



BUILDING DEMOCRACY FOR THE 21ST CENTURY

Direct Democracy Series Week 3: First Amendment Protections and a Model State for Direct Democracy

Petition gathering is core political speech, protected by the First Amendment

In *Meyer v. Grant*, the U.S. Supreme Court held that the act of circulating petitions for ballot initiatives is protected political speech under the First Amendment.¹ Colorado provided a six-month petition process for either proposed legislation or proposed constitutional amendments.² Colorado state law at the time also made it a felony for any proponents of one of these petitions to pay petition circulators.³ Proponents of any such statewide petition must submit signatures equal in number to at least five percent of all votes cast for candidates for the Office of Secretary of State in the preceding general election.⁴ Because the proponents concluded, based on their prior experience as circulators, that they would need paid circulators to succeed in their initiative campaign, they brought an action under 42 U.S.C. § 1983, seeking to have the ban on paid circulators ruled unconstitutional.⁵

At trial, the district court judge found that the ban on paid circulators did not violate the petitioners' First Amendment rights because it did not place any restraint on their individual expression.⁶ The court also found that this ban did not have a measurable impact on the petitioners' ability to place their initiative on the ballot.⁷ The court found that even if the restriction burdened the petitioners' speech, the state's interest in ensuring every initiative has a sufficiently broad base to warrant placement on the ballot, as well as protecting the integrity of the initiative process, outweighed the petitioners' First Amendment interest.⁸

After a divided U.S. Court of Appeals for the Tenth Circuit upheld the district court, an *en banc* rehearing of the Tenth Circuit found that the record indicated that the petitioners were engaged in speech when obtaining signatures, and the available pool of circulators being smaller than if they could have paid circulators constituted a burden on their speech.⁹ The *en banc* rehearing also rejected the argument that, because ballot initiative is a state-created right, individual states are free to impose whatever condition they see fit.¹⁰

¹ 486 U.S. 414 (1988).

² *Id.* at 415.

³ *Id.* at 416.

⁴ *Meyer*, 486 U.S. at 416.

⁵ *Id.* at 417.

⁶ *Id.* at 418.

⁷ *Id.*

⁸ *Id.* at 418–19.

⁹ *Id.* at 419.

¹⁰ *Id.* at 420.



BUILDING DEMOCRACY FOR THE 21ST CENTURY

The Supreme Court upheld the Tenth Circuit’s *en banc* opinion, ruling that this content-neutral limitation on political speech required exacting, or intermediate, scrutiny.¹¹ Following the Court’s seminal *Buckley v. Valeo*, which addressed a litany of campaign finance provisions, content-neutral limitations must be substantially related to an important government interest.¹²

The *Meyer* Court found that “[a]ppellees seek by petition to achieve political change in Colorado; their right to freely engage in discussions concerning the need for change is guarded by the First Amendment.”¹³ The kind of discussions required to convince someone that a proposal is worthy of public scrutiny and debate is clearly “core political speech.”¹⁴ A restriction like prohibiting paid circulators restricts the number of voices who will speak on an issue, limiting the number of people proponents can reach and lowering the likelihood of a proposal earning a position on the ballot.¹⁵

The Court also rejected the state’s argument that the ban on paid circulators was not a burden because alternative means of communication were available. “The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.”¹⁶ In summary, First Amendment protection for initiative petition circulation is “at its zenith.”¹⁷ The Court likewise rejected the state’s arguments on the need for the prohibition, as all of the interests presented were adequately accomplished by other ballot access requirements.¹⁸

Signing an initiative petition is also core political speech

In *John Doe No. 1 v. Reed*, the Supreme Court stated that the act of signing an initiative petition was also political speech.¹⁹ The Court applied a framework for the analysis of First Amendment protection for petition signers, which remains the current test.

The petition at the center of *Doe* would have extended certain benefits in Washington to same-sex couples.²⁰ Respondent intervenors in the case sought to obtain copies of the petitions, including names

¹¹ *Id.*

¹² 424 U.S. 1 (1976).

¹³ *Meyer*, at 421.

¹⁴ *Id.* at 421–22.

¹⁵ *Id.* at 422–23.

¹⁶ *Id.* at 424.

¹⁷ *Id.* at 425.

¹⁸ *Id.*

¹⁹ 561 U.S. 186 (2010).

²⁰ *John Doe No. 1 v. Reed*, 561 U.S. 186, 191 (2010).



BUILDING DEMOCRACY FOR THE 21ST CENTURY

and addresses of the signers.²¹ The petition sponsor and some signers contested this effort, arguing that disclosure would violate their First Amendment rights.²²

The Court stated that “[a]n individual expresses a view on a political matter when he signs a petition under Washington’s referendum procedure... In either case, the expression of a political view implicates a First Amendment right.”²³ They went on to state that “[p]etition signing remains expressive even when it has a legal effect in the electoral process.”²⁴

In other words, just because something has a legal effect on either the outcome of an election for a candidate or, in this case, the future of potential legislation, does not make the activity any less political speech. The Supreme Court was unequivocal in identifying petition signing as an expressive act of political speech. Thus the Court applied the same level of “exacting scrutiny” to this disclosure requirement as they did to other disclosure requirements on speech.²⁵ The Court found a substantial relation between an important government interest and the disclosure requirement.²⁶ However, the case provides a framework for the privacy of future potential petition signers.

Idaho provides a model for state and local direct democracy

Idaho provides a robust opportunity for binding questions of statewide or local policy through citizen-initiated referendums. The Idaho Constitution provides a general right to initiative and referendum, but the process is defined by statute.²⁷

Idaho law includes a full chapter dedicated to referendum procedures, laying out requirements for the form of the question, signature requirements, filing procedures, and other pertinent details.²⁸ While the chapter directly addresses requirements for statewide initiatives, subsections define parallel processes for city²⁹ and county³⁰ referendums. These subsections substitute respective officeholders and duties in place of their statewide counterparts. They also define the threshold as “at least twenty percent (20%) of the total number of qualified electors voting in the last general county [or city] election in November of an even-numbered year.”³¹

²¹ *Id.*

²² *Id.*

²³ *Id.* at 194–95.

²⁴ *Id.* at 195.

²⁵ *John Doe*, 561 U.S. at 196.

²⁶ *Id.* at 199.

²⁷ Idaho Const. Art. III, § 1.

²⁸ Idaho Code § 34.

²⁹ Idaho Code § 34-1801B.

³⁰ Idaho Code § 34-1801C.

³¹ *Id.*



BUILDING DEMOCRACY FOR THE 21ST CENTURY

To reach the ballot with a statewide initiative, proponents must collect signatures equaling at least six percent of all qualified electors at the last general election, both statewide and in each of at least eighteen legislative districts.³²

The form of petitions is also set by statute, which notably contains the following subject-matter restriction: “PETITION. (1) An initiative petition shall embrace only one (1) subject and matters properly connected with it.”³³ While Illinois law does not currently contain a parallel provision, case law governing the form and clarity of questions, covered in last week’s installment, serves a similar purpose.

The Illinois Constitution might include a substantial barrier to a similarly broad, statewide initiative and referendum process; the text specifies that “[t]he legislative power is vested in [the] General Assembly.”³⁴ Though Illinois courts have not definitively answered whether this constitutes a bar to a broad delegation of authority to the people, a purely legislative change may evoke such a challenge.

Building direct democracy in Illinois requires nuanced understanding of state constitutional constraints

The Illinois Constitution provides a right to initiative and referendum. However, this may not be open-ended enough to provide for both statewide and local direct democracy processes. Furthermore, a statutory process would always be subject to later legislative bodies’ whims, leaving the right susceptible to curtailment.

Next week’s installment will consider this dynamic in proposing a path towards an inclusive, accessible direct democracy in Illinois.

³² Idaho Code § 34-1805.

³³ Idaho Code 34-1801A

³⁴ Ill. Const. Art. IV, § 1.