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# Dan Walters: Is Democratic tax-fee swap really legal?

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One of the odder – and more interesting – aspects of the Capitol's budget stalemate has been a scheme by Democrats to increase revenue by billions of dollars without, or so they say, running afoul of the 31-year-old constitutional requirement that tax increases require two-thirds legislative votes.

Gov. Arnold Schwarzenegger appeared poised at one point to endorse the scheme that could, Democrats insisted, be passed with simple-majority votes.

Ultimately, however, he vetoed the multi-bill plan because, he said, it did not have deep enough spending cuts and did not include other "economic stimulus" provisions he was demanding. Democrats said he got cold feet after being pressured by anti-tax groups.

Schwarzenegger's veto short-circuited a lawsuit that those groups and Republican legislators had filed contending that the complex tax-and-fee package violated the two-thirds vote requirement of Proposition 13, enacted by voters in 1978.

Perhaps Schwarzenegger backed off a deal because he was worried that it would be unconstitutional, thereby embarrassing him and making the state's budget crisis even worse, although he says he's not concerned about its legality and is still open to a deal. The question of its legality remains, therefore, unsettled.

Senate President Pro Tem Darrell Steinberg, the scheme's father, insists that it's legal, basing that assertion on a 5-year-old opinion from the Legislature's legal office. He and other Democrats contend that if one bill both cuts one tax and increases another by an equal amount, it could be done on simple-majority votes, thus cutting Republicans out of the political equation.

The plan would eliminate excise and sales taxes on gasoline and raise other taxes to help close the budget deficit, then "backfill" the gasoline taxes with a new "fee" that would actually increase the bite on motorists by 50 percent, from 26 cents a gallon to 39 cents. A "fee" can be imposed by a simple majority vote as long as it relates to actual services rendered by government.

Finding a way around the two-thirds vote barrier on new taxes has been a holy grail for those on the political left, while preserving it has been a bedrock cause for those on the right. And while many business leaders might accept the particular plan that Democrats offered as a way to crack the budget stalemate, they fear it could lead to even more creative ways to impose new levies on business, such as a "carbon fee" that's been mentioned.

The legality, however, remains very questionable.

The business-supported California Taxpayers Association, in a recent editorial in its weekly bulletin, points

out that the constitutional provision at issue requires a two-thirds vote on "any changes in state taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in the methods of computation ..."

Given that wording, a scheme to skirt the two-thirds vote could have an uphill battle in the courts.

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