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**ENTRENCHING INTERESTS:
STATE SUPERMAJORITY REQUIREMENTS TO RAISE TAXES**

by

Max Minzner*

I. INTRODUCTION

It has been said that . . . in particular cases, if not in all, more than a majority of a quorum [ought to have been required] for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.¹

At the opening of the 104th Congress, the new Republican majority imposed the first supermajority requirement "limited to particular cases" in the history of Congress. House Rule XXI(5)(c) requires the support of 60% of the House for all increases in federal income tax rates. Democrats immediately criticized Republicans for ignoring both Madison's warnings and 200 years of history. The constitutionality of the Rule quickly became the source of litigation.²

The unanswered question is whether the Rule is a good idea, particularly whether this Rule is well designed. The states have extensive experience with supermajority requirements for tax increases. Sixteen states have imposed

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¹James Madison, Federalist 58, 396-97 (Cooke Edition).

²See *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997).

supermajority requirements for tax hikes, caps on state revenue, or both.³ When considered in light of the states' experiences, the Rule appears rather odd. While eleven states have constitutional provisions and five states have statutory limitations,⁴ no state implements its revenue limitations through a procedural rule. Similarly, while some states have supermajority requirements that apply only to certain tax types, no state draws it so narrowly as to apply to only income tax rates.⁵ To the extent the House Republicans believe in federalism, they have failed to look at the laboratory results.

This article attempts to answer the question of supermajority design. If alterations in the tax code are to be restricted, how should they be limited?⁶ To what type of bills should a supermajority requirement apply? At what level should the requirement be implemented? When and how should the legislature be allowed to avoid the rule? Part II discusses the current House rule and considers why it was imposed, whether or not it is constitutional, and the effect the rule has had in practice. Part III moves to the states' experiences with supermajority requirements, and examines both the *de jure* limitations on legislative behavior and the practical effects of various forms of supermajority requirements. Finally, Part IV discusses the primary alternative method that has been used to limit state tax growth: revenue caps.

Supermajority requirements have essentially one degree of freedom: the primary design issue is how tightly the legislature should be bound. It is easy to create supermajority requirements that are too weak to achieve the desired goals. The House Rule is an excellent example of this. Similarly, it is easy to design limits that are overly constraining. Finding the dividing line is the essential issue in supermajority design.

³Part III, *infra*, examines which states have which types of provisions.

⁴See Table I, at Part III, *infra*.

⁵See *supra* note 4.

⁶Supermajority requirements exist in contexts other than the tax code. The Constitution mandates a supermajority rule in six situations, *see infra* notes 18-23 and accompanying text, and Congress has imposed supermajority rules in other contexts, most notably the filibuster. As noted above, the House Rule is the first supermajority requirement imposed upon certain types of substantive legislation. Whether or not one believes supermajorities should be required for tax increases while a majority of a quorum suffices in non-tax contexts turns primarily on whether one believes legislatures are more likely to pass "undesirable" changes to the tax laws than other types of statutes. This article does not attempt to answer whether the Internal Revenue Code is a particularly good or bad place for a supermajority requirement, but assumes that one is in place and only tries to look at how one should be designed.

II. THE HOUSE RULE

A. Goals: *Why Bind Congress?*

Legislators attempting to create a good supermajority requirement must first decide why they want one. The 104th Congress never made clear why it believed a supermajority rule was necessary. The Rule came in as part of the Contract with America, but did not receive substantial public attention in the weeks leading up to the 1994 midterm elections.⁷ Once the Republicans took control, they implemented several procedural reforms on the first day. House Rule XXI(5)(c) was one of these. Debate on the Rule was limited, occurring on the same day as debates over several other reforms proposed by the new Republican majority. The few references in the debate to the goals behind the Rule were almost exclusively about limiting the size of government: several Congressmen hoped the supermajority provision would reduce government receipts.⁸ Similarly, the more recent discussions of a tax supermajority constitutional amendment⁹ also indicate that the primary desired effect of such a requirement was reducing the size of government,¹⁰ and the press believed that constraining long term spending primarily motivated the proposed supermajority requirement.¹¹ Finally, many of the recent

⁷In fact, the Congressional leadership immediately backed off their original version of the supermajority requirement. The Contract with America Provision required a 3/5 vote for *all* tax increases. The Republican leadership implemented a Rule that only applied to *income tax rate* increases. See Kenneth J. Cooper, *House GOP Polishes Plans, Endorses Committee Leaders*, WASH. POST., Dec. 8, 1994 at A8.

⁸See 141 Cong. Rec. H39-01, H43 (daily ed. Jan. 4, 1995); *id.* at H63; *id.* at H69; *id.* at H71.

⁹This amendment was originally proposed as a supplement to the balanced budget amendment, but did not make it into the final amendment that passed the House.

¹⁰See, e.g., 143 Cong. Rec. H1473-02, H1475 (daily ed. April 15, 1997) (statement of Rep. Solomon); *Testimony of Rep. Joe Barton: Hearing on Tax Limitation Amendment*, Federal Document Clearing House, Mar. 6, 1996, available in 1996 WL 7135735 (emphasizing the need for a tax limitation amendment to limit the impact of taxes on American families); *Testimony of J. Kenneth Blackwell, Treasurer of the State of Ohio, Hearing on Tax Limitation Amendment*, Federal Document Clearing House, Mar. 6, 1996, available in 1996 WL 7135737 (arguing for tax limitation amendment to decrease tax burden and increase growth).

¹¹Eric Pianin, *House Passes Balanced Budget Amendment*, WASH. POST., Jan. 27, 1995, at A1.

flat tax proposals contained a supermajority requirement designed to prevent increases in the size of the federal government.¹²

However, constraining government growth was not the only goal Congress hoped to achieve. The debates and testimony surrounding the supermajority amendment and other tax proposals including a supermajority requirement illuminate a second use of such constraints: A supermajority requirement can protect a particular tax compromise from future legislative meddling. For instance, supermajority requirements have been proposed in connection with a national sales tax as a method to prevent the tax from spiraling upward.¹³ House Majority Leader Richard Armey expressed both uses of the supermajority requirement in his comments on the supermajority amendment.¹⁴ Supermajority amendments privilege the existing tax structure and, as discussed *infra*, while this can be a serious problem, it is also often an important goal.¹⁵

Turning from what the requirement is supposed to do, the next two sections discuss what it has done. First, the author considers the debate over the constitutionality of the House Rule, pointing out that the core constitutional issue is the same concern that arises in supermajority rule design: How tight should the requirement be? Then I look at the implementation of the Rule and consider whether it has, in fact, bound Congress.

¹²See, e.g., *Testimony of Rep. Richard Armey: Hearing on Alternatives to the Federal Income Tax*, Federal Document Clearing House, Apr. 15, 1997, available in 1997 WL 10569841 (stating that "the flat tax includes a special safeguard against higher taxes. It requires a three-fifths supermajority vote of Congress to raise the tax rate, lower the family allowance or add loopholes.").

¹³See, e.g., *Testimony of Rep. Sonny Bono: Hearing on Tax System*, Federal Document Clearing House, Mar. 27, 1996, available in 1996 WL 7137953 (supporting supermajority requirement in conjunction with National Retail Sales Tax to "safeguard" it); *Testimony of J. Kenneth Blackwell, Treasurer of the State of Ohio: Hearing on Fundamental Tax Changes*, Federal Document Clearing House, Mar. 25, 1996, available in 1996 WL 7137655 (arguing for supermajority requirement to increase public confidence in tax stability and to prevent balanced budget amendment from leading to tax increases).

¹⁴See Eric Pianin, *Panel Clears Balanced Budget Measure; Amendment Calls for Three-Fifths Majority Vote to Raise U.S. Taxes*, WASH. POST., Jan. 12, 1995, at A8 (arguing that "we should balance the budget by cutting the government, not taxing the American people.").

¹⁵See *infra* notes 30-31 and accompanying text.

B. The Constitutionality Debate: How Tightly Can Congress Be Bound?

The academic debate over the Rule, not surprisingly, has focused on the constitutionality question: Does the Rules of Proceedings clause¹⁶ allow the House to redefine the word "passed" as used in the Presentment clause?¹⁷ The text gives little guidance. The Constitution mandates majoritarianism in three cases: establishment of a quorum in either house,¹⁸ election of the President in the electoral college,¹⁹ and election of the President by the House in the case where no candidate gains an absolute majority in the Electoral College.²⁰ The Constitution requires supermajority votes in six situations: veto override, treaty ratification, expulsion of a member, conviction on impeachment, quorum calls in the House when electing the President, and constitutional amendment. The scholars arguing for the constitutionality of the Rule point out that if majority voting is generally required, there is no reason to provide for it in specific cases.²¹ Those opposed to the Rule argue that a supermajority is never mandated for "ordinary" legislation,²² and also note that the Vice President votes when the Senate is "equally divided."²³ The text provides no definitive way to determine whether this rule mandates majority rule or simply recognizes it as the likely default choice.²⁴

¹⁶U.S. CONST. Art. I, § 5, cl. 2 (stating that "[e]ach House may determine the Rules of its Proceedings . . .").

¹⁷U.S. CONST. Art. I, § 7, cl. 2 (stating that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . .")

¹⁸U.S. CONST. Art. I, § 5, cl. 1.

¹⁹ U.S. CONST. Art. II, § 1, cl.3.

²⁰*Id.*

²¹Chief Judge Edwards tried to counter this claim in his dissent in *Skaggs*, noting that these three situations are not covered by standard parliamentary rules. *Skaggs*, 110 F.3d at 842 (Edwards, C.J., dissenting).

²²The primary academic opponents of the Rule expressed this argument and others in an open letter to the House Republicans which was published in 1995. See Bruce Ackerman, et. al., *Comment: An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1541 (1995).

²³ U.S. CONST. Art. I, §3, cl. 4.

²⁴John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 488 (1995).

Lacking an authoritative statement on the constitutionality of the Rule,²⁵ arguments for and against the rule have taken a variety of forms. Resolving this debate is beyond the scope of this article. For purposes of this article, the essential point is that the core of the constitutionality argument reflects the same concern as that shaping the issues designers must consider when drafting a supermajority requirement. How binding are supermajority requirements and how binding should they be? How much is gridlock created or the policy preferences of the current majority entrenched? In addition, whether a majority may waive the rule determines whether Congressmen have standing to challenge the Rule in court and whether (and how) the federal courts will enforce the rule. These are all essentially debates over how tightly the rule binds Congress.

Those challenging the House Rule have focused on the framers' dislike of supermajority requirements. The Constitution developed, in part, as a response to gridlock: the inability of the Articles of Confederation to provide a functioning government. A primary weakness of the Articles were the supermajority requirements for declaring war, creating treaties, coining money, running a debt, and appointing a commander in chief.²⁶ The framers rejected both general and specific supermajority requirements,²⁷ and, in Federalist 58, Madison wrote an extensive defense of the absence of supermajority voting and quorum rules. The framers' strong opposition to constitutional supermajority requirements does not necessarily indicate a similar opposition to identical legislative enactments,²⁸ although the key concern is still gridlock. Supermajority requirements need to bind

²⁵Supreme Court precedent is even less helpful than the text. Only two Supreme Court cases have spoken to the issues underlying this constitutional debate. Dicta in *INS v. Chadha*, 462 U.S. 919 (1983), and *United States v. Ballin*, 144 U.S. 1 (1892), imply that a majority is all that is required to pass legislation. *Chadha* repeatedly states that legislation becomes law if passed by a majority of the members of Congress. *Chadha*, 462 U.S. at 948, 958. However, the Court never indicates whether it is stating a constitutional requirement or simply recognizing the standard procedure. Similarly, while *Ballin* notes that the general rules of parliamentary procedure apply in Congress and the standard rule is that a majority of a quorum can act for the body, *see Ballin*, 144 U.S. at 6, it does not indicate whether this is a default rule which Congress may alter or is mandatory.

²⁶These all required the support of nine of the thirteen states.

²⁷Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role* 100 DICK. L. REV. 341, 348-49 (1996).

²⁸Legislative enactments are more acceptable because they are less binding. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

enough to constrain legislative behavior, but not bind so much as to prevent action when necessary.²⁹

Tax supermajority requirements not only prevent action; they endorse a particular set of policy decisions. They privilege the existing tax structure. Depending on the extent to which they can be waived, discussed further *infra*, supermajority requirements allow a current majority to lock in the status quo, inflating their power with respect to future majorities. Some commentators have focused on this issue in the constitutionality debate. By insisting on an inherent equality of majorities throughout time, they derive a constitutional prohibition on supermajority requirements.³⁰ This argument has been extended to support the view

²⁹This gridlock effect is one of the primary criticisms of the filibuster, to which the House Rule has often been analogized in attempt to defend its constitutionality. Robert S. Leach, *House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress*, 44 U.C.L.A. L. REV. 1253 (1997). Those arguing against the House Rule distinguished the filibuster on the grounds that the filibuster is a "procedural" rule while this rule is "substantive." The authors of the open letter to Congressman Gingrich argue that supermajority rules are only acceptable when they further "informed and efficient debate and decision." Ackerman, et. al., *supra* note 22, at 1541. The examples of rules they believe fall in this category are the filibuster and the 2/3 vote required to suspend the rules. *Id.* However, it would not be hard to argue that raising the bar for tax increases does further informed debate; Republican Congressmen would likely jump at the chance to defend the supermajority requirements on the grounds that it makes Congressmen consider seriously whether to impose greater taxes on the American people. Like all procedural rules, the filibuster, the practice of Senate holds, the seniority system, and committee assignments have substantive effects, which is precisely why the debates over controlling them are so fierce. *See* Leach, *supra*, at 1269. To the extent the objections are based on the fact that the rule is aimed at particular substantive legislation, it is hard to see why that raises constitutional problems.

³⁰ Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2356 (1995). Jed Rubenfeld has presented another version of this usurpation argument. Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996). He provides several examples of rules redefining the word "passed" that he believes are clearly unconstitutional and yet are not forbidden by the text of the Constitution. His example rules impose requirements that: 1) the ten largest states have veto power over all legislation; 2) the three largest states do not get their votes counted in any vote taken; 3) give the Mayor of D.C. veto power over all bills affecting the District; 4) mandate 90% approval for all bills, which would give California veto power; or 5) require a 2/3 supermajority in each house, rendering the President's veto power superfluous. *Id.* at 82-84. From these he derives constitutional principles that: A) each Member gets one equal vote; B) only the votes of Members count; C) the voting power of small and large states must be proportionate to population; D) no state can have veto power; and E) the President

that even if supermajority rules are constitutional, ones that a majority cannot waive are not: insulated rules impinge absolutely on the power of future majorities.³¹ This issue is also important in the design dispute. The extent to which supermajority requirements bind the future by entrenching particular views of the current majority is the key question to be answered when designing them.

Of course, even if a supermajority enactment were unconstitutional, it is not clear how the question reaches the courts. Few potential plaintiffs would have standing. The D.C. Circuit rejected the recent challenge to the House Rule in *Skaggs v. Carle*³² on standing grounds because the plaintiff voters and Congressmen failed to show injury in fact.³³ The injury alleged was vote dilution. On bills subject to the House Rule,³⁴ the plaintiff Representatives only had the power to cast 1/261st of the votes necessary for passage, whereas, without the Rule, they would have had 1/218th. While the court found that vote dilution was a cognizable injury whether or not it affected a legislative outcome, it insisted on evidence that dilution actually occurred.³⁵ The court held that the rule had not led to vote dilution since,

cannot be removed from the process by Congress. *Id.* at 85. He views a majority voting requirement as the easiest way to fulfill these constitutional principles. *Id.* at 84. While this argument is strong, courts could simply take the approach that rules are acceptable as long as they do not infringe any of these five principles, which this rule does not. This approach would allow wide ranging supermajority requirements, as long as they did not do too much.³¹ John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 503 (1995). These arguments evaporate under a supermajority amendment because, of course, an amendment is inherently constitutional. *But see* Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347 (1995) (arguing that an amendment disadvantages an identifiable group of states, those that receive more government spending than they send to Washington in tax payments, thus denying them equal suffrage without their consent, running afoul of the Article V limits on amendments).

³²110 F.3d 831 (D.C. Cir. 1997).

³³Injury in fact is one of the three standing requirements outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The other two are causation and redressability. *Id.*

³⁴In fact, the only vote taken that was subject to the rule was on the Mink Amendment, which obtained only 96 votes, far short of even 50% of the Congress. *See Skaggs*, 110 F.3d at 839 (Edwards, C.J., dissenting).

³⁵*Id.* at 834-35. Majority avoidance of the rule is discussed further. *See infra* notes 39-40 and accompanying text.

in practice, 218 members can still pass legislation.³⁶ The requirements for amending and repealing a rule are the same as for suspension.³⁷

Whether or not the D.C. Circuit correctly interpreted the standing requirement,³⁸ the court's focus on waiver raises one of the most important issues in the design of supermajority requirements: enforcement. The standing requirement itself and its counterpart, the political question doctrine,³⁹ are focused

³⁶*Id.* at 835. Amending or repealing a rule only requires a majority of Congress, and while the Rules Committee must approve changes, 218 Members can force disgorgement from the committee. Disgorgement requires 218 votes, an absolute majority, not simply a majority of a quorum. CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 314-26 (1989). This limits the ability of a majority of a quorum to pass tax rate increases, but they have another alternative to pass legislation. They may suspend the rule for a particular bill. Normally, suspension requires a 2/3 vote, but a simple majority has suspended this 2/3 requirement in the past. *Skaggs*, 110 F.3d at 835. These suspensions are discussed further *infra*. Suspension of the rules requires a single 2/3 vote on the legislation, but House tradition allows the speaker to ignore a motion to suspend.

³⁷ Alternatively, the House could pass a special rule. Passing a special rule requires two votes and Rules Committee approval. Once the Rules Committee votes out the bill establishing the special rule, a majority of the House must approve it. Then a vote must be taken on the substantive bill itself. As noted above, an absolute majority of the House can disgorge the bill, but a majority of a quorum cannot. So while 218 members can always get legislation passed, the Rule may prevent a majority of a quorum from passing a bill it desires.

³⁸ The court's view of standing is hard to justify both in light of D.C. Circuit precedent and the realities of Congressional operations. In *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), the court found standing on the grounds of vote dilution when the non-voting delegates from the territories and Puerto Rico were given power to vote in committee of the whole, despite the fact that if the votes of the delegates were outcome determinative, a new vote would automatically be taken without their participation. *Id.* at 625. Under the *Skaggs* analysis, this should deny the *Michel* plaintiffs standing. The *Skaggs* majority did not explain the discrepancy. Even if the court intended to overrule *Michel*, their analysis ignores the fact that the creation of procedural obstacles of any sort always makes passage of legislation more difficult. Additional political capital is necessary to obtain suspension of the rules; additional energy is spent trying to round up votes. In the end, the Rule certainly makes tax increases harder to pass.

³⁹ *Baker v. Carr*, 369 U.S. 169 (1962). The Supreme Court has reviewed internal House procedural rules in the past, *see e.g.*, *Christoffel v. United States*, 338 U.S. 84 (1932); *United States v. Ballin*, 4 U.S. 1 (1892), which would weaken any political question claim. The D.C. Circuit has pioneered another comity doctrine, that of remedial discretion, *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981), which might bar a challenge to the rule. Remedial discretion is similar to the political question doctrine, yet

on the question of enforcement. Courts decline to hear cases when they believe they are not the appropriate branch to decide the question. The issues of which branch should decide whether a bill is subject to the supermajority mandate, and whether it actually received the required vote, are extremely important to the design of the requirements.⁴⁰

C. Level of Government: How Tightly is Congress Bound?

Supermajority requirements are more or less binding depending on what legislation they apply to. Tax supermajority requirements can fail to apply to bills in two ways. First, the legislation could simply not fall into the requirement's definition of a "tax bill." Second, the legislation might need a supermajority but the legislature could waive the requirement. Supermajority requirements are *de jure* weaker as their scope narrows and are *de facto* weaker as the ease of waiver increases. This section looks at the constraints on Congress, both in law and in fact. Despite the rhetoric, Congress has so far subjected itself to only the most minimal limits, with a narrow definition and relatively easy waiver.

it is discretionary, not mandatory. The district court in *Skaggs v. Carle*, 898 F. Supp. 1 (D.D.C. 1995), used this mechanism to reject the plaintiffs' claims. D.C. Circuit precedent is clear, though, that remedial discretion is not an option where there are plaintiffs who are not members of Congress. *See, e.g.,* *Gregg v. Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985). In the *Skaggs* case, as in any well-designed lawsuit, there will also be voters challenging the rule or statute. The district court used remedial discretion to reject their claims as well, arguing that they are entirely derivative, since they are based on exactly the same vote dilution that the Congressional plaintiffs raised. *Skaggs*, 898 F. Supp at 3.

⁴⁰The potential for enforcement difficulties in the rule is shown by the controversies that have arisen over the Byrd rule. Senate legislation is normally subject to filibuster by 41 Senators. In part to avoid filibuster, the Senate implemented fast track proceedings for budget reconciliation bills, essentially giving these bills immediate cloture. As a compromise to prevent the introduction of general legislation under this procedure, the Senate mandates that 60 Senators consent to amendments to reconciliation bills that add "extraneous material," defined as that which has only a minimal effect on the deficit compared to its non budgetary provisions. This rule has led to rancorous debate and conflicted case by case rulings by the parliamentarian. For background on the Byrd rule and its interpretative problems, see Donald B. Tobin, *Less is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115, 132-34 (1996).

1. The De Jure Constraint: What's In and What's Out

There has been significant academic debate on whether the D.C. Circuit was right in saying that a majority may waive the current rule.⁴¹ In application, though, the rule has been frequently subverted. In its three years of existence, House Rule XXI(5)(c) has only been enforced against one bill. The Mink Amendment to the 1996 Welfare Reform bill was clearly subject to the provision: it directly increased the top marginal rate on corporate taxes. As the next section discusses, the Rule has been waived a number of times, yet most of the situations have involved bills that were unlikely to have the Rule applied against them in any event. This is the result of a narrow interpretation of "tax rate increases" by the House Parliamentarian, the Rules Committee, and the Joint Committee on Taxation, which have applied the Rule only to those bills which alter the specific sections of the Code that actually define the applicable rates. The 105th Congress has now explicitly codified this interpretation. The current Rule only applies to adjustments of the rate schedules for individuals,⁴² corporate rate schedules,⁴³ or alternative minimum tax requirements.⁴⁴ As will be discussed below, this is far narrower than almost every state supermajority rule. No state limits their requirement to adjustment of specific statutory provisions. The approach has the advantage of constraining any discretionary interpretation of the Rule but sharply weakens the provision.

2. The De Facto Constraint: Ease of Waiver

Waiver of the House Rule has occurred frequently and easily. Admittedly, in most of the cases where waiver has occurred, it has not been an attempt to avoid the rule. Rather, waiver usually happens in circumstances where the Democrats attempted to find reasons to apply the Rule to block legislation. Two of the 1995 waivers exhibit the standard language Congress uses when waiving the Rule. For the Seven Year Balanced Budget Reconciliation Act of 1995,⁴⁵ the Rules Committee placed an explanation in the Congressional Record which stated that it did not believe the bill contained a rate increase, but instead included a waiver in an attempt to "avoid unnecessary points of order that might otherwise arise over

⁴¹The "equality of majorities" argument also only has force if majority waiver is not present. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 503 (1995).

⁴²I.R.C. § 1(a)-(e) (1994).

⁴³I.R.C. § 11(b) (1994).

⁴⁴I.R.C. § 55(b) (1994).

⁴⁵H.R. 2491, 104th Cong. (1995).

confusion or misinterpretations of what is meant by an income tax rate increase."⁴⁶ The Democrats had raised the Rule as a bar to portions of the Act involving alterations in the Earned Income Tax Credit. The Committee used identical language when claiming that waiver was simply being used preemptively in the Medicare Preservation Act of 1995.⁴⁷ The claim was that penalties on Medicare Savings Account withdrawals would constitute a tax rate increase. Neither of these fell within the narrow interpretation given to the Rule by the Committee nor would the current language of the rule cover them.

The 1996 experience with waiver was similar. The Small Business Job Protection Act of 1996⁴⁸ provided tax credits for small businesses, particularly those which hire disadvantaged workers, but also eliminated a group of tax preferences for Puerto Rican businesses. The Republican leadership insisted that despite the Democrats' claim, the Rule did not apply to the bill,⁴⁹ and was waived only as a cautionary measure. The most recent waiver occurred in the Health Coverage Availability and Affordability Act of 1996.⁵⁰ The concern arose over two measures: 1) attempting to prevent renunciation of citizenship as a tax evasion measure, 2) applying penalties for early withdrawal of funds from Medical Savings Accounts.⁵¹ These two bills also indicate that waiver is being used to escape political bickering rather than as a mechanism to force through legislation that should be subject to the Rule.⁵²

The first time Congress waived the Rule, however, the legislation was plausibly subject to the Rule. The 104th Congress adopted the rule on opening day and waived it almost immediately. H.R. 1215, the Contract with America Tax Relief Act of 1995, repealed the 28% cap on the tax rate for capital gains income and provided a 50% deduction of net capital gains. The overall 39.6% cap remained in place, so the maximum effective rate was 19.8%. However, for some classes of taxpayers, specifically those holding qualifying small business investment stock, the 50% deduction already existed. Therefore, the tax rate might

⁴⁶ 141 Cong. Rec. H10853-03 (daily ed. Oct. 26, 1995).

⁴⁷ H.R. 2425, 104th Cong. (1995).

⁴⁸ H.R. 3448, 104th Cong. (1996).

⁴⁹ 142 Cong. Rec. H5432-03 (daily ed. May 22, 1996).

⁵⁰ H.R. 3103, 104th Cong. (1996).

⁵¹ 142 Cong. Rec. H3029-03, H3029 (daily ed. Mar. 28, 1996).

⁵² One reference indicated that the welfare reform bill, H.R. 3734: the Personal Responsibility Act, may have involved a waiver of the Rule. However, no debate or vote in the Congressional Record about such a waiver exists. Since waiver was discussed extensively every other time it happened, and the welfare reform bill was high profile legislation, the reference must be in error.

have increased for them, but they were provided an election option for the year of enactment. Republicans argued, and the Joint Committee on Taxation concluded, that the repeal of the 28% cap was not a rate increase. It simply repealed one maximum, leaving a different (and higher) maximum in place. The Joint Committee took the position that the 28% cap was not even a "rate" under the definition of the rule, since it did not appear in the section of the Code defining rate schedules.⁵³ This led to the restricted interpretation of the provision discussed above. The new version of the Rule clearly would not apply to this change. While most of the instances where the Rule has been waived occurred in situations where the rule was unlikely to be applied in any case, the ease and frequency of waiver underscore the relative ineffectiveness of a rule-based implementation of supermajority requirements.

III. THE LESSONS FROM THE STATES: HOW TIGHTLY SHOULD CONGRESS BE BOUND?

While the enactment of a supermajority requirement to raise taxes is a new idea at the federal level, states have had similar provisions since the 19th century. Sixteen states currently impose either a supermajority requirement, a revenue cap, or both. Tables I and II on the following pages summarize the provisions that are in effect in the various states. After the tables, the author considers the types of restrictions that states have imposed and the lessons that come out of the state experiences. First, the author analyzes the decision whether to impose the requirement at the statutory or the constitutional level and conclude that the provisions that are imposed by statutes are no less binding than constitutional amendments. Next the author examines the substantive content of the requirements and the types of legislation to which they apply. While the states do not provide a perfect model for the federal government, they can help guide the design of a federal limitation.

⁵³141 Cong. Rec. H11989-01, H11998 (daily ed. Nov. 9, 1995).

TABLE I

State (Type)	Super-majority Required	What Taxes?
Arizona (Constitutional Supermajority)	2/3	New taxes, rate increases, deduction eliminations, fee adjustments, or reallocation of state/local burdens
Arkansas (Constitutional Supermajority)	3/4	Property, excise, privilege or personal tax rates
California (Constitutional Supermajority AND Revenue Limit)	2/3	"Any changes enacted for the purpose of increasing revenues" AND expenditure growth is limited by sum of cost of living and population growth; 50% of revenues collected in excess of this limit is placed in an emergency fund—the other 50% is returned by revisions of tax rate/fee schedules.
Colorado (Constitutional Revenue Limit AND Statutory Supermajority)	Voter Approval	Tax revenue cannot grow faster than population or it must be returned AND voter approval must be obtained for non-emergency tax increases
Delaware (Constitutional Supermajority)	3/5	All new taxes and license fees and all increases in the effective rate
Florida (Constitutional Revenue Limit AND Constitutional Supermajority)	Voter Approval	Revenue growth faster than personal income (requires 2/3 of legislature to waive) AND new taxes or fees (requires 2/3 voter approval to pass)
Hawaii (Constitutional Revenue Limit)	2/3	Expenditure growth cannot exceed growth rate of the economy; if state surplus exceeds 5% of revenues in two successive years, there must be a credit or refund.
Louisiana (Constitutional Supermajority AND Statutory Revenue Limit)	2/3	Any new tax, increase in existing tax, repeal of an exemption, fee or civil fine AND revenue growth rate is limited to growth rate of personal income

Massachusetts (Statutory Revenue Limit)	Voter Approval	Revenue growth faster than wages/salaries
Michigan (Constitutional Revenue Limit)	Voter Approval	Revenue growth faster than personal income must be returned
Mississippi (Constitutional Supermajority)	3/5	Any revenue bill or bill providing for assessment of property for taxation
Missouri (Constitutional Supermajority AND Constitutional Revenue Limit)	Voter Approval	Tax increases which exceed the lesser of 1% of total state revenues or 50 million dollars AND if state revenue grows faster than personal income, the surplus must be returned.
Nevada (Constitutional Supermajority)	2/3	Bills generating revenue
Oklahoma (Constitutional Supermajority)	3/4	All revenue bills
South Dakota (Constitutional Supermajority)	2/3	Corporate or personal income tax, the levies or percentage basis of property
Washington (Statutory Revenue Limit AND Statutory Supermajority)	2/3	Expenditures cannot grow faster than the prior three years' average sum of inflation and population growth; excess revenue is diverted to an emergency reserve fund until it reaches 5% of state revenues and then to "education construction fund" AND all actions which raises state revenue or requires revenue neutral tax shifts

TABLE II

State	How Enacted	Is It Judicially Enforced?
Arizona	1992 Initiative	Not litigated
Arkansas	1939 or before	Yes
California	1978 Initiative; 1979 Initiative	Yes

Colorado	1992 Initiative; 1993 Statute	Not litigated
Delaware	1981 Constitutional Amendment	Yes
Florida	1996 Initiative (supermajority requirement); 1994 Initiative (revenue limit)	Yes
Hawaii	1978 Initiative	Not Litigated
Louisiana	1921 or before (supermajority requirement); 1979 statute (revenue limit)	Yes
Massachusetts	1986 Initiative	Not Litigated
Michigan	1978 Initiative	Not litigated
Mississippi	1892 or before	No
Missouri	1996 Initiative (supermajority requirement); 1980 Initiative (revenue limit)	Not Litigated
Nevada	1996 Initiative	Not litigated
Oklahoma	1992 Initiative	Yes
South Dakota	1978 Initiative	Yes
Washington	1993 Initiative	Not Litigated

A. Level of Implementation: The De Facto Constraint in the States

Significantly, no states have enacted legislative procedural rules limiting tax increases. All have either constitutional or statutory restrictions.⁵⁴ Despite the relative ineffectiveness of the House Rule, a federal revenue restriction need not be imposed by constitutional amendment. The experiences in the states indicate that a statute should be sufficient. If a revenue cap is the selected mechanism of control, whether the cap is implemented by statute or by amendment does not matter much. Statutory revenue limits might appear less permanent than constitutional restrictions. Unlike constitutional caps, which require voter approval of an amendment to eliminate,⁵⁵ a simple majority of the legislature can rewrite a statutory limit. Despite this flexibility, the experience in the states indicates that there are only minimal practical differences between the two types of revenue limits.

⁵⁴It is possible that other states have procedural rules or may adopt them in the future.

⁵⁵However, some states provide that the legislature may waive the revenue cap by a supermajority. See e.g., FLA. CONST. Art. 7, § 1 (requiring two thirds to waive); WASH. REV. CODE ANN. 43.135.045 (1996) (requiring two thirds to waive).

Louisiana, Massachusetts, and Washington have statutory revenue limits. While this provides a small sample size, the structural characteristics of the limits in these three states do not differ significantly from those in states with constitutional restrictions. Louisiana limits its rate of revenue growth to personal income, which is the most common choice, existing in four of the nine states with constitutional revenue caps. Massachusetts selected a similar growth rate: wages and salaries. Washington's statute is almost identical to California's constitution. Both are primarily expenditure caps and tie expenditure growth to inflation and population. Massachusetts is the only state of the three that provides an explicit mechanism for providing refunds. Like Michigan and Missouri, the constitutional states with explicit refund mechanisms, Massachusetts must return surpluses proportionate to income tax liability. Regardless of the state, when a surplus appears, the debate on how to spend or return the funds varies little based on whether the revenue cap is statutory or constitutional. The proposal that succeeds is almost always a proportionate tax refund or tax cut.⁵⁶ For instance, Massachusetts provided \$150 million in refunds last year that were proportionate to income tax liability.⁵⁷ Louisiana also has a surplus this year but has not yet decided how to return it.

There is also only a limited difference in the types of judicial enforcement of statutory versus constitutional provisions. Courts consider what should be counted under the limit, rather than determining whether the limit has been violated.⁵⁸ This is similar in the cases with constitutional restrictions.⁵⁹ No state Supreme Court, in either a statutory or constitutional state, has directly enforced a revenue cap. The only significant structural difference between statutory and constitutional caps is that there has been less litigation in states with statutory limits. Louisiana has had none and Massachusetts's provision overcame a

⁵⁶ Hal Spencer, *Democrats Push for Tax Surplus Rebate*, COLUMBIAN, Dec. 2, 1997 at B1.

⁵⁷ Edward T. McHugh, *Legislature Sends Weld \$401M Deficiency Budget*, WORCESTER SUNDAY TELEGRAM, July 21, 1996, at A16. They have run a surplus this year, but have not decided how to return it. The most likely possibility seems to be a permanent reduction in the income tax. David G. Tuerck, Editorial, *State Should Return \$ to Taxpayers*, BOSTON HERALD, Sept. 14, 1997, at 31.

⁵⁸ See, e.g., *Klickitat County v. State*, 862 P.2d 629 (Wash. Ct. App. 1993).

⁵⁹ *San Francisco Taxpayers Assoc. v. Bd. of Supervisors of San Francisco*, 828 P.2d 147 (Cal. 1992) (determining what constitutes debt restriction and therefore what is outside the scope of the constitutional provision).

constitutional challenge.⁶⁰ A few Washington cases have looked at what constitutes a transfer of responsibility between state and local governments.

Aside from these structural features, there is little practical difference in the effects of the statutory and constitutional provisions. There is no evidence that either of these provisions is waived on a regular basis. In ten years, Massachusetts has waived Chapter 62F only once. In 1996, the legislature waived a large number of statutes to expedite highway construction. Since none of the projects actually raised revenue, it is not clear the supermajority statute would apply in any event.⁶¹ Louisiana has never waived its limit and has in fact taken particular steps to protect the provision. The state eliminated all special funds comprised of state revenues except the Tax Surplus Fund.⁶² Washington also has never waived its revenue limit.⁶³

The similarity of statutory and constitutional provisions in the states experience may spring from their common source. Unlike the top down implementation of the House Rule, the state level revenue controls have developed as a result of popular movements. Every revenue cap except Louisiana's (as well as every supermajority requirement except Delaware's) has been instituted by voter initiative. If these provisions are the voice of the voters in some significant way, waiving the statutory versions may lead to political costs that are too high.⁶⁴

⁶⁰See *Tax Equity Alliance for Mass. v. Commissioner of Revenue*, 516 N.E.2d 152 (Mass. 1987) (determining that the refund provision did not constitute an appropriation which the constitution prohibited from being enacted through an initiative).

⁶¹ 1996 MASS. LEGIS. SERV. Ch. 205, §72 (H.B. 6191 (West)).

⁶² 1988 LA. SESS. LAWS. SERV. 1st Ex. Sess. 5 (West).

⁶³ However, Washington also requires that *fees*, in addition to revenue, not grow faster than the allowed rate unless a simple majority of the legislature approves. This provision has been waived every year since the statute's enactment for at least one fee. See *e.g.*, 1997 WASH. LEGIS. SERV. Ch. 454 §1119 (S.H.B. 2259)(West)(waiving nurses fees); 1996 WASH. LEGIS. SERV. Ch. 283 §217 (S.S.B. 6251)(West)(waiving hypnotherapist fees); 1995 WASH. LEGIS. SERV 1st Sp. Sess. Ch. 1 §215 (S.S.B. 5103)(West)(waiving public water operator certification fees).

⁶⁴However, if voters were constraining their legislators by reacting negatively to waivers, they would have to be informed of the waivers first. The instances when the provisions have been waived in Washington and Massachusetts were not covered in the popular press. (Similarly, the waivers of the federal rule were not reported outside the Congressional Record.) This indicates that the caps themselves, regardless of structure, are having an effect independent of the general anti-tax sentiment in the states.

B. What's In; What's Out: The De Jure Constraint in the States

After sorting out whether the supermajority requirement is imposed by statute or by constitution, the next issue is what it should cover. What legislative enactments need a supermajority and which require only 51% of a quorum? This question has caused the most conflict at the state level. This section examines some of the options and problems that have arisen with various attempts to define what actions are subject to supermajority requirements. First the author considers the debate over taxes versus fees. Broadly speaking, fees are behavior specific exactions designed to cover the cost of a specific government service.⁶⁵ Defining the precise contours of this category, as well as whether supermajority requirements should cover fees at all, has been the subject of much litigation. Next the author considers unfunded mandates. The question of federal unfunded mandates imposed on state governments has received substantial attention in the literature,⁶⁶ yet similar issues arise when state governments pass on obligations to localities. Supermajority requirements make this a much more attractive option for state legislatures. Then the author examines the limitations that supermajority requirements place on revenue neutral tax shifts. Depending on how the provision is phrased, the rule may prevent not only tax increases, but also reallocation of the tax burden among different tax types or taxpayers. Finally, the author discusses a variety of tools that legislators have used when faced with a supermajority limitation, including "automatic" tax increases, delegation of taxing authority to subdivisions, and shifts to debt financing.

The starting place in determining what a supermajority requirement covers is the language of the requirement. Three basic types of supermajority requirements exist. First, some states restrict legislation that is *intended* to raise revenue. California, for instance, imposes its supermajority requirement on those bills with the purpose of increasing revenue.⁶⁷ Oklahoma's constitutional mandate mentions "revenue bills, " which the Oklahoma Supreme Court has interpreted to mean those bills with the purpose of raising revenue.⁶⁸ Second, other states have

⁶⁵See, e.g., *Sinclair Paint Co. v. State Bd. Of Equalization*, 937 P.2d 1350 (Cal. 1997).

⁶⁶Much of this literature arose after the passage of the 1995 Unfunded Mandates Reform Act, 109 Stat. 48 (1995) (codified in scattered sections of 2 U.S.C.), which was designed to restrict Congress' ability to impose requirements on the states without paying for them. See, e.g., Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137 (1997); Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113 (1997).

⁶⁷CAL. CONST. Art. 13A, § 3.

⁶⁸OKLA. CONST. Art. 5, § 33; *Leveridge v. Oklahoma Tax Comm'n*, 294 P.2d 809 (Okla. 1956). Mississippi uses the same language, and would perhaps interpret it the same way, but

looked to the *effect* of the bill. Delaware imposes a supermajority on new taxes or increases in the effective rates of old ones.⁶⁹ Nevada requires a supermajority on any bill that "creates, generates or increases any public revenue in any form."⁷⁰ Finally, Washington limits actions that raise revenue or require revenue neutral tax shifts.⁷¹ Obviously, effect based requirements are easier for courts to administer. What the legislature did is simpler to discern than what it intended. However, judicial review based on the effect of legislation means representatives do not know whether they need a supermajority until after the fact. Missouri has implemented a partial solution to this dilemma by requiring voter approval for bills that increase revenues more than 50 million or 1% of state revenues.⁷² Missouri presumes that bills which have such a substantial revenue effect are designed, at least in part, to increase revenue.

Finally, Arkansas, South Dakota, and Louisiana do not purport to impose a supermajority requirement on all taxes. Arkansas limits its provision to property, excise, privilege, or personal tax rates, excluding increases in the sales tax rate and all base broadening efforts.⁷³ South Dakota includes only rate increases and new taxes.⁷⁴ Louisiana, while imposing what seems to be a broad restriction on "a new tax, an increase in an existing tax, or a repeal of an existing tax exemption,"⁷⁵ seems to have interpreted the restriction narrowly. A proposed 1996 amendment would have extended the requirement to the suspension or repeal of existing tax credits, deductions, or exclusions, but was withdrawn before it was presented for a floor vote.⁷⁶ This seems to indicate that "exemption" is interpreted, by the legislature at least, as not extending to cover these other features of the tax code. The distinction among these three types of requirements plays an important role in the drafting issues that follow. Each raises its own particular problems.

the Mississippi Supreme Court has refused to enforce the supermajority requirement on what amounts to political question grounds. *Hunt v. Wright*, 11 So. 608, 609 (Miss. 1892).

⁶⁹DEL. CONST. Art. 8, § 10.

⁷⁰NEV. CONST. Art. 4, § 18.

⁷¹WASH. REV. CODE ANN. 43.135.045 (1996). Florida and Arizona also seem to fall into the "effect" category, but are too new to have received court interpretation. Both were passed within the last six years. Arizona mandates a 2/3 vote for any act that "provides for a net increase in state revenues," listing a wide variety of types of bills that fall in the category, but specifically excluding the effect of inflation. ARIZ. CONST. Art. 9, § 22.

⁷²MO. CONST. Art. 10 § 18(e).

⁷³ARK. CONST. Art. 5, § 38.

⁷⁴S.D. CONST. Art. 11, § 13.

⁷⁵LA. CONST. Art. 7, § 2.

⁷⁶Keith Darce, *Business Scores Again in the Legislature*, New Orleans CityBusiness, June 17, 1996, at 1.

1. Taxes and Fees

During Congressional hearings in 1987, Secretary of Commerce Malcolm Baldrige was asked the difference between taxes and user fees. He responded that it was simple: "If it is a Democratic proposal, it is a tax; if it is a Republican proposal, it is a user fee."⁷⁷ Unfortunately, neither the states nor the federal government have been able to agree on a distinction this straightforward. The issue is one of the most litigated in the fiscal policy arena and the supermajority field is no exception. Generally, fees are earmarked for a particular activity and the amount collected is proportional to the service provided. Fees are designed to cover the cost of a specific government service, not to provide general revenue to support a broad range of activities. For supermajority purposes, the distinction between taxes and fees should be drawn based on the goals underlying the requirement. If the limitation is imposed to lock in a particular fiscal structure, (rather than to limit the overall size of government) a majority of the legislature should only be allowed to impose exactions that the compromise was not intended to cover. If, on the other hand, the goal were to limit the size of the federal government, fees should be construed narrowly. Restraining revenue is an attempt to reduce the influence of the government in the economy and reduce the discretion of the legislature. This section shows that the existing federal definitions of taxes and fees are inapposite for the supermajority context and that the state definitions are no better.

The difference between taxes and user fees has been hotly contested across the entire field of fiscal policy. No clear federal definition has been developed; fees have been defined as widely as any exaction "charged identifiable individuals or entities . . . for a service or good" or as narrowly as "prices imposed to recover the cost to the federal government of providing special benefits to an identifiable recipient beyond those that accrue to the general public."⁷⁸ Delegation doctrine has been the primary arena where the federal courts have examined the definition of "taxes" versus "fees." User fees only became a substantial portion of the federal budget in the 1950s. Title V of the Independent Offices Appropriation Act of 1952⁷⁹ gave the head of administrative agencies the power to set user fees for any good or service provided, "taking into consideration direct and indirect cost to the government, value to the recipient, public policy or interest served, and other pertinent facts," and had the goal of making any such provision "self sustaining."⁸⁰

⁷⁷CONG. BUDGET OFF., *THE GROWTH OF FEDERAL USER CHARGES* (1993).

⁷⁸*Id.*

⁷⁹96 Stat. 1051, codified as amended at 31 U.S.C. 9701(a)(b) (1994).

⁸⁰Independent Offices Appropriation Act of 1952, Publ. L. No. 137, 1951 U.S.C.C.A.N. (ch. 376 §501) 251, 277.

The Supreme Court faced this provision in the 1974 companion cases *National Cable Television Ass'n v. United States*⁸¹ and *Federal Power Comm'n v. New England Power Co.*⁸² In *National Cable Television*, the Court held that the statute allowed agencies to impose fees, not taxes, defining fees as "incident to a voluntary act" and imposed for "a grant which . . . bestows a benefit on the applicant, not shared by other members of society."⁸³ Furthermore, fees were limited to "the value to the recipient" of the service provided.⁸⁴ *New England Power Co.* further limited the definition of fees, mandating that it be imposed on an "identifiable recipient" of a unit of service for which "he derives a special benefit."⁸⁵ These definitions were not intended to be drawn along the contours of a supermajority requirement and do not further those goals. The question in the supermajority arena is whether Congress is collecting funds to spend to further policy aims. If it is, those exactions should be subject to the requirement. Whether there is an "identifiable recipient" or they are receiving a particular benefit is not particularly relevant.⁸⁶

Several states have chosen to avoid this thorny interpretative dividing line by specifically placing fee increases under the supermajority requirement.⁸⁷ Among those that have not, four states have faced the question of what constitutes a fee.⁸⁸ On the whole, the lines drawn between taxes and fees is inconsistent and unclear.

⁸¹415 U.S. 336 (1974).

⁸²415 U.S. 345 (1974).

⁸³*National Cable Television*, 415 U.S. at 340-41.

⁸⁴*Id.* at 342.

⁸⁵*New England Power Co.*, 415 U.S. at 351.

⁸⁶Congress further increased its reliance on user fees in 1985 with COBRA-85. The law authorized the Nuclear Regulatory Commission to collect up to 33% of its annual operating costs in user fees. For general background on the history of this legislation, see CONG. BUDGET OFF., *THE GROWTH OF FEDERAL USER CHARGES* 19 (1993). The Court interpreted this bill in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989). The Court backed off of the distinction between taxes and fees for purposes of the delegation question, holding *National Cable Television* and *New England Power* "stand only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'taxes' or 'fees,' on those parties." *Id.* at 213.

⁸⁷*See, e.g.*, NEV. CONST. Art. 4, § 18.

⁸⁸Delaware dealt with the question in *In re Opinion of the Justices*, 575 A.2d 1186 (De. 1990). This case was less interesting than the ones discussed in the main body, though, since Delaware's constitutional provision specifically includes "license fees." DEL. CONST. ART. 8 § 11.

Florida was the first to deal with the issue. *State ex rel. v. Keller*⁸⁹ considered the legality of a fee imposed upon attorneys to obtain a license to practice law. The license fee increased in steps in proportion to the attorney's income. The court found that this was in fact a tax on income, not simply a regulatory fee, because the amount of tax varied based on the income of the attorney. A fee on the privilege of doing business would not have been covered.⁹⁰ Of course, if the goal of the supermajority requirement is to limit the size of the government, this distinction makes little sense.

This Florida test, however, has not been adopted in other states. California and Louisiana look primarily at the purposes underlying the tax. "If the imposition has not for its principal object the raising of revenue, but is merely incidental to the making of rules and regulations to promote public order, individual liberty and general welfare, it is an exercise of the police power."⁹¹ In *Bernard*, the Louisiana Court rejected an assessment levied by the state Insurance Rating Commission that was not passed by an adequate supermajority. Traditionally, the IRC levied percentage assessments on the previous year's premiums to fund its own operations. In 1979, the commission added an additional fee to fund the firefighters' pension plan.⁹² The court looked at the fact that the fee did not have the "purpose of defraying the cost of insurance regulation,"⁹³ and in fact raised four times as much money as would be necessary to cover its costs. The attorney for the state tried to claim that the insurers benefitted from a healthy firefighters' pension system because it encouraged people to become firefighters. The Court rejected this, on the grounds that "[i]t is not an imposition limited to the extraction of fees from persons receiving a special benefit from government not shared by other members of society," particularly since it did not tax only fire insurers.⁹⁴ While this case was decided correctly in light of the goals of the supermajority requirement, its reasoning is mistaken. If the supermajority requirement is designed to restrict the size of government, this "special benefit" test does not fulfill these purposes.

California has most recently considered the distinction between taxes and fees. *Sinclair Paint Co. v. State Bd. Of Equalization*⁹⁵ looked at a lead paint agency created by the state. The agency was to develop programs for screening and

⁸⁹191 So. 542 (Fla. 1939).

⁹⁰*Id.* at 547.

⁹¹*Audubon Insurance Co. v. Bernard*, 434 So. 2d 1072, 1074 (La. 1983).

⁹²*Id.* at 1075.

⁹³*Id.*

⁹⁴*Id.* at 1075-76.

⁹⁵937 P.2d 1350 (Cal. 1997).

education relating to the dangers of lead paint. The program was funded through a tax on the current and former producers of lead-based paint in California. The amount of spending on the program was limited by the revenues generated through this assessment, and the revenues from the assessment were not to be used for any other purpose. Fees were imposed to the extent of "market share" responsibility for the current contamination levels in the state. The Court surveyed the history of the distinction between taxes and fees, holding that taxes are imposed for revenue purposes rather than in return for a specific benefit or privilege conferred on the taxed individuals.⁹⁶ Taxes are compulsory rather than imposed in response to a voluntary decision to seek government services.⁹⁷ The Court found three type of non-tax fees: 1) Special assessments imposed to compensate the government for benefits conferred onto property, e.g. fees for street building; 2) Development fees, e.g. building permit fees; 3) Regulatory fees.⁹⁸ Since the expenditures were restricted in amount and fee expenditures were limited to the lead agency, the Court analogized the tax to an initial licensing fee. It saw the fee as regulatory because it mitigated the effects of Sinclair's behavior and was essentially a cost of doing business.⁹⁹

The *Sinclair* case indicates the one situation where perhaps user fees should be treated separately from taxes for supermajority purposes. If the goal of the requirement is to limit the government's collection of revenue, courts should look at the effect the fee has on society. Is the legislature collecting money and using it to further policy goals? If so, it should be subject to the limitation. In cases where the legislature's exaction is essentially standing in for the tort system,¹⁰⁰ the legislature has no additional discretion and is simply reducing the costs of collecting a debt that is already due. However, *Sinclair* is probably not one of those situations. The funds collected did not go to compensate those injured by lead paint. Instead, they were used to set up education programs to prevent future injuries. That is a policy decision by the legislature and the fact that they called the funding mechanism a fee rather than a tax should not make a difference.¹⁰¹

⁹⁶*Id.* at 1354.

⁹⁷*Id.*

⁹⁸*Id.* The standard for regulatory fees was held to be that they cannot exceed the cost of providing services necessary to the activity regulated. *Id.* at 1355.

⁹⁹*Id.* at 1357.

¹⁰⁰CBO has called these "liability-based taxes." CONG. BUDGET OFF., THE GROWTH OF FEDERAL USER CHARGES 6-7 (1993).

¹⁰¹The danger of skyrocketing user fees is not trivial. Even without the pressure imposed by a supermajority limitation on taxes, federal user fees increased at almost twice the rate of either GDP or overall federal receipts. *See id.* at 41.

2. Unfunded Mandates

Supermajorities are generally not required to devolve a program to a locality. While none of the states with standard supermajority requirements have been confronted with cases involving shifting of obligations to state and local governments, the language of the provisions seem not to regulate shifts of responsibility. Most of these supermajority provisions focus on affirmative steps taken to increase gross receipts.¹⁰² Of course, bills which reduce the state's obligation to provide services do not have this purpose. Even in states with vaguer enactments, the supermajority requirement is unlikely to restrict these types of shifts. For instance, Oklahoma's provision applying to "revenue bills,"¹⁰³ under a very expansive reading, could restrict shifts of obligations since they are bills that free up state revenues. However, it has been construed to make it essentially equivalent to the California constitution.¹⁰⁴

Arizona is the only state with a supermajority provision which specifically regulates the interaction between states and localities. It applies its supermajority requirement to "change[s] in the allocation among the state, counties or cities of Arizona transaction privilege, severance, jet fuel and use, rental occupancy, or other taxes."¹⁰⁵ As discussed below, states with revenue caps tend to restrict responsibility shifts to local governments. In contrast, this provision limits the ability to rewrite the tax law to *take* funds from localities. However, this language may not have a significant effect because these types of transfers of revenues may be covered even if they are not specifically mentioned. As noted above, supermajority requirements fall into two categories. Some states, including Delaware and Nevada, look only at the effect of tax changes: supermajority requirements apply to all legislation raising revenue. Other states, like Oklahoma and California, focus on the intent of the legislature in enacting the change. Bills converting local tax revenue to the state coffers would almost certainly be subject to the requirement in states where the provision is aimed at the effect of changes, and it is likely that the requirement would apply in states with intent oriented constitutions as well. However, it is possible that a transfer of funds could be justified in intent oriented states on the grounds that it did not have the purpose of

¹⁰²California is typical among these, applying the supermajority requirement to "changes in state taxes enacted for the purpose of increasing revenues." CAL. CONST. Art. 13A, § 3. *See supra* notes 65-76 and accompanying text.

¹⁰³OKLA. CONST. Art. 5, § 33

¹⁰⁴*Leveridge v. Okla. Tax Comm'n*, 294 P.2d 809, 809 (Okla. 1956) (defining revenue bills as those with the primary purpose of raising revenue).

¹⁰⁵ARIZ. CONST. Art. 9 § 22(B).

raising revenue, particularly if the transfer is accompanied by a shift of responsibility for certain programs. For instance, redirecting gas tax revenues from the counties to the state might, or might not, be designed to raise state revenue. If counties had traditionally administered road repair programs and the legislation transferred responsibility for these programs to the state along with the tax receipts, the purpose of the bill might well be administrative savings, not revenue enhancement.

If the goal of the supermajority limitation is to restrict the overall size of government, this failure to account for unfunded mandates is a serious weakness. State governments can simply shift the burden on to the localities, forcing them to raise the tax revenue. If the objective is to freeze in place the current allocation of the tax burden among various taxpayers, either for equity or for other reasons, this problem is less severe but should remain a source of concern. There is no guarantee that the taxpayers bearing the burden of devolved programs are the same as those that would pay if the state retained the programs. In fact, since most localities fund their programs through property taxes, and most states collect the majority of their tax revenue from sales and income taxes, it is likely that very different types of taxpayers will pay for burdens placed on localities.¹⁰⁶

3. Revenue Neutral Tax Shifting

In addition to locking in revenue levels as a proportion of state income, supermajority requirements in theory should lock in the distribution of revenues across different tax types. States cannot cut taxes in one area and increase another tax to keep revenues constant. This subsection analyzes whether supermajority requirements actually constrain states' ability to shift the revenue burden among tax types.¹⁰⁷ Every state with a supermajority requirement but one has comprehensive

¹⁰⁶The applicability of supermajority provisions to situations when the state claims both the responsibility and the revenue for formerly local programs highlights the importance of the intent of the provisions. The provisions should not apply if the purpose is to lock in the current tax structure and assure that taxpayers continue to bear the same relative share of the cost of government. Similarly, if the goal is to restrict the size of "government," they should not apply, since it does not really matter at what level services are provided. However, they should apply if the goal is to limit the size of *state* government, stemming from a belief that government operates better at a lower, decentralized, level. This view of the requirements, though, is undercut by the fact that most states with these provisions also apply them to city and county tax increases.

¹⁰⁷In this area, states with revenue limits are the least interesting. Revenue limits implicitly accept shifting among different tax types as long as the cap is not exceeded. The exception to this occurs when states adopt supermajority requirements over and above their revenue

provisions.¹⁰⁸ All attempts to raise state revenue are subject to the limit. As noted above, tax shifts seldom appear in case law, and generally are absent from the press as well. While tax increases and tax cuts are covered, they are seldom explicitly linked. In fact, politicians have a strong incentive not to indicate when the adjustments are tied together. They can take credit for cutting taxes and argue that they were forced to raise them when revenue shortfalls appear. As a result, measuring the effect of a supermajority limit on tax shifting is difficult.

However, looking at the data can be instructive. The following table compares five of the states with supermajority requirements to five states that do not have the limits. The analysis looks at the distribution of state revenue longitudinally across different tax types. The hypothesis is that in states with supermajority requirements, the distribution of state revenues across tax types should remain more stable than in states without such a requirement, because supermajority states cannot, for example, easily compensate for a sales tax cut by broadening the income tax base.¹⁰⁹

The five supermajority states were selected based on the data available. Only the states with the requirement through the entire period of 1981 to 1992 are included. Arkansas was also excluded because, as explained above, its provision

caps. In these cases, eliminating shifting is essentially the only additional effect of the requirements. However, it is not evident that the voters enacting these provisions recognize this. Missouri adopted its supermajority requirement for tax increases in 1996 on top of its 1980 Hancock Amendment imposing a revenue limitation. One primary argument in favor of the 1996 provision was that a large increase in income taxes in 1993 had, in part, caused a current surplus leading to a sales tax cut. Jo Mannies, *Amendment 4 Ads Carry a Lot of Baggage*, ST. LOUIS POST-DISPATCH, Mar. 27, 1996, at B5. However, the tenor of the campaign was much more "anti-tax" than "anti-tax shifting." Similarly, Florida adopted its supermajority mandate in 1996, two years after adopting a revenue limit. The revenue limit was presented as a reason the supermajority requirement was unnecessary. Diane Hirth, *State Tax-Cap Amendment Has Dole's Support*, FT. LAUDERDALE SUN-SENTINEL, Nov. 3, 1996, at A17. Here too, though, the focus of the campaign was on restricting taxes rather than locking in the current distribution across tax types.

¹⁰⁸Arkansas limits its supermajority provision to tax rates and to particular tax types. See *supra* note 73 and accompanying text.

¹⁰⁹The percentages do not sum to one hundred because, in addition to these three tax types, revenues include intergovernmental transfers, both up from localities and down from the United States, other taxes, and user fees. The ACIR data used distinguishes between these 'other taxes' and 'charges.' It seemed unlikely that the distinction would be the same as the distinction made by courts between taxes and fees. These three tax types are revenue mechanisms that would be universally considered taxes.

is explicitly non-comprehensive. The five non-supermajority states were selected because each had a 1992 tax distribution that was similar to one of the supermajority states. In the attached table, the state that the non-supermajority state is similar to is noted parenthetically after the state code. The assumption in selecting states on this basis is that it is possible that states tend toward similar distributions across tax types over time, and that states that start out far from other states are likely to have higher than average variance.¹¹⁰

The final results are reproduced in the table.¹¹¹

Supermajority State	Average Variance	Average Variance	Non-Supermajority State
CA	2.06	.92	MD
DE	2.13	2.74	OR
LA	1.58	1.03	AL
MS	2.00	4.77	NM
SD	1.17	1.99	TN
Supermajority Average	1.79	2.29	Non-Supermajority Average

The states without supermajority requirements do in fact have significantly higher variability in their tax distribution than states with such a limit, which supports the hypothesis that these requirements do significantly restrain tax choices. However, this data is somewhat suspect. New Mexico has an unusually high variance and Maryland has an unusually low variance. Excluding the two of them makes the average variance in non-supermajority states 1.92, which is higher but

¹¹⁰It would be possible to compare the variance in each state's distribution to the national variance, but the national variance is likely to appear deceptively low since opposite direction effects in different states will cancel each other out in aggregate.

¹¹¹ The average variance is the average across the three tax types. However, in states lacking a particular tax type across the entire time period, like Delaware and Oregon, no average was computed in the zero variance from these taxes. This essentially is an assumption that the lack of a property and sales tax in Delaware cannot be attributed to the supermajority limit, but rather to the existence of exogenous political factors making that type of tax "out of bounds." Imposing a brand new tax type is likely far more difficult than making an equal size change in a pre-existing tax.

not as much. It is difficult to determine whether New Mexico is an outlier or not given the number of data points.

Another issue is that the variance of the percentage collected from property taxes is low in every state. It may that property tax increases are effectively not an option for states, since local governments have so jealously guarded property taxes as a revenue source and since the state (as opposed to the localities) collect so little money through this mechanism. The chart is reproduced with the average variances excluding property taxes.

Supermajority State	Average Variance	Average Variance	Non-Supermajority State
CA	3.00	1.36	MD
DE	2.13	2.74	OR
LA	2.34	1.55	AL
MS	2.86	7.12	NM
SD	1.17	1.99	TN
Supermajority Average	2.3	2.95	Non-Supermajority Average

The difference between the supermajority and the non-supermajority states is even greater here, although New Mexico is having an even more significant effect in this case. On the whole, it does seem that the supermajority requirement does have some effect on the ability of states to shift among taxes, but the extent of that effect is not entirely clear. Here too, whether limitations on revenue neutral tax shifts are considered a problem or not depends on the goal of the supermajority requirement. If the objective is to limit the size of government, this is a dangerous unintended consequence. If the goal is to fix a particular tax structure in place, this is exactly the desired result.

4. Evasion Tools

Standard supermajority requirements can be evaded in a variety of ways. This subsection analyzes legislative attempts to find different ways to increase state revenues when a supermajority requirement bars traditional tax increases. First, the author considers several "hidden" ways to raise taxes that lead to additional revenue but do not need a supermajority. Second, the author examines attempts to substitute

other funding measures for taxes. Finally, Louisiana has been especially active in trying to adjust state revenue upwards and the author discusses its efforts in detail.¹¹²

The legislature can evade a supermajority by finding ways to raise taxes that do not require a supermajority vote. Late last year, Colorado considered tying gasoline taxes to the rate of inflation.¹¹³ The proposal was defended on the grounds that gas taxes, imposed on a per gallon basis, currently erode as prices increase where sales and income taxes do not. This automatic tax increase subverts the supermajority mandate. It might require a supermajority vote in the first year, but might not, as there is no guarantee that state revenues will increase. While Colorado did not adopt this provision last year, Delaware had a similar measure through the 1980s.¹¹⁴ For 15 years, the per gallon tax was 10% of the average price per gallon, blending traditional gas taxes with a sales tax. This system was first imposed in the same year that the supermajority requirement came in, but was abandoned in 1995 when gasoline taxes were increased well past the 10% level. Other states with supermajority requirements have not followed Delaware's lead. Arizona, Mississippi, Nevada, Oklahoma and South Dakota all have traditional per gallon taxes.¹¹⁵ Admittedly, in many states, gas taxes are dedicated to highway

¹¹²There are two types of "evasion" mechanisms not considered in the text. The first is voter approval. For instance, in Arizona, while it takes 2/3 of the legislature to pass tax increases, a simple majority can send voters a tax increase and a simple majority of voters can approve. This has been pointed out as a weakness in the Arizona structure and there have been attempts to require a 2/3 vote of the people for any tax increase. Phil Immordino, *It's Time for Legislature to Revisit Tax Increase Law*, TUCSON CITIZEN, Jan. 29, 1996, at A7. However, no examples of taxes that have been imposed in this way exist, and it seems unlikely to provide a significant source of new revenue, given the general unpopularity of tax increases and the administrative complexities of voter referenda. Second, there have been attempts to pass constitutional amendments to exempt certain types of taxes from both revenue caps and supermajority requirements. Colorado Governor Roy Romer fought to remove unemployment insurance fund taxes from the limits, arguing that both the receipts and the expenditures of the fund are particularly volatile. Editorial, *'No' on Referendum D*, ROCKY MOUNTAIN NEWS, Oct. 12, 1996, at A57. These attempts have universally failed.

¹¹³Ellen Miller, *Romer Urges Indexing Gas Taxes to Inflation*, DENVER POST, Sept. 9, 1997, at A1.

¹¹⁴Del. Code. Ann. Tit. 30 §5110 (1995).

¹¹⁵See e.g., ARIZ. REV. STAT. §28-1501 (1990); MISS. CODE ANN. §27-55-11 (1972); NEV. REV. STAT. §365.170 (1997); OKLA. STAT. tit. 68, §500.4 (1997), S.D. CODIFIED LAWS § 10-47B-4 (Michie 1995).

construction, limiting the utility of this mechanism for this specific tax type, but there is no reason it could not be used for other types of taxes.¹¹⁶

Another form of automatic tax increases also apply to gas taxes. Nevada and Oklahoma have adopted measures providing that if there is any reduction in federal gas taxes, state gas taxes will increase by the amount federal taxes are reduced.¹¹⁷ It is not clear whether the supermajority provisions would apply to these measures. Nevada passed the statute before enacting its supermajority provision, but, in the language of the Nevada Constitution, the statute does not "create, generate, or increase public revenue," since, at the time of bill's passage, it does not alter state revenue at all. Oklahoma limits its provision to bills that are designed to raise revenue, and if this provision is defended on environmental grounds, for instance, it seems likely to succeed against a court challenge. Even if the provisions do need such a vote once, that is a far easier task than having to return annually to obtain another increase. These contingent tax increases are a straightforward loophole. Presumably it would even be possible to pass measures similar to those used for Congressional pay raises. Unless the legislature affirmatively rejected them, tax increases could annually go into effect either automatically or on the motion of a commission. This would present a particular problem in states like Arkansas, which also mandate a supermajority vote to *cut* taxes.

States that limit the effect of their provisions based on the intent of the legislature provide more opportunities for undercutting the measure. For instance, in 1987, Arkansas attempted to incorporate federal definitions of taxable income into their tax code.¹¹⁸ This did not trigger the Arkansas provision, which only applies to tax rates, and did not even pass by a majority, but presents a potential evasion tactic for states which have supermajority requirements that emphasize the intent of the legislature in making the change. Oklahoma limits its requirement to bills for raising revenue and California's provision applies to changes in state taxes enacted for the purposes of raising revenues. The Oklahoma courts have in fact held that a revenue bill is one whose "principal purpose is to increase state tax revenue."¹¹⁹ In the Arkansas proposal, it was clear that the legislature was trying to raise revenue, but a similar provision could easily be defended as an attempt to

¹¹⁶It is also less effective in states that have a revenue cap in addition to a supermajority requirement.

¹¹⁷NEV. REV. STAT. § 365.185 (1997); OKLA. STAT. tit. 68, § 500.4A (1997).

¹¹⁸Maria Henson, *Main Pillar of Clinton Revenue Plan Fails in Senate Despite Lobbying*, ARK. GAZETTE, Feb. 27, 1987 at A1.

¹¹⁹Walters v. Okla. Tax Comm'n, 935 P.2d 398, 401 (Okla. Ct. App. 1996).

simplify the administration of the tax code. The increase upheld in the *Walters* case, for instance, raised about \$18 million in additional revenue from out-of-state taxpayers by adjusting the method used to calculate their marginal tax rate. While this was defended on equity grounds, and that did seem to be the primary motivating factor in the legislature's actions, it provides a way to obtain small revenue increases. Of course, in states like Nevada and Delaware, where the provision applies to all legislation that has the effect of raising revenues, this tactic is unavailable. These provisions, however have a disadvantage: it is not necessarily clear in advance whether bills will have the effect of increasing revenues. A strict reading of these provisions could lead to retroactive nullification.

Once legislatures exhaust these tax-based revenue mechanisms, non-tax sources of revenue are a natural place for state legislatures to look. In particular, states might be expected to rely more heavily on bonds and fees. There are reasons to think that bonds cannot be used to replace lost tax revenue. Most states have limitations on the use of non-recurring debt to fund recurring expenses and many have limitations on the overall debt burden the state can assume. Even in states without such a limit, the market imposes an effective cap on bond issuance. The table below compares 1992 state debt burden as a percentage of state general revenues in six states with supermajority requirements to the national average for states.

State	1992 Debt Burden as a Percentage of State Revenue
Arizona	35.7
Arkansas	37.4
Delaware	144.1
Mississippi	30.7
Oklahoma	53.5
South Dakota	124.4
National Average	61.4

The data are inconclusive. While Delaware and South Dakota have debt burdens that far exceed the national average, the other states have very low levels of debt. This highlights the problems of the endogenous variable of state fiscal discipline. States with a preference for supermajority requirements are likely to favor relatively low debt levels as well. It is therefore hard to extract the effect of the supermajority requirements.

Louisiana has engaged in the most varied attempts to try to undercut the supermajority limitation. The most interesting of these was the six year saga of the Louisiana Recovery District. The recovery district was former Gov. Buddy Roemer's solution to the 1988 fiscal crisis. The district was formed to borrow about \$1 billion to cover a deficit in the state's operating budget. Proceeds from recovery district bonds were used to balance the budget three years in a row. The original enabling legislation gave the district the authority to impose a sales tax to pay off these bonds. In 1993, by less than a two thirds margin, the legislature authorized the recovery district to waive a sales tax exemption on certain items, effectively imposing a new tax. The vote was a last ditch solution to another fiscal crisis when the legislature was unable to obtain a 2/3 majority for a direct tax increase.¹²⁰ While these maneuvers successfully balanced the budget, they caused tremendous political heat, and led to a 1994 constitutional amendment abolishing the district and imposing a 2/3 vote of the legislature to create a similar institution in the future.¹²¹

Louisiana combined this attempt with another means of "evading" the provision. Traditionally Louisiana has renewed a number of sales taxes on a year to year basis. However, in an attempt to avoid the difficulty of repeated approval, they began to provide a two year cycle for these taxes.¹²² While this does not evade the provision in the sense that the legislature could make these permanent at any time, a variation from tradition in this way does undermine the intent of the requirement. A federal supermajority mandate would likely lead to the transformation of several tax provisions that are now "temporary" into more permanent measures.

In the end, legislatures can evade the supermajority requirements only if they are interpreted narrowly. Arizona, for instance, has interpreted it broadly. Bills were even held up that simply increased civil penalties, including one that mandated DWI violators pay for emergency response services.¹²³ Drafting a provision that strikes a balance between this type of problem and those presented

¹²⁰The district also flaunted other constitutional provisions, including a prohibition on covering operating deficits with borrowing. Jack Wardlaw, *Keeping the State in Business for the Next Fiscal Year*, NEW ORLEANS TIMES-PICAYUNE, June 6, 1993, at B7.

¹²¹ Ed Anderson & Jack Wardlaw, *Amendments Pass Amid Poor Turnout*, NEW ORLEANS TIMES-PICAYUNE, Oct. 2, 1994, at A12.

¹²²Jack Wardlaw, *Taxes on Food, Utilities Are Renewed by House*, NEW ORLEANS TIMES-PICAYUNE, Apr. 24, 1992, at B8.

¹²³ Mary K. Reinhart, *Legal Questions Cloud 'Supermajority' Tax Initiative*, ARIZ. DAILY STAR, Feb. 8, 1993, at A1.

when the legislature can simply enshrine automatic tax increases into the code is extremely complicated.

IV. REVENUE CAPS

Supermajority requirements are not the only way that legislatures entrench a revenue structure. Nine states¹²⁴ have adopted revenue caps, which directly limit the size of the government. Money collected in excess of the limit cannot be spent and, as will be discussed below, must be returned to the public in some way. Part discussed the two potential goals of supermajority requirements: limiting government and entrenching a particular set of policy preferences. Revenue caps differ from supermajority requirements primarily in that they are only aimed at the first goal. All caps do is limit government. In this way, while they have their own particular problems, revenue caps are more straightforward and are easier to analyze. Having only one goal means that their problems are more transparent.

First, the author considers what states do when excess revenue comes in. Any revenue cap needs to deal with this contingency, but must do so in a way that the refund mechanism used is not simply a proxy for spending. Here the lessons for a federal revenue cap are somewhat disheartening. While political pressures have constrained legislative behavior, the formal mandates of the refunds provisions have generally not affected the way money is returned to constituents. Next, the author considers how states have defined what is, and what is not, revenue. The problems the states have faced are significant, but are small compared to the definitional issues arising from a federal revenue limit.¹²⁵

A. Returning Surpluses

For tax supermajority requirements, once the definitional problems are solved, enforcement is not very difficult. Bills passed in violation of the mandate are invalid. In contrast, even after courts and legislatures have decided what is

¹²⁴California, Colorado, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Missouri, and Washington.

¹²⁵The constitutionality of a revenue cap is an open question. While the imposition of a statutory maximum would likely pass constitutional muster, finding an officer who can enforce such a cap if Congress were to step over the limit is difficult. Obviously, judicial enforcement would face the same political question issues that arise in the supermajority context, see *supra* note 31. *Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986) makes clear that neither the Comptroller General nor any other "Congressional" officer can have the power of rescission.

"revenue," the question of what happens if excess revenue is collected remains open. Here too the issue is how much discretion future legislatures retain. When legislatures are left unrestrained in how they handle surpluses, the process turns highly political with legislators attempting to use various refund methods to gain popular support. However, even when rules restrain the refund process, the legislators retain the ability to "refund" the surplus through pre-emptive tax cuts. While few states have been through the refund process, the restraints seem to matter little. Just last year, in Colorado, which lacks restraints, the surplus was returned through the simplest possible method: in rough proportion to income tax liability. However, in Missouri, which requires surpluses be returned in proportion to income taxes, the state adopted non-income tax cuts to achieve other policy goals.

Colorado and Missouri, along with 42 other states, have accumulated substantial surpluses this year.¹²⁶ Colorado's constitution does not mandate how the money should be returned.¹²⁷ The plan the legislature adopted provides that those with an income under \$15,000 receive a \$37 refund, from \$15,000 to \$100,000, the refund was \$60, and over \$100,000, it was \$80.¹²⁸ The state considered several alternative suggestions. The governor strongly supported a public referendum to keep the money for education or transportation.¹²⁹ The most competitive counter-proposals involved tax cuts. One was a retroactive reduction in income tax rates,

¹²⁶ Michelle Johnston, *State Revenue Surplus Spurs Talk of Tax Cuts*, DENVER POST, Sept. 25, 1997, at A1.

¹²⁷It does state that refunds need not be proportional when prior payments are impractical to identify and return. This language could be interpreted as requiring proportional returns when the income tax produces the surplus revenue, but not when the sales tax does. The Colorado legislature, however, does not seem to have read this language as binding their actions at all. Governor Romer refused to permit the special session of the legislature to discuss the creation of a permanent refund mechanism. Thomas Frank, *Tax Refund Tug of War Shaping Up*, DENVER POST, Sept. 4, 1997, at B1. This probably was a political decision; Republicans dominate the Colorado legislature and Romer is a Democrat.

¹²⁸Editorial, *A 'Marriage Bonus' Refund*, ROCKY MOUNTAIN NEWS, 10/27/97 at 38A. The legislature actually ended up returning \$3 million more than was required.

¹²⁹Genevieve Anton, *Refund Talk Has Bruce Smiling*, COLO. SPRINGS GAZETTE, Oct. 19, 1997, at A1. The state has never run a referendum on whether to keep surpluses, but 70% of Colorado's local governments have. These referenda tend to give specific spending priorities on which the surplus will be spent, most commonly education. When municipalities ask to keep money, they are allowed to retain the money 92% of the time. *Id.* This indicates that the broad public support for supermajority requirements is somewhat suspect. Voters may be more concerned over government waste than the size of government and frequently support spending when they know where it is going.

which would have produced a result somewhat similar to the one finally reached.¹³⁰ The other was a midyear tax rate cut to avoid accumulating a surplus.¹³¹ This suggestion, along with the actual refund, largely ignored taxes other than the income tax.¹³² While not proposed, the constitution does not prevent refunds to particular members of the public: Colorado could have "refunded" the money by distributing it to particular citizens.¹³³ However, political pressures forced them toward something approximating an income tax refund.

Missouri's "Hancock Amendment" does have a constitutionally compelled method of refund return. Surpluses must be returned pro rata, based on the taxpayer's state income tax liability. Despite this, the state avoided the restriction on refunds.¹³⁴ The governor attempted to get voter approval to spend the money on transportation infrastructure but failed. Instead, the legislature avoided

¹³⁰Michelle Johnston, *Surplus Solutions Offered*, DENVER POST, July 25, 1997, at B3. Several other plans were advanced, some serious, some frivolous. One legislator proposed giving the refund only to voters. John Sanko, *Legislator Suggests Tax Refund Only Go to Voters*, ROCKY MOUNTAIN NEWS, Oct. 7, 1997, at 4A. A flat refund to all citizens was proposed by the drafter of the revenue limitation amendment, but was quickly rejected. John Sanko, *Bruce Calls Special Session a Waste*, ROCKY MOUNTAIN NEWS, Oct. 24, 1997, at 43A. He also noted an ironic wrinkle. The refund adopted by the legislature is probably taxable by the federal government since it is tied to adjusted gross income, and therefore looks like a return of state and local income taxes which were deductible. A flat refund would look more like a refund of sales taxes, which would not be subject to federal tax. *Id.*

¹³¹Johnston, *supra* note 126, at A1. Ironically, the limitations of the amendment may have scared off the tax cut solution. There was substantial concern that bringing taxes back up would require voter approval, even if the tax cut was explicitly temporary. Editorial, *It's Time For a Tax Cut*, ROCKY MOUNTAIN NEWS, Sept. 15, 1997, at 39A.

¹³²This problem was noted, but was never adequately resolved. Genevieve Anton, *Refund Option Trimmed*, COLO. SPRINGS GAZETTE, Oct. 21, 1997, at A1.

¹³³Any direct transfer program could be replaced by tax refunds.

¹³⁴Missouri has been running surpluses for three years to a total of \$700 million. None of this money has been returned yet. Scott Charton, *Swollen Coffers are Headache for State Officials*, ST. LOUIS POST-DISPATCH, Oct. 19, 1997, at 6C. A state Supreme Court equal protection challenge attacking the constitutionality of a refund system based on income tax liability has prevented the distribution of the refunds from the previous two years. The Court found this refund plan constitutional in December. *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100 (Mo. 1997). This money is now being returned in proportion to income tax liability. Bill Bell, Jr., *Court Clears the Way for \$695 Million in Missouri Tax Refunds*, Dec. 24, 1997, ST. LOUIS POST-DISPATCH, at A7. However, it is not clear that the legislature would have allowed this default provision to kick in had the suit not occurred. Certainly, the 1997 experience indicates that they might have tried to subvert the mandate.

accumulating a surplus in two ways. First, the state cut the sales tax on food by 3%, returning \$250 million.¹³⁵ This method was selected over a wide variety of other tax proposals, in part because the tax on food was viewed as regressive.¹³⁶ A second, \$100 million, tax cut has been proposed. It provides a refundable income tax credit for some portion of local property tax payments.¹³⁷ Missouri's system is formally more constrained than Colorado, because it either leads to tax cuts or actual refunds, but it is not clear that the framers of the Missouri revenue cap would have approved. The constitutional mandate demonstrates a clear preference for income tax cuts over sales tax cuts. The property tax cut is essentially a transfer from state taxpayers to property owners. These refunds may not be wrong normatively, but they certainly indicate that the legislature did not feel constrained by the constitutional requirement.

Whether or not they are written into the state constitution, revenue limits vary in another respect. Hawaii, California and Washington do not restrict revenues directly. Instead, they restrict state expenditures and provide methods for distributing excess funds in the state general fund. These effectively provide a revenue limit by eliminating the state's discretion in how much they spend and how they handle unspent revenues. These in theory can have the same general form as pure revenue caps but, in practice, have one significant difference. These three states are much slower to mandate refunds. The states with pure revenue limits tend to mandate that any surplus must be immediately returned to the taxpayers.¹³⁸ California divides the surplus: 50% of the money is placed in a stabilization fund and 50% is returned as refunds. Hawaii provides an even higher barrier for refunds. The year end surplus must exceed 5% of state revenues before a refund is required.¹³⁹ Despite this, Hawaii regularly provides refunds. In 1990, Hawaii provided each taxpayer a \$60 refund per personal exemption. In each year from 1991-95, the state gave a refund of \$1 per personal exemption.¹⁴⁰ Similarly, Washington does not mandate that surplus revenues be returned, but instead targets them toward education construction. Despite this, the money has not been spent that way. The provision has not restrained the legislative stampede toward tax

¹³⁵Jerry Heaster, *Credit for Tax Cut is Hancock's*, KANSAS CITY STAR, Oct. 11, 1997 at B1.

¹³⁶Editorial, *Down the Home Stretch*, ST. LOUIS POST-DISPATCH, May 11, 1997, at B2.

¹³⁷Will Sentell, *Missouri Considers Property Tax Cut*, KANSAS CITY STAR, Dec. 2, 1997 at A1.

¹³⁸Florida is the exception, feeding its surplus to the budget stabilization fund until it reaches its limit, and then providing distribution of tax refunds.

¹³⁹Even then, it is not clear how much of the surplus must be returned. They probably only have to return enough to reduce the surplus down to the 5% level.

¹⁴⁰1990-1995 HAWAII SESSION LAWS. This gives Hawaii the distinction of being the only state to provide a flat refund.

cuts.¹⁴¹ The experience in these states¹⁴² indicate that limiting the refund mechanism is not a successful way to constrain legislative discretion over how a refund will be distributed. The cap does, however, remove additional spending from the list of options.

One reason for this may be a lack of judicial enforcement. Missouri and Colorado seem to foresee court activity as one means of enforcing the provision, since they provide for the possibility of obtaining attorney's fees by successful plaintiffs. Even with this provision, the only Colorado case is *Havens v. Board of County Commissioners*.¹⁴³ The plaintiff challenged a local government's referendum which allowed the county to retain and spend the revenues. The issue was whether the county was required to reduce future revenues to offset these retained funds. The court rejected this interpretation, reading the county's obligation as either refunding the money or gaining voter approval to keep it. While this case does show some interest in judicial enforcement, it does not indicate whether the court is willing to calculate state revenues and evaluate whether the legislature is violating the limit or whether the court might mandate a particular refund mechanism.

The Missouri court refused an opportunity to make that determination. In *Dirck v. State*,¹⁴⁴ several taxpayers sued, alleging they were owed refunds because the state violated the revenue limit. The majority opinion rejecting the claim on ripeness grounds is only two sentences long and provides little guidance. The dissent also does not make clear why the majority found the issue not "ripe for adjudication." However, the Missouri court has been willing to interpret various sections of the amendment and tell the state whether or not certain items should be included in "total state revenues."¹⁴⁵ *Dirck* may indicate that the court is willing to decide what should be counted but not whether the state was over the limit.

¹⁴¹ Keri Murakami, *Use Budget Surplus for Schools, Says Commission*, Seattle Times, Jan. 8, 1995, at B1.

¹⁴² Michigan does not seem to be facing the surplus issue this year. The Michigan provision is identical to Missouri's: a surplus must be returned proportionate to income liability. Michigan did have a surplus in 1995 which they returned in two ways. \$113 million was returned through this type of pro rata refund. Another \$91 million came back to the taxpayers through a permanent increase in the personal exemption. Peter Luke, *Michigan Taxpayers are in Line for a Rebate Next Year*, GRAND RAPIDS PRESS, Dec. 5, 1995 at A1. ¹⁴³924 P.2d 517 (Colo. 1996).

¹⁴⁴665 S.W.2d 615 (Mo. 1984) (per curiam).

¹⁴⁵ *Buechner v. Bond*, 650 S.W.2d 611 (Mo. 1983).

Michigan's case law has also focused on what should be counted; the major issue that has arisen is the definition of what constitutes a transfer of obligations to a local government which leads to a lowering of the revenue ceiling.¹⁴⁶ Michigan has had one case that indicates the courts may enforce the revenue ceilings directly. *Grosse Ile Comm. for Legal Taxation v. Township of Grosse Ile*¹⁴⁷ involved a challenge to a local government property tax structure. The plaintiffs claimed that the local government had exceeded the allowable property tax rate provided in a different section of the constitution. The court held that jurisdiction was appropriate, and that the plaintiffs had standing to sue, and remanded the case to the Tax Tribunal for a determination of whether the county actually exceeded the limit. This may signify a willingness on the part of the court to enforce the Headlee Amendment directly if the issue arises.

The most effective restraint on legislators in the surplus realm is probably political. While specific refund mandates do not seem to have an effect on what the states actually adopt, no legislature has attempted any steps that are particularly unusual.

B. Defining Taxes: What's In; What's Out

Before the legislature gets to decide how to spend the money it collected in excess of the limit, it needs to know where the limit is. States have selected a variety of mechanisms to determine what ceiling should cap revenue. First the author analyzes the general decisions that have been made, then the author considers the one specific question from Part II that survives in the revenue cap context: how unfunded mandates are treated. Finally, the author examines the consequences when states try to combine supermajority requirements with revenue caps.

1. Counting revenues

Arizona and Colorado exempt far more types of "revenue" from its calculations than Missouri and Michigan. Missouri and Michigan only exclude funds received from the federal government and revenue increases due to a shift in responsibility for programs. Colorado, however, excludes refunds, which presumably were counted in a previous year, gifts, federal funds, collections from another government, pension contributions and pension fund earnings, reserve

¹⁴⁶See, e.g., *Schmidt v. Department. Of Educ.*, 490 N.W.2d 584 (Mich. 1992).

¹⁴⁷342 N.W.2d 582 (Mich. Ct. App. 1983).

transfers, damage awards, and receipts from property sales.¹⁴⁸ Arizona includes a similar, even more extensive, list of exceptions.¹⁴⁹ Arizona excludes income from bonds sales from state revenues, presumably as an analogy to the exclusion of loans from gross income under the federal tax code: The bonds come with an associated debt. Colorado includes bond income, but provides a "deduction" in the year the bond is repaid.¹⁵⁰ Arizona also excludes interest and dividend income from investments.

Colorado's constitution excludes all money received from the federal government and the Arizona Attorney General has interpreted its Constitution in the same way.¹⁵¹ Finally, while Colorado excludes pension plan funds, it does not exclude money paid into the unemployment fund. Arizona excludes unemployment monies, but does not explicitly exclude pension plan funds. However, Arizona does leave out of revenues all money "received by the State in the capacity of trustee, custodian, or agent," which likely includes pension plan funds.

Drawing up a federal list of exceptions would be trying. The exceptions fall into three general categories. First, they exclude revenues that come with an obligation: income from the sales of bonds, unemployment insurance payments, money collected for cities and counties, and income received as trustee. Second, non-recurring income is left out: gifts and money from the sale of property (excluding interest and dividend income also fits into this category, although not cleanly). Third, money that has already been included in revenue: transfers from other state agencies and refunds from previous years. Each of these categories would be far more complicated at the federal level, but the first is easily the hardest and largest. Determining which social policy programs would be viewed as coming with a corresponding obligation would be difficult and politically charged.

2. Unfunded Mandates

The states that impose revenue caps, rather than supermajority requirements, have attempted to restrict the ability of the state legislature to require that localities provide particular services. The experience in these states provides

¹⁴⁸COLO. CONST. Art. 10 § 20(2)(e).

¹⁴⁹ARIZ. CONST. Art. 9 § 17(2).

¹⁵⁰COLO. CONST. Art. 10. § 20(7)(d).

¹⁵¹Ariz. Op. Atty. Gen. No. I78-283 (1978). All federal funds transferred to the state, including the federal share of all matching programs, are excluded.

lessons for a federal requirement.¹⁵² The requirements that are in place in various states tend to limit the ability of the state to place additional burdens on local governments, either by reducing the revenue ceiling by any amount shifted or by simply forbidding the creation of unfunded mandates. The most effective provisions seem to be the second type, giving substantial power to localities to resist new burdens.

Most states with revenue caps exert some limitation on the power of the state to pass unfunded mandates requiring localities to pick up what were formerly state obligations.¹⁵³ Florida and California have the most straightforward restrictions. Florida reduces the revenue ceiling by an amount equivalent to the reduction in responsibility and increases it for any increased obligation.¹⁵⁴ California follows a similar approach. While it does not have a revenue cap per se, California combines an expenditure limit with a requirement that surpluses be refunded. The expenditure ceiling is adjusted for any transfer of responsibility.¹⁵⁵ While these structures would seem to be an invitation for litigation, particularly on the question of how to evaluate the "cost" of a responsibility transfer, no cases have

¹⁵²Of course, some states without revenue caps have also limited the power of the legislature to devolve. While this experience can be instructive, the difference between states with and without the requirements is substantial, since the legislature faces much less temptation to devolve when political pressure serves as the only restraint on their ability to fund new services themselves.

¹⁵³Three states with revenue caps do not limit the legislature's power to create unfunded mandates. Massachusetts alters its revenue cap, but does not do so based on responsibility transfers. The ceiling is lowered by any delegation of taxing authority to localities. MASS. GEN. LAWS ch. 62F §4 (1998). This provision thus does not restrict unfunded mandates, but is instead specifically targets the size of government. The effect is to cap total revenue intake by all levels of government. As written, the provision has a ratchet effect. If the state reduces the taxing authority of smaller governmental units, its revenue cap does not increase. This provision also has not appeared in the case law, also perhaps because there is not a pool of plaintiffs available who have a financial interest in challenging potentially unconstitutional state activities. Hawaii and Louisiana are the only states that do not attempt to reflect shifts of responsibility in their revenue caps. Hawaii does not have a standard revenue cap; the constitution limits the growth rate of expenditures to that of the state economy and requires that budget surpluses be refunded. HAW. CONST. Art. 7 §9. Unlike California, which has a similar provision, the expenditure growth rate is not reduced by shifts of responsibility for programs. Louisiana's statutory cap on revenues also does not limit these transfers. LA. REV. STAT. ANN. §5001 (1998). Of course, there has been no litigation on the effect of these provisions.

¹⁵⁴FLA. CONST. Art. 7, § 1(e).

¹⁵⁵CAL. CONST. Art. 13(B) § 3.

arisen in either state. While these might provide good models for a federal revenue cap, the structure does not easily transfer to a supermajority requirement.

However, four states have even stronger restrictions on the ability of the legislature to evade revenue cap requirements by creating unfunded mandates, and these do provide a model for federal legislation. Missouri and Michigan, whose constitutional provisions are identical, prohibit either the statutory creation of new local obligations without funding or the reduction of the proportion of funding the state provides for activities it requires of counties.¹⁵⁶ If either a constitutional amendment or court order transfers obligations between state and local governments, then the revenue caps are adjusted to reflect this change.¹⁵⁷ Washington's statutory revenue cap is similar to the constitutional versions in Missouri and Michigan. If the cost of any state program or function is shifted from the general fund to another funding source, expenditure and revenue limits are adjusted.¹⁵⁸ Additionally, any new programs imposed on localities must be fully funded.¹⁵⁹

Like the provisions in California and Florida, the adjustment of the revenue caps have not received much attention from the courts in these states.¹⁶⁰ However, the prohibitions on unfunded mandates have been the subject of extensive and ongoing litigation and expose the primary danger behind simply prohibiting unfunded mandates. State governments can be held liable for large and highly unpredictable amounts.¹⁶¹ Just last year, the Michigan Supreme Court reversed a

¹⁵⁶ MO. CONST. Art. 10, § 18(d); MICH. CONST. Art. 9 § 29.

¹⁵⁷ MICH. CONST. Art. 9 § 26; MO. CONST. Art. 10 § 16.

¹⁵⁸ WASH. REV. CODE §43.135.035 (1998).

¹⁵⁹ *Id.*

¹⁶⁰ The difference in the amount of litigation over bans on unfunded mandates compared to those provisions which simply alter revenue caps based on responsibility transfers may turn on the availability of relief. In states that simply adjust their revenue ceilings, no plaintiff has a clear interest in suing. The individuals most likely to file suit are members of the legislature who opposed the responsibility shift. While they have a political interest, they do not have a financial motivation to sue. Counties are unlikely to appear as plaintiffs, and may not even have standing, since they will not get an injunction against the shifted obligation. In states where unfunded mandates are flatly prohibited, though, localities can get the requirement lifted and may receive back funding for the time the obligation was in place. *See, e.g., Durant v. State*, 566 N.W.2d 272 (Mich. 1997)

¹⁶¹ The Missouri, Michigan and Washington Supreme Courts have attempted to provide some limitation on legislative liability. The Michigan Court has rejected the most expansive reading of the constitution, holding that the state need not continue to provide funding if the program is optional. *Livingston County v. Department of Management and Budget*, 425

summary judgment order in favor of the state in a case claiming that the state was under-funding county foster children programs,¹⁶² and imposed multi-billion dollar liability on the state for failing to fund special education programs.¹⁶³ Like Michigan, the Missouri Supreme Court has been willing to enforce this provision vigorously. In 1992, the legislature attempted to expand special education programs to three and four year olds and to impose part of the costs of the new program on localities. The Missouri Court enjoined the expansion and rejected the state's argument that unrestricted education funds provided by the state should count as a form of "offset" to the unfunded mandate. The Missouri Legislature is now required to provide a specific itemized appropriation for every new mandate placed on a local government.¹⁶⁴

Washington's cases have arisen primarily in the criminal arena. In *State v. Howard*,¹⁶⁵ the court imposed the costs of indigent criminal defense upon the state when the Attorney General, rather than a local prosecutor, initiates the prosecution. The Washington Court, in holding the state responsible for an expansion of a domestic violence prevention program, has also refused to limit the requirement to shifts involving programs "traditionally managed" by the state.¹⁶⁶ This approach is certainly the most consistent with the language of the constitution, yet it means that a wide variety of activities are technically unfunded mandates. For instance, every time the legislature passes a statute expanding criminal penalties, it is responsible for additional funding.

The presence of substantial litigation on these issues might indicate that these provisions are substantially constraining state behavior. However, it is

N.W.2d 65, 72 (Mich. 1988). Missouri has adopted the same view of its constitution, and provides a de minimis exception.. *County of Jefferson v. Quiktrip Corp.*, 917 S.W.2d 487, 491 (Mo. 1995) (en banc). *City of Seattle v. State*, 666 P.2d 359 (Wash. 1983), the first Washington case examining the unfunded mandates provision, limited the restriction to mandates imposed by the state legislature, holding that the legislature need not fund a program established by a new court rule. Furthermore, at least in Missouri and Michigan, monetary relief is supposed to only be an extraordinary remedy, even though it has been awarded. See e.g., *Durant*, 566 N.W.2d at 272; *Rolla 31 School District v. State*, 837 S.W.2d 1, 7 (Mo. 1992)(stating that "[t]he legislature does not insure the constitutionality of its actions"). Washington has not been reticent about awarding costs, and seemed to assume that a monetary award was a matter of course.

¹⁶² *Oakland County v. State*, 566 N.W.2d 616 (Mich. 1997).

¹⁶³ *Durant*, 566 N.W.2d at 272.

¹⁶⁴ *Rolla 31 School District v. State*, 837 S.W.2d 1, 7 (Mo. 1992).

¹⁶⁵ 722 P.2d 783 (Wash. 1985).

¹⁶⁶ *City of Tacoma v. State*, 816 P.2d 7 (Wash. 1991).

noteworthy that *all* of the cases involve expansions of state programs to provide a wider range of services. These were not situations where a state is attempting to evade a pre-existing obligation that became too expensive to administer. Of course, the requirements may mean that state legislatures do not even attempt to shift programs *in toto*, since that would clearly violate the mandate. Whether states would take such a step even absent these constitutional requirements is an open question, because localities do have some political power to fight such changes.

Rather than limit the power of the state to pass unfunded or underfunded mandates, Colorado empowered the localities. Except for public education and federal mandates, districts have constitutional authorization to stop supporting programs even if the general assembly delegated the program to them.¹⁶⁷ While shifting responsibility for a program may place a local government in a difficult ethical and political situation, they are legally able to decline to take the obligation. Under two recent Colorado cases,¹⁶⁸ though, the continued viability of this provision is in question. Both cases turn on the use of the word "subsidy," a term not given a definition in the constitution. *Mesa* prevented counties from refusing to provide funding for courthouse security and *Weld* held that a county cannot stop paying its required 20% share of welfare support.¹⁶⁹ The cases point out that the state creates counties and thus exist only as subdivisions. Therefore payments made from the county on the order of the state cannot be subsidies, since a government cannot subsidize itself. While clever, this logic eviscerates the provision, since all cities and counties are state creations. There has not been further litigation on attempts to reduce local government subsidies. This type of voluntary "opt-out" provision has the advantage of providing a choice to localities whether to accept or reject the program. If localities feel that a program is unfunded, the simple threat to stop paying may force the legislature to act without litigation. Whereas in states without such a provision, litigation is almost inevitable. Either the locality will sue for funding or the state will sue when the locality stops paying.

Unfortunately, the empirical data available is not adequate to determine whether these various provisions are limiting the creation of unfunded mandates.

The data on local government revenues I have been able to find is, at best, sporadic. Even if consistent aggregate data were available, it might not answer the question adequately. Most of the changes are likely to be small compared to the overall level of spending. States may be increasing counties' shares of programs

¹⁶⁷ COLO. CONST. Art. 10 § 20(9).

¹⁶⁸ *State ex rel. Norton v. Board. Of County Comm'rs*, 897 P.2d 788 (1995); *Romer v. Bord of County Comm'rs*, 897 P.2d 779 (1995).

¹⁶⁹ *Mesa*, 897 P.2d at 791; *Weld*, 897 P.2d at 782.

by five or ten per cent, which would not necessarily show in the overall data. At a minimum, though, the lesson from the states on restrictions on unfunded mandates is that, while important, these restrictions present substantial dangers.

3. Combining Revenue Caps and Supermajority Requirements

Adding a supermajority requirement on top of a revenue cap constrains the state's discretion in two significant ways. First, revenue limits implicitly accept shifting among different tax types as long as the cap is not exceeded, while the supermajority requirement prevents it. However, it is not evident that the voters enacting these provisions recognize this. Missouri adopted its supermajority requirement for tax increases in 1996 on top of its 1980 Hancock Amendment imposing a revenue limitation. One primary argument in favor of the 1996 provision was that a large increase in income taxes in 1993 had, in part, caused a current surplus leading to a sales tax cut. However, the tenor of the campaign was much more "anti-tax" than "anti-tax shifting."¹⁷⁰ Similarly, Florida adopted its supermajority mandate in 1996, two years after adopting a revenue limit. The revenue limit was presented as a reason the supermajority requirement was unnecessary. Here too, though, the focus of the campaign was on restricting taxes rather than locking in the current distribution across tax types.¹⁷¹

Second, supermajority requirements limit the state's options when surpluses occur. The combination could have one of two effects on tax cuts. States with both provisions may have stronger anti-tax sentiment. This may lead legislators to take any opportunity to cut taxes which is presented to them. Or their fear of the difficulty of raising taxes might discourage cuts, leading legislators to prefer refunds. At least in some states, the combination has acted as an obstruction to tax cuts when a surplus exists. Colorado's government knew in advance that receipts were running ahead of spending and in fact accumulated a significant surplus this year. A primary reason that an income refund was preferred over preemptive tax cuts was the possibility that voter approval would be necessary to bring taxes back up.¹⁷² However, most states have not been deterred from tax cuts based on the difficulty of raising them again. Missouri has adopted tax cuts, as have both California and Washington. There has not seemed to be a preference in those states toward tax refunds over tax cuts. Both options are on the table and are not

¹⁷⁰Jo Mannies, *Amendment 4 Ads Carry a Lot of Baggage*, ST. LOUIS POST-DISPATCH, Mar. 27, 1996, at B5.

¹⁷¹Diane Hirth, *State Tax-Cap Amendment Has Dole's Support*, FT. LAUDERDALE SUN-SENTINEL, Nov. 3, 1996, at A17.

¹⁷²Editorial, *supra* note 131, at 39A.

discussed with reference to the supermajority requirement. Florida and Louisiana have not yet had the opportunity to distribute surpluses under their provisions.

V. CONCLUSION: ENTRENCHMENT

Since a supermajority Rule has been enacted and more stringent supermajority legislation has been seriously discussed, while a federal revenue cap has only been mentioned in passing, the most likely outcome at the federal level is a supermajority requirement designed to reduce the size of government. The experiences of the states is complicated but instructive for designing federal restrictions on revenues. First, it seems to matter little whether the limitation is imposed by statute or by amendment. Second, Congress needs to draw a clear line between taxes and fees in the supermajority context, since the existing federal precedent on the issue is not helpful. If Congress' goal is to keep the size of government down, taxes should be defined broadly and fees narrowly. Third, Congress needs to be aware of the danger of locking itself into a particular tax distribution. A supermajority not only limits the size of government, it limits Congress' ability to rearrange the burden of government among different taxpayers. Finally, the states' experiences with evading these revenue caps should give Congress pause about trying to limit the size of government through a supermajority requirement. Before taking any steps, Congress needs to decide why it is imposing a limitation. If the aim is to entrench a particular set of policies, a revenue cap would be ineffective and a supermajority requirement is the only option. If the goal is to keep the size of the federal government down, as most of the debate seems to indicate, a revenue cap is probably better suited to that objective, despite the definitional problems that arise in the refund context.

Congress' flexibility on the spending side of fiscal policy has been substantially limited over the last three decades. Formal caps on discretionary spending have been imposed repeatedly since the 1990 budget act, and the percentage of the federal budget available for discretionary spending has also plummeted through two informal entrenching measures. First, the tradition of deficit spending has increased the proportion of the budget dedicated to interest payments on the national debt. Past spending decisions became entrenched in the most direct way possible. Past legislatures spent money they did not have to further those interests. Second, the percentage of federal funds dedicated to entitlement spending has consistently gone up. Perhaps unintentionally, the promises made through Social Security and Medicare have combined with demographic changes to politically entrench a particular set of (primarily pro elderly) policy views into the fiscal environment.

Supermajority requirements and revenue caps are the first attempt to formally entrench policy preferences and limit legislative discretion on the revenue side of the fiscal equation. Informal requirements, especially perceived political costs, have restrained tax behavior for a long time, but formal mechanisms being implemented in the states and proposed for the federal government are very different. While designed to achieve a specific set of policy goals, they often constrain legislative behavior in a variety of unintended ways. The lessons from the states provide guidance about how to attempt to shape revenue limitations that do only what they are supposed to do, whether it is limit the size of the government or solidify a particular set of policy compromises.

