A Vote of No Confidence: Proposition 218, Local Government, and Quality of Life in California

Stacey Simon
A Vote Of No Confidence: Proposition 218, Local Government, and Quality of Life in California

Stacey Simon*

CONTENTS

Introduction ...................................................... 520
I. Local Government Structure, Responsibilities, and Finance ........................................... 522
   A. The Structure of Local Government and Its Role in Land Use .................................. 522
   B. Sources of Revenue ...................................... 523
      1. Taxes .............................................. 524
      2. Benefit Assessments ................................ 524
      3. Fees .............................................. 525
II. Proposition 218 and the Tax Revolt in California .................................................. 525
   A. The History of Proposition 218 ...................... 525
      1. Proposition 13 ..................................... 525
      2. How the Courts Interpreted Proposition 13 .................................................. 526
      3. Proposition 62 ..................................... 529
   B. The Structure of Proposition 218 ...................... 530
      1. Voter Approval for Local Tax Levies ............. 530
      2. Assessments and Property Related Fee Reform .............................................. 532
         a. Procedures and Requirements for All Assessments ..................................... 533
         b. Effective Date ....................................... 535
         c. Property Related Fees and Charges .............................................. 535
   C. The Causes of the Tax Revolt ......................... 537
III. The Impacts of Proposition 218 .................................................. 539
   A. Expected Fiscal Impact .................................. 539
   B. Impact on Local Government Function ................. 540
   C. Some Election Results Since Proposition 218, Public Goods .................................... 542

Copyright © 1998 by Ecology Law Quarterly
* J.D. Candidate, May 1999, Boalt Hall School of Law, University of California at Berkeley; B.A. 1991, Occidental College, Los Angeles. I would like to thank Professors John Dwyer and Daniel Rodriguez for their help with this Comment.
INTRODUCTION

The City of Antioch, California, stopped mowing the grass in several public parks this year. According to a local sixteen year-old, the weeds now stand waist-high.1 Meanwhile, nearby Lake Elsinore's parks have been fenced off with six foot high chain-link fences, baseball fields have been closed, and park activities, such as the girls' annual all-star softball tournament, have been cancelled.2 In the cities of Davis and Los Angeles, landscaping projects may be in jeopardy.3 Some in Los Angeles have even argued that the City should turn off its street lights.4 What is going on in California? Do people not care about parks and public amenities? Are we in a state of fiscal crisis, no longer able to afford the improvements that we enjoyed in better times?

Actually, current forecasts show a strong California economy, marked by steady job growth and increased home sales.5 Rather, the cause of the phenomenon described above is a little known constitutional ballot initiative6—Proposition 218 (The Right to Vote on Taxes Act)—which passed in 1996.7 Although Proposition 218 remains relatively unknown even two years after its passage, the Right to Vote on Taxes Act has profoundly changed the power of local governments in California to make decisions regarding the programs and services that they have historically provided.

The Act, now articles XIIIC and XIIID of the California Constitution, requires that a majority, and in some cases a super-majority, of affected voters approve all local taxes and most other property-related fees and charges levied by local governments before they are imposed,
extended, or increased. The initiative effected a major—although not totally unexpected—change in the authority of California's local governments to raise money. Virtually all local levies that were not previously limited by Proposition 138 or Proposition 629 now require voter approval, and in some cases burdensome and costly procedures, to enact. The park closures and maintenance suspensions described above resulted from voter rejection of taxes to keep those services operating in elections mandated by Proposition 218. These losses are, at best, temporary and isolated and, at worst, permanent and extensive. In either case, these abandoned public works symbolize a larger change in local government control over land use decisions resulting from Proposition 218 and its predecessors.

By giving the taxpayers the right to decide whether they want to pay for a variety of programs and services that formerly required approval only by local governing bodies, Proposition 218 has devolved decisionmaking authority from elected representatives to the voters. Theoretically, delegating control over land use to local government improves the general welfare by allowing government to correct market failures in land use decisionmaking. By transferring some of this decision-making authority back to the market—the voters—we may witness a corresponding decline in the general welfare over the long term. Such a result depends on whether the priorities of the voters differ from those that local government has historically pursued on our behalf. A look at some basic principles of economics and property law, in addition to the anecdotal evidence cited above, suggests that they do in fact differ.

What is already clear is, that along with Proposition 13, Proposition 218 has reduced the power of local government to make decisions and provide services in a variety of arenas. This reduction affects not only the provision of public goods in the area of land use, which is the subject of this Comment, but also the provision of traditional local government services, such as police and fire protection, libraries, and hospitals. Some of the beneficial results of Proposition 218 include increased voter control, a heightened level of government accountability, and arguably lower taxes. At the same time, however, the law has reduced flexibility on the part of local governments, entails costly and burdensome compliance, diminishes the provision of government services and public goods,\textsuperscript{10} and will probably increase dependence on

\begin{itemize}
  \item \textsuperscript{8} See \textit{Cal. Const} art. XIIIA. Proposition 13, which passed in 1978, limited property taxes to 1 percent of the assessed value of property and restricted annual increases to 2 percent. \textit{See infra} Part II discussing Proposition 13.
  \item \textsuperscript{9} See \textit{Cal. Govt Code} §§ 53720-53730 (West 1997). \textit{See infra} Part II.
  \item \textsuperscript{10} This occurs either because the proposed services or goods never made it to the ballot due to the expenses associated with that procedure, or because the voters reject them outright.
\end{itemize}
state, federal, and even private funding, hence lessening local autonomy.

Part I of this Comment begins by outlining the basic structure of local government and its role in land use decisionmaking in California. Part II then details the events that preceded passage of Proposition 218 and some possible repercussions which the proposition could have on the quality of life and the physical environment in California. Finally, Part III suggests that in the short term, local government should respond to and ameliorate these impacts by building voter confidence in the services that it provides, and in the long term that the state reassess the allocation of tax revenue in order to improve accommodation of local governments.

I. LOCAL GOVERNMENT STRUCTURE, RESPONSIBILITIES, AND FINANCE

A. The Structure of Local Government and Its Role in Land Use

California has 58 counties, over 470 cities, more than 1,000 school districts, and over 3,400 other special districts. Through its broad police power authority to protect the health, safety and welfare of its citizens, local government in California provides more services to taxpayers than both the state and federal governments and has the most direct impact on our day-to-day lives.

11. Cities and counties in California are established by either general law or charter. General law governments operate according to general laws, passed by the legislature and applicable statewide. Charter (or home rule) cities and counties do not require statutory authority to act, but are subject only to constitutional constraints. See CALIFORNIA ASSEMBLY, OFFICE OF RESEARCH, CALIFORNIA STATE AND LOCAL SYSTEMS; A REVIEW OF MAJOR REVENUE SOURCES 245 (July 1985).

12. Special districts are independent units of government that have substantially the same general governmental powers as those shared by most other local governments under the State Constitution and state statutes. In California, special districts are divided into two categories, enterprise and non-enterprise, depending on their structure and function. Non-enterprise special districts, such as air pollution control, library, parks and recreation, and fire protection acquire funds largely through bonds, taxes, and special assessments. Enterprise special districts, such as water, airport, and harbor and port districts generally pay for themselves through user fees and charges. See CALIFORNIA STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA, ANNUAL REPORT, FISCAL YEAR 1994-95 (hereinafter FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS).

13. See CHARLES G. BELL & CHARLES M. PRICE, CALIFORNIA GOVERNMENT TODAY: POLITICS OF REFORM 282 (1996). The services that local government provides include, but are not limited to, health and safety services, such as police, fire, paramedics, and hospitals; cultural and educational opportunities, such as libraries and schools; household services, such as water, electricity, garbage, and sewage; and improvements to the physical infrastructure of communities through the provision and maintenance of roads, sidewalks, parks, and open space.
Historically, local governments have intervened in land use decisions in order to improve the general welfare of the community. For example, local governments may institute zoning ordinances to screen residents from unwanted externalities, such as a nearby polluting facility, or to create residential neighborhoods and attractive downtown areas which increase the desirability of communities and attract residents and business. Similarly, local governments provide public goods, such as parks, swimming pools, and street lights, which benefit entire communities and raise property values, but which a private party has little economic incentive to provide. Indeed, the conventional economic approach to property law suggests that maximum efficiency is achieved where private property ownership is the norm, and the government intervenes in instances of market failure, such as those cited above, to provide public goods or improve development patterns.

B. Sources of Revenue

Cities, counties and special districts are funded through a variety of sources, including taxes, benefit assessments, service charges, and fees (collectively “fees”) as well as intergovernmental transfers, bonds, and private grants. A series of voter initiatives passed over the last twenty years known as the California “tax revolt” has lim-

15. Because of the “free-rider” problem, individuals will opt not to pay for improvements that will benefit the public at large, even if they themselves receive some of that benefit. They assume, often correctly, that others will pay and that they can therefore reap the benefits for free.
16. See Carol M. Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 719-20 (1986). Of course, problems may arise with this economic approach. For example, local legislators may be “captured” by special interests and therefore use public money to pay for goods that only a few will enjoy. See id. at 734. Alternatively, the costs of effective intervention may exceed the increase in production that intervention would achieve, rendering any necessary intervention less likely to occur. See id. at 720. Professor Rose also identifies other obstacles to effective intervention: “[T]he state must be able correctly to identify instances of market failure; it must be clever enough to exercise its powers so as to reduce the inefficiency; it must avoid errors or political temptations to exercise its powers in ways that create new inefficiencies.” Id. at 719-20.
17. These are also called special benefit assessments, assessments and special assessments. The terms “special assessments” and “benefit assessments” are interchangeable. Background Staff Report for an Interim Hearing on the Use of Benefit Assessments since Proposition 13, before the Senate Committee on Local Government 11 (Cal. 1986) (hereinafter Use of Benefit Assessments).
18. Other less significant sources of revenue for local governments include licenses, permits, franchises, fines, forfeitures, penalties, interest, rents on property, bond issues, and benefit assessments.
ited the first three sources of income, which are described briefly below.

1. **Taxes**

There are two types of taxes: general and special. General taxes are levied without any restrictions on their use, and they go into the general fund. The most common forms of general taxes imposed by local governments are property, sales and use, business license, and utility users taxes. Special taxes are levied for a specific purpose, such as building a stadium or funding public transportation, and are usually placed into a separate fund.

2. **Benefit Assessments**

A benefit assessment is "a charge imposed on real property for a local public improvement of direct benefit to that property." Improvements commonly funded through benefit assessments include street lighting, sidewalks, parks and landscaping projects. For each benefit assessment, the local agency responsible for the relevant improvement defines the area on which the assessment is to be imposed, called the assessment district, calculates the cost of the improvement, and charges each benefitted property within the district an amount proportionate to the benefit that property receives. In most jurisdictions, the percentage of revenue generated by benefit assessments is small compared to that generated by taxes, fees and charges.

---

20. This distinction became significant after the passage of Proposition 13 in 1978, which required that special taxes be approved by a two-thirds vote. However, court decisions prior to the passage of the proposition were already using this definition of special taxes.


22. In fiscal year 1994-95, the total revenue generated from both general and special taxes imposed by cities and counties in California amounted to a little over $12 billion, or approximately 22 percent of total city and county revenues. See Financial Transactions Concerning Cities, supra note 21, at ix; Cal. State Controller, Financial Transactions Concerning Counties of California, Annual Report, Fiscal Year 1994-95 vii (hereinafter Financial Transactions Concerning Counties).


25. In fiscal year 1994-95, benefit assessments accounted for 1.28 percent of city revenues, .02 percent of county revenues. See Financial Transactions Concerning Cities, supra note 21, at ix; Financial Transactions Concerning Counties, supra note 22, at vii. Local governments also use both taxes and benefit assessments as revenue streams for bonds: in 1992-93, counties issued $65 million and cities issued $570 million in assessment-
ever, after Proposition 13 limited the ability of local governments to impose new taxes, benefit assessments became a more significant source of revenue. This is discussed below in more detail.

3. Fees

Finally, local governments collect service fees for things such as ambulance service and property related fees for things such as sewer connections, residential energy, or development fees. The amount of a fee must reflect the actual cost of providing the service; otherwise, the proceeds are considered taxes. Fees amount to a significant percentage of city and county revenue.

II. PROPOSITION 218 AND THE TAX REVOLT IN CALIFORNIA

A. The History of Proposition 218

Proposition 218 is only the latest in a series of voter initiatives in California that limit or otherwise control local governments' ability to raise money, comprising a movement commonly deemed the "taxpayers' revolt." In fact, according to its drafters, Proposition 218 was a necessary response to loopholes in the earlier Proposition 13—loopholes created by local governments and ratified by the courts, which had enabled local governments to continue to raise revenue without voter consent.

1. Proposition 13

Before 1978, local governments in California generally had the power, within constitutional or legislative limits, to impose any taxes, charges, or fees by a vote of their governing bodies. In 1978, how-
However, California voters passed the first and most well-known of the tax revolt measures, Proposition 13. The proposition amended the state constitution to limit the ability of local government to collect a variety of taxes, most notably property taxes.

Proposition 13 restricts ad-valorem property taxes to one percent of the value of the property, and annual increases to two percent. Under the amendment, no new ad-valorem taxes on real property can be imposed, either by the state, or by local governments; nor can any transaction tax or sales tax on the sale of real property be imposed. Any increase in state taxes, or state-authorized local taxes, requires a two-thirds vote by the legislature. Finally, any new or increased special tax imposed by any local government must receive two-thirds approval by the local electorate.

2. How the Courts Interpreted Proposition 13

Beginning immediately after the passage of Proposition 13, courts were faced with myriad lawsuits questioning the validity of taxes and assessments imposed by local jurisdictions. In general, the courts narrowly interpreted article XIII A to exempt local revenue raising mechanisms from its restrictions, expanded the allowable uses of these mechanisms, and limited the types of taxes that were subject to voter approval under the amendment. These decisions limited the impact of Proposition 13 in several significant ways, at least two of which would later be addressed by Proposition 218.

31. See Cal. Const. art. XIII A. Proposition 13 is often called the Jarvis-Gann Initiative after its sponsors, Howard Jarvis and Paul Gann.
32. At the time of Proposition 13's passage, 36.3 percent of county revenues, 22.4 percent of city revenues, and 67.4 percent of non-enterprise special district revenues in California came from property taxes. See California Legislative Analyst, An Analysis of the Effect of Proposition 13 on Local Governments 6-10 (Oct. 1979) (using figures from fiscal year 1977). Proposition 13 cut this revenue by 57 percent. See Assessing the Benefits, supra note 24, at 4.
33. The one percent figure is applied as assessed in 1975-76, or if built, transferred, or sold after that time, then applied at the rate at time of building, sale, or transfer.
36. Close on the heels of Proposition 13, voters passed Proposition 4 in 1979, which added article XIII B to the State Constitution. Called the Gann Spending Limit, or the "Spirit of 13," Proposition 4 capped spending at actual appropriations for the year 1978-79, allowing annual increases based on a jurisdiction's population increase and changes in the cost-of-living index or per capita personal income, whichever is lower. Only with a majority vote from its electorate can a jurisdiction go beyond this cap, and then only for a four-year period. See Valerie Raymond, Institute of Governmental Studies, Surviving Proposition Thirteen: Fiscal Crisis in California Counties 57 (1988).
First, the court held that benefit assessments were not taxes under Proposition 13 and therefore were not subject to either the two-thirds vote required to impose a special tax or the one percent limit on ad-valorem taxes.\(^{37}\) Since 1979, courts have upheld a wide variety of benefit assessments to pay for improvements that, prior to Proposition 13, would likely have been funded through taxes. Several of these assessments share characteristics of the special taxes or ad-valorem property taxes that Proposition 13 restricted. They include benefit assessments charged to undeveloped land,\(^{38}\) assessments that provide a general benefit to the public outside the assessment district,\(^{39}\) assessments based on parcel size\(^{40}\) or parcel value,\(^{41}\) and assessments based on the number of feet of private property abutting the proposed improvement.\(^{42}\)

The California Supreme Court recently affirmed and arguably expanded the rationale of these earlier decisions in a case that then became a rallying point for the anti-tax proponents who drafted and supported Proposition 218. In *Knox v. City of Orland*,\(^{43}\) the California Supreme Court upheld a citywide assessment district under the Landscaping and Lighting Act of 1972\(^{44}\) to finance the maintenance of pools, playgrounds, and other recreational amenities in five city parks.\(^{45}\) The plaintiffs, four residential property owners, challenged the twenty-four dollar assessment, contending that, as a matter of law, a special assessment is never appropriate for financing the maintenance of a park because a park is not a type of improvement that confers a special benefit upon real property.\(^{46}\) The plaintiffs sought to distinguish parks, which provide a benefit to the general public, from what they viewed as more "traditional" improvements, such as street

\(^{37}\) See County of Fresno v. Malmstrom, 156 Cal. Rptr. 777, 782-83 (Ct. App. 1979) ("a special assessment . . . strictly speaking, is not a tax at all"), citing Wells v. Union Oil Co., 76 P.2d 696 (Ct. App. 1938).

\(^{38}\) See J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580 (Ct. App. 1984) (upholding a facilities benefit assessment charged against undeveloped land in order to accommodate the needs of future residents upon their development).

\(^{39}\) City of San Diego v. Holodnak, 203 Cal. Rptr. 797 (Ct. App. 1984) (facility benefit assessment to pay for provision of parks, a public library, fire station, and park and ride facility, and to widen highway bridge was not a tax because each planned facility conferred a special benefit within the assessment area, even though general benefits also accrued to the community at large).

\(^{40}\) See City Council of San Jose v. Kent South, 194 Cal. Rptr. (Ct. App. 1983).

\(^{41}\) See Solvang Municipal Improvement District v. Board of Supervisors, 169 Cal. Rptr. 391 (Ct. App. 1980) (exempting from the one percent limitation a benefit assessment based on the assessed value of property within the area benefitted, or in other words, an ad-valorem benefit assessment).

\(^{42}\) See White v. County of San Diego, 608 P.2d 728 (Cal. 1980).

\(^{43}\) 841 P.2d 144 (Cal. 1992).

\(^{44}\) See CAL. STS. & HWY. CODE §§ 22500-22525.5 (West 1997).

\(^{45}\) See Knox, 841 P.2d at 153.

\(^{46}\) See id. at 150.
lights, sewers, sidewalks and flood control,\textsuperscript{47} which directly benefit specific properties.

The court, relying on a 1898 U.S. Supreme Court decision upholding a benefit assessment within the District of Columbia for park construction,\textsuperscript{48} found that parks enhance property values and increase desirability as a place of residence, amounting to a special benefit to property owners within the district and therefore justifying the imposition of a benefit assessment. Because most of the benefit the property owners would receive from using the parks was also available to the public at large, the \textit{Knox} decision essentially confirmed that local governments could impose a benefit assessment where the special benefit received by the assessed property owners was nothing more than the general enhancement of their property values.

The result of \textit{Knox}, and the decisions preceding it, was to open the door for local governments to use benefit assessments as revenue-raising tools, not subject to the limits imposed by Proposition 13.\textsuperscript{49} However, the amount of money actually paid by landowners through assessments does not nearly replace the cuts resulting from Proposition 13's property tax limits.\textsuperscript{50}

The second way in which courts limited the impact of Proposition 13 is reflected in another California Supreme Court case frequently cited as an impetus for the initiative. In \textit{City and County of San Francisco v. Farrell},\textsuperscript{51} the Court interpreted the term "special taxes" to include only those taxes levied for a specific purpose.\textsuperscript{52} In \textit{Farrell}, the

\textsuperscript{47} See \textit{id.} at 151.
\textsuperscript{48} Craighill v. Lambert, 168 U.S. 611, 616 (1898) (erroneously referred to as "Wilson v. Lambert" in \textit{Knox}).
\textsuperscript{49} According to the California Taxpayers Association, during the period between the passage of Proposition 13 and the present, the use of benefit assessments as a revenue-raising tool by cities increased ten-fold and use by non-enterprise special districts increased by over 4,000 percent. \textit{See What's So Wrong about Voter Approval to Raise Taxes?}, CAL-TAX NEWS, Oct. 1, 1996, at 1-2. According to the California State Controller's Office, from 1978 to 1990, property assessments by special assessment districts rose from about $7.5 million to approximately $113.5 million, or about 1500 percent. \textit{See Financial Transactions Concerning Special Districts, supra note 12.}
\textsuperscript{50} In fiscal year 1990-91, benefit assessments made up only 0.01 percent ($3,179,483) of the total budget of California counties, 0.88 percent ($198,500,962) of the total budget of California cities, and 3.2 percent ($113,663,432) of the total budget of California non-enterprise special districts. Compare these figures to taxes which, in that same year, accounted for 26.36 percent of counties' budgets, 33.22 percent of cities' budgets, and 35.2 percent of special districts' budgets. \textit{See California State Controller, Financial Transactions Concerning Counties, Annual Report, Fiscal Year 1990-1991 vii; California State Controller, Financial Transactions Concerning Cities, Annual Report, Fiscal Year 1990-1991 vii; Conversation with Sandy Chang, California State Controller's Office; Aug. 31, 1998.}
\textsuperscript{51} 648 P.2d 935 (Cal. 1982).
\textsuperscript{52} Many disagree with this interpretation, arguing that the distinction between a special and a general tax intended by the proposition referred to the scope of the tax. Under this view, a general tax applies to everyone, while a special tax applies to "a specific prod-
voters had approved an extension to a 1.1 percent tax increase on pay-rolls or gross receipts imposed on businesses operating within San Francisco by a majority vote of fifty-five percent. Prior to the vote, the mayor had approved an appropriation request for $1.1 million to pay for improvements at a municipally-owned hospital. The request specified that the money was to come from the proceeds of the increases in the payroll and gross receipts taxes.\(^{53}\) The city controller refused to collect the tax, alleging that it required a two-thirds vote since it was a "special tax." The controller argued that the term "special tax" meant any tax that is an "extra, additional, or supplemental charge imposed . . . to raise money for public purposes."\(^{54}\) The Supreme Court disagreed, construing "special taxes" as "taxes that are levied for a specific purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes."\(^{55}\)

In addition to narrowly construing special taxes to exclude many forms of levies, this decision presumably allowed local governments to escape the two-thirds vote requirement simply by placing the revenue from a new or increased tax into the general fund, even if the money had already been politically restricted. Indeed cities imposed taxes without voter approval in reliance on Farrell.

3. Proposition 62

In 1986, in an attempt to reverse some of these perceived misinterpretations of Proposition 13, the California Tax Reduction Movement sponsored, and voters passed, Proposition 62,\(^{56}\) a statutory initiative entitled "Voter Approval of Taxes."\(^{57}\) Among other things, Proposition 62 required two-thirds voter approval for all special taxes imposed by any local government or district,\(^{58}\) and majority voter ap-
proval for all general taxes levied;\textsuperscript{59} it also defined all taxes as either general or special taxes.\textsuperscript{60}

Initially, most local governments declined to follow the statute after two appellate decisions found portions of the statute unconstitutional.\textsuperscript{61} However, in 1995, the California Supreme Court held that the voter approval provisions were in fact constitutional.\textsuperscript{62} It appeared that at least some local governments would be subject to its restrictions.\textsuperscript{63}

B. The Structure of Proposition 218

1. Voter Approval for Local Tax Levies

Eighteen years after Proposition 13, and ten years after Proposition 62, the sponsors of Proposition 218 finally achieved the constitutional right to vote on all taxes, no matter what they are called or into what fund they are placed.\textsuperscript{64} As its title suggests, the first article added to the California Constitution by Proposition 218 requires that all local tax levies be submitted to the voters before being imposed, extended or increased. In the words of the proposition's drafters, Article XIIIC "constitutionalizes Proposition 62 . . . and makes it stronger in its application."\textsuperscript{65} Like Proposition 62, Article XIIIC states that all special taxes must be approved by a two-thirds vote of the electorate,\textsuperscript{66} and all general taxes by a majority vote.\textsuperscript{67}

\textsuperscript{59}. See \textsc{Cal. Gov't Code} § 53723 (West 1997).

\textsuperscript{60}. See \textsc{Cal. Gov't Code} § 53721 (West 1997).

\textsuperscript{61}. See City of Westminster v. County of Orange, 251 Cal. Rptr. 511, 516 (Ct. App. 1988) (holding that Proposition 62's "window period" provision, \textsc{Cal. Gov't Code} § 53727(b), which required that any local taxes imposed in the 16 months prior to the effective date of the proposition be submitted for approval by a majority of the voters, was an unconstitutional referendum on taxes); City of Woodlake v. Logan, 282 Cal. Rptr. 27, 31 (1991) (holding that Proposition 62's requirement of majority approval for the imposition of general taxes was an unconstitutional referendum on taxes).


\textsuperscript{63}. Under some interpretations, only general law cities, but not charter cities, would be subject to a legislative statute such as Proposition 62 since the constitution, not the legislature, gives charter cities the power to tax regarding municipal affairs under the "home rule" doctrine. See \textsc{Cal. Const.} art. XI § 7 (setting forth homerule taxing authority provision for cities and counties. In California if a tax is of "municipal effect" it is governed by local rules, if it is of statewide significance, state laws apply.).

\textsuperscript{64}. See \textit{Proposition 218 Statement of Drafters' Intent} 1 (accompanying \textsc{Cal. Const.} art. XIIIIC, § 2, Findings and Declarations) (hereinafter \textit{Proposition 218 Statement of Drafters' Intent}).

\textsuperscript{65}. \textsc{Howard Jarvis Taxpayers Association, Annotated Version of Proposition 218} (December 6, 1996) \textit{reprinted} in \textsc{California League of Cities Proposition 218 Implementation Guide} A-22 (Jan. 1997) (hereinafter \textsc{Annotated Proposition 218}).

\textsuperscript{66}. \textsc{Cal. Const.} art. XIIIIC, § 2(d).

\textsuperscript{67}. \textsc{Cal. Const.} art. XIIIIC, § 2(b). Since these requirements are now a part of the California Constitution, they also apply to charter cities and counties. Proposition 218 also
In an effort to prevent courts from interpreting its provisions in a way that frustrates its purpose, article XIIIC explicitly defines "local government" and "special district" to include any governmental agency besides the state itself.\(^6\) Thus, there is little doubt that all local government entities, even those not yet in existence, are subject to the article's restrictions. "Special taxes" under Proposition 218 are defined as any taxes imposed for specific purposes, even those imposed for specific purposes that are placed into the general fund.\(^6\) This definition extends the two-thirds vote requirement to many tax levies that courts previously held exempt from Proposition 13.\(^7\)

In addition, by deeming all local taxes to be either general taxes or special taxes,\(^7\) article XIIIC prevents local governments from inventing new types of taxes that are not subject to the act's restrictions. Finally, the Act states that special purpose districts or agencies have no power to levy general taxes, meaning that all tax levies imposed by special districts are special taxes and must receive two-thirds voter approval.\(^7\)

Article XIIIC also requires that elections to impose or increase general taxes\(^7\) be consolidated with regularly scheduled general elec-

\(^6\) This section was intended "to prevent a 'rush' of new taxes to meet what would otherwise be an effective date of November, 1996," ANNOTATED PROPOSITION 218, supra note 65, at A-24, and it means that any non voter-approved taxes levied since 1995 will cease to be valid unless approved by the voters within two years. The drafters point out that "this provision is not draconian for local governments which have been complying with the requirements of Proposition 62," namely general law cities and counties. Id. at A-24.

\(^7\) There has been some speculation that this section may apply only to single-purpose special districts and not to multi-purpose special districts that would still be able to levy a general tax. Litigation is likely on this question. The "Right to Vote on Taxes" Initiative: Restrictions on Local Government Finance: Joint Interim Hearing of the Senate Local Government and Revenue & Taxation Committees, 2 (Cal. 1996) (testimony of Michael G. Colantuono, Esq.) (hereinafter Testimony of Michael Colantuono).
tions for members of the governing body of the local government. This requirement provides a disincentive for elected officials to propose new or increased general tax levies since the vote would take place at the same time as a general election for their own re-election, making them appear to be proponents of higher taxes. The problem may be mitigated at least in part however, since the article also allows voters to approve future rate increases in the initial election for a tax.

Finally, the last part of Article XIIIC gives the citizens of California the constitutional right to repeal taxes, assessments, fees and charges through the initiative process and prevents the government from raising the signature requirement for the statutory initiative process above its current limit. The drafters of Proposition 218 claim that this section merely “constitutionalizes” the California Supreme Court’s 1995 decision in Rossi v. Brown which held that the initiative power, unlike the power of referendum, may be used to reduce or repeal a tax prospectively. However, the Act also expands on Rossi by extending the initiative power for the first time to assessments, fees, and charges. These levies were previously considered administrative, rather than legislative matters, and therefore beyond the initiative power.

2. Assessments and Property Related Fee Reform

The second major portion of Proposition 218, targets the use of benefit assessments to raise revenues and limits property related charges and fees to prevent these from replacing assessments as revenue raising tools. Article XIIID applies to all assessments, and nearly all property-related charges and fees, whether imposed under a state statute or charter. Charges or fees made as an incident to property development, timber yield taxes, and fees for the provision of

74. See Cal. Const. art XIIIC, § 2(b).
75. Cal. Const. art XIIIC, §§ 2(b), 2(d). A general tax or 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. Id.
76. See Cal. Const. art. XIIIID, § 3.
77. 889 P.2d 557, 563 (Cal. 1995) ("[T]he limitation on the referendum power, which excludes tax-related matters, does not extend to the use of the initiative to repeal taxes prospectively.")
78. See supra note 6, describing the initiative process in California.
79. See Cal. Const. art. II, § 9(a) ("The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state.").
80. See Cal. Const. art. XIIIIC, § 3.
81. See Testimony of Michael Colantuono, supra note 72, at 4.
82. See Cal. Const. art. XIIID.
83. See Cal. Const. art. XIIIID, § 1.
electrical or gas service\textsuperscript{84} are explicitly exempted.\textsuperscript{85} Like Article XIIC, key terms are defined in the act in order to avoid their later misinterpretation by the courts,\textsuperscript{86} and an exclusive list of those levies that may be imposed on property is provided\textsuperscript{87} so that no new levies can be created.

The substantive provisions of Article XIID affect the imposition of benefit assessments in three important ways. First, extensive procedures must be followed when benefit assessments are imposed; second, benefit assessments must be approved by a majority of the affected property owners, or they may not be imposed; and third, the burden of proof in legal actions contesting the validity of an assessment is shifted to the agency making the assessment. Additionally, benefit assessments are now subject to repeal by initiative as discussed above.

\textit{a. Procedures and Requirements for All Assessments}

Prior to Proposition 218, benefit assessments imposed by local government were subject to majority protest by the landowners affected. In some assessment district proceedings, a majority landowner protest could be overruled by a 4/5 vote of the governing body.\textsuperscript{88} Since landowners who did not protest were counted as votes of approval, the imposition of an assessment was rarely thwarted.\textsuperscript{89} Proposition 218 shifts the burden away from landowners. Now the agency must garner majority support for an assessment among those benefitted, \textit{before} it may be imposed.

Further, the initiative sets forth procedures that local government must follow before imposing benefit assessments, and circumscribes agencies’ discretion to calculate the amount of the assessment. As in existing benefit assessment law, an agency must first identify the parcels that will receive a special benefit and upon which an assessment will be imposed. The agency then calculates the total cost of the im-

\footnotesize{\textsuperscript{84} See Cal. Const. art. XIID, § 3(b).}

\footnotesize{\textsuperscript{85} According to its drafters, Proposition 218 intended that these provisions would apply only to those levies imposed as an incident to property ownership. Since developer fees are imposed as a condition on the voluntary act of development, and timber yield taxes are addressed in the California Constitution and by legislation, they are not covered. See Proposition 218 Statement of Drafters’ Intent, supra note 64, at 6.}

\footnotesize{\textsuperscript{86} See Cal. Const. art. XIID, § 2 (defining “agency,” “assessment,” “capital cost,” “district,” “fee or charge,” “maintenance and operation expenses,” “property ownership,” “property-related service” and “special benefit”).}

\footnotesize{\textsuperscript{87} See Cal. Const. art. XIID, § 3(a).}

\footnotesize{\textsuperscript{88} See League of California Cities, Proposition 218 Implementation Guide 11 (hereinafter Proposition 218 Implementation Guide).}

\footnotesize{\textsuperscript{89} See Daniel Hentschke et al., An Analysis of Proposition 218: the Fox Initiative, W. Cities, Aug. 1996, at 30 (pointing out that a public agency could also alter the improvement, modify the engineer’s report, or otherwise respond in an attempt to gain approval).}
All assessments must be supported by a detailed engineer’s report.\textsuperscript{91}

Under Article XIIID, however, the agency must separate any general benefit conferred on the assessed property, such as increased property values, from the special benefit\textsuperscript{92} conferred. The agency may only charge the properties for the special benefits they receive. The charge may not exceed the proportional benefit each property actually receives.\textsuperscript{93} In the event that the assessment is challenged, the agency imposing the assessment now bears the burden of proof to show that these calculations are accurate.\textsuperscript{94}

Article XIIID sets forth detailed procedures for notifying the owner of each assessed parcel of the proposed assessment.\textsuperscript{95} The agency is also required to conduct a public hearing at which it considers all protests and tabulates the ballots. The ballots are weighted according to the proportional financial obligation of the affected party,\textsuperscript{96} and if a majority protest exists, the assessment will not be imposed.\textsuperscript{97}

The other significant change to assessment law made by Article XIIID is the requirement that public property, such as schools and parks, also be subject to assessments. The government may only avoid assessment by demonstrating that parcels it owns receive no special benefit from an improvement.\textsuperscript{98}

\textsuperscript{90} See CAL. CONST. art. XIIID, § 4(a).

\textsuperscript{91} See CAL. CONST. art. XIIID, § 4 (b). Proponents of Proposition 218 claim that it is only since Proposition 13 that the requirement for certified engineers reports has been relaxed, meaning that this section is nothing new.

\textsuperscript{92} See CAL. CONST. art. XIIID, § 2(i). Article XIIID defines the “special benefit” required to justify the creation of an assessment district, to be “a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute a ‘special benefit.’” Cf. Knox v. City of Orland, 841 P.2d 144 (Cal. 1992), discussed supra Part II.A.2, (defining special benefit to include the general enhancement of property value).

\textsuperscript{93} See CAL. CONST. art. XIIID, § 4(a).

\textsuperscript{94} See CAL. CONST. art. XIIID, § 4(f).

\textsuperscript{95} See CAL. CONST. art. XIIID, § 4(c). This includes the total amount to be assessed, the amount chargeable to that parcel, the duration of the charges, the reason for the assessment, the basis for calculating the amount of the proposed assessment, the procedures for protesting the assessment, and a disclosure statement indicating that if a majority protest occurs, the assessment will not take place.

\textsuperscript{96} Some have questioned whether the weighted vote process violates constitutional principles of one person/one vote or equal protection. Section 4(g) addresses possible legal challenges on this issue, stating that “[b]ecause only special benefits are assessable, electors residing within the district who do not own property within the district shall not be deemed under this Constitution to have been deprived of the right to vote for any assessment. If a court determines that the Constitution of the United States or other federal law requires otherwise, the assessment shall not be imposed unless approved by a two-thirds vote of the electorate in the district in addition to being approved by the property owners as required by subdivision (e).” Id. The issue is sure to be litigated. See PROPOSITION 218 IMPLEMENTATION GUIDE, supra note 88, at 17.

\textsuperscript{97} See CAL. CONST. art. XIIID, § 4(e). Renters, unless they are made responsible in their lease for paying assessments, would be ineligible to vote.
b. Effective Date

All existing, new, or increased assessments, with four limited exceptions, must have complied with the procedures imposed by the initiative by July 1, 1997.98 Even initially exempt assessments must comply with the initiative when they are subsequently increased,99 and they are still subject to Proposition 218's substantive restrictions. They therefore may already have needed to be amended to ensure compliance.

There are only four types of assessments excepted from the procedures imposed by Proposition 218. The first is for assessments imposed exclusively to finance the capital costs or maintenance and operation of streets (but not street lighting), sidewalks, sewers, water, flood control, drainage systems or vector control. The drafters of Proposition 218 referred to this as the "traditional purposes" exception.100 The second exception applies to assessments imposed pursuant to a petition signed by the persons owning all of the parcels subject to an assessment at the time the assessment is imposed.101 This is known as the "developers' exception", since it would apply most frequently to situations where a developer, as the owner of all parcels prior to development and sale, approves an assessment to finance infrastructure serving the development. This section exempts most land secured financing arrangements used by developers.102 The third exception is for any assessment used exclusively to repay bonded indebtedness where the failure to pay would violate the Contract Improvement Clause of the U.S. Constitution.103 Finally, the fourth exception is for any assessment that previously received majority voter approval.104

c. Property Related Fees and Charges

Article XIIIID also prevents local governments from using fees and charges to avoid the new restrictions placed on benefit assess-

99. Assessments imposed to repay bonded indebtedness are not subject to this requirement. See Cal. Const. art. XIIIID, § 5(c).
100. Cal. Const. art. XIIIID, § 5(a). The exception seems to trace the plaintiff landowners' unsuccessful argument in Knox v. City of Orland, 841 P.2d 144 (Cal. 1992), where the plaintiffs attempted to contrast an assessment to pay for park maintenance, which they argued was not appropriate as a matter of law, to assessments for what they referred to as "traditional" government improvements such as street lights, sewers, sidewalks and flood control, which were permissible. Under Proposition 218, these "traditional" purpose levies must still be voted on when they are increased, but they may be paid for by benefit assessments, so long as the property assessed receives some special benefit.
102. See Proposition 218 Statement of Drafters' Intent, supra note 64, at 16.
103. See Cal. Const. art. XIIIID, § 5(c).
104. See Cal. Const. art. XIIIID, § 5(d).
ments. According to the Proposition's drafters, "flat rate parcel taxes have avoided the strictures of Proposition 13 simply by being called 'assessments'." Proposition 218 seeks to prevent a similar circumvention of taxpayer protections with fees.\textsuperscript{105} Prior to Proposition 218, agencies could impose most fees merely by adopting an ordinance or a resolution at a public hearing\textsuperscript{106} without voter approval. Fees could not exceed the estimated reasonable cost of the facility or service being provided, or their proceeds were considered taxes.\textsuperscript{107} Examples of common local agency-imposed fees were county sewer connection fees, utility districts' residential energy fees, city standby fees for utility availability, and school districts' developer fees.\textsuperscript{108}

Like benefit assessments, with three minor exceptions, Article XIIIID subjects property-related fees\textsuperscript{109} to a variety of procedural requirements and limits.\textsuperscript{110} The new term "property-related-fee" is defined, somewhat circularly, as a fee or charge imposed upon any parcel or person as an incident of property ownership.\textsuperscript{111} The drafters of Proposition 218 stated that their intent was to include most fees charged on monthly bills to property owners, such as water delivery, garbage service, sewer service, and storm water management fees.\textsuperscript{112}

An agency proposing to impose or increase a property related fee\textsuperscript{113} must identify the affected parcels, calculate the fee, then notify the parcel owner by mail of the amount of the fee, how it was calculated, the reason for it, and the date, time, and location of a public

\textsuperscript{105} See Annotated Proposition 218, supra note 65, at A-22.

\textsuperscript{106} See, e.g., Cal. Gov't Code § 66018 (West 1997).

\textsuperscript{107} See Cal. Gov't Code § 50076 (West 1997).


\textsuperscript{109} Except for fees or charges for sewer, water and refuse collection services. See Cal. Const. art. XIIIID, § 6(c).

\textsuperscript{110} See Cal. Const. art. XIIIID, § 6(d).

\textsuperscript{111} See Cal. Const. art. XIIIID, § 6(b)(3).

\textsuperscript{112} Other analysts of Proposition 218 contend that fees that vary by level of service, such as a fee for metered water usage, should (like fees for the provision of electricity and gas) not be considered a property-related fee, because they are based on usage, rather than property ownership. Because Proposition 218 does not restrict nonproperty-related fees, the definition of this term will have significant revenue impacts for local governments. See Legislative Analysts Office, Understanding Proposition 218 7 (December 1996).

\textsuperscript{113} A fee or charge is defined in section 4 as "any levy other than an ad valorem tax, a special tax or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including user fees or charges for a property related service." Section 6 (c) states that in determining whether a fee or charge is imposed as an incident of property ownership, "[r]eliance by an agency on any parcel map, including but not limited to an assessor's parcel map, may be considered a significant factor . . . [i]n any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article." The drafters of the proposition have stated that it does not affect fees that are not property related such as DMV fees, park fees, or administrative charges imposed by a local government. See Proposition 218 Statement of Drafters' Intent, supra note 64, at 18.
hearing on its imposition.\textsuperscript{114} Unlike benefit assessments, votes are not weighted according to the amount charged, and a majority protest of all owners of the identified parcels, or two-thirds of the electorate residing in the affected area—as opposed to a majority of those who respond—is required to defeat the fee's imposition.\textsuperscript{115}

Additionally, property related fees must meet five requirements. First, total fee revenues may not exceed the funds required to provide the service. Second, they may not be used for any purpose besides that for which the fee was imposed.\textsuperscript{116} Third, the amount of individual fees shall not exceed the proportional cost of the service attributable to a parcel. Fourth, there may be no fees or charges based on potential or future use of a service. This requirement also classifies standby charges, such as charges to finance water and sewer service expansions to new households and businesses, as assessments and subjects them to the requirements applicable to benefit assessments, including notification and majority approval.\textsuperscript{117}

Finally, no property related fees or charges may be imposed for "general governmental services including, but not limited to, police, fire, ambulance or library services where the service is available to the public at large in substantially the same manner as it is to property owners."\textsuperscript{118} This prohibition reflects the belief of the proposition's drafters that, after Proposition 13 limited the revenue available to local governments in the general fund, the loss should not be made up by charging landowners for services that confer a general benefit.

The final part of the amendment states that the provisions of the Right to Vote on Taxes Act shall be construed liberally in order to effectuate the purpose of limiting local government revenue and enhancing taxpayer consent.\textsuperscript{119}

\section*{C. The Causes of the Tax Revolt}

In light of the fact that the voters continue to enact taxing restrictions, of which Proposition 218 is only the latest, it is important for local governments to look at the motivations behind these measures, in order to respond to the sentiments that they reflect.

On the one hand, it is easy to see the success of the grass-roots campaign to pass Proposition 13 back in 1978, led by political outsider

\begin{itemize}
\item \textsuperscript{114} See Cal. Const. art. XIIID, § 6(a)(1).
\item \textsuperscript{115} See Cal. Const. art. XIIID, § 6(c).
\item \textsuperscript{116} According to the proposition's drafters, these two restrictions prohibit the current practice of using fee revenue to supplement a city's general fund, which, they assert, occurs in both Los Angeles and Sacramento. See Proposition 218 Statement of Drafters' Intent, supra note 64, at 18.
\item \textsuperscript{117} See Cal. Const. art. XIIID, §§ 6(b)(1), (2), (3), (4).
\item \textsuperscript{118} Cal. Const. art. XIIID, § 6(b)(5).
\item \textsuperscript{119} See Cal. Const. art. XIIID, §§ 5, 6.
\end{itemize}
Howard Jarvis, as little more than a reasoned response to the fact that California property taxes were among the highest in the nation, and becoming increasingly unaffordable.\textsuperscript{120} The 1970s explosion in the California real estate market caused property taxes to rise more rapidly than incomes, threatening some, particularly the elderly and retired, with the loss of their homes.\textsuperscript{121} The year before the proposition’s passage, California personal income devoted to taxes reached 16 percent, while the rest of the country saw only 12.1 percent go to taxes.\textsuperscript{122} From this perspective, Proposition 13 and its progeny seem a rational response to a specific social problem.

But, the tax revolt can also be seen as reflecting a declining confidence in government in general.\textsuperscript{123} This view has been more prominent in the recent attempts to limit taxes in California: the tax revolt measures passed after 1978, including Proposition 62, and to an even greater degree, Proposition 218, have increasingly touted voter control over government decisionmaking, rather than reduced taxes, in their appeals to the public for support. As the ballot pamphlet argument in favor of Proposition 62 boldly proclaimed, "Proposition 62 will decide whether government controls the people, or people control the government."\textsuperscript{124}

What “taxpayer advocates” object to more than the amount of taxes Californians pay, seems to be the manner in which local governments responded to the mandates of Proposition 13 and how California courts interpreted the amendment.\textsuperscript{125} Many supporters of Proposition 218 accuse local governments of scheming to thwart the public will, citing the increase in fees and assessments that occurred after the passage of proposition 13 as examples of "new and devious way[s] to sneak around Proposition 13 . . . ."\textsuperscript{126} In reality, according to the state Department of Finance, California is now close to the national average in the amount of state and local taxes paid based on percentage of personal income.\textsuperscript{127} Nevertheless, the tax revolt has continued to flourish as a bold reminder of the waning public confi-

\textsuperscript{120} See Sears & Citrin, supra note 19, at 21. California property taxes exceeded the national norm by approximately 52 percent.
\textsuperscript{121} See id. at 23.
\textsuperscript{122} See id. at 6.
\textsuperscript{123} See id. at 8. See also R. Novak, What's Happening Out There?, 42 Public Opinion 2-7 (1978).
\textsuperscript{124} Argument in Favor of Proposition 62, in California Ballot Pamplet, Proposed Statutes and Amendments to California Constitution with Arguments to Voters 42 (1986).
\textsuperscript{125} Telephone interview with Jonathon Coupal, author of Proposition 218 and legal affairs head of the Howard Jarvis Taxpayers Association.
\textsuperscript{126} See Hentschke et al., supra note 89, at 16 (citing Jarvis Taxpayer literature).
\textsuperscript{127} Taxes and Government Spending, California Opinion Index, March 1993 (The Field Institute).
dence in government and the concomitant desire of the people to exercise more direct control over government spending and decisionmaking.

III. THE IMPACTS OF PROPOSITION 218

Increasing the accountability and responsiveness of local government to the needs of the voters is a worthy goal. One has to wonder, however, whether there is another way to achieve this accountability without imposing such high costs or so dramatically limiting the power of local government.

A. Expected Fiscal Impact

California local governments currently raise more than $50 billion annually from taxes, assessments, and fees.\(^\text{128}\) According to the Legislative Analyst’s Office (LAO), local government revenue reductions statewide as a result of Proposition 218 will likely exceed $100 million annually in the short run—and potentially hundreds of millions of dollars annually in the long run—depending on voter decisions, local government actions, and court interpretations.\(^\text{129}\)

Local government entities that rely heavily on the types of assessments and fees affected by the amendment could be severely affected. These entities, typically small, newly incorporated cities, and library, fire, and park and recreation special districts, as well as less developed cities with little sales tax or development revenues, may lose much more than 5% of their revenue.\(^\text{130}\) In addition, even where overall losses are slight, those programs and services that enjoy less public support or that are not mandated by the state will bear a disproportionate share of the losses.

Further, local governments will see less of their costs covered by benefit assessments when they build local improvements. Under the new rules, any costs above those that result in special benefits to property within the assessment district, even if they provide a general benefit to those properties, will have to come from another source, such as the general fund. To compound matters, land owned by school and community college districts, cities and counties, is now subject to the same assessments as private property, although special taxes to cover these costs require a two-thirds majority vote, making them almost impossible to levy.\(^\text{131}\)

\(^{128}\) See id. at 3.

\(^{129}\) See UNDERSTANDING PROPOSITION 218, supra note 112, at 4.

\(^{130}\) Id.

\(^{131}\) Prior to Proposition 13, local agencies were subject to assessments, and they generally levied special taxes to pay for them. With Proposition 13’s imposition of the two-
While revenues decrease, Proposition 218 is also costing California local government, and the taxpayers, a significant amount of money to implement. According to LAO, the costs of procedures mandated by the amendment could at first exceed $10 million. Some local government officials have commented that the expense of these procedures is already stopping some benefit assessments from reaching the voting stage, particularly where the project is a minor one, voter approval is not certain, and procedural costs (for example, the engineer’s report, mailings, and the like) are substantial.

Finally, the expansion and constitutionalization of the initiative power creates uncertainty for local government revenue sources, since it appears that virtually all sources of local revenue may be repealed or reduced through the initiative process. California bond attorneys have referred to this section as the most disturbing part of Proposition 218, and in the months after the proposition’s passage, bond ratings for many California cities and counties were downgraded, raising the interest and insurance rates these entities pay when borrowing money. Even revenue sources that support bonds may be affected.

B. Impact on Local Government Function

In a more general sense, local governments in California will be less effective. The proposition changes the role of local government by reducing discretion, decisionmaking power, and funding. To the 

thirds voter requirement for special taxes however, this became nearly impossible. Courts created an implied exemption from assessments for local public agencies. This exception has now been reversed, but the two-thirds requirement for special taxes remains. See Proposition 218 Implementation Guide, supra note 88, at 19, 21.


133. See id. at 5.

134. See Interview with Marshall Rudolph, County Counsel, County of Mono, in Mono County, Cal. (Nov. 24, 1997).

135. See Testimony of Michael G. Colantuono, supra note 72, at 72.

136. See Kenneth Kurtz & David Brodsky, Rating News: California’s Proposition 218 Significant, But not Devastating, Moody’s Says, Business Wire, Dec. 19, 1996, available in LEXIS, NEWS Library, BWIRE File (“Moody’s has recently downgraded San Diego and Los Angeles.... Further downgrades will likely occur in highly rated cities where financial flexibility is a key part of the rating.”).


extent that they are able to make up some funding losses through transfers from the state and federal governments, or even by working in cooperation with the private sector, it is likely that any money will come with some strings attached, further decreasing discretion and flexibility for local government.

Proposition 218 may influence land use decisions as well. First, since Proposition 218, like Proposition 13, does not limit development fees or exactions, it creates an incentive to approve new development that will pay for its own services and amenities when built. If the development is commercial, it will also offer increased sales tax revenues, exacerbating the competition which already occurs between neighboring cities for commercial development.

Second, besides presenting a potential voter roadblock to increased charges on existing properties, the proposition creates a disincentive for local governments to even pursue improvements in these areas. Each time a project is to begin, say a road improvement or a new park, unless local politicians can find the money in the general fund they will be forced to ask for more taxes to pay for it, an often unpopular position and one with uncertain results since voters may decline to approve the new change. Third, Proposition 218 could also have an effect on local government’s ability to become involved in broader environmental issues such as biodiversity preservation and conservation, in which commentators have increasingly argued that they should play a part. Due to the intricacies of these fields, and their often intangible future outcomes, it may be difficult to convince voters to spend money to support them. Finally, with current takings jurisprudence in flux, and the real possibility of a lowered threshold for finding a regulatory taking, local governments might be wise not


140. One expert on local government finance has speculated that privatization of public services could be a major outcome of the proposition since a private entity would have discretion to raise rates, while a city would not. Interview with Kim Rueben, Policy Analyst, Public Policy Institute of California, (May, 1998).


142. For example, Professor Tarlock argues that biodiversity protection is particularly suited to the traditionally local methods of regulation, such as land use planning and regulation of land and water development, because it is decentralized, site specific, and requires intensive site management. See A. Dan Tarlock, Local Government Protection of Biodiversity: What is its Niche?, 60 U. CHI. L. REV. 555, 557.

to zone in a manner that would encourage a takings claim under the Fifth Amendment. Less discretionary revenue translates into less discretion for local governments in carrying out their mandates. While lack of discretion may have been the intent of the Proposition’s drafters all along, this lack of discretion has already led to a decline in public services and amenities in many areas of the state.

C. Some Election Results Since Proposition 218, Public Goods

Since the passage of Proposition 218, voters have gone to the polls to affirm or abolish a variety of fees, assessments, and taxes covered by the amendment. In Los Angeles, homeowners in 31 of 83 assessment districts voted down a landscape maintenance assessment that they had been paying since 1984. In Davis, a park tax was narrowly defeated when it received only 65.3% of the vote. A 16-year-old Antioch resident, who used to play baseball at a local park was quoted as saying: “Our parks, which were so nice before, have now turned into an eyesore . . . . They need to keep the parks open. Society is bad enough as it is. Kids need as many things to do as possible.”

For the most part, supporters of the measures have stressed that the charges are not new taxes, but merely requests for the public to affirm charges that they already pay. Forces opposing them largely argue that taxes are already too high. In Moorpark, for example, opponents of a park maintenance tax (and a similar school bond measure) posted signs urging voters to “Stop Higher Taxes.” One vocal opponent argued that the city should not tax all residents for parks, but should find the money in the general fund. The park tax was rejected, despite a 53 percent majority (of votes cast) approval, because as a special tax, 66.7% support was required. Likewise, the school bond issue garnered only 66.6% out of the needed 66.7% sup-


145. The Davis measure, which would have imposed a $98 per-parcel tax, was to replace funding formerly provided by landscape and lighting fees that ranged from $80 to $150 per parcel. It would have raised about $2.5 million per year, an amount equal to about 20 percent of the city’s $12.9 million general fund. See Davis Park Tax Narrowly Defeated, SACRAMENTO BEE, Nov. 5, 1997, at B3.


147. Bonds have been subject to two thirds vote since the late nineteenth century. Their status was not changed by proposition 218. CAL. GOV’T CODE § 25211.14 (West 1988).

port. Only 24% of registered voters turned out for the election. The low voter turn-out, and narrow, yet majority supported, margins in these and similar elections raise the obvious question of whether their results represent the public will.

If any pattern has emerged from the first few elections since Proposition 218, it is that voters are generally unwilling to vote down funds that support safety services such as fire stations, police, and paramedics, but when it comes to recreation, physical improvements, and even in some cases education ("quality of life improvements"), they will hedge their bets that the money can be found in the general fund. Of the few quality of life measures that did pass, most, if not all, were located in wealthier communities such as Marin County, where voters agreed to allow the Marin County Open Space District to acquire $6 million worth of scenic bay-side land.

In districts where quality of life improvements were struck down, voters did not say that they did not want well-maintained parks, open space, or street lights and the like; generally voters said they voted against funding such projects because they did not think the money should come from new taxes. Provided we assume that the general fund is not limitless, this is a variation on the free rider problem. Voters do want these goods, they just expect others to pay for them. The message such a voting outcome sends to local governments is problematic. On the one hand, voters seem to be saying that they do not value these items as much as others for which they do vote. On the other hand, they expect governments to come up with the money to pay for them, presumably not by cutting the programs voters value more, but by cutting "government waste." With Proposition 13 and Proposition 218 in place, this seems unlikely to happen.

149. See Gloria Gonzales, Moorpark Vote Will Slice Plans; Park, School, Taxes Fail, L.A. DAILY NEWS, Nov. 6, 1997, at SV1.
150. A fire protection tax passed in three San Diego towns, Ramona, Jamul and Tecate, with 85 percent, 81 percent, and 73 percent support, respectively. San Diego City Towns OK Fire Protection Tax; School Bonds Mixed, CAPITAL MARKETS REPORT, Nov. 5, 1997, available in WESTLAW, CANEWS Database, CMREP File.
151. Measure F, El Dorado County's ambulance tax mentioned above, sailed through with 74% support. See Emily Bazar, El Dorado Voters OK Ambulance Special Tax, SACRAMENTO BEE, Nov. 6, 1997, at B4.
153. See Raymond, SURVIVING PROPOSITION THIRTEEN, supra note 36, for a complete discussion of the impacts of Proposition 13 on counties. See also CALIFORNIA BUDGET PROJECT, PROPOSITION 13: ITS IMPACT ON CALIFORNIA AND IMPLICATIONS FOR STATE AND LOCAL FINANCES (April 1997).
D. The Future with Proposition 218

Proposition 218 will affect all local government, from fire protection to hospitals, since, beyond a certain point, the amount of money available for these services is now up to the voters. It appears, however, that the effects of Proposition 218 may be felt more acutely in government programs designed to improve the physical quality of life in California. Voters in the few elections since the proposition's passage seem more often than not to be rejecting ballot measures that raise revenue for parks, street lighting, and the like. Indeed, through Proposition 218, the voters have had the opportunity to demonstrate that it is these quality of life programs that they are most willing to put on the line in order to force government to "cut the waste." Also, many of the programs that local government continues to provide, such as welfare, social services, and police protection, are mandated by statutes and cannot be cut.

Areas with enough discretionary income to vote for special taxes and assessments to pay for street lighting, landscaping, and parks will be more inclined to approve increased taxes, while poorer areas, arguably those that need the improvements most, will be left out. Already local governments are considering redrawing assessment and special tax districts to encompass small, discrete [read wealthy] areas where revenue raising measures are likely to pass. 154 This phenomenon may lead to the exacerbation of what most would agree is already occurring in California, a greater separation between wealthy and poorer communities. As commentators have pointed out, "unlit streets and derelict parks ruin property values and attract crime." 155

Although it may make perfect sense that a person struggling to make ends meet would vote down a special tax or benefit assessment, and we might even applaud the fact that Proposition 218 has given them the power to reject a tax rather than face personal hardship, there are certain realities in terms of loss of services and the geographic distribution of that loss. Imagining a worst case scenario, how far will we allow certain areas to degenerate? And even in a less extreme case, what if voters reject taxes only because they assume that others will pay (the free-rider problem)? If individuals have no economic incentive to control externalities and provide public goods as discussed at the beginning of this paper, what will California look like if the people, rather than elected officials, decide which programs and services to provide?

154. UNDERSTANDING PROPOSITION 218, supra note 112, at 4.
E. Some Suggestions for Local Governments and the State

Ideally, California local government could be responsive, and accountable, to the public without the need for the burdensome and expensive restrictions imposed by Proposition 218. In the meantime, however, local governments must cope with its provisions. Like any private business, government now has a product to sell. For every fire district it would like to provide, or every landscaping project it would like to maintain, it must obtain voter approval or find the money in its general fund. In keeping with the assertion that the tax revolt in California is fueled by distrust of government rather than the desire to reduce taxes, local governments need to respond by improving its relationship with the public and by building voter confidence. If anything is to be learned from the aftermath of Proposition 13, it is that Californians are sensitive to government attempts to circumvent taxing limitations and may clamp down even harder if they perceive that it is happening again.

Government must now educate and inform the voters so that they may exercise their power to make fiscal decisions in a responsible manner. This will hopefully reduce those instances in which voters reject taxes for the wrong reasons, either because of the free rider problem, or out of distrust for government. The public, likewise, must learn about the issues it will be voting on, as people will ultimately have to live with the outcome of their vote.

In 1996, the City of San Mateo mailed a “Citizen’s Benefit Statement” to its residents, which listed the costs of several important services provided by the city, and each resident’s contribution to those costs. What the numbers show is that each resident’s property taxes contribute only a portion of the true costs to provide services such as police and fire protection, parks and recreation and libraries. Taxes on businesses and motor vehicles and sales taxes and fees make up the rest. The city received positive feedback from voters about the mailing, which presented the information in a neutral and respectful manner, without lobbying voters to respond (or vote) in any certain way.

The news media presents another opportunity to get information to the public so that people may make well-informed decisions. If local media do not already understand the importance of voter education since Proposition 218, then local government needs to educate them about the role they can play in bringing facts and information to the new decisionmakers. Local papers could carry fiscal information

---

156. See Kay Jimno, A Strategy for Leadership, The Opportunity of Proposition 218, W. CITIES, Feb. 1997, at 13. (providing a fairly comprehensive strategy for marketing the services of government and educating the public in the post-Proposition 218 era.).
in weekly columns, giving voters a broader overview of issues and ballot measures than do typical pre-election summaries. Since many California residents do not even know that they have gained the right to vote on all taxes, education is crucial.

Following the successful model of community policing, local government could also arrange meetings with constituents to discuss the implications of Proposition 218 and the resulting barrage of taxation measures on local ballots. In addition, these meetings could provide the opportunity to get voter feedback and suggestions, to which local governments will want to pay close attention. Of course, this all costs money.

For those who find these suggestions simplistic, they are. They are based on the assumption that voters can make responsible decisions about taxes, and that government therefore needs to provide them with the information that they will need, both pro and con. Since voters have given themselves the right to vote on taxes in California, this is the only assumption we can make at present.

In the long-term, voters may decide that having so much control over local government is not worth the loss in service and efficiency and pass a future initiative to loosen restrictions. Ironically, since it only takes a majority vote to amend the constitution, that may now be easier to do than passing a park tax.

In addition, it may be time for the state itself to reevaluate the way tax dollars are distributed in California so that our local governments remain viable.\textsuperscript{157} Suggestions for how this should be accomplished abound.\textsuperscript{158} The common theme among them is that the State needs to provide local governments with a steady stream of income, in increased amounts, in order to make up for the revenue losses caused by the last two decades of tax revolt. Land use, and other local government decisions, should be made according to what best serves the public, rather than what best keeps local government in the black. For now, all eyes are on local government, challenging them to find money for programs if it is there or cut programs if it is not. Perhaps the best voter education really would be for the lights to go out in Los Angeles.

\textsuperscript{157} See OFFICE OF THE CONTROLLER, CONTROLLER'S QUARTERLY 5-7 (August 1997).
\textsuperscript{158} See, e.g., Making "Cents" of Local Dollars, Assemblymember Michael Sweeney, CONTROLLER'S QUARTERLY, August 1997, at 8 (arguing that the 1992-93 "property-tax shift for education" which transferred approximately 30% of all local government revenue to the State, be eliminated); The 1993-94 Budget: Perspectives and Issues, Report from the Legislative Analyst's Office to the Joint Legislative Budget Committee. Elizabeth G. Hill, Legislative Analyst, Part V, Restructuring California Government, at 11 (suggesting that the Bradley-Burns Sales Tax which currently allocates 1% of the sales tax for sales made within parts of a county to that county be eliminated, and replaced with a revenue stream which is not tied to sales within a jurisdiction.).