Opinion Analysis: S234148 California Cannabis Coalition v. City of Upland

Authors: David A. Carrillo & Darien Shanske

This is a preview of a forthcoming article, California Constitutional Law: Interpreting Restrictions on the Initiative Power (2017) 51 U.C. Davis L. Rev. Online 65, David A. Carrillo and Darien Shanske. Reprinted by permission.

Overview

On August 28, 2017 the California Supreme Court decided *California Cannabis Coal. v. City of Upland*, (Aug. 28, 2017, S234148) ___Cal.4th___ . Justice Cuéllar wrote the opinion, joined by the Chief Justice and Justices Werdegar, Chin, and Corrigan. Justice Kruger wrote separately to concur in part and dissent in part; Justice Liu joined that opinion.

The basic facts of the case are these.[1] A local initiative in the city of Upland proposed to require marijuana dispensaries pay a city fee. The proponents wanted the initiative to be considered by voters at a special election. The city concluded that because the fee would exceed the actual costs, it constituted a general tax. To the city, this meant that the initiative could not be voted on during a special election; instead, under California constitution Article XIII C, section 2 the measure had to be submitted to the voters at the next general election. This provision of the constitution clearly requires that all (general) tax increases imposed by a local government be submitted to the voters at a general election.[2] So if a city council (like Upland's) proposes a tax increase, then it must follow the Proposition 218 rule and wait for the next general election. The question posed by this case was whether this rule also applies to general tax measures put on the ballot by the *voters*. The court decided that this provision does *not* restrain voter initiatives. Therefore, if the voters propose the increase of a general tax, then a vote on the tax can occur at a special election.

Analysis

Debating the definition of "government" is unproductive.

The key question confronting the court was whether the phrase "no local government may impose . . ." also served to impose a limit on the *voters* of a local government acting through the initiative process. The majority thought that this phrase did *not* include the electorate; the dissent thought that it did. Though both sides made reasonable points, we think that the arguments based on the language of the provision are so evenly balanced that the heavy lifting is done by the majority's presumption in favor of liberally construing the initiative power. The majority candidly says as much.[3] Indeed, the majority explains that when it comes to limiting the electorate's initiative power, it will apply a "clear statement rule." That is, unless the voters clearly intend to limit the initiative power, the court will not find that they did.

There is a strong case for this clear statement rule.

The dissent cogently asks what the majority's basis is for applying a clear statement rule and making it a rule for future cases.[4] After all, a judicially crafted clear statement rule hamstrings a legislative body and hands power to judges to decide what is "clear enough." A clear statement rule is particularly troublesome to the extent the drafters of legislation did not know their work would be evaluated on that standard.

The majority's response is that a presumption in favor of the initiative power is not new. In 1991 the court applied that principle in a case involving Article XIII A, section 3 (added by Proposition 13), which at the time provided that "any changes in State taxes enacted for the purpose of increasing revenues . . . must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature . . . ."[5] The court applied the presumption and found it did not apply to the electorate.

Only five years later, Proposition 218 aimed to clarify the interpretation of another section in the same article: Article XIII A, section 4 (added by Proposition 13), which reads: "Cities, Counties and special districts, by a two-thirds vote of the qualified

electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district." It should be unsurprising that the court again applied the presumption in favor of the initiative in interpreting Proposition 218's clarification of Article XIII A, section 4. In this context it is especially apt to charge the proponents[6] with knowledge of the law,[7] including knowledge of this presumption.

But this argument only goes so far if a presumption in favor of the initiative power is misguided. Consider the U.S. Supreme Court's widely-criticized federal preemption clear statement rule. That rule is a restriction on federal power, imposed on federalism grounds. If Congress does not clearly preempt a state law, then the state law stands. Yet there is a good argument that after the Fourteenth Amendment's adoption there is no good ground for tipping the scale in favor of state versus federal power. Another criticism is that federalism values, appealing as they are, should not receive special judicial solace at the cost of protecting individual rights, as often ends up being the case.[8] The fact that the federal clear statement rule is long established and fairly applied is no response to such points.

We considered whether a deeper justification exists for a presumption in favor of broadly construing the initiative power as a matter of California constitutional law. We think there is such an argument, as follows.

An initiative constitutional amendment that purported to prevent future electorates from undoing a past act, or otherwise placed substantive limits on the future electorate's legislative power, would be invalid as a revision. The California electorate's initiative power is a structural part of the state's constitutional system. California's constitution can be changed, of course, but structural changes are labeled "revisions" and revisions cannot be accomplished by means of the ordinary voter initiative. A revision requires a supermajority of the legislature *and* a majority vote of the electorate.[9] Consider also the fact that the initiative was created via the revision process. How the initiative power got into the constitution is not determinative, but it is suggestive.[10] If altering the state government to add the initiative was a revision, and if the litmus test for a revision is whether it changes the nature of the state government, then reducing or removing the initiative power

is also a revision. As an extreme example, if the electorate by initiative constitutional amendment attempted to assume all taxing power, or claimed to renounce any taxing power, either act would be an invalid revision.

Thus, if Proposition 218 significantly impairs the electorate's right of initiative, then it should be invalid to that extent because the initiative can only be substantively curtailed by a revision. The court has justified this rule on the principle that, although the state constitution is binding on future legislatures and electorates alike, the electorate cannot restrict its own future initiative power through the initiative process.[11] Only the legislature plus the electorate could do that with a revision.[12]

An initiative constitutional amendment that purports to prevent future electorates from undoing a past act, or otherwise placed substantive limits on the future electorate's legislative power, would also be invalid as a separation of powers violation. Using the example above again, if the electorate by initiative constitutional amendment attempted to assume all taxing power, or claimed to forfeit any taxing power, either act would violate the separation of powers because the initiative is a core electorate legislative power, which cannot be substantively limited or reassigned.[13] The electorate cannot self-harm, just as the legislature cannot over-delegate, reduce, or give away its core powers.[14]

How does one know if a change is structural enough to become a revision, or a material enough impairment? Key questions include: Does it change the frame of government?[15] Does it substantively reduce the electorate's legislative power?[16] Obviously the electorate (by initiative constitutional amendment) can prescribe substantive and procedural limits on the other branches of California government.[17] But the present electorate cannot by initiative constitutional amendment reduce the amount of legislative power held by the future electorate. This does not mean that the initiative cannot be used to constrain future initiative acts at all. Proposition 13 itself is an example of setting limits on future electorates, and absent any other action the future electorate is indeed constrained by the past electorate's action. Yet the future *state* electorate can always use its initiative power to undo the past electorate's act and change the rules.

Remember that the provision in question here is a restriction placed on the *local* initiative power by the *state* electorate. The dissent argued that this fact indicates that *Kennedy Wholesale* was not really about protecting the initiative power because the state voters could always change the provision.[18] Leaving to one side whether this is the best reading of *Kennedy Wholesale* (and the majority has a potent counter), we think that this point makes the argument for applying the clear statement rule stronger in this case. As to the state electorate, their initiative power would arguably not have been overly restricted by a two-thirds rule because a majority of the electorate could change the rule. But that is not the case for the local electorate and the local initiative power. The local initiative power is also constitutionally derived.[19] Based on the argument above, it is not at all clear to us if the state electorate could constrain the use of local initiative power absent a constitutional revision. It is at least a very difficult constitutional question. Consequently, it is certainly sensible to apply a clear statement rule to avoid that question. In this context, the clear statement rule functions more like a canon of constitutional avoidance.

We should be clear that the majority opinion did not rely on the argument we just outlined in its defense of the clear statement rule, although we believe that it did gesture to it at various points in its opinion, most particularly when the court explained that: "As Ulysses once tied himself to the mast so he could resist the Sirens' tempting song (Homer, The Odyssey, Book XII), voters too can *conceivably* make the clear and important choice to bind themselves by making it more difficult to enact initiatives in the future.[20] We added the italics to the "conceivably," and we think this comment shows that the court sees that self-binding in this way poses a hard question.

The Elephant in the Room

This case is about California constitution Article XIII C, section 2(b). The celebrity of the case has to do with section 2(d), which reads: "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved."

The language concerning the election rules construed in this decision ("No local government may impose, extend, or increase any general tax unless . . .") is identical to the language concerning the required supermajority for special tax measures ("No local government may impose, extend, or increase any special tax unless…"). This strongly suggests that the local voters can, by initiative, increase special taxes by a simple majority because the supermajority limitation does not apply to initiatives any more than the general election requirement applies to initiatives.

The majority does not comment on this implication, which is appropriate, as that issue was not before the court. Perhaps some grounds for distinction between the two provisions might be found. Indeed, there is language in the majority opinion that suggests it thinks there might be such a distinction. The court says:

That the voters explicitly imposed a procedural two-thirds vote requirement on themselves in article XIII C, section 2, subdivision (d) is evidence that they did not implicitly impose a procedural timing requirement in subdivision (b).[21]

This language can be read to suggest that there is some difference between the election timing provision and the vote threshold provision. We do not actually think that this is what this passage means. Instead, it is part of an argument in favor of the majority's interpretation of section 2(b) and the (minor) point the majority is making is that the electorate knows how to refer to itself.[22]

Nevertheless, the implication remains and was brought up by the dissent in a footnote:

The majority opinion contains language that could be read to suggest that article XIII C, section 2(d) should be interpreted differently from section 2(b). (See maj. opn., ante, ––– Cal.Rptr.3d at ––––, ––– P.3d at –––– [noting that the enactors of Prop. 218 "explicitly imposed a procedural . . . requirement on themselves in" art. XIII C, § 2(d), which "is evidence that they did not implicitly" do so in § 2(b)].) I see no basis for construing the two provisions differently. Sections 2(b) and 2(d) are, in all pertinent respects, indistinguishable.[23]

If we are correct that the majority did not wish to introduce a difficult-to-understand distinction in this offhand way, then why did the majority not change the language or

in some other way respond to the dissent? Perhaps the majority thought its implication was clear enough and that there had to be some end to the back and forth. Perhaps the majority was not displeased with the implication the tax threshold question was arguably open for the lower courts to consider.

Implications

The public response to this decision—both pro and con—suggests that it changes the possibilities of local government finance significantly.[24] Again, the focus has been on the decision's supposed impact on the voting threshold for special taxes. We are skeptical that the impact would be so great even if this decision does ultimately result in the supermajority rule not applying to special taxes placed on the ballot by the voters themselves.

As a matter of political economy, we do not think there is a reservoir of pent up demand for tax measures. As noted in the post previewing this case, cities and counties can already subject general taxes to a majority vote[25]—along with a non-binding advisory measure on how any revenue collected is to be spent.[26] Thus, it is not clear how important this change will be for cities and counties. School districts, for example, have already been able to fund infrastructure with a 55% voter threshold, assuming certain conditions are met.[27] So we would predict that operational school district taxes passed by majority vote will be the main source of demand for this kind of voter initiative, if it were to be possible.

Even assuming that the court's reasoning means that the two-thirds threshold does not apply to local special tax initiatives, how this area of the law develops from here is unclear. The initiative power extends to taxation,[28] but it is also the case that the initiative power is generally interpreted to be as broad as the legislative power of the underlying local government.[29] Charter cities have the inherent power to tax and therefore, presumably, their citizens have that right as well.[30] But general law cities and counties do not have the inherent power to tax.[31] Does that mean the legislature must explicitly permit local tax initiatives in these governments?[32] School districts have no initiative power at all—at least not granted by the constitution.[33] Thus, if school districts wanted to use this ruling, must the legislature grant the school district electorates the power to impose taxes by

initiative? These are hard questions.[34] We note them here not to answer them, but to indicate that many thorny legal and political questions remain whatever this decision's applicability to the tax threshold provision.

Conclusion

The majority describes the conflict in this case as between two constitutional provisions: sections 8 and 11 of article II (the initiative power), and article XIII C (limiting local governments' ability to impose, extend, or increase general taxes). Because the latter provision was created by the former, we think that the court found that this is not a clash of two equally-matched California constitutional doctrines. Thus, in keeping with its past practice and sound doctrinal considerations, the electorate's initiative power prevailed.

[1] For further description of the case see: http://scocablog.com/argument-preview-california-cannabis-coalition-et-al-v-city-of-upland/.

[2] Cal. Const., art. XIIIC § 2:

(b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.

(c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).

(d) No local government may impose, extend, or increase any special tax unless and

until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.

[3] *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *12: "Our analysis in those decisions consistently begins with the presumption that the initiative power is not constrained, then searches for clear evidence suggesting that electors could reasonably be understood to have imposed restrictions upon their constitutional power."

[4] *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *18.

[5] *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, (1991) 806 P.2d 1360.

[6] The Howard Jarvis Taxpayer's Association sponsored both Propositions 13 and 218. https://www.hjta.org/about-hjta/the-history-of-hjta/.

[7] *See, e.g.*, *In re Harris*, (Cal. 1989) 775 P.2d 1057, 1060 ("[T]he voters who enact [an initiative] may be deemed to be aware of the judicial construction of the law that served as its source.").

[8] *See, e.g.*, Eskridge & Frickey, *Quasi-Constitutional Law: Clear Statement Rules As*

Constitutional Lawmaking, (1992) 45 Vand. L. Rev. 593, 643-44.

[9] Or a constitutional convention. Cal. Const. art. XVIII, § 2.

[10] *See Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, (Cal. 1978) 583 P.2d 1281, 1285 ("We think it significant that prior to 1962 a constitutional revision could be accomplished Only by the elaborate procedure of the convening of, and action by, a constitutional convention (art. XVIII, s 2). This fact suggests that the term 'revision' in section XVIII originally was intended to refer to a substantial alteration of the entire Constitution, rather than to a less extensive change in one or more of its provisions.").

[11] *Rossi v. Brown*, (Cal. 1995) 889 P.2d 557, 574. ("[T]hrough exercise of the

initiative power the people may bind future legislative bodies other than the people themselves"). *See also Cty. of Los Angeles v. State*, (Cal. 1987) 729 P.2d 202, 209 n.9 ("Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question.").

[12] Cal. Const., art. XVIII, § 1, 4; 68 Hastings L. J. 731, 744.

[13] *Amador Valley Joint Union High Sch. Dist.*, (Cal. 1978) 583 P.2d 1281, 1286 (posing as a hypothetical example of an invalid revision an initiative constitutional amendment vesting all judicial power in legislature). For an explanation of the idea that a separation of powers analysis applies to electorate legislative acts, *See* Carrillo, Duvernay, & Stracener, *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L. J. 731.

[14] For background on the unique features of the California separation of powers doctrine, *See* Carrillo & Chou, *California Constitutional Law: Separation of Powers* (2011) 45 USF.L.Rev. 655.

[15] *Professional Engineers in California Government v. Kempton*, (Cal. 2007) 155 P.3d 226, 245; *Amador Valley Joint Union High Sch. Dist.*, 583 P.2d at 1286 (does the measure "accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision").

[16] 68 Hastings L. J. 731, 745–46.

[17] *Rossi*, 889 P.2d at 574; 68 Hastings L. J. 731, 744 and 753.

[18] *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *19.

[19] Cal. Const, art. II, § 11(a): "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. Except as provided in subdivisions (b) and (c), this section does not affect a city having a charter."

[20] *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *1.

[21] *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *10.

[22] The opening sentence of the paragraph says as much: "Indeed, as we observed in *Kennedy Wholesale*, 53 Cal.3d at page 252, 279 Cal.Rptr. 325, 806 P.2d 1360, when an initiative's intended purpose includes imposing requirements on voters, evidence of such a purpose is clear."

[23] *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *18 n.7.

[24] *See, e.g.*, https://calmatters.org/articles/california-taxes-two-step/ ("The ruling 'isn't just a small crack in the protections that voters across the state have relied on—it is a sledgehammer,' said [Assembly Member] Baker at a press conference."). And, in fact, Republican members of the Assembly have introduced a constitutional amendment (ACA 19) to overturn the holding of this case. http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180ACA19.

[25] Cal. Const. art. XIIIA, § 2(b).

[26] *Coleman v. County of Santa Clara*, (1998) 64 Cal.App.4th 662.

[27] Cal. Const. art. XIIIA, § 1(b)(3).

[28] *Rossi*, 889 P.2d at 563.

[29] *DeVita v. Cty. of Napa*, (1995) 9 Cal.4th 763, 775.

[30] *California Fed. Savings & Loan Assn. v. Los Angeles*, (1991) 54 Cal.3d 1.

[31] *Santa Clara County Local Transportation Authority v. Guardino*, (1995) 11 Cal.4th 220, 247-48.

[32] Before one assumes the answer is yes, it must be remembered that, as the majority in this case explained, "we have held that the people's power to propose and adopt initiatives is at least as broad as the legislative power wielded by the Legislature and local governments." *California Cannabis Coal. v. City of Upland*, 2017 WL 3706533 at *4 (citing cases). If the initiative power is broader, then perhaps explicit permission to place a tax measure on the ballot by initiative is not necessary.

[33] But, again, perhaps the power of initiative is so broad that this power could be found to have been reserved by the people it being explicitly granted to the electorate of a school district.

[34] Another twist. Proposition 62, approved by the voters in 1986, placed limits on local government taxing power very similar to that of Proposition 218 into California statutory law. See, e.g., Cal. Gov't Code § 53722 ("No local government or district may impose any special tax unless and until such special tax is submitted to the electorate of the local government, or district and approved by a two-thirds vote of the voters voting in an election on the issue."). The Legislature cannot simply repeal a statute passed by initiative. See Cal Const. art. II, § 10(c); Cal. Gov't Code § 53729. Presumably Proposition 62 does not bar local tax initiatives any more than Proposition 218 does, but this is another issue that will need to be litigated.