerned with reducing taxes than with improving the quality of government services.[18] Candidates for office tend to be much more responsive to the issues that matter most to voters than are initiative advocates, for whom there is little or no incentive to select issues that are salient to voters. Candidates, unlike initiative activists, must seek out issues that are not only popular but that matter to ordinary voters.

The diminished salience of tax issues to voters was reflected in the defeat of a number of anti-tax initiatives in 2000, including Alaska's Measure 4, which would have capped

16. CHAVEZ, *supra* note 7, at 118, 160.

17. Had it not been for the courts there would have been two additional anti-tax initiatives on the ballot, both radical, one in Arizona, the other in Arkansas. Arizona's Taxpayer Protection Act of 2000, which would have eliminated the state's income tax over four years, require public votes on new state taxes, and allow candidates for federal office to include ballot notations next to their name indicating that they pledge to eliminate the federal income tax, was thrown off the ballot in August for violating the single-subject rule. Two weeks before the election, the Arkansas Supreme Court struck down Amendment 4, which would have repealed the state sales tax on used goods and require public votes on future tax increases. *See* Kurrus v. Priest, 29 S.W.3d 669 (2000). The ballot title, the court argued, failed to inform voters "of the far-reaching consequences of voting for this measure." In particular, the court faulted the title for not making it clear to voters that "by approving this measure, he or she may risk losing valuable government services." *Id.* at 674. Moreover, the court faulted the ballot title for failing to define clearly what counts as a "tax increase" and what counts as "a regularly scheduled statewide election," so that the voter could not know for certain what acts would trigger the voter approval provision and when those votes would take place. According to the court, "the ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title." *Id.* at 672. One can agree with the court about the importance of voters making informed decisions; that is the reason we have campaigns. It is less clear, though, that the decision about whether voters are capable of making informed decisions should be left to judges.

18. In 1980, for example, 62 percent of Americans agreed that Washington "ought to cut taxes even if it means putting off some important things that need to be done." In 1999, only 21 percent agreed with this statement. LOS ANGELES TIMES polls conducted in 2000 showed that voters by nearly a 3 to 1 margin preferred to use government surpluses for Social Security, Medicare or debt reduction rather than tax cuts. *See* Peter G. Gosselin, *Tax Cuts Seen as Spoiler in Boom Times*, LOS ANGELES TIMES, August 26, 2000, at A1; *see also* Jeff Mapes and Harry Esteve, *Healthy Economy Cools Oregon Tax-Cutting Fever*, OREGONIAN, September 24, 2000, at A1; BRENT STEEL & ROBERT SAHR, OREGON GOVERNMENTAL ISSUES SURVEY-2000 (Program for Governmental Research and Education, Oregon State University, July 2000) (on file with the author).

property taxes, California's Proposition 37, Colorado's Amendment 21, and Measures 91 and 93 in Oregon. But the presence of these initiatives on the ballot forced political officials and interest groups to play defense on the question of taxes. Thus, even when they lose the electoral battle, initiative activists may win the political war by controlling the agenda. Although six of Sizemore's initiatives in 2000 lost, for example, he still managed to dictate Oregon's political agenda by forcing the state's political leaders to react to his agenda rather than to define their own. In the 1998 gubernatorial election Governor Kitzhaber had unceremoniously trounced candidate Sizemore by a better than two-to-one margin, yet within little more than a year Kitzhaber felt compelled to challenge his defeated opponent to a series of debates about Sizemore's billion dollar tax cut proposal. Moreover, Kitzhaber scaled back his own initiative plans, which included establishing a rainy day fund for schools, so that he could concentrate his campaigning and fund-raising efforts on defeating Sizemore's tax proposals. The cost to the state of enacting a reckless anti-tax measure, Kitzhaber and his allies calculated, outweighed the potential benefit that might be gained by passing his own set of education initiatives.

Labor unions have experienced similar frustrations. They have been forced to raise millions of dollars in California and Oregon in 1998, and again in Oregon in 2000, to fight initiatives designed to limit their ability to contribute money to political campaigns.[19] Although all of these measures failed at the ballot box, they succeeded in placing the unions on the defensive, diverting valuable resources away from candidate elections and from the unions' own agenda. In 2000, labor unions in Oregon gave about two million dollars to state legislative candidates, less than half of what they spent to defeat Sizemore's two anti-union measures (Measures 92 and 98). Partly as a result, the gap in Oregon between labor and business spending on candidate races grew from less than two-to-one in 1998 to nearly three-to-one in 2000.[20] Moreover, the unions decided not to pursue a number of initiative petitions that they had submitted to the Secretary of State, including: the Minimum Wage Protection Act of 2000, which would have required that the

19. The story of the 1998 battle over Proposition 226 (the Paycheck Protection Act) in California is well told David Broder. *See* DAVID S. BRODER, DEMOCRACY DERAILED, 113-14, 118 (2000) (note chapter 3: "Initiative War in Close-Up").

20. Dave Hogan & Steve Suo, *Campaign Spending Heads Into Record Territory*, OREGONIAN, October 23, 2000, at A1.

state's minimum wage be automatically adjusted for inflation; the Workplace Safety and Workers' Compensation Fairness Act, which would have made it easier for workers to receive workers' compensation benefits; a Patients' Bill of Rights; and a State Purchases of Products Made with Child Labor Act, prohibiting the state from buying from vendors who employ children under age fourteen.[21] Diverting unions' attention from their own agenda was arguably the primary objective of Sizemore's anti-union initiatives. As Sizemore assistant Becky Miller exulted after the election, "Imagine the mischief [the unions] could have done in Oregon if they had had that money to spend on something else. . . .They were completely tied up trying to play defense and were not able to play offense."[22]

In short, it does matter how initiatives get onto the ballot and who puts them there. The populist platitude that "the initiative process belongs to the people"[23] is an effort to scare us away from asking hard, searching questions about the signature gathering process and its connection to democratic ideals.

II. THE PURPOSE AND VARIETY OF SIGNATURE REQUIREMENTS

All states require initiative petitioners to obtain a number of signatures before they can place a measure on the ballot. The primary purpose of signature requirements is to ensure that initiatives that reach the ballot meet a minimum threshold of public support. States vary considerably in where they set the threshold, but no state has ever dispensed with the threshold. Without a signature requirement, voters would almost certainly be inundated with a flood of frivolous or idiosyncratic measures. Every irate citizen with a pet peeve and a little energy could force their obsession upon the voters. Set the signature hurdle too high, however, and committed citizens with genuine, widely shared grievances would be prevented from bringing their issue directly before the people.

The highest signature threshold for a statutory initiative exists in Wyoming, which requires the number of valid signatures to be at least 15 percent of the total number of votes

21. Initiative, Referendum, and Referral Log, Elections Division, Oregon Secretary of State, *available at* http://sos-venus.sos.state.or.us:8080/elec_srch/web_irr_search.search_form.

22. Quoted in Dave Hogan & Harry Esteve, *Unions Enjoy Election Victories*, OREGONIAN, Nov. 12, 2000, at B4.

23. Bill Sizemore, quoted in David Postman, *Legislators Try to Limit Initiatives That Try to Limit Them*, SEATTLE TIMES, July 19, 1999, at A1.

cast in the preceding general election. Much more lenient is North Dakota, where petitioners only need to gather the signatures of two percent of the resident population (calculated on the basis of the last federal census) to place a statutory initiative on the ballot.[24] In the vast majority of states, the signature requirement for statutory initiatives ranges between five and ten percent, usually calculated as a percentage of the number of votes cast in the last gubernatorial election.[25] In Montana, for instance, the number is five percent of the number of votes cast for governor.[26]

Typically the number of signatures required to get a constitutional amendment on the ballot is greater, though how much greater varies by state. In Montana the number of signatures required for a constitutional amendment is twice what it is for statutes, which is one of the largest spreads in the country and a valuable disincentive to constitutional tinkering.[27] In Oregon, in contrast, the difference between statutory changes and constitutional amendments is only the difference between six and eight percent, which encourages activists to cast their political demands as constitutional changes. Between 1990 and 2000 nearly sixty percent of the 74 initiatives that qualified for the ballot in Oregon were crafted as constitutional amendments. In contrast, in Montana, only a quarter of the 44 initiatives that have been on the ballot in the thirty years since the 1972 constitution was enacted have been constitutional amendments (prior to 1972, constitutional initiatives were not permitted).

States also differ in the length of time they allow petitioners to gather signatures for initiative petitions: in Oklahoma they have only 90 days and in California 150 days, while Montana petitioners have one year, and in Oregon they have two years, and four years in Florida. Three quarters of the states give petitioners at least a year to gather signatures for an initiative.

---

24. Although texts on the initiative and referendum routinely list North Dakota as the state with the most lenient signature requirement, the state's two percent requirement is roughly equivalent to a requirement that signatures be equal to five percent of the votes in the previous gubernatorial contest. For instance South Dakota, which sets a five percent threshold for statutes and has a population of about 700,000, required 13,010 signatures in 2000, while North Dakota, which counted 638,000 people in the 1990 census, required 12,776 signatures. By a very slight margin, then, North Dakota's requirement was actually more burdensome than South Dakota's.

25. DUBOIS & FEENEY, *supra* note 4, at 33-34; DAVID MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 38-40 (1984).

26. *See infra* text accompanying note 28.

27. *Compare* MONT. CONST. art XIV, § 9, cl. 1, *with* MONT. CONST. art. III, § 4, cl. 2.

Half of the initiative states also require that signatures must meet some kind of geographical distribution requirement, the aim of which is to prevent petitioners from obtaining all their signatures in a few heavily populated urban areas. In Montana, for instance, prior to November 2002, a proposed statutory initiative not only had to receive signatures equal to 5 percent of the number who voted in the last preceding gubernatorial election, but also had to achieve that 5 percent threshold in 34 of the 100 legislative districts. [28] In November, Montana voters approved a legislative referral that stiffened this requirement by requiring petitioners to reach the 5 percent threshold in at least half of the state's 56 counties. None of the high use initiative states – Oregon, California, Arizona, Colorado, and Washington – have a geographic distribution requirement, which is not a coincidence since geographic distribution requirements tend to make qualifying an initiative more difficult and expensive.

Adding to the variation in the signature gathering experience are the tremendous differences in state size. In California, for instance, the five percent signature threshold for a statutory initiative meant that initiative petitioners had to obtain 420,000 signatures to place an issue on the ballot in 2000. The same five percent requirement in Montana required petitioners to gather only about 20,000 signatures. Thus even though both California and Montana have adopted an identical five percent signature threshold calculated on the basis of votes cast in the last gubernatorial election, size alone makes the signature gatherers' task in the two states different in kind. Because of its size, petitioners in California have long been heavily reliant on professional signature gatherers, whereas in states like Montana, South Dakota and North Dakota petitioners traditionally have not needed to hire paid signature gatherers to qualify a measure. A study done by David Schmidt in 1984 found that in California and Ohio, the two most populous initiative states during this period,[29] only fifteen percent of the initiatives that appeared on the ballot between 1980 and 1984 had been qualified by signature drives that had used volunteers to gather at least ninety percent of the requisite signatures. In contrast, in the other initiative states, more than

28. MONT. CONST. art. III, § 4, cl. 2.

29. This does not count Illinois, which though it has marginally more people than Ohio, has had only one initiative in its history. Florida, which today is the second most populous initiative state, had no initiatives during the period Schmidt studied.

eighty percent of the initiatives that reached the ballot had relied on volunteers to gather at least ninety percent of the signatures. And of the ten initiative states with populations under 2 million, more than 85 percent of initiative campaigns during this period relied on volunteers to gather at least ninety percent of the signatures. Only two of Montana's ten initiatives in that period used paid petitioners.[30]

III. A BRIEF HISTORY OF SIGNATURE REQUIREMENTS

Schmidt's 1984 study seemed to vindicate the grassroots character of most initiative campaigns. According to Schmidt, only about one quarter of all statewide initiatives between 1980 and 1984 relied on professional circulators to garner more than one-third of the required signatures; and about two-thirds used volunteers to amass more than ninety percent of the signatures. In the early 1980s, then, most initiative campaigns apparently still relied on a large number of dedicated volunteers, people who were working to get the measure on the ballot because they believed in the issue not because they were being paid. Plenty of initiatives relied heavily and even exclusively on paid petitioners, but outside of the most populous states like California, Ohio, and Michigan these remained a distinct minority.[31]

In a few states, the reliance on volunteers during the early 1980s was a product not of choice but of law. Oregon had outlawed paid petitioners in 1935, and it was not until a 1982 district court decision that the state's ban was invalidated.[32]

---

30. David Schmidt, *Studies Show Initiatives are Nonpartisan, Grassroots Politics*, INITIATIVE NEWS REPORT, Nov. 30, 1984, at 1-2, 5-9. Alaska accounted for close to half of the campaigns in small states that relied on paid signature gatherers for more than 10 percent of the signatures.

31. *Id.* at 2.

32. Libertarian Party of Oregon v. Paulus, Civ. No. 82-521FR, slip op. at 4 (D. Or. Sept. 3, 1982). The case was brought by the Libertarian party, which wanted to use paid petitioners to collect the signatures required to qualify the party's candidates for the ballot. U.S. District Court Judge Helen Frye ruled that Oregon's ban on paid signature gatherers was an unconstitutional restriction on the Libertarian party's right of free speech. Although Frye's decision did not specifically address ballot measures, it was widely assumed that the ruling applied to initiative and referenda as well, and so the Oregon legislature responded the following year by dropping its longstanding ban on paid canvassers in initiative and referendum elections. In 1984, after a federal judge upheld Colorado's ban on paid petitioners in a case dealing specifically with an initiative (*See* Grant v. Meyer, 741 F.2d 1210 (10th Cir. 1984) (discussing the district court's action)), Oregon's Secretary of State Norma Paulus spearheaded an effort to reinstate the ban on paid signature gatherers for ballot measure campaigns only. The bill passed

Colorado's ban on paid petitioners, enacted in 1941, remained in place until the U.S. Supreme Court ruled, in *Meyer v. Grant*, that the ban was unconstitutional because it restricted free speech.[33] The Supreme Court's decision in *Meyer* also effectively nullified Washington's longstanding ban on paid signature gatherers.[34] In 1993 the Washington state legislature responded to *Meyer* by modifying its ban to prohibit only the method of paying per signature, leaving initiative campaigns free to pay by the hour. But even this more limited ban on paid signature gatherers was struck down in federal court on free speech grounds.[35] The courts had turned the law on its head. Prior to the 1980s, no federal or state court in the United States had found a ban on paid petitioners to be unconstitutional. In 1973, for instance, both the Washington Supreme Court and the Oregon Supreme Court emphatically rejected the view that a ban on paid petitioners was unconstitutional.[36] Up until the 1980s, banning paid petitioners, like myriad other state regulations of the initiative process, was widely seen as something best left to the legislature and to the people of a

---

by better than a two-to-one margin in the Oregon House in 1985 but died in the Senate. The measure resurfaced in the next legislative session, and again passed the House by a large margin and failed in the Senate.

33. Meyer v. Grant, 486 U.S. 414 (1988). The ban was modified by a 1983 Colorado Supreme Court decision, which struck the word "inducement" from the statute that had banned "direct or indirect payment in consideration of or as an inducement to circulation of a petition." Urevich v. Woodward, 667 P.2d 760, 764 (1983). That decision stemmed from a suit filed by the Association of Community Organizations for Reform Now (ACORN), which in 1982 had tried to qualify an initiative for the ballot and had requested that petition circulators collect financial donations at the same time they sought ballot signatures. The circulators were offered 30 to 40 percent of the contributions they collected. A Denver district judge said ACORN violated the ban on paid circulators, but the Supreme Court both reversed the decision–arguing that "ACORN's method falls outside the statute, because its solicitors are not paid in consideration of circulating the petition, but rather in consideration of the financial contributions they solicit"— and struck the term "inducement" as overly broad. *Id.* at 761; *see also* UPI wire report (July 18, 1983).

34. *Meyer* also nullified a short-lived ban on paid signature gatherers in Nebraska, which had been enacted earlier in the 1980s.

35. *See* LIMIT v. Maleng, 874 F. Supp. 1138 (1994).

36. *See* Washington v. Conifer Enters, 508 P.2d 149, 153 (1973); Oregon v. Campbell, 506 P.2d 163 (1973). The first time a court struck down a state restriction on paid circulators came in 1976, when the California Supreme Court invalidated a law (enacted as part of the Political Reform Act of 1974, which was passed by initiative) limiting expenditures on behalf of an initiative to no more than 25 cents a signature. Hardie v. March Fong Eu, 556 P.2d 301 (1976). In reaching its decision, the California court explicitly followed the U.S. Supreme Court's landmark ruling on campaign finance, Buckley v Valeo, 424 U.S. 1 (1976), which was issued earlier that year. The *Buckley* case is discussed in greater depth later in this chapter.

particular state.

That a number of states long ago took the trouble to ban paid petitioners tips us off to a simple, often forgotten fact: namely, paid petitioners are as old as the initiative process itself. In Oregon, for instance, paid petitioners were used to qualify all of the state's most famous good government measures, including the direct primary law passed in 1904, the Corrupt Practices Act passed in 1908, and the presidential primary bill of 1912, as well as the constitutional initiative in 1906 that established the initiative and referendum for localities, and the 1908 constitutional initiative that permitted the recall of public officials.[37] As the Supreme Court of Oregon observed in 1912, "it is difficult to find citizens who are so devoted to their principles as to be willing to circulate such petitions without compensation."[38] A study of the Oregon initiative process published in 1915 concluded that while "[p]etitions for some measures have been circulated wholly by volunteers. . .such cases have been comparatively few."[39] Even in the initiative's infancy there were already frequent and disparaging references made to the "industry" of "petition peddling." And the business could be a lucrative one for those gathering signatures. Signature gatherers in 1910 could expect about 5 cents a signature (equivalent to roughly 80 cents in 2000 dollars), or if, as often happened, they were carrying multiple measures at the same time, their rate might be dropped to closer to three or three-and-a-half cents a signature. As the deadline for submitting the signatures neared, however, the price per signature could climb as high as ten cents or more.[40]

The concerns and anxieties expressed about paid petitioners in the early twentieth century are similar to the ones we often hear today. "Any person with sufficient money," worried the *Eugene Register* in 1913, "knows that he can get any kind of legislation on the ballot."[41] In 1908, the *Oregonian* had lodged the same objection: "the man or group of men who have money to spend, and who are willing to spend it, can secure submission of any measure to a vote of the people." Enlisting "the voluntary service of people in circulating petitions," the *Oregonian*

37. JAMES BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON 59-60 (1915).

38. State v. Olcott, 125 P. 303, 306 (1912).

39. Barnett, *supra* note 37, at 59.

40. *Id.* at 60.

41. *Id.* at 61.

reasoned, was the only reliable way of determining whether "a measure is. . .of sufficient importance and public interest" that it should be brought before the people. Paying signature gatherers effectively gutted the purpose of requiring signatures in the first place.[42] To Republican Senator Jonathan Bourne, a primary problem with paid petitioners was that they choked out the grassroots: "while paid circulation of petitions is the universal custom, there will be few volunteers, for most people will either decline to work without pay while others are paid, or will hesitate to put themselves in the class of paid workers."[43] Paying petitioners degraded the signature gatherer – it became seen as a sales job rather than as the precious province of the public-spirited citizen. Knowing they can pay their way onto the ballot, groups do not even attempt the hard political work of mobilizing a dedicated band of citizens. Payment for signatures simplifies the job of the initiative's sponsors, but at the price of attenuating civic involvement in the political process.

Sentiments such as these, together with concerns about outright fraud and corruption in the signature gathering process, led to a number of early attempts to ban paid petitioners, some of them successful. A bill to ban paid petitioners was introduced in Oregon as early as 1909.[44] Similar laws were introduced in legislatures across the nation, including Washington, South Dakota, and Ohio, where such bans were enacted into law between 1913 and 1914. Most states, though, declined to ban paid petitioners, although spectacular cases of fraud, or concerns about the control of special interests sporadically forced the issue onto the legislative agenda. In California, for instance, bills to ban paid petitioners were introduced and defeated in 1915, 1917, 1937, 1939, 1953, 1959, 1963, 1965, 1969, 1973, and again in 1987.[45] Banning paid petitioners, opponents warned, would advantage firms that employed large numbers of people and would make it impossible for all but the most popular causes to exercise the right of direct democracy. "Most of these proposals," political scientists V. O. Key and Winston Crouch wryly observed in 1939, "come from that idyllic school of political thought which holds that the

42. Barnett, *supra* note 37, at 62.

43. *Id.* at 63.

44. *Id.* at 62.

45. PHILIP L. DUBOIS AND FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE app. B, C (California Policy Seminar Research Report, 1992).

political wheels should go round, like the perpetual machine, without money."[46]

Fears that a ban on paid petitioners would cripple the initiative process were particularly acute in California. In 1912, the first year in which the tools of direct legislation were made available to Californians, the State Federation of Labor reported that obtaining the required number of signatures had "proved no easy undertaking." "Depending upon volunteer work alone," the Federation found, "has proven to be very unsatisfactory."[47] Each of the successful initiatives in California's first initiative election relied heavily on paid signature gatherers. Over the next six decades, just one initiative qualified for the ballot in California using only volunteers, a 1938 measure that promised voters a number of benefits including improved pensions. California's decision in 1966 to reduce the percentage of required signatures for a statutory initiative from eight to five percent increased the importance of volunteer efforts in California's initiative process,[48] but the effect was short-lived. Volunteer signature campaigns played a prominent, even predominant, role in a substantial number of high profile initiatives during the 1970s, including the landmark Proposition 13 in 1978. But since 1982 few California initiatives have relied on volunteers for the bulk of the signatures, and it has been the very rare exception that has not used paid signature gatherers. The last volunteer-only initiative in California was a 1990 measure that outlawed the hunting of mountain lions.[49]

---

46. V.O. KEY, JR. AND WINSTON W. CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 562, 546-47 (1939).

47. Proceedings of the Thirteenth Annual Convention of the California State Federation of Labor, October 7-12, 1912, p. 91, *in* CHARLENE WEAR SIMMONS, CALIFORNIA'S STATEWIDE INITIATIVE PROCESS 7 (California Research Bureau, 1997).

48. Prior to 1966 California had an indirect initiative option that required only 5 percent of signatures. The option was little used and voters approved abolition of the indirect initiative at the same time they lowered the number of signatures for direct statutory initiative, as recommended by a constitutional revision commission.

49. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 146 (Center for Responsive Government, 1992) [hereinafter CALIFORNIA COMMISSION]; SIMMONS, *supra* note 47, at 9; PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 210 (1998). The mountain lion sponsors experimented with using direct mail solicitations that included signature petitions and fund-raising appeals, but found that combining signature collection with fund-raising was not an effective way either to gather signatures or to raise money. Eleven organizers were hired to coordinate the work of the army of volunteer signature gatherers, some of whom devoted the entire summer of 1989 to circulating petitions. *See* William M. Lunch & Wesley Jamison, *The Lab Rat That Roared: The Mountain Lion Initiative in California and the Animal Rights*

IV. THE DECLINE OF THE VOLUNTEER AND RISE OF THE PROFESSIONAL

California's reliance on paid petitioners today is hardly surprising given the state's size and the relatively short period in which circulators are permitted to gather signatures. It is by far the most populous state in the union, and its 150 day window for circulating direct initiative petitions is the second most restrictive in the nation. The more dramatic story of the past two decades is the change that has occurred in many medium-sized and small initiative states. In Idaho, for instance, which up until 1998 allowed petitioners two years to circulate a petition, paid petitioners were virtually unknown in the post-war era. In the half century prior to 1994, none of the twelve initiatives that made it to the ballot used paid petitioners. In 1994, however, both initiatives that appeared on the ballot – the first establishing term limits for elected officials, the second establishing state policies regarding homosexuality – used paid petitioners. In 1996 and 1998 five more initiatives appeared on the ballot, each of them relying on paid signature gatherers to a greater or lesser degree. Virtually overnight the practice of signature gathering in Idaho had been transformed from almost exclusive reliance on volunteers to a heavy reliance on paid signature gatherers.[50]

Most states do a poor job tracking whether initiatives rely on paid signature gatherers. Only a handful of states require petitioners to indicate whether they plan to use paid petitioners, and these requirements have generally been enacted so recently that useful data is not yet available. A pioneering exception is the state of Oregon, which for over a decade has mandated chief petitioners to indicate whether they will use paid petitioners in the signature gathering process. Thus in Oregon it is possible to document precisely the growth in the number of paid petitioners over the last decade. Moreover, since Oregon requires this information to be submitted before signature gathering has

---

Movement in the Nation 9-11(March 1992) (unpublished paper prepared for delivery at the Annual Meeting of the Western Political Science Association, San Francisco, Ca., on file with the author).

50. E-mail from Penny Ysursa, Administrative Secretary, Election Division, Office of the Secretary of State, Idaho, to the Author (October 18, 1999); Kevin Richert, *Signature-for-hire Businesses Fueling Idaho Ballot Initiatives*, IDAHO FALLS POST REGISTER, December 7, 1995, at A1; Marty Trillhaase, *Initiative Drives Get Costlier*, IDAHO STATESMAN, June 18, 1996, at A1; Marty Trillhaase, *Recognizing an Era Has Passed*, IDAHO FALLS POST REGISTER, February 11, 1997, at A10.

begun, reliance on paid signature gatherers can even be examined among the initiative campaigns that failed to gather the requisite number of signatures.

The number of initiatives in Oregon that rely entirely on volunteers to gather signatures has not changed appreciably since 1988, while the number of initiatives relying on paid petitioners has increased dramatically. In 1988 a majority of the initiatives circulating were volunteer-only, whereas between 1994 and 1998 there were twice as many initiatives using paid petitioners as there were using only volunteers. In 2000 and 2002, there were four times as many initiatives using paid signature gatherers. However, the big difference between volunteer-only petitions and paid petitioners is demonstrated by their success rates in qualifying for the ballot. Between 1988 and 2002, little better than 1 in 10 volunteer-only efforts made it to the ballot. Since 1996 only three volunteer-only initiatives have qualified for the ballot, and one of these, a vote-by-mail initiative, was spearheaded by the Secretary of State and other government officials. In contrast, about 40 percent of initiatives that relied at least partly on paid petitioners have made it to the ballot since 1996. Over the last four elections (1996 to 2002), 94 percent of the initiatives on the Oregon ballot have used paid petitioners.

The impact of paid petitioners on the success of a qualification campaign is understated by these numbers, dramatic as they are. Petitioners who indicated an intention to pay for signatures, but failed to make it to the ballot, generally were unable to raise the money to make it possible for them to pay signature gatherers. Among the groups for whom money presented no obstacle, the success rate in qualifying for the ballot approached one hundred percent. Overwhelmingly, groups in Oregon that had the money to pay petitioners gained access to the ballot, while groups that did not have the money to pay petitioners found gaining access to the ballot extraordinarily burdensome.

In the neighboring state of Washington, the story is similar. The only initiative to appear on the ballot in 1994, a measure allowing denture makers to sell dentures directly to the public rather than to dentists, spent roughly three times as much as any other initiative campaign. It was also the only initiative campaign willing to violate the 1993 state law prohibiting payment per signature. The other nine active signature-gathering campaigns, which included measures relating to gay

rights, abortion, welfare reform, criminal punishment, and legislative ethics, relied entirely on volunteers and each failed to gather the necessary signatures. Sherry Bockwinkel, whose signature gathering firm gathered most of the signatures for the denturists, admitted that "there isn't a chance in the world a volunteer effort is going to make it."[51] The following year Bockwinkel's firm, Washington Initiatives Now (WIN), was hired to qualify two initiative campaigns, one relating to commercial fishing regulations and the other to casino gambling on Indian reservations. Bockwinkel publicly boasted, "I can guarantee we'll be on the ballot. . . .I've got the key to the ballot."[52] And Bockwinkel was as good as her word: both measures qualified; indeed they were the only direct initiatives among the 17 filed that qualified for the ballot that year. Not coincidentally, they were also the only two to use paid signature gatherers. "You have to pay to play," is Bockwinkel's catchy slogan.[53]

Bockwinkel's boast and bravado notwithstanding, volunteer-only efforts are still possible when an issue captures the imagination of citizens and activists, as the 1998 and 1999 Washington elections showed in spectacular fashion. In 1998 two of the four ballot measures qualified without the use of paid signatures. The first, a ban on partial-birth abortions, gathered the needed signatures in only six weeks and benefited from one of the highest validation rates in state history – a remarkable 90 percent of its signatures were deemed valid. The second, a hike in the minimum wage, exceeded the 180,000 signature target by better than 50,000.[54] An even more spectacular refutation of

---

51. Patti Epler, *Illegalities Won't Stop Initiative; Denturists' Measure Likely to Be Only One on Fall Ballot*, NEWS TRIBUNE (Tacoma, Wash.), June 30, 1994, at A1; *see also* Kathy George, *State's Citizens May Have Too Much Initiative*, SEATTLE POST-INTELLIGENCER, July 7, 1994, at A1.

52. Joseph Turner, *Fall Ballot Likely to List 2 Initiatives*, NEWS TRIBUNE (Tacoma, Wash.), June 26, 1995, at B1.

53. Kimberly Mills, *The Name Game: Initiative Process at Its Best with a Volunteer Effort*, SEATTLE POST-INTELLIGENCER, July 23, 1995, at E1. Cite checkers, find these articles and let me know if I need to split this cite.

54. Joseph Turner, *Abortion Issue Likely on Ballot*, NEWS TRIBUNE (Tacoma, Wash.) , July 2, 1998, at B1; Hunter T. George, *Initiative Campaigns Succeed Without Paid Signature Gatherers*, COLUMBIAN (Vancouver, Wash.), July 2, 1998, at B2; Susan Gilmore, Abortion Initiative to Be on Ballot in November, SEATTLE TIMES, July 27 1998, at B1. Even as these volunteer efforts were succeeding quite comfortably, Rob Killian, a Tacoma physician who paid for every signature gathered for the medical marijuana measure, told reporters, "I don't know anyone who can get anything on the ballot anymore just with volunteer signature-gatherers." Hal Spencer, *Marijuana, Wage Initiatives on Track*, COLUMBIAN (Vancouver, Wash.), June 2, 1998, at B5.

Bockwinkel's slogan came in 1999 when I-695, which proposed to roll back Washington's motor vehicle tax and require voter approval for any tax or fee increase by state or local government, qualified without the use of paid signature gatherers. In fact, the initiative gathered close to 400,000 valid signatures, more than double the number of signatures required, and the second highest total in Washington history.[55] A number of other volunteer-only drives succeeded in the 1990s, including a 1996 measure orchestrated by the Humane Society that banned bear and cougar hunting using dogs or bait, a measure similar to ones the Humane Society had qualified using volunteers in Oregon in 1994 and California in 1990. Also noteworthy were the 230,000 signatures gathered by volunteers for a popular referendum on a controversial property rights law enacted by the state legislature in 1995. That number was well over twice the 90,834 signatures the petitioners needed, and was gathered within the 90 days allowed for a referendum petition.[56] Not all issues, then, have to pay to play.

Still, of the thirty initiatives that reached the ballot in Washington between 1992 and 2000, only six secured their spot without paid signature gatherers: a 1993 anti-tax measure, the 1996 hunting ban, the 1998 partial-birth ban and the minimum wage increase, the 1999 repeal of the motor vehicle tax, and, in 2000, another Humane Society measure banning certain animal traps and poisons. Considering that prior to 1991 no initiative campaign in Washington had used paid signature gatherers, the practice having been outlawed in the early twentieth century, the transformation is remarkable. Ironically, the first Washington initiative campaign to employ professional signature gatherers, after the longstanding ban was invalidated, was a 1991 term limits measure, the aim of which was to throw professional politicians out of the legislature and to allow amateurs and ordinary citizens a chance to volunteer for public service. In fact, every term limits measure that has qualified for the ballot in the United States has done so primarily and often exclusively through utilizing professional signature gatherers.

---

55. The most signatures in Washington history were gathered in a 1973 initiative campaign to roll back and cap legislative salaries. Riding a tidal wave of popular outrage against a legislative pay raise that had tripled legislators' salaries from $3,600 to $10,650 a year. A furniture salesman and political novice, Bruce Helm, spearheaded a volunteer effort that needed only two weeks to collect almost 700,000 signatures. Mills, *supra* note 53.

56. Mills, *supra* note 53.

The rapid transformation in Washington from volunteer to professional signature gatherers has been replicated with similar speed in Colorado, a state with at least a million fewer people and a substantially lower signature threshold. In 1998, initiative sponsors in Washington needed to gather just under 180,000 signatures, while initiative proponents in Colorado needed less than one third that many. Yet despite the relatively low number of signatures required in Colorado (during the 1990s, initiative petitions needed around 50,000 in a state of well over three million people), the lack of any geographical distribution requirement, and the absence of a tradition of paying for signatures (prior to the 1988 *Meyer* decision, the practice had been forbidden for almost half a century), the Colorado ballot in the 1990s was monopolized with measures using paid signature gatherers. Between 1990 and 1996 only one of the 31 measures (a bear trapping measure) reached the ballot without paying for signatures, though several (like a 1996 campaign finance reform measure) used volunteers extensively. Initiative activists were quick to proclaim that paid signature gatherers were the only way to reach the ballot. Jim Klodinski, an organizer of a 1994 gambling initiative, justified his measure's reliance on paid signature gatherers by insisting, "If you think you're going to get something on the ballot without paid professionals, you're crazy."[57] Similarly sweeping was another initiative activist's assurance that "it is impossible in Colorado to qualify a petition without using paid circulators."[58]

The activists' exaggerated claims are belied, however, by the success of the Colorado Pro-Life Alliance in using only volunteers to qualify not one but two initiatives for the 1998 ballot: the first requiring parental notification before a minor can obtain an abortion, and the second banning late-term abortions.[59] Calling on "God's people to take a stand for God's righteousness and against abortion," a dedicated cadre of roughly 200 volunteers collected signatures outside churches, at Christian concerts and in other venues where God's people were

57. Burt Hubbard, *Big Bucks Buy Spot on Ballot*, DENVER ROCKY MOUNTAIN NEWS, Aug. 7, 1994, at A4.

58. Elizabeth Garrett, *Money, Agenda Setting and Direct Democracy*, 77 TEX. L. REV. 1845, 1852 n.31 (1999) (quoting Bill Orr, executive director of the American Constitutional Law Foundation).

59. Daniel Smith, *Progressives Need to Show Initiative on Ballot Signatures*, THE DENVER POST, Jan. 13, 2000, at B7.

likely to congregate.[60] Moreover, Colorado, like Washington, has had a history of some spectacular volunteer signature drives. In 1982, for instance, an initiative allowing Coloradans to purchase wine at the grocery store gathered over twice the required number of signatures, with most of those coming in two days.[61] Also conveniently obscured by the activists' rhetoric is that in the four elections between 1982 and 1988, 24 initiatives qualified for the ballot in Colorado, and all of them relied exclusively on volunteers.[62] In states like Colorado, where the signature requirements are not onerous, paid signature gatherers are clearly not indispensable to ballot access, at least not for those groups with a sizeable and committed band of activists or for those issues that capture the popular imagination.

For many groups and issues, though, paid signature gatherers undoubtedly are essential to reaching the ballot. The main hurdle that most initiative proponents face is finding enough people willing and able to dedicate a large number of hours to gathering signatures. To collect 75,000 signatures (which could safely be assumed to yield 50,000 valid signatures), one expert estimates that a volunteer drive would need roughly 66 three hour volunteer shifts (two people) per week, every week for five months.[63] People might be happy to let denturists sell their wares directly to the public, but few if any citizens would be willing to give up even an hour of their day to circulate petitions on behalf of such a cause. And denturists, who have a sizeable economic stake in the outcome, are unlikely to have sufficient leisure time to gather the requisite signatures; moreover, even if all the denture makers in the state or region dropped their tools for six months and devoted themselves full time to signature gathering their numbers would likely be too few to qualify the measure. Gambling generally arouses more

60. Ann Schrader, *Abortion Limits Proposed; Coalition Submits Petitions for Pair of Ballot Initiatives*, THE DENVER POST, July 8, 1998, at B1.

61. UPI wire report (July 23, 1982).

62. Because of the growth in the state's population, the number of signatures required increased somewhat between the 1980s and 1990s. In 1984, for instance, 46,737 signatures were required, while a decade later, in 1994, 49,279 signatures were needed. By 1998, however, the number of required signatures had reached 54,242, and heavy turnout in the 1998 election (the signature percentage in Colorado is determined as a percentage of the vote in the preceding secretary of state's race) meant that 62,595 signatures were required to qualify for the 2000 ballot.

63. JIM SCHULTZ, THE INITIATIVE COOKBOOK: RECIPES AND STORIES FROM CALIFORNIA'S BALLOT WARS 33 (1998).

excitement and enthusiasm than dentures, but gaming initiatives also have a difficult time attracting volunteers. Many people like to gamble but it is apparently not a habit they feel so strongly about that they are willing to devote long, arduous hours to gathering signatures (though an anti-gambling measure might be more likely to mobilize a cadre of volunteers devoted to eradicating vice); and while gambling interests may have pots of money, they have a comparative dearth of time and numbers.

In opening up the initiative process to issues and interests that could not otherwise play, such as denturists and gambling proprietors, paid petitioners arguably democratize the initiative process, making it more inclusive. Banning paid signature gatherers penalizes those individuals or groups who possess money but lack spare time, while advantaging those short on money but long on time. But why should individuals with lots of spare time be privileged over people with lots of money? Are those groups who have difficulty raising money but no trouble harnessing a cadre of fanatics any more deserving of a place on the ballot than those who have an abundance of cash but lack fervent enthusiasm? Are a small group of denture makers less virtuous than a large band of religious zealots? From this vantage point, the rise of paid petitioners and professional signature gathering firms promotes democracy by increasing the involvement of a wider diversity of groups.

Yet the complaint persists that permitting paid petitioners means that "anybody can buy their way on the ballot."[64] Allowing rich individuals or well-financed special interests to qualify measures for the ballot almost regardless of either the depth or intensity of popular support seems to violate the original vision of direct democracy. Grassroots democracy degenerates into "greenback democracy"; a system designed to save us from the special interests becomes captured by those very same interests.[65] The initiative and referendum were not created to promote the sale of dentures and the spread of gambling, but rather to make sure legislatures did not ignore widespread popular sentiments for change and reform, and to

64. Scott Maier, *Big Bucks Back 2 State Initiatives; Paid Professionals Circulated Petitions*, SEATTLE POST-INTELLIGENCER, Aug. 31, 1992, at A1 (quoting Washington Secretary of State, Ralph Munro).

65. For instance, Oregon's Secretary of State Phil Keisling complains: "The promise of the initiative is grassroots democracy. It's becoming greenbacks democracy." Henrikson, *supra* note 2.

prevent self-aggrandizement or corruption on the part of politicians and powerful interests. Initiatives such as the ones in Washington aimed at repealing unpopular taxes, saving wild animals, or keeping politicians honest all tap into strong popular feelings, and the signature gathering requirement allows proponents to demonstrate the depth of public feeling in support of an initiative. Relying entirely on volunteers is no guarantee that a measure has broad support in the population – after all, many volunteer-only initiatives, like the Colorado ban on late-term abortions, are defeated at the polls – but a successful volunteer effort is a virtual guarantee that a significant segment of the population feels passionately about the issue, so passionately that they are willing to relinquish their valuable time to ask fellow citizens for signatures. Having mobilized their convictions and passions, having risked rejection and courted confrontation, these advocates have earned the right to place their issue before the voters. Those who merely purchase their spot on the ballot have not earned that same moral right, or so the argument goes.

V. THE COST OF BALLOT ACCESS

Has the initiative process in fact been transformed from a grassroots to a greenbacks democracy? The answer to this question is more complex than the activists on either side are willing to allow. Those who bemoan the capture of the initiative process by monied special interests ignore the reality that organized and well-financed special interests have long been central players in the initiative process, particularly in those states that have made frequent use of direct democracy. Writing in the late 1930s, political scientists V.O. Key and Winston Crouch discovered that the battle over initiatives closely resembled the battle over legislation – both arenas were dominated by organized pressure groups.[66] Proponents of the initiative and referendum, Key and Crouch noted, "thought that 'The People' would circulate petitions and put measures on the ballot for the promotion of the welfare of the average man. The fight would then be over since all measures. . .fell into two well-defined categories, namely, those in the public interest and

66. KEY & CROUCH, *supra* note 46; *see also* David McCuan, Shaun Bowler, Todd Donovan & Ken Fernandez, *California's Political Warriors: Campaign Professionals and the Initiative Process*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 57-61 (Shaun Bowler et. al. eds., 1998).

those for the benefit of some special interests."[67] But initiative measures in California, Key and Crouch found, did not originate with "The People." Instead "initiated measures, like legislative bills, originate with some interest group which has found the existing law unsatisfactory and seeks to secure more favorable legal rules."[68] Groups using the initiative, they reiterated, "have not differed from the organizations lobbying before the legislature."[69]

Moreover, volunteer signature gatherers might be nobler and more altruistic than paid mercenaries, but they are far from free. Or, more precisely, while the volunteers are free, the costs of recruiting, training and coordinating those volunteers can be substantial. A 1998 "Initiative Cookbook," written to dispense advice to Californians who want to "use the initiative process to advance issues of social and economic justice," recommended that a signature gathering drive with a large volunteer component would need between $500,000 and $750,000 to qualify an initiative.[70] In 1990 none of the 18 California initiatives that reached the ballot, including the few that relied heavily on volunteers, spent less than $500,000 in the qualification phase; a gill net measure, for instance, which spent only $21,000 on paid circulators, still spent $620,000 in qualification; and a pesticides measure, which spent less than $200,000 on paid circulators and direct mail efforts, spent an additional million dollars to qualify the measure.[71] Even grassroots democracy, it turns out, needs to be a rich green, at least in California.

Still volunteer campaigns are generally less expensive than campaigns that pay for signatures, and sometimes far less expensive. In Washington in 1999, for instance, the volunteer-only drive that qualified the rollback of motor vehicle taxes (I-695) spent only $78,000 in the qualification stage; its 400,000 valid signatures came at an average price of about twenty cents per signature.[72] In contrast, the previous year a medical marijuana measure in Washington (I-685) paid for all of its signatures and needed over $400,000 to qualify the measure,

67. KEY & CROUCH, *supra* note 46, at 444.

68. *Id.* at 572.

69. *Id.* at 487.

70. SCHULTZ, *supra* note 63.

71. CALIFORNIA COMMISSION, *supra* note 49, at 152.

72. David Ammons, *Tabs & Taxes Initiative Headed for Ballot*, Associated Press State & Local Wire (June 29, 1999).

most of which went to a signature gathering firm called Progressive Campaigns.[73] The cost per valid signature for I-685 was roughly two dollars a signature, ten times as high as the cost of qualifying I-695. If I-685 exemplified greenbacks democracy – the $400,000 came entirely from three out-of-state millionaires, including George Soros, one of the richest men in the world – I-695 was a paradigmatic grassroots campaign.[74] Nobody gave more than $10,000 and half of the campaign's money came from individuals who contributed less than $100.[75]

The success of I-695 shows that the grassroots are not dead. But even among initiatives that rely exclusively or heavily on volunteers, I-695 is the exception. More typical of successful volunteer efforts are the two initiatives that qualified in Washington in 1998: the ban on partial-birth abortions and the minimum wage increase. Unlike Proposition I-695, which was fueled by a combustible mix of populist rage and the entrepreneurial skill and energy of Tim Eyman, the 1998 measures relied heavily on existing organizations. The minimum wage increase was drafted and sponsored by union leaders, and the recruiting and organizing of volunteers was done using the staff and offices of the Washington State Labor Council, estimated by the council to be worth $57,401.[76] Similarly, the anti-abortionists relied heavily on a dense organizational network of over 2,000 churches to recruit and train volunteers and to reach potential signatories.[77] Neither the Christian conservatives nor the labor unions lacked for clout in the halls of the state legislatures. That volunteer drives are often orchestrated by organized interest groups should not be surprising; it is after all special interest groups, not individual citizens, who are in the best position to meet the tremendous organizational demands of a volunteer drive. Individuals who lack access to the organizational resources of established interest groups are, ironically, likely to be the ones who are most

73. Robert Gavin, *Backers of $30 Tabs Raked in Piles of Cash; Half Came from Donors Giving less than $100 Each*, SEATTLE POST-INTELLIGENCER, December 29, 1999, at B1.

74. Ann Donnelly, *Just Say No to Marijuana Legalization*, COLUMBIAN (Vancouver, Wash.), July 12, 1998, at B13.

75. Deidre Silva, *Initiatives May Face More Rules*, THE SPOKESMAN-REVIEW (Spokane, Wash.), February 1, 1999, at A1.

76. Hal Spencer, *Records Show labor as Main Force Behind Wage Initiative*, COLUMBIAN (Vancouver, Wash.), July 14, 1998, at B9.

77. Hunter P. George, *Initiative Campaigns Succeed Without Paid Signature Gatherers*, THE COLUMBIAN (Vancouver, Wash.), July 2, 1998, at B2.

reliant on greenbacks democracy.

Volunteer signature drives continue to survive for reasons both principled and practical. By helping to reduce the cost of the qualification phase, volunteers can help strapped initiative campaigns save their limited resources for the electoral contest.[78] Volunteer signature drives also often benefit from higher validity rates than paid signature campaigns, thus effectively reducing the number of total signatures needed.[79] More important, involving volunteers in the signature-gathering process can politicize citizens and mobilize groups, making it easier to call upon their assistance later in the process or even in subsequent initiative campaigns. Relying exclusively or heavily on volunteers can also be a public relations coup, a signal to relevant audiences (media, potential contributors, voters) that the measure is a populist, grassroots movement. For some who rely on volunteers, like the Oregon Citizen Alliance's leader Lon Mabon, who used volunteers to qualify initiatives in four successive elections between 1988 and 1994, and then again in 2000, it is also a matter of principle.[80] "I'm a purist," Mabon concedes. Purity has its costs, though. The OCA's attempt to qualify anti-gay and abortion measures failed in 1996 and again, narrowly, in 1998.[81]

---

78. Lynn Fritchman, spokesman for a group trying to qualify an Idaho measure that would have outlawed the use of bait and dogs in hunting bears, explained that they wanted to avoid paying for signatures because, "We know the National Rifle Association is going to spend a whole bunch of money to defeat this, and we want to have some money left at the last month to combat that." Marty Trillhaase, *Money Helps Gather Signatures*, IDAHO STATESMAN (Boise, Id.), Nov. 12, 1995, at B1. In the end though, as the volunteer campaign faltered, Fritchman's group was forced to pay for signatures in order to qualify for the ballot. Kevin Richert, *Bear Group Is Paying to Collect Signatures*, IDAHO FALLS POST REGISTER, April 30, 1996, at A1; Bill Loftus, *Bear Advocate Says He Has Enough Signatures*, LEWISTON MORNING TRIBUNE, June 26, 1996, at A1.

79. Kelly Kimball, head of one of the largest and most successful signature gathering firms, Kimball Petition, Management, estimates that paid signature gatherers have signature validity rates of between 60 and 70 percent, while well-trained volunteers typically have rates between 75 and 80 percent. Direct-mail petitions typically do best of all, usually ranging between 85 and 90 percent. CALIFORNIA COMMISSION, *supra* note 49, at 149; Daniel Lowenstein & Robert Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 199 (1989). In Oregon in 1998 and 2000, the validity rate for signatures submitted to the Secretary of State's office for verification was about 10 percentage points higher for volunteer-only signature drives (87 percent) than for campaigns that relied on paid signature gatherers (76 percent).

80. SHULTZ, *supra* note 63, at 32.

81. Telephone Interview with Lon Mabon, Chairman, Oregon Citizen Alliance (Jan. 12, 1999).

For every volunteer success story there are scores of failures. The initiative seas are strewn with the hulls of wrecked volunteer drives. Volunteers are notoriously unpredictable, and qualification often hangs in the balance until the closing weeks or even days. Even Washington's I-695 campaign, which ended up submitting over 500,000 signatures, only had 180,000 with less than two weeks remaining. Ten days prior to the July 2 deadline, Eyman was reported as saying that he hoped to raise another 40,000 signatures so as "to provide a cushion"; had he done so I-695 would likely have failed since an invalidity rate of 20 percent (the actual invalidity rate ended up at 23%) would have been enough to drop the initiative below the required 179,248 valid signatures. Fortunately for I-695, Eyman's prediction was off by more than 270,000 signatures.[82] Volunteers and amateurs commonly waste time reinventing the wheel or, worse, make grievous mistakes – in Colorado, for instance, an anti-abortion initiative campaign used volunteers to gather 57,000 valid signatures, more than enough to make the ballot, but the measure was disqualified because circulators had mistakenly used outdated forms.[83]

The great advantage to hiring a professional signature gathering firm is that professionals, by definition, know what they are doing. They can tell the initiative sponsors how long it will take to gather the required number of signatures and what it will cost per signature. An initiative campaign that contracts with a firm like California's Kimball Petition Management is buying the services of a firm that has been in the business of signature gathering for over two decades and has a remarkably successful track record. Professional signature firms, such as Kimball Petition Management, or the Cleveland-based National Petition Management, drain the mystery and uncertainty from the process. If the initiative proponents have the money, professional signature companies can virtually guarantee almost any measure a place on the ballot, thereby allowing initiative backers to concentrate their energies and attention on other stages of the process. "We handle everything," crows Dan Kennedy, president of a Colorado signature-gathering firm. "You just give me the petitions and we'll get them back to you, filled

82. Sally Farhat, *Signatures Collected to Lower Tab Fees – Sponsors of I-695 to Turn in Petitions*, THE SEATTLE TIMES, June 22, 1999, at B1.

83. Steve Lipsher, *Ballot Drive a Job for Pros*, THE DENVER POST, Sept. 19, 1994, at A1.

out. We've got it down to a science."[84]

No political process, of course, is without uncertainty, and even professionals can miscalculate or encounter unexpected problems. The signature market can be volatile, particularly toward the close of an initiative campaign. Circulators typically carry multiple initiatives, and will make the highest paying initiative petitions their priority. When Philip Morris pays two dollars per signature, as they did in California in 1994 to qualify a smoking initiative, those who circulate that petition make sure it is the one people are asked to sign first.[85] Getting bumped to the rear of the initiative queue can cause an otherwise well-run signature drive to stall; many people will sign one or two or even three petitions but will balk at the fourth, fifth, or sixth.[86] Short on signatures and time, an initiative campaign will be forced (if it can afford it) to hike its per signature price. Savvy circulators, knowing that the cost of a signature often climbs in the closing weeks of a campaign, have been known to withhold signatures until the qualification deadline nears in hopes of fetching a better price for their wares.

Courts, too, can inject uncertainty into the signature gathering process. In 1988, for instance, the California Supreme Court struck down a no-fault insurance initiative that had already paid for hundreds of thousands of signatures. The insurance companies were forced to redraft the measure and begin gathering signatures all over again.[87] For most organizations this eleventh hour judicial setback would have been fatal, but deep pockets enabled the insurance companies to hire a direct mail firm, which gathered the required 400,000 plus signatures in just 48 days. To achieve this feat cost the insurance industry 2.3 million dollars, a mere drop in the bucket though compared to the 14.5 million dollars that the industry

84. *Id.*

85. SCHULTZ, *supra* note 63, at 34.

86. One professional signature gatherer, who had worked in at least six different states, testified in court that "it's mostly the placement of the petition, and how much the petitioner pushes it [that determines what gets signed]. You're only going to get them to sign 3 out of 10 petitions so you figure your 3 most profitable petitions [are the ones you push]." Tr. of July 10, 1999, hearing at 98, Affinity Communication v. Crosley, (testimony of Michael Rhodes before the Oregon State Employment Office), *rev'd sub nom.* Canvasser Serv. Inc. v. Employment Dep't, 987 P.2d 562 (Or. App. 1999); *see also* David Broder, *Taking the Initiative on Petitions: Signatures for a Price*, WASHINGTON POST NATIONAL WEEKLY EDITION, April 20, 1998, at 11; CALIFORNIA COMMISSION, *supra* note 49, at 147.

87. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1243 n.29 (1998).

reportedly spent on behalf of the no-fault measure in the qualification phase. [88] The ballot titling process can also disrupt well-laid plans. If opponents challenge a ballot title, as often happens with controversial measures, the title is appealed to the courts. The appeal process can be time-consuming, and since signature gathering generally cannot commence until a ballot title has been fixed, initiative campaigns are sometimes left with considerably less time to gather signatures than state law permits.

Despite these uncertainties, however, professional signature gathering firms rarely fail to reach their signature targets. On those occasions when they fail to qualify a measure it is usually because the percentage of invalid signatures is unexpectedly high, the sponsors' money dries up, or the professional firm has been hired too late in the signature-gathering season to rescue a faltering volunteer campaign.[89] One study reported that of the 53 initiative campaigns that had retained the services of Kimball Petition Management through 1988, all but one reached the ballot. In that one case the firm met the signature target it had set but had an unusually high percentage of signatures declared invalid.[90] The impressive success rates of paid signature firms make the job security of congressional incumbents seem downright hazardous by comparison.

Not that all initiatives are equally easy to qualify. Individuals do not generally scrutinize the petition they sign – indeed many do not bother to read it at all – but a popular ballot measure is still easier to qualify than an unpopular or confusing one. A less popular measure may require the signature gathering firm to charge a higher per signature price. But if popular appeal affects the cost of the initiative it generally has little impact on whether an initiative qualifies, assuming the backers have the requisite money.[91] The key variable is not the

88. Charles M. Price, *Afloat on a Sea of Cash*, CALIFORNIA JOURNAL, Nov. 1988, at 484; CALIFORNIA COMMISSION, *supra* note 49, at 132.

89. An example of the latter is Ohio Governor George Voinovich's failed attempt to qualify a campaign finance measure. With less than a month left and still far short of the required 104,000 signatures, the campaign turned in desperation to American Petition Corporation, but even a $200,000 campaign war chest and a price of better than $1 per signature was not enough to rescue the effort by the December 23 deadline. Benjamin Marrison, *Campaign Reform Drive Faces Hurdle*, THE PLAIN DEALER (Cleveland, Ohio), Dec. 14, 1994, at 5B.

90. Lowenstein & Stern, *supra* note 79.

91. Those who doubt this might find the following experiment of interest: earlier this year Patty Wentz of Oregon's Voter Education Project wrote a petition that said only: "We, the undersigned voters, request that a measure for an idea be submitted to

attitude of those who sign the petition. People sign for lots of reasons that have nothing to do with the substance of the petition. Instead, the key variable is the number of people who can be solicited. Initiative proponents who possess the resources to approach enough people can qualify any, or almost any measure. The emergence of professional signature gathering firms have not made huge sums of money a *necessary* condition of ballot access for all groups or issues, but it has meant money is now a *sufficient* condition of ballot access.[92]

Those who mourn the passing of the grassroots initiative may justly be accused of romanticizing the initiative's past, but stalwart defenders of the initiative as the authentic voice of the people are guilty of whitewashing its present condition. In California in 1976, the median expenditure during the qualification phase was only $44,861 and the mean was $69,398. In 1978, the backers of Proposition 13 spent even less than that, and still managed to gather a million and a quarter signatures, which remains a record for any initiative campaign. During the 1980s, the median qualification expenditure in California exceeded $700,000, and by 1990, both the median and mean climbed over one million dollars.[93] Throughout the 1990s, qualification expenses in California routinely ranged between one and two million dollars. Unlike in the 1970s, when the bulk of the money spent by an initiative campaign to qualify a measure generally went to support a staff and organization as well as printing and distributing literature, in the last two

---

the people of Oregon for their approval or rejection at the election to be held on November 8, 2002." The project then sent petitioners out on the street to gather signatures for the fictitious initiative; the rules were that all they could say was, "This is a petition for an idea. Can you help us get this idea on the ballot?" They gathered 25 signatures in 10 minutes. Occasionally a citizen would question them and then the phony petitioners would congratulate the person for being an informed voter. But precious few people questioned them. Most just signed, without ever asking what the idea was.

92. *See generally*, CALIFORNIA COMMISSION, *supra* note 49, at 132, 147 n.60; Lowenstein & Stern, *supra* note 79, at 203, 204 n.128; Garrett, *supra* note 58, at 1849. That any, or virtually any, issue can make it to the ballot if the backers have the money is attested to by multiple sources: *see, e.g.*, Larry Berg & C.B. Holman, *The Initiative Process and its Declining Agenda-setting Value*, 11 LAW AND POLICY 458 (Oct. 1989); Lowenstein & Stern, *supra* note 79, at 175, 199; David B. Magleby & Kelly D. Patterson, *Consultants and Direct Democracy*, P.S. 31, June 1998, at 161; CALIFORNIA COMMISSION, *supra* note 49, at 35; Garrett, *supra* note 58, at 1852; THE CITY CLUB OF PORTLAND, REPORT ON THE INITIATIVE AND REFERENDUM IN OREGON 27 (1996); P. K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues and Alternatives*, 23 FLA. ST. U. L. REV. 417, 446 n.269 (1995).

93. CALIFORNIA COMMISSION, *supra* note 49, at 157-59.

decades of the twentieth century the cash flowed almost entirely to professional campaign consultants, pollsters, lawyers, and most especially professional signature gathering firms.[94]

Outside of California, of course, the amount of money required to qualify an initiative is usually dramatically less. Expert witnesses testifying before a committee of the Portland City Club in 1996 reported that $100,000 to $150,000 was sufficient to get a measure on the ballot in Oregon.[95] Interviewed in 1999, Rick Arnold, who runs National Voter Outreach, a Nevada-based signature gathering firm that has been in operation since 1979, estimated that $80,000 to $100,000 was enough to be assured of the necessary signatures in Colorado.[96] In Idaho $60,000 to $70,000 is generally sufficient to secure a spot on the ballot. These are not trivial amounts of money, particularly if one were required to raise the money in relatively small contributions, as federal and many state laws require candidates to do.[97] But since there are no limits on what an individual or group can contribute to an initiative campaign these amounts are not difficult to reach even for a single (wealthy) individual. In Oregon in 1996, for instance, three initiatives were qualified by a rich eye doctor, who wrote and bankrolled each of the measures himself. To qualify all three initiatives, none of which received more than 35% of the vote, cost the doctor under $200,000.[98] In 2002, to take a more recent example, Loren Parks, an eccentric and reclusive millionaire, single-handedly secured a place on the ballot for two initiatives (Measures 21 and 22) that would have transformed the way judges were elected. Qualifying the two constitutional amendments cost Parks $256,453, which was 99.7% of the total amount raised by the two qualifying campaigns.[99] Ironically, the mammoth sums of money required in California may increase the chances that qualification of a measure reflects broader public or group support.

Mountains of cash are not necessarily evidence of a

94. *See* Berg & Holman, *supra* note 92, at 455-57.

95. CITY CLUB OF PORTLAND, *supra* note 92.

96. Michael Roman, *Ruling Not Expected to Boost Initiatives*, THE ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 13, 1999, at 18A.

97. Betsy Z. Russell, *Grass-Roots Ballot Initiatives Withering*, THE SPOKESMAN-REVIEW (Spokane, Wash.), July 8, 1998, at A1.

98. *The Price of Petitioning*, THE OREGONIAN, July 25, 1996, at A15.

99. Press Release, *One Donor is Big Bucks Behind 3 of 11 Initiatives* (July 24, 2002), *available at* http://oregonfollowthemoney.org/July2402.html.

withering of the grassroots. If many, many people are contributing money to an initiative campaign, then money can be one measure (albeit a highly imperfect one) of breadth of support and intensity of preference. Although grassroots purists might prefer to see different, "higher" forms of involvement, like attending meetings or gathering signatures, giving money to political campaigns is one important form of political involvement in our society. The trouble is that the U.S. Supreme Court, by prohibiting any limits on what individuals or groups can contribute to initiative campaigns, has created an environment in which initiative campaigns have little or no incentive to seek out smaller contributions. Instead the legal regime established by the Court encourages initiative campaigns to seek out a few fat cats and sugar daddies who will bankroll the effort and save initiative sponsors the more time-consuming effort of raising money from the little guy (and gal).[100] In California in 1990, for instance, contributions of under $1,000 made up only six percent of the total contributions in support of or in opposition to initiative campaigns. Thirty-seven percent (or roughly forty million dollars) of the total initiative dollars came from 19 donors, and 67 percent (74 million) came from 141 individuals and organizations, each of which gave at least $100,000. Almost as much money came from Anheuser Busch (8.3 million dollars in opposition to a proposed liquor tax) as was given by the 18,000 contributors who gave less than $1,000. A glance at the 1998 general election in California shows that little has changed. More than half of the almost 10 million dollars raised to support a tobacco tax came from four individuals, two of whom were married to each other. Five of the seven ballot initiatives received an average of 3 or 4 percent of their contributions from donors giving under $10,000; the only two measures to receive a respectable percentage of their support in smaller amounts were a measure forbidding the slaughter of horses for horsemeat (23% of its contributions came from people who gave under $10,000) and another banning the use of some kinds of animal traps and poisons (39% came from contributions of less than $10,000). Both of these measures, not coincidentally, were passed overwhelmingly by the voters – the average support was 58 percent. In contrast, the mean support for the other five measures was only 44 percent.[101]

100. *See* discussion *infra* Part VI.

101. CALIFORNIA COMMISSION, *supra* note 49, at 274, 279-80. The 1998 figures are

These statistics refer to overall spending, not just the costs of qualification, and so tend to *overestimate* the popular basis of financial support at the qualification phase. For instance, in 1990, Harold Arbit, a wealthy investor, contributed 5 million dollars in support of "Forests Forever" (Proposition 130), which equaled roughly two-thirds of the total contributions to the initiative campaign. But he bankrolled essentially the entire one million dollars it took to qualify the initiative.[102] Arbit's largesse is unusual – indeed the 5 million dollar contribution was at the time a record for an individual contribution to a ballot initiative and was itself a major issue in the campaign – but the pattern of initiative contributions being more concentrated among fewer people in the qualification stage than the post-qualification phase is commonplace. Media attention, in California and elsewhere, tends to focus on the huge sums of money raised and spent in the post-qualification stage, particularly as television ads begin to hammer the airwaves, but it is the contributions at the qualification phase that should concern us most.

To begin with, money can essentially guarantee a spot on the ballot, whereas no amount of money can guarantee an electoral victory. Huge amounts of money have been spent on spectacular defeats, and vast sums have been spent opposing successful efforts. In Florida in 1994, for instance, over 16 million dollars was spent to promote a casino initiative that failed miserably, receiving less than 40 percent of the vote.[103] The $35 million spent by the insurance industry in 1988 in California on behalf of no-fault auto insurance also was for naught, and even failed to prevent passage of a rival auto insurance measure that the insurance companies had hoped to defeat.[104] Tobacco companies have frequently spent mammoth amounts of money in efforts to defeat tobacco tax initiatives, and have usually been unsuccessful. In Oregon in 1996, for instance, the tobacco industry outspent the proponents of a cigarette tax increase by almost ten-to-one, yet the industry lost by a sizeable margin.[105] In 2000, 31 million dollars (about three-quarters of

---

calculated from the campaign finance data available on-line from the California Secretary of State's office, *at* http://www.ss.ca.gov./;. *see also Big Givers Dominate Initiatives*, STATE GOVERNMENT NEWS, Sept. 1992, at 25.

102. CALIFORNIA COMMISSION, *supra* note 49, at 158, 265, 274.

103. Jameson & Hosack, *supra* note 92, at 447.

104. *Id.* at 447 n.279.

105. Steve Woodward, *It's Not Always the Money That Matters*, OREGONIAN, Nov. 9, 1996, at A1.

which came from Tim Draper, a Silicon Valley entrepreneur) was spent in support of a school voucher initiative in California that failed to get above thirty percent of the vote. The same fate befell a vouchers initiative in Michigan despite a pro-vouchers campaign that spent about 13 million dollars, two-and-a-half times what the opposition spent. Of course, having money is better than not having money, and the evidence shows that heavy and lopsided spending *against* a measure is frequently effective in defeating the measure.[106] But in electoral contests, unlike in qualification campaigns, money is not a sufficient condition for success.[107]

Moreover, although the large sums spent on 30 second television ads in the closing months and weeks of an electoral campaign may not be pretty, they are essential if voters are to have any chance of arriving at an informed opinion about an initiative. In candidate races many voters can rely on the party as a cue to make reasonably informed decisions even with relatively little information. Partisan cues (in the forms of endorsements) are available in many initiative campaigns, but they do not come conveniently stamped on the ballot, and take more work on the voter's part to ferret out. Television ads, though often obnoxious to the more educated voter, can be essential in giving the less-informed voter a rudimentary understanding of a measure's meaning as well as a rough sense of who is for it and who is against it. Those most concerned about the potential dangers of lawmaking by initiative are those who should be most vigilant not to restrict the flow of money to initiative campaigns, for it is only through spending large sums of money that opponents of a measure can educate voters about the unintended consequences and pitfalls of a bill.

But concentrated spending by one or a few individuals at the qualification stage is conceptually quite another matter. For here money sabotages the purpose of a signature requirement, which is to demonstrate intensity and breadth of popular support. If paid circulators are used to gather all or virtually all of the signatures then a campaign's capacity to gather those signatures is no longer a reliable indicator of public interest. Only the task of raising money is left as a meaningful way in which initiative sponsors can show the existence of public interest in their measure. But if a single individual, or a small

106. Dubois & Feeney, *supra* note 4, at 181-88.

107. Garrett, *supra* note 58, at 1847.

handful of people, can finance the qualification of an initiative, then this hurdle too is knocked over and rendered useless. If, on the other hand, individuals were limited to contributing no more than $100 or even $1,000 (or perhaps more in a state the size of California) to the qualification of an initiative, then the qualification of a ballot measure, even with paid signature gatherers, could again serve as a useful test of popular interest or support. Unfortunately, states wanting to make qualification a meaningful hurdle have been prevented from doing so by the courts.

VI. THE JUDICIAL PREEMPTION OF POLITICS

The first barriers to a state's ability to make qualification a meaningfully democratic exercise were erected by the United States Supreme Court in the landmark 1976 case, *Buckley v. Valeo*, in which the Court considered the constitutionality of a host of limitations on campaign finance practices that had been passed by Congress in 1974.[108] In its ruling the Court distinguished between contributions and expenditures, arguing that limitations on expenditures (what a candidate can spend) impermissibly reduce "the quantity of expression by reducing the number of issues discussed, the depth of their exploration, and the size of the audience reached," while contribution limits entail "only a marginal restriction upon the contributor's ability to engage in free communication."[109] A contributor who would like to give $5,000 but is limited by law to $1,000 has still been able clearly to communicate his message of support for a candidate; in contrast, restricting a candidate's spending to $100,000 when she could have spent $500,000 would drastically limit her ability to communicate her message to potential voters. Given the more indirect impact on freedom of expression imposed by contribution limits, the Court accepted that the limits were justified by the government's "weighty interest" in preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[110] No such compelling interest exists in the case of expenditure limits, the Court ruled. Neither the government's interest in controlling campaign costs nor in

108. 424 U.S. 1 (1976).
109. *Id.* at 20-21.
110. *Id.* at 25.

equalizing spending between campaigns could justify the substantial restraints on "the quantity and diversity of political speech" that expenditure ceilings would entail.[111]

Buckley v. Valeo had nothing specifically to say about the initiative and referendum; its subject was candidate elections. The uncertainty as to where *Buckley v. Valeo* left direct democracy was quickly answered, however, by the Court's decision in *First Nat'l Bank of Boston v. Bellotti*.[112] This case challenged a Massachusetts law that forbid business corporations from contributing or spending any money "for the purpose of. . .influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[113] The statute explicitly excluded corporations from financial involvement with any measure "concerning the taxation of the income, property or transactions of individuals."[114] Such a statute, a bare majority of the Court held, was impermissible because "the risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."[115] Such sweeping language suggested that even less draconian regulations would have a hard time passing constitutional muster, a suspicion confirmed a few years later in *Citizens Against Rent Control v. City of Berkeley*, in which the Court struck down a city ordinance that limited contributions to ballot measure committees to $250 on the grounds that the threat of corruption was absent in ballot elections.[116] In the Court's view, public disclosure of contributions was sufficient to safeguard the integrity of the political system.[117]

The U.S. Supreme Court's pronouncements in *Bellotti* and *Berkeley* meant that once a measure qualified for the ballot the states could do virtually nothing to restrict the flow of money to initiative campaigns. So long as states were free to ban paid petitioners, however, the states still had the power to restrict the influence of money at the qualification stage. Wealthy individuals could not be prevented from supporting their favorite causes, but by banning paid petitioners a state could

111. *Buckley v. Valeo*, 424 U.S. at 19.
112. 435 U.S. 765 (1978).
113. *Id.* at 768.
114. *Id.*
115. *Id.* at 790.
116. 454 U.S. 290, 297-300 (1981).
117. *Id.*

stop a wealthy individual from simply buying a place on the ballot. That option was unceremoniously closed by the Supreme Court in *Meyer v. Grant*, which declared that circulating an initiative petition was "core political speech" for which "First Amendment protection is at its zenith."[118] Prohibiting paid signature gatherers restricts speech in two ways. First, it directly restricts the amount of speech that occurs during the petition circulation phase; second, it indirectly burdens speech by making it less likely that an initiative will qualify for the ballot, thus reducing the proponents' chances of making their issue "the focus of statewide discussion."[119] In the Court's view, the state of Colorado failed to offer a justification that was sufficiently compelling to warrant the burden on political expression that the ban imposed.[120]

Writing for a unanimous Court, Justice John Paul Stevens dismissed Colorado's claim that the prohibition was justified by the state's "interest in assuring that an initiative has sufficient grassroots support to be placed on the ballot." According to Stevens, that interest was "adequately protected by the requirement that the specified number of signatures be obtained."[121] This sweeping judicial pronouncement comes without a scrap of supporting evidence. But if, as we have seen, a single individual can pay a professional signature gathering firm to qualify virtually any issue, then Stevens is clearly wrong. When there are no restrictions on what an individual can contribute to an initiative campaign and when paid signature gatherers are permitted, then a signature requirement is no guarantee that an initiative has grassroots support. One could perhaps sympathize with the Court had it said that the First Amendment right of free expression outweighs the state's interest in ensuring grassroots involvement, but instead it only betrayed its ignorance of the initiative process.[122]

When the United States District Court upheld the Colorado ban in 1984 it had emphasized that Colorado ranked fourth in the number of initiatives placed on the ballot, ahead of at least 20 states that allowed paid petitioners. This evidence suggested to the court that "the prohibition against payment of circulators

118. 486 U.S. 414, 425 (1988).
119. *Id.* at 422-23.
120. *Id.* at 428.
121. *Id.* at 425.
122. *See* Lowenstein & Stern, *supra* note 79, at 200-205.

is in reality no inhibition."[123] The court might also have pointed out that paid petitioners were banned in two other states in the top six, Washington (#6) and Oregon (#1). The Supreme Court quite rightly countered that these numbers did not preclude the possibility that even more petitions would have made it to the ballot had Colorado not banned paid petitioners. Had the Court known more about the history of the initiative in Colorado, they might also have pointed out that Colorado did not enact its ban until 1941 and that Colorado had as many initiatives on the ballot in its first 30 years with paid petitioners as they had in the next nearly 50 years without paid petitioners. Had the Court really wanted to impress, it might also have noted that in Oregon initiatives appeared on the ballot three times as often in the decades before paid petitioners were banned. But though the Supreme Court was right to reject the District Court's empirical argument, Stevens and company then made a far more egregious error by assuming that if banning paid petitioners makes ballot access more difficult, as it undoubtedly does, then to restrict paid petitioners is to suppress political speech.[124] However, as Daniel Lowenstein and his colleagues have pointed out, Stevens' argument "can hardly be taken seriously. The First Amendment prevents suppression of speech but does not require states to place measures on the ballot in order to encourage speech."[125] If Stevens' logic were to be followed, then all effective restrictions on ballot access – including geographical distribution requirements, short circulation windows, or high signature requirements – would be unconstitutional. A state that imposes a 15 percent signature requirement, for instance, does at least as much or more to restrict ballot access than a state that bans paid signature gatherers. Stevens cannot seriously believe that states are under a constitutional obligation to maximize the number of initiatives on a ballot, but unless he is willing to accept this position his argument collapses. The number of initiatives on the ballot is irrelevant to the First Amendment.[126]

The Court's naivete about the initiative process was evident, too, in its idealized discussion of petition circulation. According

123. Grant v. Meyer, 741 F.2d 1210, 1213 (10th Cir. 1984).

124. *Meyer*, 486 U.S. at 424.

125. Caroline Tolbert, Daniel H. Lowenstein & Todd Donovan, *Election Law and Rules for Using Initiatives*, *in* CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE U.S. 36 (Todd Donovan et al. eds., 1998).

126. *See* Lowenstein & Stern, *supra* note 79, at 215.

to Stevens, a petition circulator will "at least have to persuade [the potential signer] that the matter is one deserving of the public scrutiny and debate that would attend its consideration. . .This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it."[127] Thus the activity of signature solicitation is clearly "core political speech." The only evidence the Court provided as to what occurs "in almost every case," however, was the testimony of one person, an appellee in the case, Paul Grant, who claimed:

> you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, 'Please let me know a little bit more.' Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations. Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign. . . .[We try] to explain. . .not just deregulation in this industry, that it would free up. . .industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.[128]

The Court uncritically accepted Grant's account while ignoring a vast body of evidence suggesting that most encounters bear little resemblance to the one described by Grant, particularly when (as is usually true with paid signature gatherers) the circulator is pushing multiple, unrelated petitions at once. One initiative "campaign manual" explicitly instructs signature gatherers not to "converse at length with signers or attempt to answer lengthy questions. While such a conversation is in progress, a hundred people may walk by unsolicited. The goal of the table operation is to get petition signatures, not educate voters."[129] Ed Koupal, one of the most successful signature gatherers in California in the 1970s, worked on the maxim that "a signature table is not a library." In an interview published in 1975, he described "the hoopla process" that his

127. *Meyer*, 486 U.S. at 421.

128. *Id.* at 422 n.4.

129. David D. Schmidt, CITIZEN LAW MAKERS: THE BALLOT INITIATIVE REVOLUTION 199 (1989).

signature gatherers use:

> While one person sits at the table, the other walks up to people and asks two questions. (We operate on the old selling maxim that two yesses make a sale.) First, we ask if they are a registered voter. If they say yes, we ask them if they are registered in that county. If they say yes to that, we immediately push them up to the table where the person sitting points to a petition and says, 'Sign this.' By this time the person feels, 'Oh, goodie, I get to play,' and signs it.[130]

Similar is the description that Kelly Kimball offers of the training Kimball Petition Management gives its circulators:

> Our training is, the first thing you do is ask [potential signers] which county are you registered to vote in. [Then we ask] will you sign a petition for a California state lottery. For the most part that's all you have to say. If they want more information, you have a second line. California lottery is good for schools. Well, they want more information. At that point you hand them a petition and text sheet. You say come back to me if you want to sign it. After two or three lines it doesn't become cost effective to argue with a person.[131]

People sign, Kimball explains, "because you ask them to sign."[132] Even Paul Grant himself admitted that people were more likely to sign when he told them it was his birthday, a fact that Justice Stevens conveniently left out.[133]

Stevens' rose-colored portrait of signature gathering is offered to bolster his argument that "core political speech" is implicated; but in fact the characterization is largely irrelevant. Even if signature gathering is typically closer to the description offered by Koupal and Kimball than the one pedaled by Grant, the act of gathering signatures in public places would still be a constitutionally protected activity. But Colorado did not restrict a person's right to engage in signature gathering; rather the state said only that one could not be paid for doing so. The Court's fallback position, relying on *Buckley*, is that paying people to circulate initiative petitions is itself a form of speech and thus warrants heightened First Amendment protection that creates a burden on the state that is "well-nigh insurmountable."[134] Such is the shadow *Buckley* casts that the District Court judge who upheld the ban also tried to invoke *Buckley* to argue that paying a signature gatherer was more like

130. Lowenstein & Stern, *supra* note 79, at 197.
131. *Id.* at 198.
132. *Id.*
133. *Id.* at 182; *see also*, Grant v. Meyer, 741 F.2d at 1214.
134. *Meyer*, 486 U.S. at 425.

a contribution than a campaign expenditure and thus did not warrant the same level of constitutional scrutiny.[135] There is little to choose between these two metaphysical positions. Both judicial pronouncements divert us from the important empirical and normative questions, questions that courts are ill-equipped to handle: Does a ban on paid signature gatherers promote grassroots democracy and civic involvement? Does it help ensure that measures reaching the ballot have a sufficiently broad base of support to warrant public consideration? Does it help to promote public trust in the initiative process? Does it help to keep the number of measures on the ballot to a manageable level or does it mean that the hurdles to ballot qualification are impossibly high? Answers to these questions will surely vary by state; what works in South Dakota will not necessarily be effective or desirable in California. One-size-fits-all court edicts preempt a healthy political debate about the appropriate role of the initiative process in a democracy. And by closing down the states as "laboratories of reform," in the famous phrase of Louis Brandeis, the courts limit our ability to discover the relative merits of different ways of regulating the initiative process.

The U.S. Supreme Court, however, shows little sign of extricating itself from the political thicket it has entered. Indeed judging by its 1999 ruling in *Buckley v. American Constitutional Law Foundation, Inc.*, a majority seems intent on plunging ever deeper into the judicial jungle.[136] In *Buckley v. American*, the Court considered the constitutionality of a number of regulations that Colorado had placed on signature gatherers in the aftermath of *Meyer*. Forced by the Court in 1988 to allow paid signature gatherers, Colorado took steps to regulate paid signature gatherers, focusing in particular on making it possible for the public to ascertain which initiatives were using paid signature gatherers.[137] If the state could not stop them from circulating petitions at least it could make citizens aware of their presence. To this end, Colorado enacted a requirement that petition circulators must wear an identification badge indicating whether they are being paid for their services and by whom. The requirement also specified that initiative sponsors file monthly and final reports identifying the name, address and compensation of each paid circulator, and the amount of money

135. *Id.* at 1212; *see also* Tolbert, Lowenstein & Donovan, *supra* note 125, at 36; Lowenstein & Stern, *supra* note 79, at 183.

136. 525 U.S. 182 (1999).

137. *Buckley v. American*, 525 U.S. at 187-89.

paid per signature. The Court struck down the identification badge and disclosure requirement as unconstitutional infringements on political expression. In addition, the Court invalidated Colorado's requirement that petition circulators be registered voters, a regulation that is commonplace in initiative states and exists in many states for candidate petitions as well. Colorado's law, which applies to candidate petitions no less than initiative petitions, had been on the books in Colorado since 1980 when it was approved by the voters in a legislative referendum.[138]

Although the opinion has been hailed by initiative enthusiasts and bewailed by initiative skeptics, the decision was in some ways more limited in its scope than was generally recognized in press accounts. In particular, the Court explicitly refused to judge the constitutionality of the requirement that the badge disclose whether the circulator is paid and by whom. Following the Court of Appeals, the Supreme Court limited its opinion to the requirement that the badge identify the name of the circulator. All nine justices agreed that requiring an individual to wear an identity badge was unacceptable, and indeed it is hard to see any strong state interest in compelling circulators to display their names on a badge. The purpose of the badge should not be to reveal the personal identity of the circulator but to inform the signer whether the circulator is being paid and by whom. For now at least, Colorado and other states are still free to require circulators to wear badges that indicate whether they are paid and by whom, so long as that badge does not also include the individual's name.[139]

Although the Court agreed that forcing the circulator to divulge his identity at the point of solicitation was unconstitutional, they were sharply divided as to whether the state could compel the circulator to relinquish his anonymity in monthly or final reports. In the majority's view, the substantial state interest in maintaining the integrity of the initiative process was served by requiring a measure's proponents to divulge their names and the total amount they spent to collect

138. *Id.* at 190 nn.5-8.

139. *Id.* at 200. In truth, such badges, with or without names, are unlikely to be effective. As DuBois and Feeney point out, circulators might very well "seek and obtain signatures by using the disclosure as the basis for an appeal for voter support to help them achieve some worthy personal goal (e.g., pay the rent, go to college, travel abroad) wholly unrelated to the content of the petition." DUBOIS & FEENEY, *supra* note 4, at 102; *see also* Lowenstein & Stern, *supra* note 79, at 220.

signatures. The added value of revealing the names of the paid circulators and the amounts paid to each of them "is hardly apparent, and has not been demonstrated." "What is of interest is the payor, not the payees," the Court concluded.[140] Three justices (O'Connor, Breyer, and Rehnquist) disagreed. "As a regulation of the electoral process with an indirect and insignificant effect on speech," O'Connor argued, "the disclosure provision should be upheld so long as it advances a legitimate government interest."[141] And for O'Connor it was self-evident that Colorado's "stated interests in combating fraud and providing the public with information about petition circulation" were sufficient to meet this level of review.[142] Indeed so substantial were these interests that O'Connor affirmed that she would have upheld the regulations even had she believed more exacting scrutiny were required. In the view of the three dissenting justices, whether voters should be interested in the payee as well as the payor was a judgment properly left to the states.[143]

Perhaps the most important and disturbing aspect of the Court's ruling was its decision to invalidate the state's requirement that circulators must be registered voters. It is this aspect of the decision that most clearly reveals the poverty of the reasoning in *Meyer*. For the majority, it was "beyond question" that "Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions. That requirement produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*."[144] Banning paid circulators, like restricting circulators to registered voters, "'limit[s] the number of voices who will convey [the initiative proponents'] message' and, consequently, cut[s] down 'the size of the audience [proponents] can reach.'"[145] The Court thus rejected a regulation that had existed for years in all but a handful of initiative states, including every state that used the initiative with great frequency. The Court's decision also would appear to call into question a whole host of state laws that use registration as a

140. *Buckley v. American,*, 525 U.S. at 203.

141. *Id.* at 222.

142. *Id.*

143. *Id.* at 231; *see also* Wash. Initiatives Now v. Ripple, 213 F.3d 1132 (9th Cir. 2000).

144. *Buckley v. American*, 525 U.S. at 182.

145. *Id.*

means of regulating the political process. Most directly, the decision threatens the requirement that *candidate* petition circulators be registered voters, a requirement that exists in many states, including a large number that do not possess the initiative process.[146] Also in jeopardy are laws like the one in Oregon which mandates that only registered voters may file a petition with the Oregon Supreme Court challenging a ballot title.

Given the ubiquity of state regulations that limit political activities (including voting and signing a petition) to registered voters, it is understandable that the majority's decision provoked something approaching disbelief from the three dissenting justices, each of whom viewed registration requirements as well within the states' power to regulate their own electoral processes. "State ballot initiatives are a matter of state concern," Rehnquist tried to remind the Court, "and a state should be able to limit the ability to circulate initiative petitions to those people who can ultimately vote on those initiatives at the polls."[147] What concerned Rehnquist most was the Court's insistence that a state regulation was constitutionally suspect if it either decreased "the pool of potential circulators" or reduced "the chances that a measure would gather signatures sufficient to qualify for the ballot." Under this "highly abstract and mechanical test," Rehnquist pointed out, the validity of almost any regulation of petition circulation is called into question.[148]

The majority tried to blunt Rehnquist's objection by quoting Robert Bork to the effect that "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski to the bottom."[149] But the trouble is that the majority opinion leaves state legislatures and lower courts little guidance as to how far down the slope the Court desires to ski. Observers can only wonder why a state can require candidates for office to be registered voters (as the Court has held in a previous case) but

146. At the time of *Buckley v. American*, some twenty states required that party or candidate petitioners be registered voters: Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Michigan, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Virginia, West Virginia, Wisconsin, and Wyoming. Since *Buckley v. American*, Arizona and Idaho have repealed the requirement, and federal district courts in Illinois have struck it down twice. Both district courts based their decision on *Buckley v. American*. BALLOT NEWS, Aug. 3, 1999, and Sept. 1, 2000.

147. *Buckley v. American*, 525 U.S. at 155.

148. *Id.* at 228.

149. *Id.* at 195 n.16.

cannot require the same of petition circulators. And if states cannot mandate that petition circulators be registered voters, then why can they insist that petition *signers* be registered voters? Would the Court also strike down a residency requirement for signers? If one rigorously follows the logic of the Court's "abstract and mechanical test" articulated in *Meyer* and repeated in *Buckley v. American*, then residence requirements would seem to be doomed, as would many other initiative regulations. The Court's "sphinx-like silence" on the residence requirement, together with the circumscribed character of its decision regarding the badge and disclosure requirements, suggests, however, that the Court is hesitant to follow the demanding logic of *Meyer*.[150]

Meyer's potential to transform the entire regulatory environment of the signature gathering process had been immediately grasped by initiative activists. After Meyer, initiative proponents began to challenge all sorts of initiative regulations, some of which (like the identification badge and the payee disclosure requirements) were themselves enacted in response to *Meyer's* ban on paid circulators, but others of which have been settled law for decades, sometimes dating back to the initiative's inception. The *American v. Buckley* case itself began as a challenge not only to the three provisions debated by the Court but as a radical assault on the requirement that the petition circulation period be limited to six months, that circulators attach to each petition an affidavit containing the circulator's name and address, and that circulators be at least 18 years of age. The lower courts brushed aside each of these challenges, and the Supreme Court refused to revisit them,[151] even though the length of the circulation period is more important in determining a measure's chances for successful qualification than whether circulators are registered voters. One would be hard pressed to say why a six month window is a "sensible" and "reasonable" regulation, as the Court of Appeals concluded,[152] and a requirement that circulators be registered

150. *Id.* at 228; *see also Court Denies Appeal on Marijuana Petition*, BANGOR DAILY NEWS, July 29, 1998. Since *Buckley v. American*, residency requirements for initiative petition circulators have been upheld in North Dakota (Initiative & Referendum Institute v. Jaeger, 241 F. 3d 614 (8th Cir. 2001)), Mississippi (Kean v. Clark, 56 F. Supp. 2d 719 (S.D. Miss. 1999)), Maine (Initiative & Referendum Institute v. Secretary of State of Maine, Civ. No. 98-104-B-C (D. Me. Apr. 1999)), and Idaho (Idaho Coalition United for Bears v. Cenarrusa, Civ. No. 00-0668-S-BLW (D. Idaho Nov. 2001)).

151. *Buckley v. American*, 525 U.S. at 198.

152. *Id.* at 191 n.10.

voters is unreasonable. Would three months still be reasonable, or what about one month? And even if the circulation period is not deemed by judges to be "reasonable" or "sensible," if the voters and elected officials of a particular state decide that they want to organize their initiative process in such a way as to make ballot access extremely difficult, why should they not be allowed to do so? How reasonable or sensible a particular initiative regulation is depends on a prior political judgment about the desirability of having a large number of initiatives on the ballot. Courts simply have no business skiing on this particular slope.

VII. WHAT'S LEFT FOR THE STATES?

The U.S. Supreme Court's decisions in the last quarter of the twentieth century, beginning with *Buckley v. Valeo*, have made it increasingly difficult for states to craft initiative regulations that stop wealthy individuals from purchasing a place on the ballot. The most effective way to achieve this goal would be to limit contributions to initiative qualification campaigns in the same way that we do for candidate campaigns, but the Court's decisions in *Bellotti*[153] and *Citizens Against Rent Control*[154] have ruled out this option. Banning paid signature gatherers was seen by many states as an alternative way of preventing the rich and powerful from paying their way onto the ballot, but a decade later this option too was eliminated by the Court in *Meyer*. The immediate impact of *Buckley v. American* is less clear. If states can require circulators to be residents then the registration requirement may not be necessary to achieve the goal of preventing out-of-state circulators. And if states can still require circulators to wear badges that identify them as paid circulators, or to disclose that information on the petition itself, then the absence of the individual's name on the badge is not particularly important. Finally, if states can compel proponents to file monthly and final reports indicating the sources of the money and how much they paid per signature, then the media and citizens will have the information they need to make informed judgments about the grassroots nature of the initiative campaign. But even if *Buckley v. American* is given a circumscribed reading, the ruling signals the Court's intention to scrutinize restrictions on the signature gathering process.

153. 435 U.S. 765 (1978).
154. 454 U.S. 290 (1981).

In the immediate aftermath of *Buckley v. American*, initiative reformers wailed that "the Supreme Court ruling robs states of the ability to fix a defective system,"[155] while initiative activists exulted that states would now have to keep their dirty mits off signature gatherers. Both reactions are understandable, but if the states' response to *Meyer* is any guide, neither prognosis is entirely accurate. Banning paid signature gatherers severely hampered states' ability to regulate the signature gathering process, but it also spurred a flurry of efforts to find alternative means to regulate and restrict paid signature gatherers in ways that might pass constitutional muster.

Among the boldest responses to *Meyer* came from several states – including Washington and Maine in 1993 and Mississippi in 1996 – which prohibited payment per signature but permitted initiative campaigns to pay by the hour or on salary. The courts quickly beat back this subterfuge – the Washington and Mississippi laws lasted barely a year, and the Maine law only five.[156] The same law, however, has continued to survive judicial challenge in North Dakota, which enacted its prohibition on per signature payments in 1987 in reaction to publicized instances of petition fraud associated with a 1986 state lottery initiative – the first North Dakota initiative in many years to rely on paid signature gatherers. The district court judge upheld the pay restriction, reasoning that the state's argument that "a signature-based commission rate of compensation encourages or promotes fraud" has "a common-sense basis," even if the evidence was "primarily anecdotal." The restrictions, he concluded, were not "an impermissible burden" on the free-speech and political advocacy rights of initiative proponents.[157]

---

155. *Voters On Their Own In Initiative Process*, S.F. CHRON., January 18, 1999, at A22.

156. LIMIT v. Maleng, 874 F. Supp. 1138 (W.D. Wash. 1994); Term Limits Leadership Council v. Clark, 984 F. Supp. 470 (S.D. Miss. 1997); On Our Terms '97 PAC v. Secretary of State of Maine, 101 F. Supp. 2d 19, 26 (D. Me. 1999). Wyoming prohibited payment per signature in 1996, but the restriction has yet to be challenged in court. E-mail from Peggy Nighswonger, Elections Director, Wyoming, Office of the Secretary of State, to the Author (March 13 & 27, 2000).

157. *Initiative and Referendum Inst. v. Jaeger*, No. A1-98-70 (D.N.D. 1999). *See also* Dale Wetzel, *Judge Throws out Petition Restrictions Challenge*, BISMARK TRIBUNE, August 3, 1999, at A3. In February 2001, the U.S. Court of Appeals for the 8th Circuit affirmed the district court's judgment. Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001). The effect of the law is hard to estimate, but North Dakota is one of the few states where volunteer campaigns remain the norm. Of the eight initiatives on the ballot in North Dakota between 1996 and 1998, five were qualified by volunteers

The fraud argument worked for North Dakota in district court, but it is a frail reed upon which to rest a challenge to paid signature gatherers, as Maine found out when its prohibition on per-signature payments was struck down in 1999. The Maine law, like the North Dakota law, was challenged in federal court by a coalition of out-of-state groups, including U.S. Term Limits, the Initiative & Referendum Institute, and a California signature gathering firm. The judge concluded that Maine had "offered no evidence whatsoever that fraud is more pervasive among circulators paid per signature, or even that fraud in general has been a noteworthy problem in the lengthy history of the Maine initiative and referendum process."[158] Similarly, in Washington in 1994, the court emphasized the absence of "actual proof of fraud stemming specifically from the payment per signature method of collection."[159] The Washington judge agreed with the Supreme Court in *Meyer* that there was no reason to "assume that a professional circulator – whose qualifications for similar future assignments may well depend on a reputation for competence and integrity – is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot."[160]

The Supreme Court is probably right that there is no strong *a priori* reason to believe fraud is more likely among paid signature gatherers than among volunteers. Nor do we have systematic empirical evidence that relying on volunteers reduces signature fraud, though neither do we yet have systematic evidence that it does not reduce fraud. We do know that paid signature campaigns generally have lower signature validity rates, but an invalid signature is not usually a result of fraud on the part of the signature gatherer. More often an invalid signature results from unregistered voters signing petitions, which is fraud only if the circulator knows the signer is not a registered voter. Paid signature gatherers may be more careless about checking whether a signer is a registered voter but one would be hard pressed to label that sort of behavior as fraud.

---

exclusively. E-mail from Cory Fong, Office of the Secretary of State, North Dakota, to the Author (November 23, 1999).

158. *Per-Signature Payments to Petition Gatherers OK'd A U.S. Magistrate Rules that a Maine Ban on the Practice is Unneeded*, PORTLAND PRESS HERALD, December 12, 1999, at B6.

159. *Maleng*, 874 F. Supp. at 1140-41.

160. *Id.* at 1141 (quoting *Meyer*, 486 U.S. at 426).

Moreover, every initiative state already has in place an elaborate system for checking and weeding out invalid signatures, so the presence of invalid signatures need not pose a great threat to the integrity of the initiative process. Finally, petitioners who knowingly pad a petition with false signatures are liable to criminal prosecution.

Although fraud prevention is typically the dominant theme inside the courtroom, reactions outside the courtroom in Maine and North Dakota showed that for many people restrictions on paid signature gatherers have less to do with preventing fraud than with preserving the integrity of the initiative process by encouraging volunteer efforts and discouraging qualification campaigns that rely only on money. North Dakota's leading newspaper hailed the district court's decision as a victory "for states' rights and common sense." The prohibition against paying circulators by the signature, they explained, was "intended to discourage 'shortcuts,'" and to make it more difficult for people who wanted to buy their way on the ballot. If North Dakota wanted to promote this end, why shouldn't they be allowed to? "It's nobody's business but North Dakota's."[161] Maine's Secretary of State explained his dismay at the Maine court's decision by stressing that "the citizen initiative process is an important part of our democratic process, and it is our responsibility to ensure the integrity of this process for the citizens of Maine. We strive to keep the focus on 'citizens' in the citizen initiative process."[162]

If civic concerns are slighted in the legal arguments, while fraud is invoked, as one lawyer involved in *Buckley v. American* complained, as "a talismanic incantation,"[163] that is largely the fault of the United States Supreme Court, whose decisions have forced states to frame their defense on the shallower grounds of fraud. By accepting the patently false premise that a state's interest in ensuring an initiative has a broad base of public support is adequately protected by a signature requirement (in *Meyer*), and denying that corruption or the appearance of corruption was relevant to initiative campaigns (in *Bellotti* and

161. *Process Belongs to States*, BISMARCK TRIBUNE, August 12, 1999, at A4.

162. *Per-Signature Payments to Petition Gatherers OK'd A U.S. Magistrate Rules that a Maine Ban on the Practice is Unneeded*, *supra* note 158.

163. Richard Carelli, *Court Considers How Much States Can Regulate Ballot Initiatives*, Associated Press wire report (Oct. 14, 1998) (quoting Denver attorney Neil O'Toole), *reprinted as* Richard Carelli, *Court Mulls Ballot Initiatives*, ASSOCIATED PRESS ONLINE, Oct. 14, 1998, *available at* 1998 WL 21171857.

Citizens Against Rent Control), the Supreme Court seems to have left no room for the expression of legitimate civic concerns about the democratic health of the initiative process. The Court's sweeping rulings allow no place for some of the most important reasons the people of a state might want to restrict or regulate paid signature gatherers, including making it more difficult for wealthy individuals to purchase a place on the ballot and promoting grass-roots volunteerism. One might think that it is more than reasonable for a state be permitted to regulate its political process so as to ensure that wealthy individuals like Loren Parks or George Soros cannot purchase a place on the ballot with the same impunity that they might acquire a yacht or a vacation home. Under the court's reasoning only if Parks or Soros are foolish enough to attempt to purchase their place on the ballot through fraudulent means does the state have a compelling interest to regulate the payment of signature gatherers. Having reduced democratic concerns about the integrity of the initiative process to little more than the prevention of forgery and bribery, the Supreme Court not only weakens the initiative process but impoverishes democratic discourse in the United States.

Despite the Supreme Court's rulings, however, the states continue to be laboratories of reform. In Alaska, for instance, where there were 5 initiatives in 1998 (only the initiative heavyweights, California, Colorado, and Oregon, had more that year), the legislature responded with legislation that restricted anyone from being paid more than $1 per signature. At the time the bill was enacted in 1998, few if any initiative campaigns in Alaska had paid more than one dollar per signature; but inflation ensures that the limitation, if left alone, will impact qualification drives in the near future. Moreover, since the price of signatures is affected by the number of petitions being circulated, the $1 limit will be felt most acutely in elections where a large number of initiatives are vying for ballot access. Its effect will be relatively slight, however, when the number of initiatives being circulated is small. What impact the law will have on paid signature gatherers and whether it will survive constitutional challenge has yet to be seen.

In Oregon, paid petition gatherers have recently been redefined as employees rather than as independent contractors, thus making a signature gathering firm liable for payment of unemployment benefits. This regulatory change, which increases the cost of gathering signatures, was instituted not by

the legislature but by an administrative audit after an individual circulator filed for unemployment compensation and listed a signature gathering firm as her last employer. The Employment Department's determination that the individual had been an employee of the signature gathering firm was affirmed by an administrative law judge and then upheld in 1999 by the Oregon Court of Appeals,[164] much to the chagrin of Bill Sizemore, who predicted "it would be a heavy wet blanket on the entire initiative process."[165] The near record number of initiatives on the 2000 Oregon ballot suggests the blanket was nowhere near as suffocating as Sizemore feared.

Even restrictions that *Buckley v. American* explicitly struck down have not been automatically repealed elsewhere. In April 1999, for instance, a federal judge in Maine upheld that state's power to require initiative petitioners be registered voters. Unlike Colorado, where as many as one third of the voting-age population were not registered to vote, in Maine less than two percent of the eligible population is not registered. The Maine law was constitutional, the judge reasoned, because unlike the Colorado law it did not significantly shrink the pool of circulators nor make it more difficult to qualify an initiative. Because the burden on initiative sponsors in Maine was at most "slight," a less stringent standard of review was appropriate. It was sufficient that the registration requirement served a "legitimate" state interest in administrative efficiency. [166] The

164. Canvasser v. Employment Dept., 987 P.2d 562 (Or. Ct. App. 1999).

165. David Kravets, *Signature Gathering Facing Court Fight*, STATESMAN JOURNAL (Salem, Or.), February 5, 1999, at C3 (quoting Bill Sizemore). In February 2000, the Oregon Supreme Court let stand the Court of Appeals' ruling in *Canvasser* by refusing to review the decision. *Canvasser*, 987 P.2d 564, *review denied*, 994 P.2d 132 (Or. 2000). The original hearing before the administrative law judge opened a revealing window on the underworld of signature gathering. Rhonda Buffington had set up a political consulting business (Affinity Communication) and obtained a contract with a large California signature gathering firm, Kimball Petition Management, to coordinate the campaigns for three measures that Kimball had contracted to get on the ballot. Buffington's duty was to recruit individuals to gather signatures, and to this end she hired an office staff of four persons, whom both sides in the case agreed were properly considered employees, and about four hundred people, most of whom she did not know and who by the time of the trial had "scattered to the far ends of the country." Most of the people who were gathering signatures for Affinity were also gathering for other firms, and according to testimony, some of these circulators were carrying "as many as 22 petitions." Tr. of July 10, 1999, hearing at 26, Affinity Communication v. Crosley (before the Oregon State Employment Office), *rev'd sub nom.* Canvasser Serv. Inc. v. Employment Dep't, 987 P.2d 562 (Or. Ct. App. 1999).

166. Initiative & Referendum Institute v. Secretary of State of Maine, Civ. No. 98-104-B-C, 25-27 (D. Me. Apr. 1999).

state's residency requirement was more burdensome, but the judge agreed with the state that Maine had a "compelling" interest in "ensuring that Maine is governed by Mainers."[167] Petition circulators, the judge noted, "play a vital role in the process of self-government [and so] the state may reasonably require that such circulators be residents of Maine."[168] A residency requirement also served the state's "important" interest in making it easier for the state to hold "circulators answerable for infractions of its initiative laws."[169]

Despite the Supreme Court's sweeping language in *Meyer*, which seemed to call into question all state restrictions that "make it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot,"[170] courts have shown little appetite for using this test to strike down the most consequential restrictions on circulators, including circulation windows and geographic distribution requirements. Although there have been numerous challenges to such provisions since the *Meyer* decision, courts have, until very recently, generally upheld geographic requirements and brief circulation periods.

So far there are two exceptions. First is a decision rendered late in 2001 by the U.S. District Court in Idaho. A federal judge struck down Idaho's geographic distribution requirement, which required that the state's six percent signature threshold be reached in half of the state's 44 counties. The judge reasoned that because over 60 percent of Idaho's population resides in about one-fifth of the state's counties, the geographic distribution requirement violated the Equal Protection Clause by giving the "rural voters preferential treatment."[171] The state

---

167. *Id.* at 26.

168. *Id.* at 27.

169. *Id.*

170. Meyer v. Grant, 486 U.S. 414, 423 (1988).

171. Idaho Coalition United for Bears v. Cenarrusa, Civ. No. 00-0668-S-BLW (D. Idaho Nov. 30, 2001). The judge also struck down a 1933 statute that made it "a felony for any person to. . .offer, propose, threaten or attempt to sell, hinder or delay any petition or any part thereof or of any signatures. . . ." The judge reasoned that a person could reasonably believe that "this statute could easily be interpreted to prohibit the common practice of paying circulators on a per-signature basis." *Id.* An official in the Idaho Secretary of State's office conceded that the statute is "about as clear as mud." E-mail from Peggy Ysursa, Administrative Secretary, Elections Division, Office of the Secretary of State, Idaho, to the Author (Oct. 18, 1999). However, the state has consistently taken the position that this statute was not designed to prevent paid signature gathering. No individual had ever been prosecuted for paid signature gathering, and it was widely recognized in the state that paid signature gathering was

has appealed this decision to the 9th U.S. Circuit Court of Appeals, arguing that the judge's decision had failed "to take into account the fact that the initiative and referendum powers are not fundamental or federal rights but powers expressly granted only by the states and are therefore subject to reasonable rules and regulations regarding their governance."[172]

The second exception is the recent decision by a divided Utah Supreme Court, which found geographic distribution requirements to be in violation of both the state constitution and the federal constitution. Using a logic the U.S. Supreme Court applied to redistricting cases in the early 1960s in *Baker v. Carr*[173] and *Reynolds v. Simms*,[174] the Utah court said the geographic distribution requirement rule rendered "a signature in Daggett County, whose population is 0.1 percent of Salt Lake County's population,. . .1000 times as valuable as the signature of a voter in Salt Lake County."[175] Although the petitioners made a free speech claim based on the U.S. Supreme Court's decisions in *Meyer* and *Buckley v. American*, the majority neither relied on nor made reference to these cases, basing their decision instead on the "uniform operation of laws" provision of the state constitution and the Equal Protection Clause of the U.S. Constitution.[176] The dissenting opinion did address the relevance of *Meyer* and the free speech claim, and explicitly rejected the notion that "core political speech" was burdened by

---

permissible. In fact, most of the initiative campaigns in the 1990s had qualified by paying for signatures. So it is hard to see how this statute could reasonably be construed as having a chilling effect on circulators, as the judge maintained.

172. Mark Warbis, *State Appeals Federal Judge's Decision*, Associated Press State & Local Wire (Dec. 31, 2001). Two other states in the 9th Circuit have geographic distribution requirements that would be at risk if the appeal was upheld: Montana and Nevada. Prior to 2002, Montana's distribution requirement was based on legislative districts and was not especially onerous — only requiring the requisite signatures to be gathered in one-third of the state's 100 legislative districts for statutory initiatives and two-fifths for constitutional initiatives. Montana's law was thus easily distinguishable from Idaho's. Passage of CI-37 and CI-38 in 2002, however, places Montana's distribution requirement in great jeopardy if the district court ruling is upheld because CI-37 and CI-38 shift the basis of the distribution requirement to counties and at the same time stiffen the law by requiring the requisite percentage of signatures be gathered in at least half of the state's counties. So Montana's distribution requirement is now virtually indistinguishable from Idaho's. Nevada requires that the requisite signatures be reached in at least three quarters of the state's counties, a distribution requirement which on its face appears to be even more onerous and inequitable than Idaho's.

173. 369 U.S. 186 (1962).

174. 377 U.S. 533 (1964).

175. Gallivan v. Walker, 54 P.3d 1069, 1087 (Utah 2002).

176. *Id.* at 1099.

the geographic distribution requirement.[177]

That these decisions emerged out of Utah and Idaho is not altogether surprising since their Republican-dominated state legislatures have enacted a number of restrictive changes to the initiative process in recent years. Idaho's geographic distribution requirement was passed in 1997 as part of a package of initiative reforms that also included shortening the circulation period to 18 months and requiring petitions to indicate in bold red type whether a circulator was a volunteer or not (the latter provision was repealed in 1999 after *Buckley v. American*).[178] Utah's requirement that the ten percent signature threshold be achieved in two thirds of the counties dates from 1998, when the legislature increased the number from half of the counties. Several other states have also made signature gathering more difficult in the past few years. In 1998, for instance, Maine shortened its circulation window from three years to one year. The same year, Wyoming voters approved a legislative referendum that kept the 15 percent signature requirement statewide but added a provision requiring petitioners also to obtain 15 percent in at least two-thirds of the state's counties. Prior to that, Wyoming's geographic distribution requirement had been nominal, as petitioners only needed one signature in two-thirds of the counties.

The irony is that states that are least in need of tighter restrictions often seem to be the ones most inclined to make qualification more difficult. Wyoming, for instance, has the highest signature threshold of any state, and has only had seven initiatives on the ballot in three decades. Utah had fewer initiatives on the ballot in the 1990s (three) than any other state except Illinois and Mississippi. A number of high use states have seriously considered adding geographic distribution requirements or even increasing signature requirements, but the proposals have generally failed. In Oregon in 1997, for example, the legislature succeeded in referring to the voters a

177. *Id.* at 1106.

178. At the same time, Idaho changed its signature requirement from ten percent of the number of votes in the last gubernatorial election to six percent of the number of registered voters in the last general election. The total number of signatures required under these two standards was roughly the same: in 1996 petitioners needed 41,335 signatures, while in 1998 they needed 42,026. The change was made to be consistent with the new geographic distribution requirement, and it was also hoped that registered voters would be a more stable basis for calculating signatures than a gubernatorial vote. E-mail from Penny Ysursa, Administrative Secretary, Election Division, Office of the Secretary of State, Idaho, to the Author (March 3, 2000).

proposal that would have followed Mississippi's lead and required one-fifth of all signatures be gathered in each of the state's congressional districts, but the voters resoundingly rejected the idea. In 1999, the Oregon legislature referred a proposal to increase the number of signatures required for a constitutional amendment from eight percent to twelve percent, but again the voters repudiated the change.[179]

If courts will allow restrictions that make ballot qualification substantially more difficult, and the evidence generally suggests they will, that does not answer the harder question of whether such restrictions are good policy. If states make the signature gathering process more difficult by increasing the number of signatures required or by mandating a geographic distribution requirement, they will advantage those groups with the greatest financial and organizational resources. Signature gathering firms will be in even greater demand, and

179. Although voters rejected the legislature's signature hike, Oregon has nonetheless experienced a substantial de facto increase in the number of signatures required to qualify an initiative. This stealth increase has occurred as a result of a dramatic increase in the number of signatures deemed invalid by the secretary of state's office: from 17 percent in 1996 and 1998 to 25 percent in 2000 and 31 percent in 2002. In fact the highest invalidity rate in 1998 (25 percent) was less than the lowest invalidity rate in 2002 (27 percent)! The sharp increase in signatures declared invalid has a number of causes, but among the most important was a March 2000 directive by the Oregon Elections Division instructing county clerks not to count initiative signatures by "inactive voters," a category established by the U.S. Congress in 1993. Initially used by the state for voters who moved and failed to re-register, the category was expanded by the state legislature in 1999 to include voters who had not voted for five years. The legislature's aim in pruning inactive voters from the rolls was to make it easier to reach the 50 percent turnout threshold for tax increases that had been imposed, ironically, by a Sizemore-sponsored initiative in 1996. The additional increase in invalidity rates between 2000 and 2002 was likely due to the heightened scrutiny induced by having outside observers challenging signatures and observing the signature checking. Normally when a signature is deemed valid it is not checked again, but when it is deemed invalid it goes through a second or even third review. By successfully challenging signatures initially deemed valid, outside observers helped government officials identify more invalid signatures. In addition, the oversight itself may have been a factor. As Patty Wentz of the Voter Education Project puts it, "I know I'm more careful in my job when people are watching me." E-mail from Patty Wentz, Voter Education Project, to the Author (Aug. 6, 2002). At least one of the Oregon initiatives that failed to qualify in 2002 – Sizemore's anti-union measure which was deemed to have missed by a few hundred signatures – was clearly a casualty of this moving signature target. The invalidity rate for Sizemore's measure, which attracted particularly close scrutiny from the union-funded Voter Education Project, climbed to over 35 percent, the highest of any of the measures submitted to the secretary of state's office. Two other measures – a term limits measure and campaign finance measure – would likely have qualified if they had been submitted in the 1990s. Both needed validity rates close to 79 percent to reach the required threshold, a validity rate that was commonplace in the 1990s. In fact, in 1996 and 1998 only four of the 26 initiatives that qualified for the ballot fell below a 79 percent validity rate.

ordinary citizens will find it more difficult to place their issues on the ballot. The only way to make signature gathering firms and money less important in the qualification phase is to relax the signature requirements. But opening the floodgates to more initiatives, particularly in states where the ballot is already crowded with direct legislation, is not an attractive reform option. By forbidding states from limiting contributions to qualification campaigns and then forbidding them from banning paid signature gatherers, the United States Supreme Court has created a no-win situation for states wishing to reform the signature gathering process. Absent a judicial change of heart, what if anything can states do to extricate themselves from the horns of this court-induced dilemma?

VIII. WHAT IS TO BE DONE?

"Publicity," Louis Brandeis famously observed, "is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[180] The majority in *Buckley v. Valeo* and the dissent in *Buckley v. American* both quoted this passage approvingly in their defense of disclosure requirements, and it suggests a place where states could fruitfully concentrate their reform energies without advantaging the rich and powerful. States could enact laws that require petitioners to disclose whether they are using paid petitioners. Oregon enacted such a law in the 1980s, and other states have recently followed suit. Alaska, Missouri and Utah, for instance, all enacted a similar requirement in 1999. Initiative campaigns could also be compelled to report precisely how much they paid to gather signatures, as well as the number of signatures gathered using paid petitioners and the number of signatures gathered using volunteers. Montana did something like this in 1999 when the state legislature passed a law requiring that those who employ paid signature gatherers must file financial disclosure reports, which must include the amount paid to each signature gatherer.[181]

Such laws would be even more useful if they required the government not only to collect this sort of data but to compile

180. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY (1933), quoted in Buckley v. Valeo, 424 U.S. 1, 67 (1976), and Buckley v. American Constitutional Law Found., 525 U.S. 182, 223 (1999).

181. *See* MONT. CODE ANN. § 13-27-112 (2002).

and publish it in a form that is readily accessible and understandable to ordinary citizens. This information could be disclosed to the government immediately after the signatures are submitted, and the government could make the information available to voters at least one month prior to the election. Financial and in-kind contributions to the qualification phase of an initiative campaign could also be made available to the public at the same time. The aim of such laws would not be to prevent fraud, but to inform voters about how initiatives qualified for the ballot. Under the current legal framework in which one wealthy individual can essentially purchase a place on the ballot, preserving the integrity of the initiative process means that states need to inform voters about whether a ballot measure qualified because a few wealthy individuals paid for signatures or whether it qualified because of the efforts of thousands of volunteers.

Is there anything states can do beyond collecting information and making it more readily available to voters, journalists, and researchers? One radical option, dubbed "the cynic's choice," would be to abandon signature gathering altogether, and instead require (or at least allow) petitioners to pay a hefty filing fee. Paid signature gathering firms would go out of business, states would be saved the considerable expense of verifying signatures, and the amount that would have been spent qualifying the initiative could instead be used by the state for any number of socially useful purposes.[182] The virtue of such a proposal is that it would strip away the populist veneer that masks the financial realities of today's signature gathering process. Yet the plan obviously does nothing to make the qualification process a more meaningful reflection of citizen interests, nor does it help to make money less important in the process. The proposal does not so much reform the system as admit defeat.

More appealing perhaps is a proposal to make signatures gathered by volunteers count for more than signatures gathered by paid petitioners.[183] Allowing for a "volunteer's bonus" would enable states to encourage volunteer involvement in signature gathering without restricting the rights of individuals to hire paid signature gatherers. If done in conjunction with an increase

182. *See* Lowenstein & Stern, *supra* note 79, at 200 n.116; DUBOIS & FEENEY, *supra* note 4, at 102-04.

183. *See* Tolbert, Lowenstein & Donovan, *supra* note 125, at 37; Lowenstein & Stern, *supra* note 79, at 219-23; Garrett, *supra* note 58, at 1873-76.

in the number of signatures required, such a two-tiered scheme could simultaneously make qualification more difficult for initiatives relying on paid signature gatherers and easier for initiatives relying largely or entirely on volunteers. Nebraska considered such a two-tiered plan in 1995, but the proposal was eventually defeated amidst concerns that the volunteer's bonus might violate equal protection guarantees and that it might prove difficult to administer and enforce. One notable limitation of the proposal is that although it stimulates grassroots involvement and makes it more likely that a qualifying measure has a cadre of devoted partisans who care intensely about the proposal, it does not address the problem that "signatures, whether gathered by volunteers or paid solicitors, are simply not meaningful gauges of public discontent or even interest."[184] What, if anything, can be done to make it more likely that the measures that qualify for the ballot resemble issues that ordinary citizens are most concerned about?

In the initiative's early years, this question frequently prompted the suggestion that petitions be left with county registration officers and signed only in their presence. In part this proposal was intended to reduce fraud, but it was also designed to ensure that an initiative reflected voters' concerns. "Everyone knows," declared the Eugene *Register* in 1913,

> that under the present system petitions do not express real opinion. They are signed for a variety of reasons, among which are desire to be rid of the solicitor or to help him earn a day's wages, and the natural tendency to do that which is requested providing it costs nothing. Petitions signed voluntarily by persons who would take the trouble to go to the registration clerk. . .would be a real call from the people for initiating or referring any measure.[185]

One could make the petitions available at other public locations as well, including public libraries or fire stations. Initiative sponsors could still spend unlimited amounts of money to hire solicitors who would explain the measure to interested citizens, distribute relevant literature, and urge citizens to sign. Having learned about the initiative, the individual citizen would then need to make the effort to go to one of the designated public locations and sign the petition. Money would still matter in the qualification phase, but its importance relative to issue appeal

184. DUBOIS & FEENEY, *supra* note 4, at 105; *see also* PATRICK B. MCGUIGAN, THE POLITICS OF DIRECT DEMOCRACY IN THE 1980S: CASE STUDIES IN POPULAR DECISION MAKING 117 (1985) (reproducing an interview with Sue Thomas).

185. BARNETT, *supra* note 37, at 5; *see also* KEY & CROUCH, *supra* note 46, at 562.

(and organization) would be reduced. Of course, without a change in the number of required signatures such a reform would render the initiative process virtually unusable. But if this reform was linked to a dramatic reduction in the number of signatures required, as it should be, qualifying a measure could become much easier for initiative sponsors who tap into genuine citizen grievances or concerns. Whereas proponents of popular or controversial issues would find qualification substantially easier, those pushing issues about which people cared little would find the process much more onerous. But if the purpose of gathering signatures is to demonstrate breadth and depth of public support, that is exactly the way the process should work.[186]

A more modest but probably more realistic proposal is to press state officials to monitor the signature gathering process more closely. Elections officials would not dream of leaving polling places unattended, yet signature gathering is routinely conducted without any observers monitoring the process. An interesting experiment was tried in Oregon this past year by a union-funded watchdog organization calling itself the Voter Education Project (VEP). The project's aim was twofold: to identify signature fraud and forgeries committed by signature gatherers and to promote voter education about their rights and responsibilities as petition signers. The VEP sent staff into the field, directly onto the turf of the signature gatherer. Their aim, as their slogan has it, is to get people to "think before you ink." They hand out fliers, talk with people to make sure they understand what they are signing, and even videotape signature gatherers where they suspect fraud or deception.

The project's effect on voter education is difficult to quantify, but its impact in identifying fraud and forgery has been unmistakable. Between November 2001 and June 2002 VEP filed complaints against 15 paid signature gatherers for forging signatures and misleading signers. At the time of this writing, most of these complaints were still pending investigation, but two people had been convicted of forgery. One of the signature gatherers admitted that "he would not be surprised" if the number of valid signatures on his petitions was in single digits. The other signature gatherer who was convicted

186. *See* Daniel Lowenstein, *Election Law Miscellany: Enforcement, Access to Debates, Qualification of Initiatieves*, 77 TEX. L. REV. 2007 (1999); DUBOIS & FEENEY, *supra* note 45, at 85-88; DUBOIS & FEENEY, *supra* note 4, at 106-09.

estimated his valid signatures at about 50 percent. Both "acknowledged forging signatures, using fraudulent addresses and fraudulent counties, and knowingly having non-registered voters sign petitions."[187] After being informed by the state of the fraud perpetrated by these signature gatherers, Sizemore decided that he would not use any of the signatures gathered by these two individuals, which ended up costing Sizemore's anti-union measure its spot on the 2002 ballot.[188]

More important, the evidence and publicity generated by the Voter Education Project helped secure a commitment from the Secretary of State's office to create a position that would be responsible for proactively monitoring the signature gathering process. Potentially even more consequential is that the evidence of fraud compiled by the VEP may provide the evidence of fraud that courts have said a state needs to justify restrictions on paid signature gatherers. And with the passage of Measure 26 in November – a measure that would ban payment by signature but allow payment by the hour – the state will need that evidence if the measure is to survive the inevitable court challenges.

It is unfortunate that the U.S. Supreme Court has diminished our political discourse by reducing the concept of democratic integrity to the petty crimes of fraud and forgery. Absent a judicial change of heart or dramatic legislative action (both very unlikely), the main responsibility for ensuring the integrity of the initiative process will rest with individual citizens, who should refuse to sign an initiative petition until they have read the proposed bill carefully and thought about it for a long while. Nobody should sign just to be nice or accommodating, or because they feel sorry for the poor man or

187. Letter from Assistant Attorney General Steven Briggs to Bill Sizemore, communicated via e-mail from Patty Wentz, Voter Education Project, to the Author (July 8, 2002).

188. Further evidence of pervasive signature fraud has emerged as a result of a lawsuit filed against Sizemore by the Oregon Education Association and the Oregon chapter of the American Federation of Teachers. According to the testimony of Saul Klein, who managed several signature gathering campaigns for Sizemore and other chief petitioners, forgery is a "constant menace" when paying by the signature. According to Klein, the most common method of forgery is to obtain a signature on one petition sheet and then copy that person's signature and address onto the sheets for other petitions the circulator is carrying. Since paid circulators will often carry between five and 10 initiatives at the same time, the potential for fraud is clearly great. Patty Wentz, Voters Education Project, *News Release* (Sept. 17, 2002); William McCall, *Sizemore Business Associate Says Petition Fraud a 'Menace,'* Associated Press State and Local Wire (Sept. 17, 2002).

because they want him out of their face so they can get on with the shopping. Most of all, citizens should not give in to the canard that they should sign so that the people can decide. People should, as Oregon's Secretary of State Bill Bradbury has said, "treat their signature as carefully as they do their vote." A signature on a petition is not designed to be a measure of faith in "the people" but of support for a particular policy. If citizens sign petitions without scrutinizing the merits of what is proposed, then a ballot loaded with initiatives is not a sign of democratic vitality but rather an abrogation of civic responsibility.