

**Tax Limitation and the California Supreme Court:  
Just Because You're Paranoid, Doesn't Mean They're Not Really After You.**

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This past summer, the California Supreme Court decided *California Cannabis Coalition v. City of Upland*.<sup>1</sup> The facts are straight forward: A local citizens' group proposed an initiative to permit the operation of medical marijuana dispensaries within the City and required each dispensary to pay the city an "annual Licensing and Inspection fee" in the amount of \$75,000.<sup>2</sup> Having submitted sufficient signatures, the City was obligated by State statute to "(1) adopt the initiative without alteration; (2) immediately order a special election; or (3) order an agency report and, once the report was presented, adopt the initiative or order a special election."<sup>3</sup> The City ordered an agency report which concluded that the \$75,000 fee was actually a tax because it substantially exceeded their estimated costs for issuance of licenses and conducting annual inspections.<sup>4</sup> Consequently, the City ordered the initiative placed on the *general election ballot*, as all proposals to "impose, extend, or increase any general tax" were required, pursuant to art. XIII C, section 2(b) of the California Constitution.<sup>5</sup>

Initiative proponents filed suit challenging the City's decision to place the matter on the general election ballot. The Superior Court determined the measure was a tax and sustained the City's decision. The Court of Appeal reversed, holding "that article XIII C, section 2 only governs levies that are imposed by local government and, therefore it does not apply to the voter initiative at issue here."<sup>6</sup>

The Supreme Court's opinion sustaining the decision of the Court of Appeal is an interesting study. On the one hand, the facts present a narrow issue: was the City within its authority to declare the voter initiative's proposed charge a "tax" and by that decision place the matter on the general election ballot as required by article XIII C, section 2(b), notwithstanding the requirement of a special election under Election Code section 9214? On the other hand, the Court itself asks a much broader question: "The question before us is whether article XIII C also restricts the ability of *voters* to impose taxes via initiative."<sup>7</sup> (Emphasis in original.) Indeed, the Court answers its own question more broadly than

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<sup>1</sup> *California Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 401 P.3d 49, 222 Cal.Rptr. 3d 210.

<sup>2</sup> *Id.* at p. 931.

<sup>3</sup> *Id.* citing Cal. Elections Code § 9214, repealed Stats. 2017, ch. 748 (Assem. Bill No. 765).

<sup>4</sup> *Id.* p. 931-932.

<sup>5</sup> Article XIII C, Section 2(b) provides: "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."

<sup>6</sup> *City of Upland, supra*, at p. 932.

<sup>7</sup> *City of Upland, supra*, at p. 930.

necessary to dispose of the matter: “[W]e agree with the Court of Appeal that article XIII C does not limit voters’ power to raise taxes by statutory initiative.”<sup>8</sup>

One might be inclined to say that the implications of the Court’s opinion are somewhat of a voter initiative / taxpayer Rorschach test. I see it more as the Darkside Cave on the planet Dagobah. A cold, dark, musty cave where Luke Skywalker is drawn by instinct to face the dark side of the Force. “What’s in there?” Luke asks of Master Yoda, who replies, “Only what you take with you.”

## I. What You Take With You

The majority opinion begins and ends with an allegory of Homer’s Ulysses and his confrontation with the irresistible temptation of the Sirens’ song. As you may recall, in Greek mythology, Sirens were mythical creatures who lured sailors with irresistible music and song causing them to steer their vessels toward the sounds only to be crushed among the rocks on the shore. To avoid this fate, Ulysses ordered his crew to plug their ears with beeswax and tie him to the mast of the ship, so that while he could experience their song, he and his crew would be protected from its lure. Like every sailor before him, Ulysses could not resist the temptation of the Sirens’ song and begged his crew to be untied so that he could steer towards the sound notwithstanding it was to his doom and that of his crew. Keeping with his prior direction, his crew ignored his pleas and their ship sailed safely past the danger of the Sirens.

The Court presents the myth as an allegory for whether the voters made clear their intent to limit their own power of initiative under Art. XIII C.

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. The electorate made no such clear choice to tie itself to the mast here.<sup>9</sup>

It is an odd analogy. Ulysses uses the ropes (here analogized as a limitation on the initiative power) as the means to save himself and his crew from the Sirens’ irresistible temptation. Rather than recognize that the voters had Ulysses’ foresight to protect themselves from the disaster awaiting the Sirens’ song of over-taxation, the Court makes more difficult their task by suggesting a new heightened standard of review when scrutinizing limitations on the “unadulterated” initiative power.<sup>10</sup> In essence, the Court makes more difficult Ulysses’ effort to protect himself and his crew from the Sirens’ song and avoid the certainty of his own demise.

What I suspect more likely, is that the allegory is simply the Court’s attempt to rephrase what Justice Mosk said about the two-thirds vote more than thirty years ago: it is

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<sup>8</sup> *Id.* at p. 931 citing *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Ca.3d 245, 251 as “[reaching the same conclusion with regard to art. XIII A of the state Const.]”

<sup>9</sup> *City of Upland, supra*, p. 931.

<sup>10</sup> *City of Upland, supra*, p. 931. “Without a direct reference in the text of a provision – or a similar clear, unambiguous indication that it was within the ambit of a provision’s purpose to constrain the people’s initiative power – we will not construe a provision as imposing such a limitation. (See *Kennedy Wholesale*, at p. 252.)”

“fundamentally undemocratic.”<sup>11</sup> In this view, narrowly construing any limits placed even by voters on their own power of initiative is not perceived as protecting them from an external threat, but a means the Court employs to protect voters from themselves.

Though Luke was unaware when he entered the Darkside Cave that he carried with him the heritage of Darth Vader, taxpayers know well the heritage of the Supreme Court’s interpretation of taxpayer initiatives attempting to limit the power of taxation. It is a heritage that reflects repeated struggles by taxpayers to use words of sufficient clarity to survive scrutiny of some of the best legal minds in the country, seemingly committed to impede their every effort to protect themselves from the Sirens’ song of over-taxation.

## II. The Progenitors

### A. Proposition 13

In 1978, California voters overwhelmingly approved Proposition 13, which enacted an “interlocking package” of constitutional provisions designed to assure effective real property tax relief.<sup>12</sup> New Article XIII A contained four elements: (1) a limitation on the rate of property tax; (2) a restrictions on increases in assessed value and reassessments of real property; (3) a required two-thirds vote for “any changes in state taxes enacted for the purpose of increasing revenues”; and (4) empowering Cities and Counties to raise “special taxes” by a two-thirds vote of the people.

What began with a more liberal construction for ambiguities,

Acknowledging as we must that article XIII A in a number of particulars is imprecise and ambiguous, nonetheless we do not conclude that it is so vague as to be unenforceable. Rather, in the usual manner, the various uncertainties and ambiguities may be clarified or resolved in accordance with several other generally accepted rules of construction used in interpreting similar enactments. Thus, California courts have held that *constitutional and other enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people.* (Emphasis added.)<sup>13</sup>

quickly turned narrow in regard to limitations on the power to tax.

In view of the fundamentally undemocratic nature of the requirement for an extraordinary majority and the matters discussed above, *the language of section 4 must be strictly construed and ambiguities resolved in favor of permitting voters of cities, counties and "special districts" to enact "special taxes" by a majority rather than a two-thirds vote.*<sup>14</sup> (Emphasis added.)

As enacted by Prop. 13, the limitation on local government taxing power provided:

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<sup>11</sup> *Los Angeles Transportation Commission v. Richmond* (1982) 31 Cal.3d 197, 205.

<sup>12</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231; *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 872.

<sup>13</sup> *Amador, supra*, at p. 245.

<sup>14</sup> *Richmond, supra*, at p. 205.

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.

The first ambiguity to receive special attention was what constituted a “special district.” In *Los Angeles County Transportation Com. v. Richmond*,<sup>15</sup> a divided Supreme Court found that “special district” in Art. XIII A, Sec. 4, meant only those districts that had the power to impose property taxes.<sup>16</sup> The consequence of this decision was predicted by Justice Richardson in his dissent; “[w]hat the majority opinion really tells us is that the constitutional restrictions of article XIII A, section 4, can be readily and completely avoided by the simple creation of a district which is geographically precisely coterminous with a county, but which lacks its real property taxing power.”<sup>17</sup> Indeed, the dissent was prescient as recognized by the Court when it ultimately reversed itself in *Rider v. County of San Diego*.<sup>18</sup>

The term “special tax” was construed by the Supreme Court the very same year in *City and County of San Francisco v. Farrell*<sup>19</sup> to mean “taxes which are levied for a special purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes.”<sup>20</sup> Again, this narrow construction was noted by dissenting Justice Richardson as at odds with the “interlocking” role of the two-thirds vote limitation and more likely intended to mean *all new taxes* imposed after Prop. 13.<sup>21</sup> Because at the time only “special taxes” necessitated a public vote at all, *Farrell* had the immediate impact of removing taxes imposed for general government purposes from a public vote entirely.

## B. Proposition 62

Proposition 62, followed Proposition 13 in 1986 to “close by legislation what [proponents] perceived were court-made ‘loopholes’ in Proposition 13.”<sup>22</sup> The measure clarified several provisions in light of both *Richmond* and *Farrell*, and while embracing the Court’s interpretation of ‘special taxes’, required general taxes (those used for general government)

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<sup>15</sup> *Infra, fn. 11.*

<sup>16</sup> “Since only those ‘special districts’ which levied property taxes could ‘replace the ‘loss’ of such taxes, these statements imply that the ‘special districts’ referred to are those which are authorized to levy a property tax.” *Richmond, supra*, at p. 206.

<sup>17</sup> *Richmond, supra*, at p. 213 (dis. Op. of Richardson, J.)

<sup>18</sup> (1991) 1 Cal.4th 1.

<sup>19</sup> (1982) 32 Cal. 3d 47.

<sup>20</sup> *Id.* at p. 57.

<sup>21</sup> *Richmond, supra*, at p. 217, (dis. Op. of Richardson, J.) “Although I do not consider it necessary to so conclude for the purposes of this action, it is arguable under the taxing scheme embodied in article XIII A, that ‘special taxes’ are now the only new or increased taxes which cities, counties and special districts are empowered to impose to replace lost real property tax revenues. There is no provision for the adoption of other, ‘nonspecial’ taxes by a lesser majority; and we cannot assume that the drafters or adopters of the amendment sought to emasculate local government by not only requiring approval of any such ‘replacement’ taxes by a two-thirds majority of the electorate, but also restricting the nature of such permissible taxes to some undefined, narrow category.”

<sup>22</sup> *Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 235.

to be submitted to the voters for approval by a majority vote.<sup>23</sup> However, as a statutory initiative, Proposition 62 was challenged as unconstitutional.<sup>24</sup> Though eventually vindicated,<sup>25</sup> arguably was limited in application to general law cities.<sup>26</sup>

### C. Specials Assessments

In *Knox v. City of Orland*,<sup>27</sup> the Court took up the question of whether the formation of a special district and its imposition of a special *assessment*, a charge imposed on property “particularly and directly benefited” by local improvements, constituted a “special tax” under Art. XIII A, section 4. The Court, finding that Prop. 13 was not intended to limit “traditional benefit assessments”<sup>28</sup> upheld the imposition of a flat \$24 per dwelling unit assessment based merely on the District’s determination that the fee reflected a reasonable measure of special benefit to the parcel.

### D. Proposition 218

In 1996, the voters responded again, this time with a constitutional amendment; “The Right to Vote on Taxes Act” (Proposition 218), which added articles XIII C and XIII D to the California Constitution. Prop. 218 solidified the requirement that all local increases be approved by voters (general taxes requiring a majority vote and special taxes requiring a two-thirds); defined the nature and manner of imposing ‘special assessments’ on real property; as well as the permitted uses of fees and other charges on real property or as incidents of property ownership.<sup>29</sup> Prop. 218 “was enacted to plug this loophole in Proposition 13 and to stop this rampant abuse of special assessments.”<sup>30</sup> As the progeny of Prop. 13, Prop. 218 has been construed in that context.<sup>31</sup>

### E. Taxes vs. Fees.

In 1997, in *Sinclair Paint v. State Board of Equalization*,<sup>32</sup> the Supreme Court took up the question of whether the Legislature, by simple majority vote, could impose “fees” on manufacturers or other persons contributing to environmental lead contamination to fund the evaluation, screening, and medically necessary follow-up services for children deemed potential victims of lead poisoning. The Court found that “*the police power* is broad enough to include mandatory remedial measures *to mitigate the past, present, or future adverse*

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<sup>23</sup> Proposition 62 added Chapter 4 of Part 1 of Div. 2 of Title 5 of the Government Code, Sections 53720 - 53730, et. seq. Section 53723 required a majority vote of the people to approve a ‘general tax.’

<sup>24</sup> See *City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623; *City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058.

<sup>25</sup> See *Santa Clara County Transportation Authority v. Guardino*, *supra*.

<sup>26</sup> *Id.* at p. 261. The question was never quite resolved. See *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 390-391. “Although Proposition 62 defined the term ‘local government’ to include a chartered city, doubt existed as to whether the provisions of Proposition 62 applied to charter cities ... In 1995, the California Supreme Court rejected various arguments that Proposition 62 was unconstitutional but found it unnecessary to determine whether its voter approval provisions (discussed, ante) applied to charter cities.” Citing *Guardino*, *supra*, at p. 260-261.

<sup>27</sup> (1992) 4 Cal.4th 132.

<sup>28</sup> *Id.* at p. 141

<sup>29</sup> See *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679.

<sup>30</sup> *Id.* at p. 686.

<sup>31</sup> *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 838-839.

<sup>32</sup> (1997) 15 Cal.4th 866.

*impact of the fee payer's operations*, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects.”<sup>33</sup> (Emphasis added.) The breadth of this language suggested an entirely new path for raising government revenue, defining the source of payment as producing or contributing a negative externality and the program to be funded aimed at addressing that negative externality. Indeed, taxpayers had identified to the Legislature any number of proposed assessments that might avoid the two-thirds vote requirement under the Court’s “adverse impact” definition of “fees.”<sup>34</sup>

#### **F. Proposition 37**

The “Two-Thirds Vote Preservation Act of 2000” was the first effort to address *Sinclair Paint* and could be best described as surgical: it amended articles XIII A, section 4, and XIII C, section 1, to provide that “compulsory fees enacted ... to monitor, study or mitigate the societal or economic effects of an activity, and which imposes no significant regulatory obligation on the fee payor’s activity other than payment of the fee... shall be deemed general or special taxes subject to the majority or two-thirds vote requirements...”<sup>35</sup> Labeled “The Polluter Protection Act” by opponents, Proposition 37 failed at the ballot, 47.9% to 52.1%.

#### **G. Revisiting the Legislative two-thirds Vote.**

In the mid-2000s, faced with unprecedented budget deficits, the Legislature began exploring the boundaries of Article XIII A, Section 3’s two-thirds vote requirement. As enacted by Prop. 13, section 3 provided that “any changes in state taxes enacted for the purpose of increasing revenues collected pursuant thereto, whether by increased rates or changes in the method of computation must be imposed ... by not less than two-thirds [vote]...” Legislative Counsel had long ago opined that the language did not implicate revenue neutral bills.<sup>36</sup> As most bills fitting that category were not controversial, the opinion was never the subject of judicial review. That changed in 2008 with the passage of SBX1 11<sup>37</sup> and ABX1 2.<sup>38</sup> SBX1 11, proposed new “fees” on the sale of gasoline and diesel fuel (raising approximately \$6.9 billion). ABX1 2, imposed a new “oil severance tax”, a surtax on personal income, an increase in the sales tax, while eliminating the existing excise and sales taxes on fuel. While ABX1 2 was arguably “revenue neutral”, when combined with SBX1 11, the proposals raised billions of dollars in new state revenues. Passage of the measures prompted members of the Republican minority, along with the Howard Jarvis Taxpayers Association to file suit. Though the suit was ultimately abandoned in light of the Governor’s veto, the impression that revenue neutral tax shifting would be a new front facing Prop. 13 and its progeny, was indelible.

#### **H. Proposition 26**

Ten years after the failure of Prop. 37, the voters responded to a revised measure in Proposition 26 by passing it, 52.5% to 47.5%. “California voters approved Proposition 26 in 2010 to close the perceived loopholes in Propositions 13 and 218 that had allowed “a proliferation of regulatory fees imposed by the state without a two-thirds vote of the

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<sup>33</sup> *Id.* at p. 877-878.

<sup>34</sup> See <http://arev.assembly.ca.gov/sites/arev.assembly.ca.gov/files/hearings/Attachment%20A.pdf>

<sup>35</sup> Proposition 37, The Two-Thirds Vote Preservation Act of 2000, Gen. Elec. (Nov. 7, 2000).

<sup>36</sup> Ops. Cal. Legis. Counsel No. 10846 (May 21, 1981) Tax Legislation: Vote Requirement.

<sup>37</sup> Sen. Bill No. 11 (2009-2010 1st Ex. Sess.).

<sup>38</sup> Assem. Bill No. 2 (2009-2010 1st Ex. Sess.).

Legislature or imposed by local governments without the voters' approval.”<sup>39</sup> “Taken together, Propositions 13, 218, and 26 create a classification system for revenue-generating measures promulgated by local government entities. Any such measure is presumptively a tax.”<sup>40</sup> Proposition 26 did three things: (1) it addressed the tax/fee debate by defining “tax” broadly for purposes of both article XIII A, section 3, and article XIII C, as “any levy, charge, or exaction, of any kind except...” with limited, defined exceptions; (2) it addressed the revenue neutral tax shift argument by revising Article XIII A, section 3, to provide that “[a]ny change in state statute which results in any taxpayer paying a higher tax must be imposed ...” by a two-thirds vote in both houses; and (3) it clarified that the burden of proof was placed on government to establish that a challenged imposition was not a tax, that it did not exceed the reasonable costs of paying for the government activity, and that the costs allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the activity funded.

### **I. Levy, Charge or Exaction of *Any Kind***

Not long after Prop. 26’s “presumptively a tax” construct was approved by voters, the Court of Appeal for the Second District, was asked to consider whether a County ordinance imposing a 10 cent per paper bag charge constituted a “tax.” However, instead of directly receiving the remittances from the charge itself, the County imposed conditions under which the proceeds of the bag fee would be retained and used by retailers—but only for purposes specified by the County. Notwithstanding that the ordinance effectuated every goal of taxation and expenditure, the Court concluded that “California Constitution, article XIII C, section 1, subdivision (e) is limited to charges payable to, or for the benefit of, a local government.”<sup>41</sup> In other words, a required charge in conjunction with required terms of expenditure of the proceeds therefrom was not a “levy, charge, or exaction of *any kind*” in the eyes of the Court.

Understanding what you bring with you when reading *City of Upland* helps bring into focus the context in which the opinion is read. Or as Justice Holmes famously noted, “a page of history is worth a volume of logic.”<sup>42</sup> From a taxpayer’s perspective, the history of the Court’s treatment of Propositions 13, 62, 218, and 26, specifically in regard to limitations on the power to tax, play an important role in our understanding of what the Court is trying to express in *City of Upland*.

### **III. Reading the City of Upland Signs**

#### **A. The Court Speeds Through All the Exits**

*City of Upland* could have ostensibly been a rather mundane case. For one thing, the controversy was moot. After granting the City’s petition for review in June of 2016, the matter came before the electorate on November 8, 2016, and the voters soundly rejected it.<sup>43</sup> The Court did not hold oral argument until May of 2017 and issued their opinion on August 28, 2017.

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<sup>39</sup> *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326.

<sup>40</sup> *San Buenaventura v. United Water Conservation Dist.* (2015) 235 Cal.App.4th 228, 239.

<sup>41</sup> *Schmeer, supra*, at 1329.

<sup>42</sup> *New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349

<sup>43</sup> San Bernardino County Elections Office of the Registrar of Voters, City of Upland, Measure U, available at <http://www.sbcounty.gov/rov/elections/Results/20161108/>.

Second, even assuming the case presented “important questions of continuing public interest that may evade review,” the question petitioners actually asked was whether they were entitled to a special election, or by the City’s hands (that proponents believed opposed the measure) destined to the less favorable general election ballot.<sup>44</sup> The Court devotes scant attention to the question. But even the Court’s summary makes clear the matter could have been fully redressed within the boundaries of Elections Code § 9214.<sup>45</sup>

Section 9214 obliges a city to (1) adopt the ordinance without alteration; (2) immediately order a *special election*; or (3) order an agency report and, once the report is presented to the city council, adopt the ordinance or order a *special election*. These deadlines are mandatory [citations], and the city ignored them. Its unilateral determination that the proposed initiative constituted a general tax and was therefore governed by article XIII C, section 2 did not relieve it of its obligation to adhere to section 9214—particularly given that the initiative purported to propose a “fee” and was thus, facially at least, not a tax measure. In the future, cities should follow section 9214 and order a special election. At that point, either the city or other interested parties may pursue any appropriate legal challenge to the measure either in the pre-, or more likely, postelection context.<sup>46</sup> (Emphasis added.)

Moreover, pending legislation made this central inquiry entirely moot by repealing Election Code § 9124.<sup>47</sup>

Finally, having avoided the exits for a narrower construction of the case, the Court fails to contemplate the potential ramifications should other limitations on local initiatives be viewed through the lens of whether they “explicitly constrain[] the initiative power.”<sup>48</sup> In this regard, *City of Upland* is reminiscent of *Los Angeles Transportation Com. v. Richmond*,<sup>49</sup> in which the Court first having found that “special district” under article XIII A, section 4, was limited to districts with the power to impose property taxes, created a major loophole in Prop. 13. The Court, however, was forced to revisit the matter in *Rider* holding “[w]e conclude that the Agency must be deemed a ‘special district’ under [article XIII A,] section 4, despite its lack of power to levy a tax on real property. To hold otherwise clearly would create a wide loophole in Proposition 13 as feared by the dissent in *Richmond*.”<sup>50</sup>

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<sup>44</sup> *City of Upland, supra*, at p. 932, fn. 6. “Plaintiffs also alleged that the City’s true motivation in declaring the charge a general tax was its opposition to medical marijuana dispensaries.”

<sup>45</sup> The Court also recognizes that Election Code section 9214 was repealed by legislative action prior to the issuance of its opinion. *Id.* at p. 931, fn. 4.

<sup>46</sup> *City of Upland, supra*, at p. 947-948.

<sup>47</sup> See Assem. Bill No. 765 (Low), as Introduced Feb. 15, 2017. The measure was subsequently approved by both houses and signed by the Governor. See Stats. 2018, ch. 748 § 6.

<sup>48</sup> *City of Upland, supra*, at p. 948.

<sup>49</sup> *Infra*, fn 11.

<sup>50</sup> *Rider, supra*, at p. 10.



## B. Confusing Kennedy Wholesale

The Court in *City of Upland* repeatedly references *Kennedy Wholesale*<sup>51</sup> as supporting their conclusion that article XIII C, section 2 does not apply to voter initiatives because the Court in that case found that the two-thirds vote limit in article XIII A, section 3, does not apply to statewide voter initiatives.<sup>52</sup> In *Kennedy Wholesale*, the Court was asked whether article XIII A, section 3's two-thirds vote requirement applied to statewide voter initiatives. The Plaintiff there read section 3 to mean that *only* the Legislature can raise taxes, and then only by a two-third's vote.<sup>53</sup> Finding that such an interpretation "would implicitly limit the expressly reserved power of initiative," the court rejected Plaintiff's argument.

The Court in *City of Upland* drew significant support from this simple construct of *Kennedy Wholesale*, where "we held that the constitutional requirement that the Legislature obtain a two-thirds vote before raising taxes (Cal. Const. art. XIII A, § 3) is a requirement that does not apply to voters' initiative power."<sup>54</sup> *Kennedy Wholesale*, however, in rendering its conclusion, drew a distinction between section 3 and section 4, finding the latter *did* apply to *local* voter initiatives. Section 4 provides that:

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.

Unlike section 3, which lacked unambiguous application to statewide voter initiatives, the Court in *Kennedy Wholesale* saw section 4 differently:

Indeed, section 4 hurts plaintiff's argument more than it helps. This is because the section demonstrates, **unambiguously**, that the voters knew how to impose a **supermajority voting requirement upon themselves** when that was what they wanted to do. That the voters expressly adopted such a requirement in section 4 strongly suggests that they did not do so *implicitly* in section 3. (*Ital.* in original, bold added.)

While the Court in *Kennedy Wholesale* found that the voter initiative power was not limited by article XIII A, section 3, it appears it felt differently about the local voter initiative, at least in regard to the language in section 4; language that while not resorting to the more ambiguous "local government" designation, speaks to "cities, counties and special districts... may impose special taxes," and not specifically referencing voters imposing taxes via the initiative, which one might argue the Court's holding in *City of Upland* demands.

The Court in *City of Upland* extends the ambiguity to its reference to article XIII C, section 2(d). That section provides:

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

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<sup>51</sup> *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Ca.3d 245.

<sup>52</sup> *City of Upland, supra*, at pp. 931, 936 ("reaching the same conclusion with regard to art. XIII A...").

<sup>53</sup> *Kennedy Wholesale, supra*, at p. 249.

<sup>54</sup> *City of Upland, supra*, at p. 935.

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. (Emphasis added.)

To this language the Court in *City of Upland* notes:

In article XIII C, section 2, subdivision (d), for example, the enactors adopted a requirement providing that, before a *local government* can impose, extend, or increase any special tax, *voters must approve* the tax by a two-thirds vote. That constitutes a higher vote requirement than would otherwise apply. [citations]. 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 article XIII C, section 2, subdivision (b).<sup>55</sup> (Emphasis added.)

While the quoted passage from *City of Upland* lends solace to those that want the Court decision to be viewed narrowly and not upset the very foundation of Prop. 13 and its progeny, these two sentences simply cannot logically square with the Court's opinion that "local government", which is not defined in article XIII C, section 2(b), but article XIII C, section 1 and applicable to both article XIII C and article XIII D, does not include voters acting via initiative. Moreover, the Court repeatedly resorts to a boarder expression of their view. To wit:

[W]e agree with the Court of Appeal that article XIII C does not limit voters' 'power to raise taxes by statutory initiative' [citations] ... [a] contrary conclusion would require an unreasonably broad construction of the term 'local government' at the expense of the people's right to direct democracy...<sup>56</sup>

Moreover, construing local government as an entity distinct from the public is consistent not only with how the term is used in the provision's text, but also with how it is used in its findings and declarations.<sup>57</sup>

What's more, the principle of *ejusdem generis* suggests...[i]nterpreting 'city' to include the electorate would give that term a much broader meaning than the adjoining specific term 'local or regional governmental entity'.<sup>58</sup>

Under the City's interpretation then, 'agency' in article XIII D also includes voters—an understanding that seems, at best, quite an improbably version of what was plausibly contemplated when this provision was enacted.<sup>59</sup>

Nowhere in the materials is there any suggesting that Proposition 218 would rescue voters from measures they might, though a majority vote, impose on themselves.<sup>60</sup>

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<sup>55</sup> *City of Upland, supra*, at p. 943.

<sup>56</sup> *City of Upland, supra*, at p. 931.

<sup>57</sup> *City of Upland, supra*, at p. 937.

<sup>58</sup> *City of Upland, supra*, at p. 939.

<sup>59</sup> *City of Upland, supra*, at p. 939-40.

<sup>60</sup> *City of Upland, supra*, at p. 940.

Without an unambiguous indication that a provision's purpose was to constrain the initiative power, we will not construe it to impose such limitations.<sup>61</sup>

Multiple provisions of the state Constitution explicitly constrain the power of local governments to raise taxes. But we will not lightly apply such restriction on local governments to voter initiatives...Only by a measure that is unambiguous in its purpose to restrict the electorate's own initiative power can the voters limit such power...<sup>62</sup>

It doesn't require Olympic caliber linguistic gymnastics to read *City of Upland* as impugning article XIII A, section 4 as well. Certainly, the question of whether the Court wiped out the application of article XIII C and article XIII D to voter initiatives was left open to question in *City of Upland*. Article XIII A, section 4 was not even before the Court nor does the Court reference *Altadena Library Dist. v. Bloodgood*<sup>63</sup> in which the Court of Appeal expressly held a local voter initiative proposing a special tax was subject to the two-thirds vote requirement of article XIII A, section 4. Nevertheless, for many taxpayers, one need only to look at history and the Supreme Court's repeated cues in this case to believe it is just a matter of opportunity to address the matter squarely.

### C. Don't Take My Word For it.

Unfortunately, too often the true test of the boundaries of Supreme Court jurisprudence is subsequent litigation. A recent opinion by the Office of the City Attorney of the City and County of San Francisco<sup>64</sup> suggests that such litigation is only a matter of time. In their opinion, while the decision in *City of Upland* did not reach the issue of whether a special tax submitted by voter initiative is subject to a mere majority vote and not a two-thirds, they believe it "very likely" does. Indeed, according to the City Attorney, none of the two-thirds vote requirements presently in article XIII A, section 4 (special taxes), article XIII C, section 2(d) (special taxes), or article XIII D, section 3(a)(2) (taxes, assessments, fees and charges on property or as an incident of property ownership), apply to local voter initiatives.

Taking the San Francisco City Attorney at his word would seem to create an odd incentive for local government bodies to abandon their taxing authority and instead collude with special interest groups to propose initiatives raising taxes; particularly when those special interests stand to directly benefit from the tax increases.

More troubling questions, however, arise. There is no ambiguity in the Court's determination here that the City should not have rendered independent judgment on the question of whether the charge proposed was a "tax" or a "fee." That question, the Court declared is left to "appropriate legal challenge ... either in the pre-, or more likely, postelection context."<sup>65</sup> This raises two questions: First, could the City simply have approved the proposed initiative pursuant to Elections Code § 9214 (see now Elections Code § 9215) because the proposal simply declared the charge a fee?

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<sup>61</sup> *City of Upland, supra*, at p. 945-46.

<sup>62</sup> *City of Upland, supra*, at p. 948.

<sup>63</sup> (1987) 192 Cal.App.3d 585.

<sup>64</sup> <https://www.sfcityattorney.org/wp-content/uploads/2015/07/CA-Cannabis-Coalition-Memo-1.pdf>

<sup>65</sup> *City of Upland, supra*, at p. 948.

Second, if articles XIII C and XIII D are not applicable to voter initiatives at all, couldn't a local initiative propose a "fee" to "mitigate, the past, present, or future adverse impacts of the fee payer's operations"<sup>66</sup> and couldn't the local government simply approve the proposal? The Court in *City of Upland* even previews the argument:

The ballot materials concerning [Prop. 13 and Prop. 26] similarly evince a specific concern with *politicians* and their imposition of taxes without voter approval. (E.g., Ballot Pamp., Primary Elec. (June 6, 1978) rebuttal to argument against Prop. 13, p. 59 ['We must not let the *spendthrift politicians* continue to tax us into poverty' (italics added)]; Voter Information Guide, Gen. Elec. (Nov. 2, 2010) argument in favor of Prop. 26, p. 60 ['STOP POLITICIANS FROM ENACTING HIDDEN TAXES' (italics added)]; Voter Information Guide, Gen. Elec., supra, argument in favor of Prop. 26, p. 60 ["[l]ocal politicians have been calling taxes 'fees' so they can bypass voters" (italics added)]; Voter Information Guide, Gen. Elec., supra, argument in favor of Prop. 26, p. 60. ['Proposition 26 requires *politicians* to meet the same vote requirements to pass these Hidden Taxes' (italics added)].) All of this is more evidence that the drafters of these propositions, like the drafters of Proposition 218, simply did not contemplate that they were affecting the power of voters to propose taxes via initiatives.<sup>67</sup> (Emphasis in original.)

And supposing that the local government approved the proposed initiative imposing a "Sinclair fee" pursuant to Elections Code § 9215 without a vote of the people, wouldn't the question of whether such a charge constituted "a levy, charge, or exaction of any kind" pursuant to article XIII C, section 1, be entirely irrelevant?

#### IV. CONCLUSION

The Court presents the dilemma in *City of Upland* as pitting the people's power of initiative against the people's less than explicit expressions via the initiative power to place limits thereon, at least in regard to taxation. For many taxpayers, however, the opinion reflects a false dichotomy. For more than thirty years, taxpayers have repeatedly exercised their sacred power of initiative with the intent to place limits on the power to tax, only to be repeatedly foiled, diverted, or derailed by artful construction in the judiciary. For them, the *City of Upland* reflects yet another example. So, when the Court finds that "local government" as used in article XIII C does not include "voters via initiative", or more expressly "that article XIII C does not limit voters' 'power to raise taxes by statutory initiative," taxpayers understand to take the Court at its word, not parse its meaning and hope for subsequent litigation to narrow its construction. Instead, they pin their hopes on yet another round of initiatives to plug yet another loophole created by the judiciary in regard to restrictions on the power to raise taxes.

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<sup>66</sup> *Sinclair Paint*, supra, at p. 877-878.

<sup>67</sup> *City of Upland*, supra, at p. 941.