

Local taxes have lots of untapped potential

By David A. Carrillo and Darien Shanske | February 26, 2021

Help may be coming at long last from the federal government, but California local governments are likely to face [fiscal challenges](#) as a result of the pandemic and recession for a long time. After all, many of those local governments faced [major issues](#) before the current crisis. It turns out that a 2017 decision by the California Supreme Court might offer some communities the ability to help themselves.

When the California Supreme Court decided *California Cannabis Coalition v. City of Upland* (2017) [3 Cal.5th 924](#), we — and others — [argued](#) that the court opened the door for local initiative measures to adopt special taxes by majority vote rather than the supermajority that ordinarily applies to taxes. The issue of whether local tax initiatives can be passed by majority vote has now been litigated in three Court of Appeal decisions, and our prediction is coming true: all three decisions expressly adopted a majority vote rule for local special tax initiatives.

In *City and County of San Francisco v. All Persons Interested in Proposition C* (2020) [51 Cal.App.5th 703](#), 61% of the local voters approved a proposed initiative tax. Opponents argued that California constitution article XIII A, section 4 and article XIII C, section 2(d) (Proposition 13 and Proposition 218, which require special taxes proposed by local governments to be approved by two-thirds of the voting electorate) applied to special taxes adopted by local initiative. Following *Upland's* reasoning, the Court of Appeal relied on the electorate's reserved initiative power to reject that argument and held that local voters may exercise their initiative power to adopt a special tax by a simple majority. The same issue was presented in *City of Fresno v. Fresno Building Healthy Communities* (2020) [58 Cal.App.5th 884](#), and *Howard Jarvis Taxpayers Assn. v. City and County of San Francisco* ([A157983](#)). Both decisions adopted the reasoning in *San Francisco* and adopted the majority vote rule for local special tax initiatives.

All three decisions were unanimous, and the Court of Appeal published all three decisions. That makes them the only controlling law on this issue, so Superior Court judges have little choice but to follow them. And absent an appellate division split, the California Supreme Court is unlikely to disturb these rulings. Indeed, the state high court denied review in *San Francisco*; a review petition is pending in *Fresno*; and the Court of Appeal denied rehearing in *Howard Jarvis*.

These rulings are correct; they are natural extensions of *Upland* and properly build on doctrine that preexisted *Upland*. Courts have long held that the initiative power is not subject to the same constraints that apply to local governments or the legislature and have historically been skeptical of two-thirds vote requirements. The *San Francisco* decision noted that two-thirds requirements must be “strictly construed” in the initiative context due to the “fundamentally undemocratic nature of the requirement for an extraordinary majority.” That principle derives from *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47 — a decision that was overturned by Proposition 218. Relying on *Farrell* now shows both how skeptical courts are of supermajority requirements, and how compelling the judicial imperative to jealously guard the initiative power is. Look for this skepticism of supermajority voting rules in future initiative cases.

The concern about supermajority requirements partly flows from the fact that the simple majority rule for initiatives has been in effect from direct democracy's inception. Since then California voters have permitted just three modifications to their direct democracy powers — and none of those changes reduced their powers. It would be a significant departure from that history for the initiative power to be limited by the voters, which is another reason we think the court in *Upland* was correct to hold that such a limitation “require[s] clear evidence of an intended purpose to constrain exercise of the initiative power.”

This trend is also consistent with the California Supreme Court's treatment of local control over taxation. Unlike many states, the California Supreme Court has interpreted a charter city's home rule power to [extend to taxation](#). Our state high court has also interpreted the initiative power broadly in the [taxation context](#). Though it would not be an outright contradiction to apply a supermajority rule to local tax initiatives, it would be at least incongruous for the courts to take away the local electorate's power over taxation after recognizing the importance of local control over finances in these related contexts.

We think the more interesting question is not whether a court should or would depart from these three decisions, but how their implications can be harnessed to make life better for Californians. The initiative power is explicitly granted to counties and cities, but not to school district electorates. Yet there is a strong argument that school district voters retain the initiative power and could pass tax measures by majority vote. It would be even better, of course, if the legislature gave school district voters this power by statute. It would be better still if the legislature also expressly permitted local governments to impose [tiered parcel taxes](#) so local voters could approve measures that do a better job of spreading the tax burden.

We understand that extending the *Upland* reasoning has already stirred up some opposition, even a threat of a constitutional amendment imposing a supermajority rule on local voters. But, as we have [argued](#), it's not clear that *Upland* can be undone that way. *Upland*'s clear statement rule is, we think, predicated on the notion that certain powers are reserved for the local electorate. And thus the *state* electorate could not change the power of *local* voters unless the change resulted from a constitutional revision. As a result, we think the power of local voters to impose taxes on themselves by majority vote using the initiative power is here to stay.

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