Argument Preview: California Cannabis Coalition et al. v. City of Upland

The California constitution subjects tax increases proposed by a local government to vote at a general election, but does this requirement also apply to an *initiative* measure proposed by the people themselves? The particular provision of the California constitution at issue, Article XIIIC, section 2(b), added by Proposition 218 in 1996, does not indicate whether or not it also applies to initiative measures. The Court of Appeal decision[1] under review in this case found that this provision did *not* govern initiative measures. Therefore, under this reasoning, initiative measures do not need to be submitted to a vote at a general election.

Viewed from 20,000 feet, one can see there are two plausible ways to approach the absence of clear instruction as to whether initiative measures are covered by this provision. One might argue that there is a deep principle of California law that the people's power of initiative is to be jealously guarded[2] and thus the judgment of the Court of Appeal should be affirmed. On the other hand, one might argue that Proposition 218 was clearly intended to make it harder to raise taxes. And permitting votes on initiative measures to raise taxes at special elections would make it easier to raise taxes (at least assuming the limitations added by Proposition 218 are effective).

The (somewhat simplified) facts of this case seem to be as dry as the question presented, even though they involve cannabis. The California Cannabis Coalition wanted to place an initiative on the ballot at a special election. The measure arguably imposed a tax on medical marijuana dispensaries and so the City argued that the measure must be put on the ballot at a general election, per the state constitutional rule governing the imposition of taxes.

This case has been much written about in tax circles and drew multiple amicus briefs, almost all arguing that the special Proposition 218 rules should govern initiative measures. Among the amici making this argument are the strange

bedfellows The California League of Cities and the California Taxpayer's Association. Indeed, the City is represented by the Howard Jarvis Taxpayer's Foundation. On the other side, the high-powered firm of Munger, Tolles & Olson wrote an amicus brief on behalf of the San Diego Chargers in support of the California Cannabis Coalition.

What then is really going on here? Proposition 218 does not just require that all measures imposing a tax be voted on at a general election. It also requires, crucially, a two-thirds supermajority for the passage of special taxes.[3] This is a high hurdle. If the strictures of Proposition 218 do not apply to initiative measures, then this is a way for the people to tax themselves with only a majority vote. Imagine the residents of a so-called sanctuary city opting to increase their taxes to counter a loss of federal funds.

Given this broader context, it is easy to understand the interest of advocacy groups that are generally hostile to taxes. Apparently the cities are not happy about the Court of Appeal's ruling because they are worried about losing relative control; the cities will have their revenue measures limited by Proposition 218 but initiatives from the voters will not be so limited. And the Chargers, well, they are apparently interested in getting some help from the public in financing a new stadium and a lower threshold for a tax initiative measure would likely be very helpful.[4] That is, it will be easier to get a majority of San Diego residents to back a tax to help the Chargers, but much harder to get a supermajority.

As indicated, I think the text can be mustered to support either position. Furthermore, the legislative history of the ballot measure, such as it is, contains passages supporting both sides. Proposition 218 was certainly about limiting taxes, but also about limiting taxes by making sure that the voters—not just local politicians—get to vote on taxes. Therefore, the case will be decided on the basis of the background principles that the court brings to its analysis and in particular the importance of the power of the initiative.

It should be noted—though it was not by the Court of Appeal—that there is a California Supreme Court decision that is nearly exactly on point and dispositive. In 1978, Proposition 13 added the requirement that the legislature could only increase taxes with a supermajority.[5] The question then arose whether this requirement

also applies to tax increases imposed by the voters. In *Kennedy Wholesale*,[6] the court acknowledged the broad language of that provision could also apply to initiative measures, but held the requirement did *not* apply to initiative measures, at least in significant part because of the background assumption about protecting the power of the initiative.[7] To be sure, this case can be distinguished on the basis of different text, different ballot history and even the difference between state and local taxation. But crafting such a distinction will be difficult. First, a different canon of interpretation imputes to the voters knowledge of the law, which would include *Kennedy Wholesale*. The canon is supposed to put the burden on the party seeking to change the law and thus the absence of any indication that Proposition 218 limits the power of initiative is a problem. Second, if there is an important distinction between state and local level fiscal rules, then this implicates many cases in which the courts have toggled between the two in deciphering California's fiscal constitution.

A final note about political economy. It is an empirical question how significant it would be if the California Supreme Court upheld the Court of Appeal, but there are a few points worth noting.

First, in a world in which the Court of Appeal is affirmed, there will still need to be elections about tax increases (there is an argument made by the appellants that local governments could collude with initiative proponents to get tax increases imposed *without* an election, but this is a red herring because local governments cannot impose taxes without a vote of the electorate). In other states with similar tax limitation measures, such as Missouri,[8] there is often just the requirement that tax increases be subject to a vote. The underlying political intuition seems to be that taxes are so inherently unpopular that forcing voters to focus on them is tantamount to limiting them. Consider what has happened at the state level since *Kennedy Wholesale*. The voters of California have indeed approved tax increases via a majority vote, but they have not done so often.

Second, it is true that upholding the Court of Appeal would create an asymmetry between the powers of the people and the powers of government officials. Leaving aside the possible merits of such an arrangement, it is worth noting that the California Supreme Court has already created a not-dissimilar asymmetry through

its interpretation of Article XIIIC, section 3. As things currently stand, voters can reduce fees by initiative even after the government has gone through all the procedural requirements for imposing the fee that are mandated by Article XIIID, which was also added by Proposition 218.[9]

Third, it is already the case that general-purpose governments, namely cities and counties, can increase taxes with a majority vote.[10] It is also common practice for these governments to ask for non-binding guidance on how to spend the money that they raise from general tax increases.[11] Thus, it is not clear how much this decision would affect cities and counties.

Finally, the power of initiative is specifically authorized for only cities and counties in the California constitution,[12] and so this decision will have no immediate effect upon special districts, including school districts. That said, the power to impose taxes by initiative could be given to the electors of school districts.[13] Suppose that school district electors were so empowered and that tax increase measures could pass with a bare majority instead of a two-thirds supermajority, as is currently the case. But how much would this matter? School districts have had the ability to finance new capital projects through a 55% vote since 2000 (assuming certain conditions are met).[14] All of this is not to say that there would not be a significant impact should the Court of Appeal decision be affirmed—perhaps schools will find it easier to raise taxes for non-capital costs if current law were changed—only that matters should be kept in perspective.

[1] 245 Cal.App.4th 970.

[2] Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) at 250.

[3] Special taxes are defined in Article XIIIC, section 1(d) as "as any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." The two-thirds requirement is found in Article XIIIC, section 2(d).

[4] http://www.dailybulletin.com/general-news/20160721/how-the-fate-of-the-san-diego-chargers-could-hinge-on-uplands-marijuana-battle.

[5] Cal. Const. art. XIIIA, § 3.

[6] Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) at 248-49.

[7] Id. at 253.

[8] Mo. Const. art. X, § 22(a).

[9] Bighorn-Desert View Water Agency v. Verjil (2006).

[10] Cal. Const. art. XIIIA, § 2(b).

[11] Coleman v. County of Santa Clara (1998).

[12] Cal. Const. art. II, § 11.

[13] The electors of school districts can use the power of initiative to impose term limits on board members. See Cal. Educ. Code § 35107(c).

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