BEN HOVLAND*

Comments

Championed by Progressives and William U'Ren: Can Oregon Give the Ballot Initiative to the People Again?

> How would you like to live in a state where the people can and do enact laws for the common good which their Legislature has failed to enact for them, where they can nullify any obnoxious measure passed by the Legislature, where they can nominate and elect, or defeat for public office, any man regardless of his party strength, and can recall any public officer, Supreme Judge included, whose acts they do not approve; a state where the party boss has been put out of business; a state in short where the people rule . . . ? Such a state is Oregon.
>
> How would you like to live in a state where the people can and do amend their constitution in the most radical fashion by a minority vote, where one-third of the voters decides the fate of laws affecting the other two-thirds, where one-twentieth of the voters can and do cripple the state educational institutions by holding up their funds; where special interests hire citizens to circulate petitions asking for the recall of judges who have found them guilty; where men representing themselves as for the people, buy signatures with drinks, forge dead men's names, practice blackmail by buying and selling . . . signatures for petitions needed to refer certain measures to the people; a state where the demagogue thrives and the energetic crank

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> with money through the Initiative and the Referendum, can legislate to his heart's content . . . ? Oregon is such a state.
> —Allen H. Eaton[1]

Oregon's initiative system is often described with adjectives like revered, beloved, populist, or historic.[2] This system is referred to as the voice of "the people."[3] Through the initiative process, concerned but frustrated Oregonians may bypass an unresponsive legislature to enact the laws important to them.[4] At least that was the intention of the leaders who gave Oregon the initiative and referendum system.[5] In the 1980s and 1990s, however, short-sighted court decisions struck down prohibitions on payment for signature gathering.[6] These court decisions "allowed well-financed private interest groups to co-opt the 'people's' initiative."[7] Proponents of the current initiative regime often rely on the claim that "the initiative process belongs to the people"; however, this rhetoric is simply an attempt to deter inquiries about the realities of direct democracy and the signature-gathering process.[8]

In extending the reasoning that money equals speech from political candidate campaigns[9] to initiative campaigns,[10] the United States Supreme Court failed to recognize that "[t]he primary purpose of signature requirements is to ensure that initiatives that reach the ballot meet a minimum threshold of public support."[11] Professor Daniel Lowenstein and practitioner Robert Stern argue that signature gathering is not ever a matter of First Amendment protected speech, but rather a tool that allows the states to "ration spaces on the ballot in a manner consistent with the purposes of the initiative process, or, indeed, in a manner that makes any sense at all."[12]

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[1] ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON v-vi (1912).

[2] Russell Sadler, *A Parallel Government*, 61 OR. ST. B. BULL., Oct. 2000, at 78, 78.

[3] *Id.*

[4] *Id.*

[5] *See infra* text accompanying notes 26-35.

[6] Sadler, *supra* note 2, at 78.

[7] *Id.*

[8] *See* Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 44 (2003).

[9] *See* discussion *infra* Part II.A.

[10] *See* discussion *infra* Part II.B-C.

[11] Ellis, *supra* note 8, at 44.

[12] Daniel Hays Lowenstein & Robert M. Stern, *The First Amendment and Paid*

While each state's signature threshold varies, every state with the initiative has a signature requirement.[13] As Professor Richard Ellis said, "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."[14] However, because of the Court's jurisprudence in this area, the current initiative system allows any irate citizen with a pet peeve and a large bank account to get on the ballot and dictate part of the electoral menu.[15] In essence, by commandeering the initiative system, those who can purchase ballot space are able to circumvent "the traditional checks and balances of representative government."[16]

The time has come for reform. The costs to Oregon exceed the value of the initiative system. Many opponents of the current initiative system would like to see it scrapped completely. That is unlikely. Many Oregonians take a special, if not idiosyncratic and irrational, pride in the initiative system.[17] One would, however, be hard-pressed to deny that the system has become overused and even abused.[18] For Oregonians, the initiative system would not, and perhaps should not, be given up easily. This Comment argues, however, that Oregonians have already given up the initiative system to well-financed special interests. The time has come to take the initiative system back. The time has

Initiative Petition Circulators: A Dissenting View and a Proposal, 17 HASTINGS CONST. L.Q. 175, 205 (1989).

13 Ellis, *supra* note 8, at 44.

14 *Id.*

15 In 2002, 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. *Id.* at 67. Parks spent $256,453 to qualify the two constitutional initiatives, which represented 99.7% of the financial contributions raised by the campaigns. *Id.* Under the U.S. Supreme Court's reasoning, wealthy individuals like Parks can "purchase a place on the ballot with the same impunity that they might acquire a yacht or a vacation home." *Id.* at 86. States may regulate the payment of signature gatherers only if such individuals were "foolish enough to attempt to purchase their place on the ballot through fraudulent means." *Id*.

16 Sadler, *supra* note 2, at 78.

17 *See* DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 214 (2000) (noting that despite a 1995 survey that found a large majority of Oregonians willing to accept tougher controls on the initiative system, a majority were not willing to let the legislature decide what issues would be on the ballot).

18 *See* Hans A. Linde, *Taking Oregon's Initiative Toward a New Century*, 34 WILLAMETTE L. REV. 391, 399 (1998).

come to enact reforms giving the voice of the initiative back to the "people" who were intended to have it.[19]

This Comment examines the initiative system's origins in Oregon and follows its progression over the past century. This examination reveals the intent of the founders of the initiative system and exposes the corruption of the original vision that has taken place since. This Comment then examines methods available to reform the initiative system under the current court-imposed limitations and ultimately suggests that genuine reform may require revisiting the U.S. Supreme Court case *Meyer v. Grant* or a drastic change in the initiative qualification process.

I

DIRECT DEMOCRACY IN OREGON

A culture of corruption consumed Oregon politics in the late nineteenth century.[20] The state legislature was made up of "briefless lawyers, farmless farmers, business failures, bar-room loafers, Fourth-of-July orators, [and] political thugs"[21] who were more concerned with selling legislation to the highest bidder than addressing the concerns of their constituents.[22] Stories of fraud, bribery, abuse of power, and misuse of money were common.[23] As one contemporary observer noted, "[f]raud and force and cunning were for so many years features of Oregon politics that they came to be accepted, not only as a part of the game, but by many as the attractive features of the game."[24] This atmosphere created widespread dissatisfaction and distrust of the government, which led to Oregon's direct legislation movement.[25]

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[19] William S. U'Ren said, "The one important thing was to restore the lawmaking power where it belonged—in the hands of the people." Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 413-14 (2003). As such, the platform of the Populist Party in 1892 proclaimed that the goal of direct democracy was "to restore the government of the Republic to the hands of the 'plain people,' with which class it originated." *Id.* at 414.

[20] David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 TEMP. L. REV. 947, 948-49 (1994).

[21] *Id.* at 949 (alteration in original) (quoting EATON, *supra* note 1, at 3).

[22] *See id.*

[23] EATON, *supra* note 1, at 3.

[24] *Id.*

[25] BOB GRUNDSTAD, LEGISLATIVE ADMIN. COMM., THE HISTORY AND DEVELOPMENT OF THE INITIATIVE AND REFERENDUM IN OREGON AND OTHER STATES 4 (1978); *see* Schuman, *supra* note 20, at 949.

A. The Progressive Movement and William U'Ren

Beginning in 1892, a group of progressives led by William U'Ren[26] decided to pursue the adoption of the direct initiative in Oregon.[27] Their efforts culminated in the adoption of the initiative and referendum, which passed the legislature in 1901 and was ratified by Oregon voters on June 2, 1902.[28] Since then, Oregon politics has never been the same.[29]

Oregon was not the first state to adopt the initiative process.[30] Oregon, however, was the first to use the initiative,[31] and the practice became widely known as the "Oregon system."[32] Following ratification, the initiative process quickly became a powerful instrument for change.[33] Oregonians used the initiative to enact legislation that reformed presidential primaries and U.S. Senate elections, banned poll taxes, and provided for women's suffrage.[34] These reforms reflected the faith of U'Ren and his followers that corruption and special-interest politics were not an inevitable part of government.[35]

Within a decade of its ratification, however, Oregon's initiative system shifted away from its progressive roots.[36] Professor David Schuman noted that the initiative's early days were highlighted by attempts "to increase participation, by expanding the electorate to include previously disenfranchised groups—by extending self-rule to previously dependent governmental entities, and by attempting to economically empower previously oppressed classes."[37] Following the shift away from progressivism, however, the initiative process quickly disintegrated into its modern form—a tool primarily used to disempower, to marginalize,

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[26] GRUNDSTAD, *supra* note 25, at 4 n.8; *see* Schuman, *supra* note 20, at 952.

[27] GRUNDSTAD, *supra* note 25, at 4. This group was inspired by J.W. Sullivan's book, *Direct Legislation in Switzerland*. *Id.*

[28] Schuman, *supra* note 20, at 956. For a more detailed history of the adoption of the Oregon initiative process, see generally *id*.

[29] *Id.* at 956.

[30] That honor goes to South Dakota. Howard R. Ernst, *The Historical Role of Narrow-Material Interests in Initiative Politics*, *in* DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 2 (Larry J. Sabato et al. eds., 2001).

[31] *Id.*

[32] EATON, *supra* note 1, at 1.

[33] Schuman, *supra* note 20, at 958.

[34] Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1193 (2005).

[35] Schuman, *supra* note 20, at 961.

[36] *Id.*

[37] *Id*. at 962.

and to create an economic and political elite.[38]

B. Oregon's Initiative System Today

Getting a measure on the Oregon ballot today is a fairly involved and expensive process.[39] The early steps of qualifying an initiative include writing the proposed law or amendment and filing several forms.[40] In Oregon, that paperwork includes registration for a political committee, a statement of how the committee intends to raise funds, and an indication of whether the petitioners intend to pay signature gatherers.[41] Upon completion of the paperwork, the Secretary of State reviews each petition to ensure legal compliance.[42] Following the proponent's filing, the Secretary of State sends a copy to the Attorney General, who has five days to write a ballot title and summary.[43]

Once the ballot title and summary are complete, the Secretary of State provides copies of the text, title, and summary to the

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[38] *Id.*

[39] "It takes a lot of money to use the process—it's been taken out of the average voter's hands." *See* David Crary, *Citizen Initiative Process Is Now Widely Criticized*, ASSOCIATED PRESS, Oct. 14, 2002 (quoting Dane Waters, executive director of the Initiative and Referendum Institute); *see also* LEAGUE OF WOMEN VOTERS OF OR., OREGON'S INITIATIVE SYSTEM: CURRENT ISSUES (2001), http://www.lwvor.org/documents/InitiativeSystem2001.htm (describing costs of gathering signatures for various Oregon initiatives in the 2000 election cycle).

[40] Initial qualification for ballot placement requires twenty-five signatures, the names and addresses of up to three chief petitioners, and the full text of the proposed law or amendment. OR. REV. STAT. § 250.045(1), (3) (2005); *see* OR. CONST. art. IV, § 1(2)(d).

[41] Petitioners must indicate whether they intend to pay signature gatherers and must notify the Secretary of State upon knowledge of any intent to the contrary. OR. REV. STAT. § 250.045(4). Further, petitioners must create a political committee, appoint a treasurer, and indicate how funds will be solicited. § 260.118.

[42] OR. ADMIN. R. 165-014-0028 (2006).

[43] §§ 250.035, 250.065; Initiative & Referendum Inst., Univ. S. Cal. Sch. of Law, *The Basic Steps to Do an Initiative in Oregon* 1, http://www.iandrinstitute.org/Oregon.htm (follow "Basic Steps to Undertake an Initiative Campaign" hyperlink to access PDF document) (last visited Oct. 20, 2006). As one writer explained:

> [T]he [A]ttorney [G]eneral, with comment from the public, drafts a ballot title for each statewide measure that includes (a) a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure"; (b) a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved"; (c) a "simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected"; and (d) a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect."

Hoesly, *supra* note 34, at 1200-01 (footnotes and citations omitted).

state legislature, proponents, and other concerned parties.[44] After the initiative is distributed, a fifteen-day comment period commences in which the public can raise objections to the proposed ballot title, summary, or the full text of an initiative.[45]

During this fifteen-day comment period, proponents can bring a challenge of the title or summary's wording to the Oregon Supreme Court.[46] Title challenges are common and prevent proponents from collecting signatures until the supreme court resolves the dispute.[47] Proponents often file several nearly identical measures, or "ballot-title shop,"[48] in an effort to get a favorable ballot title.[49] If the ballot title is not objected to and the Secretary of State approves the cover and signature sheets, the proponent may begin collecting signatures after the fifteen-day comment period passes.[50] Those whose measures were not approved may file suit and ask the court to declare their petition and initiative lawful.[51]

Once proponents secure a ballot title, the largest hurdle is collecting the required number of signatures. Oregon's signature

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[44] Initiative & Referendum Inst., *supra* note 43, at 1; *see* § 250.067.

[45] Initiative & Referendum Inst., *supra* note 43, at 1. Note that no public hearings are held.

[46] *Id.*; *see* § 250.085.

[47] S*ee* § 250.085; William A. Lund, Note, *What's in a Name? The Battle over Ballot Titles in Oregon*, 34 WILLAMETTE L. REV. 143, 143 (1998); Initiative & Referendum Inst., *supra* note 43, at 1.

[48] Ballot-title shopping:

> involves sponsors filing several versions of the same measure. Once a committee of lawyers at the Attorney General's Office decides on a ballot title, the backers try to decide how appealing that 25-word summary will be with voters—most of whom won't read the initiative's full text. And if they're not satisfied with the wording, backers will submit a new version with the hopes that a more voter-friendly title will result. The practice, which began in the 1990s, means political foes begin sparring months before they start trying to sway voters.

David Steves, *What? 142 Ballot Measures Filed? Don't Worry Yet*, REGISTER-GUARD (Eugene, Or.), Jan. 6, 2006, at A1.

[49] *See* Initiative & Referendum Inst., *supra* note 43, at 1; *see also* LEAGUE OF WOMEN VOTERS, *supra* note 39 (discussing the various reasons for filing an initiative).

[50] Initiative & Referendum Inst., *supra* note 43, at 1; *see* Hoesly, *supra* note 34, at 1198.

[51] *See* § 250.085; OR. ADMIN. R. 165-014-0028 (2006). If the Secretary of State determines that either the petition or initiative is unlawful, the petitioners must stop gathering additional signatures. OR. ADMIN R. 165-014-0028. If such a determination is made, however, petitioners can bring a challenge to the Secretary of State's decision. *Id.* If the Secretary or a court declares the petition and initiative lawful, signature gathering may resume. Hoesly, *supra* note 34, at 1198-99.

requirement for ballot placement varies depending on the form and level of action of direct democracy that the petitioners select. In Oregon, placing a statutory initiative on the ballot requires petitioners to gather signatures totaling six percent of the number of votes cast in the previous gubernatorial election.[52] All voters who are eligible to vote for an initiative or referendum may also sign a petition to place a measure on the ballot.[53]

Several rules govern the signature gathering phase,[54] but some indications in recent years suggest that these rules are not followed or present only a slight inconvenience to petitioners who can afford to pay signature gatherers.[55] Ultimately, while the state may require petitioners to meet certain thresholds for ballot qualification, its autonomy over the initiative process is limited by the U.S. Constitution as interpreted by a few key cases.

II

FEDERALISM AND THE INITIATIVE: THE IMPACT OF THE U.S. SUPREME COURT

A. Buckley v. Valeo

At the foundation of initiative regulation is the concept that money equals speech. This idea became part of our political sys-

[52] OR. CONST. art. IV, § 1(2)(b). Initiative amendments have a threshold of eight percent. *Id.* § 1(2)(c). Only four percent is required for referenda. *Id.* § 1(3)(b).

[53] Hoesly, *supra* note 34, at 1198.

[54] In his Comment, Hoesly summarized some of the important rules governing the signature gathering process:

> Signature gatherers must certify that all signatures were gathered in their presence and that they believe each signatory is an eligible voter. Signature gatherers must also have a copy of the full initiative on them at all times while gathering signatures for signatories to review. Signature sheets must contain ballot titles; captions; and, if signature gatherers are being paid, a notice stating: "Some Circulators For This Petition Are Being Paid." Each sheet may only contain signatures from voters of one county. It is a crime for petitioners and signature gatherers to lie about petitions or collect false or invalid signatures. It is also a crime for signatories to falsely, invalidly, or twice sign a petition. It is illegal to pay and to accept payment for signing or not signing a petition. It is also illegal to buy and sell signature sheets. If a chief petitioner is aware that his or her signature gatherers have violated any statute, he or she is strictly liable for that violation unless he or she notifies the [S]ecretary of [S]tate. Further, false advertising regarding initiatives is prohibited.

Id. at 1199 (citations and footnotes omitted).

[55] *See* Ellis, *supra* note 8, at 63 ("If the initiative proponents have the money, professional signature companies can virtually guarantee almost any measure a place on the ballot.").

tem in the now-infamous *Buckley v. Valeo* decision.[56] In *Buckley*, the U.S. Supreme Court held that political campaign expenditures were political speech protected by the First Amendment.[57] The Court reasoned that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[58] Despite this reasoning, however, the Court did not ban all regulation of campaign finances. The *Buckley* Court differentiated between contribution and expenditure limits, striking down expenditure limits as unconstitutional but upholding contribution limits.[59] The Court declared that contribution limits have little direct restraint on political communication as the contributor is still permitted the symbolic expression of support.[60] Additionally, the Court reasoned that the purpose of contribution limits—i.e., to limit the actuality and appearance of corruption—was permissible because large financial contributions "given to secure political quid pro quos from current [or] potential office holders" undermine the integrity of the representative

[56] 424 U.S. 1 (1976). Academics have given *Buckley v. Valeo* mixed reviews. Many have listed the *Buckley* decision "on their list of the ten worst decisions of this century." Joel M. Gora, Buckley v. Valeo: *A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 7 & n.2 (1999) (citing cases). In contrast, others view the *Buckley* decision as a "landmark of political freedom, a ruling [that] carefully and conscientiously addressed the critical issues of campaign finance controls and free speech rights [that] still bedevil the nation today." *Id.* at 7-8. For more information on the impact of *Buckley v. Valeo*, see generally Alan B. Morrison, *What If . . .* Buckley *Were Overturned?*, 16 CONST. COMMENT. 347 (1999) (assessing the campaign finance scene in the event *Buckley* is overturned); Trevor Potter, Buckley v. Valeo, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71 (1999) (discussing disclosure issues in the Internet age); and Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311 (discussing possible responses to *Buckley*'s treatment of political money).

[57] *Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). While the Court's jurisprudence in campaign finance reform has stuck with the *Buckley* premise, there has been some recent deference to states' interests. *See* Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 885-86 (2005). Most recently, the Court in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), held in a plurality opinion that a Vermont campaign finance statute violated the First Amendment free speech protection by restricting what state candidates could spend during their campaigns and by limiting individuals' and organizations' campaign contributions.

[58] *Buckley*, 424 U.S. at 19; Mark Goodman, Comment, *The Coming Clash of Campaign Finance Enforcement and the Prior Restraint Doctrine*, 7 J. L. & SOC. CHALLENGES 219, 225 (2005).

[59] *Buckley*, 424 U.S. at 58-59; Goodman, *supra* note 58, at 225.

[60] *Buckley*, 424 U.S. at 21.

democracy.[61] In contrast, the Court saw expenditure limits as substantially limiting political speech and conflicting with the "core of our electoral process and of the First Amendment freedoms."[62]

B. First National Bank of Boston v. Bellotti

Buckley did not address ballot initiatives, but the Court later extended the reasoning in *Buckley* to *First National Bank of Boston v. Bellotti*, holding that limits on corporate expenditures in ballot initiative campaigns violate the First Amendment.[63] Noting that a significant role of the First Amendment is to protect discussion about government activities, the Court held that corporations and individuals should be treated equally as contributors to a ballot initiative.[64] The *Bellotti* Court also highlighted the distinction between constitutional limitations on corporate campaign contributions to politicians and unconstitutional limitations on corporate spending in initiative campaigns.[65] To justify the distinction, the Court referred to the concern in *Buckley* regarding the potential for corruption or the potential appearance of corruption due to the quid pro quo influence that money may have on a candidate once he or she is in office.[66] The Court viewed the potential for and appearance of corruption as an issue faced solely by individual candidates and not applicable to initiative campaigns.[67]

Such a view, however, ignores the fact that initiative campaigns "can be 'bought' as easily as an individual candidate's."[68] Individuals, corporations, and special interest groups would not be willing to spend so much money if they did not have a considerable interest in the initiative's outcome.[69] It is arguable that the financial influence of ballot initiative campaigns is more hazard-

[61] *Id.* at 26-27.

[62] *Id.* at 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

[63] 435 U.S. 765, 776 (1978).

[64] *Id.* at 776-77; Jodi Miller, Comment, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 28.

[65] *See Bellotti*, 435 U.S. at 788 n.26; Miller, *supra* note 64, at 28.

[66] Miller, *supra* note 64, at 28; *see Bellotti*, 435 U.S. at 788 n.26.

[67] *See* John B. Anderson & Nancy C. Ciampa, *Ballot Initiatives: Recommendations for Change*, 71 FLA. B.J., Apr. 1997, at 71, 72.

[68] *Id.*

[69] *See id.*; *see also* Miller, *supra* note 64, at 29 ("[L]arge monetary contributions have an equally real and profound effect on the success or failure of an initiative.").

ous to the political system than the corruption of individual office holders because initiatives can be used to change or create laws without the checks and balances of our representative government.[70] And yet it is in the initiative process that the Court has refused to apply the reasoning that the government has an interest in preventing the "real or imagined coercive influence of large financial contributions."[71] The Supreme Court furthered this error in *Meyer v. Grant*[72] where the Court ignored the power of the initiative, the states' need to regulate initiative campaigns, and the possibility for money to corrupt such campaigns.

C. Meyer v. Grant

In *Meyer*, petitioners challenged a Colorado statute that criminalized paying signature gatherers in initiative campaigns.[73] Comparing the prohibition to the campaign expenditure limitations struck down in *Buckley*, Justice Stevens, writing for the Court, said that banning the payment of signature gatherers restricted free speech by limiting "the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach."[74] Justice Stevens also noted that the payment ban restricted speech by making it more difficult for initiative proponents to qualify their issues for the ballot "thus reducing the chances for proponents to make their proposals the focus of extensive debate."[75] Relying on the reasoning from *Buckley*, the Court held that the government could not limit the speech of one group with the purpose of enhancing the relative speech of another group.[76]

D. Buckley v. American Constitutional Law Foundation

More recently in *Buckley v. American Constitutional Law Foundation*, the Supreme Court extended the reasoning of

[70] *See* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 19-20 (1978) ("[W]e vote politicians into office, not into law. Once in office, they may become well-informed, responsible representatives; at the least, their excesses may be curtailed by the checks and balances of the political process.").

[71] *See* Miller, *supra* note 64, at 28-29 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

[72] 486 U.S. 414 (1988).

[73] *Id.* at 417.

[74] *Id.* at 422-23; *see* Lowenstein & Stern, *supra* note 12, at 182.

[75] Lowenstein & Stern, *supra* note 12, at 182; *see Meyer*, 486 U.S. at 423.

[76] *See Meyer*, 486 U.S. at 426 n.7.

Meyer to strike down multiple provisions of a Colorado statute governing its ballot initiative petition process.[77] The Court struck down one provision that petitioners report the names of and payments made to signature gatherers.[78] Additionally, the Court struck down requirements that signature gatherers must (1) be registered voters[79] and (2) wear name badges.[80] In rejecting Colorado's argument that these statutes were necessary to prevent fraud, the Court determined that other Colorado laws sufficiently protected the integrity of the initiative process.[81]

E. The Initiative Today

This line of Supreme Court rulings has tied the states' hands with regard to the tools they may use to control state election issues. In *Meyer,* Justice Stevens appears to have held a romanticized vision of an initiative process that involves a dedicated band of public-spirited volunteers who are committed to their cause and brave the elements in order to obtain signatures needed for their petition.[82] However, while an initiative process similar to this vision may have existed at one time, today's initiative process is wholly different.[83]

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[77] 525 U.S. 182, 186-87 (1999).

[78] *Id.* at 204.

[79] *Id.* at 194-95.

[80] *Id.* at 199-200.

[81] *Id.* at 196, 198, 204 n.24. The Court's rhetoric is that the "states have 'considerable leeway' to protect direct democracy's integrity and reliability"; in reality, however, "the Court has not upheld many state regulations." Hoesly, *supra* note 34, at 1214.

[82] *See* Meyer v. Grant, 486 U.S. 414, 421-22 (1988). For more information regarding the tension between campaign finance regulation, ballot-initiative issues, and free speech limitations, see generally Michael Carlin, Note, Buckley v. American Constitutional Law Foundation, Inc.: *Emblem of the Struggle Between Citizens' First Amendment Rights and States' Regulatory Interests in Election Issues*, 78 N.C. L. REV. 477 (2000) (discussing the tension between direct democracy, regulation, and free speech) and Ryan K. Manger, Note, Buckley v. American Constitutional Law Foundation: *Can the State Preserve Direct Democracy for the Citizen, or Will It Be Consumed by the Special Interest Group?*, 19 ST. LOUIS U. PUB. L. REV. 177 (2000) (discussing the fact that initiative processes are designed to enhance the power of individual citizens but are abused by special interest groups).

[83] In contrast to the version of the signature gathering process adopted by Justice Stevens, Lowenstein and Stern offer a version from an interview with the late Ed Koupal, who was the most successful manager of volunteer petition drives in California during the 1970s:

> "Generally, people who are out getting signatures are too god-damned interested in their ideology to get the required number in the required time," Koupal said. "We use the hoopla process. First, you set up a table with six petitions taped to it and a sign in front that says, ['sign here']. One person

Gathering signatures to register ballot initiatives has become a big business.[84] The vast majority of people collecting signatures today are not idealistic volunteers. Instead they are only interested in being paid for gathering signatures and are "largely indifferent to the substance of the petition."[85] As noted by Professor Ellis, because a signature gatherer's income increases with each signature gathered:

> 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.[86]

Because citizens are often willing to sign petitions for reasons unrelated to content,[87] today's reality is that anyone willing to put up the money can "buy a place on the ballot."[88] Furthermore, the expense associated with qualifying an initiative for the statewide ballot is cost-prohibitive to all except well-financed organizations and the wealthiest individuals.[89] As a result, the initiative process has been captured by the big money and special

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> sits at the table. Another person stands in front. That's all you need—two people.
>
> "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. If a table doesn't get 80 signatures an hour using this method, it's moved the next day."
>
> Koupal said that about 75% of the people sign when they're told to. "Hell no, people don't ask to read the petition and we certainly don't offer," he added. "Why try to educate the world when you're trying to get signatures?"

Lowenstein and Stern, *supra* note 12, at 197 (citing Carla Lazzareschi Duscha, *The Koupals' Petition Factory*, 6 CAL. J. 83, 83 (1975) (omission in original)).

84 *See* Ellis, *supra* note 8, at 37.

85 *Id.*

86 *Id. See generally* RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 49-65 (2002) (discussing the decline of the volunteer and rise of the professional). In Oregon, signature gatherers are currently not allowed to be paid per signature. *See infra* note 211. However, per-signature payment has been and still is the norm in most initiative states. *See* Ellis, *supra* note 8, at 37.

87 *See* Lowenstein & Stern, *supra* note 12, at 180 (noting that people are persuaded to sign petitions for reasons other than the political validity of the cause espoused).

88 *Id.* at 199-200.

89 *Id.* at 176.

interests that it was created to circumvent—grassroots democracy has degenerated into a "greenback democracy."[90]

Concerns about wealthy individuals and interest groups buying their way onto the ballot are not new.[91] In a 1915 account of the Oregon ballot initiative system, Professor Barnett said, "[When] the 'professional circulator' is largely responsible for placing on the ballot measures in which he has only a pecuniary interest, the petition is deprived of true representative character, and lawmaking becomes a mercenary matter."[92] Professor Barnett noted over ninety years ago that "[t]he critical weakness in the . . . system is that it gives the interests that can command money a practical monopoly of the business of petition making."[93] When faced with this problem, early users of the initiative suggested banning the payment of signature gatherers on the premise that "[i]f a measure is not of sufficient importance and public interest to enlist the voluntary service of the people in circulating petitions, it should never go before the people under the initiative or referendum."[94]

In 1935, this argument prevailed and Oregonians outlawed the payment of signature gatherers.[95] The ban stayed in effect until the 1982 district court decision *Libertarian Party of Oregon v. Paulus*[96] invalidated the law. The court reasoned that the ban "restricts the candidate's opportunity to get his view across to the public by circulating petitions; it restricts the discussion of issues that normally accompanies the circulation of petitions; and it restricts the size of the audience that can be reached."[97]

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[90] Ellis, *supra* note 8, at 58.

[91] Hoesly, *supra* note 34, at 1202.

[92] JAMES D. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM, AND RECALL IN OREGON 60 (1915).

[93] *Id.* at 60-61 (quoting EUGENE REGISTER, Dec. 31, 1913, at 4).

[94] *Id.* at 62 (quoting OREGONIAN (Portland), Mar. 27, 1908, at 8).

[95] Ellis, *supra* note 8, at 47. Unfortunately, the legislative history of this law was lost in the fire that destroyed Oregon's Capitol on April 25, 1935. *See* Wayne Pettit, *Flames Raze Oregon Capitol; Fireman Killed: Records Burned in Costly Blaze*, MORNING OREGONIAN (Portland), Apr. 26, 1935, at 1. However, former Oregon Senator Richard Neuberger was able to offer a perspective on the state of the initiative near that time in his book *Our Promised Land*. *See* RICHARD L. NEUBERGER, OUR PROMISED LAND 140-63 (1938).

[96] Libertarian Party of Or. v. Paulus, No. 82-521-FR, slip op. at 4 (D. Or. Sept. 3, 1982). This sentiment was moved to the national level when Justice Stevens wrote for the court in *Meyer v. Grant*, which determined that Colorado's ban of paid circulators was unconstitutional. Meyer v. Grant, 486 U.S. 414, 428 (1988).

[97] JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY: POPULISM REVISED 73 (1986) (quoting *Paulus*, No. 82-521-FR, slip op. at 4); Ellis, *supra* note 8, at 47.

In the years that paying signature gatherers was prohibited, the number of initiatives on the ballot significantly decreased.[98] From 1904 until 1935, the ballot averaged approximately nine initiatives per election cycle.[99] From 1936 to 1982, when paid signature gathering was prohibited, that average dropped to roughly three initiatives per election.[100] And then from 1983 to 2004, following *Paulus* and later *Meyer v. Grant*, the average went back up to just over ten initiatives per election cycle.[101] To some, this does not matter. Others believe that there should be as many initiatives on the ballot as there can be.[102] Oregon initiative activist Bill Sizemore has argued that "[a]ll of politics is run by money," and to say that the initiative system should be different is "hypocritical."[103]

Admittedly today's political scene is inundated with money.[104] Candidates spend hundreds of thousands and even millions of dollars to run for office.[105] But does this make Bill Sizemore correct? Is it hypocritical to think the initiative system should be

98 SECRETARY OF STATE, OREGON BLUEBOOK 2005-2006, at 281-303 (2005).

99 From 1904 to 1934, there were 146 initiatives on the statewide ballot in Oregon. *Id.* at 282-88.

100 From 1936 to 1982, there were seventy-three initiatives on the statewide ballot in Oregon. *Id.* at 288-95.

101 From 1984 to 2004, there were 112 initiatives on the statewide ballot in Oregon. *Id.* at 295-303.

102 Ellis, *supra* note 8, at 38-39 (quoting initiative activist Bill Sizemore as saying, "It's really irrelevant who puts it on the ballot, because Oregonians, and only Oregonians, can vote yes or no").

103 *Id.* at 37.

104 The Federal Election Commission tracks federal campaign contributions and expenditures. Many groups have taken and sorted the commission's data for analysis and easy public consumption. *See, e.g*, Political Money Line, Money in Politics Databases, http://www.fecinfo.com/ (last visited July 27, 2006) (providing news dedicated to the topic of political money). For recent commentary on the state of finance reform, see generally Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006) (discussing solutions to the problem of legislators' time being consumed by fundraising, distracting them from the process of governing), and Meredith A. Johnston, Note, *Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166 (2006) (discussing the imposition of limits for independent political organizations not currently subject to hard and fast rules regarding campaign finance).

105 In the 2002 federal election cycle, Senate and House candidates spent $357.7 million between January 1, 2001 and June 30, 2002. That still left them with $373.2 million, presumably to be spent through Election Day. For an eye-opening look at campaign spending, see Press Release, FEC, FEC Releases Congressional Fundraising Summary (Sept. 9, 2002) http://www.fec.gov/press/press2002/20020909canstats/20020909canstat.html.

held to a different standard? Professor Ellis noted that "defenders of the initiative process raise an important challenge: Why should we be more wary about the role of money in the initiative process than in candidate elections?"[106]

III

INITIATIVE CAMPAIGNS DIFFER FROM CANDIDATE CAMPAIGNS

A. Checks, Balances, and Campaign Finance Reform

The initiative system should be treated differently than candidate elections because it was created to be the people's check on unresponsive or corrupt representatives.[107] William U'Ren and his followers intended the initiative to be a tool for progressive grassroots efforts to champion better government and progressive policies.[108] Oregon adopted the initiative to give a voice to dispersed popular movements that generally lack the more traditional lobbying influence.[109] As Lowenstein and Stern observed, Justice Frankfurter noted:

> that [the] institutions of direct democracy, like all other electoral mechanisms, are controversial because they are conducive to the needs of some interests relative to others. Indeed, one of the guiding principles of the Constitution itself was to create a balance among institutions, each of which would tend to be most responsive to different groups and interests.[110]

The Constitution did not create direct democracy, however, so the initiative should be used with caution. Without the same checks and balances present in the rest of our government, the initiative can be a powerful tool or a dangerous weapon. As Allen Eaton observed in his 1912 book on the Oregon system:

> [T]he people of the state of Oregon enjoy a very wide political power—so wide that they may do anything in politics that they please to do. There are practically no restraints upon their power . . . .
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> . . . .
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> . . . [T]hrough the Initiative, the people have not only taken over to themselves powers which they once delegated to the Legislature, but have taken even greater powers than those

106 Ellis, *supra* note 8, at 37-38.
107 *See supra* note 19.
108 *See* Hoesly, *supra* note 34, at 1212.
109 Lowenstein & Stern, *supra* note 12, at 200.
110 *Id.* (citing Baker v. Carr, 369 U.S. 186, 299 (1962) (Frankfurter, J., dissenting)).

> originally set forth in the constitution. The people of Oregon can and do not only make laws independent of the Legislature, but pass constitutional amendments at will. But this is not all: the governor cannot exercise his veto of any measure passed upon by the people.
>
> . . . .
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> . . . [I]t cannot be denied that they have set up another legislative branch of government with greater power and less restrictions than were originally provided by our constitution.[111]

Much of Eaton's observation holds true today and emphasizes the initiative system's unique role. Attempts to compare initiative campaigns to candidate campaigns fail for two reasons. First, under current campaign finance laws, individuals are limited in the amount they can directly contribute to a candidate.[112] In contrast, there are no limits on what individuals can contribute to an initiative.[113] As Professor Ellis noted, "If paying people to petition is . . . 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)."[114] Second, major party candidates only appear on the general election ballot after winning the primary election of the candidate's party.[115] In contrast, signatures are generally the only thing that may show public support for an initiative prior to it appearing on the ballot.[116] Professor Ellis noted, "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."[117]

As we have seen, numerous initiative professionals recognize that with enough money, anything can be qualified for the ballot.[118] Therefore, we must protect the initiative process as a tool for the people. The current system readily allows the initiative to

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111 EATON, *supra* note 1, at 6, 8, 12; *see* BRODER, *supra* note 17, at 37-38.

112 Ellis, *supra* note 8, at 38.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *See id.* at 63 ("If the initiative proponents have the money, professional signature companies can virtually guarantee almost any measure a place on the ballot . . . ."); *see also* PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 102 (1998) (arguing against signature gathering requirements since "political interests with sufficient funding and professional assistance can qualify nearly anything they want for the ballot").

be wielded with a heavy hand by special interests purporting to speak for the "people."

B. What's in a Name?

Some do not believe that limiting access to the ballot matters because the people ultimately vote on an issue. They are wrong. First, the trouble with this argument is that it ignores the power wielded by the individuals and organizations who frame the issue.[119] Any pollster could tell you that public opinion on many issues is extraordinarily sensitive to a question's wording.[120] The psychological impact of wording combined with the fact that initiative wording is often "lengthy, complex, and ambiguous" leads to voter confusion and miscast votes.[121]

Furthermore, initiative information generally lacks the shorthand identifiers associated with political party sponsorship.[122] Research has revealed that a significant majority of a state's population will likely lack the requisite reading comprehension level to understand traditional ballot language.[123] As a result, support for a ballot initiative largely depends on how the question is posed or the title is worded.[124]

An initiative's ballot title can also be confusing and misleading.[125] The ballot title's wording can even confuse voters as to

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119 Ellis, *supra* note 8, at 39.

120 *See id.* Professor Ellis notes, as examples, that people are more likely to support spending for the "poor" as compared to spending on "welfare." *Id.* Similarly, people disfavor the term "preferential treatment" in comparison to "affirmative action." *Id.* Finally, large majorities feel that terminal patients should be allowed to have a physician's help to "die with dignity," but comparatively few support "physician-assisted suicide." *Id.*

121 *See* Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 248 (1999).

122 Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 554 (2002).

123 *Id.* at 555; Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 139-40 (1995). David Magleby's study of the ballot language used from 1970 to 1979 in California, Massachusetts, Oregon, and Rhode Island revealed the need for a fifteenth- to eighteenth-grade reading level to understand ballot language. DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 118-19 (1984). Not even twenty percent of voting adults were likely to have attained that level of education. *Id.* at 119.

124 *See* Ellis, *supra* note 8, at 39.

125 David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 38-39 (1995).

the meaning of a "yes" vote.[126] The ballot title experience was summed up by one Oregon petitioner who said, "We couldn't get the words 'spending' and 'limit' in the ballot title—and that's what it was, a spending limit. We just wanted a simple ballot title so the average guy doesn't need a law degree to understand what he's voting on."[127]

C. Political Agendas and Crypto-Initiatives

Beyond crafting the impact of an initiative's wording, petitioners are able to influence the political menu and limit voter choice.[128] One of the best examples of controlling the political menu in Oregon, if not the country, has to be Bill Sizemore's efforts in the 1990s.[129] A *Willamette Week* article stated, "Bill Sizemore did for signature gathering in the 1990s what Ray Kroc did for McDonald's in the 1950s. Both men would turn their respective industries from sleepy, localized concerns into vertically integrated, massively financed enterprises."[130]

One way that Sizemore's framing of issues made a difference was by only giving voters a choice between the status quo and the initiative. For example, in 1996, Oregon voters voted for Measure 47, which severely reduced property taxes.[131] One critic analogized Measure 47 to "killing an ant with a bazooka" with the problem being that "a bazooka is the only weapon at [the

126 Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 577 (2001).

127 *See* Steves, *supra* note 48, at A1.

128 Ellis, *supra* note 8, at 40.

129 Bill Sizemore, a former Bible teacher, gubernatorial candidate, and businessman, "was the reigning king of direct democracy in Oregon." Hoesly, *supra* note 34, at 1206. He led his group, Oregon Taxpayers United, "in placing antitax and antilabor initiatives on the ballot nearly every year." *Id.* His power stemmed from the ability of Oregon Taxpayers United to get an issue on the ballot. "Even when Sizemore's initiatives failed, he fulfilled his objective by distracting unions from pushing their own initiatives." *Id.* Despite being convicted of racketeering, Sizemore is still active in Oregon's ballot initiative process and was associated with fifteen proposed measures for the upcoming 2006 initiative season. *See* Steves, *supra* note 48, at A1. So far, his proposal on reforming insurance rates is the first initiative to qualify for the November ballot. Dave Hogan, *Sizemore's Back on Ballot: This Time, About Insurance*, OREGONIAN (Portland), July 20, 2006, at A1.

130 Matt Buckingham, *The Signature King*, WILLAMETTE WEEK (Portland, Or.), Mar. 9, 2005, at 68.

131 Ellis, *supra* note 8, at 41.

taxpayer's] disposal at the moment."[132] Rather than being given the opportunity to choose between a huge tax cut and a moderate tax cut, voters were only offered a choice between the huge tax cut or no tax cut at all.[133] Professor Ellis explains that "while the vote on Measure 47 reflected the majority's preference for lower property taxes (fifty-two percent supported the measure), the precise policies . . . that were enacted did not reflect the will of the voters so much as the will of the measure's author, Bill Sizemore."[134]

Not all of Bill Sizemore's initiatives have passed. In 1998 and 2000, Oregonians did choose the status quo over the bazooka a few times.[135] However, the mere presence of these initiatives on the ballot allowed Sizemore to accomplish his political goals.[136] Whether on taxes or unions,[137] Sizemore's initiatives forced his political adversaries to play defense and limited their ability to push an alternative agenda.[138] Following the 2000 election, Sizemore assistant Becky Miller exulted, "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."[139] Despite the defeat of six Sizemore initiatives in 2000, he was able to dictate Oregon's political agenda.

Many scholars believe that initiatives are simply citizen efforts to control public policy.[140] However, a growing number of initiatives are being designed with policy as a secondary concern at best. Professors Thad Kousser and Mathew McCubbins term these initiatives "crypto-initiatives," where the motives of their sponsors and their connections to political parties are hidden.[141] They point to the November 2004 "defense of marriage" initiatives in eleven states, including Oregon, as a primary example of

132 *Id.* (quoting James Mayer, *The Property Tax Puzzle: Will Measure 47 Make Oregon's System More Fair?*, OREGONIAN (Portland), Sept. 23, 1996, at A8).

133 *Id.*

134 *Id.*

135 *Id.* at 43.

136 *Id.*

137 A large majority of Sizemore's initiatives have focused on decreasing taxes and the power of labor unions. *See* Buckingham, *supra* note 130, at 68.

138 Ellis, *supra* note 8, at 44.

139 *Id.* (alteration and omission in original).

140 Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 969 (2005).

141 *Id.* at 969-70.

the recent use of crypto-initiatives.[142] Coordination between state Republican leaders and the White House on the "defense of marriage" initiatives helped increase Republican turnout and secure a Bush victory.[143]

In sum, placing an initiative on the ballot is about more than just voting a measure up or down. Certainly proponents generally want their initiative to pass, but simply getting it on the ballot is often a victory. Bill Sizemore once asked, "Which makes more sense—paying a politician to increase your taxes, or paying a petitioner to collect signatures to give you a chance to vote on lowering your taxes?"[144] Getting an initiative on the ballot is not only a chance for proponents to pass legislation, it is also a way to dictate the political agenda. Win or lose, getting an issue on the ballot has significant consequences. Signature gatherers' popular technique of telling potential signers that they do not have to make up their mind at that moment, but simply give the issue a chance to be on the ballot is not true. The decision to sign is a decision to support what issues make up the political menu and dictates the choices that voters have. Again, this is a powerful tool and should be treated accordingly.[145]

D. How Much Does Direct Democracy Cost?

There are those who would argue that the initiative battle is

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[142] *Id.* at 970.

[143] *Id.* at 970-71. Professors Kousser and McCubbins admit that Karl Rove may be the only person who knows the full extent and impact of this coordination. For a more detailed examination of crypto-initiatives, see *id.* *See also* Elizabeth Garrett, Commentary, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005) (discussing the interaction between the citizenry and crypto-initiatives—those initiatives that are created and supported by "agenda setters" for whom changing public policy is not a primary goal).

[144] Hoesly, *supra* note 34, at 1207.

[145] Lowenstein and Stern wrote:

> It should be made clear that the voter has every right to sign an initiative out of a belief that all proposals should be given a chance, or because of sympathy with the circulator, or because of a reluctance to turn down a stranger who asks a favor in a public place, or for any other reason. The point is not that petition signers are doing anything blameworthy. The point is that in so acting, they create enough static that the system cannot discern the message it was designed to receive, namely, how many voters out there want this proposal to become law. Not necessarily by design, the system adjusted itself, discerning a message that was different but still good enough, namely, whether there are a number of people who care enough about this proposal that they are willing to make a substantial personal sacrifice in its behalf.

Lowenstein & Stern, *supra* note 12, at 204.

simply politics, and the old adage "all is fair" should apply.[146] This may be so, but the cost of the initiative process may cause those arguing this point to think again. While the costs to individuals and groups who wish to qualify and campaign for an initiative are undoubtedly high, the primary costs are incurred by the state and, in turn, taxpayers. These costs come in many forms: from actual dollars and wasted resources to an overburdened and distrusted judiciary.[147]

1. Actual Dollars

As Oregonians gear up for the 2006 ballot initiative season, state legal and elections officials have been devoting countless hours of work to many of these proposed initiatives.[148] The Oregon Elections Division Director described the effort to verify signatures, draft ballot titles, and resolve the legal challenges associated with the initiative as "very process-intensive."[149] With the proliferation of ballot-title shopping, the workload becomes even more intense for elections workers, lawyers with the Attorney General's Office, and the Oregon Supreme Court.[150]

As the workload increases, so has the price tag for Oregon taxpayers.[151] The Attorney General's Office estimates its cost in drafting ballot titles and defending them once they are written to be between $350,000 and $360,000, which has increased from about $303,000 in 2001 through 2003.[152]

2. Time Is Money

Aside from the Attorney General's Office, the Oregon Supreme Court is also impacted by ballot title challenges. During the 2000 general election cycle, more than twenty-five percent of the Oregon Supreme Court's caseload was devoted to initiative

146 *See supra* notes 104-06 and accompanying text.

147 *See* B. Carlton Grew, *Governing by Initiative: The Rise and Fall—and Rise Again—of Oregon's Initiative Ballot Measure*, 61 OR. ST. B. BULL., Oct. 2000, at 9, 9 (discussing the costs of the initiative process in Oregon); *see also* James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon's Appellate Courts*, 39 WILLAMETTE L. REV. 1313, 1313-14 (2003) (noting that people get "hoppin' mad at judges" when they perceive court decisions as preempting popular majorities).

148 Steves, *supra* note 48, at A1.

149 *Id.*

150 *See id.*

151 *Id.*

152 *Id.*

disputes, primarily ballot title challenges.[153]

Moreover, ballot title challenges are just the beginning of the process for the courts. After the title challenges are settled, signatures must be gathered, and if there are enough valid signatures, the measure is then submitted to the voters.[154] Once the votes are counted, opponents of an initiative that passes often bring suit to throw out the results. In the past twenty-five years, nearly half of the voter-approved initiatives have been taken to court by opponents.[155]

That is not to say that these challenges are without merit. In fact, nearly half of the challenged initiatives in the last twenty-five years have been invalidated in whole or in part by the courts.[156] The high number of court challenges to initiatives has been attributed to "the lack of checks and balances in the initiative writing process."[157] When laws are created by representative government, the courts are the last in a series of institutional reviews.[158] In the initiative process, however, the courts are often the only governmental institution that may review the law.[159] Placed in this position, the courts must either defer to the "people's will" or serve as "watchdogs" by vigorously reviewing the process.[160]

3. Attack on the Judiciary

Recent decisions by the Oregon courts have indicated their willingness to serve the "watchdog" role over the initiative process.[161] Rulings have limited where petitioners can work,[162] and the use of constitutional initiatives was limited through the separate-vote rule established in *Armatta v. Kitzhaber*.[163] Additionally, an Oregon federal district court decision limiting the employment relationship between paid signature gatherers and

153 LEAGUE OF WOMEN VOTERS, *supra* note 39.
154 OR. REV. STAT. § 250.105 (2005).
155 LEAGUE OF WOMEN VOTERS, *supra* note 39.
156 *Id.*
157 *Id.*
158 *See id.*
159 *Id.*
160 *Id.*
161 *See infra* Part IV.A.1. *But see* MacPherson v. Dep't of Admin. Servs., 340 Or. 117, 130 P.3d 308 (2006) (upholding the constitutionality of the property-compensation initiative known as Measure 37).
162 Stranahan v. Fred Meyer, Inc., 331 Or. 38, 11 P.3d 228 (2000).
163 327 Or. 250, 959 P.2d 49 (1998); *see infra* notes 190-99 and accompanying text.

the chief petitioners was recently upheld by the Ninth Circuit Court of Appeals.[164] These limitations have made some initiative activists feel that the Oregon courts have put too many constraints on the process.[165]

By playing the watchdog role, the courts bear the brunt of the heat generated by post-passage scrutiny of initiatives.[166] Most notably, the Oregon Supreme Court's separate-vote jurisprudence[167] has angered many career petitioners, making them wary of wasting time and resources on initiatives that will ultimately be struck down.[168]

As petitioners begin to view judges as obstacles limiting their agenda, they have in turn begun to attack the judiciary.[169] Initial attempts were aimed at limiting the powers of the judiciary to rule on voter-passed initiatives.[170] In 2000, Measure 96 was proposed and ultimately defeated; however, had it passed it would have prevented nearly all attempts to limit the initiative system.[171] The following year brought a proposed initiative that would have undone the court's separate-vote jurisprudence in the *Armatta* line of cases,[172] but it failed to make the ballot.[173]

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164 Prete v. Bradbury, No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738 (D. Or. Feb. 18, 2004), *aff'd*, 438 F.3d 949 (9th Cir. 2006).

165 LEAGUE OF WOMEN VOTERS, *supra* note 39.

166 For some judges, playing the role of watchdog may put their judicial careers at stake. *See infra* text accompanying notes 177-81.

167 "The Oregon Supreme Court recently rediscovered another provision of the state constitution. Article XVII, section 1 requires that any 'two or more amendments' must be 'separately' submitted to the voters." Hoesly, *supra* note 34, at 1220. Before *Armatta v. Kitzhaber* in 1998, the separate-vote requirement had not been addressed. *Id.* In deciding *Armatta*, the Oregon Supreme Court struck down Measure 40, an anticrime initiative, because of "substantive" alterations to the Oregon Constitution that did not meet a "closely related" threshold. *Armatta*, 327 Or. at 283-84, 959 P.2d at 67-68. The court decided the initiative's defects were incurable and struck Measure 40 entirely. *Id.* at 289-90, 959 P.2d at 71. Since then, the court has not been shy about wielding the sword it created in *Armatta*. Hoesly, *supra* note 34, at 1220.

168 Hoesly, *supra* note 34, at 1225.

169 Following the district court decision in *MacPherson v. Dep't of Admin. Servs.*, No. 05C10444 (Or. Cir. Ct. Marion County Oct. 14, 2005), *rev'd*, 340 Or. 117, 130 P.3d 308 (2006), *available at* http://www.ojd.state.or.us/mar/documents/Measure37_000.pdf, which temporarily struck down the voter-approved Measure 37, some observers felt that the decision reflected a larger problem with judicial activism: "This is telling everybody our vote doesn't mean squat. We need new judges." Laura Oppenheimer, *Judge Razes Measure 37 Land Law*, OREGONIAN (Portland), Oct. 15, 2005, at A1 (quoting Barbara Prete, chief petitioner for Measure 37).

170 Hoesly, *supra* note 34, at 1225.

171 SECRETARY OF STATE, *supra* note 98, at 301; Hoesly, *supra* note 34, at 1225.

172 *See infra* text accompanying notes 190-99.

After *Stranahan v. Fred Meyer*,[174] where the Oregon Supreme Court overruled its nine-year-old precedent and held that there is no right to gather signatures at shopping centers and malls, Oregon conservatives began going after the judiciary directly.[175] In 2002, petitioners introduced two measures that made the ballot but were narrowly defeated. The first measure was aimed at making judicial reelection more difficult, and the other was intended to create geographic judicial districts.[176]

More recently, after the district court decision in *MacPherson*, which overturned voter-approved Measure 37,[177] angry Oregonians rallied to remove the ruling judge from the bench.[178] The recall petition filed against the judge stated that "[b]y overruling Measure 37, Judge Mary James has disregarded the express will of the people of Oregon."[179] While the Judge James recall has run into problems,[180] it is a reminder of the risk judges assume by serving as watchdog of the initiative process. The recall petition

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173 Hoesly, *supra* note 34, at 1225.

174 Stranahan v. Fred Meyer, Inc., 331 Or. 38, 11 P.3d 228 (2000).

175 Hoesly, *supra* note 34, at 1225. While the measures that have been struck down have largely been considered "conservative," Measure 37 provides a notable exception. Surprisingly, the Oregon Supreme Court concluded that Measure 37 was constitutional in *MacPherson v. Dep't of Admin. Servs.*, 340 Or. 117, 122, 130 P.3d 308, 312 (2006). In writing for the court, Chief Justice Paul De Muniz noted that the constitutionality determination "is the only one that this court is empowered to make" and that "[w]hether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview." *Id.* at 141, 130 P.3d at 322. Time will tell whether or not *MacPherson* signals a larger shift in the Oregon Supreme Court's treatement of initiatives. For more on Measure 37, see generally Keith Aoki, Kim Briscoe & Ben Hovland, *Trading Spaces: Measure 37,* MacPherson v. Department of Administrative Services*, and Transferable Development Rights as a Path Out of Deadlock*, 20 J. ENVTL. L. & LITIG. 273 (2006).

176 Hoesly, *supra* note 34, at 1225. Measure 21 was a constitutional amendment that would have allowed voters to mark "None of the Above" in judicial elections, thus making reelection more difficult. *Id.* Measure 22 would have created a constitutional amendment imposing geographic election districts for state appellate judges, thereby limiting the number of judges elected from the comparatively liberal Willamette Valley. *Id.*

177 Oregonians in Action's President David Hunnicutt referred to *MacPherson* as "the height of judicial activism." Press Release, Oregonians in Action, Marion County Judge Overturns Measure 37 (Oct. 14, 2005), http://oia.org/Measure37overturnPR.htm (last visited June 11, 2006).

178 Julie Sullivan, *Firestorm over Measure 37 Clouds Judge's Long-Held Dream*, OREGONIAN (Portland), Dec. 4, 2005, at B1.

179 *Id.*

180 The drive for signatures is now encountering technical difficulties because some of the signature pages did not bear the required identification numbers. David Steves, *Recall Petitions for Salem Judge May Be Recalled*, REGISTER-GUARD (Eugene, Or.), Jan. 10, 2006, at D1.

also exposes another weakness of the initiative system. When judges are elected, as in Oregon, a ruling contrary to the popular will, regardless of the reasoning, may be costly.[181]

Courts may find it easier to overturn initiatives that are primarily driven by small, well-financed special interests. However, playing "watchdog" over the initiative process has an inherent risk. When popular initiatives are overturned by the courts, voter frustration is common and leads voters to agree with anti-court sentiments.[182] Initiative scholars have learned that "[o]nce the participatory system is established . . . it becomes self-sustaining because the very qualities that are required by individual citizens if the system is to work successfully are those that the process of participation itself develops and fosters."[183]

This sentiment, coupled with the facts that (1) proponents of the initiative can be counted on to fill the media with rhetoric criticizing the judiciary[184] and (2) rulings that rebuff the majority may appear paternalistic,[185] leads to public distrust of the courts.[186] As Professor Julian Eule wrote, "It is one thing for a court to undertake the task of protecting the people from their

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[181] Hoesly, *supra* note 34, at 1226. Oregon's judiciary has shown recently that it is willing to accept the risks of serving as a watchdog. *See infra* notes 190-98 and accompanying text. This may be due to the judges' commitment to the law or to the rarity of judicial recalls. Sullivan, *supra* note 178, at B1 (noting statistical rarity of judicial recall). While the threat of judicial recall may seem at odds with this Comment's suggestion that the initiative has been commandeered by well-financed special interests, these ideas can coexist. Former Oregon Supreme Court Justice Hans Linde noted that "[i]t no longer is political suicide to question the shibboleth of unconstrained lawmaking by simple majority of those choosing to vote on any kind of initiative." Linde, *supra* note 18, at 399. Conversely, late California Supreme Court Justice Otto Kaus observed that "ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'" Richard L. Hasen, "*High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1320 (1997). Ultimately, both former jurists are correct.

[182] Kenneth P. Miller, *Courts as Watchdogs of the Washington State Initiative Process*, 24 SEATTLE U. L. REV. 1053, 1055 (2001).

[183] Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 210 (1997) (quoting CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 25 (1970)) (omission in original).

[184] After a Washington judge overturned a voter-approved, tax-cutting initiative, the initiative sponsor referred to the judge as "one guy with a robe on, but he might as well be wearing a crown if he's going to act like a king." David Postman, *I-695 Ruling Fuels Debate over Role of Courts,* SEATTLE TIMES, Apr. 11, 2000, at B1.

[185] *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1584 (1990).

[186] *See id.* at 1585.

government and quite another to protect the people from themselves."[187]

IV

ATTEMPTS TO FIX THE INITIATIVE PROCESS

The problems related to financial and special-interest capture of the ballot initiative system are not new. Allen Eaton's 1912 book on the "Oregon System" should make that apparent.[188] The most effective method for limiting financial influence on the initiative system—banning the payment of signature gatherers—has been foreclosed by the U.S. Supreme Court.[189] However, there have been other attempts and proposals. This section examines alternative solutions and discusses the strengths and weaknesses of these alternate methods that attempt to give the ballot initiative back to the people.

A. Oregon's Attempts

1. Armatta v. Kitzhaber *and the Oregon Constitution*

In *Armatta v. Kitzhaber*,[190] the Oregon Supreme Court rediscovered article XVII, section 1 of the state constitution, which requires that "two or more amendments" be proposed "separately" to the voters.[191] The *Armatta* court "found that Measure 40[192] made multiple 'substantive' changes to the constitution that were not 'closely related.'"[193] The court determined that the initiative's defects were incurable and the separate-vote requirement demanded that the entire initiative be struck down.[194] The court's application of article XVII, section 1, in what has become known as the *Armatta* rule, has significantly impacted the Ore-

187 *Id.*

188 *See supra* text accompanying notes 1 and 111.

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

190 Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998).

191 Hoesly, *supra* note 34, at 1220.

192 Measure 40 was a ballot initiative intended to "preserve and protect crime victims' rights to justice and due process and to ensure the prosecution and conviction of persons who have committed criminal acts." Preamble, Ballot Measure 40 (1996) (boldface in original omitted). For more information about Measure 40 and the *Armatta* decision that struck it down, see generally Philip Bentley, Note, Armatta v. Kitzhaber: *A New Test Safeguarding the Oregon Constitution from Amendment by Initiative*, 78 OR. L. REV. 1139 (1999).

193 Hoesly, *supra* note 34, at 1220.

194 *Armatta*, 327 Or. at 284, 959 P.2d at 68; Hoesly, *supra* note 34, at 1220.

gon initiative system.[195] Following *Armatta*, several initiatives were struck down by the separate-vote requirement.[196] If the court continues to follow *Armatta*, most constitutional initiatives seeking to change the Oregon constitution will likely fail.[197]

While the *Armatta* rule may not be effective in the long run as a test to preserve representative government, it is the course the Oregon Supreme Court has chosen.[198] As a result, Oregon's Constitution has become more stable.[199] Meanwhile, the statutory initiative remains available to those seeking to change the law. While the *Armatta* rule may help protect the Oregon Constitution, it does not eliminate the potential for corruption or abuse of the initiative system.

2. The Initiative Integrity Act: Circulators as Employees

In response to perceived corruption and abuse of the initiative system, the Voter Education Project (VEP), a union-backed

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195 Hoesly, *supra* note 34, at 1222.

196 *Id.* at 1220.

197 *Id.* at 1224. Proponents of a republican form of government, like former Oregon Supreme Court Justice Hans Linde, will not be upset to see such a change. Justice Linde has long argued that the initiative process should be governed by the decision in *Kadderly v. City of Portland*, 44 Or. 118, 74 P. 710 (1903). Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 962 (2001); *see* David B. Frohnmayer & Hans A. Linde, Appendix, *State Court Responsibility for Maintaining "Republican Government": An Amicus Curiae Brief*, 39 WILLAMETTE L. REV. 1487, 1491-1500 (2003). The *Kadderly* opinion allowed voters to share in the state's legislative power—by initiatives and by referenda—only as long as the representative legislature retains the power to change, repeal, or reenact laws. Linde, *supra*, at 963. This means that ordinary laws may not be put beyond legislative reach even if they are placed in the state's constitution or other special obstacles are put in place to prevent later legislative action. *Id.*

198 Linde, *supra* note 197, at 969-70. Linde noted that the recent trend of "invalidating initiative amendments for formal defects" is:

> often less pertinent to the real problem, and . . . less useful in the long run than the test of preserving representative government. Yet, the recent decisions suggest that courts no longer believe that overturning an initiated law outrages most voters. . . . So far, negation or avoidance may have seemed the courts' most convenient and politically safe course.

Id.

199 *See* Ashbel S. Green, *Ruling Puts Oregon's Initiatives to the Test*, OREGONIAN (Portland), July 9, 2001, at A1 (noting that election law experts agree that the *Armatta* decision restricts Oregonians' ability to alter the state constitution). In his Comment, Cody Hoesly recognizes the importance of a stable constitution. "A stable constitution exposits greater principles of government, leaving details to statutes and future interpretation, while an unstable constitution requires frequent amendment because its excessive detail does not allow for future technological or societal change." Hoesly, *supra* note 34, at 1224.

watchdog organization, was formed in 2001.[200] The VEP has since been operating with the dual goals of identifying signature fraud and promoting voter education.[201] VEP staff members go out to the streets—"directly onto the turf of the signature gatherer"—asking voters to "think before you ink."[202] VEP staff "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."[203] These efforts have resulted in the conviction of signature gatherers who admitted using fraudulent techniques to increase signature totals.[204] Ultimately, VEP efforts were largely responsible for bringing down Bill Sizemore for actions[205] described in the following account by *Willamette Week*:

> If you were a wealthy political conservative with, say, $50,000, "Dollar Bill" could essentially sell you 50,000 petition signatures for your pet cause. Not only that, he could juggle your donation around between various accounts and organizations until, when it came time to report the campaign's finances, that $50,000 no longer had your name on it.[206]

Sizemore considered his actions to be shrewd bookkeeping, but in a 2002 lawsuit brought by Oregon's largest teacher's union, the courts determined that these same actions were, in fact, "racketeering" and "money laundering."[207] Oregon Taxpayers United, Sizemore's organization, was held liable for placing two measures on the ballot with falsified signatures and illegal campaign contributions.[208] The courts, who later imposed personal liability on Sizemore, accordingly ordered Oregon Taxpayers United to pay $2.5 million to defray the opponent's cost of fighting the measures.[209]

Also in 2002, Oregonians reacted to increased perceptions of faults in the initiative process by passing Measure 26, known as

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200 Ellis, *supra* note 8, at 95.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at 95-96.

205 Hoesly, *supra* note 34, at 1216 n.201.

206 Buckingham, *supra* note 130, at 68.

207 *Id.*

208 *Id.*

209 *Id.*

the Initiative Integrity Act by a three-to-one margin.[210] Measure 26 requires that petition circulators be paid as employees rather than on a per-signature basis.[211] The overwhelming public support for this measure is largely credited as backlash from the revelations that Bill Sizemore's groups engaged in voter fraud.[212]

Not surprisingly, Measure 26 was challenged in court.[213] In *Prete v. Bradbury*, the court upheld Measure 26, stating that the "limited burdens imposed by Measure 26 are far outweighed by [the] need to protect the integrity of the electoral process and to restore the public's confidence in its government."[214]

While the aims of Measure 26 are admirable, its actual benefits are debatable. If anyone could be expected to benefit from Measure 26, it would surely be the signature gatherers who are now being paid as employees. However, an interpretation by the Oregon Secretary of State indicates that Measure 26 still allows for the payment of an hourly wage or salary, minimum signature requirements, the termination of circulators who do not meet productivity requirements, and the paying of discretionary bonuses based on reliability, longevity and productivity.[215] Bill Sizemore does not believe that Measure 26 will have its desired impact and argues that signature gatherers will still "have the same motivation they [had before Measure 26]—the same motivation to work hard, or if they are unscrupulous or lacking in character, the

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[210] The Initiative Integrity Act was passed as Measure 26 in 2002. The measure passed 921,606 to 301,415. SECRETARY OF STATE, *supra* note 98, at 302.

[211] Measure 26 added the following into the Oregon Constitution: "It shall be unlawful to pay or receive money or other thing of value based on the number of signatures obtained on an initiative or referendum petition. Nothing herein prohibits payment for signature gathering which is not based, either directly or indirectly, on the number of signatures obtained." OR. CONST. art. IV, § 1b.

[212] Hoesly, *supra* note 34, at 1216.

[213] *Id.*

[214] Prete v. Bradbury, No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738, at *39 (D. Or. Feb. 18, 2004), *aff'd*, 438 F.3d 949 (9th Cir. 2006). Oregon Secretary of State Bill Bradbury celebrated the decision, stating that "[t]his decision strongly supports Oregon voters' judgment that we need to restore public confidence in our initiative and referendum system, and protect elections against fraud." Press Release, Oregon Secretary of State, Ban on Pay-Per-Signature Upheld (Feb. 12, 2004), http://www.sos.state.or.us/executive/pressrel/021204.htm (last visited June 11, 2006). Oregon Attorney General Hardy Myers joined Bradbury in support of the ruling, noting that the ruling "affirmed the common-sense proposition that regulations aimed at reducing petition-circulation fraud are not unconstitutional." *Id.* Myers also said that Measure 26 and the Secretary of State's rules implementing it were "narrowly tailored to serve the state's important interests in protecting the integrity of the initiative and referendum process." *Id.*

[215] OR. ADMIN. R. 165-014-0260 (2006).

same motivation to cheat."[216]

Furthermore, while Measure 26 may ultimately reduce the number of initiatives on the ballot, those lost will not be from well-funded special interests. The measures that fall short will be from grassroots organizations that are unable to afford the increased costs of paying signature gatherers as employees.[217] For Oregonians in Action,[218] Measure 26 simply made it worthwhile to gather signatures by direct mail.[219]

Direct-mail signature gathering has generally been eschewed for "sidewalk" signature gatherers because of cost concerns.[220] While acquiring signatures by direct mail is much more expensive than paying petition circulators, direct mail signatures are more likely to be valid.[221] Thus, from an integrity standpoint, gathering signatures by direct mail is preferable. If our only concern was public support for a measure, direct mail would help solve this problem. Lowenstein and Stern note that with direct mail signature gathering, "[s]omething relevant is measured, namely, the willingness of large numbers of individuals to figure out how to complete the petition properly and return it."[222] Generally, direct mail recipients are not likely to sign and return the petitions unless they have some interest in seeing the issue on the ballot.[223] Unfortunately, because of its expense, direct mail still

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216 Hoesly, *supra* note 34, at 1217 (alteration in original).

217 *See id.*

218 Oregonians in Action is an Oregon-based property rights group that sponsored Measures 7 and 37, which were property compensation measures. *See* Aoki, Briscoe & Hovland, *supra* note 175, at 284-87 (examining the rise of Oregonians in Action's influence in Oregon through the use of the initiative process).

219 Hoesly, *supra* note 34, at 1226.

220 Lowenstein & Stern, *supra* note 12, at 205. The emergence of circulating initiative petitions by direct mail "is generally attributed to a California tax reduction initiative sponsored by Howard Jarvis in 1979. . . ." *Id.* At that time, observers expected direct-mail usage to "mushroom," and one state official claimed it would be "crazy not to go the computer-letter route. It's so easy." *Id.* These predictions were based on the fact that in addition to receiving over 800,000 signatures, Jarvis also received enough financial contributions to pay for the mailing. *Id.* However, the direct-mail boom never arrived because future campaigns did not receive the same type of response as Jarvis's tax initiative. *Id.* at 205-06.

221 *See* Hoesly, *supra* note 34, at 1226-27. Direct-mail "signature validity rates are closer to 90%, far better than the usual 70% that teams of sidewalk signature gatherers achieve." *Id.* at 1227.

222 Lowenstein & Stern, *supra* note 12, at 208.

223 *Id.* Lowenstein and Stern note that it is more difficult to determine whether the use of volunteer circulators is superior to direct mail. Using volunteer circulators does a better job of measuring depth of support as compared to breadth. *Id.* In

primarily benefits well-funded initiative proponents.[224]

While one consequence of Measure 26 may be an increase in the use of direct mail, ultimately the effectiveness of Measure 26 will only be known over time. However, perhaps the most valuable consequence of the measure was the court's recognition that the state "need[s] to protect the integrity of the electoral process and to restore the public's confidence in its government."[225]

3. Property Rights v. Political Speech

The Oregon Supreme Court has also limited the locations where signature gatherers may operate. In *Stranahan v. Fred Meyer*, *Inc.*, Fred Meyer had a signature gatherer arrested for refusing to leave the store's sidewalk where she was gathering initiative petition signatures.[226] In the signature gatherer's action for false arrest, the store asserted a defense of its right to exclude as a private property owner.[227] The court concluded that a person soliciting signatures for initiative petitions may not gather signatures on certain private property over the owner's objection.[228] The *Stranahan* decision overruled the court's previous interpretation of article IV, section 1 of the Oregon Constitution in *Lloyd Corp. v. Whiffen*, which limited a property owner's ability to exclude signature gatherers from common areas.[229]

These Oregon court rulings have approved limitations on the initiative process. The impact has been notable, especially that of *Armatta*, but the initiative process in Oregon is still in dire need of reform. Moreover, Oregon's initiative system is not the only one in the country in need of improvement. The next section examines the strengths and weaknesses of reform attempts implemented in other initiative states.

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contrast, direct mail is an excellent tool to measure breadth of support, but only indicates depth if numerous financial contributions are included as well. *Id.*

224 *See id.* at 208-09. Under the current line of Supreme Court decisions that regulate signature gathering, including *Meyer v. Grant*, direct mail may be the best way to preserve integrity and accurately measure popularity.

225 Prete v. Bradbury, No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738, at *39 (D. Or. Feb. 18, 2004), *aff'd*, 438 F.3d 949 (9th Cir. 2006).

226 Stranahan v. Fred Meyer, Inc., 331 Or. 38, 41-42, 11 P.3d 228, 230 (2000).

227 *See id.*

228 *Id.* at 65-66, 11 P.3d at 243; *see also* Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 861-63 (2000) (providing a more in-depth analysis of the Oregon Supreme Court's interpretation of this issue).

229 *Id.* Petitioners do not enjoy this right under the U.S. Constitution, either. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

B. Initiative Reform in Other States

1. Increased Signature Thresholds

Several states with the initiative system have experimented with a variety of reforms. However, unlike most of Oregon's attempts, many of these reforms come from legislatures and take the form of limits that make it more difficult to get an initiative qualified for the ballot. The most frequently used reform attempt is to raise the required number of signatures necessary to qualify an initiative for the ballot.[230]

Currently, states vary in the percentage of voter signatures they require for qualification.[231] The spectrum ranges from North Dakota, which requires 2% of the total population to sign, to Wyoming, which requires signatures totaling 15% of the votes cast in the previous gubernatorial election.[232] While Wyoming has the highest percentage requirement, California leads the way in total signatures needed by requiring signatures totaling 5% of the votes cast in the previous gubernatorial election,[233] which would currently be 373,816 signatures.[234]

The use of professional signature gatherers creates a situation where an increased signature threshold equates to raising the cost of ballot access.[235] This increased cost only furthers the monetary influence over the initiative process, deterring grassroots campaigns without a similar impact on well-funded interest groups.[236] The current scarcity of genuine grassroots efforts is a reflection that ballot qualification is already difficult enough for underfunded groups and that the added burden of increased signature thresholds may all but eliminate the grassroots initiative.[237]

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230 Hoesly, *supra* note 34, at 1230.

231 RICH BRAUNSTEIN, INITIATIVE AND REFERENDUM VOTING: GOVERNING THROUGH DIRECT DEMOCRACY IN THE UNITED STATES app. at 152 (2004).

232 *Id.*

233 *Id.*

234 California Secretary of State, Elections & Voter Information: How to Qualify an Initiative, http://www.ss.ca.gov/elections/elections_h.htm (last visited June 15, 2006). Oregon requires 6% of the votes cast in the previous gubernatorial election, which is generally considered reasonable. BRAUNSTEIN, *supra* note 231, app. at 152.

235 *See* Hoesly, *supra* note 34, at 1231.

236 *Id.* at 1230-31.

237 *See id.*

2. Time Constraints

Several states have also limited the time in which petitioners may gather signatures to qualify for the ballot.[238] Petitioners in seventy-five percent of the initiative states are given at least a year to gather signatures for an initiative, but the time limit still varies from ninety days in Oklahoma and 150 days in California to one year in Montana, two years in Oregon, and even four years in Florida.[239] Again, the problem with this limitation is that it raises the costs for qualifying an initiative, thereby excluding grassroots campaigns.[240] In states with a short time limit, direct democracy firms simply charge more for a guarantee that an initiative will be on the ballot.[241] The majority of observers have actually recommended eliminating time constraints on signature gathering, viewing them as an unnecessary hurdle for volunteer signature drives.[242]

3. Geographic Distribution Requirements

Yet another common limitation—imposed in half of the initiative states—is to have signatures meet a geographical distribution requirement.[243] The goal of this limitation is to force petitioners to obtain signatures beyond just heavily populated urban areas.[244] It is notable that geographic distribution requirements are not used in any of the states that most frequently use the initiative (Oregon, California, Arizona, Colorado, and Washington).[245] This should not be too surprising as these requirements generally make initiative qualification more costly and onerous.[246] In 1996, the Oregon state legislature placed a referendum on the ballot that would have imposed a geographic requirement; however, it failed with only forty-four percent of the electorate's support.[247]

Like the other alternatives discussed in this section, geographic

238 Ellis, *supra* note 8, at 45; Hoesly, *supra* note 34, at 1231.
239 Ellis, *supra* note 8, at 45.
240 *See* Hoesly, *supra* note 34, at 1230.
241 *See id.* at 1231.
242 *Id.*
243 Ellis, *supra* note 8, at 46.
244 *Id.*
245 *Id.*
246 *Id.*
247 Harry Esteve, *Initiative System Resistant to Change*, OREGONIAN (Portland), May 19, 2000, at D1.

distribution requirements simply raise the cost of ballot access without adequately resolving the concerns they are purported to address. For those with vast financial resources, the changes make little difference. The groups that are hindered most by these restrictions are those with limited funds, even those with popular support.

C. Plausible Alternatives

The attempts at reform in Oregon and the other initiative states have not proved to be viable methods for returning the initiative to the people as William U'Ren intended. As this Comment has illustrated, concerns about the ballot initiative system are not new.[248] Suggestions for fixing the system have existed just as long.

1. Proactive Signatures and Registration Officials

One early suggestion was to require that petitions be left with and signed in the presence of county registration officials.[249] This proposal aimed to reduce fraud and to ensure that initiatives reaching the ballot actually addressed voter concerns.[250] As one contemporary account stated:

> Everyone knows 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 provided 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.[251]

Professor Ellis has suggested that if such a system were implemented, petitions could also be made available at public locations such as libraries, fire stations, and post offices.[252] Under this scenario, "[i]nitiative sponsors could still spend unlimited amounts of money to hire solicitors who would explain the measure to interested citizens, distribute relevant literature, and urge

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[248] *See supra* text accompanying notes 1, 12, 92.

[249] Ellis, *supra* note 8, at 94.

[250] *Id.*

[251] *Id.*; BARNETT, *supra* note 92, at 75 (quoting EUGENE REGISTER, Dec. 18, 1913, at 4).

[252] Ellis, *supra* note 8, at 94.

citizens to sign."[253] Voters who had learned about a measure and were interested in supporting it would then be able to seek out a designated public location to sign the petition.[254] Certainly those with financial resources would still have an advantage, but it would be reduced.[255] However, measures that "tap into genuine citizen grievances or concerns" may be more likely to reach the ballot, regardless of financial backing.[256]

Professor Ellis also recognized that in order for such a system to be viable, a significant reduction in signature thresholds would be required.[257] Under such a program, "proponents of popular or controversial issues would find qualification substantially easier," and "those pushing issues about which people cared little would find the process much more onerous."[258] In turn, the collection of signatures would actually demonstrate the "breadth and depth of public support."[259]

In recognizing the potential of a registration-official system, Professor Ellis also recognized that the reality is that such a proposal is unlikely to be adopted.[260] The registration official system was not adopted when the *Eugene Register* lobbied for it in 1913, and little indicates that the public would be receptive to it today.[261] Professor Ellis did, however, offer what he termed a "more modest but probably more realistic proposal" as well.[262] He proposed pressing state officials to increase the monitoring of the signature gathering, which would help preserve some legitimacy in the system.[263]

In Oregon, a private group took the initiative to begin monitoring the signature gathering phase of the initiative process. The Voter Education Project offers an example of the corruption and fraud that can be exposed and eliminated from signature gathering.[264] Because VEP is union-backed, however, the organ-

253 *Id.*
254 *Id.*
255 *Id.* at 94-95.
256 *Id.* at 95.
257 *Id.*
258 *Id.*
259 *Id.*
260 *See id.* (noting that a registration official system is not that realistic).
261 *Id.* at 94-95.
262 *Id.* at 95.
263 *Id.* Ellis has observed that "[e]lections officials would not dream of leaving polling places unattended, yet signature gathering is routinely conducted without any observers monitoring the process." *Id.*
264 *Id.*

ization has been subject to partisan accusations.[265] Political leanings aside, it is impossible to deny that the VEP did catch signature gatherers attempting to defraud the system.[266] One signature gatherer estimated that the number of valid signatures on his petitions could have been in the single digits.[267] Another convicted signature gatherer believed valid signatures comprised approximately half of his petition sheets.[268] Additionally, the VEP's efforts helped prevent two initiatives with numerous fraudulent signatures from making it on the ballot.[269] Furthermore, the VEP's efforts can be given some credit for bringing down Bill Sizemore, creating the public sentiment that passed Measure 26 (the Initiative Integrity Act), and providing evidence that helped defeat the Measure 26 court challenge.[270]

However, while the VEP's efforts should be commended, the state government should be responsible for providing such a monitoring system. It is encouraging that the VEP generated publicity and evidence that helped convince the Secretary of State's office to create a position responsible for monitoring the signature gathering process.[271] Also, while increased monitoring is something that should be incorporated into initiative reform, it does nothing to ameliorate the fiscal realities of today's initiative system.

2. The Volunteer Bonus

Political scientists and initiative scholars have asked, "[w]hat, 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?"[272] One of the few suggestions that might address this problem is the "volunteer bonus."[273] This pro-

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265 *Lisa Baker*, *Voter Education (Eradication) Project: Is Their Goal Education or Elimination of Oregon Voters' Rights?*, BRAINSTORM NW, Dec. 2003, at 55, *available at* http://www.brainstormnw.com/archive/dec03_feature.html.

266 Ellis, *supra* note 8, at 95.

267 *Id.*

268 *Id.* at 95-96.

269 *Id.* at 96.

270 *See id.*; *see also* Prete v. Bradbury, No. 03-6357-AA, 2004 U.S. Dist. LEXIS 28738, at *34-38 (D. Or. Feb. 18, 2004) (finding compelling state interest in Measure 26 because it combats fraud and restores public confidence in the initiative process), *aff'd*, 438 F.3d 949 (9th Cir. 2006).

271 Ellis, *supra* note 8, at 96.

272 *Id.* at 94.

273 Lowenstein & Stern, *supra* note 12, at 221. For a more in-depth look at the proposition of the volunteer bonus, see *id.* at 220-23.

posal would require initiative campaigns that pay signature gatherers to turn in a larger number of signatures than campaigns that use volunteers.[274]

Essentially, there would be a two-tier signature requirement.[275] Campaigns could gather signatures with both volunteers and paid circulators; however, there would be a bonus for signatures obtained by volunteers.[276] The goal of the volunteer bonus would be to discourage paid signature gathering by giving "a significant incentive to switch, at least in part, to volunteers."[277] Coupling a "volunteer bonus" with a higher number of required signatures would foster volunteer participation without curtailing the paid signature-gatherer option.[278] Professor Ellis suggests that implementing such a system would improve ballot access for volunteer-led efforts, while impeding paid signature gatherers.[279] Unfortunately, however, the volunteer bonus proposal invites several potential problems.

Professor Elizabeth Garrett has argued that the volunteer bonus encourages fraud and abuse of the system.[280] The unequal value of signatures would likely encourage groups to disguise the origin of signatures and circulator payment in order to qualify for the ballot with fewer signatures.[281] Policing these abuses would be difficult.[282] While direct fraud such as lying about the origin of signatures may be detectable, some situations would be a much closer call. For example, Professor Garrett posed the following dilemma: "[I]nterest groups relying on volunteers frequently boost morale and encourage participation with parties and food. When do such in-kind benefits become so generous that they serve as compensation?"[283]

The volunteer bonus raises other concerns as well. The U.S. Supreme Court may take issue with a volunteer bonus program. The essence of such a program is to reward volunteer efforts and

274 *See id.* at 221.

275 *Id.*

276 *Id.*

277 *Id.* at 222.

278 Ellis, *supra* note 8, at 93-94.

279 *Id.*

280 *See* Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1874 (1999).

281 *Id.*

282 *Id.* at 1874-75.

283 *Id.* at 1875.

conversely penalize paid campaigns.[284] While less onerous than banning or criminalizing the payment of signature gatherers entirely, the volunteer bonus proposal may still be viewed as burdening political speech.[285] As Professor Garrett noted, any state implementing a volunteer bonus for signatures will need to show a compelling state interest for the regulation.[286]

Additionally, the volunteer bonus may be subject to an equal protection challenge.[287] Lowenstein and Stern have addressed this concern:

> If an equal protection challenge is brought by a proponent who relies predominantly on paid circulators, the response would be that the proponent has the same right as others to recruit volunteer circulators. Furthermore . . . the volunteer bonus is supported by the compelling state interest of rationing ballot positions on a basis other than the depth of the proponent's pocket.[288]

Beyond the courtroom, other notable concerns about the volunteer bonus have been raised. Professor Ellis points out that while the volunteer bonus may stimulate grassroots involvement, "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.'"[289] Also, upon introducing the concept of a volunteer bonus, Lowenstein and

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284 *Id.*

285 *Id.*

286 *Id.*

287 Ellis, *supra* note 8, at 94. "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 prove difficult to administer and enforce." *Id.*

288 Lowenstein & Stern, *supra* note 12, at 223. Lowenstein and Stern also argue that:

> [t]he unequal weighting of signatures might be analogized to unequal weighting of votes, which is not permitted under the Fourteenth Amendment. But a signature on a petition is not like a vote, for purposes of evaluating "weighting." Votes are competitive, either among candidates or among positions (yes or no) on propositions. Increasing the "weight" of *A*'s vote harms *B*, who may take a position opposed to *A*'s. In contrast, petition signing is additive. If *B* signs a petition section circulated by a professional circulator in the hope of qualifying a measure for the ballot, *B*'s goals are furthered, not hindered, if *A*'s signature for the same measure on a section circulated by a volunteer is multiplied. Furthermore, *B* retains the option of signing a volunteer section and thereby multiplying the effect of *B*'s own signature.

Id. (footnote omitted).

289 Ellis, *supra* note 8, at 94.

Stern saw politics as the primary hurdle to contend with, writing that:

> The main drawback of our proposal is neither one of policy nor of constitutionality, but of politics. The volunteer bonus makes the process somewhat more complex than it has been, and even may appear gimmicky at first hearing. The Colorado ban was much more straightforward, and in that sense it was preferable. The volunteer bonus system, at the cost of greater complexity, introduces an element of flexibility that may be desirable. At any rate, the straightforward approach is ruled out for now. Those interested in the well-being of our processes of direct democracy will need to be open to innovative approaches, whether to ours or to others that may be put forward.[290]

Ultimately, I can only come to the same conclusion as Lowenstein and Stern. When the Supreme Court held Colorado's ban on the payment of signature gatherers unconstitutional in *Meyer*,[291] it was a blow to the legitimacy of the initiative process. The Court took away a major tool from the states to regulate their democratic institutions, and in the cases that followed *Meyer*, largely shot down any attempt to fix the initiative process.[292] Some critics have abandoned hope that the Court will have a "change of heart."[293] Recent decisions, however, may indicate a small glimmer of hope that the Court will return control of the initiative back to the states.

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[290] Lowenstein & Stern, *supra* note 12, at 223.

[291] Meyer v. Grant, 486 U.S. 414, 428 (1988).

[292] *See*, *e.g.*, Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 205 (1999) (holding that some of Colorado's ballot access controls unjustifiably inhibited the circulation of ballot-initiative petitions). Also, prior to *Meyer*, the U.S. Supreme Court had ruled that a restriction limiting political contributions to a ballot-measure campaign violated the First Amendment. Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 299-300 (1981) ("Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure.").

[293] *See* Ellis, *supra* note 8, at 96. Ellis has put his faith in the voters and noted that:

> 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.

Id.

3. Revisiting Meyer v. Grant

The first U.S. Supreme Court decision discussed in this Comment was *Buckley v. Valeo*.[294] The current jurisprudence impacting the initiative would not be the same without the foundation provided by *Buckley*. However, this Comment will not address the possibility of *Buckley v. Valeo* being overturned,[295] but will instead focus on the implications of revisiting *Meyer v. Grant*.

When the *Meyer* decision was handed down, Lowenstein and Stern saw the decision for what it was and crafted a critique that the Court should consider:

> The world will little note nor long remember *Meyer v. Grant*. Yet, even a minor decision of the United States Supreme Court has significant consequences. In *Meyer*, which struck down a Colorado law banning the use of paid circulators for the qualification of initiatives for the ballot, these consequences included the apparent removal from consideration by the states of a salutary and timely device for the reform of the initiative process. . . . The Colorado statute did not prohibit any form of speech, and the Court's decision privileged not communication, but the access to the ballot of those with financial resources, to the detriment of those without such resources.[296]

Lowenstein and Stern also pointed to several other faults in the *Meyer* decision.[297] The remainder of this section will focus on the argument that Justice Stevens, writing for the Court, failed to recognize the states' interest in safeguarding the initiative process by ensuring significant popular support for any measure making the ballot.

In *Meyer*, the Court addressed the question of whether a state could prohibit proponents from paying individuals to gather signatures for initiative petitions.[298] Lowenstein and Stern contend "that given the plain need to ration the limited number of ballot positions, the more pertinent question is whether the state may

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[294] For a discussion and evaluation of *Buckley*, see *supra* notes 56-62 and accompanying text.

[295] As former Stanford Law School Dean Kathleen Sullivan said, "*Buckley v. Valeo*, the two-decades-old decision that gave limited First Amendment protection to the outlay of political money, has become the great white whale of constitutional law: the more elusive its demise becomes, the greater the intellectual exertion expended in its pursuit." Sullivan, *supra* note 56, at 311 (footnote omitted).

[296] Lowenstein & Stern, *supra* note 12, at 175-76 (footnote omitted).

[297] *See generally id.* (criticizing the *Meyer* decision).

[298] Meyer v. Grant, 486 U.S. 414, 416 (1988).

choose a system in which the requisite level of support must be demonstrated by the willingness of volunteers to devote time and effort to circulate petitions."[299]

The *Meyer* Court felt public sentiment could be measured by the number of voters willing to sign the petition.[300] Numerous studies, however, have shown that the number of signatures gathered proves very little about the voter's support for a measure.[301] Of course, it may be easier to get signatures for a popular measure, but popularity pales in comparison to the importance of the number of potential signers.[302] Lowenstein and Stern assert that as a result, "the true hurdle for qualifying measures for the ballot is not having a proposal that people want to sign but inducing enough people to go out and circulate the petitions."[303] Amazingly, Justice Stevens emphasized the notion that petition circulation is hard work and even recognized the difficulty in recruiting volunteer signature gatherers.[304] However, he failed to recognize the connection between the willingness of volunteers and public support.[305]

Admittedly, volunteer circulators do not necessarily guarantee broad popular support.[306] A measure qualified wholly by volunteer circulators, however, demonstrates that there are at least a fair number of individuals who are willing to make a considerable personal sacrifice for the cause.[307] In contrast, a measure that is qualified by paid circulators only demonstrates that someone was willing to pay for it.[308] The financial cost of qualifying an initiative today is not cost prohibitive for well-financed special interests or corporations. Lowenstein and Stern believe that "if supporters can hire enough circulators, . . . the measure can qualify, even though virtually no voters have any affirmative desire to

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299 Lowenstein & Stern, *supra* note 12, at 186-87.

300 *See Meyer*, 486 U.S. at 425-26.

301 Lowenstein & Stern, *supra* note 12, at 213-14.

302 *Id.* at 203.

303 *Id.*

304 *Id.*

305 *See id.* (explaining that "the true hurdle for qualifying measures for the ballot is not having a proposal that people want to sign but inducing enough people to go out and circulate the petitions" and noting that hiring circulators is much easier than recruiting volunteers).

306 This is because a small group of extremely dedicated volunteers may be able to qualify a measure. *Id.* at 203-04.

307 *Id.* at 203.

308 *Id.* at 204.

have it enacted into law."[309]

The potential for abuse of such a system is too great. The example of Bill Sizemore's group, Oregon Taxpayers United, dictating the political agenda in Oregon exemplifies how William U'Ren's vision of the initiative as a tool for the people has been turned inside out—wealthy interests control the process, not the "people."[310] The professional initiative industry has eliminated the system's ability to filter ballot propositions in a manner consistent with the purposes of the system.[311]

Colorado, like Oregon, had found a simple and effective way to repair the system. In *Meyer*, however, the Court took away the states' ability to ban the payment of signature gatherers, asserting that signatures sufficiently demonstrate support for a measure.[312] We have seen that this is simply not true.[313]

Before *Meyer* was decided, Coloradoans used the initiative with great frequency.[314] In fact, the district court in *Meyer* had found that Colorado had one of the heaviest usage rates of the initiative in the United States and had more initiatives qualify for the ballot than in most states that permitted circulator payment.[315] Presented with this information, the *Meyer* Court's response was to note "that even more petitions would have been successful if paid circulators had been available . . . ."[316]

The Court's response ignores the fact that the purpose of the signature requirement is to eliminate proposed initiatives that lack a certain level of popular support.[317] If the objective was to qualify the largest possible number of initiatives, states could simply remove the signature requirement.[318] As was noted above, no state has chosen to go this route because without a signature threshold, it is nearly certain that voters would be overwhelmed with trivial and idiosyncratic measures.[319]

Instead, prior to *Meyer v. Grant*, states regulated their initia-

309 *Id.*

310 *See supra* notes 128-39 and accompanying text.

311 Lowenstein & Stern, *supra* note 12, at 204-05.

312 *See* Meyer v. Grant, 486 U.S. 414, 425-26 (1988); Lowenstein & Stern, *supra* note 12, at 205.

313 *See supra* text accompanying notes 300-09.

314 Lowenstein & Stern, *supra* note 12, at 218.

315 *Id.*; *see Meyer*, 486 U.S. at 419 n.3.

316 *Meyer*, 486 U.S. at 419 n.3.

317 Lowenstein & Stern, *supra* note 12, at 219.

318 *Id.* at 218-19.

319 *See supra* text accompanying notes 14-15; Ellis, *supra* note 8, at 44.

tive systems in a way to ensure ballot initiatives had the necessary popularity to warrant statewide consideration.[320] When *Meyer* was decided, dissatisfaction with the financial capture of the initiative qualification process was rising.[321] That same disenchantment exists today, and *Meyer* simply barred the most straightforward remedy the states had.[322]

In the years following *Meyer,* the Court and the public have become more comfortable with campaign finance reform.[323] In fact, *Meyer* was decided by the Supreme Court at a time when such laws were viewed as impinging too greatly on First Amendment rights.[324] But now, Professor Richard Hasen argues that several cases that precluded states from limiting contributions or expenditures to initiative campaigns are ripe for reexamination under the Supreme Court's recent deference to campaign finance regulation.[325]

Professor Hasen points to *McConnell v. FEC*,[326] *Nixon v. Shrink Missouri Government PAC*,[327] *FEC v. Colorado Republican Federal Campaign Committee*,[328] and *FEC v. Beaumont*[329] as the "New Deference Quartet" (NDQ).[330] He argues that these cases may signal that the Court is more willing to recognize that ballot measure limits are an important tool to limit corruption and preserve voter confidence.[331] He further states that while the NDQ cases "did not concern ballot measures . . . their analyses of campaign finance laws in the context of *candidate* elections [could] potentially open up the door to new regulations in the *ballot measure* context."[332]

One solution to the current dilemma over state regulation of the initiative system would be to challenge *Meyer*. If Professor Hasen is correct and the Supreme Court would be more receptive to a challenge, Oregon, with its history of national leadership

320 *See supra* Part IV.B.

321 Lowenstein & Stern, *supra* note 12, at 219.

322 *Id.*

323 Hasen, *supra* note 57, at 885-86.

324 *Id.* at 886.

325 *Id.* For a more detailed examination of the Court's shift in attitude toward campaign finance reform, see generally *id.*

326 McConnell v. FEC, 540 U.S. 93 (2003).

327 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

328 FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).

329 FEC v. Beaumont, 539 U.S. 146 (2003).

330 Hasen, *supra* note 57, at 886.

331 *Id.* at 886-87.

332 *Id.* at 886.

in the initiative process, would be the perfect state to reenact a ban on the payment of signature gatherers.[333] Challenging *Meyer* based on Lowenstein and Stern's arguments could return the power to regulate the initiative system back to the states. If *Meyer* was overturned and the states had the power to regulate the initiative, there is a possibility that the states could return the initiative back to the people as William U'Ren and his followers intended.

V

BEYOND THE SIGNATURE THRESHOLD

Meyer should be overturned; however, if no state challenges it or if the Supreme Court holds its ground, we must look at an alternate solution. Currently, the signature threshold requirement only operates to prevent those without an abundance of financial resources from getting on the ballot. Furthermore, state attempts to enact a useful signature threshold have either been struck down by the Court, rendered ultimately ineffective, or both.

If the Court will not revisit *Meyer*, the time has come to abandon the signature threshold. Such a suggestion has been put forward before by observers who feel the system is beyond repair and are willing to abandon hope of eliminating financial influence on the initiative system.[334] This so-called "cynic's choice" suggests that groups seeking to gain access to the ballot through the initiative should simply pay a very substantial filing fee.[335] Such a system would save the state the expense of verifying signatures and free up much needed resources for other programs.[336] While this system would do little for grassroots groups,

[333] While Oregon may be a natural leader in the initiative process, any attempt at banning paid signature gatherers may be unconstitutional under Oregon's free expression clause. *See* OR. CONST. art. I, § 8 ("No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."). *See generally* Rex Armstrong, *State Court Federalism*, 30 VAL. U. L. REV. 493 (1996) (discussing how Oregon courts have interpreted free expression to be broader under the Oregon constitution than their federal counterparts have interpreted freedom of expression under federal law).

[334] *See* Ellis, *supra* note 8, at 93.

[335] DUBOIS & FEENEY, *supra* note 118, at 102-04; Ellis, *supra* note 8, at 93; Lowenstein & Stern, *supra* note 12, at 200 n.116 (suggesting a filing fee ranging from $400,000 to $700,000).

[336] Ellis, *supra* note 8, at 93.

it would at least wash away the pretense that the system is in place to help them.[337]

The "cynic's choice" in itself is more favorable than our current system;[338] however, it could be drastically improved with a little vision. The cynics would throw out the signature threshold and replace it with a large filing fee. However, that plan lacks what the signature threshold was intended to produce: a measure that has enough popular support to warrant ballot qualification.[339]

A. The Initiative Primary

The creation of a new system for qualifying an initiative that would replace the signature threshold should be guided by the notion that "it can be both too hard and too easy to qualify an initiative."[340] The system needs to set a high enough bar to prevent initiatives from being filed on a whim and low enough so as to allow "committed citizens with genuine, widely shared grievances" to bring "their issue directly before the people."[341]

Such a system could be created by replacing the signature threshold with a filing fee and an "initiative primary." The filing fee would only differ from the "cynic's choice" in amount. The fee should be set at an amount high enough to deter pure whims and low enough that a sizeable yet underfunded group of people could afford it. Once petitioners pay the filing fee and obtain a ballot title and summary, the proposal would be placed on a primary initiative ballot.[342]

The initiative primary could resemble a traditional candidate primary election and may even accompany the traditional ballot. Voters would then choose the initiatives that propose changes that are important to them. A minimum percentage of votes would be required to make the final ballot. This percentage should be based on registered voters so that it would require at least a certain level of turnout and commitment from the entire electorate. Again, the number should be high enough to maintain the initiative process's integrity and yet low enough to only

337 *See id.*

338 *See* Lowenstein & Stern, *supra* note 12, at 199-200 & n.116.

339 Ellis, *supra* note 8, at 44.

340 Lowenstein & Stern, *supra* note 12, at 220; *see* Ellis, *supra* note 8, at 44.

341 Ellis, *supra* note 8, at 44.

342 For a discussion on how to attain a ballot title and summary in Oregon, *see supra* text accompanying notes 39-45.

allow those measures truly supported by citizens. Initiatives meeting the established threshold would then appear on election ballots as they currently do. The initiative primary would assist states in returning integrity to the initiative process and should bolster voter confidence.

The benefits of an initiative primary would be manifold. From a control standpoint, the states would be able to establish limits that appropriately limit the number of initiatives on the ballot. From a fraud standpoint, signatures would be replaced by more-reliable votes. As for popular support of the electorate, the initiative primary combined with a vote requirement will ensure that measures on the final ballot enjoy a breadth of support throughout the voting population. While the filing fee could be seen as a way of simply selling legislation, this Comment and other articles have pointed out that the current system is doing just that while presenting itself under a false pretense of popular public support.[343]

As for the current funding disparity among initiative proponents, it would still exist but with a more limited influence. While well-funded groups would still be able to win the battle of advertising, that does not always guarantee victory.[344] Furthermore, any financial burdens placed on the state government by an added election step should be offset by the filing fees and elimination of the signature confirmation stage.

Of course, no system is without faults. One shortfall of the initiative primary is that the likely increase in demand for ballot titles and summaries would result in a proliferation of ballot title challenges. From a financial standpoint, filing fees will hopefully offset this cost. Beyond cost, there is concern about overwhelming the Oregon Supreme Court with ballot title challenges.[345] This reality may make the creation of a specialty court designed to deal with ballot title challenges useful to alleviate the added

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[343] Ellis, *supra* note 8, at 58-71, 75-77; Lowenstein & Stern, *supra* note 12, at 200-05.

[344] Garrett, *supra* note 280, at 1847 (noting that scholars of the impact of financial influence on ballot questions have "uniformly concluded that money plays a large role in such campaigns, particularly when it is spent to defeat ballot questions").

[345] Oregon law requires ballot title challenges to be heard by the Oregon Supreme Court. OR. REV. STAT. § 250.085 (2005). As a result, the court already spends much of its time and resources on the ballot title process. ELLIS, *supra* note 86, at 149; *see also supra* text accompanying notes 153-55 (discussing effect of initiatives on the Oregon Supreme Court caseload).

burdens on the court.[346]

Another potential critique of the initiative primary is the potential "lag" in democracy. The notion that the initiative primary will somehow place a burdensome amount of time between an initiative being proposed and becoming law is, however, incorrect.

Such a charge fails to recognize that the time used securing and confirming signatures would be eliminated because initiatives would be placed on the initiative primary ballot after securing a ballot title. In addition, the time between the initiative primary and general election may actually be beneficial.

This time gap could allow the legislature to pass laws in reaction to public concerns. The passage rate of an initiative in the primary could potentially serve as a strong incentive for state legislators to take action. Legislative compromise may prevent petitioners from seeing their exact proposal put into law; however, this concession may be worth avoiding the likely court challenges of a proposed law that has not been vetted by checks and balances in the traditional political process.

Additionally, the initiative primary system might deter the generation or manipulation of initiatives by candidates, political parties, or other political actors seeking to aid the campaigns of particular candidates or parties.[347] Under the current system, those seeking to use "crypto-initiatives" are able to calculate the investment in getting the required signatures for ballot placement. An unpopular initiative may require a more significant dedication of resources than proponents are willing to expend for a chance at making the general election ballot. In sum, any inconveniences created by the initiative primary are outweighed by the benefits of returning integrity to direct democracy.

CONCLUSION

The time has come to reform Oregon's initiative system. The ballot initiative was first used in Oregon, and the state has taken a certain pride in the system. Accordingly, Oregon should also

346 This court would be similar to the Oregon Tax Court. In 1961, the Oregon legislature created the Tax Court to encourage uniform application of tax laws statewide. The Tax Court is a special court that has exclusive, statewide jurisdiction to hear only cases that involve Oregon's tax laws. For more information, see Oregon Tax Courts, http://www.ojd.state.or.us/courts/tax/index.htm (last visited July 29, 2006).

347 Garrett, *supra* note 143, at 986.

be willing to make the tough choices necessary to return the initiative to the people as William U'Ren intended. The most direct way to return the system would be to challenge *Meyer v. Grant*. Oregon, through the legislature or initiative, could make this challenge by reenacting the law banning signature gathering. Hopefully, the U.S. Supreme Court would be willing to address the issue again and recognize the states' interest in regulating their democratic institutions. If, however, the Court is not willing to revisit *Meyer,* or the people of Oregon or another state are not willing to challenge it, the signature threshold should be discarded.

This Comment has offered one option to replace the current initiative qualification process. While the initiative primary may not be the best answer, a solution must be found in order to restore integrity to the initiative process and give back the people's check on legislative corruption and inaction. Without such reform, the initiative system creates more problems than it is worth. Without reform, the initiative system is just a political system for sale. Without reform of the initiative system, state governments might as well put up a "for sale" sign, charge a massive filing fee, and take away the facade of popular support.