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Interpreting the Products of Direct Democracy

*D. Zachary Hudson**

INTRODUCTION

Twenty-seven states and the District of Columbia provide for some form of initiative procedure, allowing the citizens of a state to draft and pass legislation without assistance from their state legislature.[1] From the first statewide referendum placed on the ballot in Oregon in 1904 through 2006, "there have been 2,231 statewide initiatives, with 909 (41%) of these being approved."[2] In several states, such as California and Maine, "the initiative has by general agreement become the principal driver of policy."[3] As these enactments become more prominent vehicles for achieving policy goals, it is important to consider how courts should go about interpreting the products of direct democracy.

Many of the tools normally used when interpreting legislatively enacted statutes cannot be employed effectively in the initiative context.[4] As cases like *Ro-*

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1. PHILLIP DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 27-29 (1998); ELISABETH GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION 16 (1999). Interestingly, direct democracy was a product of the early twentieth century populist movement, and, as such, it is most commonly found in western states with constitutions drafted during that period. *See* Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

2. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 524 (4th ed. 2007).

3. PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 63 (1998).

4. The products of direct democracy are adopted through two processes: initiative and referendum. An initiative is a tool that allows the electorate to petition that a proposed statute or amendment to the state constitution appear on the ballot for consideration by the entire voting population. A referendum is a method whereby

mer v. Evans[5] illustrate, "the interpretation of ballot measures [like initiatives] is often extremely difficult, in part because they often are worded vaguely and in part because the electorate's intent concerning their meaning is often quite speculative."[6] Given the inherent differences between statutes created by conventional legislative efforts and those that are the product of direct popular action, a different set of interpretive tools is necessary when attempting to ascertain the meaning of an initiative. Because of these differences, and the typical relationship between the drafters of initiatives and the body politic, this Comment suggests importing an analytic paradigm from the realm of contract law: *contra proferentem*. Resolving statutory ambiguities against the interests of the party that drafted the initiative will help to address some of the problems inherent in direct democracy efforts, aid in incentivizing clarity in draftsmanship, and provide a reliable interpretive tool for judges to use when resolving textual ambiguities.

The argument in favor of applying the doctrine of *contra proferentem* to the products of direct democracy proceeds in three parts. First, the implications of the different resources that are available when interpreting initiatives and legislatively enacted statutes are explored. Second, the motivations behind and justifications for importing an interpretive doctrine from the realm of contract law are discussed in detail. Finally, the potential effects of applying *contra proferentem* to ballot measures are considered, and the theory this Comment promotes is distinguished from other proposals to deal with the interpretive issues presented by initiatives.

I. The Insufficiency of the Status Quo

State courts interpreting initiatives often purport to use the same analytical techniques to resolve textual ambiguity that they apply when interpreting the products of the conventional legislative process.[7] Whether examining an initiative or statute, judges look to the plain text of the statute and then apply interpretive canons such as *ejusdem generis* or *expressio unius exclusio alterius* to re-

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the electorate approves or disapproves of a law proposed by or already adopted by the legislature. Since laws adopted via referenda typically have legislative history and other analytical accoutrements associated with statutes enacted through the normal legislative process, this Comment's arguments only apply to initiatives.

5. 517 U.S. 620 (1996) (invalidating an initiative making antidiscrimination suits more difficult for homosexuals to file); *see also* Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating a state initiative that allowed landowners to refuse to sell or rent for any reason).

6. Eskridge et al., *supra* note 2, at 558.

7. Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107 (1995) (arguing for the adoption of specific interpretive canons for dealing with direct democracy and for the narrow interpretation of its products).

solve ambiguities in the text.[8] In tandem with conducting this analysis, courts often attempt to derive the meaning of the phrase or words in question by examining legislative history. This resource, however, is conspicuously absent in the case of initiatives. The analytical vacuum created by this administrative void renders the normal interpretive rubric inadequate to the task of dealing with uncertainties in statutes enacted by popular ballot.[9] A paradigmatic example of the resulting interpretive complications is found in courts' awkward efforts to deal with equal protection challenges to statutes enacted by initiative. The legislature's intent is frequently a key factor in an equal protection challenge to a statutory scheme. But, "the Supreme Court . . . has [n]ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results."[10] The nature of initiatives makes inquiries into the motives of the body enacting the challenged statute incredibly difficult, if not impossible.[11]

As an empirical matter, discovering the intent of the general public in passing a ballot measure is extremely difficult when compared to ascertaining the intent of legislative actors. Many of the sources consulted when interpreting legislatively enacted statutes, such as legislative hearings and committee reports, almost never are created in the initiative process. If a judge were to take the inquiry into textual intent seriously, as in the normal course of interpretation, she would need to examine sources like the media coverage and advertising surrounding a ballot campaign, "which social science research demonstrates affect the voters much more than formal sources such as the text of the ballot proposition and the official voter pamphlet distributed by the state."[12] This type of

8. *See, e.g.*, Hall Street Assocs. v. Mattel, 128 S. Ct. 1396, 1405 (2008) ("[W]hen a statute sets out a series of specific items ending with a general term, [*ejusdem generis* dictates that] that general term is confined to covering subjects comparable to the specifics it follows."); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 73 (2002) (explaining that "the canon *expressio unius exclusio alterius* [means that] expressing one item of an associated group excludes another left unmentioned").

9. While certainly a minority approach, some courts have been willing to look at the literature accompanying initiatives as legislative history. *See* Whitaker v. Speigel, Inc., 623 P.2d 1147 (Wash. 1981). To the extent that these resources are reliable at all, they could be used to derive the intent of the promoting party in deciding ambiguities against them.

10. Arthur v. City of Toledo, 782 F.2d 565, 573 (6th Cir. 1986).

11. Some courts have been willing to review statistical data about the identity of the parties that vote for or against a given measure, but the admissibility of this type of evidence is far from generally accepted. *See* Kirksey v. Jackson, 506 F. Supp. 491 (S.D. Miss. 1981), *aff'd*, 663 F.2d 659 (5th Cir. Unit A Dec. 1981).

12. ESKRIDGE ET AL., *supra* note 2, at 1101.

analysis, however, likely will yield inconsistent results and is not the sort of evaluation for which judges enjoy a comparative advantage.[13]

While the Supreme Court has not discussed the problems that initiatives present in any great level of detail, the Court is aware of them. Justice Kennedy's appraisal of the statutory text at issue in *Romer* provides an instructive example.[14] In that case, Colorado passed an initiative preventing homosexuals from raising claims based on discrimination in housing, employment, and other areas. While the Court ultimately invalidated the initiative on equal protection grounds, the opinion also addressed concerns with the statutory text. Addressing statutory language banning "any minority status, quota preferences, protected status, or claim of discrimination" on the basis of sexual orientation, Justice Kennedy observed that "[i]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[15] If the statute had indeed been found constitutional, *contra proferentem* could have been applied to at least prevent this broad reading of the statute.[16]

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13. Even if a judge could accomplish the feat of deducing voter intent from available media sources, disconnect likely would arise between what an analysis of this information would yield and the intention behind the text of the proposition. Construing ambiguities against the drafters of the initiative most likely will result in an interpretation that is closer to what the people adopted than to what the drafter may have opaquely intended.

14. 517 U.S. 620 (1996). The statute at issue read in relevant part:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art. II, § 30b.

15. 517 U.S. at 630. As suggested by Justice Kennedy, the text of the Colorado provision could have been interpreted one of two ways: (1) as banning any sort of protection from discrimination against people based on their sexual orientation; or (2) as banning only special preferences for people based on their sexual orientation.

16. The cases discussed in this Part are meant to be demonstrative of the issues involved with interpreting ambiguous initiatives, but these cases are just the tip of the iceberg. For a catalogue listing more than fifty cases and related descriptions involving the interpretation of ambiguous initiatives, see Schacter, *supra* note 7, at app. B.

II. IMPORTING THE DOCTRINE OF *CONTRA PROFERENTEM* TO DEAL WITH SOME OF THE PROBLEMS PRESENTED BY DIRECT DEMOCRACY

The doctrine of *contra proferentem* as applied in contract cases maintains that "when language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred."[17] Many of the justifications for this contract interpretation mechanism render it particularly appropriate for use in interpreting initiatives. First, *contra proferentem* purports to resolve ambiguities against the drafter because the drafter could have avoided the dispute by crafting the language more clearly.[18] The same is true in the initiative context, since the drafter most often possesses unilateral control over the text that will appear on the ballot. Despite this fact, initiative proposals can generate considerable voter confusion.[19] In fact, the literature accompanying initiatives is often "so complicated that one cannot understand what is going on."[20] These problems can be confounded by media campaigns, launched by the drafting organization, that distort the issues by portraying the initiative in a narrow way when in fact the language submitted for approval is quite broad.[21] This confusion possibly results from the "greater incentives for professionals in the initiative process to deploy vague or even misleading language because voters might be more easily manipulated than professional legislators."[22] Applying the doctrine of *contra proferentem* ideally will counteract these incentives and force greater clarity in initiatives' text.

Some progress already has been made in restricting the ability of parties to place proposals on ballots to mislead the electorate. Recognizing the potential problems with overly complicated ballot initiatives, both state courts and legislators have endorsed the application of the single-subject rule when drafting initiatives.[23] Under the single-subject rule, initiatives only may deal with a spe-

17. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.11 (3d ed. 2004); *see* Lanier Prof'l Servs. v. Ricci, 192 F.3d 1, 5 (1st Cir. 1999) ("[A]mbiguous [contract terms] will be construed against the drafter.").

18. Estrin Constr. Co. v. Aetna Cas. & Sur. Co., 612 S.W.2d 413, 419 (Mo. App. 1981) ("The principle that an ambiguous adhesion provision shall be given an intendment favorable to the adherent rests on the public policy that the inept drafter of a form had the resources to do better.").

19. ESKRIDGE ET AL., *supra* note 2, at 530-33.

20. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 74 (1999).

21. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 926-28 (3d ed. 2007).

22. *Id.* at 927.

23. *See id.*; *see also* Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983) (discussing the application of the single-subject rule).

cific topic, helping to "avoid the possibility of logrolling, deceit, or voter confusion."[24] Construing ambiguities against the interests of the organization that drafts the initiative will promote accuracy that in turn hopefully will result in initiatives that are better drafted and more easily understood. Enhanced specificity also will make it harder for the sponsoring organization to engage in misleading media campaigns, as the source material will be less susceptible to manipulation and multiple interpretations. Applying the doctrine of *contra proferentem* to these provisions will serve as a court-applied compliment to the statutorily created single-subject rule, forcing additional clarity in draftsmanship and resulting in more transparent ballot proposals.

A second reason that *contra proferentem* is an appropriate doctrine to adopt in the initiative context is that it "applies with particular force 'in cases . . . where the drafting party has the stronger bargaining position.'"[25] For two reasons, this description accurately captures the relationship between the party that drafts and advocates for an initiative and the portion of the electorate that will be affected by it. First, direct democracy initiatives are most often undertaken by well-financed, organized interest groups.[26] The successful conduct of an initiative campaign requires hundreds of thousands of signatures. Because states are constitutionally prohibited from regulating interest groups' compensation of petition circulators or the amount of money that a group may spend in support or opposition of a ballot measure, superior resources frequently amount to electoral success.[27] Second, the lion's share of successful initiatives enacted in the last decade has been characterized by entrenched, well-financed interests resisting some form of desired change.[28] One empirical account found that voters adopted 78% of proposed initiatives restricting civil rights between 1959 and 1993, suggesting that the products of direct democracy might be detri-

24. St. Paul Citizens for Human Rights v. City Council of St. Paul, 289 N.W.2d 402, 407 (Minn. 1979).

25. Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1207 (2d Cir. 1970) (citing RESTATEMENT (SECOND) OF CONTRACTS § 232 (Tentative Draft No. 5, 1970)).

26. BETTY ZISK, MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS 106 (1987); Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999).

27. *See generally* Meyer v. Grant, 486 U.S. 414 (1988) (holding that prohibiting the payment of petition circulators violates the First Amendment); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1998) (prohibiting states from requiring that circulators be registered voters or disclose their names); DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000).

28. CRONIN, *supra* note 20, at 212 ("A perennial fear about direct democracy has been that majorities at the ballot box might be less sensitive than state legislators to the rights of minorities—whether an ethnic, racial, or religious minority or perhaps a small ideological or partisan group."). These provisions often are supported by focused interests that purport to represent the interests of the majority.

mental to the reform efforts of minorities.[29] Construing ambiguities against the interests of the promoting organization will ensure that a superior democratic bargaining position obtained through financial advantage or majority status does not translate into a nefariously obtained legislative victory.

Finally, *contra proferentem* typically is applied to contracts where the terms are of a "take it or leave it" nature—when one party does not have the ability or opportunity to alter the terms of the agreement.[30] This, too, is exactly the situation in the initiative context. Voters are presented with the proposed text when they arrive at the ballot box and cannot negotiate the terms. By comparison, a statute enacted by a legislature is somewhat analogous to sophisticated parties entering into an agreement. There often are numerous compromises made among the interests represented in the elected body, resulting in a policy that is at least acceptable to a majority of those involved in its passage. In the case of an initiative, no such compromise exists, making these statutes more like contracts of adhesion than like bilateral contracts produced through negotiation. The all-or-nothing nature of initiatives distinguishes them from other statutes and makes them prime candidates for a strict interpretive rule like *contra proferentem.*

III. Problems with Applying *Contra Proferentem* to the Products of Direct Democracy and Other Suggestions for Dealing with Interpreting Initiatives

Despite potential objections to the contrary, judges currently are well-positioned to utilize the tools this Comment promotes. First, instead of asking courts to embrace a completely novel concept, this Comment simply asks that courts apply a doctrine they regularly use in a different context. Second, there are numerous canons that could be described as analytical cousins of *contra proferentem* that courts frequently apply when dealing with statutes, such as rules of strict construction, the rule of lenity, and the canon of constitutional avoidance.[31] Applying *contra proferentem*, then, is just an extension of analytical practices already in existence.

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29. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 253 (1997). *But see* Todd Donovan & Shaun Bowler, *Responsive or Responsible Government?*, *in* Citizens as Legislators: Direct Democracy in the United States 249, 266-70 (Shaun Bowler, Todd Donovan & Caroline Tolbert eds., 1998) (attacking Gamble's study and concluding that statutes passed by state legislatures are just as likely as those passed via initiatives to impugn minority rights).

30. Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995).

31. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction . . . ."); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491-92 n.10 (1985) ("[C]riminal statutes must be strictly construed . . . . The strict-construction principle is merely a guide to statutory interpretation. Like its identical twin, the rule

Although it seems that judges already are equipped to employ contract interpretation tools when resolving ambiguous statutes, it is possible that applying the doctrine of *contra proferentem* to initiatives would have a chilling effect on the overall production of initiatives. Similar to the economics-rooted argument made against the use of other substantively restrictive interpretive canons, increasing the ex ante costs of pursuing a ballot initiative could ceteris paribus result in a decrease in the number of initiatives.[32] It is possible that construing ambiguities against the drafter when interpreting the products of initiatives could squeeze out some popular democratic proposals at the margin. It is not clear, however, that it would be inherently undesirable to exclude potentially misleading initiatives from the popular ballot when a party is unable to draft its potential statute with sufficient clarity. While the calculus balancing statutory clarity and volume is uncertain, it may be wise to adopt interpretive canons that force parties to err on the side of fewer, more thoughtfully drafted initiatives than on the side of more, vaguely worded, overreaching initiatives.

Finally, the citizenry may in fact participate in the formation of initiatives beyond the simple casting of ballots. The more the body politic participates in the development of and debate surrounding an initiative, the less applicable the rationale supporting the application of *contra proferentem* becomes. But, as the discussion up to this point suggests, and practical experience demonstrates, the population at large frequently has little involvement in the initiative process beyond the vote. More often than not, "[t]here is no critical evaluation, input or feedback from those in society who may be affected by the legislation; nor is there the refining process that occurs in the legislature."[33]

Other scholars have proposed solutions to the interpretive problems posed by initiatives, but these suggestions fail to address the unique problems presented by direct democracy. Elizabeth Garrett argues that, when possible, ballot propositions should be understood as creating statutory law subject to amendment by the legislature rather than constitutional amendment entrenched against legislative modification.[34] In making this argument, Garret suggests that typical interpretive tools are sufficient when analyzing the text of initiatives. This explanation, however, does not account appropriately for the unique rela-

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of lenity, it only serves as an aid for resolving an ambiguity . . . .") (internal quotation marks omitted).

32. *See* William M. Landes & Richard A. Posner, *The Influences of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993).

33. St. Paul Citizens for Human Rights v. City Council of St. Paul, 289 N.W.2d 402, 407 (Minn. 1979).

34. Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 35 (1997); *see also* Jack Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals To Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487 (1998) (arguing that there is no reason to apply differing interpretive methods to the products of direct democracy and legislative efforts because the same flaws occur in both interpretive processes).

tionship between the initiative drafter and the voting population and fails to provide the appropriate incentives to parties authoring initiatives. Getting closer to the crux of the problem, Phillip Frickey argues that ballot initiatives should be understood in accordance with the plain meaning of their text and that ambiguous provisions should be interpreted narrowly. Doing so limits the effects of direct democracy on existing statutory schemes enacted in accordance with republican principles, i.e., by a legislature.[35] While interpreting ambiguous provisions narrowly may serve some ex ante accuracy forcing function, it fails to do so to the same degree that a *contra proferentem* regime would. Also, while narrow construction is a step in the right direction, it fails to account for the disparities in resources and bargaining power among the parties to an initiative.

Conclusion

The importance of determining what interpretive tools are appropriate when dealing with initiatives is greater now than ever before, as the products of direct democracy are becoming more prevalent and often deal with controversial areas of policy. Importing the doctrine of *contra proferentem* from contract law would serve to improve the quality of these increasingly important democratic products and ensure that the rights of those affected by ballot measures are protected more thoroughly.

35. Phillip Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 Ann. Surv. Am. L. 477 (arguing that direct democracy is in tension with the federal constitutional principle of republican government).