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The Separation of Legislative Powers in the Initiative Process

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Anthony Johnstone*

The Separation of Legislative Powers in the Initiative Process

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I. INTRODUCTION

Direct democracy cannot implement itself. From Nebraska's introduction of a state law authorizing the initiative at the local level in 1897,[1] through the first constitutional amendments authorizing state-

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1. Adam C. Breckenridge, *Nebraska as a Pioneer in the Initiative and Referendum*, 34 NEB. HIST. 215 (1953).

wide initiative processes in several states at the turn of the Twentieth Century, and subsequent efforts to expand the initiative power to approximately half the states,[2] legislatures must share the legislative power with the people in states that provide the initiative. After the initial allocation of legislative power to initiative processes, usually through relatively detailed constitutional provisions, state legislatures become responsible for supporting the initiative power. In authorizing initiatives, state constitutions also authorize enabling legislation necessary for filing, legislative review, petition circulation processes and timelines, signature verification, and balloting. Legislatures also may attempt to specify or supplement the requirements to qualify an initiative, or even limit the initiative through subject matter restrictions or additional procedural hurdles. Legislatures also must authorize various state executive branch and local officials to facilitate the petitioning and balloting processes.

Unlike other objects of enabling legislation, however, the initiative power by design functions as a legislative rival to the legislature. In conventional separation of powers systems, the executive checks and balances the legislature through the exercise of executive power, the judiciary checks and balances the legislature through the exercise of judicial power, and the people check and balance the legislature through elections. The initiative process, in contrast, checks and balances the legislature through its allocation of legislative power to the people themselves.[3] Unlike the near-universal structure of bicamera-

2. M. Dane Waters, The Initiative and Referendum Almanac 2-3 (2d ed. 2018). As of 2018, twenty-four states have constitutional initiative processes to amend the state constitution, twenty-one of which also authorize statutory initiatives to enact legislation. Fourteen of these states authorize "direct" initiatives enacted by the people directly. Nine states (including two of the fourteen states authorizing direct initiatives) authorize "indirect" initiatives that allow the legislature to approve the initiated proposal or reject it, in which case it is balloted for adoption or rejection by the voters at the next general election. Twenty-three states, including nearly all of the initiative states, also authorize either constitutional or statutory referendums, which allow popular approval or rejection of legislation. *Id.* at 12–14. This article focuses on the statutory initiative as the core case of shared legislative powers, but will also address related provisions addressing constitutional initiatives and both forms of referendum. The term "ballot issue" includes initiatives and referendums, constitutional and statutory.

3. Richard Briffault provided a classic defense of the initiative's role in reinforcing democratic responsiveness in *Distrust of Democracy*, 63 Tex. L. Rev. 1347, 1368 (1985) ("The best case for direct legislation in a system of representative government is that it may play an important role in just those areas in which institutional pressures cause representatives to stray from the interests of popular majorities: government structures and regulation of the political process, taxation, and spending."). Elizabeth Garrett extended the defense to the interactions between the two legislative powers, including the dynamics between the initiative and candidate elections, the initiative's facilitation of reforms to the democratic process, and the initiative power's tacit and explicit checks on the

lism in state legislatures (present company excepted),[4] which requires the coordination of the legislative power between two chambers, the initiative process makes legislation independent of the legislature. State constitutions provide a model for a division of powers and intrabranch checks in the executive branch,[5] but the distinct modes of executive power—administration by the Governor, enforcement by the Attorney General, for example—do not easily map onto the general legislative powers shared by the legislature and the people through the initiative process.

An effective model for a divided legislative branch, and an independent initiative power within that branch, can clarify and strengthen the constitutional doctrine of direct democracy. The rivalry between the legislature and the initiative process originates in basic questions of state constitutional power. Judge Jeffrey Sutton asks, "[w]ho can blame the people of some states . . . for experimenting with direct democracy"[6] to circumvent legislative blockage of popular reforms to powerful private interests, even when state constitutions already limited the exercise of public power for private purposes.[7] The rivalry has heated up again in recent years as people in their states work to make policy around increasingly polarized state legislatures. As John Dinan explains elsewhere in this issue, a series of policy innovations enacted through the initiative process have drawn a backlash by legislators opposed to those policies, leading legislators "to restrict the use of the initiative process by changing the rules to make the process less accessible and to limit the initiative measures that can be enacted."[8] Ac-

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legislature's enactment of unpopular policies. Elizabeth Garrett, *Hybrid Democracy*, 73 Geo. Wash. L. Rev. 1096, 1098 (2005).

4. *See* Neb. Const. art. III, § 1 ("The legislative authority of the state shall be vested in a Legislature consisting of one chamber.").
5. *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2453–55 (2006) (introducing the political intrabranch rivalry between Governors and Attorneys General in the state executive branch). Akhil Amar cites influential early theories of the judicial branch as bicameral as well, where "[t]he judicial structure mirrored that of the legislature, with an upper house [the judge] of greater stability and experience, and a lower house [the jury] to represent popular sentiment more directly." Akhil Reed Amar, *The Bill of Rights as Constitution*, 100 Yale L.J. 1131, 1189 (1991).
6. Jeffrey S. Sutton, Who Decides? States as Laboratories of Constitutional Experimentation 361 (Oxford Univ. Press, 2022).
7. *See* Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. Leg. 39, 46 (2004) (explaining how state constitutions restricted legislative power out of "a common concern for the special treatment of powerful interests").
8. John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century in Response to Animal Welfare, Taxation, Marijuana, Minimum Wage, and Medicaid Initiatives*, 101 Neb. L. Rev. 40, 41 (2022); *see also* Miriam Seifter, *State Institutions and Democratic Opportunity*, Duke L. J., Sections II.A–B (forthcoming 2022).

cording to Jessica Bulman-Pozen and Miriam Seifter, "The very impetus for direct democracy—the intransigence or corruption of elected officials—creates incentives for those officials to undermine direct democracy."[9]

For example, after the Supreme Court allowed states to opt-in to Medicaid expansion in *The Health Care Cases*,[10] voters in several states accepted Medicaid expansion by initiative where legislatures and other officials had opposed the policy.[11] Some state legislatures responded to these end-runs around the legislative process by imposing new restrictions on the initiative process.[12] As state courts hear challenges to some of these restrictions, however, the challengers and the courts themselves frame the issue as a legislative denial of the peoples' state or federal rights rather than an impairment of the peoples' powers.[13] This framing, while occasionally successful, is incorrect as a matter of constitutional text and structure, and of limited analytical force as a matter of constitutional doctrine.[14]

This article recenters the initiative process as a power and considers the implications of a divided legislative branch through a frame of state separation of powers principles. Part II develops the state constitutional position of the initiative process, how its provisions are entrenched against legislative incursion by detailed constitutional text, and ways in which this position leaves the initiative power vulnerable on judicial, executive, and legislative fronts. Part III introduces three possible defenses for the initiative power: a fading set of federal constitutional rights, an ill-fitting lens of state constitutional rights, and a tentative principle of separation of powers within a divided state legislative branch. This part then turns to constitutional doctrine for models that might describe and defend the initiative power, drawing from bicameralism and plural executive powers in federal and state constitutional law. Part IV explores the problems a powers-based approach may help solve, with reference to recent state legislative ef-

9. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 923 (2021).
10. NFIB v. Sebelius, 567 U.S. 519 (2012).
11. Anthony Johnstone, *A State is a "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 BYU L. REV. 1471, 1488 (2019).
12. *See* Dinan, *supra* note 8.
13. *See infra* Sections III.A & III.B.
14. This turn from rights to powers is informed by the wisdom of recent scholarship reexamining the limits of rights discourse and the potential of powers-based analysis. *See, e.g.*, Maggie Blackhawk, *Federal Indian Law as Public Law Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1798-99 (2019) (observing "[s]cholars have been increasingly calling for a paradigm that looks beyond rights and toward power," and suggesting "Federal Indian law could provide that paradigm"); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) (exploring how national minorities may find solidarity in dissent through the exercise of power at subnational levels).

forts, and state court cases that converge on an examination of whether legislation affecting the initiative power facilitates or impairs that power. Part V concludes.

II. THE STATE CONSTITUTIONAL POSITION OF DIRECT DEMOCRACY

From the beginning, state constitutions have framed the initiative as a power reserved to the people. South Dakota, the first state to adopt a statewide initiative process in 1898, features a typical example:

> § 1. Legislative power—Initiative and referendum. The legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives. However, the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state, and also the right to require that any laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. Not more than five percent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.[15]

This provision demonstrates four basic features of direct democracy's position relative to the legislature in state constitutions. First, the initiative and referendum is a power reserved by the people prior to the the people's delegation of legislative power to the legislature. Second, this power is either expressly or implicitly subject to the same constraints imposed on legislative acts, and is often subject to additional subject matter limits, usually reflecting procedural distinctions between legislative sessions and ballot issues. Third, the requirements for qualifying a ballot issue are specified in the constitution itself, protecting those requirements from legislative amendment. Fourth, the constitutional reservation of initiative powers usually authorizes enabling legislation, provided such legislation facilitates but does not impair the power. Together, these common features of the initiative power situate it as a constitutional equal, at least, to the power vested in the legislature.

A. "The people reserve the power"

Most importantly, the initiative power is "reserved"[16] to the people, the origin of "all political power" as expressed in nearly every

15. S.D. CONST. art. III, § 1.
16. *See* ARIZ. CONST. art. IV, § 1(1) ("but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls"); ARK. CONST. art. V, § 1 ("but the people reserve to themselves the power to propose legislative measures, laws and amendments to the constitution."); CAL. CONST. art. IV, § 1 ("but the people reserve to themselves the

state constitution.[17] Karl Manheim and Edward Howard explain by reference to California:

> The textual bases for the initiative power may thus be summarized as follows: first, all political power is inherent in the people; second, this political power—the power to make legitimate governments—has been thrice subdivided, with the initiative being a legislative power; third, while the legislative power is principally delegated to the legislature, the direct exercise of legislative power by initiative is reserved to the people; and finally, the people who have reserved the power of initiative are presumably the same people in whom political power is inherent.[18]

This power is retained from the power delegated to the state legislature, often expressed as a proviso on the legislative vesting clause with words like "however" or, more commonly, "but the people reserve the power" to legislate through the initiative.[19]

This power is also untouchable by the executive branch; while all states provide for a governor's veto power over legislative acts, no state allows a governor to veto an initiative. Several state constitutions reinforce the initiative power by explaining that it is "indepen-

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powers of initiative and referendum."); COLO. CONST. art. V, § 1 ("but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls"); FLA. CONST. art. XI, § 3 ("The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people."); IDAHO CONST. art. III, § 1 ("The people reserve to themselves the power to propose laws, and enact the same at the polls"); MICH. CONST. art. II, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws"); MO. CONST. art. III, § 49 ("The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative"); MONT. CONST. art. V, § 1 ("The people reserve to themselves the powers of initiative and referendum."); NEB. CONST. art. III, § 2 ("The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people"); NEV. CONST. art. XIX, § 2(1) ("the people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this Constitution, and to enact or reject them at the polls."); N.D. CONST. art. III, § 1 ("the people reserve the power to propose and enact laws by the initiative"); OHIO CONST. art. II, § 2.01 ("but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls"); OKLA. CONST. art. V, § 2 ("the first power reserved by the people is the initiative"); OR. CONST. art. IV, § 1(1) ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly"); WASH. CONST. art. II, § 1 ("but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls").

17. *See, e.g.*, S.D. CONST. art. I, § 26 ("All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper.").
18. Karl Manheim and Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1196 (1998).
19. *See supra* note 18.

dent of the legislature" in the same provision reserving that power. The Nebraska Constitution puts it plainly: "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people *independently* of the Legislature."[20] Beyond establishing the initiative as an equal and independent legislative power, ten state constitutions reserve the initiative power by privileging initiated legislation. These states either temporarily or permanently protect initiated laws from repeal or amendment by the legislature, or else require supermajorities for either repeal or amendment. Again, Nebraska: "The Legislature shall not amend, repeal, modify, or impair a law enacted by the people by initiative, contemporaneously with the adoption of this initiative measure or at any time thereafter, except upon a vote of at least two-thirds of all the members of the Legislature."[21]

20. NEB. CONST. art. III, § 2 (emphasis added). *See also* ARIZ. CONST. art. IV, § 1(1) ("independently of the legislature"); COLO. CONST. art. V, § 1 ("independent of the general assembly"); IDAHO CONST. art. III, § 1 ("independent of the legislature"); MO. CONST. art. III, § 49 ("independent of the general assembly"); OR. CONST. art. IV, § 2(a) ("independently of the Legislative Assembly"); WASH. CONST. art. II, § 1 ("independent of the legislature"). *See also* NEB. CONST. art. III, § 1 ("The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature."); *cf. id.*, ("The people also reserve *at their own option* to approve or reject . . . any act passed by the Legislature, which power shall be called the power of referendum.").

21. NEB. CONST. art. III, § 2. *See also* ALASKA CONST. art. XI, § 6 ("An initiated law . . . may not be repealed by the legislature within two years of its effective date. It may be amended at any time."); ARIZ. CONST. art. IV, pt. 1, § 1(6)(B) ("The legislature shall not have the power to repeal an initiative measure approved by a majority of the votes cast thereon or to repeal a referendum measure decided by a majority of the votes cast thereon."); *id.* § 1(6)(C) ("The legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon, or to amend a referendum measure decided by a majority of the votes cast thereon, unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to amend such measure."); ARK. CONST. art. V, § 1 ("No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any city council, except upon a yea and nay vote on roll call of two-thirds of all the members elected to each house of the General Assembly, or of the city council, as the case may be."); CAL. CONST. art. II, § 10(c) ("The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."); MICH. CONST. art. II, § 9 ("no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature."); NEV. CONST. art. XIX, § 2(3) ("An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect."); N.D. CONST. art. III, § 8 ("A measure approved by the electors may not be repealed or amended by

B. Subject Limits

Nearly all state constitutions that vest the initiative power also limit the subject matter of initiatives, imposing at least the same limits applicable to other legislation.[22] Thus, the Nebraska Constitution provides: "The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative. Initiative measures shall contain only one subject."[23]

Many states impose additional subject matter limits on the people's exercise of initiative power that do not apply the legislature. While it is tempting to view subject matter limits as demoting the initiative to a second-class legislative power, these limits simply recognize important procedural distinctions between a single-issue vote and a legislative session. To take an extreme example, the Massachusetts Constitution provides the states' lengthiest list of "excluded matters" not subject to the initiative power:

> No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.[24]

The prohibition on "a specific appropriation of money" represents the most common initiative exception to the power enjoyed by state legislatures, although the Massachusetts provision is unusually narrow to the extent it requires the legislature to fund "such money as may be necessary to carry [an initiative] into effect." Seven state constitutions limit the power of the purse in their initiative processes, reflecting the practical necessity—and state constitutional requirement—of balancing a state budget through tradeoffs made in general appropriation

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the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house."); WASH. CONST. art. II, § 1(c) ("No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided*, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house"); WYO. CONST. art. III, § 52(f) ("An initiated law . . . may not be repealed by the legislature within two (2) years of its effective date. It may be amended at any time.").

22. Only Idaho lacks any constitutional subject-matter restrictions on the initiative power.
23. NEB. CONST. art. III, § 2.
24. MASS. CONST. art. XLVIII, § 2.

bills during a legislative session.[25] Nebraska law, for example, prohibits the filing of "any initiative or referendum petition which interferes with the legislative prerogative contained in the Constitution of Nebraska that the necessary revenue of the state and its governmental subdivisions shall be raised by taxation in the manner as the Legislature may direct."[26] South Dakota and North Dakota prohibit referenda on emergency legislation, reflecting the legislature's advantages of continuity.[27]

A couple of states restrict the use of the initiative power to amend civil rights. For example, the Massachusetts Constitution's limit on measures that "relate[ ] to religion" is peculiar to it, though the Mississippi Constitution prohibits "modification or repeal of any portion of the Bill of Rights" in its constitutional initiative power.[28] These restrictions reinforce the countermajoritarian function of many state constitutional rights, particularly where the initiative power may amend the state constitution.

Other states restrict the use of the initiative power to interfere with other branches or levels of government. For example, Alaska and Wyoming prohibit initiatives creating courts or defining their jurisdiction, which provides the judiciary a degree of protection from direct

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25. ALASKA CONST. art. XI, § 7 ("The initiative shall not be used to dedicate revenues, make or repeal appropriations"); MASS. CONST. art. XLVIII, § 2; ME. CONST. art. IV, Part Third, § 19 ("[A]ny such measure which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until 45 days after the next convening of the Legislature in regular session, unless the measure provides for raising new revenues adequate for its operation."); MO. CONST. art. III, § 51 ("The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution."); MONT. CONST. art. III, § 4(1) ("The people may enact laws by initiative on all matters except appropriations of money and local or special laws."); NEV. CONST. art. XIX, § 6 ("This Article does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue."); WYO. CONST. art. III, § 52 ("The initiative shall not be used to dedicate revenues, make or repeal appropriations"). The Ohio Constitution prohibits "authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property." OHIO CONST. art. II, § 1e.
26. NEB. REV. STAT. § 32-1408 (Cum. Supp. 2020).
27. *See, e.g.*, N.D. CONST. art. III, § 6 (suspending any law "except emergency measures and appropriation measures" upon submission of a referendum petition).
28. MISS. CONST. art. XV, § 273(5). The Mississippi Constitution also prohibits any amendments to public pension and "right to work" laws, as well as to the initiative process itself, another peculiar but rare entrenchment of control over specific policy in the legislature and, to the extent these policies are constitutionalized, in the courts.

popular interference.[29] The Massachusetts restriction on local legislation reiterates prohibitions on "local or special legislation" in Alaska, Montana, and Wyoming,[30] a prohibition that also applies to the latter states' legislatures, though not to the Massachusetts Legislature.[31] The Illinois Constitution contains the strictest subject matter limitation of any state initiative power: instead of subordinating the initiative to the state legislature, the limitation authorizes only constitutional amendments of the legislature's own powers, procedure, and structure. [32] Even this narrowest of initiative power subject-matter restrictions serves as a counterweight, not a subsidiary, to the state legislature's powers.

C. Constitutional Qualifications

Almost every state constitution that vests the initiative power also provides detailed procedures for its exercise. For example, every initiative state but Idaho and Utah establishes petition percentage requirements in the constitution itself. All other states set a minimum, except for South Dakota, which sets a maximum constitutional petition percentage requirement.[33]

The Nebraska Constitution is representative of the detailed qualifications typically entrenched in constitutional text, with considerations for required signatories, geographic distributions, time restrictions, and other process considerations.[34] Nearly every aspect of the initiative process is constitutionalized, from the basic content of the petition,[35] to the signature requirements,[36] to the filing deadline,[37] to the submission,[38] to the returns and canvass,[39] to the effective date,[40] to coordination[41] and resubmission[42] rules. Other state constitutions are even more prescriptive. The Mississippi Constitu-

29. ALASKA CONST. art. XI, § 7; WYO. CONST. art. III, § 52.
30. ALASKA CONST. art. XI, § 7; MONT. CONST. art. III, § 4(1); WYO. CONST. art. III, § 52.
31. ALASKA CONST. art. II, § 19. MONT. CONST. art. V, § 12; WYO. CONST. art. III, § 27. Alaska and Montana prohibit special or local acts "when a general act can be made applicable."
32. ILL. CONST. art. XIV, § 3.
33. *See* IDAHO CONST. art. III, § 1; UTAH CONST. art. VI, § 1.
34. NEB. CONST. art III, § 2, 4.
35. *Id.* § 2 ("the proposed measure shall be set forth at length").
36. *Id.* ("seven percent of the registered voters . . . of each of two-fifths of the counties of the state").
37. *Id.* ("not less than four months" before the general election).
38. *Id.* § 4 ("a non-partisan manner" with "proper descriptive words").
39. *Id.* ("in the manner prescribed for the canvass of votes for president").
40. *Id.* ("ten days after the official canvass").
41. *Id.* § 2 ("the highest number of affirmative votes [between conflicting measures] shall thereby become law").
42. *Id.* ("once in three years").

tion, for example, contains thorough balloting instructions for indirect constitutional initiatives including a ballot form within the constitutional text.[43]

Such detail is necessary to coordinate an otherwise decentralized, from-the-ground-up process. Yet the procedures are also constitutionalized and "self-executing," rather than statutory, to guard the initiative power from its rival in the legislature, subject only to "legislation . . . enacted to facilitate their operation." Compare the legislature's enabling provisions. The Nebraska Constitution contains similarly detailed rules for districting,[44] number of members and annual sessions,[45] terms and salary,[46] qualifications,[47] timing of and conduct within sessions,[48] voting requirements and journaling,[49] term limits, [50] reading requirements,[51] and effective dates.[52] Other sections provide for the subject-matter limitations applicable to both legislation and initiatives.[53]

Many of these provisions seem to require similar levels of public support for, and public deliberation about, an initiated proposal or bill. Yet a closer look reveals telling differences in the level of constitutional detail of certain procedures, particularly at the crucial path from introduction to a final vote. To ballot a proposed initiative, the Nebraska Constitution requires it to be "set forth at length" on a petition that receives the signatures of "seven percent of the registered voters . . . of each of two fifths of the counties of the state . . . not less than four months" before the election in which it is to be voted upon, and provides rules for coordinating conflicting proposals and resubmission.[54] Conversely, for legislation, the Nebraska Constitution provides only that "[e]very bill and resolution shall be read by title when introduced," and that "[t]he bill and all amendments thereto shall be printed and presented before the vote is taken upon its final passage," along with timelines for each.[55] Beyond these provisions, the constitu-

43. MISS. CONST. art. XV, § 273(8).
44. NEB. CONST. art. III, § 5.
45. *Id.* § 6.
46. *Id.* § 7.
47. *Id.* §§ 8-9.
48. *Id.* § 10.
49. *Id.* §§ 11, 13.
50. *Id.* § 12.
51. *Id.* § 14.
52. *Id.* § 27.
53. *See, e.g.*, NEB. CONST. art. III, § 18 ("Local or special laws prohibited"); *id.* § 19 (limits on compensation increases for public officers and contractors); *id.* § 21 ("Donation of state lands prohibited").
54. NEB. CONST. art. III, § 2. Other state constitutions further specify signature requirements for filing the initiative prior to circulation. *See, e.g.*, ALASKA CONST. art. XI, § 2 ("one hundred qualified voters").
55. NEB. CONST. art. III, § 14.

tional text says nothing about the procedural prerequisites for introducing bills, the support necessary to get them to a final vote, or how to handle conflicting or reintroduced bills. That is up to the legislature by rule.[56]

This contrast between the more detailed qualifications for balloting an initiative relative to bringing a bill to a final vote should not be misconstrued as placing more procedural obstacles to approval of an initiative than to enactment of legislation. To the contrary, the constitutionalization of initiative qualifications suggests that such details are not only necessary and sufficient to the balloting of an initiative. Whereas state constitutions provide "the Legislature shall determine the rules of its proceedings,"[57] including the procedures from introduction to final passage that parallel the initiative process, constitutional provisions determine the rules of petitioning for initiatives to the exclusion of additional legislative qualifications.

In other words, the constitutional specification of additional qualifications for the initiative power relative to the legislature's power preserves the former's autonomy from the latter, since otherwise those additional qualifications would need to come from the legislature itself. State constitutions leave the procedural details of legislation to the legislature, but entrench self-executing procedural details of the initiative process to preserve the initiative's independence from its legislative rival.

D. Enabling Provisions

Where detailed constitutional procedures leave off, several state constitutions provide enabling provisions authorizing additional legislation to facilitate the exercise of the otherwise self-executing initiative power. Again, the Nebraska Constitution states "[t]he provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation."[58] Other state constitutions display a range of enabling provisions.

At one end of the range are six state constitutions that lack enabling provisions.[59] The absence of an enabling provision should not be read to disable the legislature from enacting statutes to facilitate the initiative process, which would disable the initiative process itself. But it does connote the legislature's powers over the initiative are at best implied, though might extend more broadly as a kind of "neces-

56. *See, e.g.*, Neb. 107th Leg., Rule 6 (2021).

57. *See, e.g.*, NEB. CONST. art. III, § 10.

58. NEB. CONST. art. III, § 4.

59. Alaska, California, Florida, Maine, Missouri, and Montana lack enabling provisions.

sary and proper" power.[60] Four states, Arizona, Colorado, Illinois, and Ohio, lack general enabling provisions but authorize the legislature to prescribe specific laws to facilitate the initiative power. The Arizona Constitution provides the initiative power "shall be, in all respects, self-executing,"[61] then requires the legislature to "provide a penalty for any willful violation of any of the provisions."[62] The Colorado Constitution allows "that the form of the initiative or referendum petition may be prescribed pursuant to law."[63] The Illinois Constitution states "The procedure for determining the validity and sufficiency of a petition shall be provided by law."[64] The Ohio Constitution provides "[L]aws may be passed to facilitate" the operation of petition and submission requirements, but "in no way limiting or restricting either such [petition and submission] provisions or the [initiative] powers herein reserved."[65]

In another approach, three state constitutions expressly prohibit "impairment" of the initiative power by the legislature, even while authorizing laws to "facilitate" its exercise. The enabling provision in the Arkansas Constitution provides the initiative power "shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation," however, "[n]o legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people."[66]The Mississippi Constitution's initiative section provides "The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people."[67] The North Dakota Constitution simply states "[L]aws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers."[68] Seven other state constitutions contain broader enabling provisions. The Massachusetts Constitution allows "legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions."[69] The Michigan Constitution is mandatory: "The Legislature shall implement the provisions of this section."[70] Both Nevada and Washington provide for legislation

60. The Nebraska Constitution, which does enable legislation to facilitate the initiative power, also provides "[t]he Legislature shall pass all laws necessary to carry into effect the provisions of this constitution." NEB. CONST. art. III, § 30.

61. ARIZ. CONST. art. IV.1, § 1(16).

62. ARIZ. CONST. art. IV.1, § 2.

63. COLO. CONST. art. V, § 1(10).

64. ILL. CONST. art. XIV, § 3.

65. OHIO CONST. art II, § 1g.

66. ARK. CONST. art. V, § 1.

67. MISS. CONST. art. XV, § 273(13).

68. N.D. CONST. art. III, § 1.

69. MASS. CONST. art. XLVIII, gen. prov. VII.

70. MICH. CONST. art. II, § 9.

"to facilitate" the operation of the initiative process.[71] The South Dakota Constitution's brief provision states "[T]he Legislature shall make suitable provisions for carrying the effect the provisions of this section."[72] The Oklahoma Constitution's "suitable provisions" text is substantially the same.[73] The Wyoming Constitution provides "[A]dditional procedures for the initiative and referendum may be prescribed by law."[74]

In Idaho and Utah, those two state constitutions contain open-ended enabling provisions that amount to broad delegations of power over the initiative process to the legislative branch, and as such are anomalies. Unlike every other state constitution authorizing the initiative power through constitutionally entrenched processes, the Constitutions of Idaho and Utah stand out for the brevity of the constitutional authority and potential scope of legislative discretion over the initiative processes. The entire discussion of the initiative power in the Idaho Constitution, for example, amounts to seventy-four words:

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, *under such conditions and in such manner as may be provided by acts of the legislature*, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.[75]

This broad delegation over the "conditions" and "manner" of the initiative is subject to the reservation of the power "independent of the legislature" and the nearly plenary scope of "any desired legislation." The Utah Constitution is even more succinct at fifty-four words:

> The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute . . . .[76]

Here, the independent initiative power is at its lowest ebb—Still, the initiative power is nearly plenary over "any desired legislation;" however, the conditions, manner, and time of its exercise are subject to legislative control. The rarity of such broad, yet still constrained, delegations of initiative powers to the legislature in state constitutional initiative provisions suggests that legislative control over the initiative process is the exception rather than the rule.

71. Nev. Const. art. XIX, § 5; Wash. Const. art. II, § 1(d).
72. S.D. Const. art. III, § 1.
73. Okla. Const. art. V, § 3.
74. Wyo. Const. art. III, § 52(f).
75. Idaho Const. art. III, § 1 (emphasis added).
76. Utah Const. art. VI, § 1, cl. 2.

III. THE INDEPENDENT INITIATIVE: A POWER NOT A RIGHT

State constitutions uniformly recognize the initiative as a legislative power shared with, but independent of, the state legislature.[77] Yet some state courts frame the initiative as a constitutional right when defending it against claims of legislative encroachment.[78] Rights-based analysis reflects the federal model of First Amendment protections for the individuals proposing initiatives. This model, which appears to be weakening in the Supreme Court,[79] does not protect the function of the initiative power as a power, and may even weaken the initiative power by protecting the petitioners' rights to propose initiatives at the expense of the peoples' power to enact them. Meanwhile, state constitutions offer more fitting models of divided powers, such as the plural executive branch. State courts that have adopted a powers analysis are better equipped to defend, on the constitutional merits, the initiative power against increasing incursions by its legislative rival.

A. Federal Constitutional Rights

As with so many areas of state constitutional law, federal constitutional law casts a shadow over state initiative doctrine.[80] Since the failure of a powers-based challenge to the initiative under the Guarantee Clause in *Pacific States Telephone & Telegraph Co. v. Oregon*,[81] almost all federal challenges to legislative interference with the initiative power come as rights claims, usually under the freedom of speech. The argument is that the exercise of the initiative power through petitioning is "core political speech."[82] This triggers a sliding scale of review of election regulation:

> [W]hen [First and Fourteenth Amendment] rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Four-

77. *See supra* Section II.A.
78. *See infra* Section III.B.
79. *See infra* Section III.A.
80. *See generally* SUTTON, *supra* note 5, at 102 ("While state politics has long tended to be local, state judging tends to be national today, even in states that elect their judges. The meaning of our fifty-one constitutions has become surprisingly one-sized over time").
81. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (rejecting as nonjusticiable a challenge to the Oregon initiative power under the Guarantee Clause, article IV, section 4 of the U.S. Constitution); *but see* Kerr v. Hickenlooper, 744 F.3d 1156 (10th Cir. 2014) (holding that a Guarantee Clause challenge to the Taxpayer's Bill of Rights, alleging that it constituted an amendment to the Colorado Constitution, is not barred by the political question doctrine).
82. Meyer v. Grant, 486 U.S. 414, 422 (1988).

teenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.[83]

Framed by the expressive act of petitioning under the freedom of speech, rather than political power wielded through the petition under state constitutions, heightened scrutiny under this test is limited to the abridgement of individual petitioners' speech rights.[84] Courts in these cases cast "the state" as a monolith with interests opposed to the individual petitioners, thereby neglecting the subtle separation of powers issues that arise within state constitutions' division of the legislative power.[85] Due to this doctrinal mismatch, federal rights analysis falls short in protecting the state initiative power.

Outside of its skepticism toward campaign finance regulation in all elections, including ballot issue elections,[86] the Supreme Court takes a more deferential stance toward state initiative regulations. The Supreme Court's most recent statement on state initiative law suggests at least four justices are unlikely to scrutinize laws impairing the initiative power under First Amendment doctrine. In *Little v. Reclaim Idaho*, the Court granted a stay of a district court order requiring the state to allow extended online signature gathering during the COVID-19 pandemic.[87] Concurring in the grant, Chief Justice Roberts, joined by Justices Alito, Gorsuch, and Kavanaugh, appear skeptical of fed-

83. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).
84. *See, e.g.,* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978) (invalidating state ban on ballot issue campaign expenditures by business corporations); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 300 (1981) (invalidating city contribution limits to ballot issue campaign); *Meyer*, 486 U.S. at 428 (invalidating Colorado statute prohibiting the payment of petition circulators); Buckley v. Am. Const. L. Found., 525 U.S. 182, 205 (1999) (invalidating Colorado statute requiring petition circulators to be registered voters and to disclose their names and income from circulation); Doe v. Reed, 561 U.S. 186, 199 (2010) (rejecting petitioners' facial challenge to a law requiring public disclosure of referendum petitions based on state's interest in the integrity of the electoral process). These cases consider the initiative process as an exercise of the Freedom of Speech rather than "the right of the people . . . to petition the Government for a redress of grievances," which remains undeveloped and arguably misconceived as a right of informal lobbying rather than formal petitioning. *See generally* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1205 (2016) ("Historically, Congress engaged with the public through a formal, nonarbitrary, transparent, and equal process call called petitioning. . . . In failing to satisfy even the basic requirements of the petition right [in lobbying policy and practice], Congress is violating our right to petition.")
85. *But see Doe*, 561 U.S. at 221–22 (Scalia, J., concurring) (rejecting First Amendment claim to anonymity in petitioning, because "[a] voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue.").
86. *See* cases cited *supra* note 66.
87. Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020).

eral rights claims against state initiative laws, reiterating "states retain 'considerable leeway to protect the integrity and reliability of the initiative process.'"[88] This concurrence identifies a circuit split between courts that hold "the First Amendment requires scrutiny of the interests of the State whenever a neutral, procedural regulation inhibits a person's ability to place an initiative on the ballot,"[89] and those that hold "regulations that may make the initiative process more challenging do not implicate the First Amendment so long as the State does not restrict political discussion or petition circulation."[90]

The four concurring justices leave little doubt as to which side of the split they stood:

> This is not a case about the right to vote, but about how items are placed on the ballot in the first place. Nothing in the Constitution requires Idaho or any other State to provide for ballot initiatives. And the claims at issue here challenge the application of only the most typical sort of neutral regulations on ballot access. Even assuming that the state laws at issue implicate the First Amendment, such reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support.[91]

Framing the case as a petitioner's rights versus the state's—that is, the state *legislature's*—power, as required by federal rights challenges to initiative laws, the concurrence emphasizes Idaho's "sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment."[92]

This frame around a petitioner's expressive rights is both too broad and too narrow to provide an effective safeguard of the initiative power as a matter of state constitutional law. Its breadth rules out some regulations like petitioner disclosure—a counterpart to well-established lobbyist disclosure in legislatures—that may facilitate the peoples' exercise of the initiative power even if it burdens individual petitioners.[93] Richard Ellis laments, "It is unfortunate that the U.S. Supreme Court has diminished our political discourse by reducing the concept of democratic integrity to the petty crimes of fraud and forgery," the latter but not the former being sufficient to justify regulation of petitioners.[94] At the same time, the Court's tight focus on a

88. *Id.* at 2616 (Roberts, J., concurring) (quoting *Buckley*, 525 U.S. at 191).

89. *Id.* (citing Thompson v. DeWine, 959 F.3d 804, 808 (6th Cir. 2020) (*per curiam*); Angle v. Miller, 673 F.3d 1122, 1133 (9th Cir. 2012)).

90. *Id.* (citing Jones v. Markiewicz-Qualkinbush, 892 F.3d 935, 938 (7th Cir. 2018); Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1099–1100 (10th Cir. 2006) (*en banc*); Dobrovolny v. Moore, 126 F.3d 1111, 1113 (8th Cir. 1997)).

91. *Id.* at 2617 (citation omitted).

92. *Id.*

93. *See* Buckley v. Am. Const. L. Found., 525 U.S. 182, 206 (1999).

94. Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 96 (2003).

petitioner's rights will ignore a state legislature's impairment of the initiative power so long as the law allows individual political expression, even if that expression is legislatively impotent or undermines the people's reserved legislative powers. Consider, for example, the Utah Supreme Courts' upholding of nearly insurmountable statewide signature distribution requirements because "[I]nitiative proponents are free, and even encouraged, to disseminate their message throughout the state."[95] In the end, the federal constitutional focus on "a person's *ability* to place an initiative on the ballot"[96] disregards the peoples' *authority* to place an initiative on a ballot and, in the exercise of this power shared with the state legislature, make law.

B. State Constitutional Rights

State constitutions align with the hybrid structure of direct democracy and often provide a broader vocabulary of rights, including voting rights. Yet as one recent case demonstrates, a rights-focused analysis cannot defend fully the initiative as a state constitutional power. The plaintiff-respondent in *Little v. Reclaim Idaho* was a ballot issue committee that had petitioned for a successful initiative to expand Medicaid in the previous 2018 election cycle. That Medicaid initiative passed with more than 60% of the vote after the Idaho Legislature had failed to pass Medicaid expansion.[97] In the 2020 election cycle at issue before the U.S. Supreme Court in *Little*, Reclaim Idaho was petitioning for another initiative that would increase education funding; however, that effort failed because the Court granted a stay of the district court, which had ruled in favor of Reclaim Idaho, and the deadline to qualify the initiative passed shortly thereafter, rendering the case moot.[98] Reclaim Idaho renewed its education initiative for the 2022 election cycle.[99] Meanwhile, in an apparent response to Reclaim Idaho's success, the Idaho Legislature enacted two reforms restricting the initiative process. In 2020, the Legislature added a requirement that any law proposed by a statewide initiative must contain an effective date "that shall be no earlier than July 1 of the year following the vote on the ballot initiative,"[100] thereby allowing an intervening legislative session to amend or repeal an initiated law prior to its taking effect. In 2021, the Legislature increased the distributional requirement for petition signatures from eighteen to all thirty-five legislative

95. Utah Safe to Learn–Safe to Worship Coalition, Inc. v. State, 94 P.3d 217, 233 (Utah 2004).
96. *Little*, 140 S. Ct. at 2616 (Roberts, J., concurring) (emphasis added).
97. *See* Reclaim Idaho v. Denney, 497 P.3d 160, 169 (Idaho 2021).
98. *See* Reclaim Idaho v. Little, 826 F.App'x 592, 594 (9th Cir. 2020).
99. *See Denney*, 497 P.3d at 169.
100. 2020 Idaho Sess. Laws 979 (codified at IDAHO CODE § 34-1813(2)(a) (2021)).

districts.[101] In line with the requirements of the Idaho Constitution, these reforms declared an "emergency" so as to be immediately effective, bypassing the 60 day waiting period that would have allowed Reclaim Idaho to refer the reforms to the people for repeal.[102]

After the failure of its federal rights challenge to Idaho's signature gathering deadline and methods during the pandemic, Reclaim Idaho turned to the state constitution for its challenge to these two new laws in *Reclaim Idaho v. Denney*, contending "both amended statutes nullify the people's fundamental constitutional right to legislate directly."[103] In a unanimous judgment, the Idaho Supreme Court declares both acts unconstitutional.[104] Puzzlingly, however, it does so under strict scrutiny, after holding that "[t]he initiative and referendum *powers* reserved in the Idaho Constitution are fundamental *rights*."[105] To its credit, the Court does not explicitly lockstep with the petitioner-centered federal rights analysis of the initiative process discussed above. Instead, it draws a state constitutional analogy to the "right of suffrage" expressed in the Idaho Constitution's Declaration of Rights, which is fundamental "because the Idaho Constitution expressly guarantees the right of suffrage."[106] But this analogy ignores the fact that the Idaho Constitution, like others, enumerates suffrage as a right in *the Declaration of Rights*; the Idaho Constitution enumerates the initiative as a power, rather than a right, in *the Legislative Department*.[107] From this first mistaken step, the Court reaches the right result for the wrong reason.

101. IDAHO CODE § 34-1805 (2021).

102. *Id.*; IDAHO CONST. art. III, § 22 (providing that an act does not take effect until sixty days after the end of the session where the act was passed, "except in case of emergency").

103. *Denney*, 497 P.3d at 166.

104. *Id.* at 194.

105. *Id.* at 181 (emphasis added). For these purposes, the puzzle is more doctrinal than conceptual. In Wesley Hohfeld's influential analysis, a *right* of one correlates to a *duty* of another, while a *power* of one correlates to a *liability* of another. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Jud. Reasoning*, 23 YALE L. J. 16, 30 (1913). In these terms, the initiative may be the people's legislative *power* over the state, which is an ability to change the legal relations of the state through legislation, thereby putting the state (and others) under a *liability* to follow the new law. But the initiative also may be a *right* of the people against the legislature, which would impose a *duty* of the legislature not to interfere with its exercise. The relations are complicated not only by the fact that the object of these claims is the claim-conferring action of legislation itself, but also by the state constitution's mediation of the relation between the legislature and the people.

106. *Denney*, 497 P.3d at 181 (quoting Van Valkenburgh v. Citizens for Term Limits, 15 P.3d 1129, 1134 (Idaho 2000)).

107. *Compare* IDAHO CONST. art. I, § 19 ("Right of Suffrage Guaranteed) *with* art. III, § 1 ("Legislative Power–Enacting Clause–Referendum–Initiative").

The Court in *Denney* appears to have been led into this mistake by defendant—Idaho's Secretary of State and Legislature—who argued "the initiative and referendum provisions of the Idaho Constitution . . . merely defin[e] a power that is subject to total control by the legislature."[108] They were aided in this by plaintiffs Reclaim Idaho, who argued "the people's right [to the initiative] predominates" over the constitutional proviso that the people's reserved power to initiate legislation should be exercised "under such conditions and in such manner as may be provided by acts of the legislature."[109] Thus, the Court concludes Idaho's constitutional initiative provision "establishes the people's fundamental right to legislate directly, as opposed to a power that is subservient to the will of the legislature."[110]

This priority of rights over powers is only true, however, if the legislature is a supreme constitutional source of legislative power, and therefore can preempt the exercise of a subsidiary legislative power by the people. But as the Court recognizes, the people's reserved legislative power is "independent of the legislature," not dependent upon it.[111] Although the Idaho Legislature failed to enact enabling legislation for more than twenty years after the ratification of the amendment reserving the initiative power, the Court notes "[S]imply because the legislature failed to act does not mean they were justified in doing so, nor does it signal that the drafters of the amendment intended to give the people an impotent and illusory power."[112] In the end, "while the legislature has authority to define the processes by which these rights are exercised, any legislation that effectively prevents the people from exercising these rights will be subject to strict scrutiny, as explained below."[113]

Terming the initiative a right rather than a power takes the Court into an ill-fitting strict scrutiny analysis.[114] In its analysis of the geographic distribution requirement, the Court must measure the fit of requiring signatures in all thirty-five legislative districts to the importance of the legislative purpose "to increase voter involvement and inclusivity in the voter initiative/referendum process" while "ensuring an initiative petition has a modicum of statewide support before it is placed on the ballot."[115] Because only thirty initiatives and seven ref-

108. *Denney*, 497 P.3d at 181.
109. *Id.* at 182 (citing IDAHO CONST. art. III, § 1).
110. *Id.*
111. *Id.*
112. *Id.* at 183.
113. *Id.* at 184.
114. *Id.* at 197–99 (Brody, J., concurring, in part) (concurring in the conclusion but dissenting in the applicable standard, still applying a rights-based analysis).
115. *Id.* at 185–86; *see also* Jenness v. Fortson, 403 U.S. 431, 442 (1971) (stating that there is "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organiza-

erenda qualified for the ballot in the eighty-eight years the initiative power had been enabled in Idaho (109 years since its ratification), the Court holds the state interest to be insufficient.[116] Even were this interest compelling, the Court holds the geographic distribution requirement was not narrowly tailored to this interest. The preexisting requirement of eighteen legislative districts would still require signatures "from voters in three far-flung corners of the state, representing varied regional interests, including both urban and rural interests, and spanning two time zones," even if those districts were limited to the four most populous counties in the state.[117] In its analysis of the delayed effective date requirement, the Court does not attempt a strict scrutiny analysis at all; instead, the Court simply concludes it is "an unconstitutional infringement on the peoples' right to legislate independent of the legislature."[118]

The Idaho court's rights-based approach is not unique. Utah's similar initiative provision has led its Supreme Court to a rights-based analysis. In *Utah Safe to Learn – Safe to Worship Coalition, Inc. v. State*, the Court recognizes "the initiative right is fundamental under our state constitution," but also notes "the ability to legislate through the initiative process is solely a state-created right and would not exist in the absence of a state provision creating the right."[119] Instead of strict scrutiny, the Court applies an "undue burden" test that verges on a rational basis standard.[120] A similarly strict geographic distribution requirement, ten percent of votes in twenty-six of twenty-nine state senate districts, unanimously passes this low bar. Notably, the limits also satisfy free speech scrutiny under the federal sliding scale test because the wider distribution requirements mean "[I]nitiative proponents are free, and even encouraged, to disseminate their message throughout the state."[121] In dismissing a parallel claim under the state constitutional freedom of speech, the Court continues, "'initiative supporters are free to approach any citizen within any, and ideally all,' of Utah's twenty-nine senate districts and express their views

tion's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process").

116. *Denney*, 497 P.3d at 188.

117. *Id.* at 190.

118. *Id.* at 193.

119. Utah Safe to Learn–Safe to Worship Coalition, Inc. v. State, 94 P.3d 217, 226 (Utah 2004).

120. *Id.* at 228 (stating "[t]he essential task for a court in conducting an article VI, section 1 analysis is to determine whether the enactment unduly burdens the right to initiative. In making this determination, a court should assess whether the enactment is reasonable, whether it has a legitimate legislative purpose, and whether the enactment reasonably tends to further that legislative purpose.").

121. *Id.* at 233.

without restriction."[122] Viewed through a rights-based lens, the Court seems to celebrate the legislature's imposition of a clear double-standard for legislation as almost a victory for the wide dissemination of core political speech. Yet, it upholds a law that requires nearly unanimous geographic support simply to ballot an initiative for a vote—far more than would ever be required of the state senators from those districts when bringing a bill to the floor for a final vote at the legislature.

The Utah Supreme Court iterates its rights-based analysis of the initiative power in *Count My Vote, Inc. v. Cox*—an as-applied challenge to the rejection of an initiative petition after an opposition group facilitated the removal of sufficient signatures to fall beneath the threshold for qualification.[123] As in *Utah Safe to Learn*, the initiative provision challenge is paired with failed rights-based challenges.[124] Associate Chief Justice Lee, writing for the Court, rejects the challenge because the record did not allow the Court to determine "whether or to what extent the challenged statutory provisions resulted in an undue burden on the right to initiative."[125] Justice Lee acknowledges a "carefully circumscribed . . . right to initiate legislation," citing the state constitutional grant of power, but finds "the undue burden framework is the very model of unworkability."[126] Yet, Justice Lee suggests a test that leaves little room for either a right or a power: "deference to legislative regulation of the initiative process 'except in circumstances where such regulation forecloses any meaningful possibility for the people to exercise the [initiative] power.'"[127] In a concurring opinion, Justice Himonas emphasizes the initiative power as a fundamental right, while noting the power dynamics involved: "Because the right to initiative acts as the people's check against the legislature, it seems unusual to treat the directive language as a means by which the legislature can check the people's right to initiative without being subjected to strict or heightened scrutiny review by the courts."[128] In a dissenting opinion, Justice Petersen states she would have held the law allowing opponents to seek removal of signatures after the petitioning deadline "unduly burdened the right of over 131,000 Utah voters to propose the Direct Primary Initiative to their fellow citizens."[129]

122. *Id.* (quoting Gallivan v. Walker, 54 P.3d 1069, 1111 (Utah 2002) (Thorne, J., dissenting)).
123. Count My Vote, Inc. v. Cox, 452 P.3d 1109, 1112 (Utah 2019).
124. *Id.* at 1115–17 (rejecting equal protection and uniform operation of laws claims).
125. *Id.* at 1120.
126. *Id.* at 1121–22.
127. *Id.* at 1122 (quoting Cook v. Bell, 344 P.3d 634, 643 (Utah 2014 (Lee, J., concurring) (emphasis omitted)).
128. *Id.* at 1127 (Himonas, J., concurring).
129. *Id.* at 1134 (Petersen, J., dissenting).

Other states join in the rights-based analysis of the initiative power, though the methods vary. An Oregon case, upholding a statute prohibiting compensation to signature gatherers, asks "whether by placing undue burdens on that exercise it is inconsistent with the reservation of those [initiative and referendum] rights by the people."[130] The Arizona Supreme Court recognizes "the right of the people to exercise the legislative prerogative is, and must be, subject to reasonable regulation of the initiative process," upholding a law disqualifying signatures gathered by petitioners who do not appear for trial in election litigation where that law "fosters the integrity of the initiative process and does so by reasonable means."[131] The Montana Supreme Court recites a "constitutional right to enact laws by initiative,"[132] sometimes in conjunction with the enumerated self-government right "of governing themselves,"[133] though the doctrinal implications of this are unclear. The Nebraska Supreme Court at times refers to "the right of the people to engage in the initiative and referendum process" even when conducting a powers-based approach.[134]

C. Models for a Power-Based Analysis of the Initiative

The people's reservation of the legislative power through the initiative presents a conceptual problem unknown to federal constitutional law: the divided legislative branch. The initiative power divides the legislative branch, but unlike bicameral legislatures the division creates two legislative powers nominally independent of one another. Congress, like other bicameral legislatures, is divided but the Senate and the House share legislative power. The House may have the exclusive power to originate revenue bills, for example, but such bills cannot become law without the concurrence of the Senate.[135] Federal and state houses in bicameral legislatures may make their own rules independent of the other house,[136] but cannot legislate independently. In addition, and unlike the veto-proof state initiative, federal and state legislation from a legislature must be presented to the head of the ex-

130. State v. Campbell, 506 P.2d 163, 166 (Or. 1973). The case preceded *Meyer v. Grant*, which held such prohibitions violate the freedom of speech. *See* Meyer v. Grant, 486 U.S. 414, 428 (1988).

131. Stanwitz v. Reagan, 429 P.3d 1138, 1145 (Ariz. 2018).

132. Montanans for Just. v. State, 146 P.3d 759, 764 (Mont. 2006). The author was counsel for the State in this case.

133. State *ex rel.* Montanans for the Preservation of Citizens Rights v. Waltermire, 757 P.2d 746, 750 (Mont. 1988) (quoting MONT. CONST. art. II, § 2).

134. State *ex rel.* Stenberg v. Moore, 258 Neb. 199, 213–14, 602 N.W.2d 465, 476–77 (1999) (invalidating unconstitutional statute requiring an exact match between voter registration records and signatures on initiative petitions because it restricted public's participation in initiative process rather than facilitating public's exercise of initiative power).

135. U.S. CONST. art. I, § 7, cl. 1.

136. U.S. CONST. art. I, § 5, cl. 2.

ecutive branch for signature.[137] State constitutions, unlike the federal constitution, typically provide for the express separation of powers in a way that seems to reinforce formal divisions between the branches, and potentially formal unity within the branches.[138]

Even under the standard bicameral model of a divided but shared legislative power, some baselines emerge. For example, the independent power of each house to determine the rules of its proceedings—encompassing everything from committee structure to supermajority voting rules, like the filibuster—may inform the scope of the legislature's regulation of initiative processes. The initiative's independent legislative power presumes more, not less, autonomy than the dependent legislative power shared in a bicameral legislature. If the House of Representatives cannot abolish the Senate filibuster, a state legislature may lack plenary control over signature distribution requirements. If the Senate cannot revise House committee reports, a state legislature may lack plenary control over voter information and ballot language.

State constitutional law offers another model of divided power: the divided executive branch.[139] Considering the independent office of state attorneys general, Professor William Marshall explains, "[t]he divided executive holds the theoretical advantages of dispersing power and serving as a check against any particular officer's overreaching,"[140] which captures some of the reasons for the adoption of the initiative as a check on the legislature. In the divided executive branch, state constitutions protect the independence of each officer from the other within their executive sphere.

Still, there are reasons why the divided executive branch model provides the minimal, not the optimal, amount of the initiative power's independence from the legislature. Unlike the people's reservation of the legislative power through the initiative, which is generally co-extensive with the legislature's lawmaking power outside of any constitutionally enumerated subject matter limits, a state's governor is usually first among equals. For example, the Nebraska Constitution provides "[t]he *supreme* executive power shall be vested in the

137. U.S. CONST. art. I, § 7, cl. 2.

138. *See, e.g.*, NEB. CONST. art. II, § 1(1) ("The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.").

139. *See, e.g.*, NEB. CONST. art. IV, § 1 ("The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law.").

140. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."[141] Other officers in the divided executive, by contrast, "shall perform such duties as may be provided by law,"[142] an open-ended grant of legislative power to add to or subtract from the powers of the office. None of these provisions typically contain the procedural and substantive details entrenched against legislative encroachment by state constitutional initiative provisions. Finally, there are ways in which even divided and independent executive powers are mutually exclusive: in most policy spheres only one officer can speak for the state, whether that officer is the attorney general in court or an agency under the governor in promulgating regulations or negotiating the adoption of federal programs.[143]

Unlike execution, however, legislation is unitary even if legislative power is plural. Lawmaking through the legislative and initiative process can be concurrent without conflicting. Subject to limits on the amendment or repeal of initiatives, and the referendum power, the legislature can undo what the people do and the people can undo what the legislature does. There is only ever one set of state laws at a time, regardless of their source in the legislature or initiative process. The initiative, therefore, stands apart from other separated or shared powers in state constitutions because its lawmaking function operates independently but in the same manner as its legislative rival, while also depending on that rival for enabling legislation. An account of the initiative power's independence from the legislature must therefore distinguish between legislative acts that facilitate the initiative power and acts that impair the initiative power. State constitutions draw some of these distinctions by entrenching requirements for the exercise of the initiative power that should be presumed to exclude the legislature from supplementing such requirements. Where legislatures work under initiative enabling provisions in state constitutions, or where state constitutions are silent, a structural parity principle suggests the initiative power should remain on an equal footing with the legislature's power.

141. NEB. CONST. art. IV, § 6 (emphasis added).
142. NEB. CONST. art. IV, § 1.
143. *See* Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 615–19 (2018) (explaining the procedural privileges enjoyed by state attorneys general at the United States Supreme Court); Anthony Johnstone, *A State is a "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 BYU L. REV. 1471, 1487–91 (2019) (detailing governors' decisions to implement health care exchanges under the Affordable Care Act).

IV. LEGISLATIVE FACILITATION AND IMPAIRMENT OF THE INITIATIVE

As many state constitutions recognize in their enabling provisions, even the constitutionally self-executing initiative power requires legislative action. Legislative review of proposals assists proponents, at least inexperienced proponents, in drafting an initiative that will bring about their intended policy effects. Official petition forms allow voters to know what they are signing, assure proponents their petitions will be accepted, and facilitate county and state officials' efficient verification of signatures on the petitions. Time, place, and manner regulations of petitioners guard against fraud, duress, and aggressive tactics that distort the petitioning process and give the initiative process a bad name. Ballot statements and other voter information efforts help proponents explain their purposes and may inform voters of the arguments against the initiative. Clear procedures, and enforceable penalties for violating them, are essential to the exercise of direct democracy. State constitutional enabling provisions commonly authorize these laws to facilitate the initiative power, either specific elements of it such as petition and submission requirements, or more generally.[144]

State constitutions also recognize the difference between helping and hindering the initiative power, as well as the legislature's inherent temptation to do the latter disguised as the former. So it is common for state constitutions to prohibit legislation to impair or otherwise restrict the initiative power.[145] As with other relationships between and within branches, the initiative power requires the legislature to provide the support necessary for a functioning initiative process, while respecting the constitutional independence of that process from legislative control. And as with other state constitutional separations of powers between and within branches, courts must develop workable doctrines to police the line between facilitation and impairment of the initiative power.

Several principles emerge in the cases framing challenges under the initiative power. Appropriately, these principles track the provisions that govern and entrench the initiative power in state constitutions. Laws that facilitate these provisions are constitutional and laws that impair these provisions—or add additional restrictions not contained in these provisions—are not. [146]

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144. *See supra* Section II.D.

145. *See supra* Section II.D.

146. Professor Henry Noyes suggests several additional implications of the constitutional status of the initiative as a legislative power for petitioners, including legislative immunity, potential standing to defend the initiative, and even a lack of First Amendment protection. *See* Henry Noyes, *Direct Democracy as a Legislative Act*, 19 CHAP. L. REV. 199, 214–15 (2016).

First, legislatures may facilitate the enforcement of subject matter limits consistent with the limits provided by the constitution. A corollary, undeveloped in the cases but likely to arise from current legislative efforts to regulate the initiative power, is that legislatures may not supplement subject matter limits or otherwise impair the exercise of the initiative power on subjects not ruled out by constitutional provisions.[147]

Second, legislatures may facilitate the qualification of ballot issues through petitioning and submission processes provided by law, but may not impair constitutional qualifications by introducing new qualifications or amending existing qualifications. Constitutional requirements for the exercise of the initiative power, when sufficient for that purpose, are not subject to legislative amendment. [148]

Third, all enabling legislation to facilitate the exercise of people's reserved initiative power should reflect parity with the same facilitation of the legislature's own power. Regulation of the initiative process that imposes substantially greater burdens on the people's legislative power than the legislature imposes on its own should be presumed to impair rather than facilitate the power.[149]

A. Subject Matter Requirements and Initiative Content

Initiatives must at least comply with form and content requirements of legislation, including single subject rules and title requirements.[150] Pre-submission review of petitions for form and content facilitates the initiative power by providing drafting assistance and early notice of any constitutional obstacles or textual obscurities that could preclude the initiative or make it less effective if approved as law. Professor Henry Noyes places these requirements in three categories.[151] Arizona and California offer optional drafting assistance to petitioners, and other states allow informal consultation with state officials about the form and content of an initiative.[152] Colorado, Idaho, Mississippi, Montana, Nebraska, Nevada, South Dakota, Washington, and Wyoming require review of draft petitions with advisory recommendations.[153] Alaska, Florida, Maine, Massachusetts, Missouri, Montana, North Dakota, Ohio, Oregon, Utah, and Wyoming

147. *See infra* Section IV.A.

148. *See infra* Section IV.B.

149. *See infra* Section IV.C.

150. *See supra*, Section II.B.

151. *See* Henry S. Noyes, THE LAW OF DIRECT DEMOCRACY 154–55 (Carolina Academic Press 2014).

152. *Id.*

153. *Id.*

require review and may certify or decertify the initiative for circulation based on its content.[154]

For example, Montana requires advisory legislative review and provides assistance through the Secretary of State, and petitioners may accept or reject any substantive recommendations made by legislative staff.[155] However, after the Secretary of State's review and any revisions, the Montana Attorney General also may reject a proposed initiative if it is not "legally sufficient," whether "the petition complies with statutory and constitutional requirements governing submission of the proposed issue to the electors, the substantive legality of the proposed issue if approved by the voters, and whether the proposed issue constitutes an appropriation."[156]

With exceptions in two states,[157] these review provisions are statutory, not constitutional, and therefore would be subject to separation of powers scrutiny. To the extent these requirements enforce constitutional requirements they facilitate the exercise of the initiative power. For example, in *Ethics First—You Decide Ohio PAC v. Dewine*,[158] petitioners challenged the Ohio Ballot Board's statutory authority to "divide the initiative petition into individual petitions containing only one proposed law or constitutional amendment so as to enable the voters to vote on each proposal separately . . . ."[159] The Court starts with the principle that "[t]he General Assembly may neither enlarge nor diminish the powers constitutionally reserved to the people."[160] Citing the Ohio Constitution's enabling provision, the Court then adopts the rule that "[a] statute facilitates the initiative process if the purpose of the requirement is 'not to restrict the power of the people to vote or to sign petitions, but to ensure the integrity of and confidence in the pro-

154. *Id.*

155. MONT. CODE ANN. § 13-27-202(2)(a) (2021) ("The legislative services division staff shall review the text and statements for clarity, consistency, and conformity with the most recent edition of the bill drafting manual furnished by the legislative services division"); *see also* WYO. STAT. ANN. § 22-24-304(b) (2021) ("[T]he proposed bill shall be submitted by the committee of applicants to the secretary of state for review and comment."); *id.* § 22-24-308 (grounds for denying certification of initiative application).

156. MONT. CODE ANN. § 13-27-312(8) (2021).

157. MASS. CONST. amend. art. LXXIV, § 3 ("Such petition shall first be signed by ten qualified voters of the commonwealth and shall then be submitted to the attorney-general not later than the first Wednesday of the August before the assembling of the general court into which it is to be introduced, and if he shall certify that the measure and the title thereof are in proper form for submission to the people"); N.D. CONST. art. III, § 2 ("A petition to initiate or to refer a measure must be presented to the secretary of state for approval as to form.").

158. Ethics First-You Decide Ohio PAC v. Dewine, 66 N.E.3d 689 (Ohio 2016).

159. OHIO REV. CODE § 3505.062(A) (West 2018).

160. *Ethics First*, 66 N.E.3d at 693.

cess.'"[161] The Court does not draw the link, but the statutory limit of "one proposed law" per petition was consistent with the constitutional requirement applicable to the legislature that "[n]o bill shall contain more than one subject,"[162] even if the single subject rule was not expressly contained in the Ohio Constitution's specific subject matter limits for initiatives.[163] Arguably the "one proposed law" requirement would be an unconstitutional impairment of the initiative power to the extent it departed from or supplemented the single subject rule, or to the extent that rule should not be read to apply to initiatives under the state constitution, but the case challenged the Board's authority rather than the substance of its decision.[164]

Recently the Montana Supreme Court overruled the Montana Attorney General's pre-circulation rejection, under the "legal sufficiency" process described above, of an initiative based on his opinion that a proposed environmental initiative would cause an unconstitutional taking.[165] In that case, the Court reiterates the state constitution "describes factors that will qualify an initiative petition for passage," while the Montana Legislature "facilitate[s] this process" by statute.[166] Concurring in his own opinion for the Court, Chief Justice McGrath adds his view that the Attorney General's rejection of an initiative for unconstitutionality violated the separation of powers, not between the initiative process and the legislature, but between the ex-

161. *Id.* (quoting In re Protest Filed with Franklin Cty. Bd. of Elections*,* 551 N.E.2d 150 (1990)).

162. OHIO CONST. art. II, § 15(D).

163. OHIO CONST. art. II, § 1e.

164. *Ethics First*, 66 N.E.3d at 692. Ohio's initiative power is indirect, meaning the legislature has an opportunity to pass an initiated law before it goes to the people, so it is reasonable to expect parity between what the legislature may enact directly and what it may enact when presented with an indirect initiative. *See* OHIO CONST. art. II, § 1b (providing for passage of petitioned law by the general assembly, after which the law would be subject to a referendum if passed or an initiative if not passed). The Idaho Legislature recently adopted a single subject rule, notwithstanding the absence of a constitutional single subject rule for its direct initiative process. *See* IDAHO CODE. § 34-1801A(1) (2021). A related issue may arise when the legislature defines constitutional terms in a way that may narrow the scope of the constitutional requirement itself. *Compare, e.g.,* MONT. CODE ANN. § 13-27-211(2) (2021) ("'appropriation' includes but is not limited to the act of designating or setting aside budgetary authority or directly or indirectly incurring a financial obligation with the expectation that a certain amount of money will be expended or directed for a specific use or purpose. The term also includes increasing or expanding eligibility to a government program."), *with* Nicholson v. Cooney, 877 P.2d 486, 491 (Mont. 1994) ("The definition of 'appropriation' under the [initiative] provision in Montana's Constitution is well-established and quite limited. A long line of Montana cases has established that 'appropriation' refers only to the authority given to the legislature to expend money from the state treasury.").

165. Cottonwood Envir. Law. Ctr. v. Knudsen, 505 P.3d 837 (Mont. 2022).

166. *Id.* at ¶ 3.

ecutive and judicial branches.[167] In doing so, the concurrence also observes that "it is only appropriate to forestall a valid initiative prior to an election when it is 'unquestionably and palpably unconstitutional on its face,'" because courts "should hesitate to 'interfere with the constitutional right of the people of Montana to make and amend our laws through the initiative process.'"[168] Although the concurrence emphasizes the judicial power, it also reinforces the independent initiative power with its hesitation to invoke a statutory "legal sufficiency" standard that does not apply to the legislature itself.

Ballot title and summary statements, including fiscal impact statements, raise similar questions of legislative authority to control initiative content, but do so indirectly. Again, with exceptions in two states,[169] ballot statement requirements are imposed by the legislature rather than by the constitution itself. True and impartial ballot statements facilitate the initiative power by providing the electorate objective information about the purpose and effect of the initiative. False or biased ballot statements would impair the initiative power. Even true and impartial ballot statements, however, can impair the initiative power if they discriminate among subjects in a way the constitution does not recognize. For example, a recently enacted Montana law requires the Attorney General to determine, and a petition to disclose as a "WARNING," whether "the proposed ballot issue will likely cause significant material harm to one or more business interests in Montana . . . ."[170] The Montana Constitution authorizes initiatives "on *all matters* except appropriations of money and local or special laws."[171] The state legislature subjects itself to no similar warnings in its work. Ballot statements already "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue,"[172] and are subject to judicial review.[173] If this additional warning about harm to business interests imposes an additional subject matter regulation on the initiative

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167. *Id.* at ¶ 28 (McGrath, C.J., concurring).

168. *Id.* at ¶ 29 (McGrath, C.J., concurring).

169. MICH. CONST. art. XII, § 2 ("The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, . . . and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment."); OHIO CONST. art. II, § 1g (incorporating by reference the article XVI requirements for constitutional amendment ballot statements: "the substance of the proposal to be voted upon" and "an explanation of the proposal, which may include its purpose and effects").

170. MONT. CODE ANN. § 13-27-312(9)(b) (2021); *Id.* § 13-27-204(2) (requiring warning statement on petitions).

171. MONT. CONST. art. III, § 4(1) (emphasis added).

172. MONT. CODE ANN. § 13-27-312(4) (2021).

173. MONT. CODE ANN. § 13-27-316 (2021).

power not expressed in the state constitution or imposed by the legislature upon itself, it may impair the reserved power of the initiative.

B. Qualifications

Every state constitutional initiative provision but two specifies the minimum signature requirements to ballot an initiative.[174] Where a state constitution sets a floor for qualifying an initiative, the state legislature may not raise it without impairing the initiative power. In *League of Women Voters of Michigan v. Secretary of State*, the Michigan Supreme Court considered several recent statutory amendments to the qualifications to ballot an initiative.[175] One of the amendments required "[n]ot more than 15% of the signatures to be used . . . shall be of registered electors from any 1 congressional district,"[176] when the state constitution lacked such a geographic distribution requirement. The Court explains, "[d]irect democracy in Michigan is a series of powers that the people have reserved to themselves from the Legislature," holding "[t]he Legislature's power and duty to 'implement'" the state constitution's initiative provisions "does not support an ability to enact the 15% geographic-distribution requirement."[177] In a careful analysis of constitutional text and structure, the Court concludes, "[t]he 15% requirement goes beyond 'formulat[ing] the process by which initiative petitioned legislation shall reach the legislature or the electorate,' and instead imposes an additional substantive requirement that does not advance any of the express constitutional requirements."[178]

Many state constitutions also provide timelines for the initiative process.[179] The Arizona Constitution states petitions "shall be filed with the secretary of state not less than four months preceding the date of the election at which the measures so proposed are to be voted upon."[180] The legislature imposed a different deadline five months prior to the election.[181] In *Turley v. Bolin*, the Arizona Court of Appeals frames the question as "whether the statutory provision here involved implements or supplements the above-quoted constitutional provision and does not unreasonably hinder or restrict the initiative rights given to the people by the Arizona Constitution."[182] Although

174. *See supra,* Section II.C.
175. League of Women Voters of Mich. v. Sec'y of State, Nos. 163711, 163712, 163744, 163745, 163747, & 163748, 2022 WL 211736 (Mich. Jan. 24, 2022).
176. MICH. COMP. LAWS § 168.471 (1979).
177. *League of Women Voters*, 2022 WL 211736 at *9.
178. *Id.* at 12 (quoting Wolverine Golf Club v. Hare, 185 N.W.2d 392 (1970)).
179. *See, e.g.*, *supra* Section II.C.
180. ARIZ. CONST. art. 4, § 1(4).
181. ARIZ. REV. STAT. § 19-121(D) (1976) (the statute now contains the deadline "the day required by the constitution before the ensuing general election").
182. Turley v. Bolin, 554 P.2d 1288, 1291 (Ariz. Ct. App. 1976).

the Court consideres the case a question of "rights," it essentially applies a reserved powers framework, "with a view to the relationship evidenced by our constitution between the exercise by the legislature of the legislative rights granted to it, and the independent exercise by the people of their reserved rights."[183] The Court concludes, "The constitutional provision must be construed as reserving a minimum filing right in the people, not subject to future derogation by the legislature."[184] In doing so, the Court referrs to a Colorado case considering similar effort by the state legislature to set an eight-month deadline instead of the state constitution's four-month deadline.[185] That Colorado Court invalidated the law, explaining a contrary result "would make the initiative process in a vital provision *dependent* upon the general assembly" when "[t]he people reserved to themselves the power of initiative enactment."[186]

C. General Impairment, and a Parity Principle

The bulk of legislation regulating the initiative power, and the bulk of litigation regarding it, does not involve subject matter limits or qualification requirements. Much of it is technical, addressing the form of the petition or the process for submitting and verifying petitions, and other policies necessary to the exercise of the initiative power but not detailed in self-executing constitutional provisions. Most state constitutions generally enable legislation to facilitate the initiative process, and several state constitutions that do not otherwise permit legislative regulation of the initiative expressly enable regulation of the petition form and submission.[187]

Where legislation does not expressly or impliedly contradict initiative rules entrenched in a state constitution, courts applying a powers-based analysis—and some that apply a rights-based analysis—fall back on the "facilitate or impair" standard expressed—in these or other terms—or implied in initiative provisions. These analyses draw upon an eclectic set of principles, and sometimes detour into "undue burden" or similarly broad rights-based inquiries, especially when they address regulations on petitioners. For example, in *Sudduth v. Champman* the Washington Supreme Court considered a law invalidating every occurrence of a name if the Secretary of State finds "the

183. *Id.*
184. *Id.* at 1293.
185. *Id.* at 1292 (citing Yenter v. Baker, 248 P.2d 311 (Colo. 1952)).
186. *Yenter*, 248 P.2d at 314–15. The qualifications analysis parallels *Powell v. McCormack*, in which the Supreme Court held that Congress's powers to judge the qualifications of its own members "is limited to the standing qualifications prescribed in the Constitution." Powell v. McCormack, 395 U.S. 486, 550 (1969).
187. *See supra* Section II.D.

same name signed to more than one petition."[188] In asking whether the law facilitated the initiative process, the Court ruled the initiative provision should be "liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction" beyond what "is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right."[189]

One approach to the facilitation-impairment question is a parity principle, under which the legislature may not impose greater burdens on the initiative process than it imposes on its own legislative process. Often legislation restricting the initiative process is defended on grounds of protecting voters and ensuring the integrity of the process with measures legislatures would never find necessary to protect legislators or to ensure the integrity of their processes. The Montana Supreme Court offers reasons for a double standard:

> It is instructive to note the difference in the conditions under which a measure is submitted to the electorate of this state. The members of the Legislature meet for the purpose of considering legislation, and for a period of sixty days that, with a few exceptions, is their sole business. The members of that body have the advantage of conference, that is, of conferring together and each gaining from the other such information as each may possess concerning a given measure . . . The voter to whom a measure is submitted has a business or occupation other than that of the consideration of legislation. The measure is submitted to the banker, the merchant, the farmer, the lawyer, the laborer, the housewife.[190]

While this account may or may not be true as a matter of actual democratic practice,[191] it is not reflected in the text or structure of state constitutional initiative powers reserved by the people out of distrust of their legislatures.

A parity principle can account for the different deliberative conditions between legislated and initiative legislation while respecting the independence of the initiative power from the legislature. The Idaho Supreme Court's recent decision in *Reclaim Idaho*, although rooted in a rights-based analysis, demonstrates a kind of parity principle at work. Recall the case involved new geographic distribution requirements for petition signatures and a new effective date for approved initiatives. Unlike most state constitutions, the Idaho Constitution does not speak to geographic distribution requirements, or even a minimum percentage of voter signatures, and does not provide any timelines for petitioning, submission, election, or effective dates. Instead, subject to the initiative power being "independent of the legisla-

188. Sudduth v. Chapman, 558 P.2d 806 (Wash. 1977).
189. *Id.* at 808–09.
190. Sawyer Stores v. Mitchell, 62 P.2d 342, 351 (Mont. 1936).
191. *See generally,* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735, 1758 (2021) (finding "state legislatures are typically a state's least majoritarian branch" according to democratic criteria).

ture," it provides an open-ended enabling clause that it may be exercised "under such conditions and in such manner as may be provided by acts of the legislature . . . ."[192]

Notwithstanding this broad grant of power to the legislature, and in addition to the strict scrutiny analysis discussed above,[193] the Idaho Supreme Court suggested two analogies to the legislature's power. First, the increase in requiring 6% of voter signatures from eighteen to all thirty-five legislative districts "plac[es] an absolute veto power into the hands of any one legislative district in the state,"[194] empowering a single district in a way that would be intolerable in the legislature itself. In Idaho, as in Utah, the signature requirement is set by statute. An extension of the parity principle would scrutinize as suspect a legislature's attempt to raise the percentage share of the districts necessary to propose an initiative above the level of support the legislature itself requires to bring a bill to the floor. For example, if the votes of six district representatives are enough to pass a bill out of a ten-member committee and to the floor for debate and a vote, a similar share of support from voters in their districts presumably should qualify a ballot issue. "Presumably" is an important qualifier because legislators generally are plurality winners in their districts and initiative petitions require lower percentages per district, but this difference should not be overstated given the more direct democratic pedigree of the petition process.

Second, requiring all voter-approved initiatives to take effect no sooner than July 1 of the following year, after the legislature would have the opportunity to amend or repeal the initiated law, established a clear double-standard.[195] Although the Idaho Constitution does not speak to the effective dates for initiatives, it does allow legislated acts to take affect sixty days from the end of the session—well past any election approving an initiative—and "allows the legislature considerable discretion in setting the effective date of legislation when an emergency is properly declared, should apply to legislation adopted by the people via the initiative process."[196] Despite its rights-based approach, the Court concluded on a separation of powers note that "[t]he power to legislate," whether through legislation or initiative, "is derived from the same source."[197] Thus, "Initiative-created legislation stands on equal footing with laws enacted by the legislature."[198]

192. IDAHO CONST. art. III, § 1.

193. *See supra*, Section III.B.

194. Reclaim Idaho v. Denney, 497 P.3d 160, 189 (Idaho 2021).

195. *Id.* at 192.

196. *Id.* at 193 (quoting Luker v. Curtis, 136 P.2d 978, 979 (Idaho 1943)).

197. *Id.*

198. *Id.*

Another example from the birthplace of the statewide legislature suggests an extension of a parity or "equal footing" rule. A recent South Dakota law requires "the full text of the initiated measure in fourteen-point font," in addition to previous requirements that the signed petitions "shall be filed with the secretary of state at least one year before the next general election."[199] As Miriam Seifter suggests, when combined with administrative rules requiring each sheet of a petition to be "a self-contained sheet of paper printed front and back,"[200] the new law "require[s] bedsheet-sized pieces of paper," which "raises the expense and difficulty of a campaign" while "its effect on 'integrity' seems questionable."[201] There is little doubt the South Dakota legislature does not need, and would not tolerate, a requirement it file proposed bills one year prior to the legislative session, let alone such an absurd printing requirement. Indeed, nothing in the state constitution requires anything resembling such hurdles for filing and reading of legislation.

Some states' filing fees and "sponsor" signature requirements to file an initiative to begin the process also may run afoul of a parity principle.[202] Again, comparisons with legislative rules for filing bills may be instructive. If a legislature does not require a legislator to pay a fee or gather a certain number of signatures from other legislators to introduce a bill, the legislature's attempt to impose these requirements on initiative sponsors may require scrutiny as an impairment of the initiative power. State officials have significant interests in preventing a flood of frivolous initiatives into resource-constrained state offices, but these interests may be served without applying double standards to lawmaking by initiative. For example, requiring an initiative to meet the same formal drafting rules and process as a bill in the legislature may screen out unserious proposals without discriminating against initiated legislation. Signature requirements for filing an initiative that are redundant of signature requirements for balloting an initiative may impair the initiative power by requiring proponents to clear an extra hurdle of public support not required by the state constitution, and not required by the legislature for its own lawmaking process. Nominal signature requirements that fall well below the legislative denominator, such as one-in-ten-thousand voters where legislators occupy one-in-one-hundred seats, may not present the same issue. Regardless of the right answer to these questions, the right question under the parity principle is whether the legislature is

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199. S.D. CODIFIED LAWS § 2-1-1.2 (2021).
200. S.D. ADMIN. R. 5:02:08:00.01-02 (2021).
201. Miriam Seifter, *State Institutions and Democratic Opportunity*, DUKE L. J. (forthcoming 2022).
202. *See* HENRY S. NOYES, THE LAW OF DIRECT DEMOCRACY 155 (2014) (identifying several states with filing fees from five dollars to $500 and several states with sponsor signature requirements between 5 and 1,000).

applying a double standard to the initiative process it does not apply to itself.

A parity principle may help identify other subtler unconstitutional impairments of the initiative power. In *Stenberg v. Moore*, the Nebraska Supreme Court invalidated a statute requiring an exact match between voter registration records and initiative petition signatures.[203] Although signature-matching has no parallel in the legislative process, the Court performs a functional analysis that maintained roughly equal efficacy between the two processes: "The Legislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual."[204] This states a kind of parity principle where the legislature cannot regulate the initiative process in ways that leave it less effective at lawmaking than the legislative process.

In *Browning v. Fla. Hometown Democracy, Inc., PAC*, the Florida Supreme Court invalidated signature-revocation provisions because they "substantially burden the constitutional rights of initiative proponents and initiative signatories by affording initiative opponents an unopposed, definitive opportunity to 'persuade' electors to revoke their signatures for any reason and by any means, even illegitimate."[205] Although the Court discusses the challenge in terms of rights, it explains its rule as requiring "either neutral, nondiscriminatory regulations of petition-circulation and voting procedure, which are explicitly or implicitly contemplated by article XI, or, if otherwise, are necessary for ballot integrity since any restriction on the initiative process strengthens the authority and power of the Legislature and weakens the power reserved by article XI, section 3."[206] Again, even though the Court does not directly compare the signature-revocation provision to anything the legislature would impose upon itself, it suggests a kind of parity in protecting against aggrandizement of legislative power at the expense of the initiative process.

In determining whether legislation keeps the initiative power on an equal footing with the legislative process, courts should beware of false parity. For example, in *Wolverine Golf Club v. Hare*, the Michigan Court of Appeals invalidated a statute requiring indirect initiative petitions to be filed 10 days before legislative session.[207] The legislature argued the deadline was necessary to allow consideration of an indirect initiative before it could be balloted, and such a deadline

203. Stenberg v. Moore, 258 Neb. 199, 602 N.W.2d 465 (Neb. 1999).
204. *Id.* at 474.
205. Browning v. Fla. Hometown Democracy, Inc., PAC, 29 So. 3d 1053, 1071 (Fla. 2010).
206. *Id.* at 1064.
207. Wolverine Golf Club v. Hare, 180 N.W.2d 820 (Mich. Ct. App. 1970).

may be a reasonable default rule for the legislature's own bills. But ten days before the legislative session was ten months before the general election at which the initiative could be approved, and "delay of the proposal for the convenience of the legislature operates to restrict the right of initiative beyond permissible bounds."[208] In ensuring the reserved initiative power remains on par with the legislature's power, sometimes courts must grant more leeway for the initiative process than for ordinary legislation.

V. CONCLUSION

The initiative is a reserved constitutional power of the people to legislate independently of the legislature. Because the legislature is both the rival and necessary partner of the initiative process, state constitutions establish the initiative as an independent power, provide detailed subject limits and qualifications in the constitutional text, and generally enable the legislature to enact laws facilitating but not impairing the initiative power. State courts do not always recognize the initiative as a power and sometimes see the initiative through a rights lens informed by federal First Amendment doctrine. Rights-based analysis, however, concentrates on the expression of individual petitioners rather than the check-and-balance dynamics of the people relative to the legislature. Initiative rights doctrine therefore invalidates some laws that may support the empowerment of the people relative to the legislature, while upholding other laws that derogate the initiative power but may not burden individual petitioners. A powers-based analysis of initiative laws is more faithful to the text and structure of state constitutions, and benefits from other state constitutional models of shared and divided intra-branch powers.

Restrictive initiative regulations, enacted in the wake of recent attempts to enact popular policy reforms state legislatures refused to make, present new tests for the analysis of the initiative power. Although state courts entertain a variety of doctrines to assess these regulations, even courts applying a rights-based analysis gravitate toward several rules based on a principle of facilitation or impairment of the initiative power. First, where a state constitution imposes subject matter limits on initiatives, a legislature may facilitate the drafting of effective proposals and enforcement of those limits, though courts should scrutinize impairments on the subject matter of initiatives that are neither in the constitution nor imposed by the legislature upon itself.[209] Second, where a state constitution provides rules to qualify an initiative, whether by signatures, deadlines, or otherwise, a legislature may not supplement those rules in a manner that makes qualifi-

208. *Id.* at 828–29.
209. *See supra* Section IV.A.

cation more difficult.[210] Third, when a state legislature exercises its authority to enable the petition process, and a state constitution provides no specific guidance on that process, the initiative power remains on an equal footing with the legislative power, and restrictions that make the initiative power less effective than the legislature's power are invalid.[211] One way of assessing these restrictions is to ask whether the restrictions have parallels in the legislative process.[212]

In states that have adopted the initiative, the decision as to whether the people are competent to legislate on the same terms as the legislature has been made by the people themselves through their state constitutions. At a time when democratic institutions face challenges at all levels of government, state democracy requires a clearer account of the separation of legislative powers. This article attempts to develop such an account as a matter of state constitutional law. State constitutions vest the legislative power in the people as well as the legislature, and the initiative power is both independent of and equal to the legislature's own power. The law of democracy, and the federal and state courts that develop and implement it, should better attend to the initiative as a legislative power reserved to the people.

210. *See supra* Section IV.B.
211. *See supra* Section IV.C.
212. *Id.*