Parcel taxes are likely unconstitutional. The legislature should fix that.

Overview

Local governments have increasingly relied on parcel taxes — taxes on property that are assessed independent of a property's value — to generate revenue and avoid longstanding tax reform measures like Proposition 13. The California Supreme Court's recent decision in *California Cannabis Coalition v. City of Upland* lowered the threshold for voters to pass such taxes, so they are likely to increase. Parcel taxes, however, are legally suspect and largely unregulated: statutes barely mention parcel taxes,[1] and almost no judicial decisions or legal scholarship discuss them.[2] The current unregulated parcel tax system is untenable and requires judicial and legislative solutions. Courts should enforce existing constitutional and statutory requirements, and the legislature should create new ones. This article analyzes the development of parcel taxes in California and proposes a legislative framework for them that would make these questionable taxes less susceptible to a constitutional challenge.

Analysis

The legislature developed parcel taxes to mitigate Proposition 13

Parcel taxes are defined by what they are not. Unlike ad valorem taxes, parcel taxes are not based on a property's value. Instead, parcel taxes are based on a characteristic of the parcel itself, like square footage or the number of units.

Parcel taxes are a critical source of revenue for local governments: in 2013 alone, California property owners paid over $1.79 billion in parcel taxes, based on 754 local governments imposing 1,790 parcel taxes.[3]

Parcel taxes emerged as a workaround to Proposition 13's constitutional tax restrictions. In 1978, Proposition 13 capped the property tax rate, restricted value assessments, and required a two-thirds legislative vote to increase state taxes.[4] The year after Proposition 13's enactment, local property tax revenues decreased over 50%.[5]

The legislature responded in 1979 by creating a "special tax" exception to Proposition 13[6] that authorized general law cities, counties, and districts to impose parcel taxes and other special taxes.[7]

Two years later, the legislature extended this authority to park and open space districts.[8]

In 1985, the legislature permitted general law cities to levy special taxes.[9]

Between 1987 and 1990, the legislature similarly enabled school, hospital, library, and park districts to tax parcels.[10]

And in 1991, the legislature passed omnibus legislation authorizing nearly every other special district to impose special taxes.[11]

Today, nearly every government entity below the state level can impose special taxes.

Parcel taxes are constitutionally suspect

Although it is well-settled that special taxes — taxes levied for a specific purpose — are constitutional, the constitutionality of parcel taxes remains unresolved. After Proposition 13, several judicial decisions ruled that parcel taxes were unconstitutional ad valorem taxes. Since the early 2000s, however, courts have upheld parcel taxes without addressing their underlying legality. The

constitutionality of parcel taxes currently rests on a single poorly-reasoned Court of Appeal decision.

In *Heckendorn v. City of San Marino* (1986) — the lone California Supreme Court decision on parcel taxes — the state high court upheld a city's parcel tax for police and fire protection as a special tax.[12] The court reasoned that, although the tax applied different rates to the city's zoning classifications, it applied a flat rate to all parcels *within* each zone, and thus was not an impermissible ad valorem tax.[13]

But two years later, in *City of Oakland v. Digre* (1988), the Court of Appeal invalidated a parcel tax similar to the one upheld in *Heckendorn*.[14] There, the city of Oakland sought to enforce a voter-approved parcel tax that varied depending on a parcel's size and location — a scheme common to many modern parcel taxes. The court ruled that the measure imposed an ad valorem tax and therefore violated the constitutional requirement that all property taxes be assessed based on its fair value.[15] Although the *Digre* court did not invalidate all parcel taxes, it reasoned that the tax at issue was "a tax on property ownership in all its incidents."[16]

In *Thomas v. City of East Palo Alto* (1997), the Court of Appeal went further, holding a parcel tax was "legally indistinguishable" from a traditional ad valorem tax.[17] The tax at issue there imposed a flat fee, depending on the type of parcel.[18] The court reasoned that imposing different rates on different types of property was tantamount to an ad valorem tax.[19] The court concluded that parcel taxes are per se property taxes — suggesting they

could never be passed by less than a constitutionally required two-thirds vote.[20]

But the Court of Appeal reversed course entirely in *Neilson v. City of California City* (2005), holding that "[n]on-ad valorem real property taxes are constitutional."[21] The *Neilson* court briefly (and inaccurately) distinguished *Digre* and *Thomas* on the grounds that they dealt with general, not special taxes.[22] *Neilson*'s reasoningwas superficial. It never distinguished the analysis in *Digre* and *Thomas*. Nor did it provide a framework for assessing whether a parcel tax was an ad valorem tax.

The California Supreme Court has not resolved the conflict between *Digre*, *Thomas*, and *Neilson*. Yet *Neilson* provides the current rule for parcel taxes: local governments may impose taxes on real property if the tax is dedicated to a specific purpose (*i.e.* a "special tax") and two-thirds of local, qualified voters approve the tax.[23] Two Court of Appeal decisions since *Neilson* havediscussed parcel taxes, but neither considered their underlying constitutionality.[24]

It is unclear what drove the reversal from questioning the underlying legality of parcel taxes to presuming their validity. Nevertheless, local governments increasingly propose parcel tax measures and use the revenue to fund traditional government functions.[25] Indeed, the ballot language for more than half of all parcel tax measures proposed since 2001 reveals that their revenue supports essential public services like public safety or medical services.[26]

Many parcel taxes likely violate the constitutional uniformity requirement

Parcel taxes that tax properties at different rates may violate Article XIII, section

1 of the state constitution, which requires property be “assessed” at the same percentage of either fair market value or some other “value standard.” [27] The uniformity requirement applies to special taxes, even though special taxes are technically “impose[d],” not “assessed,” because the terms “assessed” and “imposed” are not materially different. In fact, the definition of “assessment” includes “imposition.”[28]

Uniformity does not require all taxpayers to pay the same amount because, if it did, “no property or parcel tax could ever be valid.”[29] Even “the most earnest attempt at uniformity could not have a uniform effect.”[30] For example, in *Dondlinger v. Los Angeles*, a taxpayer challenged a parcel tax of 1.5 cents per square foot on all developed property, arguing it was not “applied uniformly to all taxpayers.”[31] The Court of Appeal upheld the tax, concluding that uniformity only requires “uniform application.”[32] A tax can require all taxpayers to pay the same rate, even if the final dollar amount varies.

Yet many non-charter city, county, and special district parcel taxes likely violate the uniformity clause. Only about half of city parcel measures enacted between 2003 and 2012 applied uniform tax rates to all properties.[33] Measures without a uniform rate often used a flat rate for residential parcels or dwelling units and applied different rates to non-residential properties.[34] For example, one tax applied 17 different rates depending on parcel use, ranging from $20.24 to $629 per year, per parcel.[35]

The statutes that allow local governments to impose various rates on different types of properties may also be unconstitutional. For example, the 1981 enabling legislation for regional park and open space districts authorized districts to establish different zones and decide the tax rate for each zone. The

tax rate within each zone must be uniform to be constitutional.[36] Nevertheless, the East Bay Regional Park District (in Alameda and Contra Costa counties) imposes a wide range of taxes within its zones.

And some parcel taxes local governments use to fund specific services similarly violate the uniformity requirement. For example, the legislature has enabled local agencies to impose a parcel tax to provide fire and police services.[37] But the legislature impermissibly authorized local agencies to "establish zones" in which the tax imposed may vary by parcel.[38] This could violate the requirement for uniformity and assessing a tax on property at the same percentage. While a parcel tax does not impose a tax based on value, it uses other criteria, such as ownership or lot size, as a proxy for the "full value."[39]

Upland **probably applies to parcel taxes and special districts**

A recent California Supreme Court decision will make it easier for voters to pass constitutionally-suspect parcel taxes.

In *California Cannabis Coalition v. City of Upland*, the California Supreme Court ruled that voter-proposed initiatives were not "imposed by any local government" and thus not subject to the same constitutional restraints as other initiatives. As Professor Darien Shanske argues, *Upland*'s reasoning suggests that voters could impose parcel taxes via ballot initiative with only a bare majority instead of a two-thirds vote. The Court of Appeal will likely uphold parcel taxes approved at the lower threshold.

Five pending cases show courts are applying *Upland* inconsistently. In San

Francisco, the Superior Court recently upheld two voter initiatives (confusingly both labeled Proposition C) that explicitly required only a simple majority vote.[40]

But in Oakland and Fresno, the Superior Court struck down two initiative tax measures that received more than a simple majority but less than a two-thirds vote.[41] And backers of a March 2020 tax measure in San Diego that fell short of the two-thirds vote requirement are debating whether to make an *Upland* argument in the courts.[42]

A case about the validity of a San Francisco Unified School District initiative measure will test whether *Upland* applies to special districts.[43]

Upland will likely extend to special districts.

The constitutional provision interpreted in *Upland* (which applied to general law cities) is nearly identical Government Code section 53722, which governs special districts. [44] Both provisions require a two-thirds vote to approve special taxes. And special district voters probably also have the initiative power.[45]

Given the state high court's broad interpretation of the initiative power and its reasoning in *Upland*, the Court of Appeal will likely uphold a simple-majority voting threshold for taxes and extend it to special districts.

Upland **will probably increase the number of parcel taxes**

Because the Court of Appeal will probably uphold the lower threshold for voter-proposed parcel taxes in cities, counties, and special districts, taxpayers should brace for an increase in such taxes. Historical election results support this conclusion. In the November 2018 election, most unsuccessful parcel tax measures received more than 50% voter approval but fell short of two-thirds; a substantial number received more than 60%.[46]

This means that while these taxes fail under a two-thirds voting rule, they

would pass under a majority rule. This result is consistent with historical election results. If the two-thirds requirement were reduced to 55%, one study estimated that the approval rate of local parcel tax measures for school districts would increase by 29%.[47]

After California voters approved Proposition 39 in November 2000, which lowered the two-thirds voter approval requirement for school construction bonds to 55%,[48] the number of measures both introduced and approved increased.[49] The natural consequence of the *Upland* lowering the threshold for voters to pass local taxes will be more taxes.

Additional fiscal pressures are likely to increase the number of parcel taxes. The Legislative Analyst's Office determined parcel taxes to be an "integral part" of local government finances and found that the number of proposed parcel taxes has increased in the last 20 years.[50]

California cities are increasingly reaching their maximum local sales tax rate.[51] Consequently, local governments will be forced to rely on parcel taxes to generate revenue.

Parcel taxes are also likely to increase because previous initiatives and court decisions have severely limited local governments' abilities to charge fees and assessments. Proposition 218, adopted November 1996, restricted local government power to collect fees and charges. In 2010, the California Supreme Court barred a county open space district from imposing an assessment on all properties within its district for conservation acquisition.[52] Also in 2010, California voters approved Proposition 26, a constitutional initiative to further restrict government taxation by defining any "levy, charge, or exaction of any kind" as a tax unless it meets one of seven exceptions. This "recast many fee programs as tax increases."[53]

Combined, these restrictions may force local governments to seek funds from voter-approved parcel taxes.

Parcel taxes are probably municipal affairs

Because parcel taxes are almost certainty a municipal affair, any legislation regulating parcel taxes would apply only to general law cities, not charter cities. Under the state constitution, charter cities may “make and enforce all ordinances and regulations in respect to municipal affairs.”[54] This includes “the power to tax for local purposes.”[55] Although the municipal affairs doctrine is a muddled area of law that does not receive full attention,[56] the California Supreme Court “rules for the city in nearly every case that concerns local finance, especially taxes.”[57]

The legislature cannot preempt charter cities’ parcel taxes because no legislative scheme fully occupies the field and state regulation is not a “paramount state concern.” Unlike the sales tax and income tax — which the state has preempted — California does not have a direct revenue-raising interest in parcel taxes.[58] Nor does California impose a single statewide parcel tax. Voters overwhelmingly rejected the state’s sole effort at parcel taxes in November 2006 when they voted down Proposition 88, which proposed a $50 parcel tax on “most parcels” of real property in the state to fund education.[59] And parcel taxes are not traditionally regulated by a central state or federal authority.[60] Consequently, the legislature cannot regulate parcel taxes in charter cities.

The legislature should enact comprehensive regulation

Even if charter city parcel taxes are a municipal affair, the legislature can regulate the majority of parcel taxes, because only 121 of California’s 458 cities have charters.[61] The parcel tax system (to the extent it has any foundation) is based on statutory authority. The legislature can still regulate parcel taxes in general law cities, counties, and special districts.

To do so, the legislature should emulate the Bradley–Burns Uniform Local Sales and Use Act. In 1953, that law created an "integrated, uniform system of city and county sales and use taxation" to ensure uniformity between local and state sales taxes and prevent chaos between overlapping taxing jurisdictions.[62] Bradley–Burns fixed the sales tax rate and mandated certain exemptions.[63] It also imposed conditions before local governments could enact tax ordinances and required local cooperation with state tax collection.[64]

Parcel taxes need similar regulation. The only comprehensive study of parcel taxes across the state found "no common standards, practices, or equalization" across parcel taxes.[65] Parcel taxes today resemble sales taxes before the Bradley–Burns sales tax reform: as sales taxes formerly were, parcel taxes now are concentrated in metropolitan areas.[66] Also like pre-Bradley–Burns sales taxes, parcel taxes vary widely by area and subject. And the absence of uniformity and set standards for local sales taxes fostered diverse exemptions, imposed duplicate taxation on single sales, and created issues with competitive advantage.[67] That precisely describes parcel taxes today, which calls for a similar solution.

Currently, more than 55 state statutes grant local governments the ability to enact parcel taxes.[68] These statutes provide inconsistent authority and allow varied local entities to impose different structures for different purposes. The constitution demands uniform standards. This confused taxing landscape, and the constitutional uniformity mandate, call for reform.

Conclusion

This area of the law needs a policy-level rewrite, not a piecemeal adjustment through litigation. Unregulated parcel taxes have quietly grown into a major local revenue source, but the absence of clear legal authority for these taxes means that many local governments are potentially imposing unconstitutional taxes. And *Upland* will likely lead to even more of these questionable taxes. Strict procedural rules make challenging parcel taxes difficult, which results in few challenges.[69]

The courts and the legislature should clarify the law on parcel taxes. Only those principals can provide the fundamental review of previous judicial decisions and taxation codes that is needed to provide guidance to local governments and their taxpayers.

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[1] See, e.g., Gov. Code § 54930, subd. (b) (describing parcel taxes in a manner identical to ad valorem taxes). In 2018, a resolution in the Senate to introduce a legislative constitutional amendment to lower the voter threshold for school district parcel taxes to 55% included amending Article XIII of the Constitution to read "'parcel tax' means a special tax imposed upon a parcel of real property at a rate that is determined without regard to that property's value.'" See Sen. Const. Amend. 22 (2017–2018 Reg. Sess.), at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SCA22.

[2] Only one Attorney General's opinion available on Westlaw references parcel taxes; its analysis focuses on whether the public may access a taxpayer's request to be exempt from a tax under a senior citizen exemption. See 81

Ops.Cal.Atty.Gen. 383
(1998).

[3] California Tax Foundation, Piecing
Together California's Parcel Taxes (2014) at 2. The
state does not collect this information itself. In 2012, the Legislative
Analyst's office concluded it was "unable to locate information on the
statewide amount of parcel tax revenue collected by cities, counties, and
special districts." See Legis. Analyst's Office, Understanding
California's Property Taxes (Nov. 29, 2012).

[4]
Ballot Pamp., Primary Elec.
(June 6, 1978) Legislative Analyst's Summary of Prop. 13, at 56.

[5] Cal. Legis.
Analyst's Office, An Analysis of the Effect of Proposition 13 on Local Governments
6–10 (Oct. 1979).

[6]
Gov. Code § 50075. See *Cal. Bldg. Industry Assn. v. Gov. Bd.* (1988)
at 223 ("[f]ollowing voter approval of article XIII A, the Legislature moved
promptly to provide such statutory authority").

[7]
See *Cal. Bldg. Industry Assn.*, *supra* note
6, at 224, 227–28 ("[T]he
history of this state, with respect to taxation by local governing bodies, is
that each such tax must be authorized by a specific general law."); see also *Hughes v. Ewing* (1892) 93 Cal. 414 at
418. See Cal. Const., art. XI, § 5. Charter cities did not require
legislative action because their taxing power is derived from the state
constitution. See *Cal.*
Fed. Savings & Loan Assn. v. City of Los Angeles (1991); *Weekes*
v. City of Oakland (1978) at 392 ("the power to tax for local purposes
clearly is one of the privileges accorded charter cities by the home rule

provision of the California Constitution").

[8]
Pub. Resources Code § 5566.

[9]
Gov. Code § 37100.5.

[10]
Gov. Code § 50079, subds. (a)
and (b); Gov. Code § 53717; Gov. Code § 53730.01; Pub. Resources Code § 5789.1 (formerly § 5784.39, repealed by Stats. 2001, ch. 15, section 16, p. 37). Local park and recreation districts, among many other local agencies, may also impose parcel taxes under the Mello-Roos Community Facilities Act of 1982 (Gov. Code § 53311).

[11]
Sen. Bill No. 158 (1991–1992
Reg. Sess.). See also *Borikas v. Alameda Unified School Dist.* (2013) at 162 (explaining how "the purpose
of the comprehensive bill was to 'complete[] the job by allowing nearly all special districts to ask their voters if they want to tax themselves'").

[12]
Heckendorn v. City of San Marino (1986) at 483–84.

[13]
Id. at 484–85.

[14]
Oakland v. Digre (1988) at 102.

[15]
Id. at 109–10.

[16]
Id. at 103, 106.

[17]
Thomas v. City of East Palo Alto (1997) at 1086–88, 1092.

[18]
Ibid.

[19]
Id. at 1092.

[20]
Id. at 1087.

[21]
Neilson v. City of California City
(2005) at 460; see also *id.* at 456 ("[T]he California Constitution does not prohibit a tax on the mere ownership of real property if the tax is a special tax and not an ad valorem tax.").

[22]
Id. at 461.

[23]
Neilson, *supra* note 21, at 461.

[24]
Borikas,
supra note 11; *Dondlinger v. Los Angeles County Regional Park & Open Space Dist.* (2019).

[25] Legis. Analyst's Office, A
Look at Voter-Approval Requirements for Local Taxes
(Mar. 20, 2014).

[26]
Michael Coleman, *An Overview of Local Revenue Measures in California Since 2001*, California City Finance (Jan. 2017) at 6.

[27]
See Cal. Const. of 1849, art. XI, § 13 (“taxation shall be equal and uniform throughout the state”).

[28]
Black’s Law. Dict. (10th. ed. 2014).

[29]
Dondlinger,
supra note 24, at 1000.

[30]
Ibid.

[31]
Id. at 998; Pub. Resources Code § 5566.

[32]
Dondlinger, *supra* note 24, at 998.

[33] Jon Sonstelie, *California’s Parcel Tax*, Lincoln Institute of Land Policy (2014) at 12.

[34]
Id. at 13.

[35]
Ibid.

[36]
Pub. Resources Code § 5566.

[37]
Gov. Code § 53978, subd. (a).

[38]
Id. at subds. (a)–(c).

[39]
Cal. Const., Art. XIII, § 1, subd. (a).

[40] Dominic Fracassa,*Judge Says SF Correct in Passing Two Tax Measures on Simple Majority Vote*, S.F. Chronicle (July 5, 2019).

[41]
Angela Ruggiero, *Oakland Loses Measure AA Lawsuit, Judge Calls it a "Fraud on Voters"*, Mercury News (Oct. 15, 2019); *Results of Measure P Stand, Fresno Co., Superior Court Says*, ABC News (Sept. 6, 2019).

[42]
Lisa Halverstadt, *Hotel-Tax Backers Are Weighing Plan C: The Courts*, Voice of San Diego (Mar. 4, 2020).

[43]
Robert P. Merten III and Richard E. Nielsen, *The 5 Supermajority Tax Challenges Facing Calif.*, Law360 (July 22, 2019).

[44]
Gov. Code § 53722; see also Carrillo & Shanske, *California Constitutional Law: Interpreting Restrictions of the Initiative Power* (2017) 51 U.C. Davis L. Rev. Online 65, at 74, fn. 43.

[45]
Multiple statutes and constitutional provisions suggest special districts have initiative power. Election Code § 9300 et seq., for example, authorizes citizens of special districts to use the initiative to propose ordinances. Proposition 218 broadly expanded the constitutional right to vote on local taxes and significantly expanded the local initiative power. The state

constitution arguably provides school districts with a limited form of home rule, which could permit use of the initiative. If school districts, which serve fewer citizens than many special districts, have initiative power, then special districts should also.

[46]
See Michael Coleman, *Local Revenue Measure Results November 2018*, California City Finance (Dec. 15, 2018), at 13 (showing that of 19 parcel taxes that failed, 14 received more than 50% of the vote, and 7 received more than 60% of the vote).

[47] McGhee & Weston, *Parcel Taxes for Education in California*, Public Policy Institute of California (Sept. 2013).

[48]
Cal. Const. Art. XIII A, § (1)(b)(3); Cal. Educ. Code § 15268.

[49] Lopes & Ugo, *Bonds for K-12 School Facilities in California*, Public Policy Institute of California (May 2017) (as of November 5, 2018).

[50]
Legis. Analyst's Office, *supra* note 3.

[51]
Sales and Use Rate Taxes, Cal. Dept. of Tax and Fee Admin.; see also Local Revenue Measure Results November 2018, CaliforniaCityFinance.com, at 26.

[52]
McCarthy, *Silicon Valley Taxpayers Association: Local Voters, State Propositions, and the Fate of Property Assessments* (2009) 97 Calif. L. Rev. 1899, 1907.

[53]
Richard Frank, *Proposition 26: California's Stealth Initiative*, Berkeley Law (Oct. 29, 2010).

[54]
Cal. Const., art XI, § 5.

[55]
City and County of San Francisco v. UC Regents (2019).

[56]
"Taxation is one of the problems most difficult of resolution because of the numerous conflicting interests between the chartered cities and the state." Sho Sato, *Municipal Affairs in California* (1972) 60 Calif. L. Rev. 1055. See also California Constitution Center, *Municipal Taxation is Now Interesting*, SCOCABlog (June 28, 2019) (explaining how municipal affairs is a "doctrinal area that's been characterized by opacity and inconsistency since 1879").

[57] SCOCABlog, *supra* note 56.

[58] Michael Coleman and Michael G. Colantuono, *The Origin & Devolution of Local Revenue Authority*, Western City (June 2003).

[59]
Ballot Pamp., Gen. Elec. (Nov. 9, 2006) text of Prop. 88.

[60]
Cal. Fed., *supra* note 7 ; see also SCOCABlog, *supra* note 56.

[61]
League of California Cities, Learn About Cities (as of July 1, 2011).

[62]

Geiger v. Bd. of Supervisors of Butte County (1957) at 837; see also Cal. Senate Fact Finding Committee on Revenue and Taxation, *A Study Of The Feasibility Of Increasing State And Local Government Revenues From Selected Taxes*, at p. 33 (1963); Sho Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce* (1964) 53 Calif. L. Rev. 801, 816–17.

[63] See *Century Plaza Hotel Co. v. City of Los Angeles* (1970) at 625; see also *Rivera v. City of Fresno* (1971) at 136.

[64] *Santa Clara County Local Transportation Authority v. Guardino* (1995) at 249 (referencing Rev. & Tax. Code § 7200 et seq.).

[65] California's Parcel Taxes, *supra* note 3, at 2.

[66] *Ibid.*

[67] *Ibid.*

[68] California's Parcel Taxes, *supra* note 3, at Appendix 1, 1–4.

[69] To challenge a parcel tax, a taxpayer must file a reverse validation action within 60 days of passage of a measure. Gov. Code § 50077.5. The public is

"forever barred from contesting the validity of an agency's action" to validate a tax if a challenge is not brought within the 60-day window. *Golden Gate Hill Development Co. Inc. v. County of Alameda* (2015).