REMAPPING DEBATE
Asking "Why" and "Why Not"

Supermajority gives California Dems a chance to finish what they started

Original Reporting | By Mike Alberti | Legislation, State government

Dec. 5, 2012 — Last month, California voters gave Democrats a two-thirds majority in both houses of the state legislature for the first time in 70 years. That enhanced margin theoretically gave Democrats the power to do a variety of things that they could not achieve in the past.

When the Los Angeles Times asked Assembly Speaker John A Peréz what he intended to do with the Democrats' new supermajority, he said, simply, "Nothing."

In 1978, for example, voters approved Proposition 13, a provision of which prohibited the legislature from raising taxes without a two-thirds majority ("supermajority") vote in both chambers. But being able to overcome the anti-tax barriers of Proposition 13 is only one of the advantages of a supermajority under California law. That margin also enables the dominant party to change legislative rules, override a Governor's vetoes, place initiatives and constitutional amendments on the ballot, and make changes to some existing laws that were enacted by past ballot initiatives.

Rather than considering their election a mandate from the voters to tackle some of the state's many issues, however, the tone set by California Democrats has been decidedly cautious. Governor Jerry Brown has promised to "cut down" the desires to restore some of the cuts from the last three years and to take any tax increase proposal directly to the voters. In the state legislature, when the Los Angeles Times asked Assembly Speaker John A. Pérez what he intended to do with the Democrats' new supermajority, he said, simply, "Nothing."

The most common explanation for this hesitancy has been that the state government needs to prove to California's citizens that they can thoughtfully and responsibly handle the power given to them. But what are the actual consequences of inaction? And is inaction the thoughtful and responsible course?

As a Remapping Debate analysis shows, there were at least five legislative proposals in the last two years that, although earning broad support, failed because they required a supermajority vote and didn't get one. In some cases, the bills came up only one or two votes short of the supermajority margin.

In collecting proposals, we limited ourselves to bills that have been introduced in the state legislature since Brown took office in 2011, required a supermajority vote to pass, and either narrowly failed to reach that bar in a floor vote in one or both houses, or failed to make it out of committee because it was clear that Republicans would not allow the bill to pass. We did not include bills that passed but were vetoed by the Governor, or proposed bills that fell far short of the supermajority vote necessary for passage.

Housing Opportunity and Market Stabilization (HOMeS) Trust Fund Act

Introduced last February by State Senator Mark DeSaulnier and State Senate President Pro Tem Darrell Steinberg, this proposed bill would have created a dedicated fund for the development of affordable housing in California and for the accomplishment of some other housing-related goals, such as foreclosure mitigation.

Advocates have been fighting for a stable, dedicated funding stream for affordable housing for years, but as Ray Pearl, the executive director of the California Housing Consortium, explained in an interview, the need for such a mechanism has increased dramatically in recent years, as traditional funding sources have dried up. The primary source of funds — about $1 billion a year — came through the state's independent economic development agencies, but those funds disappeared when lawmakers abolished those agencies in 2011. Additionally, while California voters have approved two ballot initiatives that raised a total of about $5 billion for affordable housing through bond sales in the last 10 years, those funds have also run out.

> Ray Pearl of the California Housing Consortium explained that the combination of budget cuts and the foreclosure crisis has left the state in a place where "the need for affordable housing is greater than ever, but with no way to pay for it."

"That leaves us in a place where, because of the economy and the foreclosure crisis, the need for affordable housing is greater than ever, but with no way to pay for it," Pearl said.

The HOMeS Trust Fund Act would have provided an estimated $525 million a year for affordable housing by imposing a $75 dollar fee on the recordation of real estate documents, excluding home sales. Dedicated trust funds for affordable housing are used by 35 states, and a document recordation fee is the second most common funding measure after a real-estate transfer tax.

The fee would still have been considered a tax under the definitions of Proposition 13, however, therefore requiring a supermajority for passage. When it came up for a vote in the State Senate last May, it did not gain any Republican votes and fell a single vote shy of the two-thirds necessary for passage.

Pearl said that he is confident that a new bill will be introduced in the next session, though it unclear who the sponsor will be or whether it will be able to attract all the Democratic votes it will need in both houses.

California DISCLOSE Act

Modeled on similar legislation that has been proposed at the federal level, the California DISCLOSE Act would have created some of the strictest transparency requirements for election spending in any state in the country. The proposed bill, introduced in January by Assembly Member (now Congress Member-elect) Julia Brownley, would have made several significant changes to the state's disclosure laws regarding campaign advertisements. In particular, the bill would have required that any television, radio, or print advertisements that support or endorse a candidate, other than those for which the candidate does not explicitly take responsibility, include a list of the organizations of individuals who made the top three largest total donations to the advertisement. The bill would also have required that any political action committee that pays for an advertisement set up a website with a list of its five largest funders.

The bill would have reformed a 1974 disclosure law that was passed as a ballot initiative and included a provision requiring a supermajority vote for it to be amended.

> "Campaign finance has become much more complicated since Citizens United, but our disclosure laws have not kept up."
> — Trent Lange, California Clean Money Campaign

Trent Lange, the president and executive director of the California Clean Money Campaign, which supported the bill, said that the huge amounts of money that were spent in the most recent election cycle, and what he described as the demonstrated inadequacy of current transparency provisions, show that stricter disclosure requirements are needed. Lang pointed to an $11 million contribution that was made to the campaign to defeat Proposition 30, Governor Brown's signature tax increase. An inquiry by California's Fair Political Practices Commission revealed just the day before the election that the source of the donation was an obscure Arizona non-profit, and the source of the Arizona non-profit's funding was a Virginia non-profit that does not reveal its donors.

According to Lange, "Campaign finance has become much more complicated since Citizens United" — the landmark Supreme Court case that prohibited government restrictions on campaign spending — "but our disclosure laws have not kept up. If we can't limit how much these groups can spend, then we need to make sure that that spending is as transparent as possible."

Land also pointed out that, had the law passed, Californians who viewed a deluge of advertisements against Proposition 37 — a failed ballot initiative that would have required all genetically modified food to carry a label to that effect — would have seen that the three largest donors to the campaign against the initiative were the huge industry players Monsanto, Dupont, and Pepsico.

The bill passed the Assembly with a supermajority in August, but ran out of time to come up for a floor vote in the Senate. Lange said that another version would be introduced in the next session.

Eliminating tax deductions for punitive damages

Under California law, individuals and corporations are allowed to take a tax deduction not only for any compensatory damages they pay to a plaintiff but also for any punitive damages that have been imposed. That arrangement is one that many advocates say undermines the very idea of punitive damages.

Under California law, a defendant cannot be found liable in a civil case for punitive damages unless the fact-finder concludes that there that the defendant had engaged in oppression, fraud, or "malice," the last of which includes conduct intended to cause injury or despicable conduct which is carried on with a "willful and conscious disregard of the rights or safety of others." The fact-finder's conclusion must be supported by "clear and convincing" evidence, a heightened standard from that which usually applies in civil cases.

The damages are levied both to punish the wrongdoer and to deter others from such wrongful conduct.

"Giving them a tax deduction is the opposite of punishing them," said Mariko Yoshihara, the political director of the California Employment Lawyers Association.

Yoshihara said that, at the same time, the deduction also undermines the idea of a tax exemption, which "is supposed to reward good behavior, not bad behavior."

In February, 2011, a proposed bill was introduced by Assembly Member Mike Feuer that would have ended the practice of giving a tax deduction for punitive damages. Because the bill would have meant that some taxpayers would have a higher effective tax rate, it required a supermajority to pass under Proposition 13. The bill did not gain any Republican votes and fell one vote shy of passing in January.

> In the this last election, voters approved 25 out of 49 parcel tax measures. If the threshold had been 55 percent instead of 66 percent, however, 37 would have passed, including seven that would have funded school districts.

It is unclear whether another version of the bill will be introduced in the next session, though Yoshihara is hopeful. "This seems like complete common sense," she said. "No matter how carefully the Democrats are treading with the supermajority, this is one we ought to be able to get through."

Lowering the bar for local "parcel tax" increases

In addition to placing strict limits on how much local governments can raise their property taxes each year, the California constitution requires that any local tax levied for a specific purpose be directly approved by two-thirds of voters. The most common such tax is known as a parcel tax, which is flat fee assessed on each piece of property in a town or school district. Parcel taxes are typically levied to fund local school systems, but can also be used for other purposes, such as police and fire services and building maintenance. Since 1983, just over half of parcel tax initiatives have achieved the two-thirds requirement at the local level.

In contrast to the parcel tax, the state only requires a 55 percent vote to pass a bond measure for school funding; California Democrats have considered trying to lower the parcel tax requirement to 55 percent for several years. Because lowering the threshold would mean amending Proposition 13, which is part of the state's constitution, California law requires that such a proposal be submitted directly to voters. However, a supermajority of the legislature could vote to place such a proposal on the ballot in 2014, avoiding the long and often expensive process of gathering signatures to place a measure on the state ballot.

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Assembly Member Sandré Swanson introduced a bill that would have lowered the required majority to 55 percent on the ballot in February, 2011, but it fell two votes short of passing the Assembly in August.

State Senator Mark Leno has recently introduced legislation that would lower the threshold to pass parcel taxes for school districts to 55 percent. In a statement, Leno said, "This change in law would give voters the power to make decisions about public education at the local level, allowing schools much-needed flexibility to improve instruction; fund libraries, music, the arts or other programs; or hire more teachers to reduce student-to-teacher ratios."

Oil Severance Tax

Though more oil is produced in California than in any state except for Alaska and Texas, the state has never implemented an oil severance tax, a tax on the volume or value of oil extracted that has long been in place in many oil-producing states, including Alaska, Florida, Mississippi, Oklahoma, Oregon, Texas, and Wyoming.

According to Jonathan Zasloff, a law professor at the University of California Los Angeles who has written about the oil severance tax, an oil severance tax would be an appealing way to raise revenue because it is targeted (that is, borne by a small number of taxpayers). Additionally, because the market for oil is global, economists believe that it is unlikely that consumers in California would see any increase in prices at the pump.

Zasloff said that the only entities likely to be negatively affected by an oil severance tax are the oil companies themselves, and for that reason, they have spent millions of dollars to defeat previous efforts to impose one. In the latest attempt, a 2006 ballot initiative that would have imposed a maximum tax of 6 percent, the industry spent nearly $100 million in opposition, and the initiative failed narrowly.

Several bills have been proposed in the legislature since then, all of them requiring a supermajority to pass. The most recent proposed bill was introduced by Assembly Member Warren Furtutani in 2011. The bill would have imposed a tax of 12.5 percent on the value of oil produced in California and dedicate the funds to the state's higher education system. The bill eventually died in the Revenue and Taxation Committee because, according to one staff member, it was apparent that no Republicans would vote for it.

There has been some revived interest in an oil severance tax recently, as several newly elected Assembly Members and Senators campaigned on the issue. One of them was State Senator Hannah-Beth Jackson.

"We have to remember that Proposition 30" — the recently passed ballot initiative that raised income and sales taxes — "only stopped the bleeding," Jackson told Remapping Debate. "It doesn't give us enough revenue to undo any of the damage that has been done to the state's education system during the recession."

Jackson said that she was hopeful that the legislature would consider a production tax in the next session.

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