As with other arenas of electoral law, opposing lawyers in courthouses across the United States are battling over ballot measures. The most commonly used mechanism of direct democracy, the initiative, allows individuals to petition a requisite number of signatures to place a statutory or constitutional measure on the ballot for citizens to adopt or reject at the polls. If the flurry of legal challenges seems almost as commonplace as the ballot measures themselves, the level of vitriol between defenders of citizen lawmaking and those who wish to provide safeguards on the process is intense. The push-and-pull to regulate the “the will of the people” is as heightened today as ever over the century-old practice of direct democracy in the American states (Cain and Miller, 2001; Smith and Tolbert, 2004).

To supporters of direct democracy, even the slightest regulation placed on the plebiscitary processes by state and local actors constitutes a frontal assault on the exercise of their First Amendment rights. In particular, efforts to regulate the initiative process are seen as punitive, intended to diminish the fundamental rights of citizens to petition their government. Paul Grant (2001, p. 195), a long-time direct democracy booster, writes, “State officials regulating I and R [Initiative and Referendum] processes are like all government agents,” and “they will fight to preserve their power” at virtually any cost. They claim that legislation ostensibly to reduce fraud in the signature-gathering phase or to ensure transparency in campaign spending increases the “costs” to qualify measures for the ballot and may even cause some potential initiative proponents to cease from using the process. As an owner of a signature-gathering firm said more than a decade ago, so-called legislative reforms are nothing but “thinly veiled attempts to slowly kill” the process (Paparella, 2001, p. 130).
Of course, critics of direct democracy—state lawmakers, state elections officials, and good-government advocates who want to ensure that procedural abuses do not compromise the public interest—view regulations on ballot measures quite differently. In particular, state lawmakers contend that their efforts to monitor the process are not intended to restrict the rights of citizens to petition their state government. Rather, they argue such legislation is needed to protect against fraud and maintain the public trust in electoral institutions. Some nonprofit organizations, concerned about the integrity of the process, have called for tighter regulations on the process. “Direct democracy is often undermined by weak (state) laws,” according to the DC–based Ballot Initiative Strategy Center (2010), and can lead to secret campaign financing, dishonest signature gathering, and outright fraud. As the Economist editorialized in 2011, direct democracy in California epitomizes “the perils of extreme democracy,” as “the citizen legislature has caused chaos,” and that “rather than being the curb on elites that they were supposed to be, ballot initiatives have become a tool of special interests, with ... extremists bankrolling laws that are often bewildering in their complexity and obscure in their ramifications.” Legislative efforts are “necessary,” National Conference of State Legislatures staffer Jennie Drage Bowser (2001) summarizes, “to craft regulations that protect the integrity of the initiative process without infringing on rights guaranteed by the First Amendment.”

The contentious process and politics of direct democracy as practiced in roughly half of the American states has led, indubitably, to a host of legal challenges. In this chapter, I begin with a brief overview of the adoption and early usage of direct democracy (specifically the initiative). Immediately after the inception of direct democracy in the American states more than a century ago, critics argued that the plebiscitary process itself was unconstitutional. These arguments can still be heard today. Enjoined by the courts from eradicating the plebiscitary process in its entirety, state legislatures have enacted laws to prevent petition fraud, clarify the titles and summaries of ballot propositions, mitigate the power of special interest groups and wealthy donors, enhance voter competence by disclosing information to the public about the measures, and protect minority interests. On the other side of the debate, defenders of direct democracy have legally challenged these various regulations. Along the way, state and federal courts—including appeals heard by the Supreme Court of the United States—have provided their opinions on numerous occasions. As a result, considerable variation exists across the two dozen states that permit the initiative process, fostering a wide range of permissible uses and limitations on direct democracy in the American states (Tolbert, 1998).

Early Adoption, and Subsequent Regulation, of the Initiative

In practice, the three mechanisms of direct democracy—the initiative, popular referendum, and recall—did not exist in the American states prior to the turn
of the twentieth century. The citizens of South Dakota became the first to adopt the statewide initiative and referendum in 1898 after the state legislature placed a referendum on the ballot that was overwhelmingly approved by voters. However, a decade elapsed before citizens in the state actually utilized the initiative, as state lawmakers balked at enabling legislation to implement the plebiscitary process.

In many regards, Oregon set—and continues to set—the standard of “citizen lawmaking.” In 1902, Oregonians adopted a legislative referendum permitting the initiative and referendum, and were the first to utilize the statewide mechanisms two years later. In 1904, citizens placed two initiatives on the ballot—one created the direct primary to nominate candidates for elective office and the other allowed local governments to prohibit the sale of liquor—with voters approving both measures at the polls. Two years later, voters approved eight of the ten initiatives that citizens qualified for the ballot by circumventing the state legislature. Oregon’s experiment, nationally recognized as the “Oregon System,” sparked a conflagration of plebiscitary powers that rapidly spread across the county. By 1914, eighteen of the twenty-four states that currently permit the initiative had adopted the procedure, although a few state legislatures continued to drag their feet with implementation language.

Today, the use of direct democracy continues to be more common in western states. Direct democracy was adopted first in western states, many of which were still in their infancy and ripe for experimentation during the first two decades of the twentieth century. Scholars have found that those states with a strong history of populism, anti-monopoly sentiments, and more homogenous populations (e.g., smaller percentages of ethnic and racial minorities and foreign born citizens) and more-dominant interest groups were more likely to adopt the process (Donovan, Bowler, and Lawrence, 2010; Goebel, 2003; Piott, 2003; Price, 1975; Smith and Fridkin, 2008). Perhaps more important, though, legislative referendums allowing citizens to approve the mechanisms of direct democracy were advanced by state legislatures with heightened political competition between the two major parties—Democrats and Republicans—and in those with sizeable numbers of lawmakers in minor parties, as legislatures with an electorally vulnerable majority party were more willing to devolve institutional power to citizens.

Not surprisingly, the substance of many of the earliest measures that proponents succeeded in qualifying for statewide ballots reflected the politics of the time (Tolbert, 2003). Women suffragettes, Prohibitionists, single-tax advocates, labor unions, and good-governance reformers all sponsored ballot measures, utilizing the very plebiscitary procedures they had lobbied to add to their state constitutions. Many of the initiatives, but certainly not all, received broad support from the electorate. Voters approved initiatives establishing various social justice reforms, including women’s suffrage, the direct primary,
the direct election of U.S. Senators, the abolition of the poll tax, home rule for cities and towns, eight-hour work days for women and miners, and the regulation of public utility and railroad monopolies.

These early ballot measures, however, were not the exclusive domain of progressive groups who originally pushed state legislatures to allow popular votes to adopt the mechanisms of direct democracy. In particular, corporate leaders—who nearly unanimously opposed the creation and expansion of direct democracy, in large part because they had considerable leverage over legislative leaders and the inner-workings of state legislatures—quickly realized that they, too, could sponsor ballot measures. Railroads, public utilities, mining operators, the fishing industry, ranchers, newspaper owners, and morticians all took their turn sponsoring ballot measures to advance their narrow economic agendas. For example, in the 1912 election in Colorado, citizens voted on thirty-two statewide ballot measures, including twenty initiatives. Several of the measures—including a controversial public utilities initiative and initiatives favoring agricultural interests, newspaper publishers, and smelter and mining operators—were financed by corporations that had vested interests in the passage of ballot measures. In Oregon, competing fishing industries placed dueling measures on the 1908 ballot, each designed to ban the other’s method of catching salmon; voters approved both measures, forcing the legislature to intervene to resolve the situation. In California, economic interests successfully qualified business-friendly measures on the ballot striking down the eight-hour work day, legalizing greyhound racing and casino gambling (Allswang, 2000; Ellis, 2002; Smith and Lubinski, 2002).

As such, the expression of the vox populi has not always flourished via direct democracy. Throughout its history, ballot measures have rarely been dominated by amateur activists who rely exclusively on volunteers to circulate petitions to qualify their measures, nor has it been immune from the influence of big money. “As long as wealth is as unequally distributed as it is in American society, and political interest groups are organized around private rather than public rewards,” John Shockley (1985, pp. 427–428) noted nearly three decades ago, “ballot proposition campaigns, like American politics generally, will reflect the power of the best organized and wealthiest groups in society.” That sentiment continues today for many critics of the process. In the late 1990s, Washington Post columnist David Broder (2000) trolled the West Coast, interviewing a range of players who contributed to what some have called the “initiative industrial complex.” Jaded by his experience, he concluded that wealthy special interests, sometimes in cahoots with the political parties, dominated the process by spending unlimited sums of money to pay for deceptive advertising to convince voters to approve their schemes.

Today, lawmaking-by-initiative in the two dozen American states that permit the process is at an all-time high, and proponents and opponents spare no expense
Direct Democracy

trying to persuade citizens to cast their voters one way or another (Smith and Tolbert, 2007). Initiative fever is alive and well, and not only in the western region of the country where the plebiscitary process formed its roots. According to data compiled by the National Conference of State Legislatures (2007), between 1904 and 2011, in the two-dozen states that allow statewide direct democracy, citizens have voted on 310 popular referendums and 2,385 initiatives, including 819 initiatives since 1990. These ballot measures span a remarkable range of issues, with some making national headlines and others remaining obscure. In recent elections, citizens have cast ballots on issues as diverse as same-sex marriage bans, taxation and spending limits on state government, public funds for stem cell research, ethics and election reforms, environmental protection, increasing the minimum wage, and ending affirmative action.

In light of the renaissance of the initiative in many of the states over the last three decades—in terms of both its use and levels of spending—it should come as little surprise that some state legislatures have responded by trying to more closely monitor the process. It is certainly true that there is no love lost between most lawmakers and direct democracy. Since the mechanisms were first adopted during the Progressive Era, the initiative in particular has come under close scrutiny by state lawmakers (Collins and Oesterle, 1995; Gerber, 2001; Waters, 2001). Though the policymaking process today in some states with high levels of initiative use may increasingly resemble what some scholars have termed “hybrid democracy” (Garrett, 2005), legislatures in initiative states have not always welcomed the plebiscitary process. Many lawmakers cast a wary eye toward citizen-initiated ballot measures, seeing them as corrupting or threatening—certainly not complementing—the traditional legislative process. To them, direct democracy is a “gun behind the door,” as Woodrow Wilson called the mechanism, that they would very much like to lock in the closet and throw away the key.

Yet, the regulation of the initiative process—and the subsequent litigation challenging new laws—is cyclical. For those with some historical knowledge about the use of direct democracy, the most recent regulatory efforts by state lawmakers against government-by-initiative should be expected. As the initiative has resurfaced as a policymaking tool, many state lawmakers perceive the power of their own lawmaking body to be attenuated. Seeking remedies, they often try to regulate the process, often with good cause. Before considering some of these regulations, however, we consider legal challenges by opponents of direct democracy to eradicate the mechanisms completely.

The Guarantee Clause and Early Constitutional Challenges to Direct Democracy

The first challenges to the plebiscitary form of governance were not from the proponents who were using the mechanisms of direct democracy and were
concerned about efforts by state lawmakers to regulate the system. Rather, they were from critics of the plebiscitary process itself, who claimed that direct democracy was anathema to the guarantee granted in the U.S. Constitution—Article 4, Section 4, Clause 1—“The United States shall guarantee to every State in this Union a Republican Form of Government.” The controversy eventually reached the highest court of the land. As evidenced by the more than 3,000 statewide initiatives that have qualified for the ballot over the last century, to say nothing of the thousands of initiatives and popular referendums on local ballots, the plaintiffs failed to make the case that direct democracy violated the U.S. Constitution.

Two seminal cases date back to 1902, when citizens of Oregon overwhelmingly adopted a constitutional amendment calling for the initiative and referendum process. The measure was placed on the ballot by the state legislature, at the time dominated by members of the Populist Party and fledgling Progressive Republicans and even some Democrats. The constitutional amendment referred to the ballot by the legislature empowered citizens to collect signatures to place statutory or constitutional initiatives on the ballot and challenge via the popular referendum statutes passed by the legislature. (As with several other states, voters a few years later used the initiative process to amend the state constitution by adopting the recall of public officials.) The “Oregon System,” as it was known, became the model for subsequent initiative and referendum legalization efforts across the country (Cronin, 1989; Ellis, 2001; Piott, 2003).

However, early critics of direct democracy challenged the constitutionality of the process. Specifically, they argued that the Oregon System was not “republican” in form—that is, allowed citizens to directly adopt statutes and constitutional amendments, bypassing the elected officials charged with conducting the affairs of the state. As such, they argued that it violated no less than the Guaranty Clause of the U.S. Constitution, which simply states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” The ‘will of the people’ could subvert the representative institutions that the U.S. Constitution was designed to protect.

The constitutionality of Oregon’s initiative and referendum was initially challenged in the Oregon state courts in 1903, with the issue tacked on to a lawsuit stemming from a legislative charter creating the city of Portland. In tackling the issue of direct democracy, which obviously dealt with a federal issue, the Oregon Supreme Court in its 1903 decision, *Kadderly v. City of Portland*, noted that the U.S. Constitution failed to elaborate on what constitutes a “republican” form of government. The court reasoned that a republican form of government must be “administered by representatives chosen or appointed by the people or by their authority” but that “the legislative and executive departments [of the state] are not destroyed, nor are their powers or authority materially curtailed” by the
direct democracy. The U.S. Supreme Court did not grant a *writ of certiorari*, refusing to review the Oregon Supreme Court’s *Kadderly* decision.

A decade later, the U.S. Supreme Court did weigh in on the question of the applicability of the Guarantee Clause to direct democracy. The case stemmed from a 1906 statewide citizen initiative that levied a 2-percent tax on the gross receipts of telephone and telegraph corporations doing business in the state. Voters overwhelmingly approved the ballot measure, but the Pacific States Telephone and Telegraph Co., an Oregon corporation, refused to pay the tax and filed suit, alleging that the state’s initiative process violated the U.S. Constitution’s Guaranty Clause. The lawsuit was eventually heard by the Oregon Supreme Court, which swiftly rejected the company’s claim. Although little by the way of factual evidence was submitted to the lower courts, the Oregon Supreme Court relied on its *Kadderly* decision to reject Pacific States’s constitutional claim. The company appealed, filing a writ of error, and the U.S. Supreme Court decided to hear the case. However, its 1912 decision, *Pacific States Telephone and Telegraph Co. v. Oregon*, did not satisfy the company or ardent critics of direct democracy. In an 8 to 0 decision, the court ruled unanimously that a constitutional challenge to direct democracy under the Guaranty Clause amounted to a nonjusticiable “political question.” States, the court averred, could incorporate the mechanisms of direct democracy into their governing structures, and the court was not prepared to review each state’s particular form of governance to determine whether they were or were not republican.

By ruling that the constitutionality of direct democracy is “a nonjusticiable political question,” the high court seemingly shut the door on subsequent challenges to the constitutionality of citizens directly voting on policy questions. Yet, some legal scholars still consider the constitutionality of direct democracy an open question with respect to the Guarantee Clause, as do some contemporary critics of the process (Linde, 1993, 2003; Williams, 1978). Indeed, in 2011, bipartisan activists in Colorado, critical of direct democracy, filed a lawsuit in U.S. District Court in Denver challenging the constitutionality of the practice. In addition to challenging the constitutionality of the Taxpayers’ Bill of Rights (TABOR), a 1992 citizen-initiated constitutional amendment that has sharply limited taxes in the state (Smith 1998), the lawsuit goes one step further, as the plaintiff’s claim that direct democracy is unconstitutional under a republican form of government. “At our nation’s birth,” the plaintiffs in *Kerr v. State of Colorado*, plead in their 2011 complaint for injunctive and declaratory relief, “some three million citizens acted through their representatives at a constitutional convention to commit the nation to a government of representative democracy, a Republic, and rejected direct democracy.” The author of TABOR, Colorado Springs attorney Douglas Bruce, countered, saying that the lawsuit “isn’t only attacking Colorado. The consequences of a ruling in their favor would invalidate
the Constitution in all 50 states, and would also mean no limits on the federal government. We would have anarchy” (Goodland, 2011).

Regulating (and Litigating) Direct Democracy

Although the earliest lawsuits challenging the underlying constitutionality of direct democracy were brought forth by defenders of representational government, historically, most of the lawsuits filed dealt with regulations placed on the process by state legislatures. There is an unmistakable irony to this game of cat and mouse. In many ways, the initiative can be seen as a victim of its own success. As citizens increasingly turn to the initiative to bring about policy changes, lawmakers in turn often seek to turn up the heat on the process in a not-too-subtle effort to preserve their monopoly on lawmaking.

Lawmakers, of course, may have a compelling state interest to regulate the process beyond any perceived institutional threats to their own lawmaker powers. State legislatures generally have broad authority to establish the electoral procedures in their states. This includes ensuring the integrity of and public trust in direct democracy procedures. Although there is some variation, the parameters established by state constitutions are generally confined to whether statutory and constitutional amendments may be put forth by citizens and the number of valid signatures from supporters of a proposed measure must collect to qualify for the ballot. In Maine, for example, citizens are permitted only to initiate statutes; the state constitution requires circulators to collect petitions with the valid signatures of registered voters equaling at least 10 percent of the votes cast for governor in the last statewide election. Colorado’s constitution, in contrast, allows citizens to propose either constitutional amendments or statutes. In either case, circulators need only to collect valid signatures from registered voters equaling 5 percent of the votes casted for secretary of state in the last statewide election. Arizona, which allows citizens only to amend the constitution, requires petitioners to collect valid signatures from 15 percent of the votes casted for governor in the previous statewide election.

As such, the constitutions of the two dozen states that permit the initiative leave considerable discretion to state legislatures to regulate the process to ensure a minimum level of popular support for the process. There are innumerable ways a legislature could require proponents of a ballot measure to demonstrate a threshold level of public interest, beyond the broad constitutional requirements (Smith, 2008). For more than a century, state legislatures have set the legal conditions under which signatures are gathered and the ensuing ballot initiative campaigns are conducted. All states, for example, place conditions on the format of petitions that are to be circulated and the window during which valid signatures can be collected. Some require proponents to pay filing fees to the secretary of state before commencing their signature-gathering efforts, whereas
others specify geographic distribution requirements on where signatures may be gathered—such as congressional districts—to ensure widespread support across the state. Other states place tight single-subject standards on the substantive text of ballot initiatives, require the attorney general or a state judge to set the precise language found in a ballot initiative’s title and summary or attach financial impact statements to initiatives that qualify for the ballot (Lowenstein, 2004; Matsusaka and Hasen, 2010). All the states verify the validity of the signatures (or random sample) submitted for verification, and some even require proponents to pay for the verification. Suffice to say, there is considerable variation regarding the ease and availability of the initiative process across the states (Bowler and Donovan, 2004, Collins and Oesterle, 1995).

Among the many conditions placed on the process of direct democracy, two policy arenas stand out as having generated the preponderance of subsequent litigation: regulations on the signature-gathering process and regulations on the campaign finance activities of ballot issue committees. Both arenas are informed by a jurisprudence of disclosure—that state legislatures have an interest in ensuring the transparency and integrity of direct democracy.

**Signature Gathering of Ballot Petitions**

All states regulate the process of collecting the necessary number of signatures needed to qualify an initiative for the ballot. Since the Progressive Era, state legislatures have regulated the mechanics of signature gathering—from the initial circulation to the validation of registered voters who signed petitions. State courts have generally upheld the right of lawmakers to determine the minimum number of signatures to qualify a ballot measure and the method used to verify those signatures. However, federal courts have been more circumspect with regard to the extent to which states may regulate the First Amendment rights of signature gatherers in an effort to combat fraudulent petitioning.

In 1988, the U.S. Supreme Court decided to wade into the murky waters of signature gathering for ballot measures. For decades, paid petitioners were a permanent fixture of Colorado’s signature-gathering industry. As early as 1912, proponents of ballot measures paid some of their signature gatherers upwards of $.03 a signature (McCuan, et al., 1998, Smith and Lubinski, 2002). However, in 1941, the Colorado state legislature, in an attempt to reduce the procurement of fraudulent signatures, passed a law making it illegal for ballot petition circulators to accept any financial reward for signatures they collected. Colorado’s ban was not unique. Several other states, including Ohio, South Dakota, and Washington, had prohibitions on paid circulator gatherers dating to the 1910s. South Dakota’s ban on paid petition gatherers, for example, dated to 1913, when the state legislature passed a law that required signature gatherers to sign an affidavit attesting that they were not being paid (Schnader, 1916, pp.
Idaho and Nebraska had similar laws on the books. The underlying reason for each of these bans was to reduce the incentive of paid petitioners to submit fraudulent signatures.\textsuperscript{5}

Colorado’s new law was challenged in federal district court in 1984 by lawyer and initiative proponent, Paul Grant, on the grounds that the law restricted petition gatherers’ freedom of expression as guaranteed under the First Amendment. Coloradans for Free Enterprise, a ballot issue committee headed by Grant, was having difficulty using volunteers to collect the 46,737 signatures needed to qualify a ballot initiative that would have deregulated aspects of Colorado’s Public Utilities Commission. Grant filed suit against Natalie Meyer, the Colorado secretary of state, alleging that the state law banning paid petitioners restricted their First Amendment rights, namely, paying people to collect signatures to qualify ballot petitions.

In its 1988 decision, \textit{Meyer v. Grant}, the U.S. Supreme Court struck down the longstanding 1941 law, ruling unanimously that Colorado’s restriction on paid initiative signature gatherers was unconstitutional. Initiative petitions were protected political speech under the First Amendment, according to the court, and it outweighed the interests of the state to reduce fraudulent signature gathering. The court summarily rejected the state’s argument that paying signature gatherers increased the undue influence of money in the process, compromising its integrity.

After their defeat at the hands of the U.S. Supreme Court, citizen activists and lawmakers in several states focused their attention on different means of regulating how paid signature gatherers could be compensated for their petitioning activities. In Oregon, it was citizens who through the initiative process itself adopted a pay-per-signature ban on signature gatherers. In 2002, Oregonians approved Measure 26, the “Initiative Integrity Act,” which amended Article IV of the state constitution to prohibit paying signature gatherers on a per-signature basis. Supporters argued that ban would reduce fraudulent signature gathering and increase invalidity rates. Opponents challenged the law in federal court, but the Ninth Circuit Court of Appeals upheld the ban in its 2006 decision, \textit{Prete v. Bradbury}. The following year, the Oregon state legislature passed additional legislation to further tighten the regulations.

Other state legislatures have followed suit with similar bans. Ten other states—Colorado, Idaho, Maine, Mississippi, Montana, Nebraska, North Dakota, Ohio, South Dakota, and Washington—passed similar legislation restricting the payment methods of petition circulators (Ballot Initiative Strategy Center, 2010; Gloger, 2006). Advocates of laws banning pay-per-signature gathering contend that they decrease the financial incentives of petitioners to submit fraudulent signatures. Opponents of the laws argue that pay-per-signature bans increase the overall cost to qualify ballot measures because it monetarily de-incentivizes gathering signatures.
Not surprisingly, plaintiffs—often with the legal assistance of libertarian advocacy groups, such as the Institute for Justice, the Independence Institute, and the American Civil Liberties Union—have objected to laws placing limits on the compensation of signature gatherers. Recently, the governors of Nebraska and Colorado signed bills limiting the payment of circulators by the signature. Like Oregon’s law, the 2008 Nebraska statute completely prohibits pay-per-signature in ballot petitioning. Among other provisions, the 2009 Colorado law prohibits paying more than 20 percent of the total compensation to petition circulators on a per-signature basis. Both laws were immediately challenged in federal court. The Nebraska chapter of the ACLU, on behalf of the nonprofit Citizens in Charge Foundation, filed suit in Omaha, arguing that the ban infringed on the constitutional rights of petitioners and made it more difficult to conduct a petition drive. Along similar legal grounds that the Colorado law violates the rights of signature gatherers under the First Amendment, the Colorado-based Independence Institute filed suit in a Denver federal court.

Recently, and not too surprisingly, the federal district courts have handed down conflicting opinions on the question of whether states can regulate how signature gatherers may be paid. Following the logic of the Ninth Circuit’s Prete decision, the Nebraska federal judge upheld the portion of the state’s law prohibiting the payment of petition circulators on a per-signature basis, finding it to be constitutional. In the Colorado case, Independence Institute v. Buescher (2010), the Denver federal judge struck down the state law, citing a 2008 decision by the 6th Circuit Court of Appeal, Citizens for Tax Reform v. Deters, that overturned a 2005 Ohio law prohibiting the payment of petitioners by the signature abridged First Amendment rights. The decisions of the Nebraska and Colorado federal district judges are currently under appeal.

Although the U.S. Supreme Court recently refused to grant a writ of certiorari when the state of Ohio appealed an appellate court decision that found the state’s ban on pay-per-signature gathering unconstitutional, the issue may be ripening. However, until the high court weighs in with a definitive ruling on the constitutionality of limiting the methods by which ballot measure proponents may pay signature gatherers, the regulatory landscape across the country will continue to resemble a patchwork quilt. State legislatures, concerned about the integrity of the signature gathering process, will likely try to devise new regulations to curtail fraud and deceptive practices by paid signature gatherers. However, just as state legislatures can be expected to offer new regulations, surely too will there be more legal challenges, with libertarian groups defending the rights of petitioners and claiming that the regulations are burdensome.

In addition to (or in lieu of) placing restrictions on their compensation, many state legislatures have enacted other disclosure requirements on petitioners to hold them more accountable and reduce the fraudulent gathering of signatures. These conditions include requiring a signature gatherer to be a resident or a
registered voter, filing his or her name, address, and other information with the Office of the Secretary of State, requiring the public disclosure of the petitioner’s name when collecting signatures, signing an affidavit attesting to the veracity of the names signed on the petition, and even securing a bond in the case of a subsequent legal challenge concerning the validity of the signatures. Other states continue to require circulators to sign affidavits included on each petition they submit for verification. For example, the state of Washington requires initiative petition circulators to sign a declaration on initiative and referendum petitions that attests to the validity of the names and signatures they have collected. The affidavit states that, to the best of the petition circulator’s knowledge, “every person who signed this sheet of the forgoing petition knowingly and without any compensation ...willingly signed his or her name and that the information provided therewith is true and correct.” The intent of the legislation is to reduce the incentives for deception and fraud during the petition-gathering process. As with the limits placed on how petitioners may be compensated, these regulations have a long history, and there is considerable variation in these requirements across the states.8

In 1999, the U.S. Supreme Court established other constitutional limits on petitioner disclosure requirements in its decision *Buckley v. American Constitutional Law Foundation (ACLF)*. After the submission of more than 25,000 fraudulent signatures submitted by petitioners in an effort to qualify an initiative in the early 1980s legalizing casino gambling (which included the name of a Denver judge), the Colorado legislature passed a law requiring paid petitioners to be registered voters, wear an identification badge with their status of being “paid,” and filing information regarding their salary (Magleby, 1984, p. 63). The badge requirement included the circulator’s name and his or her employer’s name and phone number. The legislation also required each circulator to attach an affidavit to every submitted petition to the secretary of state, which included their name and address. In passing the regulation, the state legislature had contended that the badge was to enable the public to easily identify—and if necessary, for law enforcement to apprehend—any circulators who engaged in misconduct.9 The ACLF challenged the provisions in federal court. In its 1999 decision, the Supreme Court struck down the badge requirement, reasoning that though the name of the petition gatherer was a matter of public record, the circulator may not want to reveal his or her identity when delivering a political message, especially during an intense and emotional point of contact with a potential signer of a petition. The court also struck down the registered voter requirement and salary disclosure for signature gatherers.10 However, the high court upheld the affidavit requirement, reasoning that the public disclosure was not concurrent with the moment the circulator “speaks” to the public when soliciting signatures and did not burden or subject the circulator to harassment.11
The court’s decision in *ACLF* to differentiate the timing and matter of disclosure—that some after-the-fact disclosure in the form of a signed affidavit regarding the veracity of the collected signatures was constitutional, but immediate disclosure at the point-of-sale was not—has informed subsequent regulations legislatures have tried to place on the signature-gathering process. In 2011, California’s state legislature passed a bill that would have required paid petition gatherers to wear a large badge acknowledging that there were being paid (although the name of the petitioner was not included on the badge). Governor Brown vetoed the legislation, arguing it was the beginning of a “slippery slope” that might stifle citizen’s rights (Bennion, 2011). Six years earlier, California Governor Arnold Schwarzenegger had vetoed similar legislation, contending that the initiative process constituted core political speech that should not be burdened. Still stinging from the 1999 defeat in the U.S. Supreme Court, in 2009, the Colorado legislature passed legislation requiring petition circulators to be residents of the state. The law was subsequently challenged by the Independence Institute, in 2010, and a Denver federal judge struck down the provision. In 2008, Nebraska’s governor signed into law a bill that banned out-of-state petition gatherers, requiring local petition gatherers to be residents of the city in which they were collecting signatures and requiring circulators to be at least eighteen years old. An Omaha federal district judge upheld the age requirement but struck down the other provisions of the law, including the residency requirement, reasoning that it violated the constitutional rights of petitioners.

**Disclosure of Petitioned Signatures**

Compared to regulations on placed signature gatherers, there is considerably more legal certainty with regard to the constitutionality of state laws that make the names on ballot petitions available to the public. In 2010, the U.S. Supreme Court made it clear that states could do just that. In its decision *Doe v. Reed*, eight justices on the high court agreed that the public disclosure of petition signatures did not violate the signers’ right to privacy and that the public’s access to copies of ballot petitions could help to deter corruption.

The case stemmed from a 2009 statewide popular referendum campaign led by opponents of a state of Washington law passed that year by the state legislature that recognized domestic partnerships for gays and lesbians wishing to marry. Over the summer, proponents qualified the ballot referendum—dubbed Referendum 71—for the November 2009 election by submitting more than 122,000 signatures. Opponents of the referendum, concerned that a popular vote may overturn the “everything but marriage” law, made a public records request of all the petitions submitted to qualify R-71, which was legal under the state’s Public Records Act. Fighting the release of the signatures,
the proponents of R-71 sued the secretary of state, Sam Reed, to prevent the names from being disclosed, claiming that the signers of their petitions would be subjected to harassment if their names were made public. Although scant evidence was produced, a federal judge in Washington initially sided with the petitioners, who alleged that the public disclosure law violated their rights to anonymous political speech. Washington’s Ninth Circuit Court reversed the lower court’s opinion on appeal.

After the *Doe v. Reed* decision, in which the Supreme Court upheld the public disclosure of petitions, the Washington State Archives made the 138,000 names and signatures on Referendum 71 available to the public for a small fee. Several groups immediately purchased the data and posted the names online for others to download. Those who opposed making the names available to the public continued to claim—despite a paucity of evidence—that the individuals who had signed the 1999 petition would be subjected to harassment (Parry, Smith, and Henry, 2012). A spokesman for Protect Marriage Washington, a group that sued to overturn the state of Washington’s public disclosure law, said, “I believe there will certainly be harassment, and I pray to God there isn’t more than that” (quoted in Baker, 2011).

### Campaign Finance Contributions, Expenditures, and Public Disclosure

When it comes to ballot issue campaigns, state laws regulating the contributions and expenditures in support and opposition of initiatives and popular referendums have been scorned by the courts. By contrast, however, laws requiring the public disclosure of campaign financing in initiative and popular referendum campaign financing activities have generally been well received. Indeed, the impact of the U.S. Supreme Court’s recent *Citizens United v. Federal Election Commission* (2010) ruling (see Chapter 1)—though well known as it relates to permitting independent corporate expenditures in candidate races—has important implications for ballot issue campaigns. Although the controversial decision opened the floodgates to corporate money influencing candidate races, it also reinforced the importance of transparency in the political process. Transparency, the majority wrote in its divided 2010 decision, “enables the electorate to make informed decisions and give proper weight to different speakers and messages.” Indirectly, then, *Citizens United* may help to bolster the constitutionality of state laws calling for the public disclosure of public campaign contributions and expenditures made in support of and opposition to ballot issues.

As with signature gathering and disclosure of names on petitions, decisions by the U.S. Supreme Court have shaped the terrain of state campaign finance laws in ballot measure campaigns. With the exception of campaign finance
public disclosure (Garrett and Smith, 2005), the federal courts have struck down a series of state campaign finance regulations of ballot measure campaign contributions or expenditures. In general, the courts have found there to be a fundamental conflict between First Amendment rights and restrictions on the contributions and expenditures of ballot measures, as the courts have essentially equated the campaign financing of ballot measures with “speech,” rather than “conduct.” In its 1976 landmark decision *Buckley v. Valeo*, the U.S. Supreme Court extended substantial First Amendment protections to spending in candidate campaigns, reasoning that this form of “speech” should be afforded the highest level of protection. In *Buckley*, the Court outlined its views on campaign finance reform legislation in the context of candidate campaigns, striking down as unconstitutional portions of the 1974 Federal Election Campaign Act that limited expenditures by candidates and independent campaign expenditures on behalf of candidates. The court argued that limits on expenditures could not be justified as a method of preventing “corruption or the appearance of corruption.” The Court found no danger of *quid pro quo* corruption when individuals made independent expenditures on behalf of candidates because the absence of pre-arrangement or coordination with the candidate’s campaign reduced the value of such expenditures to the candidate and the danger that such expenditures would be given for improper commitments from the candidate. The Court also found that limiting expenditures by the candidate could not be justified by the danger of corruption because such concerns were adequately addressed by the contribution limitations (Smith, 2001).

Two years after *Buckley*, in its decision *First National Bank of Boston v. Bellotti* (1978), the high court specifically ruled against campaign finance restrictions in the ballot measure campaigns. In *Bellotti*, the Court considered a Massachusetts state statute banning contributions and expenditures by corporations in initiative or referendum campaigns unless the issue materially affected the corporation’s business. The statute further specified that no question concerning an income tax could be deemed to materially affect the business of a corporation. Corporate plaintiffs challenged the statute as a violation of their First Amendment right to make expenditures to defeat a ballot measure. The Court struck down the statute by extending First Amendment protection for the expenditure of funds by a corporation and by rejecting the state’s assertion of legitimate interests in preventing corruption and protecting the interests of shareholders (Smith, 2001).

In *Bellotti*, the Court found only expenditure limitations in ballot campaigns to be unconstitutional; it did not address the question of whether contribution limitations in ballot campaigns might be upheld. The court addressed this question in 1981 in its ruling *Citizens Against Rent Control v. City of Berkeley (CARC)*. The Court found that a local ordinance limiting contributions to ballot campaigns was unconstitutional. Relying on *Bellotti*, the Court in CARC
concluded that the state had no interest in preventing corruption in a ballot campaign as no danger of corruption existed in the setting of an initiative or referendum campaign. Winkler (1998) argues that the Bellotti Court may not have been serious when it claimed that evidence of corporate influence might justify a state’s contribution limitation for ballot measures and that the findings of studies analyzing the effects of spending may not support restrictions on spending. In any event, the possibility of sustaining campaign finance limits in the ballot measure context became bleak after Bellotti.

The series of decisions by the high court clearly separated candidate campaigns from ballot measure campaigns with regard to the regulation of campaign finance (Lowenstein 1992; Briffault 1996). In Bellotti, the Court had removed other possible justifications for regulations of ballot measures, such as a state’s interest in equality and protecting shareholders (Tolbert, Lowenstein, and Donovan 1998). In CARC, the Court made the further distinction that contribution limitations could be allowed in the context of candidate campaigns but not allowed in ballot measure campaigns, as the perceived danger of potential or actual quid pro quo corruption could not be realized in ballot measure campaigns.

Currently, no state has limits on campaign contributions or expenditures in ballot initiative campaigns. This was not always the case, as the regulation of campaign finance activities related to ballot issues has a long history. Dating back to the early twentieth century, as direct democracy was just becoming established, state legislatures started to pass laws regulating the campaign financing of ballot measures. In 1912, the Montana legislature passed a law prohibiting corporate expenditures on ballot measures (Winkler, 1998). More typical was Oregon’s 1933 law requiring ballot issue committees to report their contributions and expenditures. In the following legislative session, lawmakers prohibited “any person to give, pay, or receive any money or other valuable consideration for securing the signatures of electors on direct legislation petitions” (Lapalombara and Hagan, 1951). By the 1970s, more than half of the initiative states had laws on the books restricting campaign contributions and expenditures in ballot campaigns (Shockley, 1980).

Interestingly, citizens—often through the initiative process itself—occasionally have been willing to impose campaign finance regulations on the initiative process. After the Watergate crisis, voters in California overwhelmingly approved Proposition 9 in 1974, the Political Reform Act (PRA). The ballot initiative called for strict spending limits on ballot initiatives. Proponents and opponents each were limited to $1.2 million in spending per ballot measure and were prohibited from spending $500,000 more than the other side. The act was short-lived. After the Supreme Court’s Buckley decision, the California Supreme Court struck down the PRA as unconstitutional (California Commission, 1992). California voters in November 2006 were once again afforded a chance
to regulate ballot measures. Nearly three-fourths of the voters, however, cast their ballots against the measure that would have placed restrictions on contributions to a ballot committee if a statewide candidate were involved with a committee supporting or opposing the measure and would have restricted corporations spending more than $10,000 in support or opposition of a ballot measure (Moran, 2006).

Voters in other states have also tried to reintroduce regulations on the campaign financing of ballot measures. Montana voters in 1996 passed a statutory initiative banning corporate contributions to ballot measure campaigns. The measure, Initiative 125, was not the state’s first ban on corporate spending on ballot initiatives. In 1975, the legislature had amended a statute that had been on the books since 1912 prohibiting corporate spending in candidate elections, and extended the ban to state ballot campaigns (Winkler, 1998). The 1975 statute, however, was found to be unconstitutional the following year in federal district court. The 1996 ballot measure, sponsored by the Montana Public Interest Research Group, called for the strictest statewide campaign finance laws concerning ballot measures in the country. The measure stipulated that corporations could not make contributions or expenditures in connection with ballot measures but included a provision exempting nonprofit corporations formed for the purpose of promoting political ideas that did not engage in business, have shareholders, or accept a substantial amount of contributions from business corporations. Immediately after its passage, the Montana Chamber of Commerce and other business groups successfully challenged the measure in Federal District Court. The lower court’s decision, Montana Chamber of Commerce v. Argenbright (1998), was upheld by the 9th Circuit Court of Appeals (2000).

In terms of state regulation of the campaign financing of ballot measures, public disclosure laws are virtually all that remain (Garrett and Smith, 2005). In Bellotti, as part of its dictum, the Court noted that identifying the sources behind ballot campaign ads could be required to be disclosed by a state so that its citizens could better assess the arguments. In CARC, the Court similarly reasoned that the integrity of the political system would be sufficiently protected through the public filing of campaign contributions. Following the Court’s lead—that disclosure is permissible, perhaps even necessary—all states permitting direct democracy require mandatory disclosure of ballot measure contributions and expenditures. The detail, immediacy, and public availability of these disclosure regimes, however, vary considerably across the states. As Garrett and Smith (2005) document, “veiled political actors” can go to great length to obfuscate their contributions and expenditures in ballot measure campaigns.

Most recently, in 2011, the U.S. Supreme Court refused to review a decision handed down by the Ninth Circuit Court of Appeals after it upheld the state of Washington’s disclosure laws for ballot initiatives. The case, Human Life of
Washington v. Brumickle (2010), was one of many recent challenges logged by libertarian groups challenging mandatory campaign finance disclosure laws for ballot issue committees. In its ruling affirming the public disclosure laws, the Ninth Circuit cited the U.S. Supreme Court’s 1978 *Bellotti* decision and its 2010 *Citizens United* decision. “[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,” the court reasoned, citing *Bellotti*, and “[t]hey may consider, in making their judgment, the source and credibility of the advocate.” Furthermore, the court reasoned citing *Citizens United*, the state “may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.” The court rejected the plaintiff’s argument that spending on “issue advocacy” in ballot measure campaigns should not be subjected to disclosure laws.

### Conclusion: A Delicate Regulatory Balance of Ballot Measures

The popular appeal of direct democracy remains deeply rooted in the states that have permitted the plebiscitory process. Public opinion polls reveal considerable support for expanding the use of direct democracy to the national level, and there have been recent efforts in several states that currently do not permit the mechanisms to adopt direct democracy (Smith, Tolbert, and Keller, 2010). Yet, despite the popular enthusiasm and the support for the expansion of direct democracy, citizens should have little reason to expect that it will expand across the country any time soon or that the mechanisms that are currently in place in about half the states will become less regulated (Smith, 2008). Members of the majority party in state legislatures—Republicans and Democrats alike—remain generally skeptical of the plebiscitary procedures. Absent heightened interparty legislative competition and another social movement pushing for major political reforms similar to the populist and progressive movements a century ago, elected state and federal officials are unlikely to adopt or expand direct democracy anytime soon (Smith and Fridkin, 2008).

A century ago, opponents of direct democracy challenged the constitutionality of direct democracy, arguing—but ultimately failing to convince the U.S. Supreme Court—that the process contravened the “guarantee” clause of the U.S. Constitution. Today, most lawsuits filed in state and federal court seek to undo some of the procedural regulations that state legislatures have placed on ballot measures—from the wording and title setting of a ballot measure, to the labor-intensive effort to collect valid signatures, to the public disclosure of campaign contributions and expenditures. In weighing the balance of a state’s compelling interest to regulate the plebiscitary process with the First Amendment protections of petitioners, the courts generally have taken a critical look at laws that may impede a citizen’s right to free speech. Conversely, the courts have
tended to grant state legislatures considerable authority to ensure the integrity of the direct democracy system, especially via mandatory public disclosure laws. One tangible result of the checks and balances of state legislatures and the courts is the considerable amount of regulatory variation across the roughly two dozen states permitting direct democracy, which have tangible effects not only for citizens and interest groups to utilize the plebiscitary mechanisms but on the extent to which citizens trust the integrity of direct democracy in their state. The battle over ballot measures—on Election Day and in the courts—is likely to continue into the foreseeable future.

Acknowledgment

I thank Jennie Drage Bowser at the National Conference of State Legislatures for providing me with initiative and referendum historical data and University of Florida undergraduate Micole Kaye for her timely and excellent editing assistance.

Notes

1 Citizens in many of these states also adopted the popular referendum, which allows citizens to reject laws passed by the legislature using a similar process as the initiative, and the power to recall elected officials.
2 For more on the populist rhetoric used in anti-tax ballot measures, see Smith (1998) and for a broader discussion of the “initiative industrial complex,” see Magleby and Patterson (1998).
3 The twenty-four states currently permitting the statewide initiative are: AK, AR, AZ, CA, CO, FL, ID, IL, MA, ME, MI, MO, MS, MT, ND, NE, NV, OH, OK, OR, SD, UT, WA, and WY.
4 In his bid for the presidency in 1912, Woodrow Wilson—a long-time critic of direct democracy—saw considerable political expediency in supporting the plebiscite. He offered a pragmatic defense of the instrumental use of the initiative, arguing that if a state legislature were unable or unwilling to pass popular legislation, citizens could directly propose and adopt laws themselves to correct any legislative “sins of omission.” The mere threat of an initiative—the “gun behind the door”—might even be enough to impel a reluctant legislature to take action. See Smith and Tolbert (2004).
5 Dating back to earliest years, there are numerous examples of fraud in the petition-gathering phase of ballot measure campaigns. In Oregon in 1912, discovery by a state court revealed that 60 percent of signatures on popular referendum attempting to overturn legislative appropriations for the University of Oregon were fraudulent. See Schnader (1916). The following year, an Oklahoma state court removed seven measures from the ballot after systematic fraud was revealed. California, Colorado, and Ohio also had long histories of fraudulent signature gathering activities (Ellis, 2002, p. 190).
6 In 2011, the Democratic-controlled California state legislature again passed a bill prohibiting signature gatherers from being paid by the signature, but Governor Jerry Brown, also a Democrat, vetoed it.
For example, the state of Washington in 1915 passed a law requiring signature gatherers to register their petitions “with the registration officer of a town, city or precinct” and be signed there under the “supervision of and verified by officials thereof” (Conners, 1916).

A second provision of the Colorado law, which was not challenged in the plaintiffs’ appeal to the US Supreme Court, required circulators to attach an affidavit to their petitions that stated their name and address and was subsequently submitted to the Secretary of State with the completed petitions.

More than a dozen other states had registered voter requirements for petition circulators at the time of the ACLF decision. Currently, several states, including Mississippi, North Dakota, Oklahoma, Arizona, California, Idaho, Maine, Missouri, Utah, and Wyoming, have laws requiring circulators be residents of the state, and federal courts have upheld the residency requirements for petitioners in Colorado, Maine, and Mississippi. NCSL (2012).

Currently, there are at least seven states—Arizona, California, Missouri, Nebraska, Ohio, Oregon, and Wyoming—that require on the petition itself whether the circulator is being paid or is a volunteer (NCSL, 2012). In its 1985 decision, McIntyre v. Ohio Elections Commission, the Supreme Court struck down an Ohio law requiring public disclosure on hand-distributed leaflets in referendum campaigns, in contrast to after-the-fact disclosure of campaign finance activities to a governmental agency.