

DESIGNING THE TAX SUPERMAJORITY REQUIREMENT

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States are rekindling the trend of broad constitutional amendments that require supermajority approval to create or increase taxes. This trend may inadvertently harm states' already precarious fiscal footing, particularly with several new imminent expenditure demands. States can minimize negative economic consequences, however, through proper supermajority requirement design.

This article makes three contributions. First, it examines broad constitutional tax supermajority requirements' history, asserted justifications, and effectiveness. This examination concludes that the motivations underlying the first and second supermajority waves differ importantly from those underlying the possible third wave. Recognizing this novel motivation—signaling low-tax competitive advantage—allows this article to present optimal supermajority provision design principles.

Second, this article investigates several new sources that can generate immense tax revenue for states, but that will likely be obstructed by tax supermajority provisions if not designed properly. This article also identifies several expenditure demands that are unlikely to be satisfied without new or increased taxes.

Finally, this article presents tax supermajority requirement design principles that achieve a strong low-tax signaling function while allowing flexibility to maintain a low-tax competitive advantage. Fundamentally, the constitutional tax supermajority requirement should expressly encompass personal income tax, business taxes, and fees, while excluding transaction taxes. If a state decides to pursue a broad tax supermajority requirement, these design principles will best position a state to attract businesses and wealthy individuals while also achieving fiscal stability.

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INTRODUCTION

States are rekindling the trend of broad constitutional amendments that require supermajority approval to create or increase taxes. This trend may inadvertently harm states' already precarious fiscal footing, particularly with several new imminent expenditure demands. States can minimize negative economic consequences, however, through proper supermajority requirement design. This article examines the novel motivation underlying the current supermajority trend—signaling low-tax competitive advantage—and provides design principles that can effectuate this goal while preserving fiscal flexibility.

Two states have historic tax supermajority requirements that originated in the late nineteenth and early twentieth centuries, but the

modern tax supermajority requirement movement came in two distinct waves, first in the late 1970s then in the early to mid-1990s.¹ Unsurprisingly, voters tend to approve these supermajority requirements in tax-averse states, although California initiated the first supermajority wave in 1978 as part of a tax revolt.² There are several purported justifications for tax supermajority requirements, which have historically focused on fiscal discipline and conservatism. There is no conclusive evidence, however, that tax supermajority requirements achieve these goals, which may explain their lack of popularity since the second wave in the 1990s.

Although the supermajority trend was largely dormant over the following two decades, there has been a renewed push that may represent the third wave of states adopting these broad provisions. This third wave may be motivated less by the traditional justification of fiscal discipline and more by signaling a low-tax competitive advantage. To initiate this possible third wave, Florida amended its constitution in 2018 to impose a broad tax supermajority requirement, which may lead other states to follow suit as they did after California's 1978 amendment.³ Indeed, several states have recently proposed similar provisions.⁴ And although it addressed only one tax type, Texas amended its constitution in 2019 to expand its prohibition of personal income tax to ensure that individuals were not taxed under Texas's business tax.⁵ The Texas amendment

1. See *infra* Tables 1 & 2.

2. See Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1891 (2020); see also Kathleen K. Wright, *The Aftermath of California's Proposition 26*, 62 TAX NOTES STATE 471, 471 (2011).

3. See FLA. CONST. art. VII, § 19.

4. See, e.g., Ulrik Boesen, *Ohio Voters to Consider Requiring Two-Thirds Majority for Income Tax Increases*, TAX FOUND. (Mar. 10, 2020), <https://taxfoundation.org/supermajority-ohio-income-tax-increase-amendment/>; see also Grant Gerlock, *Amendment Requiring Supermajority To Raise Income Taxes Advances In Statehouse*, IOWA PUB. RADIO NEWS (Jan. 23, 2020), <https://www.iowapublicradio.org/state-government-news/2020-01-23/amendment-requiring-supermajority-to-raise-income-taxes-advances-in-statehouse>; Aaron Davis, *Illinois GOP Lawmakers Look to Counter Tax Increases*, TAX NOTES (April 2, 2019), <https://www.taxnotes.com/tax-notes-today-state/individual-income-taxation/illinois-gop-lawmakers-look-counter-tax-increases/2019/04/02/299gs?highlight=Illinois%20GOP%20Lawmakers%20Look%20to%20Counter%20Tax%20Increases>.

5. See TEX. CONST. art. VIII, § 24-a. Texas does not have a personal income tax but does have a business "margin" tax that applies to most passthrough entities. See TEX. TAX CODE ANN. § 171.0002 (West 2021). Texas is not alone in calling for constitutional bans on certain tax types. See, e.g., Carolina Vargas, *Montana Lt. Gov. Pushes for Ban on Statewide Sales Tax*, TAX NOTES (Aug. 12, 2020), <https://www.taxnotes.com/tax-notes-today-state/politics-taxation/montana-lt-gov-pushes-ban-statewide-sales-tax/2020/08/12/2ctsm?highlight=Montana%20Lt.%20Gov.%20Pushes%20for%20Ban%20on%20Statewide%20Sales%20Tax>. North Carolina voters approved a constitutional amendment capping the personal income tax rate, although it is being challenged on

functions as a two-thirds supermajority requirement for personal income tax.⁶ The primary driver of this potential third wave appears to be maintaining and signaling a low-tax competitive advantage for jurisdictions, such as Florida and Texas, that are actively attempting to attract businesses and wealthy individuals.⁷

This article begins with a brief history of tax supermajority requirements, their asserted justifications, and their effectiveness. Next, this article analyzes the express language of each state's broad tax supermajority requirement, noting important distinctions and their implications. With that foundation, this article then examines several new sources that could generate immense tax revenue for states, but that would likely be obstructed by tax supermajority provisions if not designed properly. These new potential tax revenue sources are not the broadly applicable taxes that supermajority provisions are generally intended to restrict. Rather, these are narrow taxes imposed only on certain discretionary activities. This article also examines several new pressing state expenditure demands that are unlikely to be satisfied without new or increased taxes. To conclude, this article considers policy implications and presents tax supermajority requirement design principles that achieve a strong low-tax signaling function while minimizing detrimental effects.

procedural grounds. Lauren Loricchio, *Appellate Court Upholds Tax Cap*, TAX NOTES (Sept. 28, 2020), <https://www.taxnotes.com/tax-notes-state/litigation-and-appeals/appellate-court-upholds-tax-cap/2020/09/28/2cz95?highlight=Appellate%20Court%20Upholds%20North%20Carolina%20Tax%20Cap>.

6. Because the prohibition is in the Texas Constitution, it can be repealed only by a two-thirds vote in each legislative chamber and a statewide referendum. TEX. CONST. art. XVII, § 1(a).

7. See, e.g., Rick Scott, Gov. of Fla., 2018 State of the State Address (Jan. 9, 2018), <https://www.floridatrend.com/article/23738/governor-rick-scotts-2018-state-of-the-state-address> (advocating for a tax supermajority requirement to avoid “raising taxes on families and job creators” and to maintain “the hard work we have done to grow Florida’s economy and create jobs”); Dave Lieber, ‘Yes’ Means ‘No’, and ‘No’ Means ‘Yes’ in Coming Vote on a Future State Income Tax, DALL. MORNING NEWS (Sept. 26, 2019, 5:48 PM), <https://www.dallasnews.com/news/watchdog/2019/09/26/yes-means-no-and-no-means-yes-in-coming-vote-on-a-future-state-income-tax/>; see also Dan Patrick, *Say No to an Income Tax. Vote YES on Proposition 4*, YOUTUBE (Oct. 18, 2019), <https://www.danpatrick.org/say-no-to-an-income-tax-vote-yes-on-prop-4/>; Billy Hamilton, *What Governors Are Saying About Taxes This Year, Part 1*, 95 TAX NOTES ST. 389, 391 (2020). Republican lawmakers in New York recently proposed tax supermajority requirements, both constitutional and statutory, as a response to New York’s “increasingly high tax burden” that appears to be driving taxpayers out of the state. S.B. 3040, 2021 Reg. Sess., 244th Sess. (N.Y. 2021).

I. BROAD TAX SUPERMAJORITY REQUIREMENTS

Thirteen states currently have broad constitutional tax supermajority requirements.⁸ This article focuses on state constitutional supermajority requirements to create or increase taxes that apply broadly to all or most tax types.⁹ Some states have statutory—as distinguished from constitutional—supermajority requirements.¹⁰ Statutory supermajority requirements are much less powerful because the legislature can simply eliminate the requirement through the normal legislative process. In addition, statutory supermajority requirements may conflict with constitutional procedural provisions. In 2013, the Washington Supreme Court struck down Washington’s statutory tax supermajority requirement holding that specific statutory provisions cannot supersede general constitutional provisions.¹¹ Other states, such as Hawaii, have supermajority expenditure limitations or budget limitations.¹² And many states have narrow tax supermajority requirements that apply to one tax type such as property tax.¹³ Although these narrow supermajority requirements have significant implications, broad tax supermajority requirements are most likely to perform a signaling function and to limit a legislature’s ability to impose taxes on the new revenue sources discussed in Section II below.

A. History, Justifications, & Effectiveness

The supermajority approval concept is not novel. General supermajority requirements received significant attention from our nation’s founders. The founders generally disfavored supermajority requirements because they shifted the power from a legislative majority to a minority, which was antithetical to their general governing philosophy.¹⁴ They recognized, however, certain benefits of supermajority requirements, specifically that they were an “obstacle generally to hasty and partial measures” and guarded against “faction,

8. *See infra* Table 1.

9. This article excludes Kentucky, which has a broad constitutional tax supermajority requirement, because the requirement applies only to odd numbered years. *See* KY. CONST. § 36, cl. 1

10. *See, e.g.*, WIS. STAT. § 13.085 (2021).

11. *League of Educ. Voters v. State*, 295 P.3d 743, 752 (Wash. 2013) (holding that the tax supermajority approval statute violated Washington’s Constitution, which expressly provides for when votes require supermajority approval).

12. HAW. CONST. art. VII, § 9.

13. *See, e.g.*, Kleiman, *supra* note 2, at 1891.

14. THE FEDERALIST NO. 58 (James Madison) (recognizing that with supermajority requirements, “It would be no longer the majority that would rule; the power would be transferred to the minority.”); THE FEDERALIST NO. 22 (Alexander Hamilton) (addressing supermajority requirements, stated “at first sight may seem a remedy, is, in reality, a poison.”).

precipitancy, or of any impulse unfriendly to the public good.”¹⁵ As such, the United States Constitution requires supermajority approval for only seven fundamental actions.¹⁶ Creating or increasing taxes is not one of the fundamental actions. There was a movement in the late 1990s for a federal legislative tax supermajority requirement, although that movement failed, partially based on states’ inconclusive experiences with tax supermajority requirements.¹⁷ Thus, federal tax legislation requires only simple majority approval.

The first wave of state tax supermajority requirements was part of a nationwide “Tax Revolt.”¹⁸ California initiated the Tax Revolt with a constitutional property tax limitation that then expanded to other tax types and to additional states.¹⁹ The Tax Revolt’s primary motivation was tax reduction, specifically reducing personal tax burdens and government spending.²⁰ The first tax supermajority wave corresponded with a “Retrenchment Age” that saw a manifest shift away from state infrastructure, education, and public health spending.²¹ Other than California, which hit its tax saturation point, most states that have incorporated broad constitutional tax supermajority requirements have been traditionally tax-averse states, further supporting the fiscal conservatism motivation.²² Fiscal discipline and lowering personal tax

15. Madison, *supra* note 14; THE FEDERALIST NO. 73 (Alexander Hamilton).

16. U.S. CONST. art. 1, § 3, cl. 6 (impeachment); art. 1, § 5, cl. 2 (expelling members from House or Senate); art. I, § 7, cl. 2 (overriding presidential vetoes); art. II, § 2, cl. 2 (ratifying treaties); art. V (constitutional amendments); amend. XIV, § 3 (removing insurrection or rebellion disqualification); amend. XXV, § 4 (determining President unable to discharge duties of office).

17. See Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 43 (1999); see also Jac C. Heckelman & Keith L. Dougherty, *Majority Rule Versus Supermajority Rules: Their Effects on Narrow and Broad Taxes*, 38(6) PUB. FIN. REV. 738, 739 (2010); Letter from James R. White, U.S. Gen. Acct. Off., to Larry E. Craig, Sen. (June 2, 1998) (on file with United States General Accounting Office).

18. See Jeremy Pilaar, *Starving the Statehouse: the Hidden Tax Policies Behind States’ Long-Run Fiscal Crises*, 37 YALE L. & POL’Y REV. 345, 369 (2018); ISAAC WILLIAM MARTIN, *THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS* 1–25 (2008); Bert Waisanen, *State Tax and Expenditure Limits—2010*, NAT’L CONF. OF STATE LEG., <https://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx> (last visited May 19, 2021); Darien Shanske, *Local Fiscal Autonomy Requires Constraints: The Case for Fiscal Menus*, 25 STAN. L. & POL’Y REV. 9, 12, 27 (2014).

19. See Kleiman, *supra* note 2, at 1890–91, 1893; Wright, *supra* note 2, at 471; Shanske, *supra* note 18, at 27.

20. Kleiman, *supra* note 2, 1894–97.

21. Pilaar, *supra* note 18, at 353–54.

22. Interestingly, as some of these states have become more politically progressive, particularly Colorado and Oregon, they have seen renewed initiatives to repeal their tax supermajority requirements. See Paul Jones, *States’ Tax Supermajority Vote Rules Challenged by Changing Politics, Economy*, TAX NOTES (Feb. 24, 2020),

burdens appear to underlie the second tax supermajority wave as well, which followed closely after the 1990–91 economic recession. In addition, by 1992, most states had some type of property tax limitation so there may have been less resistance to broader tax limitations.²³ After the second wave, no state enacted a broad constitutional tax supermajority requirement for almost twenty-five years.²⁴ It is unclear why the second wave ended, but a majority of traditional tax-averse states had adopted a supermajority provision by then and others may not have seen the need because their respective legislatures were staunchly tax-averse. High-tax states may not have reached a tax saturation point where citizens become overwhelmed with the state tax burden and revolt, as happened in California. Thus, it appears the constitutional tax supermajority movement—based on the fiscal conservatism justification—had largely run its course.

Table 1: Broad State Constitutional Tax Supermajority Requirements

State	Date Created	Supermajority Required
Arizona ²⁵	1992	2/3
Arkansas ²⁶	1934	3/4
California ²⁷	1978 / 1996	2/3
Colorado ²⁸	1992	2/3
Delaware ²⁹	1980 / 1981	3/5
Florida ³⁰	1971 / 1994 / 2018	2/3
Louisiana ³¹	1966	2/3
Mississippi ³²	1890	3/5
Missouri ³³	1980	2/3

<https://www.taxnotes.com/featured-news/states-tax-supermajority-vote-rules-challenged-changing-politics-economy/2020/02/24/2c45f>.

23. See Kleiman, *supra* note 2, at 1893; Billy Hamilton, *How the ‘Long 1980s’ Shapes State Tax Policy Today*, 96 TAX NOTES ST. 639, 641 (2020).

24. See *infra* Table 2.

25. ARIZ. CONST. art. IX, § 22(a).

26. ARK. CONST. art. V, § 38.

27. CAL. CONST. art. XIII A, §§ 3(a), 4; art. XIII C, § 2(d).

28. COLO. CONST. art. X, § 20(6)(a).

29. DEL. CONST. art. VIII, §§ 10(a), 11(a).

30. FL. CONST. art. VII, § 5(b); art. XI, § 7; art. VII, § 19(a).

31. LA. CONST. art. VII, § 2 (amended by Act 175 of 1965).

32. MISS. CONST. art. IV, § 70.

33. MO. CONST. art. X, §§ 19.

Nevada ³⁴	1996	2/3
Oklahoma ³⁵	1992	3/4
Oregon ³⁶	1996	3/5
South Dakota ³⁷	1978 / 1996	2/3

Table 2: Enactment Trends of Broad Constitutional Supermajority Requirements Currently in Effect³⁸

Pre-1960	1961-1975	1976-1980	1981-1990	1991-2000	2001-2010	2011-2020
Arkansas Mississippi	Louisiana	California Delaware Missouri South Dakota		Arizona California Colorado Florida		Florida
				Nevada Oklahoma Oregon South Dakota		

Although reducing personal tax burdens and ensuring fiscal discipline are the traditional justifications for tax supermajority requirements—and likely the most appealing to voters—there are several less prominent but intriguing justifications. Scholars posit that supermajority requirements may “reduce external costs or ‘majority tyranny’ by limiting fiscal policy to non-redistributive projects that promote the general welfare of all citizens.”³⁹ Essentially, they maintain that supermajority requirements prevent states from imposing taxes on a narrow subset of the population. Some assert that tax supermajority requirements enhance government efficiency, particularly that they encourage governments to investigate “creative” ways to generate

34. NEV. CONST. art. IV, § 18.

35. OKLA. CONST. art. V, § 33.

36. OR. CONST. art. IV, § 25.

37. S.D. CONST. art. XI, § 14.

38. This table identifies each time a state initially created or substantially expanded a broad constitutional tax supermajority requirement.

39. John Charles Bradbury & Joseph M. Johnson, *Do Supermajority Rules Limit or Enhance Majority Tyranny? Evidence from the US States, 1960–1997*, 127 PUB. CHOICE 437, 437 (2006) (examining JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962)).

revenue such as selling advertising on government owned property.⁴⁰ Another interesting potential justification is that states are less likely to invalidate tax legislation compared to other types of legislation, so tax supermajority requirements may function to protect taxpayers at the outset.⁴¹ Finally, this article suggests that a primary justification, for the third wave in particular, is signaling a low-tax competitive advantage.⁴²

Detractors counter these justifications with several purported disadvantages. Most fundamentally, the provisions may not be effective at achieving fiscal discipline or controlling government growth because the state may shift to fee increases or debt financing to increase revenue. Shifting from a tax approach to a fee approach broadens the state's regulatory regime, which may actually promote government growth instead of limiting it.⁴³ Legislative limitations increase decision-making costs, so if having a supermajority requirement is not more effective than not having one, the state will face a net detriment.⁴⁴ Some also argue that supermajority requirements are not necessary because the legislative majority will not take advantage of the legislative minority because of political compromise in a dynamic setting, deemed intertemporal smoothing.⁴⁵

Even if tax supermajority provisions are effective, they may have negative consequences. States may cut government services in ways that have disparate effects and reduce overall collective welfare.⁴⁶ States may redistribute the tax burden from one tax type to another—or from the state level to the local level—thus shifting the tax burden to certain taxpayers.⁴⁷ This shift often disparately impacts minorities and low-income taxpayers, reduces state legislative accountability, and increases

40. Waisanen, *supra* note 18.

41. See Hayes Holderness, *Insidious Regulatory Taxes*, 55 U. RICH. L. REV. (forthcoming 2021) (manuscript at 1).

42. This justification may be undermined, however, if the state has less flexibility to adapt its tax regime, as discussed in Section IV.

43. DANIEL N. SHAVIRO, TAXES, SPENDING, AND THE U.S. GOVERNMENT'S MARCH TOWARD BANKRUPTCY 40 (2007); David Gamage & Darien Shanske, *The Trouble with Tax Increase Limitations*, 6 ALB. GOV'T L. REV. 50, 60–61 (2013).

44. Bradbury & Johnson, *supra* note 39, at 439; see generally BUCHANAN & TULLOCK, *supra* note 39.

45. See Avinash Dixit, Gene M. Grossman, & Faruk Gul, *The Dynamics of Political Compromise*, 108 J. POL. ECON. 531, 558 (2000). However, Bradbury and Johnson conclude that “[p]oliticians may have such short time horizons that intertemporal smoothing of transfers never occurs . . .” Bradbury & Johnson, *supra* note 39, at 446.

46. See Pilaar, *supra* note 18, at 369–70.

47. The shift from state to locality can be effectuated through unfunded mandates, essentially forcing the locality to generate revenue. See Minzner, *supra* note 17, at 67–68.

fiscal volatility.⁴⁸ Supermajority requirements “privilege the existing tax structure,” which locks in prior policy that may be antiquated or discriminatory and hinders legislatures from enacting new structures that may be more equitable and efficient.⁴⁹ Supermajority requirements may prevent a state from eliminating “special interest tax breaks” such as corporate income tax deductions for a specific industry.⁵⁰ Supermajority requirements may not limit creating these tax expenditures in the first place.⁵¹ Although supermajority requirements may mitigate “majority tyranny,” they allow for “minority tyranny” where a small minority can impede revenue legislation that would be beneficial overall.⁵² And borrowing costs may be higher for states with tax supermajority requirements because the provisions constrain the state’s ability to raise revenue to service its debt.⁵³

Even if one looks only at just the traditional justifications of fiscal discipline and controlling government growth, it is still unclear whether tax supermajority requirements achieve these justifications despite decades of analysis. Assessing tax supermajority requirement effectiveness is difficult because of the complex nature of the inquiry and endogeneity issues. State fiscal regimes are multifaceted.⁵⁴ If a study were to conclude that states with tax supermajority requirements imposed a lesser tax burden than states without, the reality may be that the state shifted to fee or debt financing, not that the state exhibited fiscal conservatism.⁵⁵ A holistic analysis also needs to examine state spending and the impact of any applicable expenditure limitations. And, as this article illustrates below, state tax supermajority requirements vary significantly, which hinders any sweeping conclusions.

These difficulties, however, have not dissuaded economists from attempting to determine the impact of tax supermajority requirements.

48. See, e.g., Francine J. Lipman, Nicholas A. Mirkay, & Palma Joy Strand, *U.S. Tax Systems Need Anti-Racist Restructuring*, 168 TAX NOTES FED. 855, 856 (2020); Gamage & Shanske, *supra* note 43, at 60.

49. Minzner, *supra* note 17, at 49; see generally Lipman et al., *supra* note 48, at 856.

50. Michael Leachman, Nicholas Johnson, & Dylan Grundman, *Six Reasons Why Supermajority Requirements to Raise Taxes Are a Bad Idea*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 13, 2012), <https://www.cbpp.org/sites/default/files/atoms/files/2-13-12sfp.pdf>.

51. Gamage & Shanske, *supra* note 43, at 54–55.

52. *Id.* at 67.

53. JAMES M. POTERBA & KIM S. RUEBEN, PUB. POL’Y INST. OF CAL., *FISCAL RULES AND STATE BORROWING COSTS: EVIDENCE FROM CALIFORNIA AND OTHER STATES* iv (1999).

54. See Gamage & Shanske, *supra* note 43, at 62 (considering how tax increase limitations “function in a more dynamic system of multiple forms of fiscal constraints”).

55. See, e.g., POTERBA & RUEBEN, *supra* note 53, at 38 (concluding that tax constraints lead states to borrow more); Soomi Lee, *Do States Circumvent Supermajority Voting Requirements to Raise Taxes?*, 109 NAT’L TAX ASS’N 1, 16 (2016).

Some have focused solely on whether supermajority requirements result in lower tax burdens, while others have gone further and focused on fiscal discipline more comprehensively.⁵⁶ The Center on Budget and Policy Priorities concluded that state and local taxes as a percentage of personal income have remained flat for three decades regardless of whether the state has a tax supermajority requirement.⁵⁷ The United States General Accounting Office determined that states with broad tax supermajority requirements raised taxes less frequently, but that tax increases were larger than states without the supermajority requirement.⁵⁸ Jordan and Hoffman concluded that supermajority requirements have no impact on revenue growth.⁵⁹ Lee concluded that supermajority requirements reduce the tax burden after the provision is created but the effect decays with time.⁶⁰ Lee also asserted that states with tax supermajority requirements do not shift to increased fees as a circumvention technique.⁶¹

Knight's 2000 study asserted that although states have nearly identical effective tax rates with or without a supermajority provision, each state's unique characteristics must be considered to determine the supermajority requirement's effectiveness.⁶² Knight's model incorporated "unobserved attitudes toward taxation" and concluded that supermajority requirements decrease tax rates by eight percent to twenty-three percent.⁶³ Knight argued that supermajority requirements are actually more common in "pro-tax" states.⁶⁴ Knight defined a state as "pro-tax" based on the legislative majority party and Governor party in the year in which the supermajority requirement was created.⁶⁵ Although Knight recognized different motivations between voter initiated and legislature initiated provisions, his study may overstate the significance

56. Each study uses different metrics and all these metrics are imperfect because of the complexity of state fiscal regimes.

57. CTR. ON BUDGET & POL'Y PRIORITIES, STATE SUPERMAJORITY RULES TO RAISE REVENUES 1 (2018).

58. Letter from James R. White to Larry E. Craig, *supra* note 17.

59. Meagan M. Jordan & Kim U. Hoffman, *The Revenue Impact of State Legislative Supermajority Voting Requirements*, 10 MIDSOUTH POL. SCI. REV. 1, 13 (2009).

60. See generally Soomi Lee, *The Effect of Supermajority Vote Requirements for Tax Increase in California: A Synthetic Control Method Approach*, 14 STATE POL. & POL'Y Q. 414 (2014) ("[t]he effect of [supermajority vote requirements] was immediate after its adoption, but has abated over time.").

61. Lee, *supra* note 55, at 42. Legislatures likely avoid the shift from taxes to fees because of broad supermajority provision language and the threat of litigation.

62. Brian G. Knight, *Supermajority Voting Requirements for Tax Increases: Evidence from the States*, 76 J. PUB. ECON. 41, 42 (2000).

63. *Id.* at 62.

64. *Id.* at 43-45.

65. *Id.* at 45.

of legislature initiated supermajority requirements.⁶⁶ Broad constitutional tax supermajority provisions are initiated directly by voters or indirectly by voters to whom the legislature is accountable.⁶⁷ In addition, one could assert that a state is actually “anti-tax” if voters create a tax supermajority provision while the government majority is “pro-tax.” If there was a “pro-tax” majority government when voters amended the state constitution to impose a tax supermajority requirement, the voters were arguably voicing their opposition to the “pro-tax” government by imposing a significant overarching fiscal constraint. It is unclear how competing theoretical and factual assumptions, and Florida’s subsequent supermajority requirement, would impact Knight’s conclusions.

Most relevant to the crux of this article is a 2010 study that analyzed whether tax supermajority requirements impacted broadly applicable taxes and narrowly applicable taxes disparately.⁶⁸ Heckelman and Dougherty concluded that supermajority requirements limit narrow taxes but not broad taxes.⁶⁹ They also concluded that higher voting thresholds (e.g., three-quarters rather than two-thirds) limit narrow taxes further, but do not have any significant impact on broad taxes.⁷⁰ This result suggests that tax supermajority requirements specifically limit redistributive policies.⁷¹ Bradbury and Johnson’s 2006 study concluded similarly, finding that “states with tax supermajority provisions do not tax or spend on general projects differently than states without supermajority rules.

66. *Id.* at 44–47.

67. There are other problems with this study’s assumptions as well. The Democratic Party was much different in 1934 when Arkansas created its supermajority provision. Mississippi actually created its supermajority provision as part of the 1890 constitution. MISS. CONST. art. IV, § 70. And eighteen years after Knight’s study, Florida voters enacted a broad constitutional supermajority provision as opposed to the very limited provision included in the study. FLA. CONST. art. VII, § 19. Both the legislative majority party and Governor party were Republican before and after that 2018 Florida election. *See Party Control of Florida State Government*, [BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Florida_state_government](https://ballotpedia.org/Party_control_of_Florida_state_government) (last visited May 19, 2021).

68. Heckelman & Dougherty, *supra* note 17, at 738–39. A significant drawback of this study is that it analyzes broadly applicable transaction taxes but not income taxes. Income taxes, both corporate and individual, differ in meaningful ways from transaction taxes, and broad tax supermajority requirements are arguably directed primarily toward restricting or preventing income taxes rather than transaction taxes (even those that are broadly applicable).

69. *Id.* at 739. This conclusion is consistent with the work of Buchanan and Tullock. *See generally* BUCHANAN & TULLOCK, *supra* note 39.

70. Heckelman & Dougherty, *supra* note 17, at 751.

71. *Id.* at 739. Heckelman & Dougherty note that “Governments redistribute in at least two ways: (1) when they tax uniformly and spend the proceeds on only a segment of the population . . . and (2) when they tax a small segment of the population and spend the proceeds on almost everyone.” *Id.* The second method of redistribution often occurs with the new taxes discussed in Section II, *infra*.

However, supermajority rules are associated with less redistributive spending”⁷² Thus, these studies support the assertion that supermajority requirements are likely to impede narrow taxes such as those discussed in Section II.

B. State-by-State Analysis

This article next examines the specific language of each state’s existing tax supermajority requirement for two reasons. First, this examination aids in future supermajority provision design. This article draws from states’ often arduous experiences to effectuate optimal design principles. Due to inherent inefficiencies in the constitutional amendment process, the amendment language is often imprecise and is typically inconsistent between states.⁷³ Indeed, many of the problems stemming from supermajority requirements can be mitigated with more carefully crafted language, as discussed in Section IV.

Second, this article contributes to the existing literature by compiling all the broad state constitutional supermajority provisions and providing significant annotations. Although descriptive, this compilation corrects many errors—from enactment dates to substantive inaccuracies—in the existing literature.

1. Arizona

In 1992, Arizona amended its constitution to create a two-thirds tax supermajority requirement with almost 72% voter approval.⁷⁴ The scope of the requirement is broad, as it covers creating new taxes, increasing existing taxes, reducing or eliminating tax deductions, exemptions, or credits, and new or increased state fees and assessments.⁷⁵

The text of Arizona’s tax supermajority requirement provides:

(A) An act that provides for a net increase in state revenues, as described in subsection B is effective on the affirmative vote of two-thirds of the

72. Bradbury & Johnson, *supra* note 39, at 438. Bradbury and Johnson did conclude that states with supermajority requirements spent seven percent less on public welfare. *Id.* at 444.

73. There are significant challenges for the constitutional amendment provision to even reach the ballot. *See, e.g.*, Brenna Goth, *Ballot Measure Opponents Want Courts to Kill Arizona Proposals*, BLOOMBERG L. (Aug. 14, 2020, 11:40 AM), <https://news.bloomberglaw.com/health-law-and-business/ballot-measure-opponents-want-courts-to-kill-arizona-proposals>; Brenna Goth, *Arizona Court Strikes Down Ballot Measure to Increase Income Tax*, BLOOMBERG TAX (July 31, 2020, 8:41 PM), <https://news.bloombergtax.com/daily-tax-report/arizona-court-strikes-down-ballot-measure-to-increase-income-tax?context=article-related>.

74. ARIZ. CONST. art. IX, § 22; ARIZ. SEC’Y OF STATE, OFFICIAL ELECTION CANVASS - GENERAL ELECTION - NOVEMBER 3, 1992 12 (1992), <https://azsos.gov/sites/default/files/canvass1992ge.pdf> (Proposition 108).

75. ARIZ. CONST. art. IX, § 22.

members of each house of the legislature. If the act receives such an affirmative vote, it becomes effective immediately on the signature of the governor as provided by article IV, part 1, § 1. If the governor vetoes the measure, it shall not become effective unless it is approved by an affirmative vote of three-fourths of the members of each house of the legislature.

(B) The requirements of this section apply to any act that provides for a net increase in state revenues in the form of:

1. The imposition of any new tax.
2. An increase in a tax rate or rates.
3. A reduction or elimination of a tax deduction, exemption, exclusion, credit or other tax exemption feature in computing tax liability.
4. An increase in a statutorily prescribed state fee or assessment or an increase in a statutorily prescribed maximum limit for an administratively set fee.
5. The imposition of any new state fee or assessment or the authorization of any new administratively set fee.
6. The elimination of an exemption from a statutorily prescribed state fee or assessment.
7. A change in the allocation among the state, counties or cities of Arizona transaction privilege, severance, jet fuel and use, rental occupancy, or other taxes.
8. Any combination of the elements described in paragraphs 1 through 7.

(C) This section does not apply to:

1. The effects of inflation, increasing assessed valuation or any other similar effect that increases state revenue but is not caused by an affirmative act of the legislature.
2. Fees and assessments that are authorized by statute, but are not prescribed by formula, amount or limit, and are set by a state officer or agency.
3. Taxes, fees or assessments that are imposed by counties, cities, towns and other political subdivisions of this state.

(D) Each act to which this section applies shall include a separate provision describing the requirements for enactment prescribed by this section.⁷⁶

Arizona's tax supermajority provision is comprehensive and attempts to define the scope of exactions that fall within and without the

76. ARIZ. CONST. art. IX, § 22.

supermajority provision. Nevertheless, the proper characterization of a particular exaction is still an issue in Arizona, although it differs from the traditional tax-versus-fee distinction because both are generally within the scope of Arizona's supermajority requirement.⁷⁷ Additionally, Arizona's supermajority requirement specifically excludes local taxes, fees, and assessments, although subsequent constitutional amendments in 2008 and 2018 provided outright prohibitions on certain new or increased taxes at both the state and local levels.⁷⁸

2. *Arkansas*

Arkansas has one of the oldest tax supermajority requirements, which dates to 1934.⁷⁹ The provision appears broad at first glance, but judicial interpretations over the past eight decades have limited the provision's scope significantly based on plain readings of the provision's text.

The text of Arkansas' supermajority requirement provides:

§ 2. None of the rates for property, excise, privilege or personal taxes, now levied shall be increased by the General Assembly except after the approval of the qualified electors voting thereon at an election, or in case of emergency, by the votes of three-fourths of the members elected to each House of the General Assembly.⁸⁰

The most significant limitation stems from the “now levied” language that restricts the scope of this provision to taxes that were being levied as of 1934. Thus, the provision does not apply to any taxes created after 1934, including Arkansas' sales tax and alcohol tax.⁸¹ Further, the supermajority provision applies only to raising tax rates, not creating new taxes.⁸² The Arkansas Supreme Court interpreted the provision's rate increase language narrowly, holding that removing a deduction or exemption did not constitute a rate increase subject to this provision.⁸³

77. *Biggs v. Betlach*, 243 Ariz. 256, 259 (2017) (holding that a hospital assessment was not a “tax” subject to supermajority vote requirement because it was a fee set by a state agency).

78. ARIZ. CONST. art. IX, §§ 22; *id.* art. IX, § 24 (prohibiting new taxes on the transfer of real property); *id.* art. IX, § 25 (prohibiting new or increased transaction taxes on services). The Arizona Supreme Court is also considering whether Arizona's supermajority requirement applies to voter propositions. *Fann v. Arizona*, No. CV-21-0058-T/AP (Ariz. *pet. granted* Mar. 4, 2021).

79. *See* Minzner, *supra* note 17, at 57; ARK. CONST. art. V, § 38, cl. 2.

80. ARK. CONST. art. V, § 38, cl. 2.

81. *See* *Miller v. Leathers*, 843 S.W.2d 850, 852 (Ark. 1992); *Caldarera v. McCarroll*, 129 S.W.2d 615, 616 (Ark. 1939).

82. *See* *Hardin v. Fort Smith Couch & Bedding Co.*, 152 S.W.2d 1015, 1018, 1019 (Ark. 1941).

83. *Morley v. Rimmel*, 221 S.W.2d 51, 57 (Ark. 1949).

The Arkansas Supreme Court also defined emergency very broadly, thus narrowing the voter approval requirement.⁸⁴

Due largely to its vintage, Arkansas' supermajority provision operates in an idiosyncratic fashion. In essence, it provides only that voters must increase the rate of taxes that existed in 1934, unless there is an emergency, in which case the legislature can increase the rate with at least three-fourths approval.

3. California

California sparked the first broad tax supermajority requirement wave in 1978 when 65% of voters approved Proposition 13.⁸⁵ California's initial constitutional amendment created a tax supermajority provision that applied to state level taxes, and in 1996, California created an additional supermajority requirement that applied to local level taxes.⁸⁶ After decades of disputes addressing tax-versus-fee characterization, California amended both supermajority requirements in 2010 to better define what constitutes a tax.⁸⁷ Despite the clarification, California is still hampered by tax-versus-fee disputes.⁸⁸

The text of California's state level tax supermajority requirement provides:

Sec. 3. (a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

84. See *ACW, Inc. v. Weiss*, 947 S.W.2d 770, 773 (Ark. 1997) (stating that an "emergency" is present when there is a grave problem and a need to promptly begin a response).

85. CAL. CONST. art. XIII A, § 3; see *Proposition 13: 40 Years Later*, PUB. POL'Y INST. OF CAL., (June 2018), <https://www.ppic.org/publication/proposition-13-40-years-later/>; *Property Tax Limitation*, UC HASTINGS SCHOLARSHIP REPOSITORY, 1978, at 57.

86. CAL. CONST. art. XIII A, §§ 3–4; Proposition 218 passed with 56.5% approval. CAL. SEC'Y OF STATE, SUPPLEMENT TO THE STATEMENT OF VOTE – NOVEMBER 5, 1996 GENERAL ELECTION 103 (1996), <https://elections.cdn.sos.ca.gov/sov/1996-general/ssov/measures-statewide.pdf>.

87. Proposition 26 passed with only 52.5% approval. CAL. SEC'Y OF STATE, SUPPLEMENT TO THE STATEMENT OF VOTE STATEWIDE SUMMARY BY COUNTY FOR STATE BALLOT MEASURES 113 (2010), <https://elections.cdn.sos.ca.gov/sov/2010-general/ssov/ballot-measures-summary.pdf>; see Wright, *supra* note 2, at 472.

88. See, e.g., *Cal. Chamber of Com. v. State Air Res. Bd.*, 216 Cal. Rptr. 3d 694, 700 (Cal. Ct. App. Apr. 6, 2017) (determining that revenue generation by sales of emissions allowances did not amount to a tax subject to the two-thirds supermajority vote requirement); *Howard Jarvis Taxpayers Ass'n v. Bay Area Toll Auth.*, 265 Cal. Rptr. 3d 235, 250–51 (Cal. Ct. App. June 29, 2020), *rev. granted*, 474 P.3d 1 (Cal. 2020) (concluding that a bridge toll was a tax subject to supermajority approval and not a fee).

(b) As used in this section, “tax” means any levy, charge, or exaction of any kind imposed by the State, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.

(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.⁸⁹

In addition to attempting to define “tax” for purposes of the supermajority requirement, the 2010 amendment also expanded the scope of the provision. The original provision applied to “any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation,”⁹⁰ whereas Proposition 26 changed the operative language

89. CAL. CONST. art. XIII A, § 3.

90. CAL. CONST. art. XIII A, § 3(a) (1978).

to “any change in state statute which results in any taxpayer paying a higher tax.”⁹¹

The text of California’s local level tax supermajority requirements provides:

Sec. 4. Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.⁹²

Sec. 2. Local Government Tax Limitation. Notwithstanding any other provision of this Constitution:

- (a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes.
- (b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.
- (c) Any general tax imposed, extended, or increased, without voter approval, by any local government on or after January 1, 1995, and prior to the effective date of this article, shall continue to be imposed only if approved by a majority vote of the voters voting in an election on the issue of the imposition, which election shall be held within two years of the effective date of this article and in compliance with subdivision (b).
- (d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved.⁹³

91. CAL. CONST. art. XIII A, § 3(a) (2010).

92. CAL. CONST. art. XIII A, § 4. Proposition 26 also clarified the definition of a “tax” for local purposes, consistent with the definition for state purposes. CAL. CONST. art. XIII C, § 1.

93. CAL. CONST. art. XIII C, § 2. Added in 1996 by Proposition 218, which also added specific limitations on taxes and assessments for property. CAL. CONST. art. XIII D.

The local level provision requires that the tax measure be submitted to voters and then imposes a supermajority requirement on the voters depending on the tax type. California's local tax supermajority requirement hinges on whether the tax is a general or "special" tax. If general, only a simple majority is required to approve the measure. Predictability, California is experiencing a surge of disputes regarding when the local level provision applies, specifically whether it applies to voter initiatives and what constitutes a "special" tax.⁹⁴

4. Colorado

Colorado amended its constitution in 1992 to add a comprehensive Taxpayer Bill of Rights (TABOR).⁹⁵ As such, Colorado's supermajority requirement is but one component of a larger regime.

Although Colorado's TABOR includes several other tax increase and spending limitations, the text of Colorado's supermajority requirement provides:

(6) Emergency taxes. This subsection grants no new taxing power. Emergency property taxes are prohibited. Emergency tax revenue is excluded for purposes of (3)(c) and (7), even if later ratified by voters. Emergency taxes shall also meet all of the following conditions:

(a) A 2/3 majority of the members of each house of the general assembly or of a local district board declares the emergency and imposes the tax by separate recorded roll call votes.⁹⁶

Colorado's TABOR relies primarily on tax increase and spending limitations other than a supermajority requirement to achieve its intended purposes. So Colorado's supermajority provision is quite narrow. The Colorado legislature can impose or increase a tax beyond the detailed revenue and spending limitations only in the case of an emergency, and then only with at least a two-thirds supermajority approval. Colorado's TABOR does not define "emergency," but does provide that "emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases."⁹⁷ Colorado's TABOR also

94. See *Cal. Cannabis Coal. v. City of Upland*, 401 P.3d 49, 53 (Cal. 2017); *City & Cnty. of San Francisco v. All Persons Interested Proposition C*, 265 Cal. Rptr. 3d 437, 439 (Cal. Ct. App. Sept 9, 2020), *petition for rev. denied*, No. S263753, 2020 Cal. LEXIS 6100, at 1 (Cal. 2020); *Howard Jarvis Taxpayers Ass'n v. City & Cnty. of San Francisco*, 274 Cal. Rptr. 3d 432 (Cal. Ct. App. Jan. 27, 2021), *petition for rev. denied*, No. S267516, 2021 Cal. LEXIS 2860, at *1 (Cal. 2021); *City of Fresno v. Fresno Bldg. Healthy Cmty.*, 273 Cal. Rptr. 3d 144 (Cal. Ct. App. Dec. 17, 2020), *petition for rev. denied*, No. S266846, 2021 Cal. LEXIS 2282, at 1 (Cal. 2021); *Jobs & Housing Coal. v. City of Oakland*, No. RG19005204, 2019 WL 5405850, at *1 (Cal. App. Dep't Super. Ct. Alameda Cnty. Oct. 15, 2019).

95. COLO. CONST. art. X, § 20.

96. *Id.* § 20(6)(a).

97. *Id.* § 20(2)(c).

provides for an automatic sunset of the tax if not approved by voters during the next election.⁹⁸ And like most states that do not include fees in the scope of their supermajority requirement, Colorado has experienced tax-versus-fee disputes.⁹⁹ There has been a push in Colorado to eliminate the TABOR, although it has yet to succeed.¹⁰⁰

5. Delaware

Delaware is the only state in the country that allows its legislature to amend the state constitution and does not allow citizen initiatives for either constitutional amendments or creating statutes.¹⁰¹ Nevertheless, the legislature approved a pair of constitutional amendments in 1980 and 1981 that, when read together, provide for a broad supermajority tax requirement.¹⁰²

The text of Delaware's supermajority requirement provides:

Section 10. (a) The effective rate of any tax levied or license fee imposed by the State may not be increased except pursuant to an act of the General Assembly adopted with the concurrence of three-fifths of all members of each House.

(b) Prior to the beginning of each fiscal year of the State, the General Assembly shall appropriate revenues of the State to pay interest on its debt to which it has pledged its faith and credit and which interest is payable in the year for which such appropriation is made and to pay the

98. *Id.* § 20(6)(c).

99. *See, e.g.,* Colo. Union of Taxpayers Found. v. City of Aspen, 418 P.3d 506, 509 (2018) (affirming that a waste reduction fee was not a tax to which TABOR applied).

100. *See* Kerr v. Polis, 930 F.3d 1190, 1193 (10th Cir. 2019) *en banc rehearing granted*, 977 F.3d 1010 (10th Cir. 2020); Natasha Mishra, *Colorado Supreme Court Greenlights TABOR Repeal Initiative*, TAX NOTES (June 19, 2019), <https://www.taxnotes.com/tax-notes-today-state/tax-reform/colorado-supreme-court-greenlights-tabor-repeal-initiative/2019/06/19/29mlx>; Carolina Vargas, *Colorado Voters Keep TABOR Refunds, Texans Ensure No Income Tax*, TAX NOTES (Nov. 11, 2019), <https://www.taxnotes.com/tax-notes-state/local-taxation/colorado-voters-keep-tabor-refunds-texans-ensure-no-income-tax/2019/11/11/2b3m6?highlight=Colorado%20Voters%20Keep%20TABOR%20Refunds%2C%20Texans%20Ensure%20No%20Income%20Tax>.

101. DEL. CONST. art. XVI, § 1 (stating “[a]ny amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives” and must be approved by two-thirds of each house); Kleiman, *supra* note 2, at 1904 n.87 (citing Jennie Drage Bowser, *Constitutions: Amend with Care*, STATE LEGIS. MAG. (Sept. 1, 2015), <http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx> (explaining that “all states except for Delaware require voter approval of constitutional amendments”)); James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 299 n.2–5 (1989) (citing D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 36 (1984)); *Delaware, INITIATIVE & REFERENDUM INST.*, <http://www.iandrinstute.org/states/state.cfm?id=30> (last visited May 19, 2021).

102. DEL. CONST. art. VIII, §§ 10, 11.

principal of such debt, payable in such year, whether at maturity or otherwise. To the extent that insufficient revenues of the State are available to pay principal of and interest on such debt when due and payable, the first public moneys of the State thereafter received shall be set aside and applied to the payment of the principal of and interest on such debt. To make up for such insufficient revenues, the General Assembly may increase the rate of taxes and fees without regard to the limitations of subsection (a) hereof after the failure to pay when due the principal of and interest on such debt.¹⁰³

Section 11. (a) No tax or license fee may be imposed or levied except pursuant to an act of the General Assembly adopted with the concurrence of three-fifths of all members of each House.

(b) Prior to the beginning of each fiscal year of the State, the General Assembly shall appropriate revenues of the State to pay interest on its debt to which it has pledged its faith and credit and which interest is payable in the year for which such appropriation is made and to pay the principal of such debt, payable in such year, whether at maturity or otherwise. To the extent that insufficient revenues of the State are available to pay principal of and interest on such debt when due and payable, the first public moneys of the State thereafter received shall be set aside and applied to the payment of the principal of and interest on such debt. To make up for such insufficient revenues, the General Assembly may increase the rate of taxes and fees without regard to the limitations of subsection (a) hereof after the failure to pay when due the principal of and interest on such debt.

(c) This amendment shall not apply to any tax or license fee authorized by an act of the General Assembly but not effective upon the effective date of this amendment.¹⁰⁴

Delaware's supermajority provision requires a three-fifths vote to impose a tax or license fee, or to increase the effective rate of any tax or fee. The language of the provision leaves open to interpretation several important aspects, including what constitutes a "license" fee, and how to determine "effective" tax rate.¹⁰⁵

6. Florida

In 2018, Florida voters amended the state constitution to include a broad tax supermajority requirement with 66% approval.¹⁰⁶ The

103. DEL. CONST. art. VIII, § 10

104. DEL. CONST. art. VIII, § 11.

105. See Opinion of Justices, 575 A.2d 1186, 1189 (Del. 1990) (finding DEL. CONST. art. VIII, §§ 10, 11 to be unambiguous and that the legislature intended for the statutes to apply to "all license fees of any nature.").

106. FLA. CONST. art. VII, § 19; *Supermajority Vote Required to Impose, Authorize, or Raise State Taxes or Fees*, FLA. DIV. OF ELECTIONS,

supermajority requirement applies to any new or increased taxes or fees created by the state legislature.

The text of Florida's supermajority requirement provides:

(a) Supermajority vote required to impose or authorize new state tax or fee. No new state tax or fee may be imposed or authorized by the legislature except through legislation approved by two-thirds of the membership of each house of the legislature and presented to the Governor for approval pursuant to Article III, Section 8.

(b) Supermajority vote required to raise state taxes or fees. No state tax or fee may be raised by the legislature except through legislation approved by two-thirds of the membership of each house of the legislature and presented to the Governor for approval pursuant to Article III, Section 8.

(c) Applicability. This section does not authorize the imposition of any state tax or fee otherwise prohibited by this Constitution, and does not apply to any tax or fee imposed by, or authorized to be imposed by, a county, municipality, school board, or special district.

(d) Definitions. As used in this section, the following terms shall have the following meanings:

(1) "Fee" means any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.

(2) "Raise" means:

a. To increase or authorize an increase in the rate of a state tax or fee imposed on a percentage or per mill basis;

b. To increase or authorize an increase in the amount of a state tax or fee imposed on a flat or fixed amount basis; or

c. To decrease or eliminate a state tax or fee exemption or credit.

(e) Single-subject. A state tax or fee imposed, authorized, or raised under this section must be contained in a separate bill that contains no other subject.¹⁰⁷

Notably, Florida already had two tax supermajority requirements in its constitution, although they are narrow. In 1971, Florida amended its constitution to require three-fifths supermajority approval for new or increased corporate income taxes.¹⁰⁸ Since 1971, the Florida corporate income tax rate has increased only once, and by only 0.5%.¹⁰⁹ Following

<https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=97> (last visited May 19, 2021).

107. FLA. CONST. art. VII, § 19.

108. FLA. CONST. art. VII, § 5.

109. COMM. ON FIN. AND TAX'N, WHY DID FLORIDA'S CORPORATE INCOME TAX REVENUE FALL WHILE CORPORATE PROFITS ROSE?, S. 2004-137, at 1 (Fla. 2003).

the federal Tax Cuts and Jobs Act of 2018, Florida actually enacted a temporary corporate income tax rate decrease of over 1%.¹¹⁰ At least in the corporate income tax context, Florida's supermajority requirement appears to have effectively limited tax rate increases.

In 1994, Florida amended its constitution to require supermajority approval for new or increased taxes effectuated by a constitutional amendment—the sole mechanism by which Florida voters can create or increase taxes directly.¹¹¹ Approximately half the U.S. states allow for voter-initiated legislation, but Florida is not among these states.¹¹² Thus, Florida can create or increase a tax in one of two ways: 1) a bill approved by the legislature; or 2) a constitutional amendment approved by Florida voters.¹¹³ Either avenue now requires a two-thirds supermajority.¹¹⁴ For purposes of the 1994 amendment, the Florida Constitution defines “new State tax or fees” as “any tax or fee which would produce revenue subject to lump sum or other appropriation by the Legislature, either for the State general revenue fund or any trust fund”¹¹⁵ Thus, any constitutional amendment that would create or increase taxes or fees requires two-thirds supermajority approval, as opposed to non-tax constitutional amendments that require sixty percent approval.¹¹⁶

Florida attempted to be specific and precise with its 2018 supermajority provision. The provision expressly applies only to action by the Florida legislature, and expressly exempts local tax authorities.¹¹⁷ Florida's provision expressly applies to both taxes and fees and defines each very broadly.¹¹⁸ This approach may minimize, although likely not

110. FLA. STAT. § 220.1105 (2021); FLA. DEP'T OF REVENUE, FLA. TAX INFORMATION PUBLICATION No. 19C01-04 (Sept. 12, 2019), https://revenue.law.floridarevenue.com/LawLibraryDocuments/2019/09/TIP-122699_TIP_19C01-04_FINAL_RLL.pdf. Pursuant to this statute, the corporate income tax rate reduction of 4.458% may vary in 2021 before reverting to 5.5% for 2022.

111. FLA. CONST. art. XI, § 7.

112. *Initiative and Referendum States*, NAT'L CONF. OF STATE LEG., <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last visited May 19, 2021).

113. The latter approach, a constitutional amendment to create or increase a tax, is arguably an improper—and certainly inefficient—approach. Creating and adjusting taxes should fall within the normal legislative process.

114. FLA. CONST. art. VII, § 19; *id.* art. XI § 7.

115. FLA. CONST. art. XI, § 7.

116. *Id.*; *id.* art. XI, § 5(e). Florida voters defeated a unique proposal in 2020 that would have required approval in two separate elections to amend the Florida Constitution. *Voter Approval of Constitutional Amendments*, FLA. DIV. OF ELECTIONS, <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74114&seqnum=2> (last visited May 19, 2021).

117. FLA. CONST. art. VII, § 19(c).

118. *Id.* art. VII § 19 (a)–(b).

eliminate, the common tax-versus-fee dispute.¹¹⁹ But subjecting any new or increased state fee (e.g., tolls or business licenses) to the supermajority requirement may prove impractical.¹²⁰

Florida included a one subject rule as well, which adds another hurdle. Several states have a one subject rule, either specifically for tax measures or more generally, and they have often been used to successfully invalidate a tax statute.¹²¹ The rule's purpose is to have clear and transparent proposed tax legislation that the legislature and their constituents can analyze independently and simply. The rule aims to prevent tax increases being buried in voluminous omnibus legislation, which may result in inadvertent passage. The rule also aims to prevent political "horse-trading," which may result in tax increases if they are contained in the same bill as some other pressing legislation. The rule's impact can be exacerbated depending on what constitutes "no other subject." If "subject" means tax, rather than the overarching substantive subject matter (e.g., recreational marijuana), the legalization bill and the tax bill would have to be separate, independent legislation. The result could be a legalization bill passed by a simple majority, and the accompanying tax bill failing to garner supermajority support. Because states' principal interest in legalization is often the resultant tax revenue, such a situation would be quite problematic.

7. Louisiana

Louisiana promulgated a new constitution in 1974 that incorporated a concise tax supermajority requirement initially added in 1966.¹²² The requirement applies to the creation of any new taxes, increase of existing taxes, or a removal of any tax exemption by the legislature.

The text of Louisiana's supermajority requirement provides:

119. See, e.g., *Disc. Sleep of Ocala, LLC v. City of Ocala, Fla.*, 300 So. 3d 316, 319 (Fla. Dist. Ct. App. June 19, 2020) (analyzing whether a city's "fire service fee" was a fee or a tax).

120. See FLA. STAT. § 216.0236(1)–(4) (2021). State agencies are granted broad discretion to impose regulatory fees, with the constraints that the fees must be "reasonable," calculated using "generally acceptable governmental accounting procedures," and "adequate to cover direct and indirect costs" of providing the service. *Id.* However, if an agency finds that the revenue generated through their current fee structure is inadequate, they must submit a legislative budget request for additional supplemental funding from the state, which is subject to legislative approval and, consequently, a supermajority vote. *Id.*; FLA. CONST. art. VII, § 19(a)–(b).

121. See, e.g., *Kunath v. City of Seattle*, 444 P.3d 1235, 1246 (Wash. Ct. App. June 6, 2019), *as amended on denial of reconsideration* (Aug. 7, 2019), *review denied*, 195 Wash. 2d 1013 (Wash. 2020) (determining that a tax-related statute violated the state constitution's single subject rule).

122. LA. CONST. art. VII, § 2.

Section 2. The levy of a new tax, an increase in an existing tax, or a repeal of an existing tax exemption shall require the enactment of a law by two-thirds of the elected members of each house of the legislature.¹²³

The Louisiana Constitution also prohibits the legislature from bringing any measure “levying or authorizing a new tax,” “increasing an existing tax,” or “legislating with regard to tax exemptions, exclusions, deductions, or credits” in sessions occurring in even years.¹²⁴ Although Louisiana’s supermajority provision is not verbose, its operative effect is broader than many other states’ provisions that are similarly succinct.

8. *Mississippi*

Mississippi’s supermajority requirement, which was included in the original text of the Mississippi Constitution of 1890, is one of the oldest and shortest supermajority requirements in the country.¹²⁵ The current provision is essentially unchanged.¹²⁶

The text of Mississippi’s supermajority requirement provides:

No revenue bill, or any bill providing for assessments of property for taxation, shall become a law except by a vote of at least three-fifths of the members of each house present and voting.¹²⁷

The primary source of controversy with Mississippi’s supermajority provision is how to define a “revenue” bill.¹²⁸

9. *Missouri*

Missouri amended its constitution in 1980 to incorporate revenue limits and a supermajority requirement.¹²⁹ The Missouri approach is most similar to Colorado’s TABOR approach.

The text of Missouri’s supermajority requirement provides:

The revenue limit of section 18 of this article may be exceeded only if all of the following conditions are met: (1) The governor requests the general assembly to declare an emergency; (2) the request is specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which the emergency will be funded; and (3) the general assembly thereafter declares an emergency in accordance with the specifics of the governor’s request by a majority vote for fiscal year

123. *Id.*

124. *Id.* art. VII, § 2(A)(3)(b) (most recently amended effective Jan. 1, 2004).

125. MISS. CONST. art. IV, § 70.

126. *Id.*

127. *Id.*

128. *See, e.g.,* Fordice v. Bryan, 651 So. 2d 998, 1001 (Miss. 1995); Hunt v. Wright, 11 So. 608, 609 (Miss. 1892).

129. MO. CONST. art. X, §§ 19, 18(a).

1981-1982, thereafter a two-thirds vote of the members elected to and serving in each house.¹³⁰

The supermajority requirement comes into play only if the legislature attempts to exceed established revenue limits during an emergency. The provision itself provides guidelines as to what constitutes an emergency, and there are additional requirements in other sections of the Missouri Constitution. Although Missouri's primary fiscal limitation tool is the revenue limit, the Missouri Constitution includes a very broad supermajority requirement as a backstop. The Missouri Constitution has an additional tax limitation that requires voter approval if the legislature attempts to increase taxes or fees that in total in a fiscal year produce new annual revenues greater than fifty million dollars.¹³¹ The Missouri Supreme Court created a framework to analyze whether charges were taxes or fees, although there is still dispute as to how that framework applies to various charges.¹³²

10. Nevada

Nevada amended its constitution in 1996 to include a tax supermajority requirement with over with 70% of voters approving.¹³³ The same amendment also added a provision that allows the legislature to refer a revenue bill to the electorate by a simple majority vote.¹³⁴

The text of Nevada's supermajority requirement provides:

2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

3. A majority of all of the members elected to each house may refer any measure which creates, generates, or increases any revenue in any form to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election.¹³⁵

130. MO. CONST. art. X, § 19.

131. MO. CONST. art. X, § 18(e) (adopted 1996).

132. *See* Keller v. Marion Cnty. Ambulance Dist., 820 S.W.2d 301, 305 (Mo. 1991); Arbor Inv. Co., LLC v. City of Hermann, 341 S.W.3d 673, 675 (Mo. 2011) (holding utility charges were a fee rather than a tax); Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223, 226 (Mo. 2013) (holding a stormwater user charge was a tax rather than a fee).

133. NEV. SEC'Y OF STATE, STATE OF NEVADA BALLOT QUESTIONS 1996 25 (1996), <https://www.leg.state.nv.us/Division/Research/VoteNV/BalotQuestions/1996.pdf>.

134. NEV. CONST. art. IV, § 18.

135. *Id.*

Nevada's supermajority requirement language is very broad, as it encompasses essentially all types of exaction, however there are still questions regarding its scope.¹³⁶ It is also distinct in expressly allowing the legislature to refer revenue measures to the voters with only a simple majority vote for both the referral and the voter approval. The Nevada Supreme Court has struggled with the how to reconcile the supermajority requirement with other substantive constitutional provisions.¹³⁷

11. Oklahoma

Oklahoma's supermajority requirement narrowly passed in 1992, with only 56% of voters approving.¹³⁸

The text of Oklahoma's supermajority requirement provides:

- A. All bills for raising revenue shall originate in the House of Representatives. The Senate may propose amendments to revenue bills.
- B. No revenue bill shall be passed during the five last days of the session.
- C. Any revenue bill originating in the House of Representatives shall not become effective until it has been referred to the people of the state at the next general election held throughout the state and shall become effective and be in force when it has been approved by a majority of the votes cast on the measure at such election and not otherwise, except as otherwise provided in subsection D of this section.
- D. Any revenue bill originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths ($\frac{3}{4}$) of the membership of the House of Representatives and three-fourths ($\frac{3}{4}$) of the membership of the Senate and is submitted to the Governor for appropriate action. Any such revenue bill shall not be subject to the emergency measure provision authorized in Section 58 of this Article

136. *Settelmeyer v. State of Nevada*, No. 19-OC-00127-1B, 2020 Nev. Dist. LEXIS 611, at *18 (Nev. Dist. Ct., Carson City, Sept. 21, 2020), *aff'd*, 137 Nev. Adv. Rep. 21 (Nev. 2021) (holding that tax extensions require supermajority approval); *see also* Paul Jones, *Nevada Democrats Will Appeal Tax Extension Ruling*, TAX NOTES (Sept. 29, 2020), <https://www.taxnotes.com/tax-notes-today-state/employment-taxes/nevada-democrats-will-appeal-tax-extension-ruling/2020/09/29/2czx3?highlight=Nevada%20Democrats%20Will%20Appeal%20Tax%20Extension%20Ruling>.

137. *Guinn v. Legislature of State of Nevada*, 71 P.3d 1269, 1272 (Nev. 2003), *decision clarified on denial of reh'g sub nom.*, 76 P.3d 22, 33 (Nev. 2003), *and overruled by Nevadans for Nevada v. Beers*, 142 P.3d 339, 341 (Nev. 2006); *see also* Steve R. Johnson, *Supermajority Provisions, Guinn v. Legislature and a Flawed Constitutional Structure*, 4 NEV. L.J. 491, 491 (2004).

138. *Search State Questions*, OKLA. SEC'Y OF STATE, <https://www.sos.ok.gov/gov/questions.aspx> (search State Question Number "640").

and shall not become effective and be in force until ninety days after it has been approved by the Legislature, and acted on by the Governor.¹³⁹

Similar to Nevada, Oklahoma's provision includes a mechanism for referring revenue bills to voters by a simple majority vote of the legislature, and further passed by a simple majority of the electorate. In Oklahoma, however, the voter referral process is the default. Oklahoma's supermajority requirement is implicated only if the legislature bypasses the default referral process and passes the legislation directly. In such a case, the supermajority provision is quite broad and, like in Mississippi, turns on the definition of "revenue bill."¹⁴⁰

12. Oregon

Oregon's supermajority requirement also passed by a thin margin, receiving only 55% of the vote in 1996.¹⁴¹ The supermajority provision, similar to Mississippi's, is very succinct.

The text of Oregon's supermajority requirement provides:

- (1) Except as otherwise provided in subsection (2) of this section, a majority of all the members elected to each House shall be necessary to pass every bill or Joint resolution.
- (2) Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue.
- (3) All bills, and Joint resolutions passed, shall be signed by the presiding officers of the respective houses.¹⁴²

Oregon's supermajority provision differs a bit from Mississippi's and Oklahoma's in that it applies to "bills for raising revenue" as opposed to "revenue bills." Although this distinction may appear semantic, courts may interpret these terms differently and in turn limit or expand the scope of the provision significantly. Oregon's courts have interpreted its tax supermajority provision quite narrowly. The Oregon Supreme Court held that eliminating exemptions or deductions is outside the scope of the

139. OKLA. CONST. art. V, § 33.

140. The Oklahoma Supreme Court has defined "revenue bills" as laws where the principal object is to raise revenue and that levy taxes in the *strict sense* of the word, and not laws under which revenue may incidentally arise. *See* *Leveridge v. Okla. Tax Comm'n*, 294 P.2d 809, 811 (Okla. 1956); *Okla. Auto Dealers Ass'n v. State ex rel. Okla. Tax Comm'n*, 401 P.3d 1152, 1153 (Okla. 2017) (holding that a bill removing a tax exemption is not a revenue bill); *Sierra Club v. Okla. Tax Comm'n*, 405 P.3d 691, 695 (Okla. 2017) (holding that an electric vehicle fee bill was a revenue bill subject to supermajority approval).

141. OR. BLUE BOOK, INITIATIVE, REFERENDUM AND RECALL 18, <https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf> (last visited May 19, 2021).

142. OR. CONST. art. IV, § 25.

supermajority provision.¹⁴³ The Oregon Tax Court then held that a bill decoupling from the new Internal Revenue Code qualified business income deduction provision did not require supermajority approval.¹⁴⁴ Because of these narrowing judicial interpretations, there has been a movement to expressly expand the Oregon provision to encompass these situations.¹⁴⁵

13. South Dakota

South Dakota, an historically tax-averse state, broadened its supermajority requirement in 1996 with almost 75% of voters supporting the constitutional amendment.¹⁴⁶ The previous provision, which was added in 1978, required a two-thirds supermajority to increase the rate of most existing taxes but only a simple majority to enact any new tax.¹⁴⁷

The text of South Dakota's supermajority requirement provides:

The rate of taxation imposed by the State of South Dakota in regard to any tax may not be increased and no new tax may be imposed by the State of South Dakota unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature.¹⁴⁸

South Dakota's supermajority provision is fairly straightforward, although it is susceptible to the traditional tax-versus-fee argument.

II. CONTROVERSIAL—BUT SIGNIFICANT—NEW TAX REVENUE SOURCES

After examining the current tax supermajority requirement landscape, this article can consider several new tax revenue sources that will likely be obstructed by these tax supermajority requirements. These

143. *City of Seattle v. Dep't of Revenue*, 357 P.3d 979, 987–88 (Wash. 2015); Paul Jones, *Oregon Credit, Deduction Rollback Bills Could Pass Without Supermajority Vote*, TAX NOTES (Apr. 26, 2017), <https://www.taxnotes.com/tax-notes-state/legislation-and-lawmaking/credit-deduction-rollback-bills-could-pass-without-supermajority-vote/2017/05/01/sxwx?highlight=Oregon%20Credit%2C%20Deduction%20Rollback%20Bills%20Could%20Pass%20Without>.

144. *Boquist v. Dep't of Revenue*, No. TC 5332, 2019 Ore. Tax LEXIS 33, at *50 (Or. T.C. Mar. 21, 2019).

145. Paul Jones, *Measure to Broaden Supermajority Tax Approval Rule on Oregon Ballot*, TAX NOTES (July 27, 2018), <https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/measure-broaden-supermajority-tax-approval-rule-oregon-ballot/2018/07/27/2881n?highlight=Measure%20to%20Broaden%20Supermajority%20Tax%20Approval%20Rule%20on%20Oregon%20Ballot>.

146. S.D. SEC'Y OF STATE, PAST SOUTH DAKOTA BALLOT QUESTION TITLES AND ELECTION RETURNS FROM 1890-2016 15, <https://sdsos.gov/elections-voting/assets/BallotQuestions.pdf>.

147. S.D. CONST. art. XI, §§ 13, 14; *see also 1996 South Dakota Ballot Question Pros and Cons*, S.D. SEC'Y OF STATE, https://sdsos.gov/elections-voting/election-resources/election-history/1996/1996_SD_ballot_question_pros_cons.aspx (last visited May 19, 2021).

148. S.D. CONST. art. XI, § 14.

new tax revenue sources are controversial, particularly in the politically conservative states that appear to be advancing this third supermajority requirement wave. Yet these new tax revenue sources are important because of their economic promise and because they generally reflect sound tax policy.¹⁴⁹

In isolation, none of these revenue sources will completely shift a state's fiscal fortune, but if aggregated they can generate meaningful revenue at a time when states need it most. Florida, for example, could generate over a billion dollars annually if it embraced the new revenue sources discussed below. The new taxes apply only to certain discretionary activities and are further justified because they account for negative externalities stemming from the respective activity. Importantly, these taxes are not as regressive as some alternatives such as a value added tax or increased general sales and use taxes, particularly due to their discretionary nature.

A. Recreational Marijuana

Although marijuana remains illegal federally there is a robust trend of states legalizing marijuana both for medicinal and recreational use. A primary driver for the recreational marijuana legalization trend is the potential tax revenue that it affords the state.¹⁵⁰ Marijuana excise tax revenues already exceed alcohol tax revenues in some early adopting states.¹⁵¹ Studies estimate that marijuana is a \$60 billion market in the United States.¹⁵² A market of this magnitude can translate to significant tax revenue, and most states are seeing marijuana tax revenues exceed expectations and increase each year.¹⁵³

In the first two and a half years after California started allowing recreational marijuana sales, the state generated almost \$2 billion in new

149. See, e.g., Sam McQuillan, *States Bolster Coffers With New Taxes, Avoid Income Tax Hikes*, BLOOMBERG TAX (Jan. 13, 2020, 4:45 AM), <https://news.bloombergtax.com/daily-tax-report/states-bolster-coffers-with-new-taxes-avoid-income-tax-hikes>.

150. Often that revenue is earmarked for a specific purpose. See Armikka R. Bryant, *Taxing Marijuana: Earmarking Tax Revenue from Legalized Marijuana*, 33 GA. ST. U. L. REV. 659, 661 (2017); Roxanne Bland, *What has Marijuana Legalization Done for the States Lately?*, TAX NOTES (Sept. 24, 2018), <https://www.taxnotes.com/opinions/what-has-marijuana-legalization-done-states-lately/2019/09/24/29z02>. Earmarking revenue can be quite controversial. See, e.g., Tiffany Kary, *New York Is Trying to Model Social Reform Through Pot Taxes*, BLOOMBERG TAX (Feb. 1, 2021, 7:00 AM), <https://news.bloombergtax.com/daily-tax-report-state/new-york-is-trying-to-model-social-reform-through-pot-taxes>.

151. CARL DAVIS, MISHA HILL, & RICHARD PHILLIPS, INST. ON TAX'N & ECON. POL'Y, TAXING CANNABIS 4 (2019).

152. Ulrik Boesen, *A Road Map to Recreational Marijuana Taxation*, TAX FOUND. (June 9, 2020), <https://files.taxfoundation.org/20200608144852/A-Road-Map-to-Recreational-Marijuana-Taxation.pdf>.

153. *Id.*; DAVIS ET. AL., *supra* note 151, at 4.

tax revenue.¹⁵⁴ In 2019, Colorado's marijuana tax revenues exceeded \$250 million, Oregon's exceeded \$100 million, and Washington's were nearly \$400 million.¹⁵⁵ Nevada collected almost \$70 million in new tax revenue in its first full year of legal recreational marijuana.¹⁵⁶ Illinois generated more than \$100 million in the first nine months after it legalized recreational marijuana.¹⁵⁷ Revenue estimates for New York and Florida were \$300 to \$740 million annually in new tax revenue for each state.¹⁵⁸ And if every state were to legalize and tax recreational marijuana annual excise tax revenues could reach \$8–\$11.9 billion.¹⁵⁹

Despite the opportunity to generate significant revenue, recreational marijuana remains very controversial.¹⁶⁰ Prior to 2021, only two states, Illinois and Vermont, legalized recreational marijuana through the legislative process.¹⁶¹ Neither state has a tax supermajority requirement,

154. Laura Mahoney, *California Reports Record Pot Tax Revenue in Third Quarter*, BLOOMBERG TAX (Nov. 23, 2020), <https://news.bloombergtax.com/daily-tax-report-state/california-reports-record-pot-tax-revenue-in-third-quarter>; *California Department of Tax and Fee Administration Reports Cannabis Tax Revenues for the Fourth Quarter of 2019*, TAX NOTES (Mar. 6, 2020), <https://www.taxnotes.com/tax-notes-today-state/excise-taxes/california-reports-fourth-quarter-2019-cannabis-revenue-collections/2020/03/18/2c954>.

155. *Marijuana Tax Data*, COLO. DEP'T OF REVENUE, <https://cdor.colorado.gov/data-and-reports/marijuana-data/marijuana-tax-reports> (last visited May 19, 2021); *Oregon Marijuana Tax Statistics*, OR. DEP'T OF REVENUE, <https://www.oregon.gov/dor/programs/gov-research/Documents/Financial-reporting-receipts-public.pdf> (last visited May 19, 2021); WASH. LIQUOR & CANNABIS BD., ANNUAL REPORT FISCAL YEAR 2019 14 (2019).

156. Press Release, Nev. Dep't of Taxation, June Marijuana Revenue Statistics News Release (Aug. 28, 2018), <https://tax.nv.gov/uploadedFiles/taxnv.gov/Content/TaxLibrary/News-Release-June-Marijuana.pdf>.

157. Michael J. Bologna, *Weed Tax Revenue Tops \$100 Million in Illinois*, BLOOMBERG TAX (Oct. 13, 2020, 6:37 PM), <https://news.bloombergtax.com/daily-tax-report/weed-tax-revenue-tops-100-million-in-illinois?context=search&index=1>.

158. Ulrik Boesen, *New York's Road to Legalized Marijuana*, TAX FOUND. (Mar. 23, 2020), <https://taxfoundation.org/new-york-legalize-marijuana/>; Boesen, *supra* note 152; DAVIS ET AL., *supra* note 151, at 37, 38.

159. DAVIS, ET AL., *supra* note 151, at 5; Boesen, *supra* note 152. The estimates for annual excise tax revenue for states that currently have a tax supermajority requirement but that have not yet legalized recreational marijuana are as follows: Arkansas: \$65–\$96 million, Delaware: \$27–\$38 million, Florida: \$508–\$736 million, Louisiana: \$89–\$137 million, Mississippi: \$51–\$80 million, Missouri: \$132–\$203 million, and Oklahoma: \$73–\$103 million. *Id.*

160. See, e.g., Nicholas Wu, *House Vote on Marijuana Legalization Bill Postponed After Backlash from Moderate Lawmakers*, USA TODAY (Sept. 17, 2020, 5:07 PM), <https://www.usatoday.com/story/news/politics/2020/09/17/marijuana-legalization-vote-postponed-after-backlash-moderates/3484129001/>; Kevin A. Sabet, *Legalizing Pot is a Catastrophic Mistake – Opinion*, NEWSWEEK (Aug. 13, 2020, 11:00 AM), <https://www.newsweek.com/legalizing-pot-catastrophic-mistake-opinion-1524734>.

161. Lauren Loricchio, *Illinois Enacts Law to Legalize, Tax Recreational Marijuana*, TAX NOTES (June 26, 2019), <https://www.taxnotes.com/tax-notes-today-state/excise-taxes/illinois-governor-signs-bill-legalize-tax-recreational>

and neither state would have satisfied the requirement.¹⁶² State legislatures are understandably hesitant to pass legislation that legalizes drug use, especially when that drug is illegal federally.¹⁶³ Additionally, legislatures are more cognizant than voters of the new complex regulatory and tax regimes, administrative burdens, and infrastructure required by legalized marijuana.¹⁶⁴

Most jurisdictions that have legalized recreational marijuana have done so through the voter approval process.¹⁶⁵ But even in many

marijuana/2019/06/26/29nj2?highlight=Illinois%20Enacts%20Law%20to%20Legalize%20Tax%20Recreational%20Marijuana; Paige Jones, *Vermont Governor Signs Marijuana Legalization Bill*, TAX NOTES (Jan. 23, 2018), <https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/vermont-governor-signs-marijuana-legalization-bill/2018/01/23/26t79?highlight=Vermont%20Governor%20Signs%20Marijuana%20Legalization%20Bill>. The legislative process is the only option in some states, including Vermont and Delaware. *See, e.g., supra* Section I.B.5. Delaware's legislature has been unable to find sufficient support for legalization over the past several years. Lauren Loricchio, *Marijuana Bill Fails to Pass Before Delaware Session Adjourns*, TAX NOTES (July 8, 2019), <https://www.taxnotes.com/tax-notes-state/excise-taxes/marijuana-bill-fails-pass-session-adjourns/2019/07/08/29pqn?highlight=Marijuana%20Bill%20Fails%20to%20Pass%20Before%20Delaware%20Session%20Adjourns>.

162. After the Vermont Governor vetoed an initial bill, Vermont's revised bill passed in its House of Representatives with 56% approval. H.B 511, 2017 Leg., Reg. Sess. (Vt. 2018); *see also*, Jones, *supra* note 145. Illinois's bill passed in its House of Representatives with 58% approval, although it received 69% approval in its Senate. Shelby Bremmer, *Illinois House Passes Plan to Legalize Recreational Marijuana*, NBC CHICAGO (May 31, 2019), <https://www.nbcchicago.com/news/local/illinois-marijuana-legalization/158679/>.

163. Although currently unlikely to gain requisite support, there have been pending federal bills that would legalize and tax recreational marijuana. *See, e.g.,* Jonathan Curry, *House Marijuana Excise Tax Bill Inches Forward With Markup*, TAX NOTES (Nov. 25, 2019), <https://www.taxnotes.com/tax-notes-federal/exemptions-and-deductions/house-marijuana-excise-tax-bill-inches-forward-markup/2019/11/25/2b51k?highlight=House%20Marijuana%20Excise%20Tax%20Bill%20Inches%20Forward%20With%20Markup>; Wu, *supra* note 161.

164. States have implemented various options for marijuana taxation, many are complex regimes that include several types and layers of tax, and there is considerable debate regarding optimal tax rates. Boesen, *supra* note 158; DAVIS ET. AL., *supra* note 151, at 6; GABRIEL PETEK, CAL. LEGIS. ANALYST'S OFF., THE 2020-21 BUDGET: THE GOVERNOR'S CANNABIS-RELATED PROPOSALS 2 (2020). California's marijuana tax regime is so complex that its designers may have been partaking in the product during its design.

165. As of December 2020, the following sixteen jurisdictions have legalized recreational marijuana: Alaska, Arizona, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon, South Dakota, Vermont, Washington, and Washington, D.C. Boesen, *supra* note 158; Billy Hamilton, *The Underwhelming Results of This Year's Tax Ballot Measures*, TAX NOTES (Nov. 23, 2020), <https://www.taxnotes.com/tax-notes-state/tax-policy/underwhelming-results-years-tax-ballot-measures/2020/11/23/2d6xs?highlight=The%20Underwhelming%20Results%20of%20This%20Year%E2%80%99s%20Tax%20Ballot%20Measures%20C>. Although Washington, D.C. voters approved its legalization initiative, federal law precludes Washington, D.C. from effectuating that result. *Id.*; Aaron Davis, *Federal Budget Would Prohibit Pot Sales in District*

politically liberal states these ballot measures have passed by slim margins. In the 2016 election year, Maine's initiative passed with just 50.26% of the vote, Massachusetts's with 53.26% of the vote, and even California's initiative garnered only 57% approval.¹⁶⁶

There were five states with potential recreational legalization initiatives in 2020, including Arizona, Oklahoma, and South Dakota.¹⁶⁷ Although voters approved the four measures that appeared on the November 2020 ballot, only New Jersey's passed by a supermajority, with 67.08% approval, and all were controversial.¹⁶⁸ Arizona's measure survived a pre-election challenge, but Oklahoma's initiative did not garner enough support to appear on the ballot.¹⁶⁹ Both Montana and South Dakota faced immediate challenges asserting the approval process was unconstitutional.¹⁷⁰

of Columbia, TAX NOTES (Feb. 17, 2020), <https://www.taxnotes.com/tax-notes-federal/excise-taxes/federal-budget-would-prohibit-pot-sales-district-columbia/2020/02/17/2c5r9?highlight=Federal%20Budget%20Would%20Prohibit%20Pot%20Sales%20in%20District%20of%20Columbia>.

166. Press Release, Me. Sec'y of State, Secretary of State Matthew Dunlap Announces Recount Results for Question 1 (Dec. 21, 2016), <https://www1.maine.gov/sos/news/2016/recountq1.html>; 2016 - Statewide - Question 4, SEC'Y COMMONWEALTH MASS., https://electionstats.state.ma.us/ballot_questions/view/7297/ (last visited May 19, 2021); CAL. SEC'Y OF STATE, STATEMENT OF VOTE, NOVEMBER 8, 2016 GENERAL ELECTION 12 (2016) (Proposition 64).

167. Boesen, *supra* note 152. In addition to legalization and tax initiatives at the state level, localities are also considering similar provisions. *See, e.g.*, Joyce E. Cutler, *Cannabis Going on the Ballot in California's Wine-Growing Valley*, BLOOMBERG L. (Aug. 21, 2019, 5:04 PM), <https://news.bloomberglaw.com/environment-and-energy/cannabis-going-on-the-ballot-in-californias-wine-growing-valley?context=article-related>; Vargas, *supra* note 100.

168. The 2020 recreational marijuana ballot measures were approved by the following percentages of each state's voters—Arizona: 60%; Montana: 57%; New Jersey: 67%; South Dakota: 54%. *State of Arizona 2020 General Election*, ARIZ. SEC'Y OF STATE, <https://results.arizona.vote/#/featured/18/0> (last visited May 19, 2021) (Proposition 207); *2020 General Election - November 3, 2020*, MONT. SEC'Y OF STATE, <https://electionresults.mt.gov/resultsSW.aspx?type=BQ&map=CTY> (last visited May 19, 2021) (Initiative No. 190); *New Jersey Elections Results*, ASSOCIATED PRESS, <https://elections.ap.org/nj/results/2020-11-03/state/NJ/race/1/raceid/31679> (last visited May 19, 2021); *General Election - November 2, 2020*, S.D. SEC'Y OF STATE, <https://sdsos.gov/elections-voting/assets/2020GeneralStateCanvassFinal&Certificate.pdf> (last visited May 19, 2021) (Constitutional Amendment A).

169. *See* Paul Williams, *Ariz. Residents Seek To Block Legal Pot Measure From Ballot*, LAW360 (July 21, 2020, 8:30 PM), <https://www.law360.com/articles/1294239/ariz-residents-seek-to-block-legal-pot-measure-from-ballot>; *see also* Carmen Forman, *Petition to Legalize Recreational Marijuana Withdrawn*, OKLAHOMAN (Aug. 29, 2020, 1:05 AM), <https://oklahoman.com/article/5670255/petition-to-legalize-recreational-marijuana-withdrawn>.

170. *See* Sam Reisman, *Anti-Drug Group Says Montana's Pot Law Unconstitutional*, LAW360 (Nov. 6, 2020, 6:55 PM), <https://www.law360.com/articles/1326778/anti-drug-group-says-montana-s-pot-law-unconstitutional>; *see also* Diana Novak Jones, *South Dakota Pot Legalization Fought In Court After Passage*, LAW360 (Nov. 23, 2020, 6:04 PM),

Despite the massive revenue projections for large states such as New York and Florida, legalization efforts have encountered significant hurdles. Many states have seen unsuccessful legislative efforts to legalize and tax recreational marijuana.¹⁷¹ The New York legislature finally legalized recreational marijuana in 2021, although it did not receive two-thirds supermajority approval.¹⁷² The Virginia legislature was also able to legalize recreational marijuana in 2021 without supermajority approval.¹⁷³

Florida faces unique hurdles to legalize and tax recreational marijuana, as it would need supermajority approval through either the legislative or voter approval process. In a somewhat conservative state, supermajority approval is unlikely.¹⁷⁴ One potential path, although not

<https://www.law360.com/articles/1331672/south-dakota-pot-legalization-fought-in-court-after-passage>.

171. See, e.g., Lauren Loricchio, *Governor Calls for Legalizing, Taxing Pot*, TAX NOTES (Feb. 10, 2020), <https://www.taxnotes.com/tax-notes-state/credits/governor-calls-legalizing-taxing-pot/2020/02/10/2c4sx?highlight=Governor%20Calls%20for%20Legalizing%2C%20Taxing%20Pot>; Lauren Loricchio, *Maryland Democrats Offer Recreational Pot Proposal*, TAX NOTES (Feb. 12, 2020), <https://www.taxnotes.com/tax-notes-today-state/excise-taxes/maryland-democrats-offer-recreational-pot-proposal/2020/02/12/2c58b?highlight=Maryland%20Democrats%20Offer%20Recreational%20Pot%20Proposal>; Loricchio, *Marijuana Bill Fails to Pass Before Delaware Session Adjourns*, *supra* note 161; Paige Jones, *Rhode Island Efforts to Legalize, Tax Recreational Pot Likely Dead*, TAX NOTES (June 11, 2019), <https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/rhode-island-efforts-legalize-tax-recreational-pot-likely-dead/2019/06/11/29ljc?highlight=Rhode%20Island%20Efforts%20to%20Legalize%2C%20Tax%20Recreational%20Pot%20Likely%20Dead>; Aaron Davis, *New Hampshire Senate Kills Pot Legalization and Tax Bill*, TAX NOTES (Dec. 9, 2019), <https://www.taxnotes.com/tax-notes-today-state/sales-and-use-taxation/new-hampshire-senate-kills-pot-legalization-and-tax-bill/2019/12/09/2b6c1?highlight=New%20Hampshire%20Senate%20Kills%20Pot%20Legalization%20and%20Tax%20Bill>; Jennifer McLoughlin, *Pennsylvania Bills Would Legalize, Tax Recreational Pot*, TAX NOTES (Oct. 17, 2019), <https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/pennsylvania-bills-would-legalize-tax-recreational-pot/2019/10/17/2b1hm?highlight=Pennsylvania%20Bills%20Would%20Legalize%2C%20Tax%20Recreational%20Pot>; Sam Reisman, *Cannabis Bill Roundup: Connecticut Talks Legalization*, LAW360 (Mar. 6, 2020, 5:57 PM), <https://www.law360.com/articles/1250926/cannabis-bill-roundup-connecticut-talks-legalization>.

172. See Carolina Vargas, *New York Governor Signs Bill Legalizing, Taxing Marijuana*, TAX NOTES (Apr. 1, 2021), <https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/new-york-governor-signs-bill-legalizing-taxing-marijuana/2021/04/01/4c62s>.

173. See Lauren Loricchio, *Recreational Marijuana Bills Pass in Virginia*, TAX NOTES (Feb. 9, 2021), <https://www.taxnotes.com/tax-notes-today-state/excise-taxes/recreational-marijuana-bills-pass-virginia/2021/02/09/2r4jw>.

174. See Samantha J. Gross, *Florida Won't Vote on Legalizing Pot This Year*, TAMPA BAY TIMES (Jan. 13, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/01/13/legalized-pot-campaign-fizzles-in-florida/>. The Florida Supreme

ideal or efficient, would be a simple majority vote to legalize marijuana without any accompanying tax provision, with the hopes of convincing a supermajority to approve a tax measure after the fact.¹⁷⁵ Despite the significant new revenue potential, recreational marijuana taxes are particularly vulnerable to tax supermajority provisions.

B. Sports Betting

Unlike marijuana, sports betting is no longer illegal federally. In 2018, the United States Supreme Court struck down the federal law that prevented most states from sanctioning sports betting.¹⁷⁶ Immediately after the *Murphy* decision, many states rushed to legalize sports betting, primarily because of the potential tax revenues. Although sports betting is controversial, it is significantly less so than recreational marijuana. The primary objection to legal sports betting is sports integrity, which is arguably less of a societal concern than the concerns surrounding marijuana.¹⁷⁷ Importantly, if a state legalizes sports betting, it is not contravening federal law as with marijuana legalization.

As of 2021, more than half the states have legalized sports betting, and several more are considering sports betting proposals.¹⁷⁸ Some states

Court struck down a ballot initiative that would have allowed voters to amend the constitution to legalize recreational marijuana because it was impermissibly misleading. Advisory Opinion to the Attorney General Re: Adult Use of Marijuana, No. SC19-2116, 46 Fla. L. Weekly S 87 (Fla. 2021).

175. Although not constrained by a tax supermajority requirement, Vermont legalized recreational marijuana without a corresponding tax. *See* Jones, *supra* note 145. Vermont ultimately passed corresponding marijuana tax legislation, although it took over two years and the controversial legislation barely passed. *See* Tax Analysts, *Vermont Cannabis Bill Becomes Law Without Governor's Signature*, TAX NOTES (Oct. 7, 2020), <https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/vermont-cannabis-bill-becomes-law-without-governor-signature/2020/10/09/2d1nn?highlight=Vermont%20Cannabis%20Bill%20Becomes%20Law%20Without%20Governor%E2%80%99s%20Signature>.

176. *See* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018).

177. *See generally* John Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & Bus. 31 (2019) (arguing that proposals to legalize sports betting would harm sports integrity); *see also* Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L.J. 465, 519 (2020). Whether illicit or legal, addiction is a concern with both marijuana and sports betting, which if legalized can generate revenue to combat addiction. *See* Laila Kearney, *As States Chase Sports Betting Gold, Addicts Left in the Cold*, REUTERS (Oct. 26, 2018), <https://www.reuters.com/article/us-usa-betting-addiction/as-states-chase-sports-betting-gold-addicts-left-in-the-cold-idUSKCN1N019H>.

178. Ryan Rodenberg, *United States of Sports Betting*, ESPN (May 25, 2021), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization; *see* Ulrik Boesen, *Sports Betting Will Not Solve State Budget Crises*, TAX FOUND. (June 10, 2020), <https://taxfoundation.org/sports-betting-will-not-solve-state-budget-crises/>; *see also* Sam McQuillan, *Maryland, Louisiana, South Dakota Expand Sports Betting Surge*, BLOOMBERG TAX (Nov. 4, 2020), <https://news.bloombergtax.com/daily->

with a tax supermajority requirement have successfully legalized and tax sports betting, including Colorado, Delaware, Mississippi, Oregon, and South Dakota.¹⁷⁹ Tax supermajority provisions have, however, presented difficulties. Colorado's efforts were nearly derailed because of its TABOR. Although a supermajority of the legislature passed the legalization and tax bill, the legislature decided to refer the bill to voters to avoid possible TABOR and other challenges.¹⁸⁰ The initiative barely passed with only 51.41% of voters approving.¹⁸¹ Louisiana enacted a statute that allows each parish to decide whether to legalize sports betting, although if Louisiana desires to tax sports betting, it will still need to pass a tax statute that will require supermajority approval.¹⁸² The Florida legislature introduced several sports betting proposals without success, although sports betting will now be allowed at certain tribal casinos.¹⁸³ Some states that have legalized sports betting have excluded online sports betting. If those states, such as Mississippi and Oklahoma, wish to expand

tax-report-state/maryland-louisiana-south-dakota-expand-sports-betting-surge; see, e.g., Aaron Davis, *Vermont Looks to Sports Betting Following New Hampshire Rollout*, TAX NOTES (Jan. 9, 2020), <https://www.taxnotes.com/tax-notes-today-state/gross-receipts-tax/vermont-looks-sports-betting-following-new-hampshire-rollout/2020/01/09/2brm9?highlight=Vermont%20Looks%20to%20Sports%20Betting%20Following%20New%20Hampshire%20Rollout>.

179. See Boesen, *supra* note 178. Arkansas has also legalized sports betting, but the new tax was not subject to its uniquely designed tax supermajority requirement. Mississippi legalized sports betting indirectly through a bill aimed at fantasy sports, with several legislators claiming they were not aware of bill's scope. See Adam Ganuchau, *Mississippi's Gamble Pays off; Supreme Court Strikes Down Sports Betting Ban*, MISS. TODAY (May 14, 2018), <https://mississippitoday.org/2018/05/14/mississippis-gamble-pays-off-supreme-court-strikes-down-sports-betting-ban/>.

180. H.B. 1327, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2019); see also Jad Chamseddine, *DOR Says Sports Betting Must Be Regulated, Taxed*, TAX NOTES (Dec. 24, 2018), <https://www.taxnotes.com/tax-notes-state/tax-policy/dor-says-sports-betting-must-be-regulated-taxed/2018/12/24/28pm3?highlight=DOR%20Says%20Sports%20Betting%20Must%20Be%20Regulated%2C%20Taxed>.

181. *Colorado Election Results – Proposition DD*, COLO. SEC'Y OF STATE, <https://results.enr.clarityelections.com/CO/97143/web/#/detail/200> (last visited May 19, 2021).

182. S.B. 130, 2020 Reg. Sess. (La. 2020). This initial bill referring the legalization decision to parishes passed both chambers by a supermajority vote. *Id.*

183. See, e.g., S.B. 972, 2020 Reg. Sess. (Fla. 2020); see also S.B. 968, 2020 Reg. Sess. (Fla. 2020). Florida and the Seminole Tribe agreed on a new gaming compact worth \$6 billion over thirty years. Jennifer Kay, *Florida Senate Clears \$6 Billion Gaming Deal With Seminole Tribe*, BLOOMBERG TAX (May 18, 2021), <https://news.bloombergtax.com/daily-tax-report-state/florida-senate-clears-6-billion-gaming-deal-with-seminole-tribe>. Florida could potentially face an additional hurdle because of another 2018 constitutional amendment that requires any new "casino" gambling to be approved by voters. FL. CONST. art. X, § 30. The plain language of this amendment, however, does not support an argument that it applies to sports betting.

their sports betting provisions to include online betting they may require supermajority approval.¹⁸⁴

If the trend of states legalizing sports betting continues, economists estimate that legal sports betting could contribute \$22.4 billion dollars to the United States GDP and that the total economic output could top \$41 billion.¹⁸⁵ One study suggested that if all states were to legalize and tax sports betting it would result in approximately \$2.5 billion in annual tax revenue.¹⁸⁶ That study suggests that large states such as Florida, New York, and Texas could each generate over \$150 million annually.¹⁸⁷ California estimates that if it were to legalize and tax sports betting it could generate \$500 million per year.¹⁸⁸ Although not as lucrative as marijuana taxation, sports betting is typically less controversial and can still generate significant revenues. But sports betting initiatives are still likely to face difficulties due to tax supermajority requirements.

C. Vehicle Miles Traveled

The primary revenue source funding the maintenance and development of the transportation infrastructure in the United States has been the excise taxes on gasoline and diesel, which are imposed at both the federal and state levels.¹⁸⁹ Unfortunately, this approach is unsustainable—at least with anything remotely close to the current tax

184. See Boesen, *supra* note 178.

185. OXFORD ECON., ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING 23 (2017). Sports betting revenues, and even legalization efforts, may be impacted by the interaction with tribal casinos. See, e.g., Kay, *supra* note 183; Steve Karnowski & Geoff Mulvihill, *Casino-Operating Tribes Influence Sports Betting Debate*, ASSOCIATED PRESS (Apr. 8, 2019), <https://apnews.com/3beda68aeb514e36ad0c7730ff3c97d5>; see also Paul Jones, *Authors Pull California Sports Betting Bill*, TAX NOTES (June 24, 2020), <https://www.taxnotes.com/tax-notes-today-state/gross-receipts-tax/authors-pull-california-sports-betting-bill/2020/06/24/2cn8z?highlight=Authors%20Pull%20California%20Sports%20Betting%20Bill>; Lauren Loricchio, *Connecticut Legalizes Sports Betting, Online Gambling*, TAX NOTES (June 31, 2021), <https://www.taxnotes.com/tax-notes-today-state/gross-receipts-tax/connecticut-legalizes-sports-betting-online-gambling/2021/06/01/67zss>; Tiffany Stecker, *Californians to Vote on Tribal Sports Betting Next Year*, BLOOMBERG TAX (May 27, 2021), <https://news.bloombergtax.com/daily-tax-report-state/californians-to-vote-on-tribal-sports-betting-next-year>.

186. OXFORD ECON., *supra* note 185, at 65.

187. *Id.*

188. STAFF OF S. COMM. ON GOVERNMENTAL ORG., 116TH CONG., GAMBLING: SPORTS WAGERING 7 (2020), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SCA6#.

189. See Roberta F. Mann, *Sustainably Funding Transportation Infrastructure: Tax Fuel or Miles*, 31 AUSTRAL. TAX F. 609, 611 (2016); see also Shaun Courtney, *Gas-Tax Proxy Out of Reach as Clock Ticks for Highway Trust Fund*, BLOOMBERG TAX (Apr. 1, 2019, 11:01 AM), <https://news.bloombergtax.com/daily-tax-report-state/gas-tax-proxy-out-of-reach-as-clock-ticks-for-highway-trust-fund?context=search&index=9>.

rates.¹⁹⁰ The transportation infrastructure in the United States is in woeful need of maintenance and expansion, as discussed in Section III.B. below. And, although beneficial for the environment, vehicles have become much more fuel efficient.¹⁹¹ Vehicles that use less fuel, or even no fuel with the proliferation of electric vehicles, reduce federal and state gasoline tax revenues that were already deficient.¹⁹² States could lose \$300 billion annually if they do not adapt their current transportation tax regimes.¹⁹³

The only effective solution is a tax on actual infrastructure usage.¹⁹⁴ Tolls may work in limited circumstances, such as with highways and bridges, but a robust vehicle miles traveled (VMT) tax is required to fairly and effectively determine usage and collect revenue based on that usage.¹⁹⁵ VMT taxes are incredibly unpopular in the United States.¹⁹⁶ First, many see a VMT tax as punishment for being an environmentally

190. See Mann, *supra* note 189, at 611; see also Andrew D. Appleby, *Pay at the Pump: How \$11 per Gallon Gasoline Can Solve the United States' Most Pressing Challenges*, 40 CUMB. L. REV. 3, 6 (2009).

191. See Mann, *supra* note 189, at 611.

192. See *id.*; Courtney, *supra* note 189. Many states continue to increase their gas taxes, although this approach is arguably unsustainable. See, e.g., Aaron Davis, *Governor Signs \$45 Billion Capital Plan*, TAX NOTES (July 8, 2019), [https://www.taxnotes.com/tax-notes-state/digital-economy/governor-signs-45-billion-capital-plan/2019/07/08/29p1s?highlight=Illinois%20Governor%20Signs%20\\$2445%20Billion%20Capital%20Plan](https://www.taxnotes.com/tax-notes-state/digital-economy/governor-signs-45-billion-capital-plan/2019/07/08/29p1s?highlight=Illinois%20Governor%20Signs%20$2445%20Billion%20Capital%20Plan); see also Ryan Prete, *Gas Tax Hike Takes Effect in Five States This Month*, BLOOMBERG TAX (July 1, 2019, 1:46 PM), https://news.bloombergtax.com/daily-tax-report/gas-tax-hike-takes-effect-in-five-states-july-1?utm_source=rss&utm_medium=DTNW&utm_campaign=0000016b-ae1e-d944-a77b-fe3effcf0003; Chris Marr, *Governor's \$300M Gas-Tax Plan Approved in Alabama*, BLOOMBERG TAX (Mar. 12, 2019, 4:02 PM), <https://news.bloombergtax.com/daily-tax-report/governors-300m-gas-tax-plan-approved-in-alabama-1>; Alex Ebert, *Bumpy Road Ahead for Ohio Governor's \$1.2B Gas Tax Plan*, BLOOMBERG L. (Feb. 22, 2019, 4:18 PM), <https://news.bloomberglaw.com/esg/bumpy-road-ahead-for-ohio-governors-1-2b-gas-tax-plan?context=article-related>.

193. Michael J. Bologna, *Electric Car Growth Sparking \$300 Billion Budget Loss for States*, BLOOMBERG TAX (Oct. 9, 2020, 4:45 AM), <https://news.bloomberglaw.com/daily-tax-report-state/electric-car-growth-sparking-300-billion-budget-loss-for-states>.

194. Many localities fund transportation infrastructure with general sales taxes, which may be the only viable option for many localities. See, e.g., Linda Chiem, *Transpo Ballot Measures Yield Wins For Public Transit*, LAW360 (Nov. 4, 2020, 10:44 PM), <https://www.law360.com/articles/1325911/transpo-ballot-measures-yield-wins-for-public-transit>. This approach reflects poor tax policy, however, because the tax is not related to the activity and general sales taxes are regressive. See *id.*

195. See Mann, *supra* note 189, at 642 (discussing VMT tax fairness).

196. See *id.* at 613, 643; see also Tim Gruver, *States Consider Taxing Drivers by the Mile Despite Privacy Concerns*, POLITICO (June 8, 2017, 10:22 PM), <https://www.politico.com/story/2017/06/08/states-consider-taxing-drivers-by-the-mile-despite-privacy-concerns-239336> (discussing the privacy concerns that make the proposed tax unpopular).

responsible individual who purchased a fuel-efficient vehicle. Electric and hybrid vehicles cost more than traditional gasoline powered vehicles, and the gasoline tax savings is often factored heavily into the purchasing decision. Second, creating a new VMT regime is costly and complex, especially if that regime is to be truly equitable.¹⁹⁷ In addition to the technological infrastructure required, the VMT rate should arguably vary depending on vehicle weight and emissions to accurately account for the infrastructure and environmental costs associated with driving that particular vehicle. Third, and maybe most importantly, are legitimate privacy concerns. To accurately administer a VMT tax there would need to be a GPS device installed in the vehicle that tracks where and to what extent the vehicle is driven.¹⁹⁸ This location data would need to be accessible by the federal and all state taxing authorities.¹⁹⁹ Although individuals are becoming more comfortable with GPS tracking, as is the reality with any smart phone, having federal and state governments track individuals' movements adds another dimension to the concern. There are alternatives that minimize privacy concerns, such as tracking mileage using a vehicle's onboard computer, but these alternatives cannot determine in which states those miles accrued.²⁰⁰ Although Oregon and Washington have been piloting VMT programs for the past several years and Washington is setting the groundwork for a VMT transition, VMT taxes have faced heavy opposition thus far, and that will likely continue in the future.²⁰¹

Less controversial, but problematic, are electric and hybrid vehicle registration fees. As of early 2020, twenty-eight states have an additional annual registration fee, ranging from \$50 to more than \$200, for plug-in electric vehicles.²⁰² These fees often exceed the amount of gas tax that an

197. See Mann, *supra* note 189, at 643; see also Courtney, *supra* note 189.

198. See *id.*

199. Alternatively, governments could allow third-party private companies to collect and aggregate drivers information and tax payments. See Courtney, *supra* note 189.

200. See *id.* In many large states, such as California, Florida, and Texas, the inaccuracy may not be a substantial concern. But for other states, particularly in the Northeast, motorists may drive in multiple states on a daily basis. See Ulrik Boesen, *Who Will Pay for the Roads?*, TAX FOUND. (Aug. 25, 2020), <https://taxfoundation.org/road-funding-vehicle-miles-traveled-tax/#GPS>.

201. See Courtney, *supra* note 189; see also Paul Jones, *Washington Lawmakers Propose Rules for Possible Mileage Tax*, TAX NOTES (Feb. 4, 2020), <https://www.taxnotes.com/tax-notes-today-state/motor-vehicle-taxation/washington-lawmakers-propose-rules-possible-mileage-tax/2020/02/04/2c4bw?highlight=%22Washington%20Lawmakers%20Propose%20Rules%20for%20Possible%20Mileage%20Tax%22>.

202. Scott Calvert, *More States Charge Fees for Electric Vehicles*, WALL ST. J. (Mar. 28, 2020, 9:00 AM), <https://www.wsj.com/articles/more-states-charge-fees-for-electric-vehicles-11585400401>. Fourteen states have an additional registration fee for hybrid vehicles. *Id.*

average driver would pay in a year for a non-electric vehicle.²⁰³ In addition to being punitive, it is difficult to reconcile these fees with large incentives that many states provide to entice new electric vehicle purchases.²⁰⁴ Importantly, these fees do nothing to address gasoline vehicles becoming more fuel efficient, which accounts for the vast majority of the gas tax revenue shortfall. And even though these fees are less controversial than VMT taxes, they may still be impeded by supermajority requirements.²⁰⁵ For example, Oklahoma passed legislation that created an electric vehicle registration fee.²⁰⁶ The Oklahoma Supreme Court invalidated the legislation because it constituted a “revenue bill” and it was not passed by a supermajority.²⁰⁷

Due in part to VMT taxes’ privacy and complexity concerns, in the near term it is much easier for a legislature to simply increase the state’s existing gas tax even if it is a suboptimal and unsustainable tool.²⁰⁸ From a policy perspective, both gas and VMT taxes are problematically regressive.²⁰⁹ The regressivity can be ameliorated by expanding public transportation options.²¹⁰ However, a substantial move toward widespread public transportation funding is unlikely in the United

203. *See id.* States could determine the average amount of gas tax paid by vehicle owners each year and charge that amount as an electric vehicle fee, which would avoid the punitive effect of many of the current fees. *See id.*

204. *See id.*; Kristy Hartman & Laura Shields, *State Policies Promoting Hybrid and Electric Vehicles*, NAT’L CONF. OF STATE LEG. (Mar. 12, 2021), <https://www.ncsl.org/research/energy/state-electric-vehicle-incentives-state-chart.aspx#incentives>. An even worse alternative is a specific tax on electricity used to power electric vehicles. *See, e.g.*, Aaron Davis, *Pennsylvania Proposes Highest Electric Vehicle Tax*, TAX NOTES (Oct. 30, 2019), <https://www.taxnotes.com/tax-notes-today-state/motor-vehicle-taxation/pennsylvania-proposes-highest-electric-vehicle-tax/2019/10/30/2b2n0?highlight=%22Pennsylvania%20Proposes%20Highest%20Electric%20Vehicle%20Tax%22>.

205. *See* Vargas, *supra* note 100. Electric vehicle registration fees may also be impeded by voter recoil. Washington voters approved an initiative that significantly reduces and caps electric vehicle registration fees and taxes. *See* Mariya Frost, *The Supreme Court’s Striking Down I-976 Represents a Failure at Every Level of Government*, WASH. POL’Y CTR. (Oct. 28, 2020), <https://www.washingtonpolicy.org/publications/detail/the-supreme-courts-striking-down-i-976-represents-a-failure-at-every-level-of-government>.

206. 2017 Okla. Sess. Laws 1292 (codified at 47 OKLA. STAT. § 1132.7(B); 69 OKLA. STAT. § 1501).

207. *See* Sierra Club v. Okla. Tax Comm’n, 405 P.3d 691, 700 (Okla. 2017).

208. *See* Calvert, *supra* note 202. This result is even more likely if a state has a supermajority requirement to create new taxes but not to raise existing tax rates. *See e.g.*, Bill Kramer, *Five States Pass Major Gas Tax Increases*, MULTISTATE (May 11, 2017), <https://www.multistate.us/insider/2017/5/11/five-states-pass-major-gas-tax-increases>.

209. *See* Appleby, *supra* note 190, at 35–38.

210. *See id.* at 31, 33.

States.²¹¹ Thus, VMT taxes face many obstacles, and their controversial nature makes them likely to be further obstructed by state supermajority requirements.

D. Federal Tax Conformity

Although federal tax conformity issues and their revenue implications differ from those associated with the new consumption taxes described above, the process can be controversial and can result in vast increases or decreases in state tax revenue. States generally use federal taxable income as the starting point for state income taxes.²¹² States then make various modifications to their tax laws, resulting in state tax laws that do not precisely mirror the Internal Revenue Code. This process of conforming to and decoupling from the Internal Revenue Code adds significant compliance and enforcement complexity for taxpayers and tax authorities, but it allows states to effectuate policy preferences that may diverge from federal policy preferences.²¹³ States generally conform to the Internal Revenue Code using either static or rolling conformity.²¹⁴ Under either method state tax supermajority requirements may frustrate a state's ability to adopt or reject a specific federal tax provision.

Although tax conformity is not nearly as controversial as recreational marijuana or sports betting, there are contentious policy implications such as whether to adopt federal tax provisions designed to aid small businesses impacted by COVID-19. Tax conformity can be quite technical, which presents its own difficulties within the legislative process.²¹⁵ State tax conformity efforts may violate constitutional limitations on state taxation, a result that state legislatures may understandably wish to avoid.²¹⁶ And state tax conformity can signal a

211. See Sarah Babbage & Shaun Courtney, *Drivers Paying for Mass Transit on Radar for Next Highway Bill*, BLOOMBERG TAX, (Mar. 22, 2019, 6:01 AM), <https://news.bloombergtax.com/daily-tax-report/drivers-paying-for-mass-transit-on-radar-for-next-highway-bill>.

212. JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & ANDREW APPELBY, *STATE TAXATION* ¶¶ 7.02, 20.02 (3d ed. 2021).

213. *Id.*

214. *Id.* at ¶ 7.02.

215. See generally Darien Shanske, *States Can and Should Respond Strategically to Federal Tax Law*, 45 OHIO N.U. L. REV. 543 (2019) (explaining that tax conformity can lead to an increase in tax evasion by taxpayers).

216. See Darien Shanske & David Gamage, *Why States Can Tax the GILTI*, 91 ST. TAX NOTES 967, 969 (2019); see also Walter Hellerstein & Jon Sedon, *State Corporate Income Tax Consequences of Federal Tax Reform*, 88 TAX NOTES INT'L 409, 415 (2018); Michael Fatale, *Foreign Commerce Clause Discrimination: Revisiting Kraft After Wayfair*, 72 BAYLOR L. REV. 47, 69 (2020); Joseph X. Donovan et al., *State Taxation of GILTI: Policy and Constitutional Ramifications*, 90 ST. TAX NOTES 315, 323 (2018); Jeanne Rauch-Zender, *Should States Embrace GILTI?*, 94 TAX NOTES ST. 1127, 1128 (2019).

state's overall approach to taxation. For example, California enacted conformity legislation in response to the 2017 Federal Tax Cuts and Jobs Act (TCJA) that will generate \$1.3 to \$1.6 billion annually, while Florida enacted legislation expressly declining to conform to certain federal tax provisions thus forgoing new revenue.²¹⁷

The TCJA raised many significant and controversial tax conformity issues.²¹⁸ The TCJA created several new international business tax regimes.²¹⁹ The TCJA also contained substantial preferential business deduction provisions and unique non-recognition provisions.²²⁰ Whether a state attains the benefit of those new federal taxes, or the detriment of the new federal deductions, depends on the state's conformity type. If a state has rolling conformity, it essentially incorporates all the new federal provisions into its state tax code automatically. If such a state wants to decouple from a particular provision, for example accelerated depreciation, it has to enact legislation expressly decoupling. This legislation may fall within the scope of a state's tax supermajority provision (e.g., as a revenue raising bill). If a state has static conformity, it adopts the Internal Revenue Code as of a certain date, so federal amendments are not automatically incorporated into the state's tax code. If such a state wants to conform to a new federal provision, for example the Global Intangible Low-Taxed Income (GILTI) or Base Erosion and Anti-Abuse Tax (BEAT) provisions, it has to enact legislation either changing the static conformity date or expressly adopting the specific provision. This legislation will likely fall within the scope of a state's tax supermajority provision.

217. Paul Jones, *California Governor Signs Conformity Package*, TAX NOTES (July 5, 2019), <https://www.taxnotes.com/tax-notes-today-state/tax-cuts-and-jobs-act/california-governor-signs-conformity-package/2019/07/05/29pq3?highlight=%22california%20governor%20signs%20conformity%20package%22.>; see Jennifer Kay, *Florida Allowing Business Taxpayers to Exclude Foreign Income*, BLOOMBERG TAX (July 1, 2019, 10:28 AM), <https://news.bloombergtax.com/daily-tax-report-state/florida-allowing-business-taxpayers-to-exclude-foreign-income>.

218. See Jared Walczak, *Toward a State of Conformity: State Tax Codes a Year After Federal Tax Reform*, 631 TAX FOUND. 1, 4 (2019); see also Darien Shanske, Adam Thimmesch, & David Gamage, *Strategic Nonconformity to the TCJA, Part I: Personal Income Taxes*, 97 TAX NOTES ST. 17, 19 (2020); Darien Shanske, Adam Thimmesch, & David Gamage, *Strategic Nonconformity, State Corporate Income Taxes, And the TCJA: Part II*, 97 TAX NOTES ST. 123, 123 (2020); Darien Shanske & David Gamage, *Why States Should Tax the GILTI*, 91 TAX NOTES ST. 751, 751–52 (2019); *Federal Tax Reform and the States*, NAT'L CONF. OF STATE LEG. (Apr. 1, 2018), <https://www.ncsl.org/research/fiscal-policy/federal-tax-reform-and-the-states.aspx>.

219. See HELLERSTEIN ET AL., *supra* note 212, ¶ 7.16A. These regimes include new tax impositions and new deduction provisions.

220. For example, accelerated depreciation under I.R.C. § 168(k), the qualified business income deduction under I.R.C. § 199A(a), and opportunity zones under I.R.C. §§ 1400Z-1, 2.

These conformity principles apply not only to the TCJA, but to all Internal Revenue Code amendments. Most recently, states are determining if and to what extent they will conform to federal stimulus efforts, particularly the Coronavirus Aid, Relief, and Economic Security (CARES) Act. The CARES Act has several tax relief provisions, most notably more lenient net operating loss provisions that eliminate limits and allow for carrybacks.²²¹ If states conform to these tax provisions it will cost them significant revenue at a time of particular revenue need.²²² For example, Oregon decided not to decouple from the CARES Act, a decision that will cost it \$225 million in lost revenue in 2020–21.²²³ It is unclear if Oregon would have needed supermajority approval because the decoupling is arguably a revenue raising bill, but Oregon courts have interpreted that term narrowly.²²⁴ Many other states have decoupled from various CARES Act tax provisions and more will likely continue to do so, if they are not impeded by supermajority requirements.²²⁵

III. CONTROVERSIAL—BUT SIGNIFICANT—STATE EXPENDITURE DEMANDS

Achieving and maintaining fiscal health is difficult for states even during times of national economic growth and stability. The task becomes much more difficult if a state’s existing tax base is eroded significantly

221. See Adam Thimmesch, *State Tax Conformity: The CARES Act and Beyond*, 96 TAX NOTES ST. 987, 988, 990 (2020).

222. See *id.* at 987; David Gamage & Michael A. Livingston, *Conformity and State Income Taxes: Suggestions for the Crisis*, 96 TAX NOTES ST. 1353, 1353 (2020).

223. See Paul Jones, *Oregon Special Session Won’t Include CARES Act Decoupling*, TAX NOTES (Aug. 11, 2020), <https://www.taxnotes.com/tax-notes-today-state/budgets/oregon-may-consider-decoupling-cares-act-special-session/2020/08/10/2ctgy>.

224. See *supra* Section I.B.12 (describing the supermajority provision that applies to “bills for raising revenue,” and discusses how courts have interpreted the terms.)

225. See, e.g., Lauren Loricchio, *Georgia Legislature Passes Bills on CARES Act, Other Tax Changes*, TAX NOTES (June 30, 2020), <https://www.taxnotes.com/featured-news/georgia-legislature-passes-bills-cares-act-other-tax-changes/2020/06/30/2cnxr>; see also Lauren Loricchio, *DOR Issues Guidance on Impact of Decoupling From IRC*, TAX NOTES (July 27, 2020), <https://www.taxnotes.com/tax-notes-state/carrybacks-and-carryforwards/dor-issues-guidance-impact-decoupling-irc/2020/07/27/2cr7r?highlight=Lauren%20Loricchio>; Amy Hamilton, *New York Decouples From CARES Act Tax Relief*, TAX NOTES (Apr. 20, 2020), <https://www.taxnotes.com/tax-notes-federal/corporate-taxation/new-york-decouples-cares-act-tax-relief/2020/04/20/2cds6?highlight=Amy%20Hamilton>. Maryland is determining how to best decouple given its complex conformity regime, which would generate hundreds of millions of dollars in 2021. Lauren Loricchio, *CARES Act Conformity Could Cause Complications*, TAX NOTES (July 13, 2020), <https://www.taxnotes.com/tax-notes-state/carrybacks-and-carryforwards/cares-act-conformity-could-cause-complications/2020/07/13/2cpp7?highlight=Lauren%20Loricchio>.

by economic downturn and a rapidly evolving economy that is no longer adequately taxed within the state's antiquated tax regime.²²⁶ As states face declining tax revenue, they simultaneously face several imperative financial outlays. There are many areas that require additional funding, including education, universal healthcare, eldercare, and mitigating climate change. With climate change in particular, economists generally prefer carbon taxes instead of regulation.²²⁷ But in coastal states such as California, Florida, Louisiana, Mississippi, and Oregon, it will be difficult for a new carbon tax to win supermajority approval despite the direct threat of climate change.²²⁸ Although all these areas are crucial, this article briefly examines states' most urgent challenges that have reached emergency levels in many cases.

A. COVID-19 Economic Impact

State and local governments were impacted significantly by the COVID-19 pandemic. Estimates of the resulting aggregate state budget shortfall exceeded \$500 billion through the end of the 2021 fiscal year, largely due to a precipitous drop in tax collections.²²⁹ Nationwide, tax collections were estimated to decline \$191 billion from the projected figures for fiscal years 2020 and 2021.²³⁰ Total state tax revenues dropped almost thirteen percent in June 2020 compared to June 2019.²³¹ Certain states were hit even harder, with California and Colorado expecting a

226. See generally Hamilton, *supra* note 225 (providing New York as an example).

227. See Gamage & Shanske, *supra* note 43, at 59 (citing Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax is a Better Response to Global Warming than Cap and Trade*, 28 STAN. ENV'T L.J. 3, 6–7 (2009)).

228. See Paul Jones, *Oregon Republican Walkout Over Carbon Tax Continues*, TAX NOTES (June 28, 2019), <https://www.taxnotes.com/tax-notes-today-state/environmental-taxes/oregon-republican-walkout-over-carbon-tax-continues/2019/06/28/29nvy?highlight=Paul%20Jones>; see also Tiffany Stecker, *Florida's Rep. Rooney Wants Republicans to Embrace a Carbon Tax*, BLOOMBERG L. (May 3, 2019, 6:01 AM), <https://news.bloomberglaw.com/environment-and-energy/floridas-rep-rooney-wants-republicans-to-embrace-a-carbon-tax>.

229. ELIZABETH McNICHOL, MICHAEL LEACHMAN, & JOSHUAH MARSHALL, CTR. ON BUDGET & POL'Y PRIORITIES, STATES NEED SIGNIFICANTLY MORE FISCAL RELIEF TO SLOW THE EMERGING DEEP RECESSION, CTR. ON BUDGET & POL'Y PRIORITIES 7, 13 (2020).

230. Jared Walczak, *State Forecasts Indicate \$121 Billion 2-Year Tax Revenue Losses Compared to FY 2019*, TAX FOUND. (July 15, 2020), <https://taxfoundation.org/state-revenue-forecasts-state-tax-revenue-loss-2020/>; Jeffrey Clemens & Stan Veuger, *Implications of the COVID-19 Pandemic for State Government Tax Revenues*, 73 NAT'L TAX J. 619, 1 (2020) (estimating a state tax revenue reduction of \$106 billion for the 2021 fiscal year).

231. See URBAN INST., *Monthly State Revenue Highlights—State Tax Revenues Declined Once Again in June 2020* (2020), https://www.urban.org/sites/default/files/2020/08/11/monthlystrh_june2020.pdf.

twenty percent decline in revenue.²³² New York estimated \$62 billion in tax losses over the next four fiscal years as a “direct consequence” of the coronavirus pandemic.²³³ New Jersey faced a \$9.9 billion shortfall for the fiscal year.²³⁴ New Jersey increased personal and corporate income taxes, and used its emergency powers to borrow \$4.5 billion, and may have to increase sales and property taxes to service this new debt.²³⁵ Illinois was forced to borrow over \$3 billion from the Federal Reserve to cover COVID-19 budget shortfalls after voters rejected income tax increases.²³⁶ And states that rely heavily on travel and tourism, such as Florida and Nevada, are particularly vulnerable.²³⁷

In addition to the foregoing concerns, states’ revenue needs are compounded by the demand for additional revenue to assist residents and businesses that have been impacted by COVID-19. Expanded services such as treatment and testing, education, housing assistance, unemployment, and small business assistance will cost each state billions.²³⁸ Supermajority requirements make it more difficult for states to respond to economic downturns, especially recessions.²³⁹

232. CTR. ON BUDGET AND POL’Y PRIORITIES, STATES GRAPPLING WITH HIT TO TAX COLLECTIONS 2 (2020).

233. ROBERT F. MUJICA, JR., N.Y. STATE, FY 2021 FIRST QUARTER UPDATE 8 (2021).

234. Elise Young & Chris Dolmetsch, *N.J. Wins Ruling to Issue Up to \$9.9 Billion Debt for Crisis*, BLOOMBERG (Aug. 12, 2020, 12:05 PM), <https://www.bloomberg.com/news/articles/2020-08-12/new-jersey-s-10-billion-bond-sale-cleared-by-state-s-high-court>.

235. *Id.*; Elise Young, *Murphy Signs New Jersey Budget With \$4.5 Billion in Borrowing*, BLOOMBERG L. (Sept. 29, 2020, 2:06 PM), <https://news.bloomberglaw.com/daily-labor-report/murphy-signs-new-jersey-budget-with-4-5-billion-in-borrowing?context=article-related>.

236. See Nic Querolo & Shruti Date Singh, *Illinois Plans to Borrow Another \$2 Billion From Federal Reserve*, BLOOMBERG (Nov. 25, 2020, 5:56 PM), <https://www.bloomberg.com/news/articles/2020-11-25/illinois-plans-to-borrow-another-2-billion-from-federal-reserve>; see also Michael J. Bologna, *Illinois Fiscal Crisis Worsens, Leaving Tough Taxing Choices*, BLOOMBERG TAX (Nov. 23, 2020, 4:46 AM), <https://news.bloombergtax.com/daily-tax-report-state/illinois-fiscal-crisis-worsens-leaving-tough-taxing-choices>.

237. Prior to COVID-19, travel and tourism generated \$83 billion in state and local tax revenue annually. See Sam McQuillan, *States Stand to Lose Billions in Taxes Tied to Tourism*, *Live Sports*, BLOOMBERG TAX (Apr. 7, 2020, 4:45 AM), <https://news.bloombergtax.com/daily-tax-report/states-stand-to-lose-billions-in-taxes-tied-to-tourism-live-sports>.

238. See Letter from Jared Polis, Governor of Colo., to Colo. Cong. Delegation (July 28, 2020), https://www.cml.org/docs/default-source/covid-19/letter-to-congressional-delegation-polis_cml_cci_ccat_sda-11-17-20.pdf?sfvrsn=9cf43e3e_0.

239. See Jones, *supra* note 22.

B. Transportation Infrastructure

America's transportation infrastructure has been neglected for decades and has reached the point where an estimated \$2 trillion investment is required simply to achieve adequacy.²⁴⁰ The American Society of Civil Engineers rated the United States overall infrastructure as "poor," with a D+ rating.²⁴¹ The report estimated that it would cost \$4.6 trillion through 2025 to achieve a "good" rating, with surface transportation infrastructure accounting for \$2 trillion of that amount.²⁴² Although the federal government provides some infrastructure funding, state and local governments incur almost 75% of infrastructure expenditures.²⁴³

It may be impossible to adequately fund transportation infrastructure investment if the primary source of revenue, federal and state fuel taxes, continues its rapid decline as discussed in Section II.C.²⁴⁴ Illinois recently committed to a \$33.2 billion transportation infrastructure plan that it is attempting to fund at least partially with increased fuel taxes, conventional and electric vehicle fees, parking taxes, and sports betting taxes.²⁴⁵ Relying heavily on fuel taxes is not a long-term solution, but at least the state is embracing other tax types as a supplement. States that have broad tax supermajority requirements may not be able to diversify their funding sources as easily.

C. Homelessness Mitigation

Homelessness has reached epidemic levels in many areas, especially on the West Coast.²⁴⁶ The COVID-19 economic impact will likely

240. See Saleha Mohsin & Jennifer Jacobs, *Gas-Tax Hike Is in Play as Trump Weighs Infrastructure Politics*, BLOOMBERG (May 17, 2019, 11:25 aM), <https://www.bloomberg.com/news/articles/2019-05-17/gas-tax-hike-is-in-play-as-trump-weighs-infrastructure-politics>.

241. *2017 Report Card for America's Infrastructure*, AM. SOC'Y OF CIVIL ENG'RS, <https://2017.infrastructurereportcard.org/> (last visited May 19, 2021).

242. *2017 Report Card for America's Infrastructure, Economic Impact*, AM. SOC'Y OF CIVIL ENG'RS, <https://2017.infrastructurereportcard.org/the-impact/economic-impact/> (last visited May 19, 2021).

243. See ELIZABETH McNICHOL, CTR. ON BUDGET & POL'Y PRIORITIES, *IT'S TIME FOR STATES TO INVEST IN INFRASTRUCTURE* 5 (2019).

244. See *id.* at 3; see also Shaun Courtney, *GOP Wants Pay-fors Before Endorsing \$2 Trillion for Public Works*, BLOOMBERG L. (Apr. 30, 2019, 5:57 PM), <https://news.bloomberglaw.com/environment-and-energy/gop-wants-pay-fors-before-endorsing-2-trillion-for-public-works?context=article-related>.

245. See Davis, *supra* note 192.

246. See, e.g., Maggie Stringfellow & Dilip Wagle, *The Economics of Homelessness in Seattle and King County*, MCKINSEY & CO. (May 18, 2018), <https://www.mckinsey.com/featured-insights/future-of-cities/the-economics-of-homelessness-in-seattle-and-king-county>; see also Christopher F. Rufo, *Seattle Under Siege*,

exacerbate the homelessness crisis even further. In addition to the devastating humanitarian concerns, homelessness has severe economic repercussions. Seattle has been in a state of civil emergency related to homelessness since 2015.²⁴⁷ Homelessness is estimated to cost the Seattle-area economy \$1.1 billion due to extra policing, lost tourism and business, and frequent homeless hospitalization.²⁴⁸ A McKinsey & Company report concluded that King County, Washington needed to spend \$360 million to \$410 million annually to effectively combat homelessness, which would approximately double the current annual expenditure.²⁴⁹ San Francisco's homelessness epidemic is jeopardizing its vital tourism industry, which generates \$9 billion a year, employs 80,000 people, and generates more than \$725 million in local taxes.²⁵⁰

State and local governments need to invest significantly toward mitigating homelessness. Supermajority requirements have impeded these efforts already and will continue to do so. California continues to grapple with supermajority challenges to local homelessness taxes as the underlying problem deteriorates.²⁵¹

Making matters worse, California's overwhelming barrage of new and increased tax proposals at both the state and local levels are leading to notable taxpayer exodus, further eroding tax revenues.²⁵² Many businesses and wealthy individuals are leaving high-tax states for the states that are effectively signaling their low-tax climates.²⁵³

CITY J. (Autumn 2018), <https://www.city-journal.org/seattle-homelessness>; Matier & Ross, *SF's Appalling Street Life Repels Residents — Now It's Driven away a Convention*, S.F. CHRON. (July 2, 2018), <https://www.sfchronicle.com/bayarea/matier-ross/article/SF-s-appalling-street-life-repels-residents-13038748.php>.

247. See Council B. 119250 (Seattle, Wash. 2018) (enacting Seattle, Wash. Ordinance 125578 (May 16, 2018)) (codified as SEATTLE, WASH., MUN. CODE tit. 5, ch. 5.37, 5.38 (2018)).

248. Stringfellow & Wagle, *supra* note 246.

249. *Id.*; Matt Day & Noah Buhayar, *Amazon Led a Tax Rebellion. A Year Later, Seattle is Gridlocked*, BLOOMBERG (June 9, 2019, 7:00 AM), <https://www.bloomberg.com/news/articles/2019-06-09/after-amazon-led-tax-rebellion-seattle-s-homeless-aid-stalls>.

250. Matier & Ross, *supra* note 246.

251. See CAL. CONST. art. XIII A, § 3(a).

252. See Billy Hamilton, *Just Another California Tax Quake*, 93 TAX NOTES ST. 229, 229 (2019); see also Joyce E. Cutler, *The More, the Better: San Francisco Leads New Kind of Tax Revolt*, BLOOMBERG TAX (July 10, 2019, 4:46 AM), <https://news.bloombergtax.com/daily-tax-report-state/the-more-the-better-san-francisco-leads-new-kind-of-tax-revolt>; Andrew Appleby, *Targeted Taxes: Localities Take Aim at Large Employers to Solve Homelessness and Transportation Challenges*, 98 OR. L. REV. 477, 479 (2020).

253. Alexandre Tanzi & Ben Steverman, *New York Worries Top 1% Will Flee With \$133 Billion of Income*, BLOOMBERG TAX (Nov. 11, 2020, 5:08 PM), <https://news.bloombergtax.com/daily-tax-report/new-york-worries-top-1-will-flee-with-133-billion-of-income?context=article-related>; see Sridhar Natarajan & Katherine Burton, *Canyon Partners Weighs Texas Off-Ramp From California's Troubles*, BLOOMBERG (Sept.

IV. TAX SUPERMAJORITY REQUIREMENT DESIGN

If voters are considering a constitutional tax supermajority requirement to ensure fiscal discipline and limit government growth they may be disappointed with the results. As discussed in Section I.A, it is unclear if tax supermajority requirements achieve these goals to any degree, and tax supermajority requirements negatively impact state fiscal regimes in many ways. If a state's primary goal is to signal a low-tax competitive advantage, a constitutional tax supermajority requirement may help accomplish that goal, although there are less controversial and obstructive ways in which a state can signal a low-tax competitive advantage.²⁵⁴ In addition, this signaling function can be undermined if the supermajority provision is not crafted precisely. Overly broad tax supermajority requirements preclude the flexibility required for effective jurisdictional tax competition. Tax supermajority provisions that are not designed carefully introduce, rather than reduce, uncertainty in the state's tax regime. It will be more difficult for the state to attract and retain new businesses and wealthy taxpayers if the state does not have the flexibility to adapt its tax regime to changing economic realities and if any attempts will be clouded by decades of litigation.

Procedurally, crafting the constitutional amendment provision precisely requires effective voter education. Educating voters in an impartial and sufficient manner—particularly in the tax context—is incredibly difficult given divergent political interests, subject matter complexity, and waning attention spans. If a state's procedure for constitutional amendments requires legislative approval and referral, legislatures will also need education and assistance to ensure they draft proposed amendments properly before they are presented to voters.

25, 2020, 10:23 AM), <https://www.bloomberg.com/news/articles/2020-09-25/canyon-eyes-an-escape-from-california-woes-in-texas-office-plan>; see also Katherine Burton & Hema Parmar, *Hedge Funds Head for Florida With Taxes on Rich Rising Elsewhere*, BLOOMBERG L. (Sept. 23, 2020, 9:52 AM), <https://www.bloomberg.com/news/articles/2020-09-23/hedge-funds-head-for-florida-with-taxes-on-rich-rising-elsewhere>; Lee Miller & Wei Lu, *Migration's Biggest Loser Is Connecticut as Florida Profits*, BLOOMBERG TAX (May 24, 2019, 11:30 AM), <https://news.bloombergtax.com/daily-tax-report/migrations-biggest-loser-is-connecticut-as-florida-profits-2?context=article-related>; Ben Steverman, *Musk Joins Billionaires on the Move, Heralding State Tax Battles*, BLOOMBERG TAX (Dec. 10, 2020, 10:22 AM), <https://news.bloombergtax.com/daily-tax-report-international/musk-joins-billionaires-on-the-move-heralding-state-tax-battles?context=article-related>.

254. A robust national media campaign, such as Miami's "Follow the Sun" or Texas' former "Texas Wide Open for Business" campaigns, may suffice. See, e.g., Burton & Parmar, *supra* note 253; see also Shan Li, *Texas Gov. Rick Perry Tries to Woo California Businesses*, L.A. TIMES (Feb. 12, 2013, 12:00 AM), <https://www.latimes.com/business/la-xpm-2013-feb-12-la-fi-perry-jobs-20130213-story.html>.

Substantively, the tax supermajority provision should limit new or increased income taxes but allow flexibility with new or increased transaction taxes. This fundamental approach will achieve a strong low-tax signaling function and maximize voter support.²⁵⁵ Importantly, this approach allows states the flexibility to adapt as the economy evolves, which in turn allows the state to tailor its signaling, access new revenue sources, and respond to changing economic conditions. This approach is likely the best alternative because it encompasses the income tax bases that concern individuals and businesses most and excludes discretionary consumption taxes. States should consider carefully, however, the distributional impact of a shift toward an increasingly regressive tax regime.

A. Scope

The key to signaling a low-tax competitive advantage is committing to prevent or minimize income taxes.²⁵⁶ State Governors and legislators tend to focus primarily on their state's income tax competitive advantage to attract and maintain wealthy individuals and businesses.²⁵⁷ Both Texas and North Carolina amended their constitutions in the past two years to prevent or cap personal income taxes specifically.²⁵⁸ Florida's recent constitutional supermajority amendment applies to all state-level tax types, but personal income tax was the intended target as Florida already had a supermajority requirement for corporate income tax increases and several property tax limitations.²⁵⁹ Individuals are even more sensitive to personal income taxes after the federal cap on state and local tax

255. In the 2020 election cycle, for example, Illinois voters rejected a progressive personal income tax and Colorado voters lowered the existing personal income tax. *See* Michael J. Bologna & Brenna Goth, *Illinois, Colorado Tax Votes Trigger Budget Crunches* (2), BLOOMBERG TAX (Nov. 4, 2020, 9:30 AM), <https://news.bloomberglaw.com/daily-tax-report/vote-count-stalls-on-illinois-flat-tax-ballot-question?context=search&index=0>. In contrast, voters in many localities approved increased transaction taxes. *See* Chiem, *supra* note 194 (describing how localities may fund transportation infrastructure with general sales tax).

256. *See generally* Miller & Lu, *supra* note 253 (explaining the reasons for inter-state migration).

257. *See, e.g.*, Gerlock, *supra* note 4 (describing Iowa's push toward a tax supermajority requirement to compete with low-tax South Dakota); *see also* Burton & Parmar, *supra* note 253; Jennifer Kay, *Mississippi Governor Pitches Eliminating Personal Income Taxes*, BLOOMBERG TAX (Nov. 16, 2020, 4:41 PM), <https://news.bloombergtax.com/daily-tax-report-state/mississippi-governor-pitches-eliminating-personal-income-taxes>; Aaron Davis, *Taxes Take the Stage in Gubernatorial Races*, TAX NOTES (Nov. 2, 2020), <https://www.taxnotes.com/tax-notes-state/politics-taxation/taxes-take-stage-gubernatorial-races/2020/11/02/2d476?highlight=Aaron%20Davis%2C%20Taxes%20Take%20the%20Stage%20in%20Gubernatorial%20Races>.

258. *See generally* Gerlock, *supra* note 4 (describing updates to state constitutions).

259. *See supra* Section I.B.6 (analyzing Florida's supermajority requirement).

deductions beginning in 2018. For high income individuals, a state income tax increase could cost them thirty-seven percent more than it would have without the cap. Although tax supermajority requirements may not be necessary to minimize personal income taxes, likely because the legislature is concerned about voter rebuke, the supermajority requirement is effective as a signaling device.

Corporate income taxes present a different dynamic. Voters are less concerned with their state increasing corporate income taxes compared to personal income taxes because they are not affected directly. For politicians attempting to attract businesses and jobs to their state, however, presenting a favorable corporate tax climate is crucial. To do so effectively, the tax supermajority requirement must encompass business taxes comprehensively. The provision's scope needs to extend beyond just corporate net income taxes because so many jurisdictions have started to impose novel tax regimes on businesses. Several states and localities now impose gross receipts type taxes, and some localities have created or proposed myriad additional tax regimes including per-employee taxes and excessive executive compensation taxes.²⁶⁰ Supermajority provisions may be particularly effective at preventing narrow targeted business taxes that drive businesses away.²⁶¹ The supermajority provision should expressly encompass taxes imposed on a business's income or aggregate receipts, as well as payroll taxes. Preventing unforeseen new tax regimes, and maintaining stable existing tax regimes, is imperative to attract new businesses. Governors often profess their states' low-tax competitive advantage, which can be reinforced with a constitutional amendment.²⁶²

The aforementioned principles apply when a state has a low-tax regime that it is attempting to preserve. But if a state is shifting from an existing high-tax regime to become more competitive a tax supermajority requirement will hinder the state's position. The state could repeal its existing high-tax regime with a simple majority vote but would need a supermajority vote to implement the new low-tax regime.²⁶³ Thus, these

260. See generally Cutler, *supra* note 252 (discussing California's new tax laws).

261. See generally Heckelman & Dougherty, *supra* note 17 (analyzing the effects of supermajority requirements on taxes that are targeted toward narrow groups); see generally Appleby, *supra* note 252 (analyzing targeted tax policies).

262. "Florida Gov. Ron DeSantis (R) didn't so much ignore taxes as use his speech as a full-on advertisement for the state's tax climate. He [stated] 'we can say with certainty that we won't have an income tax. Or a death tax.'" Hamilton, *supra* note 7, at 390. South Dakota's Governor shared the same sentiment, stating, "We don't have a corporate income tax. And there's also no business inventory tax. For our hardworking residents, we are one of the few remaining states with no personal income tax—and I am committed to keeping it that way." *Id.* at 391.

263. Gamage & Shanske, *supra* note 43, at 67.

states should strive to create a low-tax regime before or in conjunction with a tax supermajority requirement.

With the baseline of personal income tax and broad business taxes expressly included in the supermajority provision's scope, certain tax types should be expressly excluded. The provision should expressly exclude transaction taxes, including sales and use, excise, and value added taxes. Transaction taxes should be excluded for several reasons.

First, individuals—both current voters and those a state may want to attract—are concerned much less by increased transaction taxes than income or property taxes. Many individuals pay significantly less aggregate transaction taxes than income, payroll, or property taxes in given year, and likely view transaction taxes as largely discretionary.

Second, transaction taxes, especially those described in Section II, generally *are* discretionary, obviating the need for supermajority protection. The primary exception is a sales tax imposed on necessities, which also raises regressivity concerns. Legislatures have generally responded with exemptions for necessities such as groceries and basic clothing regardless of a supermajority provision, and will likely retain these exemptions and sales tax holidays because they are politically popular.²⁶⁴

Third, although transaction taxes generally apply to transactions that are discretionary, the activities described in Section II tend to have inelastic demand, which if taxed would aid revenue stability. These activities also generate negative externalities, so states should tax these activities sufficiently.

Fourth, narrowly applicable taxes are the taxes most likely to be impeded by a tax supermajority requirement.²⁶⁵ Transaction taxes that apply to discretionary behavior, are narrowly applicable, internalize costs, and generate significant stable revenue should be embraced not obstructed.

Fifth, and perhaps most important, excluding transaction taxes allows states the flexibility to adapt to an evolving economy, which could generate massive increased tax revenues. States have struggled to modernize their transaction tax regimes to adequately address new business models.²⁶⁶ Most states still do not impose tax on many service transactions and the digital economy presents further challenges.²⁶⁷ Even

264. See, HELLERSTEIN ET AL., *supra* note 212, ¶ 13.11.

265. See Heckelman & Dougherty, *supra* note 17, at 739.

266. See, e.g., Pilaar, *supra* note 18, at 372, 378 (discussing states' "disappearing sales tax revenue" and failure "to align tax codes with socioeconomic advances").

267. See HELLERSTEIN ET AL., *supra* note 212, ¶ 15.01; Andrew D. Appleby, *Subnational Digital Services Taxation*, 81 MD. L. REV. (forthcoming 2021).

worse, state and local tax authorities may attempt to impose tax on these transactions even if the statute does not clearly do so, which results in uncertainty and controversy—both of which taxpayers abhor. Thus, states should expressly exclude transaction taxes from the tax supermajority requirement.

After considering the specific tax types that should be expressly included and excluded, a state must confront the tax-versus-fee quagmire. As discussed in Section I, states that draw a distinction between taxes and fees in their supermajority requirements have endured decades of controversy. California amended its supermajority requirement to expressly, and verbosely, define fees, but that did not solve the problem.²⁶⁸ Courts have found it difficult to interpret the constitutional provision in the context of statutory and common law precedent.²⁶⁹ To avoid this perpetual controversy states should include fees within the scope of the supermajority requirement. As an overarching principle, fees should account for the government's regulatory costs of the given activity and the specific benefit provided to the payor. These amounts are more targeted than those associated with general taxes, and state and local regulatory agencies should be able to quantify these amounts with enough confidence that a legislative supermajority can approve. If fees are limited to this traditional scope they will generally be nominal compared to taxes, and any forgone revenue attributable to a supermajority provision is likely outweighed by the costs and uncertainty avoided without the tax-versus-fee distinction.

Another lesson from California is that states should avoid the general versus special tax distinction. This distinction for California's local tax supermajority provision has produced lasting controversy.²⁷⁰ And even if the statute defines "special tax" state and local lawmakers can circumvent the supermajority requirement by directing the resulting tax revenue into the general fund while simultaneously passing a resolution to use that revenue for a specified purpose.²⁷¹

Finally, states need to determine if the tax supermajority provision should apply to localities. Existing supermajority requirements take divergent approaches with some expressly including localities, some

268. See *supra* Section I.B.3.

269. See Darien Shanske, *Interpreting State Fiscal Constitutions: A Modest Proposal*, 69 RUTGERS L. REV. 1331, 1334 (2017).

270. See *supra* Section I.B.3.

271. See, e.g., Paul Jones, *San Francisco Places Tax Reform, Pay-Ratio Tax Measures on Ballot*, TAX NOTES (Aug. 3, 2020), <https://www.taxnotes.com/tax-notes-today-state/gross-receipts-tax/san-francisco-places-tax-reform-pay-ratio-tax-measures-ballot/2020/08/03/2cs4p?highlight=San%20Francisco%20Places%20Tax%20Reform%2C%20Pay-Ratio%20Measures%20on%20Ballot>.

expressly excluding localities, and some creatively preventing the state from allocating revenue raising burdens to localities. The recommended approach depends significantly on the state's overarching regime granting local taxing authority. If a state grants localities broad taxing authority, as does California, the supermajority requirement should encompass local taxation. If not included, the state's low-tax signaling efforts may be undermined by hostile local tax regimes. If a state grants localities only limited taxing authority, for example only property tax and a constrained sales tax supplement, the state need not include localities in the broad supermajority requirement. The localities will be unable to undermine the state's signaling goals and localities will be afforded more fiscal autonomy. If localities are excluded, however, there is concern that a state could shift the tax responsibility to the localities to avoid the supermajority requirement. Of greatest concern is an unfunded mandate through which the state could essentially force the locality to increase local taxes. Although Arizona's provision does not address the unfunded mandate provision directly, it does require supermajority approval for any allocation changes at the state and local levels for the state's transaction taxes.²⁷² Thus, in certain states including localities in the supermajority provision is imperative, while in other states it is of less importance but may still be beneficial.

B. Operative Provisions

States vary as to the operative provisions that trigger the supermajority requirement. The trigger may be a new tax, an increased tax, or both. It may be a revenue bill or revenue raising bill, a minor distinction with major implications. Each of these approaches has created controversy as discussed in Section I, but the revenue bill approach is especially problematic because it is ambiguous and both over and underinclusive. If the trigger is simply a "revenue bill" the supermajority provision could impede all legislation that has any revenue aspect, even if the legislation is not increasing revenue. If the trigger is "revenue raising" states can create or increase new taxes without supermajority approval as long as there is a corresponding reduction to achieve revenue neutrality.²⁷³ For example, a state could create a new broadly-applicable tax while simultaneously creating a narrow deduction for a specified industry or class of taxpayer. If the trigger is revenue raising "intent" it becomes even more subjective and difficult to determine if the supermajority provision is implicated. For example, the legislature could assert that its purpose for legislation that created or increased taxes was

272. See *supra* Section I.B.1.

273. Gamage & Shanske, *supra* note 43, at 73–74; Minzner, *supra* note 17, at 68–71.

simplifying the tax code, not raising additional revenue.²⁷⁴ Reliance on judicial interpretation, which is inevitable even if the provision attempts to define the “revenue bill” term, injects unnecessary uncertainty in the states tax regimes that is universally detrimental.

The alternative, using a new or increased tax as the trigger, is preferred but still presents challenges. Carefully defining the scope of these terms, however, is easier than with the revenue bill term and can mitigate these challenges. If a state’s goal is to signal low-tax competitive advantage it should include both creating new taxes and increasing existing taxes as triggers for the supermajority provision. If a state follows the recommended scope discussed above, the state will be able to create new transaction taxes without supermajority approval while assuring voters that creating any new income tax will receive increased scrutiny.

The supermajority provision must address two common areas of dispute with the new or increased tax trigger. First, the provision should expressly define the term “increase.” In addition to increasing the tax rate, a state can increase tax liability in several other ways. Many contemporary provisions have minimized controversy by expressly defining “increase” to include reducing or eliminating tax deductions, exemptions, exclusions, or credits.²⁷⁵ Second, the provision should expressly address automatic tax increases. For example, states can index tax rate increases to the rate of inflation, as is often done with state gas taxes.²⁷⁶ If a supermajority provision does not address automatic tax increases the legislation may require supermajority approval initially but the tax could increase in perpetuity without any approval. Automatic increases are not inherently problematic. In fact, they may be beneficial for certain types of taxes such as volume-based fuel or excise taxes. For example, the federal gasoline tax of 18.4 cents per gallon has not increased since 1993.²⁷⁷ To protect tax revenues from inflation, Arizona expressly allows automatic tax increases without additional approval.²⁷⁸ If a state adopts the scope discussed above, however, it should expressly include automatic tax increases within the scope of the supermajority provision. Doing so will prevent automatic personal income and business tax increases while still allowing states to automatically increase transaction taxes that are outside the recommended scope of the supermajority provision.

274. See Minzner, *supra* note 17, at 73–74.

275. See *supra* Section I.B.1, 6.

276. See Minzner, *supra* note 17, at 72.

277. See Mohsin & Jacobs, *supra* note 240.

278. See *supra* Section I.B.1.

There are three final elements that may be incorporated into a tax supermajority requirement provision. First, some tax supermajority provisions include a one subject rule that requires the tax legislation to be discrete from other legislation.²⁷⁹ One subject rules are common for tax and revenue legislation because they require the legislature to deliberately analyze the revenue bill in isolation and they allow for greater accountability. A one subject rule in a supermajority provision could have perverse effects as applied to transaction taxes, however. For example, to legalize and tax recreational marijuana a legislature may have to enact legalization legislation with a simple majority and then separately enact tax legislation with a supermajority. This process creates an unnecessary impediment for the taxes described in Section II. If a state adopts the scope discussed above, however, including a one subject rule in the supermajority provision would not impede transaction taxes and would provide an additional layer of comfort for taxpayers seeking a favorable personal income and business tax climate.

Second, although not addressed in any current tax supermajority provision, is whether decreasing or eliminating a tax should be subject to supermajority approval. Although this concept may seem antithetical to signaling a low-tax competitive advantage, it reinforces stability and certainty that taxpayers value. Including tax cuts in the supermajority provision would help prevent discrimination, particularly affording a competitive advantage to certain businesses. It is becoming more widely accepted that state and local credits and incentives reflect poor tax policy, and this provision would at the very least make those programs more transparent and deliberate. This provision would also protect the legislature from the impact of rashly cutting taxes if the temptation reached a simple majority and then being unable to garner supermajority support to raise taxes to previous levels if later required.

The final foundational consideration of the tax supermajority requirement is whether to incorporate voter approval. A voter approval provision could allow voters to petition for voter approval of certain tax increases or could require voter approval of all tax increases.²⁸⁰ The provision could adopt the Nevada and Oregon approach and allow the legislature the option to refer measures to voters. And another option, which Missouri utilizes, is requiring voter approval if the legislature attempts to increase aggregate taxes or fees in a fiscal year beyond a certain threshold.²⁸¹ Including a voter approval provision increases public

279. *See supra* Section I.B.6.

280. Kleiman, *supra* note 2, at 1901.

281. MO. CONST. art. X, § 18(e). Missouri's threshold is \$50 million. *Id.*

control and oversight over the governmental fiscal function.²⁸² Public control ensures that tax policies adequately reflect public preferences.²⁸³ Although voter approval may not generally change government fiscal behavior, it signals that voters' policy preferences will be effectuated and it could make a difference in extraordinary situations.²⁸⁴ States must also consider the voter approval threshold, whether a simple majority or supermajority is preferred.²⁸⁵ If a state adopts the scope discussed above, and also incorporates a mandatory voter approval provision in addition to the legislative supermajority requirement, the state would send the most powerful message that personal income and business tax burdens will be increased only if there is broad consensus that doing so is necessary.

If voter approval is incorporated, the state should also incorporate mandatory procedural requirements for voter education, including "detailed public notice of tax increases before they occur" and "public hearings for tax increases."²⁸⁶ The state should create a dedicated, easily accessible website to disseminate these notices, which should have accurate and concise summaries, and ideally present cogent arguments both for and against the measure.

In summary, if a state's primary goal is to signal the jurisdiction's low-tax competitive advantage while allowing it the flexibility to maintain that advantage, a constitutional tax supermajority requirement should expressly encompass personal income tax, business taxes, and fees. The provision should expressly exclude transaction taxes and provide a non-inclusive list of these taxes. Legislation should trigger the provision if the legislation creates or increases a tax within the scope of the provision, and it should expressly define increase to include decreases in tax deductions, exemptions, and credits. Beyond these fundamental principles, the state should consider whether to incorporate a one subject rule, tax decreases, and a voter approval mechanism.

282. See Kleiman, *supra* note 2, at 1899, 1914. Although Kleiman focuses on local public control in the context of locally administered property taxes, the concept is equally compelling at the state level.

283. *Id.* at 1899. Kleiman aptly recognizes that a "key principle is that tax limits should require public engagement in a way that fosters representation of voters' true preferences." *Id.* at 1939.

284. See Colin H. McCubbins & Mathew D. McCubbins, *Cheating on Their Taxes: When Are Tax Limitations Effective at Limiting State Taxes, Expenditures, and Budgets?*, 67 TAX L. REV. 507, 542 (2014).

285. Florida, for example, has a constitutional provision that requires supermajority approval for voters to amend the constitution to create or increase taxes; this voter supermajority provision is not in addition to the legislative supermajority requirement, however, and voters could repeal the supermajority provision with a sixty percent vote. See *supra* Section I.B.6.

286. Kleiman, *supra* note 2, at 1901.

CONCLUSION

This article had three aims. First, it examined broad constitutional tax supermajority requirements' history, asserted justifications, and effectiveness. This examination concluded that the motivations underlying the first and second supermajority waves differ importantly from those underlying the potential third wave. Recognizing this novel motivation—signaling low-tax competitive advantage—is crucial for optimal supermajority provision design.

Second, this article investigated several new sources that can generate immense tax revenue for states, but that will likely be obstructed by tax supermajority provisions if not designed properly. These new tax revenue sources are not the broadly applicable taxes that supermajority provisions are generally intended to restrict. Rather, these are narrow taxes imposed only on certain discretionary activities. This article also identified several new pressing state expenditure demands that are unlikely to be satisfied without new or increased taxes.

Finally, this article presented tax supermajority requirement design principles that achieve a strong low-tax signaling function while allowing flexibility to maintain that advantage. Fundamentally, the constitutional tax supermajority requirement should expressly encompass personal income tax, business taxes, and fees, while excluding transaction taxes. If a state does decide to pursue a broad tax supermajority requirement, these design principles will best position the state to attract businesses and wealthy individuals, achieve fiscal stability, and minimize the many drawbacks that commonly accompany tax supermajority requirements.