Proposition 26: California's Stealth Initiative

By Richard M. Frank

As the Nov. 2 general election approaches, the California ballot initiatives on which most of the public and media attention is focused are Proposition 19, that would legalize recreational use of marijuana, and Proposition 23, which would suspend implementation of California's landmark Global Warming Solutions Act (AB32). But voters and political analysts have largely ignored another initiative measure on next week's ballot — Proposition 26 — despite the fact that its passage would have profound and broad impacts on government efforts to protect public health, safety and the environment.

Proposition 26, if enacted, would fundamentally change the way an increasingly-large percentage of state and local government regulatory programs are financed. The initiative would mandate that in the future many if not most fee systems designed to fund public health, safety and environmental protection programs could take effect only if authorized by a two-thirds, supermajority vote of the California Legislature (for state fee programs) or local voters (for local government-imposed fee systems). Under current state law, such fee programs require only a simple majority vote by state and local regulators, and local fee proposals do not require voter approval.

Two obvious questions arise in the campaign over Proposition 26: first, what's the key, relevant background of this initiative measure? Second, are the initiative's supporters correct that the measure simply closes a "tax loophole" and prevents fiscal abuse by government? Or would Proposition 26 instead present a clear and present danger to a wide array of popular and necessary government programs to protect California's residents and environment, as Proposition 26's detractors argue?

To answer the first question, one must first recall two key developments in modern California political history, a related trend in California public finance, and one important, previously obscure state Supreme Court decision.

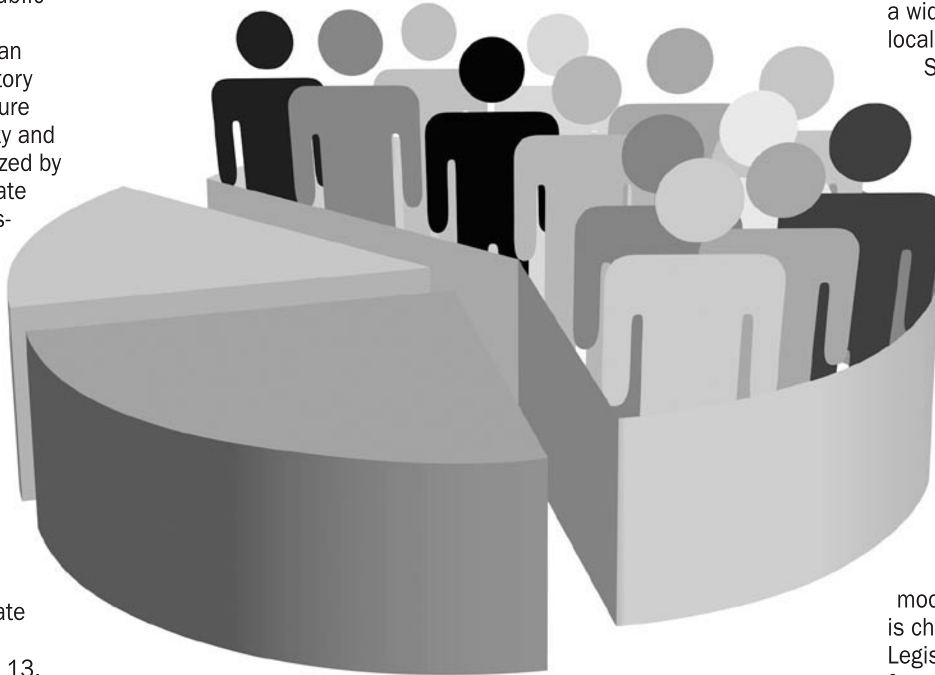
The first political development was California's iconic Proposition 13, enacted by state voters in 1978. Among Proposition 13's key provisions is the requirement that future state taxes can only be approved via a two-thirds "supermajority" vote of both houses of the California Legislature, or by the people.

The second is that California voters in 1996 again invoked the initiative process to bar *local* governments from increasing local taxes without a vote of their citizens. Under Proposition 218, most such local taxes similarly require a two-thirds vote of local voters.

The relevant trend in public finance — which was underway before Proposition 13 but increased after 1978, when imposition of new or increased taxes became far more difficult — is that California state and local governments have funded an increasingly large percentage of regulatory programs through fee systems. Such fee systems have traditionally been justified under a "user pays" philosophy — the notion that it's better public policy for those who stand to benefit from a particular regulatory program to fund it, rather than impose the costs of that program on the public at large. In the environmental context, these fee programs implement the "polluter pays" philosophy — the idea that those who pollute the environment to the detriment of public health and environmental resources should bear the costs of preventing and redressing such pollution.

Finally, the important, obscure court decision is *Sinclair Paint* (15 Cal. 4th 866), a 1997 state Supreme Court ruling that established legal rules for judging the validity of a particular California fee program. The key requirement, said a unanimous Court, is that the fees assessed not "exceed in amount the reasonable cost of providing the services" for which the fees are levied. (*Sinclair* rejected an industry challenge to a fee system established under California's Childhood Lead Poisoning Prevention Act to recoup the reasonable cost of providing programs to prevent lead poisoning of children.)

Proposition 26 would, in effect, recast many fee programs as tax increases, thus requiring a supermajority vote before they could be implemented or modified. That will be politically impossible in many cases. The inevitable result? The financial burden of innumerable California fee programs upon which Californians have come to depend will be shifted to the general public. Alternatively, such programs could disappear altogether.



Proposition 26 is being funded primarily by the oil, tobacco and alcohol industries that stand to benefit most financially from its passage. (California's non-partisan Legislative Analyst concludes that enactment of Proposition 26 would immediately increase the state deficit by $1 billion and cost Californians "billions in revenue annually.") That's not surprising.

What *is* surprising — and simply false — is the claim by Proposition 26's backers that passage of the measure would not diminish California's ability to protect its citizens' health, public safety, and environment.

Here's the nub of the debate: recall that *Sinclair Paint* validates state and local fee programs that don't exceed the reasonable costs of providing services for which the fees are charged. Proposition 26, by contrast, fundamentally changes the legal test by which a valid fee is distinguished from a tax requiring a two-thirds vote of the Legislature or local voters. Specifically, under Proposition 26 the only relevant fee programs that wouldn't be reclassified as taxes are those that impose a fee: "for a specific government benefit conferred or privilege granted directly to the [regulated industry]" that's not provided to others and that "does not exceed the reasonable costs to the state of conferring the benefit or granting the privilege to the [regulated industry]" or "for a specific government service or product provided directly to the [regulated industry]" that's not provided to others and that similarly doesn't exceed the state's costs of providing the service or product to the industry.

By its plain language, therefore, Proposition 26 radically narrows the scope of fee programs exempt from supermajority vote of the California Legislature or local citizens. Current law validates carefully-tailored fee programs that benefit the public by requiring industry to internalize both the government costs of administering the regulatory program (i.e., user pays) and harms that industry imposes on society — e.g., environmental pollution. But Proposition 26 would dramatically limit future fee programs, validating only those that confer a benefit, privilege, service or product upon the regulated company(s). By contrast, fee programs designed to protect public health, safety and the environment would be re-classified as "taxes" requiring prior legislative or local citizen approval — by a supermajority vote.

The draconian effect of Proposition 26 would fall especially heavy upon a wide array of environmental protection measures adopted by state and local governments. Three examples:

San Francisco has considered adopting a small surcharge on cigarettes sales within that city, to help defray the $10.7 million the city expends annually to clean up ubiquitous cigarette butt pollution that litters city streets, enters the municipal sewer system and befouls regional water quality due to cigarette butt toxicity.

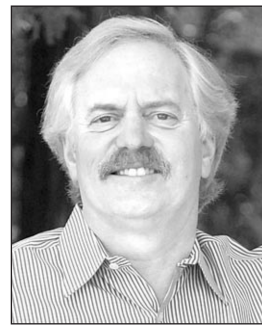
Following a major oil spill off the California coast, the state Legislature in 1990 enacted a landmark oil spill prevention and response program, funded by a five-cents-per-barrel surcharge assessed on oil brought into California by oil companies.

As part of California's pioneering Global Warming Solutions Act (AB32), the Legislature authorized the state Air Resources Board to adopt a fee program, assessed on California firms that generate greenhouse gases, to help fund Air Resources Board's multifaceted efforts to reduce the state's aggregate greenhouse gas emissions to 1990 levels by 2020. The Board did so earlier this year.

If voters approve Proposition 26, San Francisco's proposed cigarette butt fee could not be enacted without a vote of two-thirds of the city's voters. Efforts to raise the state oil surcharge even a modest amount (California's oil spill prevention and response program is chronically underfunded) would require a two-thirds vote of the state Legislature before it could be implemented. And the Air Resources Board's fee program to finance its ambitious AB32 implementation efforts would be voided in 2011 and could only be re-enacted if a supermajority off the California Legislature approves.

In short, passage of Proposition 26 would have a devastating effect on a wide array of vital programs upon which Californians have come to depend, and which have traditionally been financed by those whose business activities threaten public health, safety and the environment. Proposition 23 would, at best, shift the economic costs of those remedial government programs to the public at large. At worst, the initiative would eliminate such programs altogether.

Proposition 26 represents profoundly bad public policy, and deserves to be soundly rejected by California voters.



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