

Guess What? Voters Hate Taxes

"The electorate and the legislature share the state's lawmaking power, so the electorate's power to propose and adopt tax laws is at least as broad as the legislature's," write David A. Carrillo and Stephen M. Duvernay of the California Constitution Center at Berkeley Law.



By David A. Carrillo and Stephen M. Duvernay | March 14, 2024 at 04:00 PM

The California Supreme Court recently granted review *Legislature et al. v. Weber (Hiltachk)*, which challenges what we'll call Proposition TBD (it doesn't have a number yet): The "California Two-Thirds Legislative Vote and Voter Approval for New or Increased Taxes Initiative," an initiative constitutional amendment that is [qualified](#) for the November 2024 ballot. Proposition TBD (in sum) would require voter approval for all new state or local taxes. The court now must confront the substantive issues about the measure's validity, which primarily concern the initiative power's scope: If Proposition TBD goes so far as to change California's basic governmental plan or structure, it's a constitutional revision and beyond the initiative power. Yet this measure has a very specific target (setting state tax policy) that's well within the initiative's reach.

The initiative and referendum were designed to empower the voters to set policy — to set policy *differently* than the legislature would. The initiative and referendum are not rights granted to the people, but powers reserved by them, and courts are obliged to resolve doubts in favor of those powers whenever possible. Direct democracy in California was sparked by dissatisfaction with the legislature and a widespread belief that the people had lost control of the political process. The initiative remedied that by empowering voters to enact laws that their elected public officials had refused or declined to adopt, and gives the voters the final word in a policy dispute (initiatives are proof against legislative amendment unless the voters allow them). Thus, the initiative was aimed directly at the legislature: it enables the voters to override legislative policy choices and permits structural reform of the legislature as warranted.

No subject is off-limits for the initiative — certainly not taxes. The electorate and the legislature share the state’s lawmaking power, so the electorate’s power to propose and adopt tax laws is at least as broad as the legislature’s. Indeed, when the statewide initiative power was originally adopted, taxation was an intended object of that power. Contemporary defenders of the initiative thought that “the power of control over taxation” was “the most important right of self-government” the voters possessed, and argued that if opponents could “destroy the people’s use of the initiative in the most important function, taxation, it will be the beginning of efforts which will lead to the destruction of the entire initiative power of the people.” The only objection, then, can be to the proposed scope of the new tax law.

There’s little daylight between requiring voter approval for any *increased* taxes and requiring voter approval for any *new* taxes. In 1974, Proposition 13 set a new state policy and imposed a new procedural rule for the legislature that required a two-thirds vote for any tax increases. That limited the state’s ability to adopt *higher* taxes. In 1986, Proposition 218 required majority voter approval of *any* taxes levied by a local governmental entity. These measures made it harder for state and local governments to adopt new or higher taxes. And if those measures were proper uses of the initiative to set state tax policy, so is Proposition TBD. The voters have adopted a series of measures (Propositions 13, 218, and 26) each targeting the state’s taxing power, which cumulatively amount to a broad shift in tax-policy authority from the legislature to the voters. If those measures (alone or together) are permissible, then Proposition TBD is only the natural culmination of that evolution.

The key question here is whether Proposition TBD is more like *Raven v. Deukmejian* or better resembles *Legislature v. Eu*. The initiative in *Raven* was invalid because it set a rule of judicial decision that decapitated a core judicial power. But that’s not setting policy. *Eu*, by contrast, did not present a separation-of-powers problem because the initiative’s nature is to check the legislature, and because the voters share with the legislature the power to set policy. So although it’s true that taxing is a core legislative power, the electorate holds that power too — and using its unique initiative power to both cabin and direct the legislature’s share of the state’s taxing power is squarely within the initiative’s purpose. Because only the voters could rein in the legislature, either with structural changes (as in *Eu*) or whittling its taxing powers (as with Proposition 13), if it can be done it can only be done with the initiative.

There’s a tenuous argument that Proposition TBD is a revision because it amounts to the voters increasing their referendum power. The referendum currently is a single-use tool, and it does not apply to fiscal matters. Proposition TBD would effectively make the referendum automatic for all tax measures. But the California Supreme Court already rejected a version of this argument in *Rossi v. Brown*, holding that repealing a tax measure by initiative was not equivalent to subjecting the tax to referendum. And it’s hard to see how an initiative that never mentions the referendum is actually meant to affect that power, much less how editing the little-used referendum would fundamentally change the nature of California government.

The only question now is whether this policy proposal is lawful enough to go on the ballot. Ordinarily courts defer preelection review of initiative challenges until after the election. This is partly based on the fundamental principle of judicial restraint, which requires courts to avoid reaching constitutional questions until it becomes necessary. The limits on preelection review are

also practical: the measure may not pass, mooting any concerns. Either way, it's too early to rule on Proposition TBD. But given the history of repeated and increasing checks on the state's ability to impose taxes, it's obvious that the voters want greater control over the taxes they pay. That's a policy decision, and the voters are entitled to make such decisions themselves by initiative. Proposition TBD is only the latest in a series of battles over state tax policy — let the people decide.

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