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THE POWERS OF INITIATIVE AND REFERENDUM: KEEPING THE ARIZONA CONSTITUTION'S PROMISE OF DIRECT DEMOCRACY

Lisa T. Hauser

THE POWERS OF INITIATIVE AND REFERENDUM: Keeping the Arizona Constitution's Promise of Direct Democracy

Lisa T. Hauser*

I. INTRODUCTION

Of the fifty-two delegates elected to Arizona's constitutional convention, thirty-nine were pledged to support initiative and referendum.[1] Thirty promised to vote for recall.[2] Their election followed a series of county-level, party conventions to select candidates and adopt a platform.[3] The issue of whether to include the powers of initiative, referendum and recall in Arizona's constitution dominated the delegate selection process.[4] These liberal, progressive, "direct democracy" provisions had been included in the constitutions of Oregon and Oklahoma, but it was feared that their inclusion in Arizona's constitution would not sit well with a conservative Congress and President and would deprive Arizona of statehood.[5]

Direct democracy was a partisan issue as well. Forty-one of the fifty-two convention delegates—and all but one of the thirty-nine committed to vote for initiative and referendum—were Democrats. Their election was touted as a triumph of the people over corporate interests amid popular dissatisfaction with a territorial government thought to be controlled by the railroads and mines. By reserving the powers of initiative, referendum, and recall, the people could serve as a significant check on abuses by those elected to serve in the legislative, executive and even judicial branches of government.[6]

With a super-majority of the delegates committed to vote for initiative and referendum, their inclusion in Arizona's Constitution might have been a foregone conclusion. In fact, the delegates eventually ratified the

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1. JAY J. WAGONER, ARIZONA TERRITORY 1863-1912: A POLITICAL HISTORY 460 (1970).
2. *Id.*
3. *Id.* at 458.
4. *Id.* at 458–59.
5. *Id.* at 458.
6. The platform endorsed by Labor and Democrats endorsed recall as a means of removing judges who abused their power by issuing injunctions in labor disputes. *Id.* at 464.

constitution containing these rights by a large margin.[7] Until then, the debate was lengthy and robust as the delegates opposed to initiative, referendum, and recall pressed their case despite the odds.[8] With no other subject as thoroughly discussed and debated, the framers of our constitution have left a rich legislative history to examine when there is doubt as to the meaning of these provisions.

Over the past century, a significant body of Arizona case law has developed in the areas of initiative and referendum. Courts routinely reference the importance of both initiative and referendum to the development of Arizona's Constitution. Yet, somehow, Arizona courts have maintained a reverence for the initiative process while eroding the people's right of referendum. This Article attempts to explain how this shift occurred, why referendum should not be treated with disfavor, and suggests that we should return initiative and referendum to equal footing.

II. INITIATIVE AND REFERENDUM BASICS

The power of initiative and referendum allows Arizona's citizens to serve as a coordinate branch of the legislature.[9] The people possess the power to enact laws and constitutional amendments by initiative.[10] By exercising the power of referendum, laws enacted by the legislature can be referred to the ballot for voter approval or disapproval.[11] The power of referendum also gives the legislature the authority to refer legislation to the voters for final approval or rejection.[12]

Any law that may be enacted by the legislature may be enacted by initiative.[13] But the power of referendum is restricted. Only legislative acts may be referred.[14] Legislation that must take effect immediately—and is adopted by a two-thirds vote of each house of the legislature with a

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7. Feldmeier v. Watson, 123 P.3d 180, 181–82 (Ariz. 2005).

8. *See* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 175–225, 228–36, 732–51 (John S. Goff ed., 1990).

9. Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391, 393 (Ariz. 1972).

10. ARIZ. CONST. art. 4, pt. 1, § 1(2).

11. *Id.* § 1(3).

12. *Id.*

13. *Id.* art. 22, § 14. But at the local level, zoning may not be enacted by initiative, because it is impossible for an initiative to comply with the public hearing process required for the adoption of zoning changes. City of Scottsdale v. Superior Court, 439 P.2d 290, 293–94 (Ariz. 1968).

14. The issue of whether an enactment is legislative or administrative arises primarily with respect to city, town, or county measures. *See* Wennerstrom v. City of Mesa, 821 P.2d 146, 149–51 (Ariz. 1991) (distinguishing between legislative and administrative acts).

declaration of emergency—is not subject to referendum.[15] Also, laws "for the support and maintenance of the departments of the state government and state institutions"[16]—such as appropriations and tax measures—may not be referred.[17] Otherwise, the constitution provides that state legislation does not take effect for ninety days just to allow the opportunity for referendum.[18]

The number of signatures required for a successful initiative or referendum varies with each election cycle. The number of signatures required is based on the total number of votes cast for governor in the last general election.[19] Ten percent of this number is required to propose statutory changes by initiative.[20] Initiatives proposing constitutional amendments require the signatures of fifteen percent of those who voted for governor.[21] The framers—no doubt sympathetic to the limited period of time allowed for exercising the power of referendum—required the signatures of five percent of the votes cast for governor.[22] So, with every gubernatorial election, the minimum number of signatures required on initiative or referendum petitions changes.[23]

The constitution's initiative and referendum provisions are self-executing[24] and state the requirements for exercising the rights of initiative and referendum in some detail. The framers addressed when initiative and referendum petitions must be filed;[25] extended the rights of initiative and

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15. ARIZ. CONST. art. 4, pt. 1, § 1(3).

16. *Id.*

17. *Id.*; *see also* Wade v. Greenlee Cnty., 844 P.2d 629, 630–31 (Ariz. Ct. App. 1992) (concluding that tax measures and appropriations are excluded from referendum); Garvey v. Trew, 170 P.2d 845, 849 (Ariz. 1946) (finding that an appropriation for the support and maintenance of the corporation commission was not subject to referendum).

18. ARIZ. CONST. art. 4, pt. 1, § 1(3) ("to allow opportunity for referendum petitions, no act passed by the legislature shall be operative for ninety days after the close of the session of the legislature enacting such measure").

19. *Id.* § 1(7) ("The whole number of votes cast for all candidates for governor at the general election last preceding the filing of any initiative or referendum petition on a state or county measure shall be the basis on which the number of qualified electors required to sign such petition shall be computed.").

20. *Id.* § 1(2).

21. *Id.*

22. *Id.* § 1(3).

23. For constitutional initiatives hoping to make the 2012 general election ballot, 259,213 signatures are required whereas statutory initiatives need 172,809 signatures and a referendum requires only 86,405 signatures. *2012 Election Important Dates*, ARIZONA DEPARTMENT OF STATE: OFFICE OF THE SECRETARY OF STATE, http://www.azsos.gov/election/2012/info/importantdates.htm (last visited Feb. 21, 2012).

24. ARIZ. CONST. art. 4, pt. 1, § 1(16) ("This section of the constitution shall be, in all respects, self-executing.").

25. *Id.* § 1(4).

referendum to the qualified electors of cities, towns and counties;[26] prescribed the form and contents of initiative and referendum petitions, including the requirement that each petition sheet be attached to a "full and correct copy of the title and text of the measure" being initiated or referred;[27] and required that every petition sheet be verified by the affidavit of its circulator stating that each of the names on the sheet was signed in his presence by those he believed to be qualified electors.[28] The framers also addressed the manner in which initiative or referendum measures are to be presented on the ballot;[29] how to resolve conflicts between measures approved at the same election;[30] how the vote is to be canvassed;[31] and when and how the adopted measures become law.[32]

Despite the constitution's declaration that these provisions be self-executing,[33] the legislature may—and has—enacted numerous statutes governing the exercise of initiative and referendum.[34] Legislation that does not "unreasonably hinder or restrict" these self-executing provisions and "reasonably supplements the constitutional purpose" may stand.[35]

Some of the myriad initiative and referendum statutes enacted over the years have been found to unconstitutionally restrict these constitutional rights. In *Turley v. Bolin*,[36] the Arizona Court of Appeals considered whether a statutory requirement to file initiative petitions no later than five months prior to the general election unreasonably restricted the constitutional right to file an initiative petition not less than four months before the election. The five-months-before-election filing deadline is not "less than four months" and not in direct conflict with the constitution.[37] And sensible arguments were made that the framers might have been motivated by a desire to ensure sufficient time to investigate petitions and prepare for the election, intended to allow for flexibility to respond to the state's growth and the increasing complexities of conducting elections, and did not intend to preclude an earlier filing deadline.[38] Yet, the Court

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26. *Id.* § 1(8).
27. *Id.* § 1(9).
28. *Id.*
29. *Id.* § 1(10).
30. *Id.* § 1(12).
31. *Id.* § 1(13).
32. *Id.* § 1(5), (13).
33. *Id.* § 1(16).
34. ARIZ. REV. STAT. ANN. §§ 19-101 to -143 (2012).
35. *See* Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1972) (stating the permissible limits of legislation involving self-executing constitutional provisions).
36. 554 P.2d 1288 (Ariz. Ct. App. 1976).
37. Turley v. Bolin, 554 P.2d 1288, 1291–92 (Ariz. Ct. App. 1976).
38. *Id.*

concluded that shortening the circulation period by one month "could seriously limit the reserved rights of the people to initiate legislation."[39] Similarly, the failure to register a political committee before circulating a referendum petition did not invalidate all petition signatures because the political committee registration statutes were deemed so confusing that their enforcement would unreasonably hinder the exercise of the right to referendum.[40] And the Supreme Court construed a statutory fiscal impact summary of ballot measures (prepared by the legislative branch) to include a "fair and neutral" requirement so that it would not impair the right to initiative.[41]

Each of these cases focused on preserving the right of initiative and referendum as guaranteed by the framers. *Turley* explained the need to balance the relationship between the powers the framers granted to the legislature and the framers' intent to reserve a share of legislative power to the people—a power to be exercised independently of the legislature[42]—and then recalled the words of Chief Justice Lockwood in *Whitman v. Moore*:[43]

> The history of our constitution and its adoption, to which we have previously referred, shows beyond the possibility of contradiction that the people themselves deliberately and intentionally announced that, by its adoption, they meant to exercise their supreme sovereign power directly to a far greater extent than had been done in the past, and that the legislative authority, acting in a representative capacity only, was in all respects intended to be subordinate to direct action by the people.[44]

But in 1982, the Arizona Supreme Court pronounced that there must be strict compliance with the constitutional and statutory requirements for the exercise of referendums.[45] In doing so, the Court relegated the right of referendum to a second-tier status not envisioned by the framers.

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39. *Id.* at 1292.
40. Van Riper v. Threadgill, 905 P.2d 589, 591 (Ariz. Ct. App. 1995).
41. Healthy Ariz. Initiative PAC v. Groscost, 13 P.3d 1192, 1195 (Ariz. 2000).
42. *Turley*, 554 P.2d at 1291.
43. 125 P.2d 445 (Ariz. 1942).
44. Whitman v. Moore, 125 P.2d 445, 450–51 (Ariz. 1942).
45. Cottonwood Dev. v. Foothills Area Coal. of Tucson, Inc., 653 P.2d 694, 697 (Ariz. 1982).

III. THE COMPLIANCE STANDARD

A. Strict v. Substantial Compliance

The meaning of "legal sufficiency" in the context of initiatives was established in 1914, shortly after statehood. The Arizona Supreme Court concluded that "legally sufficient" means "a valid petition, signed by legal voters, and complying substantially, not necessarily technically, with the requirements of the law."[46] The standard for judicial review of initiative and referendum petitions was substantial compliance as first articulated by the Court in 1936.

> We think, therefore, both on sound reason and upon the unanimous decisions of our own court, that when it appears affirmatively the constitutional and statutory rules in regard to the manner in which initiative and referendum petitions should be submitted have been so far violated that there has been no substantial compliance therewith, that the courts have jurisdiction to enjoin the election at the suit of an interested citizen.[47]

This standard was embraced for the next 46 years—until 1982.

In *Cottonwood Development v. Foothills Area Coalition of Tucson*,[48] the Supreme Court considered the validity of a referendum petition that had no title or text attached in violation of the constitution.[49] The Pima County Board of Supervisors had adopted a zoning resolution after amending it some nineteen times at the same meeting. The referendum commenced the very next day but the final resolution, with the adopted amendments, did not yet exist. The text of the referendum petition sheets included information about the actions being referred, but the title and text of the resolution was not attached to the petition sheets. With nothing attached to the referendum petition, it should have been a fairly straightforward matter for the Court to conclude that the petition failed to even substantially satisfy the constitutional and statutory requirements that a "full and correct copy of the title and text of the measure" be attached to each petition signature sheet. Instead, the Court cited the great power of a referendum to hold up the

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46. State v. Osborn, 143 P. 117, 118 (Ariz. 1914).

47. Kerby v. Griffin, 62 P.2d 1131, 1136 (Ariz. 1936).

48. 653 P.2d 694, 697–98 (Ariz. 1982).

49. *Id.* at 697 (citing ARIZ. CONST. art. 4, pt. 1, § 1(9) ("[e]ach sheet containing petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed to be initiated or referred to the people"); ARIZ. REV. STAT. ANN. § 19-121(A)(3) (2010) ("[e]very sheet for signatures shall . . . [b]e attached to a full and correct copy of the title and text of the measure . . . referred by the petition")).

effective date of legislation that may represent the wishes of the majority as the basis for requiring that referendum petitions strictly comply with constitutional and statutory requirements.[50] This marked the official beginning of the strict compliance standard for referendums.

Nine years earlier, in *Direct Sellers v. McBrayer*,[51] the Court decided the fate of a referendum petition lacking the statutorily mandated verification that the circulator was a qualified elector of the State of Arizona.[52] It concluded that this omission from the circulator's affidavit could be rehabilitated with proof that the circulators were qualified electors—but not after the filing deadline.[53] The Court compared the use of referendum to the exercise of the veto power; both must be exercised within a limited time or the legislation becomes effective.[54] It supported this point by adopting the reasoning of the Minnesota Supreme Court from its 1916 decision in *Aad Temple Building Ass'n v. City of Duluth*:[55]

> The right to suspend, and possibly to revoke, as given by the referendum . . . is an extraordinary power which ought not unreasonably to be restricted or enlarged by construction. It must be confined within the reasonable limits fixed by the charter (statute). The charter (statute) prescribes what the petition for referendum shall contain, how it shall be signed, and by whom it shall be verified. These provisions are intended to guard the integrity both of the proceeding and of the petition. Where a power so great as the suspension of an ordinance or of a law is vested in a minority, the safeguards provided by law against its irregular or fraudulent exercise should be carefully maintained.[56]

Interestingly, the Duluth charter specified that the substantial compliance standard applied to both initiative and referendum.[57] Both *Direct Sellers* and *Aad Temple* concern efforts to cure referendum petition defects after the end of the referendum period. Both cases conclude that the veto-like nature of referendum precludes allowing supplementation of petitions after the

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50. *Cottonwood Dev.*, 653 P.2d at 697.
51. Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 952 (Ariz. 1972).
52. *Id.*
53. *Id.* at 953.
54. *Id.*
55. 160 N.W. 682 (Minn. 1916).
56. *Id.* at 684–85.
57. *Id.* at 683–84 (quoting Sections 51 and 52 of the charter relative to initiative and referendum, both of which required that "the forms and conditions of the petition, the mode of verification, certification and filing, shall be substantially followed, with such modifications as the nature of the case requires").

referendum deadline.[58] Neither was resolved by imposing a strict compliance requirement on referendum petitions.

The Arizona Supreme Court relied on the "extraordinary nature of referendum" as its justification for requiring strict compliance of referendums. Although the Court borrowed its rationale from *Direct Sellers* and *Aad Temple*, the strict compliance standard was all its own.

B. Liberal Construction

Our courts have consistently recognized Arizona's "strong public policy" favoring the rights of initiative and referendum,[59] which form a "fundamental part of Arizona's scheme of government."[60]

> [W]hen there is any doubt as to the requirements of the Constitution going only to the form and manner in which the power of an initiative should be exercised, every reasonable intendment is in favor of a *liberal construction of those requirements* and the effect of a failure to comply therewith, unless the Constitution expressly and explicitly makes any departure therefrom fatal.[61]

Similarly:

> *The right of initiative and referendum shall be broadly construed.* If there is doubt about requirements of ordinances, charters, statutes or the constitution concerning only the form and manner in which the power of an initiative or referendum should be

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58. *Direct Sellers*, 503 P.2d at 954 ("We do not hold that referendum petitions cannot be amended within the 90-day period. We hold only that once the 90-day period has run, the power to petition to have the legislation referred has lapsed and the law will go into effect."); *Aad Temple Bldg. Ass'n*, 160 N.W. at 684 ("After the clerk had made his certificate, and on the 15th of February, additional petitions were filed which contained names sufficient, if added to those on the original petition, to suspend the operation of the ordinance. We cannot concede that the filing of the additional petitions had any effect. The ordinance went into effect February 5, 1916, or not at all. After it went into effect, the filing of a petition, or part of a petition, would not suspend it.").

59. Sherrill v. City of Peoria, 943 P.2d 1215, 1218 (Ariz. 1997).

60. Fairness and Accountability in Ins. Reform v. Greene, 886 P.2d 1338, 1340 (Ariz. 1994).

61. Kromko v. Superior Court, 811 P.2d 12, 19 (Ariz. 1991) (emphasis added) (citing Whitman v. Moore, 125 P.2d 445, 451 (Ariz. 1942), *overruled on other grounds by* Renck v. Superior Court of Maricopa Cnty., 187 P.2d 656, 660–61 (Ariz. 1986); Brousseau v. Fitzgerald, 675 P.2d 713, 716 (Ariz. 1984)). Of course, the constitution never uses the word "fatal" and never even prescribes a penalty for a failure to comply with any initiative (or referendum) requirement. But at least two constitutional requirements that are strictly construed as to both initiatives and referendums are the signature requirements and the filing deadline. It is fatal to an initiative or referendum to file a petition that is one signature short or one day late.

> exercised, *these requirements shall be broadly construed*, and the effect of a failure to comply with these requirements shall not destroy the presumption of validity of citizens' signatures, petitions, or the initiated or referred measure, unless the ordinance, charter, statute or constitution expressly and explicitly makes any fatal departure [sic] from the terms of the law.[62]

As our Supreme Court explained in *Lawrence v. Jones*,[63] these standards must be harmonized. In *Lawrence*, a zoning referendum was challenged, in part, for failing to attach the statutorily required legal description of the affected property.[64] A map showing the location of the property was attached to each petition sheet, but not an official legal description in metes and bounds. After noting its obligations to broadly construe the right to referendum while requiring strict compliance, the Court explained:

> In harmonizing these two standards, we believe that we may not excuse the failure to include a "legal description of the property" because it is strictly required by the provisions of A.R.S. § 19-121(E). However, we must *broadly construe the definition of that requirement* in determining whether compliance was achieved.[65]

The result was the Court's strict enforcement of the requirement that zoning referendum petitions include a legal description, but it broadly construed the description requirement so that it could be satisfied by a simple map.

A similar approach was taken in *Sherrill v. City of Peoria*. Specifically, plaintiffs alleged that the entire ordinance had not been attached to the zoning referendum petition for potential signers to review.[66] The ordinance incorporated reference to a "Standards and Guidelines Report."[67] The text of the ordinance was attached to the petition but not the referenced report.[68] The plaintiff argued that, without this report, a reader would have a "fragmented understanding" of what the petition sought to refer.[69] And the Supreme Court agreed that there was a valid concern as to the ability of petition signers to make informed decisions without the referenced report.[70] But—although there must be strict compliance with the "title and text"

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62. *Sherrill*, 943 P.2d at 1218–19 (emphasis added) (quoting Historical and Statutory Notes, Laws 1989, ch. 10, § 1).
63. 18 P.3d 1245 (Ariz. Ct. App. 2001).
64. Lawrence v. Jones, 18 P.3d 1245, 1247 (Ariz. Ct. App. 2001).
65. *Id.* at 1249 (emphasis added) (citations omitted).
66. *Sherrill*, 943 P.2d at 1216.
67. *Id.*
68. *Id.*
69. *Id.* at 1217.
70. *Id.* at 1218.

requirement—"title and text" was broadly construed to mean just the ordinance itself and not any internally referenced documents.[71]

IV. A STUDY IN CONTRASTS: THE 100-WORD DESCRIPTION IN INITIATIVE AND REFERENDUM

Despite a rather shaky foundation, Arizona courts have consistently required strict compliance in the referendum context for the past twenty-nine years. The impact has been felt not only by those referendums deemed to have failed to achieve judicially-mandated perfection but in the initiative context as well. When the lesser substantial compliance standard is applied to an initiative as a whole, it can result in excusing non-compliance with specific requirements.[72] Yet, there seems to be an unstated rule that the failure to strictly comply with certain requirements is equally fatal to initiative and referendum petitions. For example, no one seriously suggests that application of the substantial compliance standard will save an initiative petition that is filed even one day late or just one signature short of the constitutional minimum. Although initiatives fare no better when it comes to the number of signatures or filing deadlines, there is an overall failure to *equally* respect referendum as part of the legislative process. "When interpreting constitutional and statutory provisions relating to election matters, courts must exercise restraint before imposing unreasonable restrictions on the people's legislative authority, which is 'as great as the power of the legislature to legislate.'"[73] But there is little evidence of such restraint in referendum cases.

Consider how the initiative and referendum description requirement has been applied. A.R.S. § 19-101(A) requires that each referendum petition sheet must contain a description of no more than 100 words of the "principal provisions of the measure sought to be referred." A.R.S. § 19-102(A) imposes essentially the same requirement on initiatives—a description of the "principal provisions of the proposed measure."

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71. *Id.* at 1218–19.

72. Wilhelm v. Brewer, 192 P.3d 404, 406 (2008) (allowing the constitution's "title and text" requirement to be satisfied by text only); *Id.* at 406, 408 (finding text of initiative to be "full and correct" despite failure to comply with statutory requirement governing capitalization of all newly proposed language).

73. Kromko v. Super. Ct., 811 P.2d 12, 18–19 (Ariz. 1991) (quoting State v. Osborn, 143 P. 117, 118 (Ariz. 1914)).

A. The Description Requirement

The origin of the description requirement is thought to be *Kromko v. Superior Court*.[74] The initiative petition at issue in *Kromko* related to proposed reforms to automobile insurance, including rate reductions. In an effort to attract signers, the petition sheets included slogans and extraneous comments emphasizing that the initiative would result in a 20% rate rollback.[75] The plaintiff argued that the petitions were misleading because they omitted the initiative's other prominent features, including: (1) a new governmental office assigned to monitor consumer interests; (2) a lower burden of proof for punitive damages; (3) a private cause of action for violations of the Unfair Claims Settlement Practices Act; (4) an approval process for insurance rates; and (5) a consumer protection fund.[76]

The Supreme Court limited its review to determining whether the petition was "legally insufficient in form, prescribed procedure, or the number of qualified electors."[77] It concluded that the petition was legally sufficient, because it satisfied all statutory requirements and because nothing expressly precluded these extraneous comments.[78]

After satisfying itself that the petition met all affirmative requirements, the Court turned its review to preventing "untrue representations designed to defraud potential signatories."[79] The slogans emphasizing the rate reductions were reasonably accurate and not fraudulent. Several key factors were observed. First, the Court concluded that a petition need not describe *every* aspect of the proposed measure:

> [T]he language employed by Kromko is "misleading," if at all, *only* because it is incomplete. We cannot say that a title's failure to describe every aspect of a proposed measure always creates the degree of fraud, confusion, and unfairness sufficient to invalidate the petition . . . ..[80]

Second, the Court recognized the need for petition proponents to use snappy slogans to attract passersby in the summer heat:

> We must also be mindful of the task faced by petition proponents and circulators, who are not only "members of the largest legislative body in the state," but are drawn, for the most part,

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74. Kromko v. Super. Ct., 811 P.2d 12, 18–19 (Ariz. 1991).
75. *Id.* at 14.
76. *Id.* at 14–15.
77. *Id.* at 18.
78. *Id.*; *see also* Pioneer Trust Co. v. Pima Cnty., 811 P.2d 22, 28 (Ariz. 1991).
79. *Id.* at 20.
80. *Id.* at 21.

> from the ranks of volunteers animated by a purpose that to them at least appears good. They must solicit voter interest from what is widely perceived as an indifferent electorate, and rare is the elector who stops long enough in the summer heat to read or listen to a complete description of the entire nature and scope of a proposed measure. For this reason, circulators often employ a variety of short, verbal catch-words or phrases during the circulation process to call attention to their specific cause.[81]

Finally, the Court explained how it could not restrict comments on petitions any more than it could restrict what circulators say:

> Few differences exist between the descriptive, oral "one liner" a circulator may say to an elector passing by and the descriptive slogan printed on a petition signature sheet. Notwithstanding their *incomplete nature*, both forms of exchange constitute legitimate political debate and facilitate the main purpose behind the signature requirement. The purpose is . . . to "make certain that the subject matter of the petition *is of interest* to a sufficiently large segment of the electorate such as would entitle the measure to a place on the ballot and justify the expense of printing and publicity required for submission of it to a vote of the people."[82]

While making it clear that voters must not be deceived or defrauded, *Kromko* confirms that petitions may contain "legitimate political debate" and emphasize the aspects of the measures at issue that are of most interest to the petition proponents.[83] *Kromko* limited judicial oversight to ensuring compliance with statutory requirements and preventing fraud, not regulating the details of how proponents describe their measures.[84]

In response, the legislature enacted a description requirement. The current version of A.R.S. § 19-101(A) and § 19-102(A), including the description requirement, was enacted in a 1991 special session.[85] An Election Reform Study Committee had been created by session law[86] and its

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81. *Id.* at 21–22 (citations omitted) (quoting Whitman v. Moore, 125 P.2d 445, 451 (Ariz. 1942)).

82. *Id.* at 21–22 (emphasis added) (citations omitted) (quoting Renck v. Super. Ct., 187 P.2d 656, 661 (Ariz. 1947)).

83. *Id.* at 21.

84. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999) (petition circulation is protected speech under the First Amendment); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 344 (1995).

85. 1991 Ariz. Sess. Laws, 3rd Spec. Sess., ch. 1, § 5.

86. 1991 Ariz. Sess. Laws, 1st Reg. Sess., ch. 241, § 8.

Initiative and Referendum Subcommittee made recommendations that were ultimately enacted in the 1991 special session.[87]

The subcommittee's draft would have required referendum petitions to include a "fair and accurate" summary.[88] Committee members expressed concern that the "fair and accurate" requirement would encourage litigation.[89] The committee voted to strike "fair and accurate summary" and replace it with a requirement to include a "description."[90] The legislature enacted A.R.S. § 19-101(A) as recommended by the committee, including the requirement to provide a "description" of the measure instead of a "fair and accurate summary."[91]

Minus the "fair and accurate" requirement, the legislature protected potential signers from one-sided petition descriptions in several other ways. For one thing, all petition sheets must include a "notice" to inform readers that the description was prepared by the sponsor (*i.e.*, it is not an official description):

> Notice: This is only a description of the measure sought to be referred prepared by the sponsor of the measure. It may not include every provision contained in the measure. Before signing, make sure the title and text of the measure are attached. You have the right to read or examine the title and text before signing.[92]

This notice also informs potential signers of another safeguard: that the measure's complete title and text are attached.[93] The Court in *Kromko* had emphasized the availability of the entire text as a reason not to require perfectly complete and impartial descriptions:

> Besides, even if electors had questions as to the entire nature and scope of the measure, they easily could have referred to the 'full and correct' copies of [the proposition] that were attached to the petition signature sheets.[94]

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87. ARIZ. LEG. ELECTION REFORM SUBCOMM., ELECTION REFORM STUDY COMM. FINAL REPORT, (1991), *available at* http://azmemory.lib.az.us/cgi-bin/showfile.exe?CISOROOT=/statepubs&CISOPTR=51&filename=52.pdf.

88. *See id.* at 1–3 & app. A.

89. *Id.*

90. *Id.*

91. *Id.*

92. A.R.S. § 19-101(A); *see id.* § 19-102(A) (prescribing a similar notice with respect to the description of a proposed measure or constitutional amendment).

93. *Id.*

94. Kromko v. Superior Court, 811 P.2d 12, 21–22 (Ariz. 1991).

B. *Initiative Description*

In 2008, the legal sufficiency of the "Homeowners' Bill of Rights" initiative was challenged on the grounds that it lacked any title, its text was not full and correct, and its initiative description was misleading.[95] Each petition sheet included the following description:

> HOMEOWNERS' BILL OF RIGHTS. Ten year warranty on new homes. Right to demand correction of construction defects or compensation. Homeowners participate in selecting contractors to do repair work. They can sue if no agreement with the builder. No liability for builders' attorney and expert fees but homeowner can recover these costs. Homeowners can sometimes recover compensatory and consequential damages. Disclosure of builders' relationships with financial institutions. Model homes must reflect what is actually for sale. Right to cancel within 100 days and get back most of the deposit. Prohibiting sellers' agents from participating in false mortgage applications.[96]

Plaintiffs complained that this summary, combined with other factors, created a sufficient degree of fraud, confusion and unfairness to invalidate the initiative.[97] Overall, they argued that the initiative gave the false impression that it was limited to residential construction by calling it the "Homeowners Bill of Rights" and by placing a key provision impacting other types of construction out of numerical sequence at the end of the text of the measure.[98]

This was the first case construing the initiative/referendum description requirement to reach an Arizona appellate court. Plaintiffs conceded that the requirement should not be construed to require drafters to include reference to every aspect of a proposed measure.[99] But they contended that the initiative, examined in its entirety, was deceptive in its presentation to voters. The Court agreed that it "must determine whether the petition, considered 'as a whole,' 'fulfills the purpose of the relevant statutory or constitutional requirements, despite a lack of strict or technical compliance.'"[100]

When it came to the initiative's substantial compliance with the A.R.S. § 19-102(A) description requirement, the Court—relying on *Kromko*—opined

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95. Wilhelm v. Brewer, 192 P.3d 404, 405 (Ariz. 2008).

96. *Id.* at 407; Application for Initiative or Referendum Petition Serial Number I-14-2008 (Dec. 19, 2007), http://www.azsos.gov/election/2008/general/ballotmeasuretext/I-14-2008.pdf.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 405.

that not every aspect of a proposed measure must be included in the description; any potential for misleading voters was mitigated by the fact that the measure itself was available for examination; and the petition sheet included the warning to prospective signers that the summary had been prepared by the initiative's supporters and advising them to review the entire measure before signing.[101] "Thus, potential signers were warned that the summary description may not be complete or unbiased."[102]

C. Referendum Description

Just two months after the Supreme Court's decision in *Wilhelm v. Brewer*, the court of appeals in *Sklar v. Fountain Hills*[103]—after noting that courts treat initiative and referendum petitions differently—invalidated two referendum petitions for failing to comply with the referendum description requirement of A.R.S. § 19-101(A).[104] How were they flawed? The descriptions were misleading because they were incomplete and contained biased opinion.[105] The descriptions stated:

> "Save Our Small Town" seeks to refer Fountain Hills Resolution No. 2008-25, an amendment to the Town of Fountain Hills General Plan 2002, to the ballot for a vote. This Resolution changes the land uses on approximately 1,276 acres (formerly known as State Trust Land) being developed in the northeast corner of the Town. It would change the character of Fountain Hills and impose major impacts on existing residents. Instead, the State Trust Land should be developed in an environmentally sensitive manner and in compliance with our existing hillside protection and subdivision requirements.[106]

and

> "Save Our Small Town" seeks to refer Fountain Hills Ordinance No. 08-12, amending the Official Zoning Map of the Town of Fountain Hills, to the ballot for a vote. This Ordinance changes the zoning of 50 parcels for approximately 1,276 acres (formerly known as State Trust Land) being developed in the northeast corner of the Town. It would change the character of Fountain Hills and impose major impacts on existing residents. Instead, the

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101. *Id.* at 407.
102. *Id.*
103. 207 P.3d 702 (Ariz. App. Ct. 2008).
104. *Id.* at 703.
105. *Id.* at 707–08.
106. *Id.* at 706.

> State Trust Land should be developed in an environmentally sensitive manner and in compliance with our existing hillside protection and subdivision requirements.[107]

The court rejected these descriptions for not including *any* of the principal provisions of the ordinances being referred despite the fact that both descriptions reference the most essential provisions of each ordinance: the change in land use and zoning on a specified number of acres in the northeast portion of the Town in an area that was formerly State Trust Land.[108] It also concluded that, even with factual support for statements concerning the effects of the measures, a referendum petition description "is not the appropriate place for the expression of such opinions" and "[t]his type of partisan positioning should not begin until after a referendum is placed on the ballot."[109] The court expressed disapproval of "highly inflammatory language calculated to incite partisan rage."[110] And although slogans and catch phrases to capture the attention of prospective signers is fine on initiative petitions, the court stated that the use of "'catchword phrases . . . to call attention to their specific cause' is not appropriate in a referendum petition's statutorily required description of the measure sought to be referred."[111]

As for the warning to petition signers that the description was prepared by the referendum sponsors, may not include every provision of the measure, and that the full text of the measure is attached for their review, the court of appeals concluded that these factors could not excuse the failure to comply with the description requirement. "Concluding that [these] petitions comply with § 19-101(A) would 'open the process to misleading information and even to mudslinging and partisan tactics.'"[112]

The court of appeals initially said all the right things about the strong policy favoring the right of initiative and referendum, that initiative and

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107. *Id.* at 706–07.

108. *Id.*

109. *Id.* at 707. This ignores both reality and Arizona law. A campaign is waged when circulators collect petition signatures and face the daunting task of capturing the attention of an indifferent electorate in sufficient numbers. In recognition of the fact that circulating a referendum petition is political activity, a political committee must be registered before valid petition signatures can be collected. A.R.S. § 19-114(B); *see also id.* § 16-901(19)(c) (a committee acting in support or opposition to the qualification of a ballot measure is a "political committee"). Alerting prospective signers to the reasons they should care about a measure is legitimate political debate whether in the form of extraneous descriptions printed somewhere on the petition sheets or in oral statements made by circulators. *See* Kromko v. Super. Ct., 811 P.2d 12, 21–22 (Ariz. 1991).

110. *Sklar*, 207 P.3d at 706–07.

111. *Id.* at 708.

112. *Id.*

referendum requirements are to be broadly construed, and that the failure to comply with a requirement does not destroy the petition unless the law expressly makes departure from the requirement fatal.[113] But the court then acknowledged—and specifically rejected—the argument that it should broadly construe the description requirement.

> Further, applying principles of broad statutory construction, SOST contends the language utilized in the petition descriptions was acceptable. We disagree.
>
> The superior court did not err in strictly construing SOST's compliance with § 19-101(A). Were we to adopt the relaxed standard urged by SOST, application of a broader standard would not further the clear legislative goal of providing petition signers with more or even adequate information. The purpose of the statute is to ensure that the public has immediate and full disclosure of the exact public action that may be reversed. The provisions of § 19-101(A) "obviously serve to ensure that petition signers are informed about the document they are signing and the measure being referred." Here, the descriptions provided by SOST in the petitions merely describe the purported anticipated effect of the provisions, and fail to identify in any meaningful way any of the provisions of the challenged governmental acts, let alone the principal ones. We find SOST's descriptions were, at most, "uninformative" and "unhelpful."[114]

In *Wilhelm*, in the initiative context, the Supreme Court broadly construed the description requirement together with the notice given to potential signers. *Wilhelm* recognizes that potentially biased statements may make their way into an initiative description. But in *Sklar*, the court of appeals seemed almost horrified at the thought. The Supreme Court declined to review the court of appeals decision in *Sklar*.

So, when it comes to initiative or referendum descriptions, we have a broad construction of the requirement for initiatives in *Wilhelm* and a strict construction of the requirement for referendums in *Sklar*. Here, the substantial v. strict compliance standards have resulted in entirely different description requirements for initiatives and referenda even though the statutory requirements are identical. Instead, there should be one requirement, liberally construed in favor of the rights of both initiative and referendum, with the courts then determining whether the appropriate level of compliance has been achieved.

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113. *Id.* at 705–06.

114. *Id.* at 707 (citations omitted).

V. RESTORING SOME BALANCE

> Section 1. (1) Senate; house of representatives; reservation of power to people. The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, 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, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.[115]

Whether exercising the rights of initiative or referendum, the legislative power of the people is said to be as great as that of the legislature.[116] The people act as a coordinate branch of the legislature.[117] Accordingly, the constitutional doctrine of separation of powers limits the judiciary's ability to intervene in these direct legislative processes: "It is well-established by the decisions of this Court that Article III prohibits the intervention of the judicial department in the internal workings of the legislative process."[118] The people, in exercising the rights of initiative and referendum, must enjoy the same immunity from judicial interference as do the Legislature and the inferior law-making bodies.[119] "When interpreting constitutional and statutory provisions relating to election matters, courts must exercise restraint before imposing unreasonable restrictions on the people's legislative authority, which is 'as great as the power of the legislature to legislate.'"[120]

The rights of initiative and referendum, viewed by the framers of Arizona's constitution as existing on equal footing, are no longer equal. The right of initiative is treated generously by the courts. The right of referendum is not. Some equilibrium must be restored if the people of Arizona are going to have the rights of direct democracy the framers intended.

One of the first steps a court should take in any initiative or referendum compliance case is a review of the statutory requirements at issue to determine whether they "unreasonably hinder or restrict" the rights of initiative and referendum or whether they reasonably supplement the

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115. ARIZ. CONST. art. IV, pt. 1, § 1(1).

116. State v. Osborn, 143 P. 117, 118 (Ariz. 1914).

117. Queen Creek Land & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391, 393 (Ariz. 1972).

118. *Id.*

119. *Id.*

120. Kromko v. Super. Ct., 811 P.2d 12, 18–19 (Ariz. 1991) (quoting State v. Osborn, 143 P. 117, 118).

constitutional purpose.[121] If possible, courts must construe statutory requirements for the exercise of initiative and referendum so that they constitutionally supplement the rights of initiative and referendum. No referendum should be invalidated for failing to comply with a statutory requirement unless that requirement meets the "constitutionally supplements" test.

Next, the basis for subjecting referendum petitions to the strict compliance standard must be reexamined. Yes, the power of referendum allows enacted legislation to be put on hold by the actions of a small minority. But the constitution comes with built-in safeguards to mitigate whatever dangers are posed by the exercise of the right to referendum.

- The framers of our constitution allowed the exercise of referendum against any item, section or part of any measure enacted by the legislature.[122] This guards against the sweeping use of referendum by allowing those wanting to exercise the right to refer just the offending portion of a bill and allow the balance of the legislation to take effect as scheduled.
- The framers also ensured that the exercise of referendum would never be allowed to cripple the ability of the state to operate by exempting laws "for the support and maintenance" of state government from referendum.[123]
- Nor is the right of referendum allowed to disrupt the effect of legislation necessary for the protection of the health, safety or welfare.[124] Legislation that needs to go into effect immediately can be adopted with an emergency clause to prevent the possibility of referendum.[125]
- The framers also specified that the legislature still has the power to enact any measure—even if the right of referendum has been invoked.[126] This means that the legislature can repeal legislation that is in the process of being referred to the ballot

121. *See* Direct Sellers Ass'n v. McBrayer, 503 P.2d 951, 953 (Ariz. 1972) (stating the permissible limits of legislation involving self-executing constitutional provisions).

122. ARIZ. CONST. art. IV, pt. 1, § 1(3).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* § 1(14).

> to cure whatever defect inspired the referendum.[127] Or, if the legislature is bold enough, it can simply repeal the legislation that is subject to a pending referendum and then reenact the same legislation in an attempt to thwart the right to referendum. In this case, a new referendum would have to begin against the reenacted legislation (or the voters might find it more to their liking to recall the members of the legislature behind this scheme).

In short, the framers understood the potentially disruptive force of referendum and attempted to guard against its abuse. It was unnecessary, and arguably inappropriate, to strangle the right to referendum with a strict compliance standard.

If anything, statewide initiatives are far more disruptive than referendums since the adoption of the "Voter Protection Act" in 1998.[128] By enacting this constitutional amendment, the people essentially immunized their initiative enactments from subsequent amendment by the legislature.[129] Accordingly, ensuring that initiative measures are enacted in compliance with constitutional and statutory procedures is more important now than pre-1998. Given that enactment of a statewide initiative measure now *prevents* the people's representatives from legislating, it can be said to be a power as extraordinary as the power of referendum to *reject* legislation enacted by the people's representatives. And if the extraordinary nature of referendum justifies application of the strict compliance standard, then

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127. The "[o]nly conceivable purpose" of this provision is to allow the legislature to tamper with a matter that has been referred to the ballot—or is in the process of referendum—but not yet voted on by the voters. McBride v. Kerby, 260 P. 435, 438 (Ariz. 1927) (overruled on other grounds by Adams v. Bolin, 247 P.2d 617 (Ariz. 1952)).

> [W]hen an act of the Legislature is referred, *that particular act* is suspended in its operation, but that such *suspension* does not deprive the Legislature of the right thereafter after to pass, in the legal manner any measure it may deem advisable, notwithstanding such measure may deal with exactly the same subject as the referred act, and in the same manner, but subject, of course, to the same right of reference as was the original act.

Id.

128. ARIZ. CONST. art. IV, pt. 1, §1(6)(B)–(D).

129. *Id.* Under these provisions, the legislature does not have the power to repeal an initiative enacted by the voters and does not have the power to amend a measure enacted by initiative *unless* the amendment "furthers the purpose of such measure" and it is approved by at least a three-fourths vote in each house of the legislature. Even if it is possible to meet the super-majority vote requirement, the requirement that an amendment "furthers the purpose" of the initiated measure is elusive. If the amendment is substantively different than what was enacted by initiative—and presumably it is—it is difficult to conclude that it furthers the purpose of the measure.

statewide initiatives—with their ability to tie the hands of the legislature—should be subject to this higher standard as well.

Rather than diminishing the power of initiative along with the power of referendum, the appropriate way to return balance to the exercise of both is to ensure that all statutory requirements for the exercise of initiative and referendum are constitutional; broadly construe all requirements in favor of initiative and referendum; and require that both initiative and referendum petitions substantially comply with the constitutional and statutory requirements governing their exercise. Unless the rights of initiative and referendum are equally favored by the courts, Arizonans will not have the right of direct democracy promised by the framers of our constitution.