

The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal

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Yeah, I think that if you have enough money, you can get on the ballot. Yeah, no question.¹

I. Introduction

The world will little note nor long remember *Meyer v. Grant*.² Yet, even a minor decision of the United States Supreme Court has significant

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1. Interview with Mike Arno, at 8 (May 8, 1989). Mike Arno owns American Petition Consultants, one of the two major firms now active in California circulating initiative petitions for hire. Transcripts of the interviews with Mike Arno, Kelly Kimball, and Joyce Koupal are on file with the Hastings Constitutional Law Quarterly.

2. 108 S. Ct. 1886 (1988).

consequences. In *Meyer*, which struck down a Colorado law banning the use of paid circulators for the qualification of initiatives for the ballot, these consequences included the apparent removal from consideration by the states of a salutary and timely device for the reform of the initiative process. This cost was incurred in the name of freedom of speech. It was a bad bargain because, we shall argue, the First Amendment analysis in *Meyer* was flawed. The Colorado statute did not prohibit any form of speech, and the Court's decision privileged not communication, but the access to the ballot of those with financial resources, to the detriment of those without such resources.

Meyer's timing was nearly as bad as its conclusion. In November 1988, only five months after the decision was rendered, twenty-nine state-wide measures appeared on the California ballot. The official pamphlet sent to voters explaining the measures totaled a burdensome 159 pages. Although the large number of propositions was not entirely attributable to the initiative process, seventeen of the twenty-nine having been placed on the ballot by the state legislature, the consequence was a downpour of criticism of the process. Responsible leaders predicted voters would be "totally confused"³ or "completely overwhelmed."⁴

Aside from the total number of propositions, outrage was especially expressed because the initiatives had been placed on the ballot by professional circulators, sometimes representing narrow interest groups, rather than by the voluntary efforts of citizens. A *Los Angeles Times* correspondent summed up the widespread sentiment in the following terms:

It is not just the number of initiatives nor their complexity that is prompting concern. It is that the system seems to have slipped away from the citizens it was invented to serve into the hands of the very kind of wealthy special interests it was meant to contain.

Merely qualifying a measure for the ballot can cost as much as \$700,000 and consume more time than most citizen groups can muster. Taking their place is a whole new industry of consultants, professional petition circulators, pollsters and media gurus who have been lured away from traditional campaigns by special interests willing to spend whatever it takes to promote or fend off these measures.

....

[T]he cost of merely qualifying a measure for the statewide ballot has priced out all but the wealthiest individuals and most moderate-sized organizations.⁵

3. Wolinsky, *Are Citizens Losing the Initiative?*, L.A. Times, Oct. 7, 1988, § 1 at 1, col. 5 (quoting Carol Federighi, California president of the League of Women Voters).

4. *Id.* (quoting Judith Bell, spokesperson for the Consumers Union).

5. *Id.*

What undoubtedly helped crystallize popular resentment was that five of the initiatives dealt, in inconsistent ways, with the highly complex questions of insurance and tort reform. Three of these were placed on the ballot by various elements of the insurance industry, one was placed by the trial lawyers, and all resulted from efforts by professional circulators. The result was a drastic impairment, at least temporarily, of popular faith in the initiative process. In the past, Californians have expressed support for that process by wide majorities.⁶ Yet, shortly before the 1988 general election, three-fourths of those interviewed in a *Los Angeles Times* poll agreed that "the initiative process has gotten out of control."⁷ Aside from blaming the state legislature for not passing adequate laws, these citizens blamed special interests that used the initiative process "to get around the Legislature," and the process itself because it was "too easy to qualify" a measure for the ballot.⁸ The prevailing discontent received national attention.⁹

The initiative's reputation in California was restored at least in part by the election results, which were widely perceived as reflecting an impressive degree of discernment and rationality on the part of the electorate.¹⁰ But concern over the qualification process, particularly the abuses made possible by professional circulators, did not disappear. At year's end, the State's leading newspaper editorialized that "[t]he 1988 elections made a mockery of the concept of the initiative petition as the people's election tool in California. The need for reform is more glaring than ever. . . . Anyone with enough money can get virtually anything onto the ballot with the use of paid petition circulators."¹¹

6. See, e.g., D. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 9 (1984) (citing 1979 Field Poll finding that 85% of Californians said proposition elections were a good idea).

7. Skelton, *The Times Poll: Nader's Proposal Is Sole Insurance Plan Favored*, L. A. Times, Oct. 26, 1988, § 1, at 1, col. 5.

8. *Id.*

9. See Schmitt, *California Voters Take Law Into Own Hands With Ballot Initiatives*, Wall St. J., Nov. 8, 1988, at A1, col. 1. While this article may be criticized in some respects on grounds of accuracy and balance, it reflects well the near hysteria that existed at the time regarding abuse of the initiative process.

10. For example, only one of the five insurance initiatives passed, and it received by far the least amount of campaign spending in its behalf. A measure to increase the excise tax on cigarettes was approved in the face of massive spending by the tobacco industry against it. An AIDS testing measure widely perceived as moderate passed, while a far more extreme proposal was rejected.

Although we have provided some documentation in these notes for our assertions about public reaction to the measures on the 1988 general election ballot, we rely as well on our experience as residents of California during that period. Concern over the process was widespread and unusually salient.

11. *Cleaning Up the Ballot*, L.A. Times, Dec. 26, 1988, § 2, at 4, col. 1.

A natural legislative response to these events and to the public reaction that ensued would have been to modify the initiative process to ease efforts of citizen groups with genuine public support to place their proposals on the ballot, while restricting or eliminating ballot access for those with deep pockets but no genuine voter support. But this seemed exactly the response that had been barred by the Supreme Court only a few months before in *Meyer v. Grant*.

Because of its unfortunate consequences and its flawed reasoning, we believe that before *Meyer* passes on to the obscurity that no doubt awaits it, a passing critical glance is in order. In part, this Article is written to fulfill that humble function.

We also have a more constructive purpose in mind. Inexcusable though it is, *Meyer* is not, as some have assumed,¹² irremediable. In Part VI of this Article we propose a reform that is more cumbersome than would be necessary without *Meyer*, but that is in some other respects superior to the outright ban that *Meyer* precludes.¹³ To explain our proposal and why it is constitutional, we must first consider *Meyer* and what we consider to be its defects.

II. *Meyer v. Grant* and a Hypothetical

A. In the Lower Courts

Colorado, like approximately one-half of the states, permits its citizens to initiate constitutional amendments and statutes by petition. To qualify for the ballot, an initiative proposal must receive signatures of registered electors equal to five percent of the total vote in the last election for Secretary of State.¹⁴ At the time the dispute in *Meyer v. Grant* arose, 46,737 signatures were required.

The plaintiffs, several individuals and a corporation named Coloradans for Free Enterprise, Inc., were proponents of a proposed constitutional amendment to remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission.¹⁵ After completing formal prerequisites to circulating an initiative proposal, they brought suit in the

12. See T. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 242 (1989).

13. See *infra* notes 189-197 and accompanying text.

14. COLO. REV. STAT. § 1-40-105 (1988).

15. Their proposal would have added the following to the Colorado Constitution: "Effective January 1, 1985, no person, corporation, or other legally recognized business entity engaged in the transportation of persons or property for compensation, shall be defined as public utilities, nor shall they be regulated as such." So far as appears from the record of the litigation regarding this proposal, its infelicitous grammar presented no obstacle to its being added to the Colorado Constitution.

United States District Court for the District of Colorado, seeking an injunction to prevent the defendants, the Colorado Attorney General and Secretary of State, from enforcing a criminal statute that prohibited the use of paid circulators for qualifying an initiative proposal.¹⁶

District Judge Moore ruled that the statute was constitutional.¹⁷ He found that the plaintiffs had not shown that the ban on paid circulators "prevented [them] in any way from espousing their cause."¹⁸ "At best," he found, their "purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers."¹⁹

Although the Colorado statute prohibited the plaintiffs from spending their money in a particular manner, Judge Moore regarded it as more similar to the contribution limits that were upheld in *Buckley v. Valeo*²⁰ than to the expenditure limits that were struck down in the same case.²¹ He reasoned that when the plaintiffs paid circulators, it would be the circulators' ideas, not the plaintiffs', that would be communicated to potential signers. Campaign expenditures receive greater constitutional protection than campaign contributions because they are the direct means of communicating the spender's ideas. Campaign contributions, as Justice Marshall observed in a case following *Buckley*, constitute "speech by proxy."²² In this respect, Judge Moore argued, paying petition circulators resembles making a campaign contribution more than a campaign expenditure.²³

16. COLO. REV. STAT. § 1-40-110 (1980) provides in pertinent part:

Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a . . . felony. . . .

The statute prohibits not only the payment of circulators, but also the receipt of payment for circulating. The prohibition of paying and the prohibition of receiving payment are correlative, and we do not believe they raise distinctive policy or constitutional issues. Accordingly, we shall feel free to refer to either prohibition as a shorthand for both.

17. Judge Moore did not publish his opinion, but in *Grant I*, Circuit Court Judges Barrett and Doyle, who formed a majority to affirm, reprinted Judge Moore's opinion and incorporated it as their own. *Grant v. Meyer*, 741 F.2d 1210 (10th Cir. 1984).

18. *Id.* at 1212.

19. *Id.*

20. 424 U.S. 1 (1976) (per curiam).

21. *Grant I*, 741 F.2d at 1213.

22. *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981).

23. *Grant I*, 741 F.2d at 1213. Judge Moore's point has its bite, but as an effort to place the ban on paid circulators within the *Buckley* category of campaign contribution limits, it is unsound. The indirect nature of the "speech" inherent in a contribution was only one of the Supreme Court's stated reasons for treating contribution limits more leniently than expenditure limits. More importantly, in *Buckley* the Court constitutionalized a distinction between

Even if treated as analogous to a campaign contribution limit, the ban on paid circulators needed to be justified by sufficiently strong state interests to be upheld against a First Amendment challenge. Judge Moore found such interests in the need to protect the “integrity” of the initiative process and to assure that the measures appearing on the ballot had demonstrated “a sufficiently broad base of support.”²⁴ At this point his analysis became somewhat tangled because he accepted the State’s denial that the goal of the ban was to prevent illegal acts. He said the State’s integrity concern was that “people may be persuaded to sign petitions for reasons other than the political validity of the cause espoused.”²⁵ So explained, the integrity concern seems to merge into the concern that sufficient support for the measure be demonstrated. On the other hand, in support of his integrity argument, Judge Moore relied on evidence of extensive forgery by paid circulators of initiative petitions in Florida, suggesting that the integrity concern was indeed a concern that illegal or improper acts be prevented.²⁶

However they might be sorted out analytically, the specific considerations mentioned by Judge Moore in support of the statute were as follows:

1) Many people were willing to sign petitions for reasons unrelated to their content.²⁷

2) There was evidence of forged signatures by paid circulators in Florida.²⁸

3) Colorado did not routinely check the validity of signatures on initiative petitions, giving it a valid interest in preventing a practice that creates a temptation to procure illegal signatures.²⁹ Judge Moore apparently regarded the non-checking of signatures as a benefit to initiative proponents that offset the disadvantage of not being able to use paid circulators.

4) Paid circulators would use techniques of salesmanship to gain signatures in order to increase their compensation. These techniques would not be “inherently illegal,” but would impair the integrity of the initiative process.³⁰

expenditures and contributions, not the stated rationale for drawing the distinction. Judge Moore’s analysis may cast doubt on the wisdom of this distinction, but cannot change it.

24. *Grant I*, 741 F.2d at 1213.

25. *Id.*

26. *Id.* at 1214.

27. *Id.* Paul Grant, one of the plaintiffs, testified to the procedures he and his associates used in soliciting signatures and volunteered that he obtained signatures more easily when he told people that it was his birthday. *Meyer v. Grant*, 108 S. Ct. 1886, Jt. App. at 16 (1988).

28. *Grant I*, 741 F.2d at 1214.

29. *Id.* This argument is particularly difficult to square with Judge Moore’s disclaimer that the ban is intended to prevent illegal practices.

30. *Id.*

5) Because the initiative measure, once circulated, cannot be amended to correct drafting errors, the state has a particularly strong interest "in seeing that any measure has significant support to insure only the better reasoned and drafted measures are given the chance of adoption."³¹

Judge Moore's ruling was affirmed by a three-judge appellate panel in *Grant I*,³² over a strong dissenting opinion by Judge Holloway.³³ Subsequently, the Tenth Circuit agreed to hear the case en banc, and in *Grant II*³⁴ reversed both Judge Moore's and the three-judge panel's prior rulings.³⁵ Because Judge Holloway's analysis for the majority, an expanded version of his dissent on the three-judge panel, was closely followed in Justice Stevens' opinion for the Supreme Court, separate consideration of it is not necessary here. Judge Logan wrote a powerful dissenting opinion, anticipating some of our arguments in this article.³⁶

B. In the United States Supreme Court

Justice Stevens began his analysis for a unanimous Supreme Court agreeing with Judge Holloway's conclusion "that this case involves a limitation on political expression subject to exacting scrutiny,"³⁷ referring, not surprisingly, to *Buckley v. Valeo*.³⁸ After observing that the First Amendment is applicable to the states and that it protects discussion of issues like trucking deregulation,³⁹ Justice Stevens turned to the crucial question whether regulation of the circulation of initiative petitions affects the freedom of speech. It does, he asserted, because such circulation "necessarily involves both the expression of a desire for political

31. *Id.* at 1214-15. We regard this as a makeweight argument. The state's interest in assuring that measures on the ballot have demonstrated public support would not be reduced if there were some procedure for corrective amendments after or during the circulation period. Furthermore, the state's interest in assuring that poorly reasoned or drafted measures not be adopted is adequately served by the election on the measure. Nevertheless, Judge Moore treated the point as central, and wrote that because of it, his opinion was not to be read as having any bearing on the validity of a ban on paid circulators for candidate nominating petitions. *Id.* at 1215.

32. *Id.* at 1211.

33. *Id.* at 1215.

34. *Grant v. Meyer*, 828 F.2d 1446 (10th Cir. 1987).

35. *Id.* at 1448. The vote was 6-2.

36. *Id.* at 1458-63. Judge Barrett wrote a short dissent, referring to the Moore opinion adopted by the three-judge panel on which he had served. *Id.* at 1458. Judge Doyle, who had been in the majority in *Grant I*, was no longer sitting on the Tenth Circuit when *Grant II* was decided.

37. *Meyer*, 108 S. Ct. at 1891.

38. 424 U.S. 1, 45 (1976) (per curiam).

39. *Meyer*, 108 S. Ct. at 1891. Just because an opinion is short does not mean that it is concise.

change and discussion of the merits of the proposed change.”⁴⁰ Justice Stevens accepted at face value the testimony of one of the plaintiffs, containing a self-servingly idealized description of the solicitation process, involving give and take over the merits of the proposal between the circulator and the potential signer.⁴¹ He did not refer to other testimony, dwelt upon by Judge Moore, to the effect that irrelevant considerations, such as being told that it was the circulator’s birthday, influenced people to sign.⁴²

Having concluded that the circulation of initiative petitions may be equated with political speech, Justice Stevens could coast the rest of the way. Banning paid circulators, he said, restricts speech by limiting “the number of voices who will convey appellees’ message and the hours they can speak and, therefore, limits the size of the audience they can reach.”⁴³ This statement echoes the conclusion in *Buckley* that limiting campaign spending must reduce either the number of messages expressed, the depth of the treatment, or the size of the audience, but Justice Stevens added a supporting reference to *Village of Schaumburg v. Citizens for a Better Environment*,⁴⁴ in which the Court extended first amendment protection to solicitation of charitable contributions.⁴⁵ A second way in which the ban restricts speech is that it makes it more difficult to qualify initiative proposals for the ballot, thus reducing the chances for proponents to make their proposals the focus of extensive debate.⁴⁶

Next, Justice Stevens concluded it was irrelevant that the Colorado ban left open all other means of dissemination of ideas regarding initiative measures except the use of paid circulators because the ban “restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.”⁴⁷ He also

40. *Id.* Judge Holloway had described the relationship between speech and the circulation of initiative petitions in similarly vague terms, asserting that the solicitation of signatures is “closely intertwined with a discussion of the merits of the measure.” *Grant I*, 741 F.2d at 1218.

41. *Meyer*, 108 S.Ct. at 1892 n.4. For a quotation of the testimony, see *infra* text accompanying note 106.

42. *See supra* note 27 and accompanying text.

43. *Meyer*, 108 S. Ct. at 1892.

44. 444 U.S. 620 (1980).

45. *Id.* at 632.

46. *Meyer*, 108 S. Ct. at 1892.

47. *Id.* at 1893. This statement reveals a deep and most unfortunate confusion of ideas. As evidence summarized later in this Article shows, the use of paid petition circulators is indeed often the most “effective” and “economical” means of qualifying a measure for the ballot. But whereas the adjectives “effective” and “economical” reflect the instrumental point of view of the proponent, the adjective “fundamental” suggests a much broader point of view.

responded to an argument made by Judge Logan in the Tenth Circuit, to the effect that under the authority of *Posadas de Puerto Rico Associates v. Tourism Co.*,⁴⁸ the state having created the right of initiative could impose limitations on its exercise.⁴⁹ In *Posadas*, the Court upheld a ban on advertising for casinos, stating that if a state could ban a product, it could exercise the lesser restraint of banning its advertising.⁵⁰ Judge Logan's argument was that by analogy, since the state had the right to eliminate the initiative process altogether, it could regulate the means of promoting particular initiatives. Justice Stevens cited Judge Holloway's sound rejoinder that *Posadas*, a commercial speech case, was inapplicable to *Meyer v. Grant*, which, if it involved speech at all, unquestionably involved political speech.⁵¹ Furthermore, Justice Stevens argued, the fact that the state in *Posadas* could prohibit advertising for casinos did not mean that the state could ban advertising on legislative proposals affecting casinos.⁵² Therefore, the state's power to eliminate the initiative process did not include the power to regulate discussion of political issues.⁵³

Before turning to the interests put forth by the State in support of the ban, Justice Stevens agreed with the court of appeals that the ban "trenches upon an area in which the importance of First Amendment protections is 'at its zenith,'" and concluded that the State's burden of justification was "well-nigh insurmountable."⁵⁴ This may account for the cursory attention given to the State's justifications.

The first justification was the State's desire to assure that a proposal

At least since the writing of Plato's dialogues, it has been a deep assumption of Western culture—and perhaps of other great cultures as well—that there is something special about intellectual inquiry that takes the form of a conversation. That special quality is diluted to the extent one of the parties has a nonintellectual interest in the outcome, and is destroyed—prostituted is perhaps the most precise expression—when one of the parties is paid to advocate a particular viewpoint. This does not deny that paid advocacy may be an essential practice, as in the case of the practice of law, but it does deny that paid advocacy partakes of that "fundamental" quality believed to be inherent in free conversation.

48. 478 U.S. 328 (1986).

49. *Meyer*, 108 S. Ct. at 1893.

50. *Posadas*, 478 U.S. at 345-46. Justice Rehnquist's statement in *Posadas* was sweeping, and may not turn out to be true in all cases. For an analysis suggesting that the statements of the Court are an imperfect guide to the commercial speech doctrine as manifested by the Court's actual decisions, see Lowenstein, "Too Much Puff": *Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1225-47 (1988).

51. *Meyer*, 108 S. Ct. at 1893-94 (quoting *Grant II*, 828 F.2d at 1456-57).

52. *Id.* at 1893.

53. *Id.* We believe Judge Logan's reliance on *Posadas* was an unfortunate error, for whether or not Justice Stevens did so intentionally, he took advantage of it to avoid confrontation with a central question in *Meyer*. See *infra* text accompanying note 178. In its brief to the Supreme Court, Colorado repeated but did not emphasize the argument relying on *Posadas*. Appellants' Brief at 14.

54. *Meyer*, 108 S. Ct. at 1893 (quoting *Grant II*, 828 F.2d at 1457).

has sufficient public support before it is placed on the ballot.⁵⁵ Justice Stevens dismissed this concern in a single sentence, asserting that it is superfluous, since public support is assured by the requirement that an initiative petition receive a specified number of signatures.⁵⁶

The State's second justification, that the ban protected the integrity of the initiative process by removing a temptation for circulators wrongfully to verify the authenticity of signatures, was rejected on the ground that there was no evidence that the concern was based on anything more than speculation.⁵⁷ This was an overstatement because, as shown above, Judge Moore had credited testimony that paid circulators had forged signatures in Florida.⁵⁸ Justice Stevens added that since a professional circulator's future business may depend on a reputation for competence and integrity, it could not be assumed that paid circulators were more likely to accept false signatures than volunteer circulators.⁵⁹ He also pointed to various Colorado penal provisions protecting against fraud and other improper practices.⁶⁰

Finally, in a footnote, Justice Stevens rejected the suggestion that the state could "mute the voices of those who can afford to pay petition circulators."⁶¹ His phrasing of the point was designed to lead into a quotation of the well-known statement in *Buckley v. Valeo* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁶² Justice Stevens added that "(t)he concern that persons who can pay petition circulators may succeed in getting measures on the ballot when they might otherwise have failed cannot defeat First Amendment rights."⁶³

C. A Hypothetical

At least twice in his opinion, Justice Stevens emphasized the criminal penalties that the Colorado ban imposed on those who employ paid circulators.⁶⁴ This is a common enough rhetorical ploy in First Amend-

55. *Id.* at 1894.

56. *Id.*

57. *Id.*

58. *Grant I*, 741 F.2d at 1214; *see supra* text accompanying note 28.

59. *Meyer*, 108 S. Ct. at 1894.

60. *Id.* at 1894-95; *see* COLO. REV. STAT. § 1-13-106 (1980) (forge signatures); COLO. REV. STAT. § 1-40-119 (1987) (make false or misleading statements); COLO. REV. STAT. § 1-40-110 (1980) (pay another to sign a petition).

61. *Meyer*, 108 S. Ct. at 1894 n.7.

62. *Id.* (quoting *Buckley*, 424 U.S. at 48-49.)

63. *Id.*

64. *Id.* at 1891, 1894.

ment controversies, but here it is symptomatic of a skewed conception of what the ban does and what it is for. It is true that the Colorado statute does, in form, define a felony, and that the possibility exists that a person could be prosecuted for violating it. These facts facilitate viewing the statute as one aimed at the conduct of private individuals, and therefore as falling within a conventional first amendment framework. The practical thrust of the statute is not, however, to regulate individual conduct but to regulate the state's conduct, namely, the circumstances in which the State will place propositions on the ballot.

This point becomes evident if we compare the actual Colorado statute with a hypothetical one. The hypothetical statute does not ban the use of paid circulators for initiative petitions. Instead, it requires each circulator to state under oath, on the face of each petition section, whether he or she has received payment. State election officials, in determining whether an initiative proposal has qualified for the ballot, are instructed not to count signatures obtained by paid circulators.

Would the hypothetical statute be unconstitutional?⁶⁵ Prior to *Meyer v. Grant*, it would have been difficult to mount a persuasive First Amendment challenge to it. No speech activity is banned. Indeed, no activity of any sort is banned. The state, without regulating private conduct,⁶⁶ simply is exercising the power to select which propositions to place on the ballot.

After *Meyer v. Grant*, it would be awkward for the Court to uphold the hypothetical statute. The reason, of course, is that its effect is virtually identical to the statute the Court struck down in *Meyer*. It is not simply that, as a practical matter, no one would employ professional circulators under the hypothetical statute, although that surely is true. Rather, there is almost no difference between what is forbidden under the two statutes. Under the actual Colorado statute, nothing prevented the plaintiffs from employing individuals to circulate petitions urging the government to deregulate trucking. Probably nothing prevented them from printing these petitions to look similar or even identical to initiative petitions, at least as long as they did not deceive signers into believing the

65. The reader might envision a challenge by persons who signed a petition circulated by a paid circulator, on the ground that failure by the state to count their signatures would deny them equal protection of the laws. However, if the hypothetical statute made it clear that paid circulators must disclose to signers that their signatures were ineffective and that signers of paid petitions were free to sign volunteer petitions, it is difficult to see in what way the statute would discriminate against those who chose to sign the paid petitions.

66. The requirement that circulators disclose whether they have been paid might be deemed a sort of regulation, but it is not different in kind from the other disclosures and avowals circulators are required to make.

documents were real initiative petitions. Finally, nothing prevented them from delivering such petitions to State officials, including the State officials charged to receive initiative petitions, so long as they made it clear that they were not filing them as initiative petitions. Essentially, what they could do under the actual statute was precisely what they would be able to do under the hypothetical statute. The only difference is that the mechanism for disclosure under the hypothetical statute would not remove the *label* of "initiative petition" from the documents the plaintiffs' employees could circulate, though the documents would be rendered ineffective for the purpose an initiative petition is intended to serve.

Even the existence of the criminal sanction in the Colorado statute does not distinguish it from the hypothetical statute. In the latter, the disclosure by the circulators of whether they have been paid is made under oath, presumably exposing the circulators to prosecution for perjury, or for some lesser violation such as fraud, in the case of false disclosure.

To regard the Colorado statute but not the hypothetical one as violating the First Amendment would be to exalt form over substance. Yet, if the hypothetical statute had been presented to the Court instead of the real one, we are convinced that the question would have seemed far more difficult to the Justices. Possibly, the First Amendment challenge would have appeared frivolous.

It is possible that readers, having been impressed by Justice Stevens' analysis summarized above,⁶⁷ or having initially reacted to the question in the same way as he did, may be comfortable with the idea that the hypothetical statute, though different in form, is just as unconstitutional as the real statute. Readers may even be convinced that had they been confronted originally with the hypothetical statute they would have regarded it as unconstitutional, perhaps because they would have converted it mentally into something like the Colorado statute.

Certainly, at this point, we have said nothing to demonstrate that the hypothetical statute is or ought to be constitutional. Nevertheless, lawyers have known for a long time that the way a question is asked has a lot to do with how the question is answered. The question the Court asked and answered was whether the state could prohibit the plaintiffs from paying individuals to circulate initiative petitions. We believe that given the plain need to ration the limited number of ballot positions, the more pertinent question is whether the state may choose a system in

67. See *supra* notes 38-63 and accompanying text.

which the requisite level of support must be demonstrated by the willingness of volunteers to devote time and effort to circulate petitions. In the remainder of this article we shall attempt to demonstrate why this formulation of the question is preferable and why, given this formulation, *Meyer v. Grant* is mistaken.

In Part III we consider the argument that the ban on paid circulators is justified as a means of preventing fraud and other improper practices. Although the state was equivocal in advancing this argument, we shall show that evidence exists to warrant taking this problem seriously. We do not conclude, however, that the ban's usefulness in preventing fraud, by itself, resolves the constitutional question.

In Part IV we turn to the state's argument that the ban is needed to assure that initiatives that qualify for the ballot have demonstrated popular support. We argue that Justice Stevens' treatment of this question is inadequate, and that the heavy reliance on paid circulators today is seriously inconsistent with the purposes of the initiative qualification process. The widespread negative reaction to the many special interest groups that bought their way onto the California ballot in the 1988 general election shows that this problem is timely and serious.⁶⁸ Part IV also contains a digression in which we consider the pros and cons of the distribution of initiative petitions by direct mail.

Our argument that paid circulators are inconsistent with the purpose of initiative qualification requirements is connected to our final constitutional argument, set forth in Part V, which is that the ban on paid circulators does not constitute a regulation of speech that requires extraordinary justification under the First Amendment. Unlike Justice Stevens, we turn to this point last because we believe it cannot be considered adequately without a proper understanding of the environment in which the ban operates.

In Part VI we consider what can be done in the wake of *Meyer v. Grant*. We do not propose adoption of our hypothetical statute. If proper respect is to be shown for the principle of stare decisis, it would be better to overrule *Meyer* than to pretend that our hypothetical statute can be reconciled with it. And we do not assume that *Meyer* will be overruled soon. Instead, we propose a variation on our hypothetical statute, one whose practical effects are not at all identical to those of the Colorado statute, and whose rationale, in one respect at least, is grounded in some of the reasoning in *Meyer*.

68. See *supra* notes 3-11 and accompanying text.

III. Fraud and Paid Circulators

In this Part we review the evidence that exists regarding the use of improper practices by paid and unpaid circulators. There is a surprisingly substantial amount of such evidence, though inevitably it is anecdotal and fragmentary. However, given the large number of petitions circulated in the last twenty years, the evidence is not conclusive that abusive circulation tactics are extremely common or that they are more likely to be associated with paid than with unpaid circulators.

At the outset, we must define what we mean by "improper or abusive practices." Within this phrase we include the submission of forged signatures and other significant violations of law, such as verification of a petition section by a person other than the actual circulator (perhaps because the actual circulator was underage or otherwise ineligible). We also include significant deception, whether or not it is prohibited by law. Examples include covering official portions of the petition with misleading cards or labels, or oral mischaracterization of the petition. However, we do not include superficial, oversimplified, or irrelevant appeals, so long as they are not flagrantly deceptive. Such appeals are common, associated with both volunteer and professional circulators, and probably inevitable. However unattractive they may be, these practices are not "improper" or "abusive," as we are using those terms in this Part.

One possible indicator of the incidence of improper circulation practices is the validity rate of signatures that are obtained and submitted. An analysis by the Ohio Secretary of State's office of three initiatives appearing on the ballot in 1983 showed that the two measures circulated by volunteers had averaged a validity rate of 83.5 percent, while the measure circulated by professionals had only a 68.7 percent validity rate.⁶⁹ We are aware of no other comparative studies of this nature, but the manager of one of the largest professional signature-gatherer firms gave us similar estimates.⁷⁰

Assuming that volunteer circulators generally yield a higher validity rate than their paid counterparts, this could indicate a higher incidence of abuse among professionals, but not necessarily. To the extent that there is significant forgery of signatures, a reasonably efficient validation

69. Letter from Margaret Rosenfield, Director of Elections Programs for the Ohio Secretary of State's Office, to Sue Thomas, National Center for Initiative Review (June 20, 1984) (copy on file with the Hastings Constitutional Law Quarterly).

70. Interview with Kelly Kimball, President of Kimball Petition Management, at 14 (well-trained volunteer groups will obtain a validity rate of 77-80%, while professionals will get around 70%); *see also* Interview with Mike Arno, at 13 (volunteers do not try to cheat as much as paid circulators because "they're not there for the money, they're there for the cause.").

process in government offices will expose it, and the validity rate will be lowered. However, other possible causes of lower validity rates do not imply the presence of impropriety. For example, volunteers may be more likely than paid circulators to take care that only registered voters sign the petition.⁷¹ Furthermore, some improper practices, such as deception regarding the content of the petition, would not be likely to affect the validity rate.

In summary, there is evidence, albeit fragmentary, that professional circulators produce a higher percentage of invalid signatures than volunteers. This evidence is at most suggestive of the relative extent of impropriety associated with the two categories of circulators.

Aside from such comparative evidence, there are a number of well-documented instances of abuse by professional circulators. Four such circulators were criminally charged in Nebraska with petition fraud and falsely attesting to names on petitions in connection with an initiative to establish a state lottery.⁷² According to the Nebraska Secretary of State, the lottery proponents were the first in recent years to pay persons to gather signatures.

In the same year, 1986, a lottery petition in North Dakota also resulted in criminal convictions of at least five paid circulators.⁷³ The fraudulent signatures submitted by these people included names copied from a phone book, names of minor children, and duplicate signatures. Although a prosecutor told us he thought the incident was an isolated one,⁷⁴ the North Dakota Legislature reacted by banning payment to circulators on a per signature basis, though not payment of salaries to circulators.⁷⁵

71. To a large extent, the lower validity rate in professional signature-gathering campaigns reflects an agency cost to the manager of the campaign. As one such manager told us, if the professional circulator knows he will be paid if he gets at least 70% valid signatures, he will get 70% and not much higher. Interview with Kelly Kimball, at 14. The invalid signatures may, but need not be, the result of improper practices.

72. Interview with Allen Beermann, Nebraska Secretary of State (June 14, 1989). At the time of the interview two of these individuals had been convicted and the other two were awaiting trial.

73. Interview with John Goff, Assistant Cass County State's Attorney (June 20, 1989); see E. JAKSHA, *OF THE PEOPLE: DEMOCRACY AND THE PETITION PROCESS*, 111, 112 (1988) (quoting a prosecutor to the effect that the circulators were "greedy for quarters").

74. Interview with John Goff, *supra* note 73.

75. N.D. CENT. CODE § 16.1-01-12 (1989 Cum. Supp). It seems unlikely that this form of ban can survive *Meyer v. Grant*. The state might argue that it is a better crafted and narrower attack on the problem of abusive practices than Colorado's total ban on payments, but in *Meyer* the Court found the problem of abuse insufficient to support a ban. Although the present study suggests that Justice Stevens' statements in support of this conclusion were overly sweeping, it does not provide a basis for challenging the conclusion. Furthermore, the North Dakota ban, while narrower, may not be better crafted. It is hard to see how the state

Possibly the most extensively documented incident of abuse by paid circulators occurred in California in 1972, in connection with the qualification of a farm labor initiative by growers. Massive evidence of improper practices by paid circulators was gathered by the United Farm Workers and delivered to then Secretary of State Jerry Brown, who filed a lawsuit seeking to have the measure removed from the ballot.⁷⁶ The lawsuit was dismissed on the ground that there was insufficient time to litigate the issue before the ballot needed to be final, but after the election several individuals were convicted of forgery and other crimes in connection with the circulation of the initiative, and the Assembly conducted extensive hearings on the incident.⁷⁷ Among the practices documented at the hearings were the extensive use of children to circulate petitions⁷⁸ and the use of "dodger cards," consisting of cardboard containing a brief slogan, to cover up the official summary of the measure as it was presented to potential signers.⁷⁹

There have been more recent, though less celebrated incidents in California. Probably the most serious of these occurred in 1979 in connection with an initiative sponsored by landlords, construction unions, and real estate interests for appearance on the 1980 ballot to repeal existing local rent control ordinances and create restrictions on the ability of municipalities to adopt new ones. Then Attorney General George Deukmejian gave the title "Rent Control" to the initiative, which enabled petition circulators to represent to potential signers that the propo-

could prevent a petition manager from firing a salaried circulator who was unproductive. Yet, if productivity were necessary for the circulator to continue on salary, the incentives would not be drastically different than under a pay per signature system. The North Dakota statute would probably have little effect beyond modestly decreasing the efficiency of a professional signature-gathering campaign.

76. The authors of this Article were then on the Secretary of State's staff, and worked on the suit in Brown's behalf. No doubt as a result of this experience, we entered into this project anticipating that the argument based on abusive practices would provide a major ground for criticism of *Meyer v. Grant*. Our research has persuaded us that although the problem is a significant one, it is not as great as we had imagined, and is offset by self-controlling incentives within the professional signature gathering industry. The considerations raised in later parts of this Article now seem to us to be more fundamental.

77. See *Cal. Assembly Comm. on Elections and Reapportionment, Public Hearing on the Initiative Process* (Los Angeles, Oct. 10, 1972). Those hearings still probably represent the best single source of information regarding initiative circulation practices, especially by professionals, although the information is now considerably dated. Regarding fraud in the circulation of the farm labor petitions, see generally Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. REV.* 505, 523-24 (1982).

78. See *Hearing, supra* note 77, at 65-66.

79. See *id.* at 48-49.

sal was *for* the adoption of rent control.⁸⁰ No criminal charges resulted from this petition drive, but misrepresentation apparently was widespread. When a circulator who was asking passers-by, "Would you like to sign our petition for lower rent in California?" was confronted by a journalist, he admitted that "this [petition] is a ripoff. We're getting paid for doing this. This is a landlord initiative."⁸¹

Several recent incidents in California did result in criminal charges. One circulator of an AIDS initiative—sponsored by Lyndon LaRouche—that appeared on the 1986 general election ballot was convicted of falsely claiming to be a resident of California.⁸² In 1987, an individual was convicted of falsifying signatures on petitions for what in 1988 became Proposition 68, the Campaign Spending Limitation Act.⁸³ The individual submitted 10,000 signatures in San Francisco that had been copied from a telephone book.⁸⁴

In 1986 the office of the California Secretary of State hired her first full-time election fraud investigator.⁸⁵ The investigator discovered seven circulators who appeared to have engaged in substantial violations of the law. She referred these seven to local district attorneys for possible felony prosecutions. Three were convicted or pled guilty to violations of the Elections Code.⁸⁶ All of the cases investigated involved paid petition circulators.⁸⁷

80. Kelly Kimball told us he refused to handle the landlords' measure after he saw the title because tests convinced him it would be impossible to prevent his paid circulators from misrepresenting the initiative on the street. He believed it would be contrary to the long-range interests of his firm to be associated with that kind of deception, and pointedly observed that the firm that did handle the landlords' petition soon went out of business because they "got a reputation off of that as being liars, unethical." Interview with Kelly Kimball, at 15-16.

81. Wood, *Rent Initiative—What's in a Name?*, L.A. Times, Dec. 26, 1979, at B1, col 4.

82. Interview with Kent Freeman, Los Angeles County Deputy District Attorney (May 25, 1989). According to Mr. Freeman, a second person was awaiting trial on similar charges. Apparently several out-of-state people were imported to circulate LaRouche's initiative. Some were paid on a per signature basis, but others were essentially volunteers, provided only with living and transportation expenses. Mr. Freeman expressed the opinion that the fraudulent claim to California residency occurred to an equal extent among the paid and unpaid circulators.

83. Since one of the present authors was closely identified with the drafting of Proposition 68, and the other signed a ballot pamphlet argument in its favor, we add our hope and belief that this was an isolated incident.

84. Interview with Kelly Kimball.

85. The information in this paragraph is derived from an interview with Pat White, election fraud investigator for the California Secretary of State, November 6, 1989.

86. Charges against one of the remaining four circulators were dismissed in the interests of justice; charges against another are pending; arrest warrants have been issued for the other two, who cannot be located.

87. The cases were referred to her either by county officials or the companies who hired the paid circulators. One paid circulator was convicted after a county employee noticed on a

Although these incidents demonstrate that the problem of abuse associated with professional circulators is not an insubstantial one, viewing the evidence as a constitutional justification for a ban on paid circulators is deficient in two respects.

First, given the large numbers of petitions that have been circulated by professionals in the last two decades and the enormous number of circulators employed, the incidents are not numerous enough to show that the problem is pervasive. If only a small percentage of the incidents that actually occur come to light, then the showing we have made is impressive. But many of the signatures submitted are checked, and petition circulation, though an obscure practice, by its nature cannot be carried out in private. Therefore, it could be that the incidents described above constitute a fairly large percentage of the total amount of abuse that has occurred.

Second, the incidents of abuse associated with professional circulators do not prove in themselves that impropriety is any less prevalent among volunteer circulators. In at least one of the incidents described above, the LaRouche AIDS fraud regarding residency, both volunteer and paid circulators engaged in abuse.⁸⁸ David Magleby reported that “[o]ne of the most blatant cases of deception and fraud in signature gathering,” involving falsification and fraudulent notarization of signatures, occurred in Colorado, where the use of professionals was illegal.⁸⁹

The number of incidents of abuse that have come to light have been more numerous for professional than for volunteer circulators. As evidence, this is strengthened by a study covering the period 1980-1984, finding that two-thirds of all initiatives that qualified for statewide ballots were circulated by volunteers alone, and only twenty-six percent utilized professional circulators for more than one-third of their signatures.⁹⁰ Nevertheless, the unsystematic nature of our survey of incidents suggests that any conclusion that abuse is more common among professional circulators must be tentative.

petition the name of a person whose funeral the employee had attended. Yet, the petition contained a “signature” of the deceased dated well after the date of the funeral. Apparently, the circulator had copied names from a telephone book. Another fraud was uncovered when a county employee noted a colleague’s name on a petition and, spotting the colleague in the office, called out, “I see that you have signed this petition I am checking.” The coworker denied signing the petition.

88. See *supra* note 82 and accompanying text.

89. MAGLEBY, *supra* note 6, at 63.

90. Schmidt, *Studies Show Initiatives Are Nonpartisan, Grassroots Politics*, 5 THE INITIATIVE NEWS REPORT, Nov. 30, 1984, at 1, col. 2.

In *Meyer v. Grant*, Justice Stevens pointed out that volunteers, motivated by the desire to qualify the measure, might have as much of an incentive to engage in impropriety as a professional, motivated by the desire to receive more money.⁹¹ We do not doubt that ideological zeal may induce abuses in individual cases, but it seems unlikely to us that it will have this effect as often as will the profit motive, if only because the volunteer who believes strongly in his or her cause may be less likely to believe that deception will be necessary to persuade others to support that same cause.

But even if we are right and Justice Stevens is wrong, the petition circulating firm, as opposed to the individual professional circulator, still has a professional interest in controlling abuse.⁹² Abuse consisting of forged or fraudulent signatures may result in the failure of the measure to qualify for the ballot, and abuse consisting of flagrant misrepresentation, if publicized, may doom the measure once it appears on the ballot.⁹³ A petition management firm that creates these difficulties for its clients will suffer considerable competitive disadvantage.

In California, where the "initiative industry" is more advanced than elsewhere, one firm enjoyed a monopoly over professional petition circulation until the early 1970s.⁹⁴ The worst incidents of abuse, in 1972 and 1979, came less than a decade after the demise of that monopoly, in petition drives conducted by firms that are no longer in business. Abuse may tend to peak during such periods of shake-up in the industry and to decline once greater stability takes effect, though the cost of supervision suggests that a residue of impropriety is likely to endure.⁹⁵

Evaluating our findings, we believe the Supreme Court of Washington was correct in concluding that the possible association of paid petition circulators with improper practices was sufficient to justify a ban on paid circulators as an exercise of the police power.⁹⁶ If it is assumed that the ban significantly infringes First Amendment rights of speech, Judge Holloway and Justice Stevens probably were correct in concluding that as an empirical matter, the danger of impropriety is not great enough to justify the ban.

91. *Meyer*, 108 S. Ct. at 1894.

92. *See supra* note 80.

93. *See Lowenstein, supra* note 77, at 566-67.

94. *See Fitzgerald, Computer Democracy*, 11 CAL. J. 6 (Supp. June 1980).

95. The well-established firms in California report extensive and even high tech procedures for rooting out false signatures. Interview with Mike Arno, at 13; Interview with Kelly Kimball, at 14.

96. *State v. Conifer Enterprises*, 82 Wash. 2d 94, 508 P.2d 149 (1973).

This conclusion is strengthened by the criticism we offer of *Meyer v. Grant* in Part IV. There we argue that the willingness of citizens to sign initiative petitions when asked, as opposed to the ability of a proponent to provide sufficient circulators to do the asking, is inadequate, as a measure of public support for a proposal, to serve as the rationing device for places on the ballot. It follows from this proposition that even if fraud were fairly widespread, the adverse consequential effects on the system might be surprisingly modest. Put simply, the point is that whether or not abuse is common, initiative proponents do not need to engage in it in order to succeed. This does not in any sense justify improper practices, for the integrity of the electoral system is an important value even when improprieties do not have an immediate distorting effect on outcomes. But in the absence of adverse systemic effects, Judge Holloway and Justice Stevens are correct that prohibitions of particular improprieties, enforceable against individual violators, are sufficient. Prophylactic measures, such as a ban on paid circulators, are justified only to prevent adverse systemic consequences, and in the case of fraud in the circulation of initiatives, these consequences may not be present.⁹⁷

IV. The Initiative Qualification Process

A. The Collection of Signatures

In this section we report and evaluate the evidence that exists on the nonabusive techniques that are used to collect signatures on petitions and on whether a person's signing of a petition necessarily evidences agreement with the substance of the petition. In the following section we consider the implications of our findings in a more general analysis of the functions served by the petition requirement in the initiative qualification process. In the final section of this Part we digress from our critique of *Meyer v. Grant* to consider briefly a new technique for the circulation of initiative petitions, the use of direct mail.

1. Social Science Studies

Numerous experiments conducted by psychologists have found that although agreement with the content is a significant variable influencing whether subjects will sign petitions, various other factors, such as the way in which the solicitor is dressed, and whether the subject has seen another person agree or decline to sign, influence the signing decision as

97. Also relevant to this conclusion is the fact that special interests have not been successful in getting unpopular initiatives adopted by the voters after buying their way onto the ballot by using paid circulators. See Lowenstein, *supra* note 77.

much or more.⁹⁸ In one of these experiments, subjects were given various personality tests after they had either agreed or declined to sign a petition. The results showed, not surprisingly, that those who signed a petition they probably did not believe in, or vice versa, scored higher on tests measuring propensity to conform to social pressure than those who followed their convictions in signing or not signing the petitions.⁹⁹ The conclusion drawn in one of these studies is applicable to all of them considered collectively: "The findings cast doubt on the validity of the unrestricted assertion that the larger the number of signatures for a petition, the more widespread the sentiment in favor of the proposed change."¹⁰⁰

Other social scientists have relied on questionnaires sent to signers of actual petitions. For example, questionnaires were sent in October 1968 to signers of George Wallace nominating petitions. The same questionnaires were sent to a similar sample of voters who had not signed the Wallace petitions. The results showed that petition-signers were significantly more likely to express an intention to vote for Wallace in the presidential election than nonsigners, but that among those who signed, fewer than half intended to vote for him. Indeed, among the Wallace petition-signers, Wallace was running second to Nixon.¹⁰¹ The authors of the study concluded that their data "should serve to dispel any notion that the number of petition signatures gathered was a reliable index of Wallace's personal popularity."¹⁰²

98. Blake, Mouton & Hain, *Social Forces in Petition-Signing*, 37 SW. SOC. SCI. Q. 385 (1956) (strength of the request to sign, knowledge of others' agreeing or declining to sign); Helson, Blake & Mouton, *Petition-Signing as Adjustment to Situational and Personal Factors*, 48 J. SOC. PSYCHOLOGY 3 (1958) (knowledge of others' agreeing or declining to sign); Suedfeld, Bochner & Matas, *Petitioner's Attire and Petition Signing by Peace Demonstrators: A Field Experiment*, 1 J. APPLIED PSYCHOLOGY 278 (1971) (whether solicitor was dressed conventionally or as a "hippie"); Garrett & Wallace, *Effect of Communicator-Communicatee Similarity in Political Affiliation upon Petition-Signing Compliance*, 90 J. PSYCHOLOGY 95 (1975) (whether petition was sponsored by Republicans or Democrats). *But see* Bryant, *Petitioning: Dress Congruence Versus Belief Congruence*, 5 J. APPLIED PSYCHOLOGY 144 (1975) (subjects were influenced by how the solicitor was dressed, but only when they had no strong beliefs regarding the content of the petition).

99. Helson, Blake & Mouton, *supra* note 98, at 7-9.

100. Blake, Mouton and Hain, *supra* note 98, at 389-90.

101. Wilcox & Weinberg, *Petition-Signing in the 1968 Election*, 24 W. POL. Q. 731 (1971).

102. *Id.* at 733. The authors added that their data

serve to illustrate an ironic feature of the political process. The various state laws which require that third parties wishing to appear on the ballot must receive the prior [']approval' of a substantial percentage of the electorate were designed to retard the formation or, at least, legitimation of new political contestants. However, because of the observed inclination of many voters to sign petitions to whose purpose they are, at best, only marginally committed, this barrier seems to have been proven not quite so formidable.

A questionnaire sent to voters in Riverside, California, yielded similar findings. One group had signed petitions for a no-growth initiative; the other group had not signed. The signers were significantly more likely to have voted in favor of the measure, but only by a margin of 71.7 percent to 55.4 percent.¹⁰³ In another study, nearly a third of those who signed a petition to place a water resources control measure on the Idaho ballot said in a questionnaire a year to sixteen months later that they had never heard of the measure.¹⁰⁴ The authors suggested that this memory decay “may result from the signing of the petition being an incidental act—intentional only in the most minimal sense.”¹⁰⁵

2. *Anecdotal Evidence*

In addition to the social science studies, inferences can be drawn about the meaningfulness of signatures on initiative petitions from the ample public testimony offered by persons experienced in the circulation of petitions. Justice Stevens credited this description by Paul Grant, one of the plaintiffs in *Meyer v. Grant*:

[T]he way we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, “Are you a registered voter?[]”

....

If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, ‘Please let me know a little bit more.’ Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from [State Public Utilities Commission] regulations.

Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign.

....

Id. at 739.

103. Neiman & Gottdiener, *The Relevance of the Qualifying Stage of Initiative Politics: The Case of Petition Signing*, 63 Soc. Sci. Q. 582, 585 (1982). In the actual election, the proposition was defeated by a narrow margin. Therefore, the group returning the questionnaire was modestly skewed in support of the proposition. Taking this into account, probably about a third of the signers of the petitions voted against the measure when it appeared on the ballot.

104. Pierce & Lovrich, *Survey Measurement of Political Participation: Selective Effects of Recall in Petition Signing*, 63 Soc. Sci. Q. 164 (1982). The measure never appeared on the ballot because the initiative drive was terminated when the legislature passed a statute accomplishing many of its objectives. *Id.*

105. *Id.* at 168.

[We try] to explain the not just deregulation [sic] in this industry [Two paragraphs follow summarizing the substantive arguments that, according to Grant, were used to try to get people to sign.]¹⁰⁶

That is one version of how the process works, one that Justice Stevens described as providing “an example of advocacy of political reform that falls squarely within the protections of the First Amendment.”¹⁰⁷ Here is another version from a published interview with the late Ed Koupal, the most successful manager of volunteer petition drives in California during the 1970s:

“Generally, people who are out getting signatures are too god-damned interested in their ideology to get the required number in the required time,” Koupal said. “We use the hoopla process. First, you set up a table with six petitions taped to it and a sign in front that says, SIGN HERE. One person sits at the table. Another person stands in front. That’s all you need—two people.

“While one person sits at the table, the other walks up to people and asks two questions. (We operate on the old selling maxim that two yesses make a sale.) First, we ask if they are a registered voter. If they say yes, we ask them if they are registered in that county. If they say yes to that, we immediately push them up to the table where the person sitting points to a petition and says, ‘Sign this.’ By this time the person feels, ‘Oh, goodie, I get to play,’ and signs it. If a table doesn’t get 80 signatures an hour using this method, it’s moved the next day.”

Koupal said that about 75 percent of the people sign when they’re told to. “Hell no, people don’t ask to read the petition and we certainly don’t offer,” he added. “Why try to educate the world when you’re trying to get signatures?”¹⁰⁸

Justice Stevens is not on record on the question whether this too provides “an example of advocacy of political reform that falls squarely within the protections of the First Amendment.”¹⁰⁹

Which version is more accurate? Grant and Koupal described extremes, and in any event, it would be a mistake to assume that the same techniques are used by all circulators or in all signature drives. Nevertheless, based on our personal experience and observations and our reading or listening to the accounts of others, we are convinced that at least

106. *Meyer*, 108 S. Ct. at 1892 n.4 (quoting 2 Record 10-11).

107. *Id.*

108. Duscha, *The Koupals’ Petition Factory*, 6 CAL. J. 83, 83 (1975). Another of Koupal’s maxims was that “a signature table [is] not a library.” Interview with Joyce Koupal, at 4. In the 1970s, Joyce and Ed Koupal were codirectors of the People’s Lobby of California, an organization that had considerable success in qualifying initiatives for the ballot in California using volunteers.

109. *Meyer*, 108 S. Ct. at 1892 n.4.

in California, where the pressure to collect large numbers of signatures in a short time period is enormous, the typical practice is closer to, though not as extreme as, the method described by Koupal. For example, Kelly Kimball described the training provided to the thousands of circulators he employs as follows:

Our training is, the first thing you do is ask [potential signers] which county are you registered to vote in. [Then we ask] will you sign a petition for [a] California state lottery. For the most part that's all you have to say. If they want more information, you have a second line. California lottery is good for schools. Well, they want more information. At that point you hand them a petition and text sheet. You say come back to me if you want to sign it. *After two or three lines it doesn't become cost effective to argue with a person.*¹¹⁰

Kimball also volunteered the opinion that people “sign because you ask them to sign.”¹¹¹ Nearly every account of signature-gathering contains the assertion that a large percentage of solicitees will sign with little or no inquiry or perusal of the petition.¹¹² Another virtually universal observation is that one of the most effective signature-gathering techniques bypasses the content of the proposal entirely. Large numbers sign in response to the statement that the petition is only for the purpose of getting the measure on the ballot, so that the signer need not decide now

110. Interview with Kelly Kimball, at 28 (emphasis added). For a similar account, see K. Smith, *Beating the Big Boys: Common Cause and the California Campaign for Political Reform 105-06* (1978) (unpublished dissertation University of Southern California School of Public Administration, June 1978), *quoted in* Magleby, *Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures*, 2 J.L. & POL. 287, 300 (1985).

111. Interview with Kelly Kimball, at 17. He added that

the reason you sign a petition when you're approached at a store is first of all you don't want to look stupid. . . . You don't want to say no because you might have to argue the issue and you don't know enough about the issue, you don't want to look stupid.

Id. at 18. He explained that in fact the circulator would not be likely to start an argument, but that the signer might have that fear anyway, so that the safest and simplest course is to sign and leave. *Id.*

112. In addition to the quotations from Ed Koupal and Kelly Kimball above, see, e.g., Self, *Initiatives Prove Voters Will Sign Anything; Yet Real Initiative May Get Real Action*, L.A. Times, Nov. 7, 1988, § 2, at 5, col. 1 (paid petition circulator reported that “[e]ighty percent of the folks I approached were willing to sign anything, with no more than a hasty glance at a few words”); MAGLEBY, *supra* note 6, at 62 (citing a study reporting that the “experience of most crew chiefs is that most people will sign petitions”); CRONIN, *supra* note 12, at 64 (“perhaps half of those who sign petitions have only a vague idea of what they are signing”); Price, *The Mercenaries Who Gather Signatures for Ballot Measures*, 12 CAL. J. 357, 358 (1981) (quoting crew chief as saying a “very high percentage of people will sign an initiative petition when approached. . . . [O]nly a few will turn us down.”).

whether he or she favors its substance.¹¹³ Finally, we should not overlook the testimony of Paul Grant, omitted by Justice Stevens, that for all his substantive arguments, he found people more willing to sign when he told them it was his birthday.¹¹⁴

3. *Summary*

Taken as a whole, the social science studies and anecdotal evidence present a consistent and plausible picture. The degree to which potential signers agree with the merits of a petition is a significant but not crucial factor in their willingness to sign. Many other considerations go into the decision. These considerations undoubtedly are more important for some people, such as those particularly susceptible to casual social pressure, than for others. Petition circulators, whether professional or volunteer, can succeed, if they are willing to put in the effort, by relying on two general principles. First, they can use their experience and training to attempt to create a situation in which the social pressure to sign is relatively high. Second, they can adapt to the need for large numbers of signatures by ignoring potential signers for whom persuasion requires more than a few seconds. Because of this second factor, although there may be some circulators who rely on extensive argument in the manner described by Paul Grant in his testimony, most circulators, especially those most likely to be successful, discipline themselves to avoid significant discussion and concentrate on numbers.

As to the signers, if the question is whether as a group they are more likely to support the substance of the petition than a comparable group of nonsigners, the answer is yes. If the question is whether the ability to obtain signatures is a reasonably accurate measure of public support for the substance of the petition, the answer is no. The latter point is vividly demonstrated by this statistic: One petition management firm was retained in a total of fifty-three petition drives through 1988, and fifty-two of these qualified for the ballot.¹¹⁵ The statement that under present conditions, anyone willing to put up the funds can buy a place on the ballot

113. See Interview with Joyce Koupal, at 4; Interview with Kelly Kimball, at 18; MAGLEBY, *supra* note 6, at 62; CRONIN, *supra* note 12, at 64.

114. See *supra* notes 27, 42.

115. Kelly Kimball, head of Kimball Petition Management, gave these figures at the Hastings conference. The 52 successful drives are listed in a document provided to the authors by Mr. Kimball and on file with the Hastings Constitutional Law Quarterly. They consist of 24 statewide California measures, 19 local California measures, and 9 out-of-state measures. The cause for the firm's only failure was not an inability to obtain the targeted number of signatures, but a higher-than-anticipated invalidity rate. Interview with Kelly Kimball, at 22.

is no hyperbole.¹¹⁶

B. The Functions of Circulation

It is generally conceded that the initiative was adopted in large part as a reaction against the perceived domination of state legislatures by special interest groups who were able to use their wealth and a variety of improper practices to enact laws benefiting themselves at public expense and to defeat popularly supported legislation that they opposed.¹¹⁷

The state may not create a legislative mechanism and exclude from it some group of citizens such as the rich and the well-organized, even for such a benign purpose as correcting an existing imbalance. But while no one may be excluded, nothing prevents the state from designing an institution so that it will be especially responsive to the needs of certain groups, especially if it may plausibly be supposed that those groups are relatively deprived elsewhere in the system. As Justice Frankfurter observed in his dissenting opinion in *Baker v. Carr*,¹¹⁸ institutions of direct democracy, like all other electoral mechanisms, are controversial because they are conducive to the needs of some interests relative to others. Indeed, one of the guiding principles of the Constitution itself was to create a balance among institutions each of which would tend to be most responsive to different groups and interests.

Therefore, it was permissible for the states to adopt the initiative in the hope that it would serve primarily as a vehicle for dispersed popular movements that tend to be more disadvantaged in legislative lobbying than narrower but better organized groups.¹¹⁹ It also was permissible for states to design the initiative as a safety valve for groups experiencing intense discontent. Such groups, without the means to attract serious attention to their proposals in the state legislature, might not enjoy ma-

116. If no better reform can be devised, it would be an improvement on the present system to sell places on the ballot for the \$400,000 to \$700,000 that it costs to hire one of the leading firms, depending on whether the measure is a statute or constitutional amendment. A useless exercise would be avoided, and a modicum of relief would be provided to beleaguered state treasuries.

117. See generally CRONIN, *supra* note 12, at 54-57; R. HOFSTADTER, *THE AGE OF REFORM* 254-62 (1955); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 30-50 (1966); G. MOWRY, *THE CALIFORNIA PROGRESSIVES* 139-40 (1951).

118. 369 U.S. 186, 299 (1962) (Frankfurter, J. dissenting).

119. The classic theoretical demonstration of the disadvantage of large, dispersed groups relative to concentrated groups is M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). For a recent empirical confirmation, based on evidence regarding lobbying at the federal level, see K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 58-119 (1986).

majority support but might be mollified by having at least the opportunity to present their proposals to the voters.

Plainly, the state cannot make the ballot available to every proposal. The number of proposals on the ballot must be kept to a small number so that citizens, who are not legislative specialists and most of whose time perforce must be devoted to private concerns, can sufficiently inform themselves.¹²⁰ The strong adverse reaction to the large number of propositions on the ballot in the California general election in 1988 shows that this is no mere theoretical concern.¹²¹

Conceivably, a state could resolve this problem by adopting a quota. For example, the state might provide that there can be no more than six initiatives on the ballot at any one election.¹²² Then, anyone could offer a proposal, but if the total number of initiatives exceeded the quota, those appearing on the ballot would be determined by first-come, first-served, or by lot.

Plainly, however, any such method would prevent the initiative from serving its purpose as a legislative institution especially available to groups that are dispersed, broad-based, and highly dedicated to their legislative causes. For this reason, all states with an initiative process have chosen to rely on a petition system. In the absence of a quota, the overall requirements must be sufficiently difficult that, generally speaking, the number of initiatives qualifying for each election ballot will be within the limits regarded as reasonable for voters.

In the conception of Judge Holloway and Justice Stevens, the measure of public sentiment regarding an issue is the number of voters in the population who either support the proposition and therefore are willing to sign petitions, or at least can be persuaded by a circulator to sign. A moment's reflection will make it evident, however, that even in a very unrealistic world in which all potential signers have an opinion on the proposal and only those who favor it will sign, the ability to provide circulators is at least as important a variable as the proneness of voters to sign the petitions.

120. Betty H. Zisk argues that the effect of the number of propositions on the ballot on the ability of voters to vote intelligently is often exaggerated. *See* B. ZISK, *MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS* 162-65 (1987). Assuming she is correct, this still should not diminish the right of the people of a state to determine indirectly how many measures they will have to vote on by adjusting how hard or easy it is to qualify a proposition for the ballot.

121. *See supra* notes 3-11 and accompanying text.

122. Illinois imposes a quota of no more than three initiatives per election, on a first come, first served basis. ILL. ANN. STAT. ch. 46, para. 28-1 (Smith-Hurd Supp. 1989). The quota supplements, rather than replaces, the petition requirements.

Let us suppose a state with a million voters eligible to sign petitions, in which the signatures of five percent of these (50,000) are needed to qualify an initiative for the ballot. Suppose that proposal *A* is supported by fifty percent of the voters, while proposal *B* is supported by only twenty-five percent. If the variable that determines which initiatives qualify is support among the electorate, *A* should qualify in preference to *B*. Nevertheless, if the supporters of *B* can provide enough circulators to solicit at least 200,000 voters, whereas *A*'s promoters are unable to solicit at least 100,000 voters, *B* will qualify for the ballot and *A* will not.¹²³ Thus, even in an idealized world, our initiative qualification system would be one that measures popular support for initiative proposals as much by the ability of the supporters to circulate their proposal as by the willingness of voters to sign it.

But we do not live in an idealized world.¹²⁴ In the real world, most people are unlikely even to have heard of an unqualified initiative proposal, and if they have heard of one, they may have no opinion about it. The evidence considered in the previous section demonstrates that numerous factors in addition to the content of the petition influences whether an individual will sign when asked.

Now let us suppose that in a world more like the real one considered in the previous section, proposal *A* addresses a popular subject—perhaps it is a toxic control measure or a tax reduction proposal—and that fifty percent of the voters will welcome an opportunity to sign once they are informed of the general thrust of the proposal. Proposal *B* involves an arcane issue that most voters either do not understand or care about—perhaps it is a proposal to remove the trucking industry from the jurisdiction of the Public Utilities Commission—so that the number of voters with an affirmative interest in signing is negligible. On the other hand, let us suppose there is a substantial percentage of voters—let us conservatively estimate 25 percent—who will sign a petition without regard to its

123. For simplicity's sake, we assume that support for the proposal is randomly distributed. Normally this would not be the case, so that by concentrating their efforts in areas where potential signers are most concentrated, the proposal's supporters reduce the number of voters who must be solicited. This does not affect our point and the assumption of randomness facilitates the exposition.

Also for simplicity's sake we ignore the fact that a significant amount of duplicate solicitation will occur. This will increase the number of solicitations that will be necessary, and the effect will be greater if the percentage of the population willing to sign is smaller. For this reason, the ratio of solicitations needed for the less popular measure relative to the more popular measure may be greater than the figures in the text suggest. This still does not affect the underlying point.

124. At least, those of us who live in Southern California do not.

content¹²⁵ because they believe or are told that the measure should be given a chance, or because it is the circulator's birthday, or because they want to avoid getting into an argument with the circulator, or for some other reason. If for purposes of simplicity we assume there is no overlap between the supporters of *A* and the group that will sign anything, three out of four voters will now sign petitions for *A*. Nevertheless, unless the *A* proponents can field sufficient circulators to solicit 66,667 people, *A* will not qualify. *B*, on the other hand, will still qualify if its proponents can solicit 200,000 people, even though we are now assuming that *B* has virtually no support at all.

These, we submit, are not unrealistic examples. What they show is that support for the substance of a measure in the general population simply is not measured by the number of signatures on a petition. All else being equal, it helps that the proposal is popular. But all else is not equal, and the significance of the popularity of the measure is minor relative to the significance of the number of people who can be solicited.

The result is that the true hurdle for qualifying measures for the ballot is not having a proposal that people want to sign but inducing enough people to go out and circulate the petitions. As Judge Holloway and Justice Stevens emphasized in their opinions, circulation is hard work, and it is not easy to induce people to do it—unless they are paid!

So long as circulation is by volunteers, the qualification requirement does only an indifferent job of testing for breadth of support for a measure, but it does an excellent job of testing for depth, or intensity, of support. Qualification of a measure by volunteer circulators demonstrates that there is at least a cadre of individuals who care enough about the proposal that they are willing to make a considerable sacrifice for their cause. This is not an ideal result. The purposes of the initiative suggest that what would be most desirable would be a set of qualification requirements that tests for some combination of breadth and depth of support.¹²⁶ The petition system carried out by volunteers does not do

125. We mean, of course, without regard to its content within reason. An interesting experiment would be to see whether under realistic circumstances a substantial percentage of voters can be induced to sign a petition in support of genocide, but nothing in our position requires us to go to such extremes.

126. Cf. Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 661 (1980).

The petition requirement imposes a dual intensity check. Proponents must be so dissatisfied that they commit themselves to a demanding campaign, and a sizeable number of voters must be so dissatisfied that they contribute their signatures. Only when a proposal provokes sufficient intensity on both fronts does the proponent gain the opportunity to convince the voting majority to override the legislature.

Id.

this perfectly because a relatively small group of fanatics may be able to qualify proposals that probably would not earn ballot placement under a system that could measure both breadth and depth of support.¹²⁷ Still, the harm is tolerable because circulation by volunteers does measure breadth to some degree¹²⁸ and because the election itself is a measure of breadth of support.

Qualification of a measure by paid circulators stands in sharp contrast. If all circulators are paid, a measure may qualify even if no one cares strongly about it. True, someone must care enough to put up the money, but many businesses are large enough compared to the costs of qualifying an initiative that the managers of the business could regard the initiative as a cost-effective investment, even though it may be a relatively minor matter to the company. Furthermore, if supporters can hire enough circulators, then given what we know about why people sign petitions, the measure can qualify, even though virtually no voters have any affirmative desire to have it enacted into law.

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

When the system began listening for this new message, the initiative circulation industry arose to simulate the message. Those who serve in that industry, and those who employ them, are not acting wrongly. They

127. The Lyndon LaRouche initiatives in California come to mind as examples.

128. Our examples show that if measures *A* and *B* each enjoyed enough intense support that they could field volunteers to solicit 100,000 voters, the more popular measure, *A*, would qualify, but *B* would not. Of course, the same could be said of professional circulation drives. There undoubtedly is a range of spending, albeit a narrow range, within which a relatively popular measure will qualify and a relatively unpopular one will not. The difference is that in the case of a volunteer drive, both the proneness of voters to sign and the willingness of volunteers to circulate petitions are normatively relevant factors for the qualification of an initiative. In the case of the professional drive, it is hard to see why the depth of the proponent's pocket is relevant. Yet, our empirical research suggests that that is the only factor that ordinarily will determine whether the proposal qualifies. The measure's relative popularity will affect only the cost to the proponent.

are working according to the rules of the system to accomplish their legitimate objectives. But by doing so they are rendering the system incapable of filtering propositions for the ballot in a manner bearing any resemblance to the purposes of the system. Colorado found a natural and effective way of rehabilitating the system's ability to carry out its purpose. Justice Stevens overthrew Colorado's reform, asserting in a single sentence that the signatures themselves demonstrate sufficient support for the measure. Justice Stevens was wrong.

C. A Digression: Circulation by Mail

The argument in the previous section shows that Colorado's interest in banning paid circulators was much stronger than Judge Holloway and Justice Stevens recognized. What was at stake was the State's ability to ration spaces on the ballot in a manner consistent with the purposes of the initiative process, or, indeed, in a manner that makes any sense at all. In the next Part we shall argue that our position also bears on the degree to which the ban affects first amendment interests. Before proceeding to our analysis of the First Amendment, we pause briefly to consider a competing technique for soliciting signatures, the use of direct mail. Without this discussion, our consideration of signature-collecting would be incomplete. The reader whose interest is solely in our critique of *Meyer v. Grant* (if any such readers are still with us) may proceed directly to Part V. The reader whose primary interest is in the initiative qualification process may wish to continue plodding along with us.

The emergence of direct mail as a primary means of circulating initiative petitions is generally attributed to a California tax reduction initiative sponsored by Howard Jarvis in 1979 and defeated on the 1980 ballot.¹²⁹ Contemporary observers expected this technique to "mushroom,"¹³⁰ and one state official claimed it would be "crazy not to go the computer-letter route. It's so easy."¹³¹ What stimulated these predictions was that the Jarvis tax initiative not only received over 800,000 signatures through the mail, but that the collection effort paid for itself through contributions received with many of the signatures.

In fact, the use of direct mail as the primary means of circulation

129. See Fitzgerald, *supra* note 94, at 3; MAGLEBY, *supra* note 8, at 64-65. Direct mail had been used, at least as a supplementary means of signature collection, in earlier California efforts, such as the Political Reform Act of 1974 for which Common Cause mailed out petitions to its California membership. See K. Smith, *supra* note 110, n.8.

130. Fitzgerald, *supra* note 94, at 2.

131. *Id.* (quoting Thomas Houston, then chairman of the Fair Political Practices Commission).

has not mushroomed, because it is not so easy after all.¹³² Direct mail is much more expensive than paid petition circulators.¹³³ Recipients are not likely to sign and return the petitions, much less enclose contributions, unless, in the words of one commentator, the issue is “real sexy.”¹³⁴ That direct mail has been used successfully only in particular situations reflects the fact that whatever may be its other virtues, and vices, direct mail is not vulnerable to the criticism we have levelled at paid petition circulators in the previous sections, namely, that their use permits qualification of measures that enjoy little or no public support.

A signature on a petition distributed by direct mail is likely to be superior, as a measurement of substantive support, to a signature obtained personally, whether the circulator is a professional or a volunteer. Direct mail entails none of the social pressure or perceived need to avoid an argument that may be implicit in personal solicitation. Whereas the course of least resistance in a shopping mall may be to sign when asked, signing and returning a petition by mail takes significantly more effort than throwing away the solicitation letter. It is difficult to see how this effort can be induced other than by persuasion that the petition is meritorious.

In his recent text on the initiative process, Thomas E. Cronin¹³⁵ lists the following criticisms of direct mail as a signature-collecting device, to which we add our comments.

1. Direct Mail Subverts the Person-to-Person Participatory Process

The reader who has paid heed to our canvassing of the evidence regarding the nature of that process may wish to respond, “Good riddance.” We add that, as Professor Cronin points out, a direct mail solicitation may prompt genuine conversations among family members and neighbors regarding the merits of the proposition.¹³⁶

132. In the numerous newspaper articles reporting discontent with the initiative qualification process during the months preceding the 1988 general election in California, little or no reference was made to the use of mail. See *supra* notes 3-11 and accompanying text. Direct mail is not always cost-effective:

[T]here's a lot of waste with direct mail. Direct mail rarely works. It's gotten a lot of press because Jarvis used it so well and Gann uses it. But for the most part it's going to cost you a lot of money. You've got to be able to target your area so you can pinpoint exactly who's going to sign your petition and who's not.

Interview with Kelly Kimball, at 20.

133. *Id.* at 20-21.

134. Interview with Joyce Koupal, at 6.

135. CRONIN, *supra* note 12, at 217.

136. *Id.* at 65.

2. *Direct Mail Turns Signature-Collection into a Business Rather than a Volunteer Effort*

This charge is a bit vague but may contain an element of truth. One cannot criticise a process merely because some people profit from it. Even a purely voluntary effort must pay a printer for the petitions and a landlord for the signature drive's headquarters. It is hard to see why the profit earned by either professional circulators and their managers or direct mail consultants is more tainted.

What Professor Cronin may be getting at is the perception, and possibly the reality, that some of the direct mail drives of the early 1980s had their origins in the profit motives of the direct mail firms rather than in some interest or ideological group.¹³⁷ Such a practice might be defended on the ground that the entrepreneurial incentive enables a latent group to overcome the structural obstacles to organization.¹³⁸

Nevertheless, the prospect of initiative drives originating in a consultant's office detached from participation by people genuinely concerned with the issue at hand is disquieting. For one thing, the consultant may have less incentive to take care in the drafting of the proposition in its political, policy, and legal aspects than would a group concerned primarily with the merits of the issue. However, experience to date indicates that very few direct mail drives can generate a profit, so that these concerns may be largely imaginary.

3. *Direct Mail Appeals May Be Alarmist or Misleading*

There is little reason to suppose that these problems are more likely to be created by direct mail seeking to qualify an initiative than by direct mail sent on behalf of candidates, to raise money for organizations, or for other political purposes. To the extent the concern is with mail that is alarmist, attempts to regulate this phenomenon would raise first amendment concerns far more genuine than those that led to the decision in *Meyer v. Grant*.

With respect to misleading mail, the major problem referred to by Professor Cronin, or that we have seen raised elsewhere, is the sending of letters designed to look like official mail or otherwise calculated to deceive the recipient into opening it.¹³⁹ This is not nice, but it is under-

137. There is no intrinsic reason why the generation of an initiative drive for reasons of profit should be more likely to occur in the case of a direct mail consulting firm than in the case of a petition management firm. However, to the best of our knowledge, the phenomenon has not been associated with the latter type of firm in California.

138. See generally Salisbury, *An Exchange Theory of Interest Groups*, 13 MIDWEST J. POL. SCI. 1 (1969).

139. CRONIN, *supra* note 12, at 64.

standable given the proliferation of junk mail with which petition distributors must compete. The half life of such devices is short, as voters learn to spot them. Even if this form of manipulation is regarded as unethical, the consequence is only to get the recipient to open the envelope. Deception inside the envelope is more difficult because the objective is to obtain a signature on the petition. The petition contains a prominent summary of its contents, and because the signature process is complex,¹⁴⁰ the signer must review it carefully, in contrast to the signer at a shopping mall who can be instructed where to sign by the circulator.

4. *Well-Funded Special Interests Have an Advantage over Groups with as Much or More Support but Little or No Money*

This is possibly the strongest argument against direct mail. Although this concern is offset partially by the possibility that a cause with very intense support will generate sufficient contributions to pay for the mailings, experience suggests this will be a rare occurrence.

If cause *A* enjoys fairly widespread but lukewarm support, while cause *B* enjoys more widespread and more enthusiastic support, but not so enthusiastic that many supporters are willing to make contributions, the purposes of the initiative dictate that cause *B* should qualify for the ballot in preference to cause *A*. Nevertheless, if the proponent of *A* has a deep pocket and the proponent of *B* does not, the availability of direct mail is likely to result in *A* qualifying and *B* not qualifying.¹⁴¹

From the public's standpoint, the use of direct mail is superior to the use of paid circulators in distributing initiative petitions. Something relevant is measured, namely, the willingness of large numbers of individuals to figure out how to complete the petition properly and return it. Whether the use of volunteer circulators is superior to the use of direct mail is more debatable. We have seen that in practice the use of volunteer circulators does a poor job of measuring breadth of support, but a good job of measuring depth. Nearly the opposite is the case with direct mail. Except when the issue at stake is of such great concern that large numbers of recipients are willing to send contributions with their signatures, direct mail does an excellent job of measuring breadth of support but does not measure depth at all. Direct mail may be criticized on egalitarian grounds because a proponent with deep pockets has an advantage. But this advantage is less than exists with paid circulators because a de-

140. Considerable information must be given and the petition must be signed in two places, once as signer and once as circulator.

141. Another important variable for the feasibility of a direct mail signature-collection drive would be how easily one could identify the supporters of the proposal.

gree of public support is necessary.¹⁴²

Perceptions of whether controls should be placed on direct mail are likely to be (and should be) affected by the extent and nature of its use. Negative feelings were aroused in California because of the suddenness of its appearance, the specific techniques and motives of its early users, and opposition by most liberals to the causes for which it was employed. Once it was discovered that direct mail was expensive and risky, the use of direct mail—and opposition to it—diminished. Although there are no signs of a resurgence, this is always possible, especially if new disincentives to the use of paid circulators, such as those we propose in Part VI, are adopted.¹⁴³ In the event of a resurgence, the impulse for controls will depend on whether and to what degree discernible abuses occur.

It may be objected that given *Meyer v. Grant*, any attempted control on the use of direct mail would be unconstitutional. It is true that direct controls would be likely to raise first amendment objections far stronger than the spurious ones validated in *Meyer*. But indirect obstacles to the use of direct mail, not easily susceptible to first amendment challenge, are possible. An example would be a rule that each petition section must be validated by a person other than one signing that section. Because of the possibility of indirect controls, normative consideration of the use of direct mail has continuing relevance, though our discussion suggests that it offers no simple conclusions.

V. Paid Circulators and Free Speech

A. The “Involvement” of Speech with Circulation

Justice Stevens described two ways in which the ban on paid circulators infringes upon freedom of speech. The first was that speech about the measure is an inevitable attendant of circulation of an initiative petition.¹⁴⁴

One might quibble with this assumption. People who already know about the petition may sign without a word being exchanged with the

142. Another inegalitarian feature of direct mail is that if the group strongly supporting the proposal consists of low-income individuals, the direct mail effort is likely to fail to generate funds despite the presence of intense support. This form of inequality, although extremely serious, infects every aspect of the system of money in politics. By itself, the use of direct mail as a signature-gathering medium probably does not materially affect the relative political influence of the poor.

143. The use of direct mail as a supplementary means of circulating petitions, such as to the members of proponent organizations, is likely to continue.

144. Justice Stevens' second argument, that the ban infringes speech by reducing the number of initiatives that qualify for the ballot, is discussed *infra* notes 164-170 and accompanying text.

circulator. Ed Koupal's account of the technique of signature-gathering is devoid of any substantive discussion of the measure.¹⁴⁵ Furthermore, a system of circulation divorced from advocacy is perfectly imaginable. Judge Logan, dissenting in the Tenth Circuit, demonstrated this by suggesting that rather than rely on private circulators, a state might require that all initiative petitions be available for signature at public locations throughout the community.¹⁴⁶ Supporters of the measure would use all available means to encourage voters to sign, but the circulation would be passive and neutral. Whatever might be said about the wisdom of such a system, it is difficult to see how it could be thought to deny anyone the freedom of speech.

Nevertheless, given a system resembling the one now in place in states with the initiative, Justice Stevens is undoubtedly correct that a degree of advocacy normally accompanies circulation of a proposal. Apparently, then, it seemed natural, or perhaps inevitable, to categorize the ban on paid circulators with *Buckley v. Valeo*'s spending limits. Here, as there, a limit is placed on spending for a speech-laden activity, and inevitably the amount of speech is reduced.

This view is plausible only so long as one ignores the precise connections between the money, the speech, and the limit. Justice Stevens fudged this point by using the vague expression that circulation of an initiative necessarily "involves" political speech.¹⁴⁷ In *Buckley*, the activity being limited was spending on political campaigns. A political campaign consists of almost nothing but speech, or intermediate tasks whose ultimate purpose is the production of speech. A limit on spending in a campaign was a limit on the necessary means by which speech is accomplished, given *Buckley*'s premise that spending money is a practical prerequisite for virtually all forms of effective campaigning. Effective campaigning does not merely "involve" effective speech; effective campaigning is *identical* to effective speech. What *Buckley* limited, then, were the means for producing speech.

In *Meyer*, the case was quite different. The goal in *Meyer* was not speech but signatures. Paying circulators is not a prerequisite to speech about the initiative proposal or about anything else. Under the Colorado law, nothing would have prevented the supporters of a proposition from sending around one or more paid employees with every volunteer circulator. The employees could have done all the arguing, so long as a volun-

145. See *supra* note 108 and accompanying text.

146. *Grant v. Meyer*, 828 F.2d 1446, 1462 (10th Cir. 1987) (Logan, J., dissenting).

147. *Meyer*, 108 S. Ct. at 1891.

teer was there to verify the signatures.¹⁴⁸ Since the ban is directed to paying the circulator, not to paying one or more advocates who might accompany the circulator, there is no ban on paying for any lawful means of persuasion the proponents may care to use. Justice Stevens simply was wrong when he wrote that the ban limited “the number of voices who [would] convey appellees’ message and the hours they can speak and, therefore, . . . the size of the audience they can reach.”¹⁴⁹ In his zeal to make *Meyer* look like *Buckley*, he overlooked that there was no speech activity that was prohibited by the Colorado law or that could not be performed by paid personnel.

For the same reason, Stevens’ recital of the principle that a speaker may not be deprived of the most effective means of speech simply because other means remain available was beside the point. Initiative proponents in Colorado were not barred from *any* means of speech. Justice Stevens’ opinion confuses two senses of “effectiveness.” Undoubtedly, paid circulators were the plaintiffs’ most effective means of gaining signatures, but this is neither here nor there so far as the First Amendment is concerned. The ban on paid circulators did not, as Justice Stevens asserted, restrict the plaintiffs’ access to “direct one-on-one communication.”¹⁵⁰ The plaintiffs were free to spend as much as they liked to hire individuals to go around communicating one-on-one.

Their ability to spend in this manner was not restricted, but their incentive to do so was removed. This is an altogether different thing. Many things done by the government reduce the incentive of persons to speak. If the legislature, learning of the plaintiffs’ planned initiative, had

148. The Colorado Attorney General argued to the Supreme Court that circulation of petitions was a quasi-official function:

The prohibition against paying petition circulators is significant because it removes the appearance of possible corruption from the only persons who validate the signatures. The position is obviously governmental in nature. The verification of signatures does not constitute speech, and the prohibition against payment of petition circulators constitutes nothing more than the prohibition against payment for the act of verifying signatures.

Brief for Appellants at 12, *Meyer v. Grant*, 108 S. Ct. 1886 (1988).

This argument contained several weaknesses. Circulators have none of the characteristics ordinarily associated with official actors. Most states have some process for checking the validity of all or a random selection of signatures after the petitions have been filed, and Colorado’s choice not to use any such process was a weak basis for treating the circulators as public servants, especially at the cost of the circulators’ speech rights.

We believe the state would have been on firmer ground if, instead of relying on the fiction that circulators occupied a governmental position, it had pointed out that the validation function was separable from all speech activities, so that a ban on paying circulators did not entail a ban on payment for any speech activity whatsoever.

149. *Meyer*, 108 S. Ct. at 1892.

150. *Id.* at 1893.

acted on its own to deregulate the trucking industry, that would have removed the plaintiffs' incentive to initiate debate on the subject far more effectively than the ban on paid circulators. It would not have violated the First Amendment.

Although paying circulators is not a prerequisite to speaking in any sense, it might be a prerequisite to acquiring signatures, if volunteers cannot be attracted. This does not present a question of freedom of speech, however, especially when, in practice, the main reason for requiring signatures as the means for qualifying initiatives is to see whether the measure can attract volunteer circulators.

The structure of Justice Stevens' argument is that when instrumental activity X is likely to entail speech activity Y , then restrictions on X infringe upon first amendment rights. Y is not itself regulated, but under the Stevens view, the fact that the activity (X) that in practice entails Y has been restricted is sufficient. We need not claim that there are no situations in which this analysis would be sound. We claim that it is not always sound. For two reasons it is unsound in the case of the circulation of initiative petitions.

First, if the First Amendment demands a policy of encouraging instrumental activities that entail speech, *Meyer v. Grant* pushes down the rug in one place only to have it pop up in another, more important place. Permitting the proponent of an initiative to hire circulators permits advocacy in the shopping malls, however minimal we have seen that advocacy to be, but in doing so it obviates the proponent's need to engage in another, more meaningful form of advocacy, namely, the recruitment of volunteers to circulate the petitions.¹⁵¹ Contrast what we have seen of the process of circulating petitions on the street with this account by an individual with extensive experience in recruiting volunteer circulators:

[W]e were finding people who felt like they would get something out of it, people who were committed to the environment for instance or just to the idea of People's Lobby, that the initiative process . . . was an important way to let citizens express what they wanted. They also participated in writing and drafting the initiative that we were going to do, so that it was theirs. They were brought into the entire process from the very beginning, what would we do, how would we do it, drafting the law and then going out and getting the signatures and participating in the campaign to pass it. They were participating in the entire process.¹⁵²

Striking down a restriction on instrumental activity in order to pre-

151. The Colorado statute placed no limitation on the proponent's ability to hire persons to recruit volunteers.

152. Interview with Joyce Koupal, at 2.

serve an incentive for political advocacy may be proper in some cases.¹⁵³ But surely, in any such case, the preserved incentives for speech must plainly outweigh any concomitant disincentives for speech. This condition is not satisfied in *Meyer* when the advocacy entailed in the recruitment of volunteers is plainly superior as an instantiation of first amendment values to the “hoopla,” the rush that rules out more than a couple of brief slogans, and the hawking of several unrelated petitions simultaneously¹⁵⁴ that characterize paid signature gathering. The point here is closely related to our argument in Part IV regarding the state’s interest in banning paid circulators.¹⁵⁵ There, we saw that the ability to recruit volunteer circulators, and not the ability of circulators to obtain

153. The charitable solicitation cases, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), which was cited by Justice Stevens in *Meyer*, 108 S. Ct. at 1892 n.5, and *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), might be regarded as examples. That is, the Court could have concluded that solicitation was an unprotected activity, but that a ban on solicitation was unconstitutional because the ban would remove an incentive to engage in advocacy, which was protected by the First Amendment. In *Schaumburg*, however, the Court rejected the state’s formulation of the case along these lines. The state argued that the ordinance at issue, which prohibited solicitation of contributions unless at least 75% of the receipts were used for charitable purposes, was permissible, because it “deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money.” *Schaumburg*, 444 U.S. at 628. The Court rejected this characterization as representing “a far too limited view” of prior cases regarding canvassing and soliciting by religious and charitable groups. *Id.* Thus, rather than striking down the ordinance on the grounds that a ban on solicitation would deter the advocacy that admittedly was not banned directly, the Court took a more holistic view of the situation, regarding the ordinance as too much of a threat to organizations whose activities traditionally had received special solicitude under the First Amendment.

Despite the emphasis in *Schaumburg*, repeated in *Munson*, on the traditional protection accorded to charities and religious groups, we recognize that these cases have a certain analogic force in *Meyer v. Grant*, and we regard the reference to *Schaumburg* as the single most persuasive argument Justice Stevens offers. Nevertheless, what decisively distinguishes *Schaumburg* and *Munson* is that in those cases the state was prohibiting a consensual transaction between private parties, whereas in *Meyer* the essential state activity was to determine how it would allocate its own scarce ballot space. Because of this difference, the analogic force of *Schaumburg* and *Munson* is at least offset by that emanating from *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

The *Regan* Court held that denial of a benefit tax subsidy, for engaging in activity protected by the First Amendment does not violate the Constitution, even when similar activity engaged in by others is subsidized. *Id.* at 546. The award of a tax subsidy in *Regan* may be analogized to the award of a ballot position in *Meyer*. That supporters of trucking deregulation undoubtedly have a right to hire persons to obtain signatures on petitions expressing their views does not obligate the state to submit their proposal to a vote any more than it obligates the state to subsidize them financially.

154. See Interview with Mike Arno, at 15 (two or three petitions at once are most effective, but he knew of one circulator carrying as many as eleven at a time); Interview with Kelly Kimball, at 13 (in 1988, his circulators were carrying up to five petitions simultaneously).

155. See *supra* notes 118-122 and accompanying text.

signatures, demonstrates in practice the requisite public support to earn a ballot position for the proposal.¹⁵⁶ Here we see, not coincidentally, that it is at this crucial stage that meaningful political expression occurs. *Meyer v. Grant* enshrines hucksterism at the expense of genuine political dialogue.¹⁵⁷

The second reason that the First Amendment does not protect the instrumental activity of circulation as an indirect means of encouraging advocacy is that doing so consistently would lead to results that are highly unlikely, if not absurd. Colorado's ban on paid circulators is but one of numerous regulations of the process that exist in one, some, or all of the states providing for the initiative.¹⁵⁸ Some regulations are routine, and others are to varying degrees controversial, but the validity of many of them would be in severe doubt in the unlikely event that the reasoning of *Meyer v. Grant* were to be taken seriously. We shall consider briefly three types of regulation, regarding who may circulate petitions, where petitions may be circulated, and the permissible content of petitions.

Most states restrict the circulation of initiative petitions to either registered voters or persons eligible for voter registration.¹⁵⁹ This means, depending on the election laws of the particular state, that persons under eighteen, aliens, nonresidents, residents who have moved into the state within thirty days, formerly convicted felons, and others are ineligible to circulate petitions. Yet, all these people have first amendment rights. None could be prohibited from advocating statutory or constitutional changes. Circulation by a member of one of these groups would "involve" advocacy to the same degree as circulation by a registered voter. 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.¹⁶⁰

156. See *supra* note 127 and accompanying text.

157. Those who believe the cardinal principle of first amendment jurisprudence is content neutrality may object to the characterization of one form of speech as superior to another. Nevertheless, such individuals should agree with our basic position. If a regulation that does not restrict speech directly (ban on paid circulators) is challenged on grounds that it discourages some speech indirectly (speech by initiative proponents who are unable to attract volunteer circulators to accompany paid advocates), the showing that the regulation also encourages speech that otherwise would be discouraged (recruitment of volunteers) should suffice for the content neutrality adherent. That person has no basis for favoring the speech discouraged by the regulation over that which is encouraged.

158. See *infra* notes 159-169 and accompanying text.

159. See, e.g., CAL. ELEC. CODE § 42 (West. Supp. 1989).

160. If restrictions on who may circulate petitions were said to infringe first amendment rights, the state might try to justify restrictions on the basis of the need for a reliable person to verify signatures. However, there is no basis for saying that an eligible voter is more reliable than a nonvoter. Aliens, for example, or persons who have moved to a state within 30 days are

In about half the states providing for the initiative, a degree of geographic distribution of signatures is required for qualification of a measure.¹⁶¹ In Massachusetts, for example, no more than 25 percent of the signatures may come from a single county.¹⁶² This means that if a proponent has already obtained 25 percent of the total required from, say, Boston, no more circulation in Boston will count toward the qualification effort. It would be difficult to justify placing a cap on the amount of speech in particular counties as a time, place, or manner restriction. Therefore, if restrictions on the circulation of initiative petitions infringe upon freedom of speech, such geographic restrictions would be difficult to defend against a first amendment attack.¹⁶³

Finally, and perhaps most significantly, the Supreme Court has often expressed the view that the most suspect form of infringement of free speech rights is one that regulates content.¹⁶⁴ Yet, numerous and diverse provisions regulate the content of initiatives.¹⁶⁵ In some states, for example, initiatives may embrace only a single subject.¹⁶⁶ In several states, initiative statutes are permitted but not initiative constitutional amendments,¹⁶⁷ meaning a proposal contravening the state constitution may not be circulated. In Illinois, only initiatives affecting the legislature

not less reliable as a group than registered voters. There is some convenience to election officials, who have signatures of registered voters on file, in limiting the circulators to that group. Administrative convenience, however, is not usually enough to justify what is, by hypothesis, a significant restriction of speech rights. More fundamentally, the "verification" function served by the circulator provides little benefit, especially in the great majority of states that check signatures after the petitions are filed. The only serious justification for restricting petition-circulation to registered or eligible voters is that the ability to recruit circulators is the measure of voter support. This is precisely the justification for a ban on paid circulators.

161. CRONIN, *supra* note 12, at 235-36. A breakdown of the requirements in individual states is found in Magleby, *supra* note 110, at 294-95.

162. *Id.*

163. Presumably, the state's defense would be that it chose to require a certain form of voter support, including not only an absolute number but a certain distribution as well. It is hard to see why this argument should be stronger than a state's claim that it wishes to require support to be manifested by the ability to recruit volunteer circulators. To the contrary, the defense of the geographic distribution requirement is suspect to the extent it treats voters differently according to their place of residence. See generally Reynolds v. Sims, 377 U.S. 533 (1964). For a challenge to geographic distribution requirements prior to the ruling in Baker v. Carr, 369 U.S. 186 (1962), to the effect that malapportionment controversies were justiciable, see South v. Peters, 339 U.S. 276 (1950).

164. For a recent discussion containing references to the extensive case law and secondary literature, see Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904 (1989).

165. See Magleby, *supra* note 110, at 289-90.

166. E.g., CAL. CONST. art. II, § 8(d). See generally Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983).

167. See B. ZISK, *supra* note 120, at 15.

are permitted.¹⁶⁸ These and similar restrictions would be in the greatest jeopardy of all if Justice Stevens' reasoning were followed because, unlike the ban on paid circulators and each of the previous examples, these restrictions are not content-neutral.¹⁶⁹

We do not think the Supreme Court would strike down these or many similar regulations of the initiative qualification process as violative of the freedom of speech.¹⁷⁰ We doubt that first amendment challenges to most of them would be taken seriously, despite the fact that under *Meyer v. Grant* all of them should be highly vulnerable. If we are right in these suppositions, why did the first amendment attack on the ban on paid circulators succeed? We can think of two possible explanations, neither of which serves as a justification.

The first relates to the form of the ban as a criminal prohibition. State statutes typically do not make it a crime, absent fraud, for a non-voter to circulate a petition, for the proponent to go on circulating in counties where the geographic distributional quota already has been satisfied, or for the proponent to circulate a petition that is ineligible by reason of containing too many subjects or for some comparable reason. Signatures so gathered or petitions so circulated simply are rejected by state election officials. The form of the Colorado ban, as a criminal prohibition, made it look more like the kind of law that raises first amendment questions. However, as we demonstrated with our hypothetical statute in Part II,¹⁷¹ the criminal prohibition form is not essential to the ban, since the same effect could have been achieved by a statute taking a form similar to the examples discussed in this section, namely instructing state officials to ignore the product rather than criminalizing the conduct. First amendment analysis should not turn on such differences of form.

The second explanation relates to the analogy drawn from *Buckley*

168. ILL. CONST. art. XIV, § 3.

169. The example of the states permitting statutory but not constitutional initiatives shows that these restrictions need not even be viewpoint neutral. Suppose the constitution of such a state mandated regulation of trucking but left most of the particulars of regulation open to legislation. In that state, an initiative to deregulate trucking would be barred, whereas an initiative to make regulation of trucking more onerous would be permissible.

170. This is not to deny that some procedures might be unconstitutional. For example, in Massachusetts, the attorney general may reject proposals he or she deems beyond the scope of the initiative process. B. ZISK, *supra* note 120, at 259-60. The vesting of content-based power to block access to an established legislative process in a nonjudicial official raises serious first amendment questions in the absence of procedural safeguards analogous to those required in the case of content-based prior restraints on literature and other forms of expression. See *Freedman v. Maryland*, 380 U.S. 50 (1965).

171. See *supra* notes 64-66 and accompanying text.

v. *Valeo*.¹⁷² We have seen that in more than one place the very wording of Justice Stevens' opinion in *Meyer v. Grant* seemed to be shaped by the rhetorical force of *Buckley*.¹⁷³ Some lawyers, and some Supreme Court Justices too, may think that *Buckley* and some of the subsequent campaign finance cases¹⁷⁴ established a privileged status within the First Amendment for political expenditures. In this view, the ability to show that a challenged regulation affects campaign expenditures creates a particularly strong, perhaps irresistible, first amendment attack.

Surely this is wrong. *Buckley* was a landmark case in part because it held that speech requiring the expenditure of money does not receive a reduced level of constitutional protection. This holding remains controversial enough,¹⁷⁵ but it would be perverse to convert it into the altogether different doctrine that one who pays for speech receives *greater* protection than one who speaks without spending money. It follows that the proponent who is restricted from spending money to hire petition circulators is entitled to precisely the same degree of first amendment protection as the proponent who is restricted from recruiting circulators who are not eligible to vote, the proponent who is restricted from continuing to circulate petitions in a county that has already surpassed its geographic quota, and the proponent who in Illinois is restricted from circulating an initiative not affecting the legislature. None.

B. The Difficulty of Qualification

Justice Stevens' second explanation for why the ban on paid circulators invades freedom of speech was that by making it more difficult to qualify initiatives, proponents' ability to focus discussion on their proposals would be limited.¹⁷⁶ This is a remarkably weak argument, and it is doubtful whether it would have been offered if the question had not been confused by Judge Logan's faulty reliance on *Posadas*.¹⁷⁷ The obvious objection to Justice Stevens' point is that the state is not required to have an initiative process at all. It is difficult to see why Colorado denies its citizens freedom of speech when it enacts a statute that increases the

172. 424 U.S. 1 (1976) (per curiam).

173. See *supra* notes 62, 147-149 and accompanying text.

174. Particularly, in matters involving ballot measures, see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

175. See, e.g., Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976); Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

176. *Meyer*, 108 S. Ct. at 1892.

177. See *supra* note 49 and accompanying text.

difficulty of qualifying an initiative, when New York is permitted to deny its citizens any access to the ballot.

Justice Stevens' answer, unfortunately blurred by the fact that it comes in the context of *Posadas*, is that "the power to ban initiatives [does not] entirely includ[e] the power to limit discussion of political issues raised in initiative petitions."¹⁷⁸ Undoubtedly, a state could restrict access to the initiative process in many ways that would violate the First Amendment or related constitutional guarantees. Obvious examples would be statutes that said only members of the Democratic or Republican parties could circulate initiatives; no one could debate publicly the merits of an initiative proposal while it is in circulation; or no one in the course of circulating an initiative could criticize a government official.

But the mere fact that it is possible to regulate access to the initiative ballot (and almost any other subject) in ways that would offend the Constitution does not mean that the states do not enjoy a general ability to set reasonable requirements to decide which initiatives will qualify for the ballot. It is hard to see what is unreasonable about a qualification standard that calls for volunteers to acquire a specified number of signatures. The constitutional defect in the examples in the previous paragraph is not simply that they make it more difficult to qualify an initiative. Otherwise, a mere increase in the required number of signatures would violate the First Amendment.

There is another, equally important respect in which Justice Stevens' argument is wrong. In making the argument he was confronted with the embarrassing fact that Colorado has one of the heaviest rates of use of the initiative in the United States.¹⁷⁹ The district court had found that more initiatives qualified in Colorado than in the great majority of states that permit the use of paid circulators.¹⁸⁰ Justice Stevens' only response to this point was to note that without the ban, even more propositions would qualify.¹⁸¹

This response overlooks the fact that the purpose of initiative qualification requirements is not to qualify the largest possible number of measures for the ballot.¹⁸² That objective could be accomplished easily

178. *Meyer*, 108 S. Ct. at 1893 (quoting *Grant v. Meyer*, 828 F.2d 1446, 1456 (10th Cir. 1987)).

179. See Magleby, *supra* note 110, at 292 (table shows 45 measures qualified in Colorado between 1950 and 1984, for a ranking of sixth out of 26 states, and nearly doubling the median figure of 23 measures qualifying during the same period).

180. *Meyer*, 108 S. Ct. at 1890 n.3.

181. *Id.*

182. The same point of confusion has occurred in lower court decisions. In *Hardie v. Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976) (en banc), *cert. denied*, 430 U.S. 969

by permitting any individual to propose as many measures for the ballot as he or she likes.

The real objective of the qualification requirements is to filter out all proposals but a reasonable number that have made the greatest showing of popular support. If, as a result of the Supreme Court abolishing the ban on paid circulators, the voters of Colorado find there are more measures qualifying than they reasonably can consider, they will demand that the legislature make the requirements more severe. The legislature undoubtedly will respond. It may shorten the time within which signatures may be gathered; or it may increase the number of signatures; or it may simply leave the signature-percentage unchanged, silently letting the qualification requirements become more difficult as the population grows. In the long term, the result will not be more initiatives. The result will be more initiative places on the ballot bought and paid for, and fewer earned by the hard work of volunteers.¹⁸³ Recent experience in California has shown precisely this course of development and an entirely appropriate adverse public reaction.¹⁸⁴ *Meyer v. Grant*, by barring the most straightforward remedy, is a blow against participatory democracy. It does nothing for free speech.

VI. A Proposal: The Volunteer Bonus

As we have seen, *Meyer v. Grant* comes at a time of growing disenchantment with the capture of the initiative qualification process by those who can afford to pay huge sums to initiative circulators. If the initiative is to continue to perform its historic function, reforms must be

(1976) (striking down a statutory limit on spending for professional circulators), the California Supreme Court declared that it could not "assume that any proposal capable of generating genuine voter support will necessarily attract at the outset sufficient 'volunteer' circulators to do the job." *Id.* at 377, 556 P.2d at 304, 134 Cal. Rptr. at 204. This comment was repeated in *Ficker v. Montgomery Bd. of Elections*, 670 F. Supp. 618, 620 (D. Md. 1985), a case correctly anticipating the result in *Meyer v. Grant*. Both these courts erroneously assumed that all proposals "capable of generating genuine voter support" are entitled to places on the ballot. If "genuine voter support" is defined as approval by a majority in an election, the number of measures with the potential to generate such support presumably is vast. If the support referred to is merely the willingness of the requisite number of voters to sign a petition if asked, our findings regarding the signature-gathering process suggest that the number of measures having the ability to generate this kind of support is virtually infinite. These lower courts and the Supreme Court all failed to recognize that the purpose of the qualification requirements is not to place on the ballot all measures that voters may be willing to support, but instead to winnow out all measures except those evidencing unusual affirmative voter demand.

183. This result is especially likely in a state such as Illinois that imposes a quota on the number of initiative measures that may appear on the ballot in one election. *See supra* note 122. A volunteer group might qualify an initiative, only to find that three other groups, operating through hired circulators, had previously qualified their measures.

184. *See supra* notes 3-11 and accompanying text.

designed to restore the initiative process to the volunteers. *Meyer v. Grant* makes that harder, but not necessarily impossible.

One proposal for reform that is likely to receive discussion is a requirement that professional circulators disclose to signers that they are being paid.¹⁸⁵ Such a requirement may be defensible on the simple ground that it is better for the solicitee to be provided with information than to be denied it. It is illusory, however, to imagine that a disclosure requirement would provide an effective response to the serious problems posed by professional circulators. For one thing, a disclosure requirement probably would not make it more difficult for paid circulators to succeed. Those in the industry do not think it would have this effect.¹⁸⁶ To the contrary, there is every reason to believe circulators, like door-to-door magazine salespersons, would be able to use the disclosure requirement to their advantage: "Please sign this petition and help me go to college!" This seems to us at least as good a reason for signing as the desire to give the circulator a birthday greeting. More fundamentally, the disclosure might add to and certainly would not detract from the degree to which the signatures obtained reflect considerations unrelated to popular support for the proposal.¹⁸⁷

Genuine reform must start with the recognition that it can be both too hard and too easy to qualify an initiative. This is the case now in California, and it will be the case elsewhere if, as seems very likely, the petition management industry that has grown up in California spreads rapidly to other states.¹⁸⁸ It is now the case in California that almost no initiatives qualify primarily with signatures obtained by volunteers. This was not always the case. Many initiatives as recently as the 1970s qualified solely or predominantly with volunteer circulators.¹⁸⁹ On the other

185. Cal. A.B. 141, Speir.

186. Interview with Kelly Kimball, at 17.

187. A related difficulty with the disclosure requirement is that in order to make it enforceable, proposals are likely to require that the disclosure appear conspicuously on the face of any petition section circulated professionally. This can only detract from the existing and far more important requirement that summary information about the content of the measure appear conspicuously. The proposal we offer below would require disclosure, but for reasons that do not make it crucial that the disclosure occur before the individual signs. Accordingly, the disclosure could take the form of a separate card that a professional circulator must hand to each person who signs.

188. One of the two major California firms managed the first paid petition drive in Colorado after *Meyer v. Grant*. Interview with Mike Arno, at 1. Kelly Kimball, whose firm has qualified initiatives in a number of states besides California, predicted growth in the utilization of the process outside of California. Interview with Kelly Kimball, at 3. He added that "Florida's in its infancy in its initiative process. It's about to explode." *Id.* at 25.

189. See Price, *supra* note 112, at 357 (examples of three measures that qualified in the late 1970s using only volunteer circulators).

hand, for those willing and able to pay, qualification is too easy. The initiative circulation industry can assure qualification, more or less without regard to the content of the proposal.

If it were not for *Meyer v. Grant*, a statute setting aside signatures obtained by professionals (along the lines of our hypothetical statute) would solve the second part of the problem. But the Court has decided *Meyer* and is not likely to stand for a disguised version of the Colorado statute. In any event, a ban on paid circulators would do nothing to ease access to the ballot for volunteer groups.

We propose that the number of signatures required for qualification be increased. This would respond to the growing feeling among the electorate that too many groups, and especially too many special interest groups, are buying their way onto the ballot. For the response to be effective, the increase in the requirement should be large enough so that it will be difficult or impossible to qualify a measure primarily with paid circulators. Given the efficiency of the petition management industry, a very substantial increase would be needed, perhaps a doubling or tripling of the requirement in California. As a starting point for discussion, we propose an increase of 150 percent.¹⁹⁰

Our proposal to this point addresses the problem of qualification that is too easy, but not the problem of its being too hard. An increase in the signature requirement without more would have nearly the same practical effect as repealing the initiative altogether, which is not at all our intent. Therefore, we propose a two-tier signature requirement. Signatures obtained by volunteers and those obtained by paid circulators would both count, but there would be a bonus for the former. Again, as a starting point for discussion and assuming a 150 percent increase in the basic signature requirement, we propose that each signature from a volunteer would count as five. In that case, a petition drive relying exclusively on volunteers would need half as many signatures as at present after taking into account the volunteer bonus.

To avoid unfairness to individuals who sign a petition section circulated by professionals, in our proposal such individuals would remain free to sign a section of the same petition circulated by a volunteer. When an individual is found to have signed both professional and volunteer sections, the signature eligible for the bonus would be the one

190. We would also favor stating the requirements in absolute figures rather than as a percentage of the electorate. Because the real challenge is the mobilization of circulators and not the actual obtaining of signatures, the ease of obtaining signatures does not grow proportionately with growth in the population of the state. This is not to deny that some adjustments are desirable from time to time, but the adjustments should be made by constitutional amendments that can be debated, rather than as an automatic by-product of population growth.

counted. The professional circulator would be required to disclose these circumstances to the signer.¹⁹¹

Our proposal would stimulate use of the initiative by popularly based groups, who have tended to be frozen out in recent years. It would not prohibit the use of the initiative by groups relying solely on paid circulators, but it would give them a significant incentive to switch, at least in part, to volunteers. It would not be a perfect system, but neither is the present system, with or without the now unconstitutional Colorado ban.

Under our proposal, a circulator might falsely declare that he or she is a volunteer, thus obtaining the volunteer bonus under false pretenses.¹⁹² Such deception, however, would not defeat the purposes of our proposal unless it occurred on a large scale. This would be difficult to conceal because the finances of an initiative qualification effort must be reported to the public, and are subject to audit.¹⁹³ We conclude that our proposal is enforceable.

Finally, we believe our plan is constitutional. It does not make payment for circulation a crime, nor does it render such payment futile. It does not prohibit anything. In *Meyer v. Grant*, Justice Stevens relied in part on testimony describing the sacrifices volunteers may be required to make, causing proponents to desire to turn to paid circulators.¹⁹⁴ In this sense, our proposal to recognize the sacrifices of volunteers by rewarding them with a signature bonus finds support in the Supreme Court's opinion. To put the point within the framework we have established in this article, we may say that by awarding the bonus, our proposal improves the state's measuring device by placing extra weight on what is most likely to reflect genuine public sentiment. In doing so, our proposal would greatly stimulate the one portion of the initiative qualification process that furthers first amendment values in a meaningful way, namely, the recruitment of volunteer circulators.

We do not deny that *Meyer* provides a toe hold for persons challenging our system. Nevertheless, we are hard-pressed to see how their argument would proceed, unless the Supreme Court is willing to say that the First Amendment hands over the ballot to the highest bidder. Presumably, the argument would be cast in terms of a "burden" being placed on the "right" to pay circulators. But it is no burden on one who pays cir-

191. See *supra* notes 65, 187.

192. Such violations could be minimized by requiring proponents to file a list of all paid circulators.

193. See, e.g., CAL. GOV'T CODE § 84200.5(f) (West Supp. 1989) (reporting requirements); § 90001(h) (West 1987) (audits).

194. *Meyer*, 108 S. Ct. at 1892 n.6.

culators that a bonus is given to proponents of other proposals in return for what Justice Stevens recognized was the difficult task of recruiting volunteers to circulate petitions.¹⁹⁵ The right recognized in *Meyer* was the right to pay circulators not to a guarantee that paid circulators' work product must be weighted identically with that of volunteers.

Our proposal might be challenged as a denial of equal protection. The unequal weighting of signatures might be analogized to unequal weighting of votes, which is not permitted under the Fourteenth Amendment.¹⁹⁶ But a signature on a petition is not like a vote, for purposes of evaluating "weighting." Votes are competitive, either among candidates or among positions (yes or no) on propositions. Increasing the "weight" of *A*'s vote harms *B*, who may take a position opposed to *A*'s. In contrast, petition signing is additive. If *B* signs a petition section circulated by a professional circulator in the hope of qualifying a measure for the ballot, *B*'s goals are furthered, not hindered, if *A*'s signature for the same measure on a section circulated by a volunteer is multiplied. Furthermore, *B* retains the option of signing a volunteer section and thereby multiplying the effect of *B*'s own signature.

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

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

195. *See id.*

196. *Reynolds v. Sims*, 377 U.S. 533 (1964).

Conclusion

Meyer v. Grant seemed like an easy case to the Supreme Court. Justice Stevens, known for his creativity, was content to follow in the tracks of Judge Holloway in the court below. He ignored telling points made in response to Judge Holloway by Judge Logan. Justices who, based on their previous actions, ought to have dissented (Justice White in particular),¹⁹⁷ joined in Justice Stevens' opinion.

The apparent reason the Court thought that this was an easy case was that it seemed to fit neatly within the doctrinal pattern set by *Buckley* and the other campaign finance decisions. But the Supreme Court should not issue decisions when it is unwilling or unable to devote the time to a careful and sensitive consideration of the case, in all its specificity. The Court's preoccupation with doctrine distracts it from its greatest task as a court, which is not the elaboration of rules but the wise determination of individual disputes. The best judicial rules are the ones that emerge from such adjudication, not the ones that are imposed on and get in the way of adjudication.

So, in *Meyer v. Grant*, if the Court had been willing to take even a second look, it would have noticed that this was not a campaign finance case; that there was no prohibition of any speech activity, paid or otherwise; that any state that employs the initiative process must employ some means of drastically restricting the number of proposals that can appear on the ballot; and that by exalting one type of initiative user, the Court was interfering with the ability of the states to ease access to the ballot for other groups. Carelessly, the Court impaired the states' ability to reform the initiative process. Perhaps, as we have suggested, the damage can be controlled.

197. See *Buckley v. Valeo*, 424 U.S. 1, (White, J., dissenting in part); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, (White, J., dissenting); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, (White, J., dissenting).