

# LEGAL SERVICES

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## MEMORANDUM

November 20, 2017

**SUBJECT:** Statute Requiring Voter Approval of Broad-Based Tax  
(Work Order No. 30-LS1088\A)

**TO:** Senator Kevin Meyer  
Attn: Christine Marasigan

**FROM:** Emily Nauman   
Legislative Counsel

Attached please find a bill requiring voter approval before a broad-based individual income tax or statewide general sales tax takes effect. The bill is unconstitutional.

### 1. Binding Future Legislature

Requiring, in statute, an affirmative vote of the people before a broad-based tax takes effect would very likely be struck down by a court as akin to entrenching legislation, more commonly referred to as "binding a future legislature." Legislative entrenchment is "widely regarded as inconsistent with the basic principles of democracy."<sup>1</sup> The bill aims to prevent a future legislature from enacting a tax without a vote of the people. In addition, it restricts the effective date a future legislature may give a tax bill.

The United States Supreme Court has consistently held that entrenchment of ordinary legislation is unconstitutional. In rejecting the practice of entrenchment, the Court stated, "no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body."<sup>2</sup> The United States Supreme Court has also shown a willingness to prevent a state legislature from binding its successors.<sup>3</sup> If you do wish to require a vote of the people before the enactment of a broad-based tax, you have one legal option: a constitutional amendment.

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<sup>1</sup> John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal. L. Rev. 1773, 1775 (2003).

<sup>2</sup> *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. 416, 431 (1853).

<sup>3</sup> *Newton v. Commissioners*, 100 U.S. 548, 563 (1879). The Alaska Supreme Court has also held that a legislative body cannot bind itself to take a future legislative action. *Mount Juneau Enterprises, Inc. v. City and Borough of Juneau*, 923 P.2d 768 (Alaska 1996).

## 2. Voter Approval of Tax

A court could also find the bill is unconstitutional because it infringes on the legislature's power to tax. The Constitution of the State of Alaska specifically preserves the governments taxing power. Article IX, sec. 1 reads:

The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.

It has long been recognized that the power of taxation lies squarely within the powers of a state legislature. The United States Supreme Court stated "[taxation] is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare" and continued that a state legislature "[has] the sole power to authorize [a] tax."<sup>4</sup> The Alaska Supreme Court has also recognized "taxation is inherently a function of the legislature and can be exercised only under its authority."<sup>5</sup> That said, it could be argued that because the people can probably legally shape the tax law of the state by initiative, referring a tax question to the voters is contemplated by the constitution.<sup>6</sup> However, given the importance of the taxing power and its historical assignment of that power to the legislature, I believe it is more likely that a court would find that the curtailment of the legislature's power to enact a tax constitutes a significant impairment to the legislature's power to tax under art. IX, sec. 1, and that therefore the bill is unconstitutional.

## 3. Inappropriate Use of Initiative or Referendum

It is likely that a law that makes an act effective only if approved by the voters would be held unconstitutional as an improper delegation of legislative authority because such a referendum is not specifically authorized by the state constitution. Section 1 of art. II,

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<sup>4</sup> *Meriwether v. Garrett*, 102 U.S. 472, 515 (1880). *See also State ex rel. S. Bank v. Pilsbury*, 105 U.S. 278, 291 (1881) ("[T]he equality and uniformity required throughout the State were only obtainable by confining the exercise of the power of taxation to the legislature, whose authority was coextensive with the territorial limits of the State."); *City of New Orleans v. Clark*, 95 U.S. 644, 654 (1877) ("Of the expediency of the taxation or the wisdom of the appropriation [the legislature] is the sole judge."); *Lane Cty. v. State of Oregon*, 74 U.S. 71, 77, (1868) ("The extent to which [a tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government.").

<sup>5</sup> *Dissolution of Mountain View Pub. Util. Dist. No. 1, In re*, 359 P.2d 951, 955 (Alaska 1961).

<sup>6</sup> The Alaska Supreme Court has not addressed the question of whether an initiative may be used to enact or amend a tax.

Constitution of the State of Alaska provides that the legislative power of the state is vested in the legislature. Laws may be enacted in two ways: by the legislature acting under this power and by the people acting under the power of initiative and referendum established in art. XI.

The Constitution of the State of Alaska provides the method for proposing an initiative or referendum in secs. 1, 2, and 3 of art. XI. Since the constitution reserves the power of initiative and referendum to the people, the legislature may not usurp that power. A court might well hold that the method for exercising the power of initiative and referendum set out in those sections is exclusive and that a statute may not add an additional structure, voter approval of a tax, to those limited types of voter approval of laws. This conclusion is bolstered by the fact that the delegates to the Alaska Constitutional Convention considered and rejected a proposal that would have authorized bills to be referred to the voters. Section 21 of Committee Proposal 5, dated December 14, 1955, stated:

SECTION 21. Any bill failing of passage by the legislature may be submitted to referendum by order of the governor either in its original form or with such amendments which were considered by the legislature, as he may designate. Any bill which, having passed the legislature, is returned thereto by the governor with objections, and, upon reconsideration is not approved by the majorities required by this constitution, may be submitted to referendum by a majority of all the members sitting as one body. Bills thus submitted to referendum shall be voted on at the next succeeding regular election occurring at least sixty days after action is taken to submit them, unless the legislature shall provide for their submission at an earlier date. This section shall not apply to bills containing appropriations, raising or earmarking revenues, nor to local or special bills.

This section on legislative referendum was considered by the delegates as a body on January 11, 1956, recorded at pages 1737, 1777 - 1778, Minutes of the Daily Proceedings, Alaska Constitutional Convention. In explaining the intent of Section 21, Committee Proposal 5, Delegate McCutcheon stated at page 1777 of the Proceedings:

MCCUTCHEON: The terminology is taken directly out of the model constitution. The point is that at the time our Committee was drafting this particular section, or considering it I should say, there was some doubt in my mind, and I think in the minds of others on our Committee, that there may not be an initiative device in the constitution. With the initiative device, this certainly may be stricken in too. You do have initiative protection. This device was placed in the legislative article in the event that there was no initiative. It was a device that was designed to get good legislation out before public opinion to react on, but since there is an initiative device, the public can take any bill that is offered in the legislature and put it as an initiative measure.

Based on Delegate McCutcheon's statement, Delegate Gray moved to delete Section 21, stating at page 1778:

Taking Mr. McCutcheon's suggestion and word, that if this article is unnecessary, if it is already cured by initiative, why I'll make a motion to strike Section 21 because it is superfluous.

Delegate Gray's motion carried, strongly suggesting that the Alaska Constitution does not allow the governor or the legislature to refer legislation to a popular vote for binding effect. Although the question has not been tested by a court in this state, it is my opinion that, except for the areas in which the Constitution expressly authorizes submission of questions to the voters, the legislature itself may not constitutionally avoid its responsibility and circumvent the requirements of art. XI, sec. 2, Constitution of the State of Alaska by requiring the placement of questions on the ballot for a binding decision of the voters.<sup>7</sup>

#### 4. Enactment of Act

Several sections of the state constitution specify that, after passage by the legislature and the signature of the governor (or no action by the governor, or veto override by the legislature), a bill becomes law. The attached bill does not conform to that constitutional timing, since a tax bill would not become law until approved by the voters. Of particular concern is art. II, secs. 14 and 16 - 18.<sup>8</sup> Although not my primary concern, it is possible a

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<sup>7</sup> In *United States v. No. Commercial Co.*, 6 Alaska 94 (D. Alaska 1918), the territorial legislature provided that an act be submitted to a referendum vote of the people. The court struck the Act down, holding that neither the organic law creating the legislature, nor any other Act of Congress authorized the submission of such an act to the popular vote. In *People ex rel. Thompson v. Barnett*, 176 N.E. 108 (Ill. 1931), the court struck down a statute on similar grounds. The court concluded that the legislature alone has the power, duty, and responsibility to legislate. Notably, a law in Alaska has been submitted to the voters for a binding vote, and, so far as I can tell, that action was never challenged. Ch. 211, SLA 1968, voter registration.

<sup>8</sup> Article II, sec. 14, reads:

SECTION 14. Passage of Bills. The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.



court would invalidate the bill because it amends the timing of the enactment of legislation as envisioned by the constitution.

5. Practical Consideration

In addition to the constitutional concerns, there is also the practical matter that, if enacted, the statute could be repealed, amended, or waived with a majority vote in each house, likely in the same bill enacting the tax. Thus, not only is the language proposed by the bill unconstitutional, it is also likely ineffective.

6. Enacting Tax

The bill only puts the vote requirement on bills enacting a tax. Would you like to also include tax increases? What about tax repeals?

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Article II, secs. 16 - 18 read:

SECTION 16. Action Upon Veto. Upon receipt of a veto message during a regular session of the legislature, the legislature shall meet immediately in joint session and reconsider passage of the vetoed bill or item. Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature. Other vetoed bills become law by affirmative vote of two-thirds of the membership of the legislature. Bills vetoed after adjournment of the first regular session of the legislature shall be reconsidered by the legislature sitting as one body no later than the fifth day of the next regular or special session of that legislature. Bills vetoed after adjournment of the second regular session shall be reconsidered by the legislature sitting as one body no later than the fifth day of a special session of that legislature, if one is called. The vote on reconsideration of a vetoed bill shall be entered on the journals of both houses.

SECTION 17. Bills Not Signed. A bill becomes law if, while the legislature is in session, the governor neither signs nor vetoes it within fifteen days, Sundays excepted, after its delivery to him. If the legislature is not in session and the governor neither signs nor vetoes a bill within twenty days, Sundays excepted, after its delivery to him, the bill becomes law.

SECTION 18. Effective Date. Laws passed by the legislature become effective ninety days after enactment. The legislature may, by concurrence of two-thirds of the membership of each house, provide for another effective date.

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7. Types of Tax

The bill puts the vote requirement on bills enacting a "broad-based individual income tax" or "statewide general sales tax." Are these types of taxes you intended to target? Would you like to define these terms?

8. Ballot Question

Note that the tax vote is defined as a "question" for purposes of Title 15. This means that every section referring to a "question" in Title 15 will also apply to the tax vote. Please confirm that this complies with your intent, or, if you need more information about the effect of this drafting decision, please let me know.

If I may be of further assistance, please advise.

ELN:boo  
17-573.boo

Attachment