

Direct Democracy as a Legislative Act

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INTRODUCTION

Direct democracy has been referred to as “The People’s Law”¹ and “Citizen Lawmaking.”² The actors who engage in acts of direct democracy have been referred to as “Citizen Lawmakers”³ and “Citizens as Legislators.”⁴ Does that mean that citizens who engage in acts of direct democracy are literally (and *legally*) “legislators” undertaking legislative acts? This Article argues that, at least in certain situations, the answer is “yes” and considers the implications of that conclusion.

Part I briefly discusses the history of direct democracy in the United States. Direct democracy was born out of frustration with reliance on elected representatives to legislate. Direct democracy allows ordinary citizens to legislate. Part II explains that direct democracy does not diminish some inherent, immutable power of the legislature. Instead, it is an exercise of the people’s inherent power to legislate. *All* power derives from the people, who can choose to delegate it to representative instruments which they create, or they can reserve to themselves the power to legislate. Several states—Arizona, California, Washington, Colorado, Oregon, and Utah—have constitutions that define the initiative and referendum as the exercise of legislative power. Part III discusses the circumstances in which direct democracy activity is a legally operative legislative act. At a minimum, the act of sponsoring an initiative or referendum petition is a legislative act. Finally, Part IV discusses some of the possible legal implications of the conclusion that direct democracy (or at least some such activity) is a legislative act. First, undertaking a legislative act does not implicate the First Amendment. Second,

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¹ See generally CHARLES SUMNER LOBINGIER, *THE PEOPLE’S LAW OR POPULAR PARTICIPATION IN LAW-MAKING* (1909).

² See generally JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAWMAKING* (SUNY Press, 2d ed. 2014) (1999).

³ DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION*, at ix (1989).

⁴ Samuel C. Patterson, *Foreword* to *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES*, at viii (Shaun Bowler et al. eds., 1998).

undertaking a legislative act entails legislative immunity and a legislative privilege. Third, direct democracy as a legislative act (in some cases) will confer the official proponents with standing to defend the initiative against legal challenge.

I. DIRECT DEMOCRACY IN THE UNITED STATES

Direct democracy has existed in the United States since the first town hall meetings were held in the American colonies in the 1600s.⁵ These town hall meetings allowed citizens to propose new laws and to veto laws passed by their elected representatives. Three of the earliest state constitutions included some features of direct democracy. The Pennsylvania Constitution of 1776 provided for the recall of public officials.⁶ The Massachusetts and New Hampshire Constitutions were the product of citizen lawmaking. These states held constitutional conventions at which citizens drafted a constitution and then submitted it to the people for their approval.⁷

Modern direct democracy began with the adoption and implementation of the primary tools of direct democracy—the ballot initiative, the referendum and the recall election—in the late 1800s and the early 1900s as a result of the Populist and Progressive movements.⁸ Populists wanted to take back control of government for ordinary citizens from the hands of the moneyed elite. Progressives wanted to improve government by making it more responsive to the will of the people and less corrupt. The ballot initiative allows the people of a state (or local government) to make law without action by their elected representatives. The referendum allows the people of a state (or local government) to have submitted for their approval any law enacted by their elected representatives.

The initiative operates entirely outside the States' representative assemblies; it allows "voters [to] petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls." While the initiative allows the electorate to adopt positive legislation, the referendum serves as a negative check. It allows "voters [to] petition to refer a legislative action to the voters [for approval or disapproval] at the polls. "The initiative [thus] corrects sins of omission" by representative bodies, while the "referendum corrects sins of commission."⁹

⁵ See, e.g., LOBINGIER, *supra* note 1, at 81; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

⁶ JOSEPH F. ZIMMERMAN, *THE RECALL: TRIBUNAL OF THE PEOPLE* 7 (SUNY Press, 2d ed. 2013) (1970).

⁷ HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 4 (2014).

⁸ *Id.* at 9–10.

⁹ *Ariz. State Legislature*, 135 S. Ct. at 2660 (citations omitted) (quoting Lewis J.

Between 1898 and 1918, twenty-four states adopted the initiative, the referendum, or both.¹⁰ Today, three states utilize the veto referendum, three states utilize the ballot initiative and, twenty-one states utilize both the veto referendum and the ballot initiative.¹¹

II. DIRECT DEMOCRACY IS AN EXERCISE OF THE PEOPLE'S INHERENT LEGISLATIVE POWER

A. All Political Power Is Inherent in the People

Direct democracy is an exercise of the people's inherent legislative power. It is not a delegation of power from the state legislature, nor is it a diminishment of power inherent in the state legislature. It is a direct and express exercise of the people's inherent legislative power.¹²

This concept—that the power to legislate and govern is an exercise of the people's inherent power—is expressed in the Declaration of Independence¹³ and the constitution of every state except New York.¹⁴ The U.S. Supreme Court recently stated that “the animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government.”¹⁵ Because the people hold the power to legislate, they may choose to delegate this power to representatives, or they may choose to reserve the power for themselves. Direct democracy is the most direct expression of the people's power to govern themselves.¹⁶

Johnson, *Direct Legislation as an Ally of Representative Government*, in *THE INITIATIVE, REFERENDUM, AND RECALL* 139, 142 (William B. Munro ed., 1912); DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 1 (1984).

¹⁰ NOYES, *supra* note 7, at 10.

¹¹ *Id.* at 78 tbl.3.1, 104 tbl.4.1.

¹² *See id.* at 10–12.

¹³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . [and] it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”).

¹⁴ NOYES, *supra* note 7, at 11 (setting forth all citations in every state constitution, except New York, that support the proposition that all political power is inherent in the people).

¹⁵ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2671 (2015); *see also id.* at 2675 (“[O]ur fundamental instrument of government derives its authority from ‘We the People.’”); U.S. CONST. amend. IX (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁶ *Ariz. State Legislature*, 135 S. Ct. at 2674 (“[T]he invention of the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power.”).

B. The Initiative and the Referendum Are Part of the People's Legislative Power

The Supreme Court has declared that—in states that adopt these tools of direct democracy—use of the initiative or the referendum is an exercise of the people's legislative power. In *Ohio ex rel. Davis v. Hildebrant*¹⁷ the Supreme Court considered an early challenge to Ohio's use of the referendum power. *Hildebrant* involved an amendment to the Constitution of Ohio that adopted the veto referendum.¹⁸

[T]he legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly.¹⁹

The Ohio General Assembly passed an act redistricting Ohio for the purpose of congressional elections, and the Governor approved the act. The requisite number of Ohio electors then signed a referendum petition and the measure was put to a popular vote.²⁰ The voters disapproved the law and Ohio state election officials filed an action seeking to declare the referendum void as violative of the Elections Clause of the U.S. Constitution.²¹ The Elections Clause of Article I of the Constitution provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations²²

The elections officials claimed that “the referendum vote was not and could not be a part of the legislative authority of the state.”²³

The Supreme Court rejected the challenge to Ohio's referendum power. The Court held that the State of Ohio had the power to allocate its governmental authority according to the wishes of the people of Ohio, including the power to legislate.

¹⁷ *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 566–67 (1916).

¹⁸ *Id.* at 566.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.* at 567. The elections officials also claimed that the referendum violated the Guarantee Clause. *See id.* at 569. Article IV, Section 4 of the U.S. Constitution provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government” U.S. CONST. art. IV, § 4. The Supreme Court rejected that challenge because it did not present a justiciable issue. *Hildebrant*, 241 U.S. at 570. For a discussion of challenges to direct democracy as violative of the Republican Guarantee Clause, see NOYES, *supra* note 7, at 12–29 and authorities cited therein.

²² U.S. CONST. art. I, § 4, cl. 1.

²³ *Hildebrant*, 241 U.S. at 567.

Ohio, like numerous other states, had amended its state constitution to incorporate the power of referendum. The Ohio Supreme Court had determined that the amendment to the state constitution was valid—that is, the referendum power constituted a part of the state constitution and laws.²⁴ That determination was binding on the U.S. Supreme Court. The U.S. Supreme Court considered whether the referendum was “part of the [state] legislative power”²⁵ consistent with the Elections Clause and answered in the affirmative. Congress had the power to alter Ohio’s redistricting scheme, but the Supreme Court noted that Congress, in recognition of the direct democracy movement, had modified the applicable federal statutes “to provide that where, by the state Constitution and laws, the referendum was treated as a part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.”²⁶

The Supreme Court again recognized the right of the people to retain their legislative power, and also made clear that the referendum did not constitute an improper delegation of legislative power, in *City of Eastlake v. Forest City Enterprises, Inc.*²⁷ *City of Eastlake* involved a challenge to a city charter provision requiring “that any changes in land use agreed to by the Council be approved by a 55% Vote in a referendum.”²⁸ Plaintiffs argued that the Ohio city’s adoption of this referendum requirement for certain zoning changes was an unconstitutional delegation to the people of a legislative power. The Court rejected that challenge, stating:

A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.²⁹

The Court confirmed that the people may choose to delegate their legislative power to elected representatives, but they also may choose to retain their legislative power.

²⁴ *Id.* at 567–68.

²⁵ *Id.* at 568; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2666 (2015) (“For redistricting purposes, *Hildebrant* thus established, ‘the Legislature’ did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people.”).

²⁶ *Hildebrant*, 241 U.S. at 568.

²⁷ *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) (“In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”).

²⁸ *Id.* at 670.

²⁹ *Id.* at 672 (citations omitted).

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,³⁰ the Court confirmed that the exercise of the initiative power is an exercise of the people's legislative power. By ballot initiative, the people of Arizona amended the Arizona Constitution to remove redistricting authority—the power to create and adopt congressional and state legislative districts—from the Arizona Legislature and to vest it in an independent commission.³¹ The Arizona Legislature sued, complaining that Arizona's exercise of direct democracy violated the Elections Clause of Article I of the Constitution.³² In short, the Court had to determine whether the phrase “the Legislature” in the Elections Clause included only Arizona's official body of elected representatives (the Arizona House and Senate) or whether “the Legislature” also included the Arizona voters when engaged in direct democracy.

The Court held that the “lawmaking power in Arizona includes the initiative process.”³³ When the voters engaged in direct democracy, they constituted “the Legislature.”

The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.³⁴

The Court recognized the right and power of individual states to determine the structure of their government and to determine who may exercise governmental authority.³⁵ The U.S. Supreme Court considered the text of the Arizona Constitution, and the Arizona Supreme Court's interpretation of that text, and concluded “the Arizona Constitution ‘establishes the electorate [of Arizona] as a coordinate source of legislation’ on equal footing with the representative legislative body.”³⁶

³⁰ *Ariz. State Legislature*, 135 S. Ct. at 2658–59.

³¹ *Id.*

³² U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .”).

³³ *Ariz. State Legislature*, 135 S. Ct. at 2659; *see also id.* at 2660 n.3 (“The people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter.”).

³⁴ *Id.* at 2674.

³⁵ *Id.* at 2673.

³⁶ *Id.* at 2660 (quoting *Queen Creek Land & Cattle Corp. v. Yavapai City Bd. of Supervisors*, 501 P.2d 391, 393 (Ariz. 1972)); *see also id.* at 2673 (“Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority.”).

C. State Constitutions Define the Initiative and Referendum as the Exercise of Legislative Power

A number of states in addition to Arizona have state constitutions that define the initiative and referendum as the exercise of legislative power. Article IV of the California Constitution states: “The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.”³⁷ The California Supreme Court has interpreted the initiative power to “represent[] an exercise by the people of their reserved power to legislate.”³⁸ In the Washington Constitution, the initiative power and referendum powers are found in article II (“Legislative Department”), section 1 (“Legislative Powers, Where Vested”).³⁹ The Washington Supreme Court has stated that the “exercise of the initiative power is an exercise of the reserved power of the people to legislate” and that “[in] approving an initiative measure, the people exercise the same power of sovereignty as the Legislature does when enacting a statute.”⁴⁰ In the Colorado Constitution, the initiative and referendum powers are found in article V (“Legislative Department”),⁴¹ and the Colorado Supreme Court has stated that “the people have reserved for themselves the right to legislate.”⁴² Oregon and Utah also have concluded that the exercise of the initiative and referendum power is the exercise of the people’s legislative power.⁴³

³⁷ CAL. CONST. art. IV, § 1.

³⁸ Builders Ass’n of Santa Clara-Santa Cruz Counties v. Superior Court, 529 P.2d 582, 586 (Cal. 1974).

³⁹ WASH. CONST. art. II, § 1.

⁴⁰ Amalgamated Transit Union Local 587 v. State, 11 P.3d 762, 779 (Wash. 2000).

⁴¹ COLO. CONST. art. V, § 1 (“The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.”).

⁴² McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980).

⁴³ See OR. CONST. art. IV, § 1 (“The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”); MacPherson v. Dep’t of Admin. Servs., 130 P.3d 308, 314 (Or. 2006) (“In Oregon, the Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power.”); UTAH CONST. art. VI, § 1 (“The Legislative Power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah”); Gallivan v. Walker, 54 P.3d 1069, 1080 (Utah 2002) (“[T]he Utah Constitution vests the people’s sovereign legislative power in both (1) a representative legislature and (2) the people of the State, in whom all political power is inherent.”).

III. DIRECT DEMOCRACY AS LEGISLATIVE ACT

A. Initiative Petition Circulation and Signature-Gathering and the First Amendment

The Supreme Court has reviewed various state law requirements relating to direct democracy activities and has assessed these requirements against First Amendment challenges. In *Meyer v. Grant*,⁴⁴ the Court considered a challenge to Colorado's ban on payment of petition circulators. The Court found that "circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change."⁴⁵ The Court concluded that the Colorado law involved a limitation on political expression and was, therefore, subject to exacting scrutiny under the First Amendment.⁴⁶ The Court struck down the Colorado law because circulation of a petition involved "core political speech" that was not justified by the State's "interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process."⁴⁷

In *Buckley v. American Constitutional Law Foundation, Inc.*,⁴⁸ the Court struck down Colorado's requirement that initiative petition circulators wear an I.D. badge bearing the circulator's name, as well as its requirement that initiative proponents report the names, addresses, and compensation received by each paid initiative circulator. The Court determined that the petition circulators' and the petition signatories' conduct expressed a political view and, therefore, implicated a First Amendment right.⁴⁹

Constitutional Law Professor Akihil Reed Amar criticized the Court's conclusion—that initiative petition circulation and signature gathering constitutes expressive activity entitled to First Amendment protection—shortly after the *A.C.L.F.* opinion was issued.

The Colorado initiative process is not about "petitions." It's about state lawmaking. Strictly speaking, the state was not regulating "petitions" or "speech" at all. It was merely saying that unless signatures were collected in a certain way, they would not count for purposes of the state initiative process. In other words, anyone in

⁴⁴ *Meyer v. Grant*, 486 U.S. 414 (1988).

⁴⁵ *Id.* at 421.

⁴⁶ *Id.* at 420.

⁴⁷ *Id.* at 420, 425.

⁴⁸ *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

⁴⁹ *See id.* at 192.

Colorado has a right to petition to his heart's content—to do so anonymously and with no disclosure, even if he is not a registered voter. But he has no First Amendment right to insist that Colorado treat his petition as anything more than a handbill. Most importantly, Colorado was not trying to treat a nonconforming signature as anything *less* than a handbill, fully protected by the First Amendment. Colorado merely said that unless its rules were followed, any signature gathered would be treated as a petition, pure and simple.

To see the point another way, imagine that I go to Denver next week and demand a right to vote for Mickey Mouse as governor. Surely Colorado need not count my vote in the next election because (a) I am not a registered Colorado voter, (b) Mickey Mouse is not an eligible candidate, and (c) the state may properly insist that all ballots be cast on election day, or pursuant to a regulated absentee ballot system. In one sense I can “vote” for Mickey—just watch me!—and the state would be wrong to punish me. But the state has a perfect right not to count my vote. The facts of *Buckley* are no different.⁵⁰

Professor Akhil Amar's brother, Constitutional Law Professor Vikram David Amar, used the same reasoning to argue that the signing of an initiative is not subject to First Amendment protection because it is citizen lawmaking.

The Court's reasoning in [the *A.C.L.F.* and *Meyer v. Grant*] cases seems plausible if plaintiffs were “petitioning” within the meaning of the First Amendment. But that label is inapt. The Colorado initiative process is not about “petitioning the Government for a redress of grievances.” It is about circumventing government by engaging in lawmaking itself. Thus, state law did not regulate “petitions” or “speech” at all. Instead, it merely provided that unless signatures were collected in a certain way, they would not count for purposes of qualifying an initiative for the statewide ballot.⁵¹

These commentators suggest that the ballot initiative process consists of legally operative legislative acts that are not subject to First Amendment protection.

B. *John Doe No. 1 v. Reed* and the Disclosure of the Identity of Petition Signatories

In *John Doe No. 1 v. Reed*,⁵² the Supreme Court considered a challenge to the State of Washington's Public Records

⁵⁰ Akhil Reed Amar, *The Five-Legged Dog*, AM. LAW., Sept. 1999, at 47, 47.

⁵¹ Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 929 (2004); see also *S.F. Forty-Niners v. Nishioka*, 89 Cal. Rptr. 2d. 388, 396 (Ct. App. 1999) (“The initiative petition with its notice of intention is not a handbill or campaign flyer—it is an official election document It is the constitutionally and legislatively sanctioned method by which an election is obtained on a given initiative proposal.”).

⁵² *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010).

Act,⁵³ which authorizes private parties to obtain copies of government documents, including referendum petitions revealing the identities of petition signatories. The State of Washington argued that Washington's disclosure requirements did *not* implicate First Amendment rights because "signing a petition is a legally operative legislative act, not speech."⁵⁴

The act of signing an initiative petition is a legislative act because the electors are exercising legislative power and acting as citizen legislators. No one person can place a measure on the ballot. It requires the support of other electors in order to qualify for the ballot. This requirement—gathering signatures to ensure a significant level of support for placing the measure on the ballot—"is analogous to the parliamentary rule that a motion must be seconded before it will be considered."⁵⁵ Individual electors do not control the content of the petition. Once the official sponsor supplies the appropriate state official with a petition in proper form for circulation, the electors can choose to sign the petition or not. They can lobby others to sign (or not to sign) the petition—certainly expressive conduct protected by the First Amendment—but the decision whether to sign is binary: "Yes" or "No." Each signature has exactly the same legal effect. It is a legally operative legislative act.

Several prominent legal scholars agree with this position.⁵⁶ Professor Eugene Volokh wrote:

[P]olitical statements are just speech. Signing an initiative, referendum, or recall petition is a legally operative act—it helps achieve a particular result not just because of its persuasiveness, but because it is given legal effect by the state election law.

The government is surely entitled to require that people who want their signature to have such a legally operative effect must disclose their identities to the government. And I see no reason why the government might not then disclose those identities to the public, who after all are in charge of the government. To do that is to inform the people about who is taking legally operative steps to change the state's laws (or the state's elected representatives, in the case of a recall).⁵⁷

⁵³ WASH. REV. CODE §§ 42.56.001–42.56.904 (West 2015).

⁵⁴ Brief of Respondent Sam Reed at 22, *Reed*, 561 U.S. 186 (No. 09-559).

⁵⁵ DELOS F. WILCOX, *GOVERNMENT BY ALL THE PEOPLE: THE INITIATIVE, THE REFERENDUM, AND THE RECALL AS INSTRUMENTS OF DEMOCRACY* 16 (Da Capo Press 1972) (1912); *see also* Brief of Respondent Sam Reed, *supra* note 54, at 26–28.

⁵⁶ *See* Amicus Curiae Brief of Direct Democracy Scholars in Support of Respondents at 7, *Reed*, 561 U.S. 186 (No. 09-559) ("The referendum is a *legislative* act and is central to the lawmaking process in Washington."); *id.* at 5 ("This Court has never decided whether the act of signing, as distinct from circulating, a petition is a form of 'core political speech.'").

⁵⁷ Eugene Volokh, *Federal Judge Temporarily Restrains Release of Names of*

The Supreme Court ultimately determined, however, that the petition circulators' and the petition signatories' conduct expressed a political view and, therefore, implicated a First Amendment right.⁵⁸ The Court considered the argument that "signing a petition is a legally operative legislative act" and, therefore, not subject to First Amendment protection, but concluded that "[p]etition signing remains expressive even when it has legal effect in the electoral process."⁵⁹ The Court reviewed such challenges under "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."⁶⁰

Justice Scalia concurred with the Supreme Court's judgment in *Reed*, but he wrote separately to express his "doubt" that the act of signing a referendum petition implicates "the 'freedom of speech' at all."⁶¹ For Justice Scalia, an elector's conduct in signing a referendum petition was a legislative act:

A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue.⁶²

Justice Scalia noted that the *Reed* plaintiffs could not identify any Supreme Court precedent "holding that legislating is protected by the First Amendment."⁶³

While no other justices joined Justice Scalia's concurrence, it raises several interesting questions: Are there some direct democracy procedures that are, in fact, legislative acts? If so, what is the significance of a legislative act? What is the legal significance, if any, of citizens as legislators?

Anti-Domestic-Partnership Petition Signers in Washington States, VOLOKH CONSPIRACY (Sept. 11, 2009, 9:57 AM), http://www.volokh.com/posts/chain_1245174890.shtml [<http://perma.cc/T7Y7-BQA4>]; see also Rick Hasen, *Ninth Circuit Issues Its Opinion Explaining Its Ruling in Washington R-71 Referendum Case*, ELECTION L. BLOG (Oct. 22, 2009, 4:25 PM), <http://electionlawblog.org/archives/014620.html> [<http://perma.cc/X6U3-L9PU>] ("What about *Burdick v. Takushi*, and the Supreme Court's rejection of the idea that voting is an expressive activity entitled to First Amendment protection? Does this or does this not apply to signing a ballot measure petition?").

⁵⁸ *Reed*, 561 U.S. at 195.

⁵⁹ *Id.*

⁶⁰ *Id.* at 196 (citations omitted) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010)).

⁶¹ *Id.* at 219 (Scalia, J., concurring).

⁶² *Id.* at 221–22.

⁶³ *Id.* at 222; cf. *Molinari v. Bloomberg*, 564 F.3d 587, 595–602 (2d Cir. 2009) (rejecting plaintiffs' claim that New York unreasonably burdened the First Amendment rights clustered around the state's initiative process by allowing legislative bodies to amend popularly passed measures and holding that plaintiffs' argument did not even raise a First Amendment issue).

C. *Chula Vista Citizens for Jobs and Fair Competition v. Norris* and the Role of the Official Proponent

In *Chula Vista Citizens for Jobs and Fair Competition v. Norris*,⁶⁴ the Ninth Circuit, sitting en banc, considered First Amendment challenges to requirements of the State of California and the City of Chula Vista (i) that the official proponent of a ballot measure (the person who sponsors a local ballot measure) must be an elector (and therefore not a corporation) and (ii) that the name of the official proponent (the person who sponsors a local ballot measure) appear on each section of the petition that is circulated to voters for their signature. The Ninth Circuit upheld the elector requirement because it “does not impose any meaningful burden on First Amendment rights.”⁶⁵ The City and State defendants contended that the elector requirement did not implicate First Amendment rights “because it is a regulation of the legislative process,” but the court declined to decide that question, given that the elector requirement survived First Amendment scrutiny.⁶⁶ The court described the elector requirement as a “legislative power,” and noted that “many *legislative and official political acts* are properly reserved to members of the electorate.”⁶⁷

The initiative power that California and the City of Chula Vista have reserved to electors is indisputably a legislative power. . . . Much like a legislator who begins the traditional legislative process by placing a bill in the hopper, an official proponent commences the process of legislating by initiative by asking voters to sign a petition to place an initiative on the ballot. Thus, by seeking to serve as official proponents, the plaintiffs seek to wield a legislative power.⁶⁸

The official proponent of a ballot initiative serves a “unique role” in the legislative process that is distinct from the role of other electors who may support the ballot initiative. The official proponent controls and manages the initiative process—preparing the text of the petition, filing it, managing the signature-gathering process and the signature gatherers, filing the signatures, and responding to challenges to the petitions and signatures.⁶⁹ In California, the official proponent also has special authority to defend the initiative against legal challenge, if public officials decline to do so.⁷⁰

⁶⁴ *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (en banc).

⁶⁵ *Id.* at 529.

⁶⁶ *Id.* at 529 n.8.

⁶⁷ *Id.* at 529 (emphasis added).

⁶⁸ *Id.* at 529–30 (citations omitted).

⁶⁹ *Id.* at 530.

⁷⁰ *Id.* (quoting *Perry v. Brown*, 265 P.3d 1002, 1006 (Cal. 2011)); see also *infra*

Thus, while all California voters play a quasi-legislative role in the initiative process, the official proponent is particularly akin to a legislator—sponsoring legislation and shepherding it through the legislative process. Indeed, like a legislator introducing legislation, and unlike a mere lobbyist (the plaintiffs’ preferred characterization), an official proponent performs a series of necessary steps for the people to exercise the power to legislate by initiative.⁷¹

The Ninth Circuit also applied exacting scrutiny to the disclosure requirement and upheld that requirement.⁷² The en banc panel acknowledged that the “legislative character of an initiative petition inform[ed] [its] analysis,”⁷³ but it did not consider whether the disclosure requirement was a “legislative act.” Instead, the “legislative character” and the public nature of being the “official proponent” influenced the court’s First Amendment analysis and the court concluded that exacting scrutiny—not strict scrutiny—applied.⁷⁴

D. When Direct Democracy Is a Legislative Act

The more that direct democracy procedures regulate advocacy for, and circulation of, an initiative petition, the more that these procedures regulate “core political speech.”⁷⁵ But these activities are different from the mechanics of initiation of a petition.⁷⁶

Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure’s defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists’ services and how much.⁷⁷

The act of sponsoring an initiative or referendum petition—drafting and submitting it to the Secretary of State—is a necessary first step in law-making. It is a *legislative* act that can only be done by the members of the relevant legislative body—

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⁷¹ *Id.* at 530–31.

⁷² *Id.* at 535–42.

⁷³ *Id.* at 536.

⁷⁴ *Id.* at 536–37.

⁷⁵ See *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) (involving a law that placed a ban on payment of signature gatherers); see also *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (involving a statute that required initiative petition circulators to wear I.D. badge bearing circulator’s name and initiative proponents to report names, addresses, and amounts paid to each paid initiative circulator).

⁷⁶ See *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 875 F. Supp. 2d 1128, 1133–35 (S.D. Cal. 2012), *aff’d in part, rev’d in part, remanded*, 755 F.3d 671 (9th Cir. 2014), *aff’d on reh’g en banc*, 782 F.3d 520 (9th Cir. 2015).

⁷⁷ *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003).

here, the electors—who choose to sponsor a proposed initiative.⁷⁸ Likewise, an initiative or referendum petition that is filed with the state (usually the Secretary of State) is a legislative document, and the act of filing a petition is a legislative act.⁷⁹ In addition, the act of submitting petition signatures to the state to qualify for the ballot is a legislative act that is performed by the sponsors of an initiative.

Individual states may require direct democracy actions by the sponsor of an initiative or referendum that constitute legislative acts. In Utah, for example, the official sponsors of an initiative must hold seven public hearings in different geographic regions of the state.⁸⁰ The official sponsors must provide notice of the hearings, and either video tape or audio tape the meeting or “take comprehensive minutes of the public hearing, detailing the names and titles of each speaker and summarizing each speaker’s comments.”⁸¹

IV. IMPLICATIONS OF DIRECT DEMOCRACY AS A LEGISLATIVE ACT

A. No First Amendment Protection

As noted above, if a particular act of direct democracy is a legislative act it may take the activity outside the scope of the First Amendment.⁸² The more that the activity in question involves the mechanics of initiation of a petition and submission of the petition to qualify for the ballot, the more likely that it is a legislative act that is outside the scope of the First Amendment. But what other legal implications, if any, are there for legislative acts undertaken by citizen lawmakers?

B. Legislative Immunity

The Supreme Court has stated that “[i]t is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities.”⁸³ If direct democracy constitutes a legislative act and

⁷⁸ *Chula Vista*, 875 F. Supp. 2d at 1137.

⁷⁹ This distinction between expressive activity and the mechanics of legislation is the reason that a majority of courts have held that initiative and referendum subject matter restrictions do not raise a free speech issue. See NOYES, *supra* note 7, at 109–20; see also *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1102 (10th Cir. 2006) (en banc) (“[The First Amendment] does not apply to structural principles of government making some outcomes difficult or impossible to achieve.”).

⁸⁰ UTAH CODE ANN. § 20A-7-204.1 (West 2015).

⁸¹ *Id.*

⁸² See *John Doe No. 1 v. Reed*, 561 U.S. 186, 222 (2010) (Scalia, J, concurring) (“Plaintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment.”).

⁸³ *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998); see also Supreme Court of Va.

if the official sponsors of an initiative or referendum petition are acting as legislators when they (1) sponsor an initiative or referendum, (2) file an initiative or referendum petition, and (3) file petition signatures with the state, then they may be entitled to legislative immunity for these legislative acts that they undertake.⁸⁴

Legislative immunity provides immunity from trial and from civil and criminal liability for performing legislative acts.⁸⁵ Legislative acts include sponsoring and introducing a bill,⁸⁶ which is akin to being an official sponsor of an initiative or referendum petition and filing the petition with the state. Legislative acts also may include holding hearings on proposed legislation.⁸⁷

The doctrine of legislative immunity does not prevent a court from declaring a legislative act to be unconstitutional,⁸⁸ but it does protect those engaging in the legislative act from liability for the act.⁸⁹ The legislative immunity doctrine also includes the legislative testimonial privilege⁹⁰ and a ban on inquiry into the motive behind legislative action.⁹¹

v. Consumers Union of U.S., Inc., 446 U.S. 719, 732 (1980) (“[The Court has] recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.”). As of 2003, forty-three state constitutions contained one or more provisions granting state legislators a legal privilege in connection with their legislative work. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 221 (2003). Despite not having such a provision in their state constitutions, several of the remaining seven states have recognized some type of legislative immunity by statute or judicial opinion. *Id.* at 237–38 n.54. California, for example, recognizes the principle of legislative immunity. See *Steiner v. Superior Court*, 58 Cal. Rptr. 2d 668, 678 (Ct. App. 1996) (“[L]egislators have absolute immunity from damage suits based on legislative acts.”).

⁸⁴ See *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980) (“[I]f legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued . . .”).

⁸⁵ See *Tenney v. Brandhove*, 341 U.S. 367 (1951); see also *Consumers Union of U.S., Inc.*, 446 U.S. at 720.

⁸⁶ See *United States v. Helstoski*, 442 U.S. 477 (1979); see also *Hinshaw v. Smith*, 436 F.3d 997, 1008–09 (8th Cir. 2006).

⁸⁷ See *Gravel v. United States*, 408 U.S. 606, 624 (1972).

⁸⁸ See *Romer v. Colo. Gen. Assembly*, 810 P.2d 215 (Colo. 1991); see also *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984).

⁸⁹ See *Powell v. McCormack*, 395 U.S. 486 (1969).

⁹⁰ See *Gravel*, 408 U.S. at 615–16 (stating that privilege against testifying concerning legislative activities applies in a criminal case to senator and also to the legislator’s aides). The legislative testimonial privilege applies in civil cases in which the legislator is a party. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502–03 (1975). In addition, it applies in civil cases in which the legislator is not a party. See *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (holding that legislative testimony privilege protects a legislator from having to testify in a civil action in which the legislator is not a party concerning the legislator’s “legislative acts”).

⁹¹ See *Greenburg v. Collier*, 482 F. Supp. 200 (E.D. Va. 1979) (granting protective order in favor of state legislator prohibiting inquiry into “any legislative activity or his

C. Standing to Defend the Initiative

Direct democracy as a legislative act also may impact the initiative proponents' standing to defend the initiative against legal challenge. In *Hollingsworth v. Perry*,⁹² the Supreme Court was asked to address the merits of Proposition 8—California's ballot initiative to amend the California Constitution to eliminate the right of same-sex couples to marry. Plaintiffs had challenged Proposition 8 as violative of the Equal Protection Clause of the Fourteenth Amendment. The State of California "refused to defend [Proposition 8], although they . . . continued to enforce it throughout [the] litigation." Thus, the federal district court allowed the official proponents to intervene and defend the action.⁹³ Article III standing was not an issue because the plaintiffs were aggrieved—Proposition 8 prevented them from getting married.⁹⁴ The district court then held a two-week long trial and found that Proposition 8 violated the Equal Protection Clause.⁹⁵

Standing became an issue upon appeal to the Ninth Circuit. Plaintiffs had won; they had no reason to seek appeal. The State of California refused to defend Proposition 8, so it did not appeal. Proposition 8's proponents appealed to the Ninth Circuit. The Ninth Circuit asked petitioners (the official Proposition 8 proponents) to address "why this appeal should not be dismissed for lack of Article III standing."⁹⁶ After considering the parties' responses, the Ninth Circuit certified to the California Supreme Court the question whether, under California law, the official proponents of a ballot initiative

possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.⁹⁷

motive for same" on the basis of federal common law legislative immunity); *see also* *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136 (D. Mass. 2001); *Steiner v. Superior Court*, 58 Cal. Rptr. 2d 668, 676 (Ct. App. 1996) ("An equally important corollary of the separation of powers doctrine is courts cannot inquire into the impetus or motive behind legislative action.").

⁹² *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹³ *Id.* at 2660.

⁹⁴ *Id.* at 2661–62.

⁹⁵ *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹⁶ *Perry v. Schwarzenegger*, No. 10-16696, 2010 WL 3212786, at *2 (9th Cir. Aug. 16, 2010).

⁹⁷ *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

The California Supreme Court accepted the question and answered in the affirmative.⁹⁸ Based on the California Supreme Court's response, the Ninth Circuit held that the official Proposition 8 proponents had Article III standing to defend the measure on appeal in federal court, and then affirmed the district court's decision on the merits.⁹⁹

The U.S. Supreme Court refused to address the merits of Proposition 8. Instead, the Court held that the official Proposition 8 proponents lacked Article III standing.¹⁰⁰ The Court noted that the proponents were "plainly not agents of the State—'formal' or otherwise"—and that they, "[u]nlike California's elected officials, . . . ha[d] taken no oath of office."¹⁰¹ Professor Vikram David Amar has emphasized the importance of this distinction:

[A]llowing initiative-proponent standing poses serious problems that permitting legislator standing does not. Most fundamentally, the fact that voters adopted an initiative measure that the proponents wrote and offered does not mean that the electorate decided—or intended—that these proponents should speak or act for the voters in any representative capacity.¹⁰²

This distinction is critical. There is a difference between the person (or group) who drafts and proposes a law and the institution or body that is empowered to enact a proposal into law. It is noteworthy that in the legislator-standing context, the standing that is permitted is the standing of *elected leaders* of the legislative body, who speak not for themselves as individual lawmakers, but rather on behalf of the entire lawmaking body. By contrast, the individual members of the legislature who may have been involved in—or even central to—the proposing, drafting, or lobbying with respect to a bill generally do not enjoy standing to defend the measure. As important as these members might have been in bringing the law about, they are not (and do not speak for) the entire lawmaking body whose votes made the proposal law.¹⁰³

The Supreme Court's decision in *Hollingsworth v. Perry* did not, however, resolve the problem of standing when direct democracy is a legislative act. The Court's opinion left us in a

⁹⁸ *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011).

⁹⁹ *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

¹⁰⁰ *Hollingsworth*, 133 S. Ct. at 2668.

¹⁰¹ *Id.* at 2666–67.

¹⁰² Vikram David Amar, *Standing Up for Direct Democracy: Who Can Be Empowered Under Article III to Defend Initiatives In Federal Court?*, 48 U.C. DAVIS L. REV. 473, 480 (2014).

¹⁰³ *Id.* at 480–81 (2014).

very curious place where the official proponents of a ballot initiative will, with increasing frequency, have standing to defend their initiative against legal attack.

First, the Supreme Court's opinion held only that the official proponents lacked standing in federal court to defend their initiative on appeal.¹⁰⁴ The official proponents will continue to be able to intervene and defend their initiative against attack at trial when the state fails or refuses to do so. The official proponents also will continue to have standing in *state court* to defend their initiative on appeal. At least where (as in California) the state supreme court so says. This might lead to an odd situation: assume that the Proposition 8 plaintiff had brought their Equal Protection Clause violation claim in California state court and had prevailed. Assume that the California Supreme Court determined (as it did) that the official proponents had standing, *under California law*, to defend Proposition 8 and also determined that Proposition 8 violates the U.S. Constitution. Would the official proponents then have standing, *under Article III*, to appeal to the U.S. Supreme Court?¹⁰⁵

Second, in response to the Supreme Court's *Hollingsworth* decision, ballot initiative proponents are making it express in the initiative itself that they are agents of the state, thereby addressing the concern about lack of agency. These official proponents are also including language in their initiatives that the electorate decided—and intended—that these proponents should speak and act for the voters and the state itself in a representative capacity, thereby addressing the concern raised by Professor Amar. The language of the initiative that amends the state constitution empowers the initiative proponents with standing to defend the initiative in any court proceedings.

The California "Online Privacy" initiative (#14-0007), for example, contained the following provision:

Proponent Standing.

- (a) The people of the State of California declare that the proponents of this Act have a direct and personal stake in defending this Act and grant formal authority to the proponents to defend this Act in any legal proceeding, either by intervening in such legal proceeding, or by defending the Act on behalf of the people and the State in the event that the State declines to defend the Act or declines to appeal an adverse ruling or judgment against the Act.

¹⁰⁴ *Hollingsworth*, 133 S. Ct. 2652.

¹⁰⁵ See NOYES, *supra* note 7, at 10; William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 294–95 (1990).

- (b) In the event that the proponents are defending this Act in a legal proceeding because the State has declined to defend it or to appeal an adverse ruling or judgment against it, the proponents shall:
- (1) act as agents of the people and the State;
 - (2) be subject to all ethical, legal, and fiduciary duties applicable to such parties in such legal proceeding; and
 - (3) take and be subject to the Oath of Office prescribed by Article XX, section 3 of the California Constitution for the limited purpose of acting on behalf of the people and the State in such legal proceeding.¹⁰⁶

An initiative on abortion restrictions being circulated for signatures for the 2016 ballot contains a similar provision.¹⁰⁷

Thus, *Hollingsworth* did not end the debate over standing of ballot initiatives' official proponents. It has led to the practical expression of direct democracy as legislative act—the official proponents will ask the electorate to approve the merits of their initiative and to bless them as the substitute voice of the legislature.

CONCLUSION

My aim in this Article is two-fold: first, to demonstrate that states, courts, and direct democracy proponents have begun to treat direct democracy as a legislative act, and second, to begin to consider some of the practical and legal consequences of the conclusion that direct democracy is a legislative act. As people take political matters into their own hands, they seek to give themselves greater legislative power and to acquire more of the perks and powers of being a (citizen) legislator engaging in legislative acts.

¹⁰⁶ The Online Privacy Act, Initiative 14-0007, § 5 (Cal. 2014), [https://oag.ca.gov/system/files/initiatives/pdfs/14-0007%20\(14-0007%20\(Online%20Privacy%20V2\)\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/14-0007%20(14-0007%20(Online%20Privacy%20V2)).pdf) [<https://perma.cc/9VR9-ZWBR>]; see also Local Control and Accountability in Education Act, Initiative 15-0078, § 15 (Cal. 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0078%20\(Certificated%20Employees%20Policy%20Decisions\).pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0078%20(Certificated%20Employees%20Policy%20Decisions).pdf) [<https://perma.cc/JZ9W-A4HC>].

¹⁰⁷ See Parental Notification, Child and Teen Safety, and Stop Sexual Predators and Sex Traffickers Act, Initiative 15-0025, § 32(u) (Cal. 2015), <http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0025%20%28Parental%20Notification%29.pdf> [<http://perma.cc/V52M-ARBU>] (containing a proposed California Constitutional Amendment Initiative providing that “the following persons, given priority in the order named, shall be authorized to defend the provisions of this Section approved by voters in any court of law: any official proponent of this Initiative, his or her designee, and any elector at the time this Initiative was approved by the voters”).

