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Publius and the Petition: *Doe v. Reed* and the History of Anonymous Speech

ABSTRACT. This Note argues that signatures on petitions intended for use in direct democracy processes such as ballot initiatives should be subject to public scrutiny and disclosure. They should not benefit from free speech protections allowing for anonymity. Signatures used in these proceedings should not be considered petitions or speech at all, but rather lawmaking. Through historical, doctrinal, and prudential analysis, this Note distinguishes between core First Amendment rights, which might include signatures on a general petition with no legislative implications or minority associational rights, and speech-like activity that forms part of the regulated lawmaking process.

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INTRODUCTION

A signature on a petition page can have myriad meanings, depending on the content and purpose of the specific petition. Signing “I oppose the war in *X*” might be the act of a protestor wishing to demonstrate how unpopular a war is. Signing a petition that reads “I want to invite *Y* as homecoming band” might be the act of a student seeking to lobby school administrators. “I join group *Z*” might be a simple membership rite or a voicing of support for an embattled or unpopular organization. In contrast, signing a petition that states “I support a ballot initiative to repeal a law” might be considered a regulated part of the state or local legislative process. It is this last petition that is the central inquiry of this Note: Are signatures gathered for direct democracy initiatives part of the government lawmaking process and therefore subject to transparency and disclosure laws? Or are they, like so many other petitions, protected speech?

The central argument of this Note is that signatures on petitions as part of ballot initiatives and similar processes can be subject to public scrutiny and disclosure; they should not benefit from free speech protections allowing for anonymity. Put differently, signatures used in direct democracy proceedings should not be considered petitions or speech at all, but rather lawmaking. The implications of this argument for future court decisions are far-reaching: judges should not analyze disclosure of legislative petitions using strict scrutiny under First Amendment doctrine but rather under a more deferential standard of review similar to that applied to other state electoral regulations.¹

This issue has vast real-world implications; speech activity benefits from broad First Amendment protections while lawmaking and legislative procedures are highly regulated. Moreover, ballot initiatives and other forms of “direct democracy” play an increasingly prominent role in state and local politics.² At least twenty-seven states have provisions that make ballot initiatives or popular legislative action possible through the collection of

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1. Compare *Buckley v. Valeo*, 424 U.S. 1, 75 (1976) (per curiam) (applying strict scrutiny in a First Amendment analysis of an electoral disclosure provision), with *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).
 2. See Kathleen Ferraiolo, *Preserving the Initiative: State Legislative Response to Direct Democracy*, 39 POLITY 425, 426 (2007). See generally PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* (1998) (analyzing initiative lawmaking across the country); JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004) (describing the growing prominence of direct democracy).

signatures.³ Ballot initiatives through signature collection on petitions are also a feature of local government.⁴ While direct democracy initiatives often target mundane issues like public spending or taxation,⁵ they are also used to settle state law on controversial national issues including gay rights,⁶ affirmative action,⁷ and marijuana legalization.⁸ This Note's argument thus has significant implications for the regulation of the direct democracy legislative processes that already are, and surely will continue, defining the states' approaches to pressing national issues.

Direct democracy processes were largely rejected at the Founding in favor of representative democracy.⁹ Nevertheless, direct democracy gained popularity in the Progressive Era as a way to empower the people by giving them an added check on their elected representatives or "big business" and "big government" generally.¹⁰ For example, the Washington State Constitution was amended in 1912 to read:

The legislative authority of the state of Washington shall be vested in the legislature . . . but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls,

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3. See *State I&R*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/statewide_i&r.htm (last visited Feb. 23, 2011) (listing all of the states and providing information about the type of direct democracy allowed in each state and the dates of adoption); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1587-88 (1990); *States That Allow for the Ballot Initiative Process*, BALLOT INITIATIVE STRATEGY CTR., <http://www.ballot.org/page/-/ballot.org/maps/Initiative%20states.pdf> (last visited Feb. 23, 2011) (providing a map of states with popular legislative initiative options by category).
 4. See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 299.
 5. See, e.g., William Yardley, *Oregon: Voters Approve Tax Increases*, N.Y. TIMES, Jan. 27, 2010, at A16.
 6. See Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.
 7. See Ethan Bronner, *U. of Washington Will End Race-Conscious Admissions*, N.Y. TIMES, Nov. 7, 1998, at A12.
 8. See Marc Lacey, *California Rejects Marijuana Legalization as Nation Votes on Issues Big and Small*, N.Y. TIMES, Nov. 3, 2010, at P8.
 9. See THE FEDERALIST NO. 10 (James Madison) (discussing the virtues of representative democracy).
 10. Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1260 (2008); see also THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 44-45 (1989); Paula Abrams, *The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process*, 87 OR. L. REV. 1025, 1025-26 (2008).

independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.¹¹

The right to legislate through initiative and referendum is neither unrestricted nor constitutionally required.¹² It should come as no surprise that ballot initiatives are limited to eligible voters and required to conform to jurisdiction-specific procedural guidelines.¹³ But to what extent can state or local governments regulate petition-based ballot initiatives—especially with regard to disclosure?

Using a First Amendment lens to analyze a state's ability to regulate the legislative process will inevitably lead to confusion and misguided outcomes. The goal of this Note is to distinguish between pure speech, which might include a signature on a generic petition with no legislative implications, and speech-like activity that forms part of the lawmaking process and should be transparent and subject to disclosure.¹⁴ The states should be able to determine, within broad constitutional bounds, the extent of the disclosure requirements.

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11. WASH. CONST. art. II, § 1. Ballot initiatives have an obvious populist appeal but have been criticized for undermining protections for minority groups. See, e.g., Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 994 (2001); Johnson, *supra* note 10, at 1260-61; cf. MATSUSAKA, *supra* note 2, at 113-14 (arguing that direct democracy does in fact benefit majority interests). Ballot initiatives may also oversimplify complex, nuanced policy questions by providing artificial binary choices. They have thus been attacked on populist grounds for capturing a polity's preferences at a given time without considering the polity's long-term interests. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 448-52 (1998); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 24 (1995) (highlighting the role of money and capital interests in shaping direct democracy outcomes). The constitutionality of referenda and initiatives has been questioned as well. See, e.g., Chemerinsky, *supra* note 4, at 301-06 (arguing that initiatives are unconstitutional). Rather than engaging the existing scholarly criticism of direct democracy in theory, this Note focuses on the tension in practice between protecting direct democracy as speech and regulating it as lawmaking.
 12. See, e.g., U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.").
 13. See, e.g., WASH. REV. CODE ANN. § 29A.72.100 (West 2005) (requiring that petitions be printed in a particular format with space for not more than twenty signatures per page); *id.* § 29A.72.130 (requiring each signatory to "print his or her name, and the address, city, and county at which he or she is registered to vote").
 14. For the purposes of this Note, "lawmaking process" means a formal, official part of the lawmaking procedure that is subject to state or local regulation. For more on why this argument does not apply to voting, see *infra* Section IV.A.

The argument here is not for a specific policy approach to disclosure provisions but rather for a distinction between lawmaking and speech.

This Note seeks to help alleviate the tension between anonymous speech and disclosure in the context of direct democracy by analyzing a recent Supreme Court case, historic practice, and judicial doctrine. Part I describes the facts, procedural posture, and outcome of *Doe v. Reed*¹⁵ to give context to the broader theoretical argument in subsequent Parts. Part II reviews the history of anonymous speech and public politics in the United States. This Part marshals the practice, understanding, and experience of the Founding generation to illustrate that the history of anonymous speech does not support efforts to participate in modern-day lawmaking anonymously. On the contrary, a vibrant history of transparent and public lawmaking bolsters the notion that direct democracy initiatives should be subject to disclosure. Part III analyzes doctrine at the intersection of free speech and election law to clarify precedential principles and argue for disclosure. This Part shows why anonymous speech doctrine does not and should not apply to direct democracy processes and why disclosure doctrine does. Part IV weighs the evidence presented in the first three Parts. Through prudential analysis, this Part considers the implications of the Note's position and engages counterarguments.

I. *DOE V. REED*: ANONYMOUS SPEECH VERSUS LAWMAKING IN PRACTICE

The Supreme Court recently had the opportunity to decide a case at the heart of this Note's inquiry. Unfortunately, the opinion in that case does not adequately resolve the issues germane to this Note. This Part briefly describes the circumstances that brought *Doe v. Reed* to the Supreme Court. It then analyzes the Court's decision in *Reed* and focuses on the ways in which the Court neglected to resolve the core problem presented. The Justices in *Reed* did not establish a clear rule of law that can resolve direct democracy cases certain to emerge in the future. But first it is important to set out the facts.

In May 2009, the governor of Washington signed into law the so-called "everything but marriage" bill that would allow for civil unions for gay couples.¹⁶ Just seven months later, the Supreme Court granted certiorari in

15. 130 S. Ct. 2811 (2010).

16. See *Doe v. Reed*, 586 F.3d 671, 674-75 (9th Cir. 2009), *aff'd* 130 S. Ct. 2811; Richard Roesler, *Gregoire Endorses Rights for Same-Sex Partnerships*, SPOKESMAN-REV. (Spokane, Wash.), May 19, 2009, at A1.

Reed.¹⁷ In granting certiorari, the Court did not intend to speak to the issues surrounding the national domestic partnership debate but rather to hear a tangential issue arising out of the unique circumstances of the Washington state initiative process. *Reed* presented a fascinating and complex First Amendment constitutional challenge to a Washington state public disclosure law.

After the “everything but marriage” bill was signed into law, a group called Protect Marriage Washington (PMW) sought to roll back the gay rights legislation through referendum.¹⁸ PMW sought a 2009 ballot referendum on the legislation so that the law would require voter approval before going into effect.¹⁹ In order to initiate the referendum process, Washington law requires that petitions must be filed with Washington’s secretary of state; those petitions must contain the valid signatures of registered Washington voters in a number at least equal to four percent of the votes cast for governor in the immediately preceding election.²⁰ Petitioners must request that each signatory sign and print her name and write the address, city, and county in which she is registered to vote.²¹

Shortly after PMW submitted its petitions to Secretary of State Sam Reed, his office received several requests, pursuant to Washington’s Public Records Act, for copies of the petitions themselves.²² Through this kind of disclosure, nongovernmental organizations have played a central role in detecting fraud.²³ PMW, together with two unnamed plaintiffs who were signatories of the petitions, sought to enjoin release of the petitions, arguing that the disclosure requirement was unconstitutional as applied to the petition signatories because there was a reasonable probability that the referendum supporters “[would] be

17. *Reed*, 130 S. Ct. 1133.

18. *See Reed*, 586 F.3d at 675.

19. *See* Linda Greenhouse, *Into the Closet*, OPINIONATOR (Jan. 14, 2010, 9:34 PM), <http://opinionator.blogs.nytimes.com/2010/01/14/into-the-closet>.

20. WASH. REV. CODE ANN. § 29A.72.150 (West 2005).

21. *Id.* § 29A.72.130.

22. *See Reed*, 586 F.3d at 675; *see also* WASH. REV. CODE ANN. §§ 42.56.001-.904 (West 2005). The Washington Public Records Act is “itself the product of the public initiative process.” Greenhouse, *supra* note 19.

23. *See, e.g.*, Nicole Fuller, *Cordish Attacks Anti-Slots Petitions: Elections Board Failed To Check for Fraud, Other Irregularities*, *Lawsuit Says*, BALT. SUN, Feb. 24, 2010, at 2A (describing a fraud investigation into a direct democracy petition drive that was initiated after nongovernmental groups accessed the petitions); BALLOT INITIATIVE STRATEGY CTR., *ABUSING DIRECT DEMOCRACY: BAD ACTORS IN THE SIGNATURE GATHERING PROCESS (2007)*, http://bisc.3cdn.net/fb3cd964499ff383ed_bwm6izdud.pdf (detailing numerous counts of fraud in direct democracy proceedings).

subjected to threats, harassment, and reprisals.”²⁴ The district court granted the petitioners a preliminary injunction preventing the Secretary of State from releasing the petitions, but the Ninth Circuit overruled the district court on the basis that the lower court had erroneously applied strict scrutiny.²⁵ A few months later, the plaintiffs sought and received a writ of certiorari from the Supreme Court on whether the First Amendment rights to free speech and to privacy require strict scrutiny of a state law compelling disclosure of identifying information about petition signers.²⁶ In addition, the Court agreed to consider whether the lower court properly granted the preliminary injunction against disclosure of the petitions.²⁷

This case provided the Court with the opportunity to resolve the tension between competing election law doctrines: a right to anonymity²⁸ on the one hand and compelled disclosure²⁹ on the other.³⁰ In the context of Washington’s referendum, anonymous speech seems to conflict with disclosure, public records, and freedom of information laws; there is a core tension between the desire for free, anonymous political speech and open, transparent government. Instead, the Court’s resolution in *Reed* means that lower courts will have to use a fact-bound, case-by-case process to determine whether petition signers will be guaranteed anonymity.

An eight-Justice majority ruled in favor of Secretary of State Reed, rejecting the facial challenge to the disclosure law, with seven Justices filing opinions.³¹ In essence, the Court held that disclosure of the identity of persons who sign

24. *Reed*, 586 F.3d at 675-76. However, the only evidence presented was hostile language directed toward individuals gathering signatures on the petitions, not the signers themselves whose anonymity was in question. See Brief for Respondent Washington Families Standing Together at 36-38, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559) (directly rebutting the argument about threats of retaliation). For a discussion of case law on protection for vulnerable groups, see *infra* Section III.A.

25. *Reed*, 586 F.3d at 681.

26. Petition for Writ of Certiorari, *Reed*, 130 S. Ct. 2811 (No. 09-559).

27. *Reed*, 130 S. Ct. at 2816-17.

28. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

29. See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements”); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (upholding portions of the Federal Elections Campaign Act mandating disclosure of campaign contributors).

30. See Richard M. Cardillo, Note, *I Am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnell*, 80 NOTRE DAME L. REV. 1929 (2005) (explaining the tension in doctrine between defending anonymous speech and upholding election transparency laws).

31. *Reed*, 130 S. Ct. 2811.

petitions for ballot referenda does not normally violate the First Amendment. However, the Court left open the question of whether the First Amendment might prohibit disclosure upon a showing that disclosure could expose those who signed a petition to serious harm.

Chief Justice Roberts, writing the opinion of the Court, accepted as given that this case presented a First Amendment issue.³² He reasoned that signing a petition in Washington's referendum process is a form of political expression that necessarily implicates a First Amendment right.³³ Rather than distinguishing a petition for the purposes of a referendum procedure from more traditional forms of speech, the Chief Justice relied on *Republican Party of Minnesota v. White*, a case considering the First Amendment rights of judicial candidates to announce their views on disputed political and legal issues.³⁴

There should be a key distinction between a law like the one challenged in *White*, prohibiting candidates from expressing their political views, and the one in *Reed*, mandating disclosure in the lawmaking process. Chief Justice Roberts, however, did "not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment."³⁵ Nonetheless, the Chief Justice recognized that the challenged statute was not a prohibition on speech but rather a disclosure requirement in the legislative process. He noted that the Court will allow states flexibility in the implementation of voting systems.³⁶ Thus, the facial challenge in *Reed* failed, and the challenged law was upheld as constitutional. The Court's decision, however, should have been unequivocal in distinguishing lawmaking signatures from pure speech.

The opinion of the Court establishes a fact-bound approach that avoids definitively resolving the dispute in *Reed* or giving lower courts clear guidance

32. Only Justice Stevens argued that the impact of disclosure on speech would be minimal. *Id.* at 2829-30 (Stevens, J., concurring in part and concurring in the judgment).

33. *Id.* at 2817 (majority opinion).

34. *Id.* ("The State, having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles.'" (first alteration in original) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002))). *White* involved a First Amendment challenge to a Minnesota Supreme Court canon of judicial conduct that prohibited candidates for judicial election from announcing their views on disputed political or legal issues. *White*, 536 U.S. at 768.

35. *Reed*, 130 S. Ct. at 2818.

36. *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992)).

on how to proceed in inevitable future cases.³⁷ Rather than clearly distinguishing pure speech from lawmaking activity, Chief Justice Roberts affirmed the Ninth Circuit on the tenuous grounds that disclosure does not as a general matter violate the First Amendment. Making explicit the Court's decision to pass on the substantive controversy, Chief Justice Roberts wrote: "We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition"³⁸ This means that, on remand, the lower courts will have to reconsider the as-applied challenge to the disclosure law. Worse still, in the future there will be a case-by-case approach to determining when and if legislative petition signers can claim anonymity with no settled standard of review.

When lower courts seek to understand and apply *Reed* in the future they will have to parse all seven opinions filed in the case. The variation between the fractured opinions, even those concurring with the majority, is so significant that lower courts will be able to pick and choose which approach to apply rather than following any clear rule of law. The Justices in the majority disagreed on a range of key issues including the proper legal standard, the opinion's basic guiding principles, and, especially, the correct way to handle an as-applied challenge. Justice Alito, for example, suggested that the as-applied challenge should succeed in the lower courts as long as petitioners can demonstrate a "reasonable probability" that disclosure will subject them to threats or harassment.³⁹ He suggested that the record easily meets that standard and that lower courts should be generous in granting as-applied relief.⁴⁰ Justice Sotomayor, on the other hand, set out a markedly different standard for the as-applied challenge; her opinion was rooted in deference to the states' efforts to regulate their lawmaking procedures.⁴¹ She concluded that

37. Only Justice Scalia (concurring in the judgment) and Justice Thomas (dissenting) relied on reasoning that was not fact-bound. Justice Scalia "doubt[ed]" that the disclosure statute is subject to First Amendment analysis at all and argued that the states should have wide latitude to determine their own legislative processes. *Id.* at 2832 (Scalia, J., concurring in the judgment). Justice Thomas, on the other hand, was not persuaded that the state's interest in disclosure was compelling and suggested that he would strike down the disclosure statute as impermissibly burdening speech and as lacking any compelling government interest or narrow tailoring. *Id.* at 2837 (Thomas, J., dissenting).

38. *Id.* at 2815 (majority opinion).

39. *Id.* at 2822 (Alito, J., concurring) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)).

40. *Id.* at 2823-24.

41. *Id.* at 2827-29 (Sotomayor, J., concurring).

lower courts “should be deeply skeptical” of efforts to conceal the identity of those participating in the lawmaking process.⁴²

The decision in *Reed* fails to resolve definitively the legal question at the heart of the case and creates a standard going forward that guarantees confusion in the lower courts and in the direct democracy processes across the country. The requisite case-by-case analysis of whether people signing lawmaking petitions benefit from anonymity or are subject to public disclosure must be made early enough in the process so that those being asked to sign know what protection, if any, they will receive. However, courts may have no real basis for making a determination before the signatures have been gathered—judges are not in the business of predicting harassment or the state’s ability to protect against it.⁴³

This Part has shown that the decision in *Reed* is at once too broad and too narrow. It is too broad because it fails to establish a clear rule of law and thus leaves the real decisionmaking to the lower courts. It is too narrow because it is confined to First Amendment reasoning and balancing. The Court should have established a judicially manageable standard that would guide lower courts across the country to consistent outcomes in future litigation. Going forward, a clear distinction should be made between pure speech and lawmaking. While the Court upheld the disclosure statute, the argument for disclosure here is far clearer in its application and has a solid grounding in history, doctrine, and prudential considerations.

II. THE HISTORY OF ANONYMOUS SPEECH

Speech is, and has long been, intricately tied to the popular sovereignty underpinnings of our constitutional government.⁴⁴ The United States has a rich and complex history of both anonymous speech and compelled disclosure. These historic practices have often coexisted in ways that suggest that they need not be in tension. The history alone cannot be expected to provide definitive answers, but it adds texture to our understanding of the role of

42. *Id.* at 2829.

43. *But cf.* Rick Pildes, *The First Amendment, Direct Democracy, and the Risks of Technology: Today’s Court Decision in Doe v. Reed*, BALKINIZATION (June 24, 2010, 11:09 AM), <http://balkin.blogspot.com/2010/06/first-amendment-direct-democracy-and.html> (“The Court then wisely leaves it to lower courts and future cases to decide whether, in any particular context, there is just a high risk of retaliation, harassment and the like to override the state’s legitimate interest in disclosure in particular contexts.”).

44. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1124-25 (1995) (describing freedom of speech as part of political thought and process).

signatures in a direct democracy initiative. This Part presents the historic practices that help identify appropriate distinctions today.

The argument here is not for originalism. Nor does this Note suggest that originalism is always a useful constitutional theory in the context of the First Amendment.⁴⁵ Indeed, First Amendment law is largely judge-made,⁴⁶ and scholars tend to agree that originalism is unhelpful in most First Amendment cases.⁴⁷ Nevertheless, one need not necessarily endorse a jurisprudence of originalism to embrace a broadly based analysis of First Amendment issues. Historic practice provides valuable support for this Note’s argument simply by illuminating the evolving understanding of issues that shaped doctrine and civil society. Here the history suggests useful distinctions that might guide a judicial decision through points of tension in the doctrine.

The history and practices of previous generations yield clues about the nature of the speech sought to be protected by the First Amendment and reveal that most “petitioning” in early America would have been the kind that requires the courage of one’s conviction. The very nature of local government meant that people knew others and were known in their communities— anonymity was rarely an option for active participants in civil society. Even

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45. Even the Court’s stalwart originalist Justices Scalia and Thomas have differed with regard to the breadth of protection afforded to anonymous speech. *Compare* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in the judgment) (finding that “‘freedom of speech, or of the press,’ as originally understood, protected anonymous political leafletting”), with *id.* at 381 (Scalia, J., dissenting) (criticizing “this newly expanded right-to-speak-incognito”).
46. *See* *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring) (“[M]ost doctrine is merely the judge-made superstructure that implements basic constitutional principles. . . . Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next.”); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198 (1988); Richard Nagareda, Comment, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 731 (1987).
47. *See, e.g.*, DANIEL A. FARBER, *THE FIRST AMENDMENT* 8-10 (3d ed. 2010) (noting that historical evidence regarding the intended meaning of the First Amendment is “ambiguous” and “unclear”); Ronald Dworkin, Comment, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 124 (Amy Gutmann ed., 1997) (suggesting that the First Amendment’s meaning was more contested at the time of its enactment than it is in modern America); Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1863 n.38 (2007) (noting that original intent does not control First Amendment doctrine); *cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (arguing that the original meaning of the Constitution would strip all but nondangerous, explicitly political speech of First Amendment protection).

though national debates might have taken place through pseudonymous publications, the lawmaking process itself was to be open and transparent—fitting in a country giving nascent meaning to the concept of popular sovereignty.

This Part marshals historic practice to argue that signatures on a petition with legislative implications should not be considered pure speech that benefits from the full protection of the First Amendment. This Part also considers and explains several counterexamples of anonymous or secretive lawmaking, including the drafting of the Constitution and the early years of Senate proceedings. Historic examples of anonymous speech, such as the *Federalist* papers, rarely had direct legislative implications.

A. Anonymous and Pseudonymous Speech

A history of anonymous speech could run from the colonial era⁴⁸ to the present day. However, the point of this Note is not to argue for or against a right to anonymous speech. Rather, the goal here is to argue for a narrower, more precise understanding of what actually constitutes speech in the context of petitions and direct democracy initiatives. To that end, a more limited review of the history is in order. History is rife with examples of anonymous speech and publishing on issues of public concern but short on examples of anonymous speech in legislative practice.

Anonymous publications have profoundly shaped American history going back to the colonial era.⁴⁹ A series of essays about free speech and liberty known pseudonymously as “Cato’s Letters” appeared in 1720.⁵⁰ Other colonial-era examples include a series of pamphlets criticizing Tory-minded English ministers that were published in the *London Political Advertiser* and reprinted in

48. The national tradition of anonymous speech has roots that can be traced back to England. For a history of anonymous speech and pamphlets in England, see Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 591 (2001). See also Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L.J. 1084, 1084-86 (1961) [hereinafter *Disclosure and the Devil*] (arguing that governmental efforts to repress anonymous speech notwithstanding, England was home to a vibrant culture of anonymous or pseudonymous political discourse).

49. See Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2001-2002 CATO SUP. CT. REV. 57, 59-60 (2002).

50. 1-2 JOHN TRENCHARD & THOMAS GORDON, CATO’S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS (Ronald Hamowy ed., Liberty Fund 1995) (6th ed. 1755).

colonial newspapers under the pseudonym “Junius.”⁵¹ The famous pamphlet *Common Sense*, widely recognized for its impact on the nascent independence movement, was originally published under the simple pseudonym “An Englishman.”⁵² The Supreme Court has recognized that anonymous forms of speech “have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest.”⁵³ While these examples do not establish the prevalence or frequency of anonymous speech in the colonial era, they indicate its existence, acceptance, and political significance. Crucially, however, these colonial-era anonymous pamphlets and writings were not used as part of any legislative process but rather as pure speech on issues of public concern.

After independence, anonymous speech continued to play a major role in the development of national politics, yet it still did not arise in the context of legislation. Many of the Framers chose to participate anonymously⁵⁴ in the debates surrounding ratification of the Constitution. The *Federalist* papers—now known to have been authored by Alexander Hamilton, John Jay, and James Madison—were all signed with the same pseudonym: Publius.⁵⁵ Justice Thomas recounts the history: “There is little doubt that the Framers engaged in anonymous political writing. The essays in the *Federalist Papers*, published under the pseudonym of ‘Publius,’ are only the most famous example of the

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51. See THE ENCYCLOPEDIA OF COLONIAL AND REVOLUTIONARY AMERICA 220 (John Mack Faragher ed., 1996).
 52. See THOMAS PAINE, COMMON SENSE (1776), reprinted in THOMAS PAINE: COMMON SENSE AND OTHER WRITINGS 5 (Gordon S. Wood ed., 2003); see also 1 GEORGE OTTO TREVELYAN, THE AMERICAN REVOLUTION pt. 2, at 150-54 (1903) (describing the influence of the pamphlet in colonial America); Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 65 (2009) (characterizing Paine’s pamphlet as “enormously influential”).
 53. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Nevertheless, the Court tends to decide disclosure cases based on more general First Amendment grounds rather than on an explicit recognition of a right to anonymous speech. See, e.g., *id.*; *infra* Part III.
 54. Note that anonymous participation need not preclude the opposite—namely, that individuals may have chosen to communicate only some of their ideas anonymously. Concurrent disclosure of identity for some communications and anonymity for others is entirely plausible. For example, James Madison anonymously authored some of the *Federalist* papers even as he personally and publicly spoke out in support of ratification. See, e.g., THE COMPLETE MADISON: HIS BASIC WRITINGS (Saul K. Padover ed., 1953) (including material to which Madison attached his name at the time of publication).
 55. See Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1853-54 (2010). Drawing on the history of the *Federalist* papers, Justice Black defended anonymous speech and recognized “that anonymity has sometimes been assumed for the most constructive purposes” in *Talley v. California*, 362 U.S. 60, 65 (1960).

outpouring of anonymous political writing that occurred during the ratification of the Constitution.”⁵⁶ In fact, Justice Thomas suggests that pseudonymous or anonymous publication was “universal.”⁵⁷ Certainly some opponents of ratification also engaged in pseudonymous debate under names including “Cato,” “Centinel,” “Brutus,” “Federal Farmer,” and “The Impartial Examiner.”⁵⁸ Yet, tellingly, none of these anonymous publications that make up much of the historical record on the ratification debates were part of the actual ratification process.

The distinction between the debates and the ratification process is significant. While some of the national and local debate leading up to the state conventions was anonymous, the identities of the representatives at the conventions were public knowledge.⁵⁹ The legislative process for ratification was determined by each sovereign state, in compliance with Article VII of the Constitution,⁶⁰ but in no state was the ratification process anonymous or secretive.⁶¹ Thus, to the extent that the anonymity of the *Federalist* papers and the broader ratification history are relevant today, they seem to suggest an acceptance of anonymous speech but not of anonymous legislative processes.

Anonymous speech and publishing were prevalent in post-ratification America but were still confined to pure speech contexts and notably absent from lawmaking.⁶² For example, Hamilton wrote a defense of George

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56. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment). Justice Thomas’s concurring opinion provides an exhaustive history of anonymous speech, pseudonymous speech, and publishing in early American history. *Id.* at 361-69; *see also id.* at 341 & n.4 (majority opinion) (stating that “[g]reat works of literature have frequently been produced by authors writing under assumed names” and listing examples such as Mark Twain, Voltaire, George Eliot, Charles Lamb, and Charles Dickens).
 57. *Id.* at 367 (Thomas, J., concurring in the judgment).
 58. *Id.* at 368; *see also id.* (“The practice of publishing one’s thoughts anonymously or under pseudonym was so widespread that only two major Federalist or Anti-Federalist pieces appear to have been signed by their true authors, and they may have had special reasons to do so.”)
 59. *See* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 14-15, 308-12 (2005) (discussing the ratification process, state conventions, and Article VII of the Constitution and describing “elected statewide conventions”).
 60. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).
 61. *See generally* AMAR, *supra* note 59, at 6-7 (discussing the ratification process and conventions).
 62. *See, e.g.*, DOUGLASS ADAIR, *FAME AND THE FOUNDING FATHERS* 386 (Trevor Colbourn ed., Liberty Fund 1998) (1974) (“Almost all books, pamphlets, squibs, letters to the editor on controversial issues—which naturally meant most political issues—were either unsigned or signed with a pen name.”).

Washington's proclamation of neutrality in the war between Britain and France under the pseudonym "Pacificus," and Madison responded under the name "Helvidius."⁶³ Indeed, well after the First Amendment was ratified, anonymous political speech continued to serve as a popular means of political expression on issues of public concern, even by those in power. Between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous or pseudonymous political writings.⁶⁴ Even Chief Justice Marshall wrote anonymously as "A Friend of the Union" to defend Supreme Court decisions against similarly anonymous attacks.⁶⁵ But this anonymous writing and publishing was not part of any legislative process. Rather, these public figures and lawmakers chose to participate in national debates and to influence popular opinion on issues of the day so as to foment political support for the lawmaking work they publicly and transparently engaged in under their true names. Nevertheless, the prevalence and prominence of pseudonymous and anonymous speech raise the question of why these individuals chose to publish anonymously.

While each individual author or speaker may well have personal reasons for using the veil of anonymity, there are some common explanations for the use of anonymous speech, none of which is applicable in the lawmaking context. Generally, the justifications for anonymous speech can be divided into two broad categories: "retaliation" and "source bias."⁶⁶ First, pseudonyms or outright anonymous speech may allow individuals to protect themselves from economic, political, or even physical retaliation when speaking out on controversial or unpopular issues. Pseudonyms would have been all the more useful in an era where the *code duello*—the set of rules regulating dueling—remained prevalent.⁶⁷ These are certainly plausible, if partial, explanations for why some colonial-era revolutionaries might have preferred not to have their words attributed to their names. It seems implausible, however, to suggest that

63. See Alexander Hamilton, *Pacificus No. 1*, GAZETTE U.S. (Phila.), June 29, 1793, reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33 (Harold C. Syrett & Jacob E. Cooke eds., 1969); James Madison, *Helvidius Number 1*, GAZETTE U.S. (Phila.), Aug. 24, 1793, reprinted in 15 THE PAPERS OF JAMES MADISON 66 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds., 1985).

64. See *Disclosure and the Devil*, *supra* note 48, at 1085.

65. See 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 318 (photo. reprint 1980) (1919).

66. See Cardillo, *supra* note 30, at 1951-55. There may also have been class-based reasons for the common use of pseudonyms. Adair suggests that "[a] gentleman lost caste if he wrote professionally in competition with mere scribblers; and conversely, a lower-class professional writer concealed behind a *nom de plume* could gain authority by writing as if he were a gentleman." ADAIR, *supra* note 62, at 386 n.1.

67. See ADAIR, *supra* note 62, at 386 n.1.

the elected and appointed officials engaged in lawmaking as part of their civic duty would have sought a veil of anonymity for their public work.

Second, anonymous or pseudonymous speech can avoid source bias. Ideas can speak for themselves without biasing the reader by identifying the author. For example, if a person is unpopular, publishing anonymously or under a nom de plume helps to ensure that the ideas are evaluated on their own merits rather than tainted with the author's or speaker's unpopularity. Again, however, this rationale is limited to pure speech and would be inapplicable to the lawmaking process, in which legislatures and public officials generally want credit for the work that they do and constituencies generally demand accountability. Thus the history of anonymous speech and even the likely motivation for anonymous speech do not tend to support a right to anonymous lawmaking.⁶⁸

68. Lest the history presented appear overwhelmingly one-sided, it is worth mentioning briefly the parallel history of legal efforts to compel disclosure in the context of speech. The Post Office Appropriation Act of 1912 required users of second-class mailing privileges periodically to file and publish the names of their officers and proprietors. Post Office Appropriation Act of 1912, ch. 389, § 2, 37 Stat. 553 (codified as amended at 39 U.S.C. § 3685 (2006)); *see also* Lewis Publ'g Co. v. Morgan, 229 U.S. 288 (1913) (construing and validating the statute). And some states have tried to compel organizations to disclose the names of their members. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960) (challenging municipal ordinances requiring disclosure of membership lists); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (overruling an order requiring the NAACP to produce membership records, including names and addresses); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928) (upholding a state statute requiring certain associations to file membership lists); Louisiana *ex rel.* Gremillion v. NAACP, 181 F. Supp. 37 (E.D. La. 1960) (invalidating a statute requiring disclosure of an organization's membership lists), *aff'd*, 366 U.S. 293 (1961). Other organizations have been required to register prior to obtaining licenses to use public spaces for speech and association. *See, e.g.*, Poulos v. New Hampshire, 345 U.S. 395 (1953) (upholding a statute requiring an application for a license prior to conducting open-air meetings); Cox v. New Hampshire, 312 U.S. 569 (1941) (affirming a conviction for parading on a public street without a required license). In the buildup to World War II Congress enacted statutes compelling disclosure by foreign agents. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611-21 (2006)). Although the Supreme Court limited the application of the disclosure requirements, in dissent Justice Black relied on the House and Senate committee reports to urge that the law be interpreted so as "to turn 'the spotlight of pitiless publicity' upon the propaganda activities" in question. Viereck v. United States, 318 U.S. 236, 250 (1943) (Black, J., dissenting) (citing S. REP. NO. 75-1783 (1938); H.R. REP. NO. 75-1381 (1938)).

B. Historical Practice: Public Politics and Disclosure

Many forms of political expression and lawmaking that existed during the Founding era required disclosure by their very nature. Participating in “a democracy takes a certain amount of civic courage,”⁶⁹ and American history is rife with examples of the kind of disclosure necessary to give legitimacy and meaning to a political or legislative act. First and foremost, the Declaration of Independence was signed with real names, not published as an anonymous document or under pseudonyms.⁷⁰ In fact, it is virtually unthinkable that such a document would have been left unsigned because it was the signatures that gave it meaning—America’s leading men were putting their names, their reputations, and their lives on the line. Had they been afraid or otherwise unwilling to sign their names—some oversized like John Hancock—why would the King of England have taken their declaration seriously? Democratic values encourage people to stand behind their beliefs even in the face of criticism or backlash.

The U.S. Constitution, the pinnacle of American lawmaking, was drafted by fifty-five men who were known to their states and the country.⁷¹ These public figures finalized the Constitution with an act of public disclosure. Thirty-nine of the fifty-five proudly signed at the bottom.⁷² Their names lent the document legitimacy. Their status as delegates from the various states⁷³ gave them some authority to act in a legislative capacity. That authority could not have been exercised anonymously even if those same men subsequently

69. Transcript of Oral Argument at 12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

70. The parchment copy of the Declaration of Independence now on display at the National Archives contains all of the original signatures. See CARL LOTUS BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 192-93* (photo. reprint 1956) (1942).

71. See, e.g., AMAR, *supra* note 59, at 207-08 (describing the prominent, public roles several of the signers of the Constitution played in colonial and early republican life); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 30 (1994) (“More than half of the fifty-five delegates had training in the law. Eight of them had signed the Declaration of Independence and two the Articles of Confederation. Some forty had served in the Congress under the Confederation and seven in the First Continental Congress. A number had been involved in the formation of their state constitutions, and seven had served as the chief executives of their states. Indeed, at the time of the convention, more than forty delegates were involved with their state government either as chief executive, judge, or legislator.” (citations omitted)).

72. See AMAR, *supra* note 59, at 80; MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 38-39* (1913).

73. Only Rhode Island boycotted the Convention. See AMAR, *supra* note 59, at 5.

chose to promote the ratification through anonymous publications. These two historic examples suggest a crucial distinction. Anonymous speech—even political speech in support of or opposition to specific laws or procedures—should be viewed as distinct from anonymous lawmaking.

A counterpoint, however, is the fact that the Constitutional Convention itself was “shrouded in secrecy.”⁷⁴ Just days after the Framers convened in Philadelphia in May 1787, they adopted a rule of secrecy that lasted for the duration of the Convention.⁷⁵ Explanations for why, under the unique circumstances of the Convention, the Framers decided to proceed in secret can be found in the historical record. For example, in May 1787, George Mason penned a letter to his son indicating that he supported the secrecy as “a proper precaution to prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in which the several crude and indigested parts might in their first shape appear if submitted to the public eye.”⁷⁶ Other contemporary letters from the Framers similarly indicate a desire to explain or excuse the need for secrecy.⁷⁷

Thus, the secrecy of the proceedings was seen, then and now, as a distinct aberration from the norm of transparency. Moreover, the secrecy rule may not have been effective at keeping the proceedings quiet, even during the Convention.⁷⁸ And, crucially, by 1819 the government had published the full Convention proceedings as the official *Journal of the Convention*⁷⁹ pursuant to an act of Congress.⁸⁰ Today, most leading constitutional law scholars rightly

74. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1115 (2003).

75. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 & n.2 (Max Farrand ed., 1966) (rev. ed. 1937).

76. Letter from George Mason to George Mason, Jr. (May 27, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 75, at 28.

77. See, e.g., Letter from Alexander Martin to Governor Caswell (July 27, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 75, at 64 (explaining why Martin had been “remiss in making . . . Communications from the Federal Convention”).

78. See, e.g., JOHN K. ALEXANDER, THE SELLING OF THE CONSTITUTIONAL CONVENTION: A HISTORY OF NEWS COVERAGE 137 (1990) (suggesting that the proceedings of the Convention were not fully secret because of leaks).

79. JOURNAL, ACTS, AND PROCEEDINGS OF THE CONVENTION, ASSEMBLED AT PHILADELPHIA, MONDAY, MAY 14, AND DISSOLVED MONDAY, SEPTEMBER 17, 1787, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES (Boston, Thomas B. Wait 1819), available at <http://ia700408.us.archive.org/12/items/journalactsproce1819unit/journalactsproce1819unit.pdf>.

80. Act of Mar. 27, 1818, 3 Stat. 475.

recognize that little weight should be given to the secret proceedings.⁸¹ Consistent with the theories and practice of popular sovereignty at the core of this country's political system, the secret drafting history is worth far less than the public ratification process.

Numerous overt acts involved in the lawmaking process are today, or were historically, public. Even those political or legislative acts that are not inherently public were often made public by the various states in which they occurred. For example, during much of U.S. history voting was a public affair.⁸² In colonial New England, for instance, voting was initially conducted by a public showing of hands.⁸³ The colonies soon switched to paper ballots but with no pretense of secrecy as a motivation. Rather, having a paper trail made more sense procedurally⁸⁴—just as disclosure does in the context of direct democracy today. Not until 1888 did Massachusetts become the first state to begin using the “Australian ballot” system for secret voting.⁸⁵ While almost all jurisdictions now employ a secret ballot system, at least one state allows voters to cast their ballots openly, if they so choose.⁸⁶ In modern America, party

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81. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1059 n.80 (1984) (“[C]onstitutional interpreters should place very little weight on the secret notes that Madison compiled during the Constitutional Convention”); Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 288 (1987) (arguing that Madison’s notes should be seen as “accurate but indirect evidence” of the way that leaders of the day understood the text of the Constitution); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1802 (1996) (“[T]he great public discussion over the document, which involved hundreds of writers for more than a year, can clarify meanings that the private drafting of the instrument, which involved fifty-five speakers during a single summer, cannot.”).
82. Until the 1890s, secret voting, or the “Australian ballot,” was not available under most state electoral proceedings. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1327 (2000); Jac. C. Heckelman, *The Effect of the Secret Ballot on Voter Turnout Rates*, 82 PUB. CHOICE 107, 111 (1995). See generally ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES (1917) (describing the introduction of secret voting to the United States).
83. See 3 CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 141 (photo. reprint 2002)(New York, Columbia Coll. 1893).
84. See THE COLONIAL LAWS OF MASSACHUSETTS: REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672, at 149 (photo. reprint) (Boston, Rockwell & Churchill 1889) (indicating that elections would proceed “by writing the names of the person Elected, *in papers* open, or once fouled, not twisted nor rouled up, that they may be the sooner perused”).
85. See EVANS, *supra* note 82, at 19.
86. See W. VA. CONST. art. IV, § 2 (“In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect.”).

primaries in states that use a caucus system, like Iowa, are incompatible with anonymity: an eligible voter who wants to participate in that particular electoral process has to be willing to reveal his or her identity.⁸⁷ Historically, and today, each state has broad discretion to determine its own electoral procedures, even if participation requires disclosure of identity.⁸⁸

Public town hall meetings, which have seen resurgence in recent years,⁸⁹ were hallmarks of early American politics, especially in New England.⁹⁰ After experiencing New England town hall meetings firsthand, Thomas Jefferson advocated their adoption across the country in 1816.⁹¹ Alexis de Tocqueville's extensive travels in early republican America led him to observe that "local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it."⁹² While today's town hall meetings tend not to play any explicit lawmaking role, such was not always the case. Historically, these meetings often served as municipal legislative bodies, a role that Timothy Dwight, former president of Yale University, vigorously defended.⁹³ Dwight suggested that the discussions at the meetings were public events and that "[a]ll the proceedings of these assemblies are also matters of record."⁹⁴ At least one New England court has recognized the central role that public town hall meetings played, declaring

87. See generally Joanna Klonsky, *The Caucus System in the U.S. Presidential Nominating Process*, COUNCIL ON FOREIGN RELATIONS (Mar. 3, 2008), http://www.cfr.org/publication/15640/caucus_system_in_the_us_presidential_nominating_process.html#p2 (describing the caucus process).

88. See U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."); Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 354-57 (2008); Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2316 (2005).

89. See, e.g., Carolyn J. Lukensmeyer & Steve Brigham, *Taking Democracy to Scale: Creating a Town Hall Meeting for the Twenty-First Century*, 91 NAT'L CIVIC REV. 351 (2002) (advocating a new model of town hall meetings as a way to give voice to the public and gather information for elected officials).

90. See FRANK M. BRYAN, *REAL DEMOCRACY: THE NEW ENGLAND TOWN HALL MEETING AND HOW IT WORKS* 26-27 (2004).

91. See *id.* at 26 n.3.

92. ALEXIS DE TOCQUEVILLE: *DEMOCRACY IN AMERICA* 53 (Isaac Kramnick ed., W.W. Norton & Co. 2007) (Henry Reeve trans. 1841).

93. See 1 TIMOTHY DWIGHT, *TRAVELS IN NEW ENGLAND AND NEW YORK* 179-82 (Barbara Miller Solomon ed., Belknap Press of Harvard Univ. Press 1969) (1821).

94. *Id.* at 179.

that “[i]t is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution.”⁹⁵ These meetings—whether explicitly legislative in function or not—required disclosure as a prerequisite to participation in the political process. While the history need not control the present, it bolsters the position of those states that establish lawmaking procedures involving disclosure.

Another crucial example of historic disclosure practice in lawmaking comes from the Constitution and the congressional record. Congressional votes were to be tallied by name and entered in the public congressional journal “at the Desire of one fifth of those Present.”⁹⁶ This allowed each state or district to hold its elected officials accountable, but it is also noteworthy as the lowest fraction to appear anywhere in the Constitution.⁹⁷ Accountability for legislative action was a valued norm. This norm may have developed in tandem with republican theory, which served “to reverse the old presumption in favor of secrecy, based on the divine right of kings and nobles, and replace it with a presumption in favor of publicity, based on the doctrine of popular

95. *Wheelock v. City of Lowell*, 81 N.E. 977, 979 (Mass. 1907). The quote continues:

No small part of the capacity for honest and efficient local government manifested by the people of this commonwealth has been due to the training of citizens in the forum of the town meeting. The jealous care to preserve the means for exercising the right of assembling for discussion of public topics manifested in city charters by the representatives of the people, whenever providing for the transition from the town meeting to the city form of local government, demonstrates that a vital appreciation of the importance of the opportunity to exercise the right still survives. The practical instruction of the citizen in affairs of government through the instrumentality of public meetings and face to face discussions may be regarded quite as important as their amusement, edification or assumed temporal advancement in ways heretofore expressly authorized by statute and held constitutional.

Id. (citations omitted).

96. U.S. CONST. art. I, § 5, cl. 3. Of course publication of the voting record might have been made mandatory in all circumstances; however, an earlier part of the Clause hints at an explanation for why disclosure was originally made optional: “excepting such Parts as may in their Judgment require Secrecy.” *Id.* Note that any form of disclosure marked a change from historical practice in England and the colonies that had shielded Parliament from public scrutiny. See AMAR, *supra* note 59, at 82.

97. *Cf.* U.S. CONST. art. I, § 3, cl. 6 (using two-thirds for an impeachment conviction); *id.* art. I, § 5, cl. 2 (using two-thirds in order to expel a member of Congress); *id.* art. I, § 7, cl. 2 (using two-thirds to bypass a presidential veto); *id.* art. II, § 2, cl. 2 (using two-thirds for purposes of Senate advice and consent to the President); *id.* art. V (using two-thirds and three-fourths for purposes of amending the Constitution).

sovereignty.”⁹⁸ The House opened its doors to the public from the start, and the Senate followed by the mid-1790s.⁹⁹ Similarly, individual states have a long history of opening the doors of their legislatures to “the admission of all persons.”¹⁰⁰ Procedures, forums, and venues like these shaped early America even as they required source disclosure in lawmaking. The very nature of these activities precluded true anonymity, and with good reason: transparency was necessary in the lawmaking process if the people were to hold their lawmakers or representatives accountable.

Today lawmaking and government processes are transparent in ways the Founders never could have imagined. For example, the Cable-Satellite Public Affairs Network (C-SPAN) airs constant coverage of government proceedings and public affairs programming.¹⁰¹ C-SPAN now operates a radio station and three full-time cable channels covering the House, the Senate, and a wide array of other government and public affairs activities.¹⁰² C-SPAN strives for independence and does not accept outside advertising or government funding.¹⁰³ For its part, the Obama White House has pledged that it “is committed to creating an unprecedented level of openness in Government.”¹⁰⁴

98. DANIEL N. HOFFMAN, *GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS* 13 (1981).

99. *See id.* at 24-29, 48-49, 55-61.

100. PA. CONST. of 1776, art. II, § 13; *see also* N.Y. CONST. art. III, § 10 (“Each house of the legislature shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy.”). More recently, states have begun passing “sunshine” laws to increase open access to government documents and proceedings. *See generally* Michael K. McLendon & James C. Hearn, *Mandated Openness in Public Higher Education: A Field Study of State Sunshine Laws and Institutional Governance*, 77 J. HIGHER EDUC. 645, 645-46 (2006) (describing the proliferation of sunshine laws).

101. C-SPAN, <http://www.c-span.org> (follow “Schedules” tab to subsequent options) (last visited Feb. 23, 2011).

102. *Id.*

103. *See generally About C-SPAN*, C-SPAN, <http://www.c-span.org/About/About-C-SPAN> (last visited Feb. 23, 2011) (“C-SPAN receives no government funding; operations are funded by fees paid by cable and satellite affiliates who carry C-SPAN programming.”).

104. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. (Jan. 21, 2009). In practice the Obama Administration’s efforts toward increased transparency have received mixed reviews. *See, e.g.*, THE NAT’L SEC. ARCHIVE, GEORGE WASHINGTON UNIV., *SUNSHINE AND SHADOWS: THE CLEAR OBAMA MESSAGE FOR FREEDOM OF INFORMATION MEETS MIXED RESULTS* (2010), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/2010FOIAAudit.pdf>.

Even some courts are opening up and, in some cases, allowing live feed broadcasting of courtroom proceedings.¹⁰⁵

A counterargument here might point to the closed-door congressional proceedings during the early years of the American Republic until 1794.¹⁰⁶ Jared Sparks explained that aberration, however, by conceptualizing the early Congress as a joint legislative-executive body that required more discretion and secrecy than would a pure legislative body.¹⁰⁷ The early Senate rules, for example, reflect the belief that the body's "special roles, including providing advice and consent to the executive branch," necessitated a shroud of secrecy.¹⁰⁸ Today these closed-door sessions are generally limited to specific subject areas like impeachment proceedings and national security.¹⁰⁹ While it is true that any member of Congress can request a secret session, in practice there is a strong bias in favor of transparency in proceedings. Indeed, from 1929 to 2004 there were only fifty-three secret Senate sessions, several of which related to the impeachment of President Clinton.¹¹⁰ Meanwhile, from 1812 until 2004 the House held just five closed sessions, all of which related to high-level executive issues or national security concerns.¹¹¹

The distinction between pure speech, including anonymous publications like the *Federalist* papers, and lawmaking is clear from the historic record; the two categories should not be blurred in modern America. This Part has traced key events and activities in American history from the colonial period to the present day to support the argument for a distinction between pure, protected

105. See, e.g., Press Release, U.S. Courts for the Ninth Circuit, Ninth Circuit Court of Appeals To Offer Remote Viewing of En Banc Proceedings (Dec. 13, 2010), available at http://www.ce9.uscourts.gov/absolutenm/articlefiles/279-COA_December_EnBancs.pdf.

But see *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (staying an order to broadcast courtroom proceedings in California's controversial Proposition 8 case).

106. See MILDRED AMER, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW (2004).

107. Journal Entry by Jared Sparks (Apr. 19, 1830), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 75, at 478, 478-79.

108. AMER, *supra* note 106, at 2.

109. See *id.* at 1.

110. See *id.* at 3.

111. See *id.* at 6. Moreover, even in the early years when secret sessions were the norm, congressional proceedings were necessarily deliberations limited to a small group of elected representatives. Direct democracy initiatives, on the other hand, are inherently public, all-inclusive affairs. It might be possible to conduct secretive legislative activity in Congress in the interests of national security or cooperation with the executive branch, but it might not be with a ballot initiative in which all voters should be fully informed and have access to the same information and in which the state's interest in preventing fraud or manipulation is compelling.

speech and lawmaking activity. The long, proud history of anonymous speech is largely relegated to what can easily be recognized as pure speech. Lawmaking and legislative processes have tended towards transparency and public disclosure, as would be expected in a country founded on principles of popular sovereignty. While historic practice alone is not controlling, this background finds further support from Supreme Court doctrine and prudential considerations.

III. ANONYMOUS SPEECH AND DISCLOSURE DOCTRINE

The modern right to anonymous speech is in tension with a parallel doctrine of disclosure.¹¹² This Part examines each of these doctrines in turn. It shows that much of what is commonly described as anonymous speech doctrine is more precisely concerned with issues such as associational rights and rooting out illegitimate government purposes.¹¹³ The doctrine that directly or indirectly protects anonymous speech should not be construed to extend to lawmaking processes such as direct democracy initiatives. Disclosure doctrine, however, which has developed largely in the context of elections and lawmaking, should apply. This Part reviews each doctrine in turn, highlighting the points of tension and intersection in order to demonstrate the crucial distinction between pure speech and lawmaking or legislative activity.

A. *Anonymous Speech Doctrine: Talley and McIntyre*

In early years,¹¹⁴ the Court did not explicitly recognize a right to anonymous speech but instead struck down disclosure requirements,

112. For a broader overview of historical First Amendment doctrine than is useful here, see David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983); and David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

113. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“[T]he application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.”); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001) (arguing for “purposivism” in First Amendment analysis of challenged laws and regulations).

114. Before wading into the analysis of First Amendment doctrine, a disclaimer is in order. The bulk of First Amendment cases that have reached the Supreme Court over the last 150 years are actually Fourteenth Amendment cases insofar as incorporation is what enables enforcement of the First Amendment against the states. Moreover, just as the struggles on behalf of racial equality and democratic inclusion are what led to the ratification of the

indicating an awareness that such requirements could threaten free speech. For example, in *Thomas v. Collins* the Court struck down a Texas statute requiring a union official to register with the Texas Secretary of State prior to soliciting members.¹¹⁵ Similarly, in *Lovell v. City of Griffin* the Court struck down a municipal ordinance prohibiting the distribution of handbills, petitions, or literature of any kind without a permit as a per se invalid infringement of First Amendment rights.¹¹⁶ These cases serve as examples of early anonymous speech doctrine that define the jurisprudential terrain today.¹¹⁷

Anonymous speech doctrinal analysis often begins in 1958 with *NAACP v. Alabama ex rel. Patterson*.¹¹⁸ In the midst of the civil rights movement, the NAACP challenged an Alabama statute requiring the organization to reveal the names and addresses of all its members. While ruling unanimously in favor of the NAACP, the Court avoided any explicit recognition of a right to anonymous speech in favor of an alternative, more general constitutional theory.¹¹⁹ The Court noted “the vital relationship between freedom to associate and privacy in one’s associations.”¹²⁰ Hence, context was key to the outcome in *Patterson*.

Fourteenth Amendment, many of the cases interpreting the First Amendment’s application to the states came out of the civil rights movement in the South, another generation’s struggle for inclusion. See HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 66-70 (1966). Thus, the First Amendment doctrine and analysis that follows makes sense only because of the historic processes of expanding democratic inclusion in general and the Fourteenth Amendment in particular; it is a deeply American story inextricably connected to historic struggles for expansion of democratic rights, popular sovereignty, and broader inclusion in civil society.

115. 323 U.S. 516 (1945).

116. 303 U.S. 444 (1938).

117. See also *Barenblatt v. United States*, 360 U.S. 109 (1959) (limiting First Amendment protections against compulsory disclosure of associational relationships in the context of a governmental interest of inquiry into the Communist Party); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (overturning a conviction for refusal to identify members of a fringe political party); *Watkins v. United States*, 354 U.S. 178 (1957) (protecting a witness from a congressional committee’s efforts to compel disclosure); *United States v. Rumely*, 345 U.S. 41 (1953) (restricting the reach of a House resolution seeking to require disclosure of the names of people who made bulk purchases of certain political books).

118. 357 U.S. 449 (1958); see, e.g., KALVEN, *supra* note 114, at 91; Meredith Hattendorf, Comment, *Theoretical Splits and Consistent Results on Anonymous Political Speech: Majors v. Abell and ACLU of Nevada v. Heller*, 50 ST. LOUIS U. L.J. 925, 930 (2006); Wieland, *supra* note 48, at 594.

119. The Court framed anonymity as a question related to “[e]ffective advocacy” and association rather than its own independent right. *Patterson*, 357 U.S. at 460.

120. *Id.* at 462.

The NAACP and the threatened racial minority group that it represented faced economic reprisal, public hostility, and threats of physical coercion.¹²¹ Moreover, in *Patterson* the Court held that whether disclosure was justified turned solely on the substantiality of the state's interest in obtaining the sought-after information as balanced against the members' associational rights.¹²² There, the state's sole justification for its desire to obtain the membership information was to facilitate its evaluation of whether the NAACP was acting in violation of the state's foreign corporation registration statute.¹²³ But, as the Court found, the sought-after membership information had virtually no relationship to the state's purported interest.¹²⁴

In the immediate aftermath of *Patterson*, the Court had the opportunity to consider squarely the issue of anonymous speech. *Talley v. California* concerned a Los Angeles ordinance requiring that any handbills distributed have printed on their cover the names and addresses of the person or persons who authored, printed, and distributed the handbills.¹²⁵ The Court was unequivocal in striking down the ordinance: "There can be no doubt that [the challenged] identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."¹²⁶ The decision reasoned that the ordinance was an overbroad method of achieving the state's purported interests of protecting against fraud, false advertising, and libel.¹²⁷ Again, the state's purpose was key to the outcome. As in other cases, the history of anonymous speech was used to buttress the importance of the outcome rather than as evidence of a specific right being violated.¹²⁸ This landmark decision

121. The same is not true of most political groups today that have support sufficient to garner the number of signatures required to initiate a ballot initiative. Though the petitioners in *Reed* claimed that they feared reprisals, Petitioners' Brief at 10-12, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559), they are not a vulnerable minority group in any meaningful sense.

122. See *KALVEN*, *supra* note 114, at 92-94.

123. See *Patterson*, 357 U.S. at 464.

124. See *id.*; see also *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (extending protection from compelled disclosure to NAACP contributors).

125. 362 U.S. 60 (1960).

126. *Id.* at 64.

127. *Id.* at 63-65.

128. In dissent, Justice Clark attempted to distinguish Talley's situation from that of the NAACP by indicating that "[t]he record is barren of any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name." *Id.* at 69 (Clark, J., dissenting). Justice Clark continued his strongly worded dissent: "I stand second to none in supporting Talley's right of free speech—but not his freedom of anonymity." *Id.* at 70. Justice Clark reported that, at the time, thirty-six states had laws prohibiting anonymous campaign literature. *Id.* at 70 n.2.

was the first recognition in the Court's modern jurisprudence of anything like a constitutional right to anonymous political speech. It would be another thirty-five years before the Court would flesh out the boundaries of anonymous speech.¹²⁹

In the 1995 case *McIntyre v. Ohio Elections Commission*, the Court was tasked with substantively exploring the nature of and limits to any right to anonymous political speech.¹³⁰ McIntyre brought a First Amendment¹³¹ challenge to an Ohio statute that required any written communication intended "to influence the voters in any election" to contain the name and address of anyone involved in funding or producing the communication.¹³² This case squarely presented a challenge to the state's ability to limit anonymous speech in a context much narrower than that in *Talley*: elections. It was on that ground that the Ohio Supreme Court had distinguished this case from *Talley* and upheld the statute.¹³³

The Supreme Court reversed the Ohio court, holding that the First Amendment protected McIntyre's right to anonymous political speech notwithstanding the state's legitimate interest in preventing fraud and libel.¹³⁴ Following the *Talley* Court's example, the majority in *McIntyre* recounted a history of anonymous, protected speech, and emphasized the chilling effect of compelled disclosure.¹³⁵ According to the decision, "[T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."¹³⁶ While this decision went further than *Talley* in clarifying anonymous speech doctrine,

129. For more on associational speech rights in the context of the NAACP's work in the South, see KALVEN, *supra* note 114, at 65-121.

130. 514 U.S. 334 (1995). The case attracted considerable attention. See, e.g., Rachel J. Grabow, Note, *McIntyre v. Ohio Elections Commission: Protecting the Freedom of Speech or Damaging the Electoral Process?*, 46 CATH. U. L. REV. 565 (1997) (examining the right to distribute anonymous campaign literature); Julia L. Luongo, Case Note, *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511 (1995), 26 SETON HALL L. REV. 1277 (1996) (reviewing the facts and outcome of the case); Mark A. Whitt, Note, *McIntyre v. Ohio Elections Commission: "A Whole New Boutique of Wonderful First Amendment Litigation Opens Its Doors,"* 29 AKRON L. REV. 423 (1996) (criticizing the holding for misapplying early American history, wrongly applying strict scrutiny, and failing to recognize that the policy was narrowly tailored).

131. The challenge was actually based on the First Amendment as incorporated through the Fourteenth Amendment. See *McIntyre*, 514 U.S. at 336 n.1.

132. *Id.* at 338 n.3.

133. See *id.* at 339-40.

134. *Id.* at 348-51, 357.

135. *Id.* at 341-56.

136. *Id.* at 342.

it too balanced a public interest against a private right without providing much clarity regarding the contours of that balance.

The Court's opinion in *McIntyre* was vague in ways that ensured future litigation over the regulation of anonymous speech.¹³⁷ Justice Scalia expressed concern that it could "take decades to work out the shape of this newly expanded right-to-speak-incognito."¹³⁸ Indeed, states were left to guess at the boundaries of the right to anonymous speech.¹³⁹ The confusion in this area of law has extended to lower courts as well, including a circuit split on the issue.¹⁴⁰ The confusion and litigation highlights the need for a clearer approach to this area of law, such as that advocated in this Note.

Properly understood, anonymous speech doctrine does not extend to the lawmaking process. In her scholarly writings as a professor, Justice Elena Kagan argued that First Amendment case law is primarily concerned with rooting out "improper governmental motives."¹⁴¹ If so, this highlights a crucial

137. In dissent, Justice Scalia wrote that, thanks to the majority opinion, "a whole new boutique of wonderful First Amendment litigation opens its doors." *Id.* at 381 (Scalia, J., dissenting).

138. *Id.*

139. See, e.g., *First Amendment and Restrictions on Political Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 13-16 (1999) (statement of David M. Mason, Comm'r, FEC) (discussing the risks and uncertainty of having disclosure statutes overturned). For a discussion of the state legislative responses to *McIntyre*, see Amy Constantine, Note, *What's in a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech*, 29 CONN. L. REV. 459, 477-82 (1996).

140. In *ACLU of Nevada v. Heller*, the Ninth Circuit was presented with a First Amendment challenge to a Nevada statute that required "persons either paying for or 'responsible for paying for' the publication of 'any material or information relating to an election, candidate or any question on a ballot' to identify their names and addresses on 'any [published] printed or written matter or any photograph.'" 378 F.3d 979, 981 (9th Cir. 2004) (alteration in original) (quoting the Nevada statute). The Ninth Circuit found the statute to be inconsistent with the First Amendment protections identified in *McIntyre*. *Id.* at 989-91. The same year, the Seventh Circuit considered the constitutionality of similar legislation out of Indiana but came to a different conclusion than the Ninth Circuit did in *Heller*. The challenged statute required that an identifying disclaimer be placed on any political advertising that expressly supported or opposed a particular candidate. *Majors v. Abell*, 361 F.3d 349, 350 (7th Cir. 2004). The Seventh Circuit dismissed the suit on the merits. *Id.* at 355. Judge Posner, writing for the majority, distinguished the case from *McIntyre* and instead placed it in a line of Supreme Court cases based on disclosure in political campaigns. *Id.* at 351-52. As Judge Easterbrook's dubitante opinion in *Majors* highlights, however, the anonymous speech doctrine epitomized by *McIntyre* is in tension with the disclosure doctrine Judge Posner relied on to resolve the case. *Id.* at 355-56 (Easterbrook, J., dubitante); see also Hattendorf, *supra* note 118 (discussing circuit court rulings on anonymous political speech in the wake of *McIntyre*).

141. Kagan, *supra* note 113, at 414.

distinction between anonymous speech cases and cases like *Reed*. In *Reed*, the public interest in disclosure is the need for transparency in validating signatures gathered to activate a legislative process. Where signatures are part of a lawmaking process, the state's interest in disclosure is necessarily tied to its obligation to protect the integrity of the referendum or initiative as well as the broader political-electoral process. In cases like *Patterson* and *McIntyre* the regulated activity in question was not itself a direct part of the legislative process and was clearly association or speech activity—both key distinctions from *Reed* and efforts to regulate direct democracy. Whether or not a right to anonymous speech exists at all remains unclear, but if it does exist, nothing in the case law suggests that it should extend to the direct democracy legislative process. Instead, a parallel doctrine of disclosure should apply.

B. Disclosure Doctrine

A separate doctrine has developed in the context of campaign finance regulation that is in tension with the anonymous speech doctrine and suggests that disclosure requirements in direct democracy initiatives are acceptable. These cases have upheld reporting and disclosure requirements in the context of elections and lawmaking without clearly distinguishing the anonymous speech cases. From *Buckley v. Valeo*,¹⁴² the first modern¹⁴³ case upholding disclosure requirements, to the 2010 decision in *Citizens United v. FEC*,¹⁴⁴ the Court has recognized campaign contributions and expenditures as protected political speech, even while upholding related disclosure laws. Thus, even if

142. 424 U.S. 1 (1976) (per curiam).

143. There are earlier cases. See, e.g., *United States v. Harriss*, 347 U.S. 612 (1954) (upholding disclosure requirements and regulation of lobbying activity); *Poulos v. New Hampshire*, 345 U.S. 395, 407 n.11 (1953) (“[A] state may protect its citizens from fraudulent solicitation by requiring a stranger in the community . . . to establish his identity” (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940))); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (affirming a conviction for parading on a public street without a required license); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 72 (1928) (“[The disclosure requirement proceeds] on the two-fold theory that the state within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required.”); *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288, 296 (1913) (upholding a federal provision requiring “every newspaper, magazine, periodical, or other publication” to submit a list of its editorial and business officers (quoting *Post Office Appropriation Act of 1912*, ch. 389, § 2, 37 Stat. 553, 554)).

144. 130 S. Ct. 876 (2010).

First Amendment rights are implicated by direct democracy disclosure laws, the laws should generally withstand scrutiny.

Buckley presented a complex constitutional challenge to campaign finance disclosure requirements.¹⁴⁵ The Federal Election Campaign Act of 1971 (FECA) severely restricted campaign contributions and imposed strict disclosure and reporting requirements.¹⁴⁶ FECA required reporting and public disclosure of contributions and expenditures above certain thresholds, including the donor's name, address, and other personal information.¹⁴⁷

In a lengthy *per curiam* decision, the Court struck down the limitations on campaign expenditures, independent expenditures by individuals and groups, and personal expenditures by candidates; the Court upheld, however, FECA's contribution restrictions, as well as its disclosure and reporting provisions.¹⁴⁸ Of particular relevance here are the disclosure and reporting requirements. The politician challenging the statute contended that "the reporting and disclosure provisions of the Act unconstitutionally impinge on [his] right to freedom of association."¹⁴⁹ But even those challenging the statute recognized that the disclosure requirements were not "*per se* unconstitutional restrictions on the exercise of First Amendment freedoms of speech and association."¹⁵⁰ Rejecting arguments of overbreadth, the *Buckley* Court held that if the disclosure requirements are narrowly construed, they are "within constitutional bounds."¹⁵¹ The Court then decided to apply strict scrutiny.

The government interests underlying FECA were threefold: first, to provide the electorate with useful electoral information; second, to deter corruption or the appearance of corruption; and third, to gather data necessary to detect violations of other requirements and regulations.¹⁵² Quoting Justice Brandeis, the Court commented: "Publicity is justly commended as a remedy

145. For an excellent summary of the Court's analysis of the expenditure and contribution limits, see FARBER, *supra* note 47, at 234-37. See also Trevor Potter, *Buckley v. Valeo*, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71 (1999) (reviewing the disclosure doctrine).

146. 2 U.S.C. §§ 431-456 (Supp. II 1973). FECA, the Court noted, was "by far the most comprehensive reform legislation [ever] passed by Congress concerning" elections. *Buckley*, 424 U.S. at 7 (alteration in original) (quoting *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975)).

147. See *Buckley*, 424 U.S. at 13, 63-64.

148. *Id.* at 14-34.

149. *Id.* at 11.

150. *Id.* at 60.

151. *Id.* at 60-61.

152. *Id.* at 66-68.

for social and industrial diseases. Sunlight is said to be the best of disinfectants”¹⁵³ After careful analysis the Court concluded that “the substantial public interest in disclosure . . . outweighs the harm generally alleged.”¹⁵⁴ Over time the Court has recognized that providing information to the electorate is a substantial state interest.¹⁵⁵ But the application of the doctrine remains far from clear because the valid state interest in disclosure must be balanced against any potential infringement of freedom of speech.¹⁵⁶ Thus, in First Amendment cases in which a party challenging a disclosure requirement could show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals,” the Court would be inclined to strike the requirement down as unconstitutional.¹⁵⁷ The outcome of the case established what then-Professor Kagan called “the *Buckley* principle,” which she defined “as an evidentiary tool designed to aid in the search for improper motive, much like the presumption against content-based restrictions.”¹⁵⁸ Several Justices suggested that the same logic should apply in *Reed*,¹⁵⁹ but the argument here is for a clearer, more definitive acceptance of disclosure policies in the specific context of direct democracy legislation.

As lobbyists, campaigners, and politicians devised ways to get around FECA restrictions, Congress updated that legislation. The Bipartisan Campaign Reform Act of 2002¹⁶⁰ (BCRA) was designed “to purge national

153. *Id.* at 67 (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (1933)).

154. *Id.* at 72.

155. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791-92 (1978) (stating that “the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments” and thus there is a significant public interest in ensuring free access to information).

156. See, e.g., *Davis v. FEC*, 554 U.S. 724 (2008) (finding unconstitutional a disclosure requirement imposed on a self-financed candidate); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002) (striking down a local ordinance requiring door-to-door canvassers to obtain permits revealing their identities); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) (“The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions.”).

157. *Buckley*, 424 U.S. at 74. The Court had the opportunity to apply this exemption to a minor party. *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 92 (1982) (“The government’s interests in compelling disclosures are ‘diminished’ in the case of minor parties.”).

158. Kagan, *supra* note 113, at 467.

159. See *supra* Part I for a detailed analysis of the decision in *Reed*.

160. 2 U.S.C. § 431 (2006).

politics of what was conceived to be the pernicious influence of “big money” campaign contributions.”¹⁶¹ One of the provisions of the BCRA required disclosure to the FEC by any person making large campaign disbursements.¹⁶² In rejecting a constitutional challenge to this disclosure requirement of the BCRA,¹⁶³ the Court provided little guidance for lower courts.¹⁶⁴ Just a few years later the Court issued another major decision on BCRA.

In *Citizens United v. FEC*,¹⁶⁵ the Court extended to corporations the same First Amendment political speech protections enjoyed by individuals and undermined the government’s ability to implement controls on unlimited corporate spending in elections.¹⁶⁶ The Court, however, found that Congress can require disclaimers and disclosure of spending. As Justice Kennedy put it, “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions”¹⁶⁷ Thus, even as anonymous speech doctrine and disclosure doctrine have evolved, expanded, and contracted in tension with each other, the Court has tended to reject facial First Amendment challenges to statutory disclosure requirements when there is a legitimate government interest behind a content-neutral regulation.

161. *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (quoting *United States v. Auto. Workers*, 352 U.S. 567, 572 (1957)).

162. 2 U.S.C. § 441i.

163. See *McConnell*, 540 U.S. at 142, 156, 161, 171.

164. As Judge Easterbrook critically pointed out in *Majors*, the Court’s “failure to discuss *McIntyre*, or even to cite *Talley*, *American Constitutional Law Foundation*, or *Watchtower*, makes it impossible for courts at [the circuit] level to make an informed decision” about which principle to apply in disclosure cases. *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., dubitante).

165. 130 S. Ct. 876 (2010). Years after publishing her article *Private Speech, Public Purpose*, cited *supra* note 113, then-Solicitor General Elena Kagan argued the government’s case in *Citizens United*. Kagan lost the case, but the outcome may be consistent with her academic scholarship insofar as both her article and the *Citizens United* majority sought to distinguish *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), from *Buckley v. Valeo*, 424 U.S. 1 (1976). See *Citizens United*, 130 S. Ct. 876 (citing *Austin* throughout); Kagan, *supra* note 113, at 465 n.143.

166. This aspect of *Citizens United* has been the focus of reporting and commentary on the case. See, e.g., Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1; see also Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622 (2010) (arguing that broad disclosure and disclaimer regulations for corporate electoral speech are both constitutionally sound and normatively superior to outright prohibitions).

167. *Citizens United*, 130 S. Ct. at 916.

In both *Buckley* and *Citizens United* the Court upheld disclosure provisions. The government interests in *Buckley* that justified disclosure would be at least as compelling in the context of direct democracy. *Citizens United* recognized the need for transparency in the electoral process, even though that case considered access to information more generally, not the narrow issue of the validity of the lawmaking process. In contrast, anonymous speech cases like *Talley* and *Patterson* tended to be decided based on the pure speech motives or associational interests of the subject being regulated and the absence of valid regulatory purpose. Meanwhile, disclosure cases have rejected facial First Amendment challenges to disclosure—even when the challenged regulation is of election campaign speech and not the lawmaking process itself. While neither of these disclosure cases squarely considered direct democracy, the Court has ruled on issues of disclosure in that context as well.

In 1999, the Court had the opportunity to consider disclosure laws in the context of direct democracy in *Buckley v. American Constitutional Law Foundation (ACLF)*.¹⁶⁸ As the following analysis shows, however, when deciding this case, the Court misconstrued the key issues. Colorado is one of the twenty-seven states that allow their citizens to make laws directly through ballot initiatives.¹⁶⁹ Colorado, like other states, imposes numerous controls and regulations on the initiative-petition process.¹⁷⁰ This case arose out of the American Constitutional Law Foundation's First Amendment challenge to: "(1) the requirement that initiative-petition circulators be registered voters; (2) the requirement that they wear an identification badge bearing the circulator's name; and (3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator."¹⁷¹ A central question in the case not squarely considered by the Court, but relevant to the issue at the heart of this Note, is whether the regulated activity should be seen as speech or lawmaking. The Court found all three of the disclosure regulations to infringe inappropriately on First Amendment rights.¹⁷²

A critique of the Court's reasoning helps develop this Note's doctrinal argument. The majority's reasoning can be summarized as follows: "The First Amendment (as applied to states via the Fourteenth [Amendment]) explicitly

168. 525 U.S. 182 (1999).

169. COLO. CONST. art. V, § 1, paras. 1-3; COLO. REV. STAT. §§ 1-40-101 to -135 (2010); see also sources cited *supra* note 3.

170. See, e.g., COLO. REV. STAT. § 1-40-111.

171. *ACLF*, 525 U.S. at 186 (citations omitted).

172. *Id.* at 187.

protects the people's right to petition. The Colorado regulations were an impermissible attempt to abridge this right. 'Circulating a petition is akin to distributing a handbill,' and so the badge requirement was squarely governed by" *McIntyre v. Ohio Elections Commission*.¹⁷³ The Court seemed to apply strict scrutiny (although without clearly articulating any particular standard) and, because it considered the regulated activity petition gathering, struck down the challenged regulations.¹⁷⁴ Had the lawyers arguing the case on behalf of Colorado succeeded in framing the issue as one of state lawmaking rather than petitioning, the outcome might have been very different—which Justice would have gone so far as to suggest that Colorado be required to allow nonresidents to vote, or to allow voting without identification at the polls? But the petition for certiorari,¹⁷⁵ the merits briefs for Colorado,¹⁷⁶ and the amicus briefs filed by other state and local governments¹⁷⁷ did not squarely set up the key distinction between speech and lawmaking advocated here.

In essence, the challenged regulations did not restrict anonymous petitioning or speech. The regulations simply stipulated circumstances necessary for the petitions to count for the purposes of the state initiative process. People who choose not to comply with state lawmaking regulations have "no First Amendment right to insist that Colorado treat [their] petition as anything more than a handbill."¹⁷⁸ Indeed, the outcome of Supreme Court cases considering disclosure provisions tends to depend on whether the issue is framed as one of election regulation or of speech. Where the issue is one of a content-neutral¹⁷⁹ election regulation, it is easiest to find a valid government interest.

The doctrine allowing for anonymous political speech has long been in tension with the parallel doctrine of disclosure. First Amendment protections for speech, expression, and association are essential rights, fundamental to

173. Akhil Reed Amar, *The Five-Legged Dog*, AM. LAW., Sept. 1999, at 47, 47 (quoting *ACLF*, 525 U.S. at 199).

174. *ACLF*, 525 U.S. at 186-87 (describing petition circulating as "core political speech" that merits the full protection of the First Amendment).

175. Petition for Writ of Certiorari, *ACLF*, 525 U.S. 182 (No. 97-930), 1997 WL 33485681.

176. Petitioner's Brief, *ACLF*, 525 U.S. 182 (No. 97-930), 1998 WL 221384; Petitioner's Reply to Brief in Opposition, *ACLF*, 525 U.S. 182 (No. 97-930), 1998 WL 34081105.

177. Brief of the Council of State Governments et al. as Amici Curiae in Support of Petitioner, *ACLF*, 525 U.S. 182 (No. 97-930), 1998 WL 212593; Brief of the States of Washington et al. as Amici Curiae in Support of Petitioner, *ACLF*, 525 U.S. 182 (No. 97-930), 1998 WL 221378.

178. Amar, *supra* note 173, at 47.

179. See Kagan, *supra* note 113, at 443 ("The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law.").

American democracy. Often these rights exist even when the speaker wishes to remain anonymous. On the other hand, the Court has often recognized the validity of disclosure requirements in a range of electoral and legislative contexts far broader than that of petitions in legislative referenda. Thus, First Amendment protections for anonymous speech should not be construed to extend to lawmaking processes such as direct democracy initiatives. In analyzing such cases, courts look to the governmental purpose for a challenged regulation as a key basis for determining its validity. In the context of legislative processes and comparable aspects of campaign finance, there is a compelling government interest in transparency and disclosure so as to ensure the integrity of the lawmaking process. Moreover, the activity being regulated often falls wide of the core speech activity that the Founders sought to protect with the First Amendment. Thus, as this Part has illustrated, disclosure doctrine provides a sound basis for recognizing the validity of disclosure in direct democracy initiatives even if the regulations are found to implicate First Amendment rights.

IV. PRUDENTIAL CONSIDERATIONS

The Court's muddled decision in *Reed* almost guarantees that there will be a flourishing of litigation in lower courts addressing a range of regulatory issues—including disclosure—in the context of state-organized ballot initiatives and beyond. Indeed, some political groups have already filed suit in multiple states to bypass electoral disclosure regulations.¹⁸⁰ Because the Court erroneously applied the First Amendment in *Reed*, these groups will continue to claim a right to anonymous speech in order to undermine state electoral and lawmaking regulations. The *Reed* Court should have grounded its decision to uphold the Washington state disclosure provision in an explicit distinction between pure speech and lawmaking, bolstered by an affirmation of the states' right to organize their own lawmaking processes. The First Amendment is vital to the very essence of this country's identity, but so too is the sovereign capacity of the people of each state to decide whether and how to permit legislation by popular action. The two need not be in tension, and in future cases the Court should rely on the distinction advocated here to clarify the doctrine for lower courts and state governments alike.

The rich and complex history of anonymous speech and disclosure in lawmaking provided a useful starting point for the approach advanced here.

¹⁸⁰. See *National Organization for Marriage To Fight Potential State-Imposed Restrictions*, EWTN NEWS (Sept. 28, 2010, 11:35 AM), <http://ewtnnews.com/new.php?id=1782>.

The history illuminates the breadth and depth of the issue. The historic record also provides concrete evidence in support of the distinction between lawmaking activity and pure speech. Foundational examples such as the signing of the Declaration of Independence, the anonymous publishing of written materials during the ratification debates, and the signing of the U.S. Constitution advance this Note's argument.

The most powerful line of argument in this Note is found in the jurisprudential analysis. The tension in Court doctrine detailed here is largely a result of the frequent blurring of lines between core speech and association on the one hand, and political lawmaking processes on the other. As Professor Jed Rubenfeld writes, "There is no First Amendment 'pass' from a law whose purpose is not to punish speech."¹⁸¹ If the purpose of the disputed law is not to regulate speech, then we should question a First Amendment challenge to its validity. As then-Professor Kagan wrote, however, "the concern with governmental motive remains a hugely important—indeed, the most important—explanatory factor in First Amendment law. If it does not account for the whole world of First Amendment doctrine, it accounts (and accounts alone) for a good part of it."¹⁸² The question of government interest remains an essential one.

The history and doctrine alone may be insufficient: prudential considerations may also impact a court's decision.¹⁸³ Thus, this final Part considers policy implications and counterarguments. By highlighting the unique government interest in transparency and fraud prevention and taking on complex counterarguments, the prudential argument buttresses the historic and doctrinal evidence.

A. State Regulation Can Promote Transparency and Deter Fraud

Distinguishing lawmaking from speech and allowing states to regulate direct democracy initiatives, including disclosure, serves a crucial policy interest of increasing transparency and rooting out electoral and legislative fraud. Governments must ensure that their functioning is transparent and credible; disclosure in direct democracy is a proven mechanism for detecting irregularities that the state itself may fail to find.¹⁸⁴ Sunlight is indeed the best

181. Rubenfeld, *supra* note 113, at 768.

182. Kagan, *supra* note 113, at 415.

183. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 59-73 (1982) (describing prudential argumentation in constitutional law).

184. See sources cited *supra* note 23.

disinfectant.¹⁸⁵ Without some form of disclosure, or public access to direct democracy records and proceedings, state government could be tricked into accepting fraudulent legislative signatures, or they could even be complicit in such fraud. Thus disclosure serves a compelling policy interest that is essential to the smooth functioning of the democratic process.

Critics may suggest that this Note's argument will lead down a slippery slope to requiring disclosure in the context of voting in elections. These critics might counter the evidence presented here to suggest that relying on transparency in congressional proceedings to advocate transparency in direct democracy leads to the conclusion that voting itself should be subject to the same public scrutiny. Voting, they might say, is equally part of the lawmaking process that this Note has argued should be subject to disclosure and should not benefit from the full protection afforded to pure speech or expression. This argument is unpersuasive because of crucial distinctions between signatures gathered to activate direct democracy provisions and voting in elections.

Direct democracy initiatives are organized by public interest groups, organizations, or civic campaigns, while elections are organized by the government. When the government organizes an election, it has a wide range of mechanisms to prevent fraud including registration, residence, and identification requirements.¹⁸⁶ Voters may be required to cast their ballot at a particular location on a particular day using a ballot designed by the government.¹⁸⁷ Indeed the details of each individual's voter registration history are public.¹⁸⁸ Not so with the direct democracy process, in which the state plays virtually no regulatory role until the signatures are submitted. This difference is crucial because it means that the state's overriding interest in ensuring credibility and preventing fraud is served by disclosure in the case of direct democracy, but not in the case of secret ballots in elections.

185. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

186. For a fifty-state survey of the voter registration requirements, see *State by State Voter Laws and Registration Deadlines*, DECLARE YOURSELF, http://www.declareyourself.com/voting_faq/state_by_state_info_2.html (last visited Feb. 23, 2011). See also, e.g., MD. CODE ANN., ELEC. LAW § 3-102 (West 2010) (providing voter registration requirements).

187. See, e.g., ALASKA STAT. § 15.15.030 (2010) (describing the ballot design criteria); N.J. STAT. ANN. § 19:8-7 (West 1999) (describing polling booth requirements); W. VA. CODE ANN. § 3-4A-9a (LexisNexis 2006) (describing requirements for “ballot-marking accessible voting device[s]”).

188. See, e.g., WASH. REV. CODE ANN. § 29A.08.720 (West 2005) (providing for disclosure of voting registration records); see also Jeffrey T. Even, *Washington's Address Confidentiality Program: Relocation Assistance for Victims of Domestic Violence*, 31 GONZ. L. REV. 523, 537 (1996) (stating that “voter registration lists are public records”).

Signatures on direct democracy petitions do not go to the underlying merits of the issue in the same way that voting at the polls on the same issue or for a particular candidate's election does. A vote expresses a political opinion on an issue, or on the election of an individual candidate. Signing a petition, however, is in no way binding, and it often may be difficult to predict the way in which an individual signer will later vote. For example, some people may support initiatives in general because of a commitment to popular sovereignty rather than a stance on any given issue. A further example: the gay rights activists who opposed the direct democracy campaign at issue in *Reed* and sought disclosure of the signatures that gave rise to the litigation ultimately won the vote on the merits that the contested signatures initiated.¹⁸⁹ Thus, after all the signatures were verified and the votes cast, they benefited from the direct democracy initiative that they had initially opposed because it added legitimacy to their position through a successful statewide vote.

Moreover, signing a lawmaking petition is entirely elective in the states where it is even possible.¹⁹⁰ While each state has the right to allow or disallow initiatives, the states certainly do not have the right to disallow elections and voting. Thus while some states might choose to give citizens the option of voting in public,¹⁹¹ states' ability to regulate should be more limited with regard to voting than with regard to optional direct democracy procedures.

B. Distinguishing Between Speech and Lawmaking Will Foster Civic Discourse

Rather than legislating from the shadows of anonymity, disclosure will encourage dialogue and debate on issues of public concern. People who have the civic courage to speak up and sign their names will be making a powerful statement, not necessarily on the merits of the issue, but at least on their desire to see it resolved through public vote. Others who disagree can engage them publicly and privately in reasoned debate. The public nature of the lawmaking process in the legislature is crucial to the ability of elected officials to talk through complex issues and come to sound solutions; the same is true in direct democracy.

A counterargument to this policy benefit relates to the need to protect potentially vulnerable minority or unpopular groups from persecution and to

189. Lornet Turnbull, *Domestic Partner Measure Kicks In*, SEATTLE TIMES, Dec. 3, 2009, at A1.

190. See sources cited *supra* note 3.

191. See W. VA. CONST. art. IV, § 2.

avoid chilling democratic participation or civic discourse.¹⁹² Disclosure may lead to harassment, threats, or intimidation of vulnerable groups, and even the fear of harassment may have a chilling effect on participation in direct democracy initiatives. Justice Alito invoked the specter of this harassment in his concurrence in *Reed*.¹⁹³ Others might point to the history of the NAACP, including in cases such as *NAACP v. Alabama ex rel. Patterson*,¹⁹⁴ in which the Court prevented forced disclosure to protect a threatened minority group. The petitioners in *Reed* invoked *Patterson* throughout their brief.¹⁹⁵ While these concerns are valid and warrant careful consideration, they are unavailing here for at least four reasons.

First, *Patterson* and its progeny did not involve lawmaking, or even voting, but rather association. That distinction goes to the heart of the argument. Associational rights to engage and participate in a social or political group, even privately, are clearly protected by the First Amendment; direct participation in the legislative process is not.

Second, the concern about harassment and intimidation is most legitimate where the potential victims are minority groups, as was the case in *Patterson*. Any group succeeding in gathering enough signatures to initiate a direct democracy initiative and believing that it can win on the issue at the ballot is unlikely to be a vulnerable minority. Where the group seeking to impact legislation is so small that it is unable to gather enough signatures to get the group's issue on the ballot, that group should probably receive the benefits of an exemption as granted in *Brown v. Socialist Workers '74 Campaign Committee*,¹⁹⁶ and as contemplated but rejected in *Buckley*.¹⁹⁷ Where, however, enough signatures are gathered to initiate a lawmaking procedure, the overriding government interest in transparency and legitimacy should control.

Third, in certain limited circumstances a judge may find that there is an unusually high risk of intimidation such as to warrant an injunction against disclosure. However, that should be the exception to a presumption of transparency.¹⁹⁸ A temporary injunction might be appropriate in extreme cases where signers meet a high evidentiary standard and are able to show actual

192. See Potter, *supra* note 145 (describing arguments against disclosure); *Disclosure and the Devil*, *supra* note 48, at 1105-13 (explaining how disclosure can lead to deterrence).

193. *Doe v. Reed*, 130 S. Ct. 2811, 2824 (2010) (Alito, J., concurring).

194. 357 U.S. 449 (1958).

195. Petitioners' Brief at 26, 27, 32, *Reed*, 130 S. Ct. 2811 (No. 09-559).

196. 459 U.S. 87 (1982).

197. *Buckley v. Valeo*, 424 U.S. 1, 72-74 (1976) (per curiam).

198. This point is consistent with the Court's decision in *Reed*. See 130 S. Ct. at 2815.

harassment or violence targeting those signing the specific petitions in question and where traditional law enforcement has failed to provide adequate remedy.

Fourth, in the 1950s and 1960s armed groups such as the Ku Klux Klan, sometimes with the complicity of local law enforcement, targeted groups like the NAACP for violent attacks and intimidation.¹⁹⁹ While America still grapples with issues of hate-based violence,²⁰⁰ minority groups generally benefit from the protection of the state and no longer contend with the same degree of vitriolic intimidation and attacks that were the backdrop for *Patterson*. Thus, while disclosure may be a cause for concern in some extreme cases, those are the exceptions. Because direct democracy initiatives are made available only at the discretion of the states, it is unlikely that the same states would seek to regulate them out of existence. Legal norms should recognize that disclosure can lead to truth and justice by shedding light on sources of information and lawmaking processes, thus allowing consumers of information or government action to better engage with the marketplace of policy, politicians, and ideas.²⁰¹

C. State Regulation and the Benefits of Policy Experimentation

Direct democracy procedures vary from state to state,²⁰² and thus states should be able to experiment with methods for regulating their own processes.²⁰³ So, for example, one state may choose to make disclosure optional upon request by any citizen while another state may make disclosure mandatory across the board. Still another might seek to limit disclosure to media organizations or civic groups. Over time the strengths and weaknesses of different regulatory and disclosure policies will emerge and other jurisdictions can amend or adopt as appropriate.

199. See generally Sally Avery Bermanzohn, *Violence, Nonviolence, and the Civil Rights Movement*, 22 NEW POL. SCI. 31 (2000) (describing local government complicity with lynch mob violence).

200. See, e.g., Manny Fernandez, *Verdict Is Manslaughter in L.I. Hate Crime Trial*, N.Y. TIMES, Apr. 20, 2010, at A1.

201. See *Disclosure and the Devil*, *supra* note 48, at 1109-10 (laying out arguments in favor of disclosure).

202. See *Buckley*, 424 U.S. at 66-68.

203. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Petitions can be (and often are) issues of pure speech, but not when filed to activate a ballot initiative or lawmaking process—in this context, perhaps they should not even be called “petitions” but rather “lawmaking signatures,” or something of the sort. In the context of a ballot initiative the state interest in regulation is less akin to the First Amendment rights of those signing their names and more related to state sovereignty, government transparency, and accountability. The state has an overriding interest in detecting fraud in the lawmaking process, and ensuring that the lawmaking process is transparent, credible, and subject to controls of popular sovereignty. Experiences across the country have demonstrated that the state itself may not be the only stakeholder, or even the best suited, to detect signature fraud: disclosure allows for a vital popular check on public and private fraud alike.²⁰⁴

CONCLUSION

The historical, doctrinal, and prudential considerations woven together here make a compelling case for transparency in direct democracy lawmaking processes. The long history of anonymous speech in this country supports at most a right to anonymous speech limited to pure speech contexts. Put differently, laws regulating the electoral process, including the collection of signatures on a ballot initiative, are generally misunderstood if analyzed through the lens of First Amendment free speech. The case law that might establish something akin to a right to anonymous speech is inapplicable in the context of actual legislative process, and the states can rely on a robust disclosure doctrine in implementing procedures that ensure for transparency in lawmaking. Finally, the practical implications of this Note’s argument further support the need to distinguish pure speech from regulated steps of the direct democracy lawmaking process.

204. See sources cited *supra* note 23.