Proposition 26: California’s Stealth Initiative

By Richard M. Frank

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s the Nov. 2 general election approaches, the California ballot initiatives on which most of the public attention is focused are Proposition 19, that would legalize marijuana, Proposition 20, that would suspend implementation of California’s land use reform law signed by Gov. Arnold Schwarzenegger last year, and Proposition 21, but other political and policy issues 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 enormous array of state and local government programs are financed. The initiative would mandate that in the future majority of the costs for designing and delivering public health, safety and environmental protection programs could take effect only if authorized by a two-thirds supermajority of both the California Legislature (in the case of non-fee programs) or local voters (for local government-imposed fees such as a property tax levy). Such programs would 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, is the initiative’s supporters correct that the measure simply draws a “thin line” and presents fiscal abuse by anyone? Or would Proposition 26 in fact present a new threat 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 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 sales taxes can only be approved via a two-thirds supermajority vote of both houses of the California Legislature, or, in law, by popular vote.

The second is that California’s voters in 1990 again invoked the initiative process to force local governments from increasing local taxes without a two-thirds vote of the electorate. The local initiative initiative — Proposition 187 — required only a two-thirds vote of local voters.

The third is that Proposition 26, which was underway before Proposition 187, would necessarily apply only to programs that had been substantially increased in cost or scope after Proposition 187 took effect. In other words, only those programs that would be substantially increased in size and scope would be subject to Proposition 26’s referendum requirement. In effect, Proposition 26 would mandate a two-thirds vote of the local electorate for only those programs that had been substantially increased in cost.

The fourth is that Proposition 26 would require only a two-thirds supermajority vote of initiative voters, even if a local government program is substantially increased in cost. The key requirement is that the state and local governments prove that they had substantially increased their program in terms of the budgetary impact that the new or increased program would have on the total state and local government budget.

Finally, the important, obscure court decision in Spector v. Stickler (1993) is relevant. The California courts have historically emphasized that every new regulatory program must be both “legitimate” and “necessary” to justify the validity of a particular California program. The issue in Spector was whether a program that was established legally must also be “necessary” and that the fees assessed did not “exceed in amount the reasonable cost of providing the service” for which the fees are levied. Spector rejected an industry challenge to a fee system established under California’s Child Lead Poisoning Prevention Act to recover the reasonable cost of providing programs to prevent lead poisoning.

Proposition 26 would, in effect, recall many fee programs as tax bills, requiring a supermajority vote before they could be implemented or modified. That will be politically impossible in many cases. The inevitable result will be the forced downsizing of important California government programs upon which Californians have come to depend will be shifted to the general public. Alternatively, such programs could disappear altogether.

A major opening ramification of Proposition 26 would fall especially heavily upon a wide array of environmental protection measures adopted by state and local government programs to meet federal standards.

San Francisco has considered adopting a small surcharge on cigarette sales within that city, to help defray the $107 million the city expects annually to clean up abandoned cigarette butt pollution that enters city waterways, enters the municipal sewer system and makes the region a smaller and less attractive place for tourists and visitors. The city Supervisor Harvey Milk and other San Francisco elected officials believe that Proposition 26’s veto could impact the city’s ability to adopt such a local environmental protection measure.

The San Francisco Planning Commission is expected to vote in late November on a proposal that would require the city to pay fees to clean up any illegal waste on city property or nearby if the city’s failure to do so violates a state or federal environmental regulation. The proposal would be an important tool for the city’s efforts to protect the city’s environment from illegal waste.

It should be noted that Proposition 26 would not impact any of the city’s existing environmental protection measures or any of the city’s existing pollution reduction measures, even if the city’s pollution reduction program is substantially increased in size and scope.

In short, passage of Proposition 26 would have a devastating effect on a wide array of local programs upon which Californians have come to depend. Such programs are critical to ensuring the safety, health and the environment in rural communities, as well as in urban centers.

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

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