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NOTES

Buckley v. American Constitutional Law Foundation, Inc.: Emblem of the Struggle Between Citizens' First Amendment Rights and States' Regulatory Interests in Election Issues

Populist and Progressive Era distrust of corporate interests and political parties stimulated enthusiasm for direct legislation—the citizen-initiated political tools of initiative, referendum, and recall.¹ Political reformers in the early twentieth century, acting on idealistic notions of pure participatory democracy symbolized in eighteenth-century New England town meetings, brought direct legislation to more than one-third of the nation's jurisdictions by 1918.² After a

1. See David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 14–15 (1995). An initiative is a citizen-initiated statute or constitutional amendment; proponents collect a certain number of voters' signatures to qualify the initiative for the election ballot. See *id.* at 13. Voters then choose to enact or reject the proposed legislation. See *id.* Moreover, initiatives are subdivided into two types: direct and indirect. Direct initiatives that qualify through a sufficient number of voter signatures appear on an election ballot for voters to consider. In contrast, indirect initiatives that garner enough voter support go first to the state legislature for consideration. If the legislature rejects the proposition or does not act on it within a specified time, then the initiative appears on the next election ballot. States may allow direct initiatives, indirect initiatives, or both. See *id.* at 29, 35; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1510–12 (1990). A popular referendum is a review of a bill just passed by the legislature; as with the initiative, citizens collect signatures to enable voters to decide the fate of the new statute. See Magleby, *supra*, at 14. The popular referendum is distinct from a referendum called by elected legislators for state constitutional amendments or other narrow purposes; this latter form is not considered direct legislation. See Magleby, *supra*, at 14. Finally, in a recall, citizens gather signatures in an attempt to force a vote on whether a particular elected official should remain in office. See PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS* 7–8 (1998).

2. See DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 21–25 (1984); Magleby, *supra* note 1, at 15–16; Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 15, 18 (1997).

Most of the 25 jurisdictions that have some form of direct legislation adopted it during the early twentieth-century Progressive Era, which inherited aspects of the late nineteenth-century Populist philosophy that “government would . . . become a function of men's daily lives only after direct democracy had dissolved a distant, corrupt government.” ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 84 (1967). Progressive leaders called for strict antitrust laws and other regulations to rein in large corporations' political activities and worked to incorporate legislative tools of initiative, referendum, and recall into the political process. See *id.* at 180. For other commentaries on direct

period of relative dormancy in the mid-twentieth century, direct legislation has become increasingly popular in the century's final three decades, as voters often have expressed dissatisfaction with the governance of elected leaders.³ The initiative process, however, has not lived up to idealists' expectations.⁴ Commentators have criticized the process on a number of grounds: the complex initiative voting process is biased against the poorly educated,⁵ a significant number of

democracy in the Progressive Era, see THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 38-59 (1989); DUBOIS & FEENEY, *supra* note 1, at 15-18.

Of course, it would be inaccurate to characterize Progressive Era reformers as achieving, or even attempting to achieve, an ideal society for all. Some initiatives of the period infringed on the rights of minority groups. See *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535-36 (1925) (striking down an Oregon citizen-initiated constitutional amendment requiring all school-age children, including Catholic-school students, to attend only public schools); *Porterfield v. Webb*, 263 U.S. 225, 232-33 (1923) (upholding a California citizen-initiated statute barring certain aliens from leasing land).

Most states west of the Mississippi allow for direct legislation, while most states east of the river do not. See Persily, *supra*, at 18-21. One theory for this phenomenon is that western states, which entered the union later than their eastern counterparts, were more distant from James Madison's admonitions against pure democracy and factions and, therefore, were more willing to incorporate new political structures, such as direct legislation, into their nascent constitutions. See Persily, *supra*, at 20-21; see also THE FEDERALIST NO. 10 (James Madison) (discussing problems of pure democracy and factionalism).

Twenty-four states and the District of Columbia allow some type of direct legislation. See DUBOIS & FEENEY, *supra* note 1, at 2. The constitutional provisions of the 24 states are ALASKA CONST. art. XI, §§ 1-8; ARIZ. CONST. art. IV, pt. 1, §§ 1-2; ARK. CONST. amend. VII; CAL. CONST. art. II, §§ 8-10; COLO. CONST. art. V, § 1; FLA. CONST. art. XI, § 3; IDAHO CONST. art. III, § 1; ILL. CONST. art. XIV, § 3; ME. CONST. art. IV, Pt. 1, § 1, Pt. 3, §§ 17-20; MASS. CONST. amend. art. 48; MICH. CONST. art. II, § 9, art. XII, § 2; MISS. CONST. art. 15, § 273; MO. CONST. art. III, §§ 49-51; MONT. CONST. art. III, §§ 4-6, art. XIV, §§ 2, 9-11; NEB. CONST. art. III, §§ 1-4; NEV. CONST. art. XIX; N.D. CONST. art. III, §§ 1-10; OHIO CONST. art. II, § 1; OKLA. CONST. art. V, §§ 1-4; OR. CONST. art. IV, § 1; S.D. CONST. art. III, § 1; UTAH CONST. art. VI, § 1; WASH. CONST. art. II, § 1; WYO. CONST. art. III, § 52. These states provide for direct legislation for statutes, constitutional amendments, or both. See DUBOIS & FEENEY, *supra* note 1, at 28.

3. See CRONIN, *supra* note 2, at 5 (noting voters' recent use of recall initiatives to oust governors from office); DUBOIS & FEENEY, *supra* note 1, at 1 (stating that in 1992, through citizen-initiated petitions, voters in 13 states chose to place term limits on their United States Congress members); MAGLEBY, *supra* note 2, at 67 (citing statistics that show increasing numbers of petitions for initiatives and referendums in recent decades).

4. See SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* 7-20 (1998) (outlining historical critiques of direct democracy); CRONIN, *supra* note 1, at 70-77 (addressing the lack of voter competence on ballot initiatives); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 17 (1997) (noting that special interest groups, not ordinary citizens, control the initiative process).

5. See LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE* 141-42 (1995) (criticizing the complexity and

initiatives have attempted to target minority groups,⁶ and many initiative supporters today are white, affluent, and highly educated⁷ members of political action groups backed by large-moneyed interests that capitalize on the burgeoning "initiative industry."⁸

overwhelming nature of ballot measures); MAGLEBY, *supra* note 2, at 111 (reasoning that less educated voters have difficulty understanding ballot questions and tend to rely instead on candidates and political parties to represent their interests); Eule, *supra* note 1, at 1509, 1516-19 (noting that the 159-page 1988 California ballot initiative pamphlet sent to voters was written at a college reading level and describing the deceptive wording in some ballot propositions); Magleby, *supra* note 1, at 33 (citing statistics that show individuals with low incomes or low levels of education are much less likely to vote on initiatives than wealthier, better-educated individuals).

6. For example, in 1992, Oregon voters rejected Measure 9, a citizen-initiated proposed constitutional amendment that would have condemned homosexuality. See Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 19 (1993). Part of the proposal stated that "[s]tate, regional and local governments . . . shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism, and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided." *Id.* at 36 n.71; see also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763, 786-87 (C.D. Cal. 1995) (striking down portions of California's Proposition 187, which was approved through direct legislation and which denied education and health care, among other things, to undocumented residents), *reconsidered in part*, 997 F. Supp. 1244 (C.D. Cal. 1997); *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (en banc) (voiding on equal protection grounds Colorado's citizen-initiated constitutional ban on gay rights), *aff'd*, 517 U.S. 620 (1996).

7. See Richard B. Collins & Dale Osterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 58 (1995); Peter Schrag, *California, Here We Come*, ATLANTIC MONTHLY, Mar. 1, 1998, at 20, 31; cf. Peter Schrag, *California's Elected Anarchy: A Government Destroyed by Popular Referendum*, HARPER'S, Nov. 1, 1994, at 50, 57 (noting that California's Proposition 13, which voters passed in 1978, sharply reduced local property taxes at a time when the state was shifting to a majority non-white school-age population).

8. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1847-49 (1999) (documenting widespread use of large sums of money in initiative campaigns); Daniel Hayes Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L.Q. 175, 176 (1989) (arguing that the cost of qualifying an initiative has resulted in wealthy interest groups replacing volunteer-based groups); Magleby, *supra* note 1, at 24 (describing the professionalization of the initiative process); David S. Broder, *Collecting Signatures for a Price*, WASH. POST, Apr. 12, 1998, at A1 (citing that signature-gathering firms participate in 90% of successful petition drives); Bruce Finley & Peggy Lowe, *Colorado Takes the Initiative*, DENV. POST, Aug. 4, 1998, at A1 (noting that Colorado initiative campaign spending exceeded \$10 million in 1994); Dan Morain, *1996 Expected to Be Boom Year for Initiatives*, L.A. TIMES, Dec. 9, 1995, at A1 (reporting that groups may spend \$50 million on California initiatives and counter-initiatives related to proposed statutes intended to limit plaintiffs' lawyers' fees and restrict rights to sue in automobile accident and stockholder suits); David Schaefer, *Stadium Foes Hide Allen for Not Voting*, SEATTLE TIMES, May 28, 1997, at B1 (describing a \$3 million initiative campaign for a new sports stadium).

Another problem with direct legislation is its purported violation of the Guarantee Clause. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to

In an attempt to rein in the excesses of direct legislation, states use statutory or constitutional provisions to regulate the ballot-petitioning process, through which supporters of proposed initiatives and referendums attempt to attain the requisite number of voter signatures to earn the measures a place on the election ballots for voter consideration.⁹ Initiative petitioners, however, have a constitutionally protected right to engage in political speech.¹⁰ State regulations reflect an attempt to negotiate the uneasy tension between citizens' First Amendment rights and states' interests in protecting the voting rights of its citizens.¹¹ In *Buckley v. American Constitutional Law Foundation, Inc.*,¹² the Supreme Court invalidated three Colorado provisions regulating ballot-petition circulators—volunteers or paid employees who approach voters for the required signatures—holding that the statutes violated the circulators' First Amendment rights to free speech.¹³ This ruling may invalidate many

every State in this Union a Republican Form of Government . . ."). Not long after the onset of direct legislation, the United States Supreme Court dismissed for lack of jurisdiction under the political question doctrine a claim that the Guarantee Clause voided a statute enacted via initiative. See *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 135, 151 (1912) (holding that political branches, not the judiciary, should determine whether states provide a republican form of government). For a discussion of the relationship between the Guarantee Clause and initiatives, see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 756–59 (1994) (concluding that the Guarantee Clause does not prohibit direct democracy); Jesse H. Choper, *Observations on the Guarantee Clause—As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U. COLO. L. REV. 741, 747 (1994) (concluding that state courts, through adherence to "republican lawmaking," may curb majoritarian excesses of the initiative process); Linde, *supra* note 6, at 19–20 (asserting that state officials have a duty to examine direct democracy in light of the Guarantee Clause, notwithstanding the *Pacific States* holding).

9. See Magleby, *supra* note 1, at 21.

10. See *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) (determining that initiative petition circulators engage in "core political speech" protected by the First Amendment).

11. See, e.g., *id.* at 421–22 (voiding Colorado's ban on payment of initiative signature gatherers as an unconstitutional infringement on First Amendment rights of political expression); *Anderson v. Celebrezze*, 460 U.S. 780, 788–90 (1983) (striking down an Ohio election law as unnecessarily trenching upon First Amendment voting and associational rights of candidates and supporters); *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (upholding a challenged New York election law as preserving the State's interest in preventing election violations); see also *infra* notes 112–17, 141–47, 148–60 (discussing *Rosario*, *Anderson*, and *Meyer*, respectively).

12. 119 S. Ct. 636 (1999). For newspaper coverage of the ruling, see Joan Biskupic, *High Court Rejects Curbs on Ballot Initiatives*, WASH. POST, Jan. 13, 1999, at A1; Linda Greenhouse, *Court Turns Back an Effort to Limit Ballot Initiatives*, N.Y. TIMES, Jan. 13, 1999, at A1; Howard Pankratz, *Court Strikes Down Colo. Petition Curbs*, DENV. POST, Jan. 13, 1999, at A1.

13. See *Buckley*, 119 S. Ct. at 639, 649.

other states' regulations of direct legislation.¹⁴

This Note reviews the facts of *Buckley*, its lower court history, the Supreme Court's holding, and the Court's reasoning on each of the three provisions.¹⁵ The Note then explains the line of cases that preceded *Buckley*, focusing on the level of scrutiny that the Court applied in each case.¹⁶ Next, the Note discusses the Court's standard in *Buckley* for evaluating Colorado's election provisions.¹⁷ It then considers the potential effects of *Buckley* on the initiative process.¹⁸ Finally, the Note offers a solution to the problem of providing voters with information about proponents' expenditures while protecting the rights of direct legislation circulators.¹⁹

Responding to the increasing prevalence of paid petition circulators in the state initiative process,²⁰ the Colorado General Assembly in 1993 enacted Senate Bill 93-135,²¹ which amended certain laws and added others to regulate the state's initiative and referendum ballot-petitioning procedures.²² In response to the bill's

14. See *id.* at 660-62 (Rehnquist, C.J., dissenting) (contending that *Buckley* may jeopardize election laws in 21 states, plus the District of Columbia); see also Howard Fischer, *Petition Circulators Needn't Be on Voter Rolls*, ARIZ. DAILY STAR, Apr. 14, 1999, at 3B (reporting that *Buckley* voids Arizona's circulator registration requirement); David G. Savage, *Justices Ease Limits on Ballot Initiatives*, L.A. TIMES, Jan. 13, 1999, at A3 (predicting "more and costlier ballot campaigns in California").

15. See *infra* notes 20-104 and accompanying text.

16. See *infra* notes 105-91 and accompanying text.

17. See *infra* notes 192-205 and accompanying text.

18. See *infra* notes 206-08 and accompanying text.

19. See *infra* notes 209-13 and accompanying text.

20. See Savage, *supra* note 14, at A3. Paid circulators have been working in Colorado since a 1988 United States Supreme Court ruling voided a Colorado ban on paying petition circulators. See *Meyer v. Grant*, 486 U.S. 414, 428 (1988); see also *infra* notes 148-60 and accompanying text (discussing the facts and significance of *Meyer*).

21. S.B. 93-135, 59th Leg., 1st Reg. Sess. (Colo. 1993).

22. See *id.*; COLO. REV. STAT. ANN. §§ 1-40-101 to -134 (West 1998). Senate Bill 93-135 added three provisions that were subsequently challenged: (1) a provision requiring circulators to be at least 18 years old, COLO. REV. STAT. ANN. § 1-40-112(1); (2) a requirement that circulators wear badges, *id.* § 1-40-112(2); and (3) a mandate that petition proponents submit monthly disclosure reports, *id.* § 1-40-121(2). See *American Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995, 997 (D. Colo. 1994), *aff'd in part and rev'd in part*, 120 F.3d 1092 (10th Cir. 1997), *aff'd sub nom. Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636 (1999).

The Colorado General Assembly, as part of a routine practice for its enactments, included a "safety clause" at the end of Senate Bill 93-135 to protect its provisions from attack by popular referendums. The safety clause states that "[t]he general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety." S.B. 93-135, 59th Leg., 1st Reg. Sess., § 11(Colo. 1993); *American Constitutional Law Found., Inc.*, 870 F. Supp. at 998, 1005. Because of the General Assembly's routine attachment of safety clauses, no citizen-initiated referendums have appeared on Colorado ballots since 1932. See Collins &

passage, the American Constitutional Law Foundation (ACLF),²³ a non-profit public interest group active in ballot petitioning, and several initiative activists²⁴ filed suit in federal court. They challenged the constitutionality of certain ballot-petition restrictions,²⁵ including requirements that ballot-initiative circulators be registered voters,²⁶ that each circulator wear a badge identifying the circulator both by name and by paid or volunteer status,²⁷ and that initiative proponents disclose to Colorado the names and addresses of all paid circulators and the amounts paid to each.²⁸ The ACLF claimed that these

Osterle, *supra* note 7, at 65 n.76. For examples of other Colorado statutes with safety clauses, see H.B. 98-1267, 61st Leg., 2nd Reg. Sess., § 21 (Colo. 1998); H.B. 98-1325, 61st Leg., 2nd Reg. Sess., § 20 (Colo. 1998); S.B. 97-1, 61st Leg., 1st Reg. Sess., § 6 (Colo. 1997); S.B. 95-1, 60th Leg., 1st Reg. Sess., § 4 (Colo. 1995); S.B. 93-136, 59th Leg., 1st Reg. Sess., § 10 (Colo. 1993).

Prior to bringing suit in *Buckley*, the plaintiffs moved to enjoin Colorado from attaching the safety clause to Senate Bill 93-135 so that the plaintiffs could initiate a referendum on it. The district court denied the plaintiffs' motion, and the Tenth Circuit affirmed. See *American Constitutional Law Found., Inc.*, 870 F. Supp. at 998, 1005; *aff'd*, *American Constitutional Law Found., Inc. v. Meyer*, No. 93-1274, 1994 WL 387872, at *1-2 (10th Cir. July 22, 1994) (unpublished opinion).

23. In this Note, ACLF denotes the plaintiffs, that is, both the organization and the individuals who brought suit.

24. Nine individual plaintiffs joined the ACLF in the suit. They included Bill Orr, executive director of the ACLF, who was not registered to vote; William David Orr, a minor who wished to participate in ballot petitioning; David Aitken, chairman of the Colorado Libertarian Party; Jack Hawkins and Craig Eley, labor activists who have sought to change Colorado's workers' compensation laws through the initiative process; and Jon Baraga, a state coordinator for the Colorado Hemp Initiative, a group aiming to legalize marijuana in the state. See *American Constitutional Law Found., Inc.*, 870 F. Supp. at 997; Brief for Respondents David Aitken, Jon Baraga, and Bill Orr, as the Parent and Guardian of William David Orr, to the U.S. Supreme Court at *2-6, 1998 WL 328332, *Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636 (1999) (No. 97-930).

25. See *American Constitutional Law Found., Inc.*, 870 F. Supp. at 997. The plaintiffs filed the suit in the United States District Court for the District of Colorado, claiming deprivation of their constitutional rights under 42 U.S.C. § 1983. See 42 U.S.C. § 1983 (Supp. 1997); *American Constitutional Law Found., Inc.*, 870 F. Supp. at 997. Senate Bill 93-135 was the origin of some, but not all, of the challenged provisions. For example, a 1980 voter-approved constitutional amendment, not Senate Bill 93-135, instituted the registration requirement. See COLO. CONST. art. V, § 1(6) (requiring that registered electors sign a ballot-petition affidavit); *American Constitutional Law Found., Inc.*, 870 F. Supp. at 999 (detailing the ratification of the 1980 amendment).

26. See COLO. REV. STAT. ANN. § 1-40-112(1) (West 1998).

27. See *id.* § 1-40-112(2). In addition, the statute required each paid circulator badge to include the name and telephone number of the circulator's employer. See *id.*

28. See *id.* § 1-40-121(1). The provision obliged circulators to submit this information to the secretary of state along with the petition. See *id.* The provision also required each circulator to submit the county in which the circulator is registered to vote and the amount the circulator receives for each petition signature. See *id.* Moreover, the statute required the proponents of each petition to submit monthly reports to the secretary of state providing the proponents' names, names and addresses of paid circulators, the name of the

provisions violated the plaintiffs' First Amendment right to free speech because the provisions not only discouraged potential signature gatherers from participating in the petition process, but also diminished the possibility that petitions would garner sufficient votes to get on election ballots.²⁹ Both of these effects, the ACLF argued, served to decrease the quantity of political speech in Colorado.³⁰

The federal district court invalidated the badge requirement and parts of the disclosure requirement.³¹ The court applied strict scrutiny to these provisions on the grounds that they restricted "core political speech"³² and found that the provisions were not narrowly tailored to achieve a compelling state interest.³³ The court, however, upheld the voter registration requirement³⁴ because it had been adopted by a

proposed ballot measure, and the amount paid and owed to each paid circulator for the month. *See id.* § 1-40-121(2).

29. *See* Brief for Respondents American Constitutional Law Foundation, Inc., Craig Eley, Jack Hawkins, Lonnie Haynes, and Alden Kautz, to the U.S. Supreme Court at *13, 1998 WL 331184, *Buckley v. American Constitutional Law Found., Inc.* (No. 97-930).

30. *See id.*

31. *See* *American Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995, 1000, 1002-03 (D. Colo. 1994). The court struck down sections 1-40-112(2), -121(1), and -121(2) of the Colorado Revised Statutes. *See supra* notes 27-28 and accompanying text (describing each section).

32. *American Constitutional Law Found., Inc.*, 870 F. Supp. at 1002. The phrase "core political speech" derives from *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) ("[Campaign] contributions and expenditures are at the very core of political speech . . ."). For a discussion of *Valeo*, see *infra* notes 134-40 and accompanying text.

33. *See American Constitutional Law Found., Inc.*, 870 F. Supp. at 1002-03. Colorado argued that the badges allowed the public to identify circulators who propound deliberate falsehoods in attempts to garner signatures, but the district court responded that inaccuracies in political speech are common and do not necessarily constitute criminal fraud and that existing criminal penalties for violations of ballot-petition regulations already address the state's concern. *See id.* at 1002. Colorado further claimed that the badge requirement helps the public to determine if a petition has sufficient grassroots support. *See id.* The court disposed of this contention by noting that the existing requirement that the number of signatures equal a percentage of the number of voters in the previous election for secretary of state adequately ensures grassroots support. *See id.* Critics assert that in the modern era of paid petitioners, the number of signatures a petition garners does not necessarily indicate public support; it may merely indicate the number of circulators the petition proponent hired to get the signatures. *See Lowenstein & Stern, supra* note 8, at 202. For examples of the excesses of the petition industry, see *supra* note 8.

The State asserted the need for disclosure requirements to attain the same two goals: prevention of fraud and determination of the level of grassroots support. *See American Constitutional Law Found., Inc.*, 870 F. Supp. at 1003. The court upheld provisions that required petition proponents to disclose the amount of money they pay circulators, but struck down requirements that proponents identify paid circulators, noting, "What is of interest is the payor, not the payees." *Id.*

34. *See* COLO. REV. STAT. ANN. § 1-40-112(1) (West 1998) (detailing the registration requirement).

voter-approved constitutional amendment in 1980³⁵ and because the United States Constitution does not mandate initiatives or referendums at the state level.³⁶ Accordingly, the district court held that the registration provision should not be subject to any level of scrutiny.³⁷ The district court also upheld three other requirements challenged by the plaintiffs: that circulators be at least eighteen years old, that circulators submit an affidavit attesting to the validity of the initiative petition, and that the petition circulation period be limited to six months.³⁸

Both parties appealed the ruling to the United States Court of Appeals for the Tenth Circuit,³⁹ which affirmed the district court in all aspects save one: the constitutionality of the requirement that circulators be registered voters.⁴⁰ The Tenth Circuit reasoned that the absence of a constitutional right to the petition process does not license Colorado to restrict core political speech in violation of the First Amendment.⁴¹ The court then determined that this exclusion of substantial numbers of Colorado residents⁴² from the process of direct legislation not only prevented them from participating in political speech, but also reduced the number of petition circulators. This exclusion, in turn, diminished the possibility that petitions would garner enough signatures to reach the ballot.⁴³ The Tenth Circuit

35. See *American Constitutional Law Found., Inc.*, 870 F. Supp. at 1002; see also COLO. CONST. art. V, § 1, cl. 6 (requiring that a registered elector sign a ballot-petition affidavit).

36. See *American Constitutional Law Found., Inc.*, 870 F. Supp. at 1002.

37. See *id.*

38. See *id.* at 1003-05. The Tenth Circuit affirmed the district court's ruling on these three provisions. See *American Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1099-1101 (10th Cir. 1997). The Supreme Court denied the ACLF's cross-petition appealing the Tenth Circuit's ruling that upheld these requirements. See *American Constitutional Law Found., Inc. v. Buckley*, 522 U.S. 1113 (1998) (mem.); see also COLO. CONST. art. V, § 1(6) (stating the affidavit requirement); COLO. REV. STAT. ANN. §§ 1-40-112(1) (stating the age requirement), -111(2) (detailing the affidavit requirement), -108(1) (noting the time limit).

39. See *American Constitutional Law Found., Inc.*, 120 F.3d at 1092.

40. See *id.* at 1100; COLO. REV. STAT. ANN. § 1-40-112(1).

41. See *American Constitutional Law Found., Inc.*, 120 F.3d at 1100.

42. Colorado reported that at least 400,000 of its eligible residents were not registered voters as of 1994. See *American Constitutional Law Found., Inc.*, 120 F.3d at 1100. The Supreme Court, in its opinion, cited statistics showing that 620,000 eligible Colorado voters were not registered at the time of the trial, and in 1997, more than 35% of eligible electors, some 964,000 people, were not registered. See *Buckley*, 119 S. Ct. at 643 n.15 (citing U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 282 tbl. 453 (1993); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 289 tbl. 453 (1997)).

43. See *American Constitutional Law Found., Inc.*, 120 F.3d at 1100.

ruled that the registration requirement had a “discriminatory effect.”⁴⁴ Accordingly, the court applied strict scrutiny and held that Colorado failed the test, reasoning that a residency requirement would be more narrowly tailored to achieve the state’s interest in policing the direct legislation system.⁴⁵

Colorado appealed the Tenth Circuit’s invalidation of the registration, identification, and disclosure restrictions on petition circulators to the Supreme Court.⁴⁶ The State argued that circulators play two roles: they act as advocates for the initiative by engaging in core political speech, and they are administrators of the electoral system who regulate the petition process by collecting valid signatures.⁴⁷ Colorado argued that, because its regulations addressed the administrative aspect of the circulators’ job and did not aim at First Amendment rights of political speech, the Court should apply a standard lower than that of strict scrutiny.⁴⁸

In an opinion authored by Justice Ginsburg, the majority rejected the argument that circulators administer the electoral process⁴⁹ and addressed only the advocacy portion of the circulators’ job.⁵⁰ Applying an unlabeled strict scrutiny test to the three challenged provisions,⁵¹ the Court affirmed the Tenth Circuit in holding that all three regulations violated the First Amendment.⁵² According to the Court, ballot-petition circulation is “‘core political speech,’ because it involves ‘interactive communication concerning political change.’”⁵³ First Amendment protection for this kind of

44. *Id.*

45. *See id.*

46. *See* Petitioner’s Brief to the U.S. Supreme Court at *1, 1998 WL 221384, *Buckley* (No. 97-930).

47. *See* U.S. Supreme Court Official Transcript of Oral Argument at *7, *21, 1998 WL 731585, *Buckley* (No. 97-930).

48. *See id.* at *7–8, *21–22.

49. The Court stated that its opinion should not “be read to suggest that initiative-petition circulators are agents of the State. Although circulators are subject to state regulation and are accountable to the State for compliance with legitimate controls, . . . circulators act on behalf of themselves or the proponents of ballot initiatives.” *Buckley*, 119 S. Ct. at 642 n.11.

50. *See id.* at 639–49.

51. Notably, the Court did not explicitly state which level of scrutiny it applied. This omission led Justice Thomas to write separately, concurring in the judgment. *See Buckley*, 119 S. Ct. at 649 (Thomas, J., concurring in the judgment); *infra* notes 73–79 and accompanying text (detailing Justice Thomas’s concurrence). Despite the lack of a label, the Court clearly purported to apply strict scrutiny, a test that required Colorado’s statutes to be “narrowly tailored to serve a compelling state interest.” *Buckley*, 119 S. Ct. at 642 n.12.

52. *See Buckley*, 119 S. Ct. at 640–42.

53. *Id.* at 639 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)).

interaction is "‘at its zenith.’"⁵⁴ The Court held that Colorado's "substantial interests" are insufficient to warrant the restrictions.⁵⁵

In ruling on the constitutionality of the restrictions on the petition process, the Court first examined Colorado's requirement that petition circulators be registered to vote in the state.⁵⁶ The Court agreed with the ACLF that the requirement restricted core political speech in two ways. First, it decreased the quantity of political speech by severely diminishing the number of persons eligible to circulate petitions. Second, it decreased the possibility that initiatives' political message would get to voters by reducing the chances that organizing a proposed initiative or referendum would acquire the requisite number of signatures to put the measure on an election ballot.⁵⁷ Furthermore, the Court maintained that Colorado failed to demonstrate that the requirement served a compelling state interest.⁵⁸ Colorado had argued that the registration provision did not severely burden political speech because registering to vote is easy. The Court, however, determined that the decision not to register could be a conscious political choice and that such an expression of protest is worthy of First Amendment protection.⁵⁹ The State also had argued that the provision allowed Colorado to subpoena circulators who violate election laws. The Court replied that the affidavit requirement upheld in the lower courts addressed that concern by requiring circulators to submit their addresses.⁶⁰ The Court stated

54. *Id.* at 640 (quoting *Meyer*, 486 U.S. at 425).

55. *Id.* at 648. The Court's use of the phrase "substantial interests" implies that it may actually have applied something less than strict scrutiny. For a discussion, see *infra* notes 203-05 and accompanying text.

56. See *Buckley*, 119 S. Ct. at 642-45.

57. See *id.* at 643-44.

58. See *id.* at 644.

59. See *id.* The Court also gave weight to trial testimony that tended to show that non-registered electors, often those "‘not involved in normal partisan politics,’" are among those who typically support initiative and referendum petition drives. *Id.* at 643 (quoting trial testimony of initiative proponent Paul Grant).

60. See *id.* at 644. Colorado explained in its brief that, from the adoption of the initiative in 1910 until a constitutional amendment in 1980, the state required signatures from eight percent of the voters for secretary of state in the previous election, but required only that signers be eligible to vote rather than registered. See Petitioner's Brief to the U.S. Supreme Court at *33-34, 1998 WL 221384, *Buckley* (No. 97-930). Because of the difficulty involved in determining who was eligible to cast a ballot, voters ratified a constitutional amendment in 1980 that required both signers and circulators to be registered voters. See *id.* The pool of eligible signers and circulators decreased, and to compensate, the amendment lowered the signature requirement to five percent. See *id.*

If the ban on Colorado's registration requirement results in increasing numbers of petitions qualifying for the ballot, legislators may increase the number of signatures required for qualification in the interests of protecting voters from overwhelmingly long

that a residency requirement for circulators might be constitutional, but did not address the issue because it was not raised on appeal.⁶¹

The Court also rejected Colorado's provision that petition circulators wear identification badges, relying on trial testimony that requiring nametags deterred potential circulators from participating in the petition process.⁶² The Court stated that the requirement obligated circulators to identify themselves when they petitioned voters for signatures "at the precise moment when the circulator's interest in anonymity is greatest."⁶³ Colorado argued that the badges were necessary to allow the public to identify circulators who act improperly.⁶⁴ The Court determined that the existing requirement that circulators sign an affidavit attesting to the validity of the petition *after* they collect signatures was a better means to serve Colorado's interest in deterring circulator fraud. The affidavit, the Court reasoned, temporally separates the circulators' act of identification from the act of petitioning.⁶⁵

Finally, the Court struck down part of Colorado's petition-

ballots. See Garrett, *supra* note 8, at 1847. Such an increase would favor petition proponents who hire circulators over proponents who rely on volunteers. See *id.* (noting that "well-compensated political consultants" are increasingly necessary to qualify an initiative for the ballot); Lowenstein & Stern, *supra* note 8, at 218-19 (describing how the initiative industry tends to make it more difficult for volunteer-based initiative campaigns to gain ballot access).

61. See *Buckley*, 119 S. Ct. at 645. Subsequently, the Court has declined to hear a challenge to a Maine requirement that petition circulators be state residents. See *Hart v. Gwadowsky*, 715 A.2d 165, 168 (Me. 1998) (applying strict scrutiny and upholding a residency requirement), *cert. denied*, 119 S. Ct. 1028 (1999).

62. See *Buckley*, 119 S. Ct. at 645-46. At trial, one petition organizer testified that the badge requirement " 'limited the number of people willing to work for us,' " while another described harassment he experienced while circulating and stated that for some circulators, " '[w]ith their name on a badge, it makes them afraid.' " *Id.* (quoting trial testimony of respondent Jon Baraga).

All nine Justices agreed that the identification badge requirement was unconstitutional. See *id.* at 645-46; *id.* at 651 (Thomas, J., concurring in the judgment); *id.* at 654 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 662 (Rehnquist, C.J., dissenting). The Tenth Circuit also held the badge requirement unconstitutional because it required circulators to display their names. See *id.* at 645. Neither the Supreme Court nor the Tenth Circuit considered the requirements that the badge identify the circulator's volunteer or paid status and, if an employee, the name and telephone number of the employer. See *id.* at 646.

63. *Id.* at 646. At oral argument, however, one of the Justices hinted that a badge that only displayed a circulator's paid or volunteer status might be upheld as constitutional. See U.S. Supreme Court Official Transcript of Oral Argument at *26-27, 1998 WL 731585, *Buckley* (No. 97-930).

64. See *Buckley*, 119 S. Ct. at 645.

65. See *id.* at 646; see also COLO. REV. STAT. ANN. § 1-40-111(2) (West 1998) (detailing the affidavit requirement).

disclosure requirements.⁶⁶ In affirming the lower courts, the Supreme Court invalidated provisions requiring identification of paid circulators and the amounts paid to each, but left intact the requirement that petition proponents reveal the amounts they paid for each voter signature.⁶⁷ Colorado argued that the disclosure requirements were vital to its interest in reining in the tendency of moneyed interests to exert excessive control over the initiative petition process.⁶⁸ The Court stated, however, that the upheld disclosure provisions requiring proponents to identify themselves and their spending levels adequately supplied Colorado voters with the information they needed to form an opinion about initiative sponsors.⁶⁹ The majority reasoned that publicly disclosing the names of paid circulators and their earnings would not aid voters because the reports would not be immediately available to voters at the moment circulators approached them.⁷⁰ The Court rejected Colorado's argument that ballot initiatives are susceptible to the "quid pro quo" corruption that exists in candidate elections and concluded that the petition stage of the initiative process is less likely to incur fraud than the ballot stage.⁷¹ The Court determined that Colorado had not demonstrated sufficiently the benefit that would accrue from further identifying each paid circulator and the amount paid to each.⁷²

Justice Thomas wrote separately and concurred only in the judgment, Justice O'Connor concurred in the judgment in part and dissented in part, and Chief Justice Rehnquist dissented separately.⁷³ In concurring in the judgment, Justice Thomas criticized the majority because he believed its opinion applied something less than strict scrutiny in evaluating Colorado's three petition regulations.⁷⁴ He outlined the framework that the Court had developed in previous

66. See *Buckley*, 119 S. Ct. at 646-48.

67. See *id.* at 647.

68. See *id.*

69. See *id.*

70. See *id.* at 647 n.22, 648.

71. *Id.* at 648.

72. See *id.* at 647.

73. See *id.* at 649-53 (Thomas, J., concurring in the judgment); *id.* at 653-59 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 659-62 (Rehnquist, C.J., dissenting).

74. See *id.* at 649, 653 (Thomas, J., concurring in the judgment). The majority responded, "Our decision is entirely in keeping with the 'now-settled approach' that state regulations 'impos[ing] 'severe burdens' on speech . . . [must] be narrowly tailored to serve a compelling state interest.'" *Id.* at 642 n.12 (quoting *id.* at 649 (Thomas, J., concurring in the judgment)) (alterations in original).

cases to determine the validity of state election laws under the First and Fourteenth Amendments.⁷⁵ According to Justice Thomas, the Court consistently has applied strict scrutiny to laws that regulate “core political speech” and has required that these laws be “narrowly tailored to serve . . . compelling governmental interest[s].”⁷⁶ If a law severely burdens voting or associational rights, the Court applies strict scrutiny, as it does with restrictions on core political speech.⁷⁷ Lesser burdens on the right to vote or to associate trigger a less exacting standard of scrutiny, however, and states’ regulatory interests usually justify those restrictions.⁷⁸ Justice Thomas considered each of Colorado’s restrictions in turn, concluding that each required, and failed, strict scrutiny.⁷⁹

Concurring in the judgment in part and dissenting in part, Justice O’Connor acknowledged the circulator’s dual role as advocate and administrator⁸⁰ and emphasized the distinction between strict scrutiny, which is appropriate for “regulations directly burdening the one-on-one, communicative aspect of petition circulation,” and the “less exacting standard of review” appropriate for indirect burdens on speech.⁸¹ Justice O’Connor asserted that if a state’s regulation primarily affects the administrative portion of the circulator’s job, then the Court should apply the less exacting test.⁸² Applying this distinction, Justice O’Connor dissented from the portion of the majority opinion that invalidated the registration requirement.⁸³

75. *See id.* at 649–50 (Thomas, J., concurring in the judgment).

76. *Id.* at 649 (Thomas, J., concurring in the judgment) (citing *Timmons v. Twin Area New Party*, 520 U.S. 351, 358–59 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788–90 (1983)).

77. *See id.* at 649–50 (Thomas, J., concurring in the judgment).

78. *See id.* at 649 (Thomas, J., concurring in the judgment).

79. *See id.* at 651–53 (Thomas, J., concurring in the judgment). Justice Thomas’s reasoning in striking down the badge and registration requirements largely paralleled the majority’s rationale. *See id.* at 650–52 (Thomas, J., concurring in the judgment). Justice Thomas, however, did not consider the disclosure requirements to severely burden political speech. *See id.* at 652 (Thomas, J., concurring in the judgment). Instead, he determined that compelled disclosure alone, in an election case, triggers strict scrutiny. *See id.* (Thomas, J., concurring in the judgment) (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 96 (1976) (per curiam)). According to Justice Thomas, Colorado had not demonstrated a compelling interest in obtaining the information that the requirement mandated. *See id.*

80. *See id.* at 653–54 (O’Connor, J., concurring in the judgment in part and dissenting in part).

81. *See id.* at 653 (O’Connor, J., concurring in the judgment in part and dissenting in part).

82. *See id.* at 654 (O’Connor, J., concurring in the judgment in part and dissenting in part).

83. *See id.* at 654–56 (O’Connor, J., concurring in the judgment in part and dissenting in part).

Because she believed that the ACLF had shown neither that the registration requirement had diminished the number of initiatives on the ballot, nor that a significant number of potential circulators had refused to register as a political protest, Justice O'Connor concluded that the requirement only indirectly restricted face-to-face communication.⁸⁴ The appropriate test, according to Justice O'Connor, was the less exacting "review for reasonableness."⁸⁵ Colorado showed a reasonable interest in petitioner registration as a means of enhancing its ability to enforce laws against circulation fraud, Justice O'Connor concluded, so she would have upheld the requirement.⁸⁶

Justice O'Connor also would have allowed Colorado to retain its petition disclosure provision, reasoning that the restriction merited less exacting scrutiny because it only indirectly affected face-to-face petitioning.⁸⁷ Justice O'Connor relied on record testimony suggesting that paid circulators had been less scrupulous than their volunteer counterparts⁸⁸ and reasoned that voters' ability to evaluate circulators' sincerity would be heightened if voters knew whether circulators were paid and, if so, how much.⁸⁹ Justice O'Connor also asserted that the affidavit requirement is an inadequate substitute because affidavits are due once the circulation process is complete, long after the voters have decided whether to sign the petition.⁹⁰ Justice O'Connor wrote that Colorado had demonstrated not only that the disclosure requirement was reasonable,⁹¹ but that she would have upheld the provision even under strict scrutiny.⁹²

84. See *id.* at 655-56 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor was not convinced by what she considered to be weak and equivocal testimony on the reasoning behind circulators' decisions not to register. See *id.*

85. *Id.* at 654 (O'Connor, J., concurring in the judgment in part and dissenting in part).

86. See *id.* at 656 (O'Connor, J., concurring in the judgment in part and dissenting in part).

87. See *id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

88. See *id.* at 658 (O'Connor, J., concurring in the judgment in part and dissenting in part); see also Magleby, *supra* note 1, at 23 (reporting that Colorado suffers more fraud committed by paid circulators than by volunteers).

89. See *Buckley*, 119 S. Ct. at 658 (O'Connor, J., concurring in the judgment in part and dissenting in part).

90. See *id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

91. See *id.* at 656-57 (O'Connor, J., concurring in the judgment in part and dissenting in part).

92. See *id.* at 659 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor's view that Colorado's interests survive strict scrutiny was based on the Court's holding in *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam) (describing governmental interests that withstand exacting scrutiny). See *Buckley*, 119 S. Ct. at 657-59. For further discussion of *Buckley v. Valeo*, see *infra* notes 134-40 and

In a vigorous dissent, Chief Justice Rehnquist disagreed with the Court's invalidation of the registration and disclosure requirements, lamenting that "in the name of the First Amendment, [the majority's opinion] strikes down the attempt of a State to allow its own voters (rather than out-of-state persons and political dropouts) to decide what issues should go on the ballot."⁹³ According to the Chief Justice, the majority opinion implies that any statute that reduces the pool of potential petition circulators or lessens the chance that an initiative may reach an election ballot could be held unconstitutional.⁹⁴ Although he did not specify a level of scrutiny for reviewing Colorado's provisions, Chief Justice Rehnquist indicated that he would apply a less exacting standard than the majority.⁹⁵

Registering to vote is not burdensome, according to the Chief Justice, and the fact that registration is a requirement for candidates, delegates, and other participants in electoral politics bolsters his assertion that the registration requirement for circulators was constitutional.⁹⁶ He further argued that non-registration as an expression or rejection of the political process applies only to a small number of those who do not register.⁹⁷ More importantly, in Chief Justice Rehnquist's view, those few individuals, by eschewing the political process, had waived their right to protest a prohibition against circulating petitions, which, after all, may be signed only by registered voters.⁹⁸ The Chief Justice also expressed concern that disenfranchised "convicted drug felons" would have a right to circulate petitions under the Court's holding.⁹⁹ Finally, the Chief Justice argued that, because at the time of the holding no existing Colorado law required that circulators be eligible to vote in the state,

accompanying text.

93. *Buckley*, 119 S. Ct. at 659 (Rehnquist, C.J., dissenting); see also Broder, *supra* note 8, at A1 (reporting that petition circulators regularly violate California's residency requirement for circulators).

94. See *Buckley*, 119 S. Ct. at 661 (Rehnquist, C.J., dissenting).

95. See *id.* at 659 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist wrote that "before today's decision, it appeared that under our case law a State could have imposed reasonable regulations on the circulation of initiative petitions, so that some order could be established over the inherently chaotic nature of democratic processes." *Id.* (Rehnquist, C.J., dissenting) (citations omitted).

96. See *id.* at 660 (Rehnquist, C.J., dissenting).

97. See *id.* (Rehnquist, C.J., dissenting).

98. See *id.* at 661 (Rehnquist, C.J., dissenting).

99. *Id.* at 660 (Rehnquist, C.J., dissenting). In discussing this issue, Chief Justice Rehnquist mentioned respondent Jon Baraga, a supporter of a movement to legalize marijuana in Colorado. See *id.* (Rehnquist, C.J., dissenting). This implication by association seems problematic, because neither the Chief Justice nor any other Justice cites any evidence linking Baraga to illegal activity.

the Court's decision effectively allows non-Coloradans to collect signatures.¹⁰⁰ Applying the majority's reasoning to circulators working to place candidates on election ballots, Chief Justice Rehnquist concluded that statutes in nineteen states and the District of Columbia could be unconstitutional.¹⁰¹

Chief Justice Rehnquist also maintained that the disclosure requirement was constitutional because the affidavit requirement, which the Tenth Circuit upheld, already destroyed circulators' anonymity.¹⁰² The disclosure requirement requested only one piece of information that the affidavit did not: the amount paid to each circulator.¹⁰³ Chief Justice Rehnquist argued that this additional requirement should not be enough to scuttle the entire disclosure provision, which served "substantial interests" and withstood First Amendment review.¹⁰⁴

Although the *Buckley* majority did not identify explicitly its analysis as strict scrutiny,¹⁰⁵ the Court's choice of a standard was determinative of the constitutionality of the provisions in question. This pattern is consistent with the body of case law developed over the past thirty years. State electoral regulations that burden citizens' First Amendment rights to engage in political speech warrant strict scrutiny review and must be narrowly tailored to serve a compelling state interest.¹⁰⁶ In contrast, burdens on other constitutional rights, such as the First Amendment right of association, do not necessarily

100. See *id.* at 660–61 (Rehnquist, C.J., dissenting).

101. See *id.* at 661 (Rehnquist, C.J., dissenting); see also *id.* at 661 n.3 (Rehnquist, C.J., dissenting) (listing relevant statutes in the 20 jurisdictions); *supra* note 14 (describing *Buckley*'s effects on other state election laws).

102. *Buckley*, 119 S. Ct. at 662 (Rehnquist, C.J., dissenting).

103. See *id.* (Rehnquist, C.J., dissenting).

104. *Id.* (Rehnquist, C.J., dissenting).

105. See *supra* note 51 and accompanying text (discussing the Court's choice of test).

106. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (ruling that a prohibition on distributing anonymous handbills related to a ballot measure trenches upon the right to political speech); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a ban on campaign-related activity within 100 feet of polling place entrances limits political speech but survives strict scrutiny); *Austin v. Michigan*, 494 U.S. 652, 654 (1990) (ruling that a Michigan prohibition on corporate expenditures on state election campaigns restricts political expression but is sufficiently narrowly tailored to the state's interests); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989) (holding that a ban on primary endorsements by political parties limits political speech); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (ruling that a prohibition on paying ballot petition circulators is unduly restrictive of political speech); *Term Limits Leadership Council, Inc. v. Clark*, 984 F. Supp. 470, 470–72 (S.D. Miss. 1997) (holding that both a requirement for petition circulators to be registered voters and a ban on payment of circulators on a per-signature basis unconstitutionally restrict political speech).

warrant strict scrutiny review.¹⁰⁷ In cases regarding regulations that do not restrict political speech, but rather address procedural or administrative aspects of elections, the Court has fashioned a balancing test to weigh citizens' rights against states' regulatory interests.¹⁰⁸ If a state's regulation severely burdens citizens' non-speech rights, the Court subjects the regulation to strict scrutiny.¹⁰⁹ If, however, the regulation places merely "reasonable, nondiscriminatory restrictions"¹¹⁰ on citizens' rights, the Court applies a "review for reasonableness" test.¹¹¹

The earliest of these cases recognized the importance of states' interests in regulating elections. In *Rosario v. Rockefeller*,¹¹² the Court applied a relaxed standard of review in upholding a New York election law that prohibited electors who had not registered as party members before the previous general election from voting in a primary.¹¹³ This provision required voters to affiliate with a party up to eleven months before a primary election.¹¹⁴ Although it did not explicitly identify its standard of scrutiny, the *Rosario* Court reasoned that the New York time restriction was warranted because it had a

107. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.").

108. See *Burdick*, 504 U.S. at 434 (explaining a "flexible standard" test); *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983) (enunciating the balancing test).

109. See, e.g., *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981) (using strict scrutiny in voiding the city's limit on contributions to groups supporting or opposing ballot measures as violating of the First Amendment right to assemble); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (purporting to apply strict scrutiny, yet upholding the requirement of a campaign finance disclosure).

110. *Anderson*, 460 U.S. at 788.

111. *Buckley*, 119 S. Ct. at 654 (O'Connor, J., concurring in the judgment in part and dissenting in part). In her opinion, Justice O'Connor implied that the "review for reasonableness" was "akin to rational review." *Id.*; see also, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 364 (1997) (using a "flexible standard" test to uphold a prohibition on candidate multiple-party ballot appearances); *Burdick*, 504 U.S. at 434 (applying a "flexible standard" in upholding a ban on write-in voting notwithstanding voters' First Amendment rights of association); *Storer v. Brown*, 415 U.S. 724, 730 (1974) (applying a balancing test to uphold a provision regulating candidate party affiliation); *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (using an unlabeled relaxed standard in upholding a restriction on voter registration); *Biddulph v. Mortham*, 89 F.3d 1491, 1493 (11th Cir. 1996) ("[S]tate initiative regulations . . . that do not burden 'core political speech,' are content-neutral, and do not disparately impact particular political viewpoints are not subject to strict scrutiny under the First Amendment."); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 299 (6th Cir. 1993) (applying "rational relationship" review to uphold Michigan's procedures to validate signatures on petitions).

112. 410 U.S. 752 (1973).

113. See *id.* at 762.

114. See *id.* at 765 (Powell, J., dissenting).

"particularized legitimate purpose" of preventing party raiding, in which voters sympathetic to one party register with and vote in an opposing party's primary, in an attempt to affect the election outcome.¹¹⁵ Justice Powell dissented, arguing that the Court's choice of standard "resembles the traditional equal protection 'rational basis' test"¹¹⁶ and that prior case law required the Court to apply strict scrutiny instead.¹¹⁷

The Court decided a case the following term, however, that called into question the scope of the *Rosario* holding. In *Kusper v. Pontikes*,¹¹⁸ the Court applied what appeared to be a higher level of scrutiny in holding unconstitutional an Illinois law that required voters to affiliate with a party twenty-three months before a primary.¹¹⁹ Illinois defended the provision on the same grounds as New York had done in *Rosario*: prevention of party raiding.¹²⁰ The Court distinguished the Illinois provision from New York's law in *Rosario* by determining that in *Kusper* the lengthy party affiliation period "absolutely precluded" voters from participating in the primary of their party of choice.¹²¹ According to the majority, the Illinois provision was not sufficiently tailored to prevent raiding.¹²² In dissent, Justice Blackmun argued that the differences between the New York and Illinois statutes did not warrant application of different standards of review¹²³ and advocated the "appropriately

115. *Id.* at 760.

116. *Id.* at 767 (Powell, J., dissenting).

117. *See id.* at 768 (Powell, J., dissenting). As examples of cases in which the Court applied strict scrutiny, Justice Powell cited *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (striking down a Tennessee law requiring citizens to reside in the state for one year and in the county for three months before registering to vote because it did not further a compelling state interest), and *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 627 (1969) (holding unconstitutional a requirement that school district electors be owners or lessees of taxable property because the requirement does not promote a compelling state interest).

118. 414 U.S. 51 (1973).

119. *See id.* at 60-61.

120. *See id.* at 59-60.

121. *Id.* at 60; *see also* *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (*per curiam*) (stating, in reference to *Rosario* and *Kusper*, that "distinctions of degree become significant only when they can be said to amount to differences in kind"); Craig M. Engle, *Buckley over Time: A New Problem with Old Contribution Limits*, 24 J. LEGIS. 207, 211-12 (1998) (noting that in *Kusper*, a difference of degree became a difference in kind: *Rosario's* shorter waiting period fell on the constitutional side of the line, while the 23-month waiting period in *Kusper* crossed the line into unconstitutional territory).

122. *See Kusper*, 414 U.S. at 58-59.

123. *See id.* at 65 (Blackmun, J., dissenting) ("This incongruity underscores what I believe to be the potential mischief that results from an easy and all-too-ready resort to a strict-scrutiny standard in election cases of this kind.").

deferential approach" of the *Rosario* Court.¹²⁴

The next year, in *Storer v. Brown*,¹²⁵ the Court further muddled the waters by advocating a case-by-case analysis for evaluating state regulation of election issues.¹²⁶ The *Storer* Court upheld a California election law that required independent candidates to refrain from affiliating with any qualified political party within one year prior to the primary election.¹²⁷ Although the Court again did not delineate explicitly the level of scrutiny it was applying, its reasoning more closely matched the *Rosario* Court's test than *Kusper*'s higher level of scrutiny.¹²⁸ The *Storer* Court weighed the burdens on the candidates' rights against California's need to provide "substantial regulation of elections . . . if some sort of order, rather than chaos, is to accompany the democratic processes."¹²⁹ The Court explicitly stated that it was not implementing a "litmus-paper test"¹³⁰ to determine the constitutionality of election laws. Rather, it used a balancing test that was a "'matter of degree'"¹³¹ and considered the totality of circumstances surrounding citizens' and states' interests.¹³² Thus, *Storer* reconciled *Rosario* and *Kusper* by evaluating not only the *kind* of state provisions at issue, but also the *degree* to which the state regulations infringe on individuals' rights to vote or to run for office.¹³³

Two years later, the Court's landmark campaign finance case, *Buckley v. Valeo*,¹³⁴ included a holding relevant to initiative petition

124. *Id.* at 63 (Blackmun, J., dissenting).

125. 415 U.S. 724 (1974).

126. See Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1767 (1999) (noting that *Storer* draws "fuzzy lines" and is an example of a case in which the Court "has often expressed a preference for contextualized approaches and balancing tests rather than per se rules"); S. Elizabeth Gibson, *Lowering the Compelling State Interest Hurdle*, 53 N.C. L. REV. 430, 436-37 (1974) (observing that the *Storer* Court established a strict scrutiny standard and then applied a lower standard for California to meet).

127. See *Storer*, 415 U.S. at 726.

128. See *id.* at 730. In *Buckley*, Justice Thomas maintained that the *Storer* Court applied strict scrutiny. See *Buckley*, 119 S. Ct. at 650 & n.1 (Thomas, J., concurring in the judgment).

129. *Storer*, 415 U.S. at 730.

130. *Id.*

131. *Id.* (quoting *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972)).

132. See *id.* (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

133. See *id.* at 731-32 ("[T]he [*Kusper*] Court did not retreat from *Rosario* Although the 11-month requirement imposed in New York had been accepted as necessary . . . the [*Kusper*] Court was unconvinced that the 23-month period established in Illinois was an essential instrument to counter the evil at which it was aimed.").

134. 424 U.S. 1 (1976) (per curiam). This case will be referred to as "*Valeo*" to avoid confusion with *Buckley v. American Constitutional Law Foundation, Inc.*

campaigns. The Court announced a standard of "exacting scrutiny"¹³⁵ in reviewing statutory disclosure requirements of federal campaign finance information, in light of the view that compulsory disclosure may violate First Amendment rights of privacy of association and belief.¹³⁶ In *Valeo*, however, the Court *balanced* the federal government's interests in deterring campaign corruption, detecting violations of election laws, and providing voters with information about the origin and expenditure of campaign money against the encroachment on campaign contributors' constitutional rights to privacy and free speech.¹³⁷ While the Court announced a standard of exacting scrutiny, it applied a standard more akin to intermediate scrutiny—requiring important interests achieved by substantially related means.¹³⁸ The *Valeo* Court also invoked the First Amendment to strike down restrictions on campaign expenditures.¹³⁹ Reasoning that, in a modern society, candidates must spend money to disseminate political speech effectively, the Court determined that a spending limit "necessarily reduces the quantity of expression by restricting the number of issues discussed . . . and the size of the audience reached."¹⁴⁰

The Court returned to its *Rosario* and *Storer* line of reasoning in *Anderson v. Celebrezze*,¹⁴¹ in which it announced a balancing test to weigh the competing interests between candidate supporters and the state. In *Anderson*, the Court held that Ohio's filing deadline for presidential candidates violated the First Amendment associational rights of Independent candidate John Anderson and his supporters.¹⁴² Nearly two months after the deadline, the candidate's boosters presented the requisite number of petition signatures to place Anderson on Ohio's November general election ballot.¹⁴³ The State

135. *Id.* at 64.

136. *See id.*

137. *See id.* at 68. The Court stated that "[t]hese are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote." *Id.* The Court required a "substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 64 (internal references omitted).

138. In *Buckley*, Justice Thomas maintained that the *Valeo* Court actually had applied a standard less rigorous than strict scrutiny. *See Buckley*, 119 S. Ct. at 653 (Thomas, J., concurring in the judgment); *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 62 (1987) (arguing that the *Valeo* Court applied intermediate scrutiny).

139. *See Valeo*, 424 U.S. at 58–59.

140. *Id.* at 19.

141. 460 U.S. 780, 788–90 (1983).

142. *See id.*

143. *See id.* at 782.

refused, citing Ohio's interests in fostering a stable political system, equal treatment of all candidates, both party and non-party, and adequate time for Ohio voters to evaluate candidates.¹⁴⁴ The Court's balancing test considered the First Amendment rights of Anderson and his supporters against specific state interests in restricting those rights.¹⁴⁵ Justice Stevens, a consistent opponent of states' interests in election-issue cases,¹⁴⁶ wrote the majority opinion rejecting each of Ohio's purported interests as insubstantial when compared to the voting and associational rights of Anderson's supporters.¹⁴⁷

In *Meyer v. Grant*,¹⁴⁸ the Court applied strict scrutiny in a unanimous decision striking down a Colorado ban on compensating ballot-petition circulators.¹⁴⁹ In *Meyer*, a case upon which the *Buckley* Court relied heavily,¹⁵⁰ the Court held that the Colorado law violated the First Amendment rights of circulators and proponents to communicate political speech.¹⁵¹ The Court determined that ballot-

144. See *id.* at 796.

145. See *id.* at 789. The *Buckley* Court relied on the *Anderson* balancing test. See *Buckley*, 119 S. Ct. at 640-42.

146. See, e.g., *Buckley*, 119 S. Ct. at 636 (joining the majority opinion against the state); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997) (Stevens, J., dissenting) (dissenting from the majority holding for the state); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (joining opinion against state); *Burdick v. Takushi*, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting, joined by Stevens, J.) (dissenting from holding for state); *Burson v. Freeman*, 504 U.S. 191, 217 (1992) (Stevens, J., dissenting) (dissenting from holding for state); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989) (joining opinion against state); *Meyer v. Grant*, 486 U.S. 414 (1988) (joining opinion against state); *Anderson*, 460 U.S. at 806 (joining opinion against state).

147. See *Anderson*, 460 U.S. at 796-806. Chief Justice Rehnquist's dissent in *Anderson* parallels his dissent in *Buckley* in many respects, especially in his defense of state interests. See *id.* at 806-23 (Rehnquist, C.J., dissenting); *Buckley*, 119 S. Ct. at 659-62 (Rehnquist, C.J., dissenting).

148. 486 U.S. 414, 420 (1988).

149. See *id.* at 428. The Colorado statute deemed payment of circulators a felony. See *id.* at 417 (discussing COLO. REV. STAT. ANN. § 1-40-110 (West 1988) (repealed 1989)).

150. See *Buckley*, 119 S. Ct. at 639, 642. Analysts of *Meyer* predicted some of the ramifications of the ruling, including some of the issues raised in *Buckley*. See Lowenstein & Stern, *supra* note 8, at 214. Under a strict interpretation of *Meyer*, any restrictions on who may circulate would violate the First Amendment right to engage in core political speech. See Lowenstein & Stern, *supra* note 8, at 214. Regulations on circulation may violate the rights of "persons under eighteen, aliens, . . . formerly convicted felons, and others If saying that one individual may not be paid to circulate a petition infringes freedom of speech, saying that another individual may not circulate a petition at all must violate the First Amendment even more." Lowenstein & Stern, *supra* note 8, at 214.

151. See *Meyer*, 486 U.S. at 428. Lower courts have interpreted broadly the holding in *Meyer*. In *LIMIT v. Maleng*, 874 F. Supp. 1138 (W.D. Wash. 1994), a district court cited the "clear mandate" of *Meyer* and voided a state statute banning payment of petition circulators on a per signature basis. See *LIMIT*, 874 F. Supp. at 1141. Similarly, in a case foreshadowing *Buckley*, a court struck down a registration requirement for circulators in *Term Limits Leadership Council v. Clark*, 984 F. Supp. 470, 475 (S.D. Miss. 1997). The

petition circulation is "core political speech"¹⁵² because circulation "involves both the expression of a desire for political change and a discussion of the merits of the proposed change."¹⁵³ Drawing from the Court's reasoning in *Valeo*,¹⁵⁴ and foreshadowing its analysis in *Buckley*, the *Meyer* Court concluded that the Colorado provision restricted speech both because the prohibition diminished the number of circulators and because the ban consequently decreased the likelihood that an initiative would gain enough signatures to be placed on an election ballot.¹⁵⁵ The Court rejected Colorado's argument that the ban ensured that initiatives or referendums

circulators in this case were not only unregistered, they were also not residents of Mississippi. *See id.* at 472.

152. *Meyer*, 486 U.S. at 422.

153. *Id.* at 421. Commentators have questioned the validity of classifying petition circulation as "core political speech." For example, Professors Lowenstein and Stern cite a successful California petition drive coordinator who stated that "about 75 percent of the people sign [a petition] 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 & Stern, *supra* note 8, at 197 (quoting Carla Lazzareschi Duscha, *The Koupals' Petition Factory*, 6 CAL. J. 83, 83 (1975)).

154. *See Meyer*, 486 U.S. at 419 (describing the Tenth Circuit's analogy between issues in *Meyer* and *Valeo*); *see also supra* notes 134-40 (discussing *Valeo*).

155. *See Meyer*, 486 U.S. at 422-23. Some commentators have suggested an alternative theory that interprets the ban as affecting the collection of signatures rather than speech because Colorado's statute did not prevent petition proponents from hiring advocates to accompany volunteer circulators. *See Lowenstein & Stern, supra* note 8, at 210-11. For a court opinion critical of this alternative theory, *see Bernbeck v. Moore*, 936 F. Supp. 1543, 1558-59 (D. Neb. 1996) (following *Meyer* in striking down Nebraska's petitioner registration requirement).

Professors Lowenstein and Stern also argue that petition qualification requirements do not exist to put as many initiatives on the ballot as possible; rather, they serve to winnow out proposals that do not enjoy sufficient popular support. *See Lowenstein & Stern, supra* note 8, at 210-11. They argue that allowing paid circulators in Colorado would likely result in increasing numbers of qualified petitions, which in turn would overwhelm voters at the ballot booth. *See id.* Legislators likely would respond by making the qualification process more difficult, for example, by reducing the amount of time allowed for gathering signatures. *See id.* This process increasingly will tend to favor petition proponents who hire circulators over proponents who rely on volunteers. *See id.* As an example of *Buckley*'s furtherance of this trend, a successful Colorado petition sponsor stated that the ruling will not result in a dramatic increase in petitions because of the high cost of the process, while Colorado's Secretary of State noted the increasing prevalence of "initiative corporations." Michael Romano, *Ruling Not Expected to Boost Initiatives*, ROCKY MTN. NEWS (Denver, Colo.), Jan. 13, 1999, at 18A.

For other examples of cases in which courts invalidated statutes that limited or prohibited payment to circulators, *see Ficker v. Montgomery County Bd. of Elections*, 670 F. Supp. 618, 621 (D. Md. 1985) (following *Valeo* in holding that a ban on payment of circulators is invalid as unduly trenching on rights of political speech), and *Hardie v. Eu*, 556 P.2d 301, 304 (Cal. 1976) (holding that a statute limiting payment to 25¢ cents per signature is an unjustified restriction of First Amendment speech rights under *Valeo* rationale).

enjoyed adequate grassroots support, concluding that the existing requirement that a petition garner a specified number of signatures before appearing on the ballot¹⁵⁶ addressed that concern.¹⁵⁷ Colorado also maintained that the prohibition guarded against the possibility that paid circulators would more likely succumb to corruption than their unpaid counterparts.¹⁵⁸ The Court responded that Colorado had presented no evidence showing that paid circulators were more prone to fraud than volunteers,¹⁵⁹ moreover, existing provisions imposing criminal sanctions on fraudulent circulators adequately safeguarded the process.¹⁶⁰

In *Burdick v. Takushi*,¹⁶¹ the Court followed the reasoning of *Rosario* and *Storer* in upholding a state election regulation while elaborating on the process of balancing states' interests against citizens' rights.¹⁶² At issue in *Burdick* was Hawaii's prohibition of write-in voting.¹⁶³ The Court concluded that burdening a citizen's right to vote does not necessarily subject a provision to heightened scrutiny, noting that "to require that [every voting] regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."¹⁶⁴ Borrowing from the test enunciated in *Anderson*, the Court explained that courts must measure the degree to which the state election law encroaches on the First Amendment rights of citizens in order to determine what analysis to apply; if the burden on rights is "reasonable [and] nondiscriminatory," then the state's interest in regulating elections usually warrants the provision,

156. See COLO. CONST. art. V, § 1(2) ("[S]ignatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition . . ."); COLO. REV. STAT. ANN. § 1-40-105 (West 1980 & Supp. 1987).

157. See *Meyer*, 486 U.S. at 425–26. For a critique of this conclusion, see *supra* note 33.

158. See *Meyer*, 486 U.S. at 426.

159. See *id.*

160. See *id.* at 427. Critics of the Court's reasoning argue that the Court incorrectly viewed Colorado's bans on payment of circulators and circulator fraud as aimed at regulating individual conduct. See Lowenstein & Stern, *supra* note 8, at 184–85. This view facilitated a traditional First Amendment approach to the challenged statute. See *id.* The critics assert, however, that the statute is designed mainly to control the state's conduct—the conditions under which Colorado will allow initiatives to get on the ballot—and, therefore, the law is not particularly amenable to First Amendment review. See *id.*

161. 504 U.S. 428 (1992).

162. See *id.* at 437.

163. See *id.* at 430.

164. *Id.* at 433.

and strict scrutiny is inappropriate.¹⁶⁵ State election laws that create merely reasonable burdens are presumed to be valid.¹⁶⁶ The Court considered Hawaii's ban on write-in voting a relatively mild infringement on voters' First Amendment rights and determined that Hawaii's interest in preventing party raiding and factionalism outweighed voters' concerns.¹⁶⁷

The Court in *McIntyre v. Ohio Elections Commission*¹⁶⁸ applied exacting scrutiny to strike down a prohibition on distributing anonymous campaign handbills, an activity that the Court held to be core political speech.¹⁶⁹ Ohio argued that its interest in deterring libel and fraud justified the law, but the Court concluded that other existing regulations addressed the concern.¹⁷⁰ In the Court's view, the ban on anonymous election literature was overbroad because it prohibited dissemination of documents that in no way could be construed as fraudulent.¹⁷¹ The *McIntyre* Court did allow for the possibility that a more circumscribed identification requirement would be constitutional, but the Court did not elaborate on that point.¹⁷² Justice Scalia, in a dissent joined by Chief Justice Rehnquist, criticized what he called the Court's discovery of a "hitherto unknown right-to-be-unknown while engaging in electoral politics."¹⁷³ Justice Scalia also found fault with the majority's application of strict scrutiny, especially in light of the Court's announcement that a more limited statute might be constitutional.¹⁷⁴

The flexible standard developed in *Anderson* and *Burdick* guided the Court in *Timmons v. Twin Cities Area New Party*,¹⁷⁵ which further established the states' authority to regulate elections.¹⁷⁶ As in *Storer*,

165. *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S.780, 788 (1983)).

166. *See id.* at 441.

167. *See id.* at 439. For a thoughtful analysis of the *Burdick* Court's announced test, see Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 917-19 (1994).

168. 514 U.S. 334 (1995).

169. *See id.* at 336, 347.

170. *See id.* at 349-50.

171. *See id.* at 351.

172. *See id.* at 353 ("We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here.").

173. *Id.* at 371 (Scalia, J., dissenting).

174. *See id.* at 380 (Scalia, J., dissenting). Justice Scalia stated that the strict scrutiny test, in which a statute must be "narrowly tailored to serve an overriding state interest," is "ordinarily the kiss of death." *Id.* (Scalia, J., dissenting).

175. 520 U.S. 351 (1997).

176. *See id.* at 358. The Court stated that "[r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser

Timmons involved a statute that regulated candidates' ballot access: Minnesota law prohibited a candidate from running a "fusion" candidacy in which the candidate's name would appear on the election ballot as the candidate for multiple parties.¹⁷⁷ Pursuant to this law, Minnesota barred a minor political party from listing on the ballot a candidate who already had been sponsored by another political party.¹⁷⁸ The minor party sued the State, asserting that its ban on fusion candidacies violated the party's First Amendment right of association.¹⁷⁹ The Court determined that the minor party's associational rights were not severely burdened because Minnesota's laws only ruled out as candidates those who were already running for another party.¹⁸⁰ Therefore, Minnesota did not need to establish compelling state interests, but merely needed to show interests sufficient to outweigh the burden on the party's rights.¹⁸¹ The Court held that Minnesota's interests in preventing exploitation of fusion candidacies¹⁸² and in promoting party stability¹⁸³ outweighed the party's rights of association.¹⁸⁴

During the final three decades of the twentieth century, the Court's application of its gradually evolving, evaluative framework¹⁸⁵ for these campaign regulation cases has led to inconsistent holdings. In *Kusper* and *Rosario*, both written by Justice Stewart, the Court used disparate standards of review to evaluate similar voter

burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' " *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (internal quotation marks omitted))).

177. *See id.* at 353-54.

178. *See id.* at 354. Andy Dawkins was running unopposed in the Minnesota Democratic-Farmer-Labor Party's primary for a state-elected office; respondent New Party chose Dawkins as its candidate for the same office in the November general election. *See id.*

179. *See id.* at 355.

180. *See id.* at 363.

181. *See id.* at 363-64.

182. *See id.* at 365-66. Minnesota argued that minor parties could nominate a popular major-party candidate and, thus, in future elections more easily gain established ballot access than the more difficult process of obtaining the requisite number of petition signatures. *See id.* at 366.

183. *See id.* at 366-69. The majority reasoned that states' interests allow them to take steps to regulate elections in ways that tend to favor the two-party system and attenuate the effects of factionalism. *See id.* at 367. *Cf.* THE FEDERALIST NO. 10 (James Madison) (discussing problems of factionalism). Justice Stevens, in dissent, asserted that an interest in maintaining a two-party system is not a sufficient justification to allow Minnesota to keep the fusion ban. *See Timmons*, 520 U.S. at 377-82 (Stevens, J., dissenting).

184. *See Timmons*, 520 U.S. at 369-70.

185. For an outline of this framework, see *supra* notes 105-11 and accompanying text.

registration rules, both of which purported to achieve the same regulatory goal.¹⁸⁶ The *Valeo* Court announced an "exacting scrutiny"¹⁸⁷ test to evaluate disclosures of campaign contributions yet proceeded to apply an intermediate level of scrutiny.¹⁸⁸ Moreover, while in *Valeo* the Court stated a high standard and then lowered it, the *Anderson* Court did just the opposite: after enunciating a balancing test for which Ohio's interests would normally suffice to justify "reasonable, nondiscriminatory restrictions[.]" the Court applied the test in a manner akin to heightened or strict scrutiny, because the Court found that the regulation discriminated against independent candidates.¹⁸⁹ As a result of these inconsistencies, the Court's framework for assessment of election laws makes it difficult to predict the outcome of potential controversies. The case-by-case approach to non-speech election cases embraced by *Storer* and *Anderson*, in which courts are to balance the burden on citizens' rights against states' regulatory interests, does not send a clear signal to the lower courts or potential litigants. The *Storer* Court explicitly admitted the unpredictable nature of its test,¹⁹⁰ and nine years later the Court in *Anderson* did little to improve the test's clarity.¹⁹¹

186. See *Kusper v. Pontikes*, 414 U.S. 51, 59-60 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973); *Brownstein*, *supra* note 167, at 896-98 (concluding that *Kusper* applied a higher standard of scrutiny than *Rosario*).

187. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

188. See *Stone*, *supra* note 138, at 62 (concluding that the *Valeo* Court applied intermediate scrutiny).

189. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The Court determined that the March filing deadline for independent presidential candidates "places a particular burden on . . . Ohio's independent-minded voters." *Id.* at 792. In dissent, then-Justice Rehnquist, writing for three other Justices, argued that the deadline merely requires a candidate to decide in March whether to file as an independent or seek nomination as her party's candidate and, thus, prevents independents from getting two shots at the November ballot. See *id.* at 811 (Rehnquist, J., dissenting); see also Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1869 n.175 (1996) (stating that the *Anderson* Court applied strict scrutiny); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 765 n.43 (1986) (observing that the Court applied heightened scrutiny because the viewpoint-neutral state regulation had a disproportionately large effect on independent candidates); Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1339 n.63 (1987) (noting that the Court applied heightened scrutiny because independent candidates' interests were involved).

190. See *Storer v. Brown*, 415 U.S. 724, 730 (1974). The Court wrote, "[w]hat the result of this process will be in any specific case may be very difficult to predict with great assurance." *Id.*; see also *Brownstein*, *supra* note 167, at 915-16 (noting that *Storer* applied a poorly defined "mixture of strict scrutiny and a more indeterminate balancing test").

191. See *Anderson*, 460 U.S. at 788-89. The Court stated that "[t]he results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the

Buckley follows a line of cases in which the deciding factor is the nature of the test that the Court applies to evaluate the state's interests. Although the *Buckley* majority chose strict scrutiny without announcing it, the dissenters would have chosen a less demanding test for Colorado's regulatory interests,¹⁹² one that requires that the provisions merely satisfy "reasonable, nondiscriminatory restrictions."¹⁹³ Generally, when the Court applies the reasonableness test, the state's interests prevail.¹⁹⁴ Conversely, an application of strict scrutiny usually results in an invalidation of the state's election regulation.¹⁹⁵ Regardless of the manner in which the Justices reached their conclusions in *Buckley*, the majority's choice of strict scrutiny virtually ensured the invalidation of the Colorado election requirements at issue,¹⁹⁶ while the dissenting Justices' choice of the reasonableness standard would have allowed the requirements to stand.¹⁹⁷

In making its ruling, the *Buckley* Court determined that it was

hard judgments that must be made.' " *Id.* (quoting *Storer*, 415 U.S. at 730); see also Brownstein, *supra* note 167, at 917 (interpreting *Anderson* as announcing three tiers of scrutiny).

192. See *Buckley*, 119 S. Ct. at 653–54 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 659 (Rehnquist, C.J., dissenting).

193. *Anderson*, 460 U.S. at 788.

194. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 396 (1997) (upholding a ban on multiple-party ballot appearance); *Burdick v. Takushi*, 504 U.S. 428, 442 (1992) (upholding Hawaii's prohibition of write-in voting); *Storer*, 415 U.S. at 746 (upholding provision regarding candidate-party affiliation); *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (upholding a restriction on voter registration); *Biddulph v. Mortham*, 89 F.3d 1491, 1493 (11th Cir. 1996) (upholding titling and single-subject requirements for initiative petitions because they do not burden core political speech and are content neutral); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 293–94 (6th Cir. 1993) (upholding procedures to check signatures on petitions). But see *Anderson*, 460 U.S. at 789–806 (application of a newly announced balancing test led the Court to strike down a state law).

195. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (voiding a prohibition on anonymous campaign literature); *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (invalidating a ban on paying ballot-petition circulators); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) (voiding Berkeley, California's limit on contributions to groups supporting or opposing ballot measures); *Kusper v. Pontikes*, 414 U.S. 51, 60–61 (1973) (striking down a restriction on voter party affiliation). But see *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding a ban on any campaign-related activity within 100 feet of polling place entrances and stating that "[this] is the rare case in which we have held that a law survives strict scrutiny"); *Austin v. Michigan*, 494 U.S. 652, 654–55 (1990) (upholding under strict scrutiny a Michigan ban on corporate expenditures on state election campaigns); *Buckley v. Valeo*, 424 U.S. 1, 60–84 (1976) (per curiam) (applying strict scrutiny, yet upholding a requirement of campaign finance disclosure).

196. See *Buckley*, 119 S. Ct. at 648.

197. See *id.* at 658 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 659 (Rehnquist, C.J., dissenting).

bound to follow the precedent of *Meyer*, which, if taken to its logical conclusion, would invalidate any state regulation that decreases the quantity of political speech in the ballot-petition process.¹⁹⁸ In addressing the challenged statutes in *Buckley*, however, the Court assumed that a residency requirement for circulators would be constitutional and relied on that assumption in invalidating Colorado's circulator registration provision as unconstitutional.¹⁹⁹ Yet, in a strict *Meyer* framework, there appears to be no clear distinction between the registration and residency requirements: to uphold either one would decrease the pool of potential circulators, thereby reducing the quantity of core political speech and decreasing the possibility that an initiative would get on the ballot.²⁰⁰ Accordingly, both the registration and residency requirements should be subject to strict scrutiny under the reasoning in *Meyer*.²⁰¹ The *Buckley* Court's presumption that a residency requirement for circulators would be constitutional serves to highlight the fact that the standards applied by the *Buckley* and *Meyer* Courts were actually different. This discrepancy may signal that the Court is retreating from *Meyer*'s harsh stance toward state regulation of petitioners.²⁰²

Additionally, one may conclude that the Court in *Buckley* applied less than strict scrutiny to Colorado's regulations.²⁰³ This conclusion is bolstered by the Court's use of the phrase "substantial interests," a term that usually denotes intermediate scrutiny, in describing Colorado's aims in regulating the initiative process.²⁰⁴ In

198. See *Meyer*, 486 U.S. at 425 (declaring that the burden the state must overcome to justify such a regulation is "well-nigh insurmountable").

199. The Court stated that "assuming that a residence requirement would be upheld as a needful integrity-policing measure . . . the added registration requirement is not warranted." *Buckley*, 119 S. Ct. at 645.

200. See *id.* at 643-44 (concluding that the registration requirement is invalid under *Meyer*).

201. The same argument applies to the badge provision. The Court discarded the name requirement, but did not rule on the constitutionality of requiring other badge information: the circulator's paid or volunteer status and the name of the employer of a paid circulator. See *id.* at 645. Both parts of the badge requirement would deter some potential circulators from participating in the petition process and would therefore restrict political speech in the same manner as would both the residency and registration provisions.

202. See *supra* note 198 and accompanying text (noting *Meyer*'s language).

203. See *supra* notes 74-79 and accompanying text (describing Justice Thomas's assertion that the *Buckley* Court applied less than strict scrutiny).

204. *Buckley*, 119 S. Ct. at 647-48. Justice Ginsburg referred to the *Valeo* Court's upholding of disclosure requirements as "substantially related to important governmental interests." *Id.* at 647. In the present case, Justice Ginsburg deems portions of Colorado's disclosure requirement as responding to a "substantial state interest," while other portions are "no more than tenuously related to . . . substantial interests." *Id.* at 647-48.

Buckley, Justice Ginsburg may have avoided announcing the Court's standard of scrutiny to send a signal that states may still attempt to regulate the ballot-petition process without undue fear that the Court will subject all challenged provisions to strict scrutiny.²⁰⁵ In so doing, the *Buckley* Court, while staying within the strictures of *Meyer*, may be narrowing the seemingly expansive scope of the *Meyer* holding.

As Chief Justice Rehnquist discussed in his dissent in *Buckley*, the Court's decision in the case has potentially substantial ramifications, especially for states concerned about curbing the excesses of the direct legislation tools of initiative and referendum.²⁰⁶ Commentators have criticized the Court's decisions in election and campaign cases such as *Meyer* and *Buckley*, which, purporting to further the democratization of direct legislation, actually have lessened democracy by enabling relatively few individuals—often the wealthy and influential—to control more easily the initiative and referendum processes.²⁰⁷ Furthermore, direct legislation petitions tend to focus on issues that special interest groups find vital but that rarely concern a large number of citizens.²⁰⁸

205. This proposition is supported by Justice Ginsburg's modification of established standards in *United States v. Virginia*, 518 U.S. 515, 531 (1996). In that case, the United States alleged that the Virginia Military Institute's refusal to admit female students was a violation of the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 519. In an opinion authored by Justice Ginsburg, the Court purported to apply intermediate scrutiny to review the state-funded school's all-male policy, but held that those defending gender-based government action must show an "exceedingly persuasive justification" for that action. *Id.* at 531. This language appears to represent a standard closer to strict scrutiny than to intermediate scrutiny. See Jon Gould, *The Triumph of Hate Speech Regulation: Why Gender Wins but Race Loses in America*, 6 MICH. J. GENDER & L. 153, 214 (1999) (noting the inconsistency between the purported level of scrutiny and the Court's use of the phrase "exceedingly persuasive justification").

206. See *Buckley*, 119 S. Ct. at 659 (Rehnquist, C.J., dissenting). For discussions of the problems direct legislation can pose to the democratic process, see Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. COLO. L. REV. 129, 136 (1995) (powerful special interest groups often dominate direct legislation processes); Eule, *supra* note 1, at 1526–27 (the initiative procedure affords no opportunity for debate on or modification of propositions); Magleby, *supra* note 1, at 18 (initiatives and referendums are outside of constitutional checks and balances).

207. See *supra* notes 4–8 and accompanying text (describing the large moneyed interests that operate in the initiative industry as well as the difficulties of the poorly educated in participating in direct democracy).

208. See Garrett, *supra* note 8, at 1863; Magleby, *supra* note 1, at 35; Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 86–87 (1990) (observing that small, well-organized special-interest groups outperform large interest groups with diverse agendas).

To protect their citizens from at least some of the ill effects of initiative petitioning, Colorado and other states must continue to seek constitutional means to regulate the process. Although the Court struck down Colorado's three challenged provisions, the State could find less controversial ways to convey vital information about petitions to voters at the meaningful moment when voters decide whether to sign the petitions. In *Meyer*, the Court found that Colorado's interest in policing petitioners' conduct was satisfied adequately by a provision that required on each petition signatory page prominent warnings against forging signatures and signing without understanding the petition.²⁰⁹

Colorado may be able to extend that provision by requiring that each signatory page also contain information about the proponents of the petition, the amount of funds the proponents have spent, and the paid or volunteer status of the circulator.²¹⁰ Such a provision may be constitutional because it would be significantly less intrusive of circulators' rights than the nametag requirement. The circulator would be able to conduct the "one-on-one, communicative aspect of petition circulation"²¹¹ without interruption. The circulator then would allow the voter to read the information about the petition on the signatory page before deciding whether to sign. Such an arrangement would prove an acceptable compromise among the rights of petition proponents, circulators, and voters because it would separate in time, albeit only slightly, the circulator's conveyance of political speech from the voter's receipt of meaningful financial and other information about the petition.²¹² The separation of time here appears to be a " 'matter of degree' "²¹³ that the Court may determine

209. See *Meyer v. Grant*, 486 U.S. 414, 427 (1988).

210. Some states already have statutes that require some or all of this information on each petition signature page. For example, Arizona's law states:

Each petition sheet shall have printed in capital letters in no less than twelve point bold-faced type in the upper right-hand corner of the face of the petition sheet the following:

_____ paid circulator _____ volunteer

A circulator of an initiative petition shall state whether he is a paid circulator or volunteer by checking the appropriate line on the petition form before circulating the petition for signatures.

ARIZ. REV. STAT. ANN. §§ 19-102B, -102C (West 1998); see also CAL. ELEC. CODE § 101 (West 1999) (imposing a similar requirement); OR. REV. STAT. § 250.045(5)(b)(B) (1999) (same).

211. *Buckley*, 119 S. Ct. at 653 (O'Connor, J., concurring in the judgment in part and dissenting in part).

212. See *id.* at 645.

213. *Storer v. Brown*, 415 U.S. 724, 730 (1974) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972)).

to be on the constitutional side of the line.

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