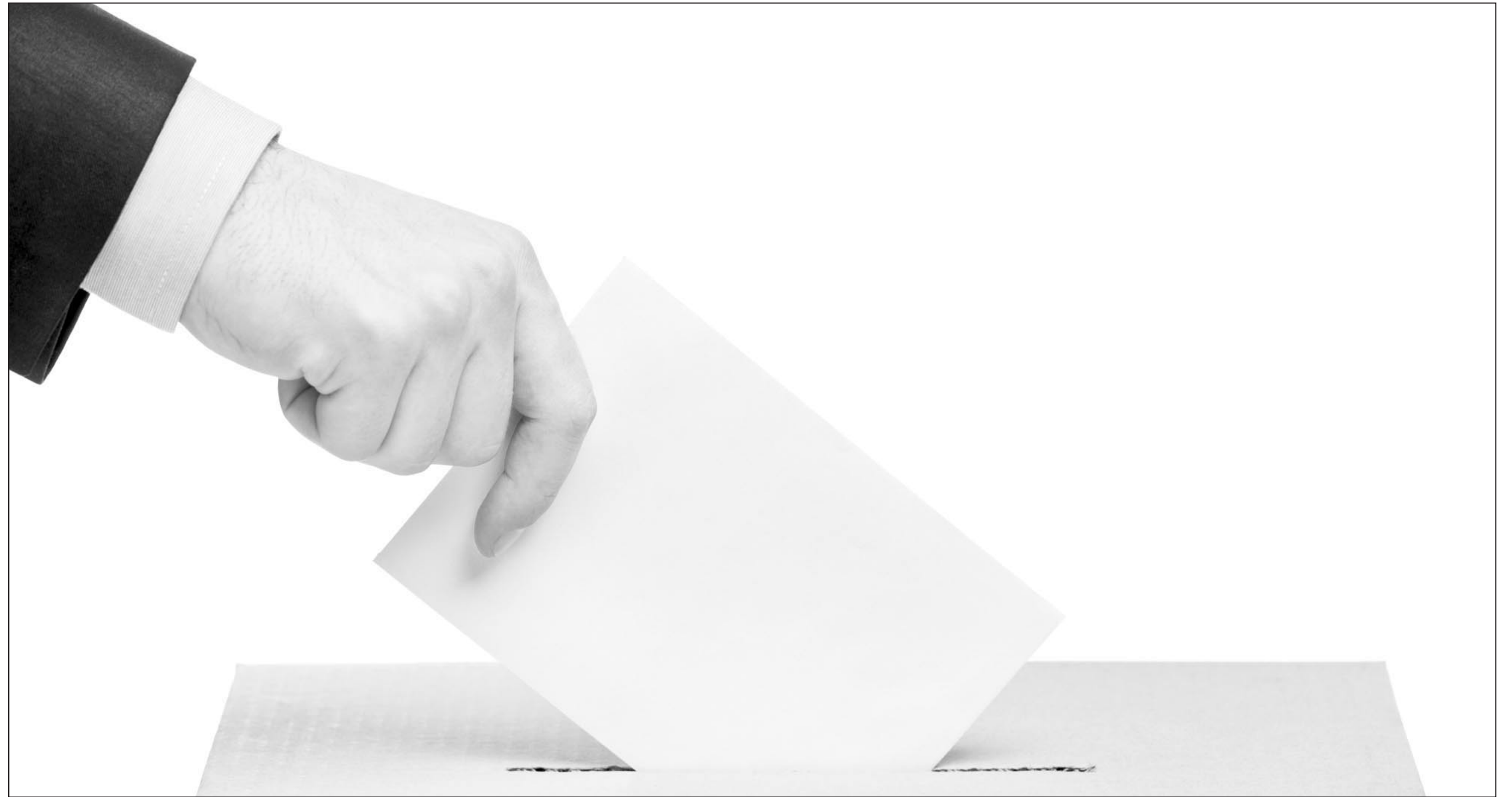
Voter Confusion and the Single-Subject Rule: Proposition 26 as a Test Case

By Chris Elmendorf



In 1948, the people of California amended their constitution to establish a "single-subject rule" for constitutional amendments enacted by ballot initiative. Writing in the official ballot pamphlet, proponents argued that "[t]he busy voter does not have the time to devote to the study of long, wordy propositions and must rely upon such sketchy information as may be received through the press, radio, or picked up in general conversation." A single-subject rule was necessary, proponents said, lest voters "be misled as to the over-all effect of [a] proposed amendment" by "improper emphasis... placed upon one feature...."

Last month, the people of California narrowly adopted little-noticed Proposition 26, an initiated constitutional amendment whose fate will tell us much about whether the original, animating purpose of California's single-subject rule lives on today. Prop. 26 does two things. First, it reclassifies many so-called regulatory fees as taxes, bringing them within the coverage of California's legendary Proposition 13 (which established supermajority-vote requirements for state and some local tax increases) and Proposition 218 (which established referendum and supermajority requirements for many local taxes). Second, Prop. 26 changes the trigger for the supermajority/referendum requirement. Previously, a tax bill only faced this hurdle if it would result in a net increase in government revenues. Prop. 26 specifies, however, that a bill that increases taxes *on even a single taxpayer* must clear the hurdle, whatever its net effect.

So does Prop. 26 have two "subjects" or one? The standard doctrinal test for single-subject violations holds that a challenged initiative is permissible only if "all of its parts are reasonably germane to each other, and to the general purpose or object of the initiative." If the courts may infer a "general purpose or object" from the substance of the measure, then Prop. 26 should pass this test with ease. Both of its parts cohere with the common purpose of protecting the reliance interests some taxpayers may have in not being burdened with additional fiscal obligations to the state.

Yet this was not the purpose sold to the electorate, or stated in the proposition's "Findings and Declarations of Purpose." Prop. 26 was plainly and simply marketed as a loophole-closing measure, one which would stop politicians from evading Prop. 13 with revenue measures labeled "fees." Not once does the proponents' argument in the ballot pamphlet even mention the new trigger for supermajority and referendum votes ("higher taxes on anyone, regardless of net revenue effects"). In all likelihood, the vast majority of Californians who voted "Yes" on Prop. 26 had no idea they were changing the trigger. And, importantly, they probably would have reconsidered their vote had they understood it. Conservatives should hate the new trigger because it subjects revenue-reducing and revenue-neutral bills to the supermajority/referendum requirement (insofar as the bill raises taxes on anyone). This will make it harder to reduce the size of government, and to substitute new sources of revenue for the most incentive-destroying taxes presently found in the code. Liberals should hate the new trigger because it makes it harder to achieve their public health, safety, and environmental goals (by replacing existing taxes with fees on pollution and unhealthful products). And voters in the middle should hate it because they are the likely beneficiaries of any legislation that reallocates burdens across taxpayers without increasing taxes overall.

The only interests that clearly stand to benefit from the new trigger are the oil, tobacco, and alcohol groups that funded the "Yes on 26" campaign.

Given the substantive undesirability of the new trigger from most any ideological perspective; the utter failure of Prop. 26's proponents even to mention the new trigger or its effects in their arguments to the electorate and the general lack of media attention to Prop. 26 during the campaign, one may reasonably suspect that the measure's adoption resulted from voters "be[ing] misled as to the over-all effect of [the] proposed amendment" by "improper emphasis...placed upon one feature...."

Such a "subversion of the electorate's will," as the state Supreme Court put it in *Senate v. Jones* (1999), is precisely the harm that California's single-subject rule was meant to guard against.

That said, the governing test for single-subject violations, which requires that the initiative's parts be "reasonably germane" to its "general purpose or object," is famously lax. It would be easy for the courts to impute a purpose to Prop. 26 that would encompass all of its provisions (e.g., protecting reliance interests in the taxation status quo), or to conclude naively that both the hidden and the overt components of Prop. 26 relate to the subject of "tax limitations."

This is what makes Prop. 26 so interesting as a test case. If the single-subject rule aims to thwart the bamboozlement of voters, then Prop. 26 looks like a very ripe target. But in order to hit the target, the courts need to equip single-subject doctrine with a little more punch.

That can be done by resolving two latent ambiguities in the case law. The first concerns the nature of the inquiry into a ballot measure's "general purpose or object." The state Supreme Court has conducted this inquiry in various ways. Often it infers a purpose from the measure's title and ballot description. Sometimes it considers hypothetical purposes. And in one important case, it praised a lower opinion that relied on the proposition's *stated* purpose in finding a single-subject violation.

Given the original rationale for California's single-subject rule, the courts should hold that the "general purpose or object" of a ballot initiative is the measure's central, public purpose *as represented by proponents to the electorate and understood by ordinary voters*. So long as the principal components of a ballot proposition reasonably advance the measure's public purpose as ordinary voters understand it, the measure's adoption is unlikely to result from voters being misled as to the initiative's "overall effect" by "improper emphasis . . . placed upon one feature."

On this approach to "purpose," Prop. 26 looks vulnerable. The measure's public purpose was to close the loophole that enabled state and local lawmakers using clever nomenclature (labeling taxes "fees") to end-run the California Constitution's supermajority and referendum vote requirements. Subjecting so-called "hidden taxes" to "the same vote requirements" that apply to regular taxes was the *only* objective stated in the proponents' argument in the voter guide, and in the findings-and-purposes section of the proposition itself. Yet *changing* the trigger for supermajority and referendum votes is not even rationally related to the stated objective of subjecting "fees" to the trigger that had applied to "taxes."

The other important ambiguity in the single-subject jurisprudence relates to the germaneness inquiry. Specifically, is "reasonable germaneness" a requirement of minimal means/ends fit, akin to the rational basis test familiar from equal protection jurisprudence, or is it a contextual inquiry under which the "reasonableness" of a given level of "germaneness" varies with, for example, the nature of proposition at issue, the campaign for and against it, the preferences of the voters who supported it, and the proposition's margin of victory?

The latter approach makes more sense if the core purpose of the single-subject rule is to prevent "subversion of the electorate's will" by ballot-initiative entrepreneurs who attach poorly understood and substantively objectionable riders to popular reforms. But the state Supreme Court more often treats "germaneness" as a requirement of a fixed (and pretty minimal) level of relatedness. That said, the Court has pointedly approved a lower court ruling that stressed — in finding a single-subject violations — that the other subject in the measure at issue was found in a single section "located inconspicuously" in the middle of a 120-page initiative. This attention to context provides a doctrinal toehold for plaintiffs to argue that the germaneness inquiry, properly understood, takes account of the likelihood that voters were bamboozled by inconspicuous, unadvertised, or otherwise hard-to-grasp riders.

The ballot initiative is an important, well established, and understandably popular ingredient in California governance. But if the initiative is to perform its long-celebrated role as a "battering ram" with which ordinary voters force through popular reforms that lawmakers beholden to special interests will not touch, the California courts must give teeth to constitutional provisions that protect the initiative process against the same special interest abuses.

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Begin the New Year by Considering Changes To Your Pension and ERISA Plans

By David McFarlane and Samuel Krause

What better way to kick off the new year than by reading about pension plans and ERISA matters? Sounds like fun, right? Probably not. Without trying to be a killjoy, however, here is an easy-to-read and practical guide to help you in that pursuit. What follows are "to do" lists for three qualified pension plans that may require your immediate attention.

Qualified Plans "To Do" List (all 401(k), traditional pension plans, etc.)

No good news here. Unfortunately if your company sponsors any type of qualified plan (such as a 401(k), profit sharing plan, cash-balance plan, traditional pension plan, etc.), then you are going to have to make some changes by the end of the 2010 plan year (i.e., December 31, 2010, for calendar year plans).

As a general matter, if you made any design changes to the 2010 plan during the year you must amend it to reflect those changes by the last day of the 2010 plan year. Additionally, if your qualified plan is individually designed and the EIN associated with the plan ends in a 5 or a 0 (i.e., falls in Cycle E) you must restate the plan on or before December 31, 2010, and submit it for an EGTRRA determination letter on or before January 31, 2011.

Even if you do not fall within Cycle E, the Worker, Retiree, and Employer Recovery Act of 2008 provides that, effective for plan years beginning after December 31, 2009, plans are required to provide a direct rollover option for non-spouse beneficiaries. Plan sponsors should adopt a plan amendment reflecting this change by the end of the 2010 plan. In addition, the Heroes Earnings Assistance and Relief Tax Act of 2008 made changes that impact qualified plans, some mandatory (e.g., plans must provide additional death benefits — other than benefit accruals — when a participant dies during active military duty, and differential wage payments must be treated as compensation), others optional (e.g., plans may provide contributions or benefit accruals if a participant dies or becomes disabled during active military duty). Some of the changes took effect as early as January 1, 2007, while others were effective January 1, 2009. Either way, plan sponsors must adopt a conforming amendment by the end of the 2010 plan year.

Finally, if you have not already done so, plan sponsors should update their Section 402(f) eligible rollover distribution notices to comply with the IRS model rollover notices published by the IRS in 2009.

Defined Contribution Plans "To Do" List (including Section 401(k) Plans and non-Section 401(k) Plans)

No good news here either. In addition to the items on the Qualified Plans "to do" list, there are a number of notices that all defined contributions plans must provide at least 30 days — but not more than 90 days — before the beginning of each plan year (i.e., December 2, 2010 for calendar year plans), including a safe harbor notice if your plan has a Section 401(k)/401(m) contribution safe harbor, an annual automatic enrollment notice if your plan has adopted an automatic contribution arrangement, an eligible automatic contribution arrangement ("EACA"), a qualified automatic contribution arrangement ("QACA"), or any combination thereof. If you do not have either a QACA or an EACA but wish to add one of these to your plan for the 2011 plan year, you must adopt an amendment doing so by December 31, 2010 for calendar year plans.

December 31, 2010, is also the deadline for plan sponsors who wish to implement provisions allowing for in-plan Roth conversions in 2010 (i.e., participants in Section 401(k) or Section 403(b) may convert pre-tax amounts into after-tax amounts — commonly called "Roth amounts" — inside a plan). For Roth conversions that occur in 2010, favorable income inclusion rules apply, such that income from a 2010 Roth conversion may be spread out over the participant's 2011 and 2012 tax years.

As a reminder, for those of you who are relying on the qualified default investment alternative safe harbor, you also must give an annual notice at least 30 days — but not more than 90 days — before the beginning of each plan year (i.e., December 2, 2010 for calendar year plans). Also, if your plan will be waiving its 2009 required minimum distributions ("RMDs"), plan sponsors must adopt amendments conforming to the published IRS requirements by the last day of the first plan year beginning on or after January 1, 2011 (i.e., December 31, 2011 for calendar year plans) to reflect the waiver of 2009 RMDs. In the meantime, plans must be administered in accordance with the new rules.

Finally, with respect to defined contribution plans holding publicly traded employer securities, plan sponsors must amend their plans by the end of the 2010 plan year to reflect the diversification requirements of Section 401(a)(35) the Code (although the final regulations are not effective until plan years beginning on or after January 1, 2011).

Defined Benefit Plans "To Do" List

In addition to the items on the Qualified Plans "to do" list, hybrid plans (including cash balance plans) must be amended on or before the last day of the first plan year beginning on or after January 1, 2010 (i.e., December 31, 2010 for calendar year plans), to use a three-year cliff vesting schedule for all participants who have an hour of service beginning on or after January 1, 2008. Also, since Notice 2009-97 extended the deadline for plan sponsors to amend their plans to comply with Section 436 of the Code (which imposes benefit restrictions on certain underfunded defined benefit pension plans), plan sponsors must amend their plans to comply with these new regulations (unless further guidance is issued) on or before the last day of the first plan year beginning on or after January 1, 2010 (i.e., December 31, 2010 for calendar year plans).

Single employer defined benefit plan sponsors are required to provide plan participants with an annual notice of the plan's funding status within 120 days of the end of the plan year to which the notice relates (however, plans with fewer than 100 participants do not have to provide the notice until the Form 5500 annual report is due for the plan year). In addition to the annual funding, ERISA requires a plan administrator to provide a notice to participants if the plan is subject to a restriction on payment of benefits. These restrictions, as well as an obligation to notify the PBGC within 105 days following the end of the plan sponsor's fiscal year (which is April 15, 2011 for calendar year taxpayers), become applicable if the plan's adjusted funding target attainment percentage is less than 80%. However, plan administrators are not required to provide this notice to participants and beneficiaries in pay status

Finally, sponsors of defined benefit pension plans that maintain an Intranet website for the purpose of communicating with employees (and not the public) are required to post portions of the defined benefit plan's Form 5500 on the company's Intranet.

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