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## A “SUPER” BAD IDEA: Requiring a Two-thirds Legislative Supermajority to Raise Taxes Protects Special Interest Tax Breaks and Gives Budget Veto Power to a Small Minority of Legislators

By Nicholas Johnson

### Summary

Enactment of state legislation normally requires approval by a majority vote in each house of the legislature plus the governor’s signature. Anti-tax activists in Kansas, however, are proposing to require a *two-thirds* supermajority vote of each house of the state legislature plus the governor’s signature in order to enact any bill that includes a tax increase.

Such a supermajority requirement would be deeply flawed.

- Tax breaks, even those narrowly targeted to special interests that fail to serve the public interest, would gain additional protection under the amendment because ending the tax break would be considered a “tax increase.” In addition, tax breaks enacted at the federal level that automatically lower Kansas taxes, even those that do not benefit Kansas residents, would be extremely difficult to remove from the Kansas code because their removal would be considered a tax increase subject to the two-thirds vote requirement.
- A supermajority requirement would increase the power of a small minority of legislators. In years in which a tax increase is necessary to balance the budget – for example, because of a recession, natural disaster, or other unforeseen circumstance – a small number of Kansas legislators in either house (42 of 125 representatives, or 14 of 40 senators) could prevent the majority from enacting a balanced budget. This minority could use its veto power to extract special favors or projects; evidence from other states such as California suggests that a supermajority requirement increases pork barrel spending. Or they could effectively shut down the budgeting process if their demands were not met.
- A supermajority requirement would have its largest impact during economic downturns. Kansas is required to balance its budget each year. During a recession, when state budget deficits must be closed, the most evenhanded way to do so usually involves a mix of

expenditure cuts and tax increases. Excluding revenue increases as a budget-balancing strategy would make the task of balancing the budget much more difficult, and would necessitate even larger service reductions than would otherwise be required.

- A supermajority amendment would increase uncertainty, and perhaps judicial intervention in state budget decisions. For instance, the dividing line between “tax” increases and “fee” increases is not always clear. The legislature might, for example, balance the budget with what it considered a fee increase not subject to the supermajority rule, only to have a judge disallow the fee increase because it is determined to be a tax that should have required a two-thirds majority – and thereby throw the budget out of balance mid-year.
- Kansas policymakers have historically shown great reluctance to raise state taxes, suggesting a supermajority requirement is quite unnecessary. Tax burdens relative to income in Kansas have changed little in the last 30 years. Like most other states, Kansas cut taxes in the late 1990s and raised them in the early 2000s. But Kansas remains an average-tax state.
- Enactment of a supermajority requirement would move Kansas along a path toward even more restrictive limits on legislative fiscal flexibility and accountability. In several states with supermajority requirements, including Arizona, California, Nevada, Oklahoma, and Oregon, political supporters of the requirement have used it as a steppingstone toward promoting such measures as a Colorado-style TABOR. A campaign for a supermajority requirement becomes merely one step in a multi-year campaign designed to severely restrict the ability of the legislature to meet the state’s needs.

## **The Amendment Would Make It Difficult to Close Tax Loopholes**

The requirement for a two-thirds supermajority would apply not only to measures to raise tax rates but also to measures to reduce or eliminate unproductive tax breaks that have been enacted in earlier years. These so-called “tax expenditures” grant narrow, often unproductive subsidies to powerful special interests, and often persist in the tax code even when they no longer have a valid policy purpose. Such “tax expenditures” can be very valuable for specific individuals, corporations, or industries who lobby for them, but they have the effect of driving up tax rates for everyone else in order to compensate for the lost revenue.

California's experience with a constitutional supermajority requirement for raising taxes bears out this concern. The California Citizens Budget Commission, a distinguished bipartisan panel of business and community leaders formed in 1993 to study the state's budget problems, reported that the state's supermajority requirement "makes it relatively easy to enact tax breaks but difficult to repeal them." The Commission recommended the state Constitution be changed to allow the legislature to narrow or eliminate tax breaks by a simple majority vote, so that it would be as easy to eliminate tax breaks as to create them.<sup>1</sup>

A particular problem might result if Kansas were to enact a tax break that turned out to be far more expensive than originally thought. Such an error is uncommon but far from unheard-of; in

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<sup>1</sup> *A 21<sup>st</sup> Century Budget Process for California: Recommendations of the California Citizens Budget Commission* (Los Angeles, Center for Governmental Studies, 1998).

### **Legal Scholar Warns of Perverse Effects, Including Increased Difficulty in Stanching Unintended Revenue Losses**

At the federal level, a similar two-thirds requirement has been considered and rejected by Congress several times in the last decade. In testimony before the Subcommittee on the Constitution of the House Judiciary Committee on March 18, 1997, Samuel C. Thompson, then Dean of the University of Miami Law School, warned of potential perverse consequences from a constitutional amendment requiring a supermajority vote to raise revenues. Thompson stated:

“[The amendment] will have the effect of making it much harder for Congress to close tax loopholes, because any such legislation could be blocked with a mere 34 percent vote in either house of Congress...

“The core problem with this proposed constitutional amendment is that it would give special interest groups the upper hand in the tax legislative process. Once a group of taxpayers receives either a planned or unplanned tax benefit with a simple majority vote of both houses of Congress, the group will then be able to preserve that tax benefit with just a 34 percent vote in one house of Congress. Thus this amendment would create an unlevel playing field in the tax legislative process.

“Indeed, I believe that if enacted this amendment would become known as the ‘Tax Loophole Preservation Amendment to the Constitution.’”

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Thompson has served in the Treasury Department's Office of Tax Legislative Counsel and has taught tax law at UCLA, the University of Chicago, the University of Miami (serving as Dean of the Law School), Northwestern University, the University of Virginia, and Yale University.

recent years, states as diverse as Arizona and Maryland have made headlines by enacting tax credits that turned out to be far easier to claim — and therefore had far greater impact on the state treasury — than was originally intended when the credit was enacted. (In Arizona’s case, it was a tax credit for low-emission vehicles; in Maryland’s case, it was a tax credit for historic preservation.) Under a supermajority requirement, reversing or tightening up the rules for the credit would require a two-thirds vote. The history in other states such as California suggests that could be difficult to obtain.

Federal tax policy changes could become highly problematic for Kansas under a supermajority requirement; the supermajority requirement could sap Kansas’s ability to make judgments on revenue issues that differ with federal policy. Kansas’ personal income tax and corporate income tax are tied automatically to the federal definitions of adjusted gross income and taxable income. This means that when Congress enacts a measure that reduces the income tax base, it automatically flows through to reduce Kansas revenues, unless Kansas specifically acts to “decouple” from that provision.

For example, the federal government is now phasing-in a tax break known as the “qualified production activities income” deduction. This tax break will have negligible economic benefits at the state level, because multistate corporations can claim the tax break for either in-state or out-of-state investments. But states that conform to it will lose substantial revenue (an estimated \$12 million to \$16 million per year in Kansas, for example). Some 19 states have already chosen to decouple their tax codes from this deduction.<sup>2</sup> In Kansas, however, such an adjustment would

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<sup>2</sup> Elizabeth McNichol and Nicholas Johnson, *States Are Decoupling From The Federal Qualified*

require a supermajority under the amendment, because it would technically be a tax increase. It is not clear why such a federally enacted tax break should enjoy such an extraordinary level of protection.

The federal government is considering new tax breaks to corporations that invest in the portions of the Gulf Coast affected by Hurricane Katrina. As a result, some corporations with Kansas operations that invest in Louisiana, Mississippi or Alabama would receive a break on their federal taxes, and by extension on their Kansas taxes as well. With a supermajority requirement, Kansas lawmakers would find it more difficult to prevent such tax breaks for non-Kansas investments from reducing the services Kansas can afford for its own residents.

### **The Amendment Would Empower a Minority of Legislators**

Balancing a state budget is a challenge, particularly during difficult economic times. A supermajority requirement would make it even harder, because a budget that included any revenue-raising measures could be blocked by just 42 of the state's 125 House members *or* 14 of 40 Senators. This would give unusual level power to a small number of legislators.

The task of persuading two-thirds of each house of the legislator to support tax changes is made still more difficult by the decision by several Kansas legislators to take a "no-taxes" pledge. Americans for Tax Reform, an anti-tax group, reports that as of October 2005, 10 members of the Kansas Senate and 21 members of the Kansas House have signed a pledge to "oppose and vote against any and all efforts to increase taxes."<sup>3</sup> These pledges do not allow exceptions for any circumstances. Were those pledge signers (or a comparable number of pledge signers in a future legislature) to stand by their commitment, a tax increase would require 27 of the remaining 30 senators *and* 84 of the remaining 104 representatives.

### **The Amendment Could Make It Difficult to Finance Transportation Projects**

In Kansas, most highway and other transportation projects are funded through the State Highway Fund, which in turn is funded largely by state gasoline taxes. Kansas gasoline tax rates are not indexed for inflation, but highway-construction costs inevitably rise over time. As a result, gasoline tax rates must be periodically increased just to keep up with construction costs. Kansas enacted gasoline tax increases in 1999 and again in 2002 to pay for highway projects.

A supermajority requirement would make it substantially more difficult to finance road projects, even those with broad support. A small number of legislators in either house of the legislature – for instance, a coalition of anti-tax conservatives and anti-highway environmentalists, drawn from the extremes of the political spectrum – could block measures that otherwise command broad support.

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*Production Activities Income" Deduction*, Center on Budget and Policy Priorities, <http://www.cbpp.org/9-14-05sfp.htm>.

<sup>3</sup> Americans for Tax Reform, "Pledge Signers Update," <http://www.atr.org/content/pdf/2005/oct/101405pr-state-pledge-signers.pdf> (accessed October 20, 2005).

## **The Amendment Could Increase Pressures for Pork-barrel Projects**

The proposed supermajority requirement could result in the expansion of special-interest projects. The two-thirds requirement would empower individual legislators to demand state funding for pet projects in return for agreeing to provide the necessary votes so legislation containing revenue-raising measures could obtain two-thirds support and pass. To be sure, such vote-swapping can occur whether revenue-raising measures require a simple majority or a supermajority. But as the California Citizens Budget Commission noted, the degree of vote-swapping tends to intensify as the level of difficulty needed to obtain the necessary votes to pass a budget increases. The level of difficulty is much greater when a two-thirds supermajority is required.

The Commission found evidence that California's requirement for a two-thirds majority to pass budgets has led to enactment of substantial "pork-barrel" legislation that individual legislators have promoted.<sup>4</sup> Supermajority requirements present legislators with tempting opportunities to threaten to block revenue-raising measures that a majority favors unless the majority accepts various pet projects or programs these legislators are pushing.

## **The Amendment Would Hinder Balanced Budget Decisions During Economic Downturns**

States are required to balance their budgets. As a result, many states cut taxes and expand the provision of public services during economic expansions as their tax bases expand, and many states increase taxes and reduce services during economic downturns as their tax bases shrink. The ability to consider both sides of the budgetary ledger – taxes and spending – gives legislators room to utilize a wide range of strategies in order to best meet the needs of their constituents during good times and bad.

During a recession, when state budget deficits must be closed, the most evenhanded way to do so usually involves a mix of spending cuts and tax increases. Most state governments – including those controlled by Republicans, those controlled by Democrats, and those with mixed party leadership -- follow this approach. In both the economic downturn of the early 1990s and that of the early 2000s, for instance, a majority of states raised taxes as well as reduced expenditures.

Under a supermajority requirement, a budget that is balanced entirely with spending cuts would require only a simple majority of each house of the legislature, while a budget that relies both on spending cuts and on tax increases to achieve balance would require a two-thirds vote of each house. The most likely outcome in a difficult budget year would be a budget in which the entire burden of compensating for the reduced revenues and increases costs that occur during a recession is met through reductions in state services.

Relying entirely on spending cuts to balance the budget would mean that the cuts would be deeper than they would be under a more balanced approach, with likely adverse consequences for public K-12 schools, health care, universities, transportation, and public safety (which are the major spending items in the Kansas budget).

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<sup>4</sup> *Reforming California's Budget Process: Preliminary Report and Recommendations of the California Citizens Budget Commission*, (Los Angeles: Center for Governmental Studies, 1995), pp. 43-47.

## **Supermajority Rules Invite Judicial Intervention**

A supermajority amendment would increase uncertainty and perhaps judicial intervention in state budget decisions. For instance, the dividing line between “tax” increases and “fee” increases is not always clear. A simple majority of each house of the legislature might, for example, balance the budget with what it considered a fee increase not subject to the supermajority rule. A taxpayer might then challenge the fee increase as violating the supermajority rule. At best, such a challenge would throw the validity of the budget into doubt; at worst, a judge could disallow the fee increase and potentially throw the budget out of balance mid-year.

## **Taxes in Kansas Have Been Flat for Thirty Years and Are Average Among the 50 States.**

The argument for a supermajority requirement appears to rest on the premise that an extraordinary rules must be enacted to head off Kansas lawmakers’ predilection for tax increases. In fact, there is no evidence that Kansas policymakers are particularly prone to raising taxes. Like most states, Kansas has cut taxes during economic expansions and increased them during economic downturns. Overall, total taxes in Kansas have changed little as a share of the economy since 1970. This suggests that Kansas lawmakers probably represent the views of their constituents, who appear to desire a reasonable tax burden that is sufficient to pay for adequate public services.

State and local taxes in Kansas have been virtually unchanged as a share of the economy over the last 35 years. Kansas tax collections in 2005 equaled 11.8 percent of personal income, virtually the same level as they were in 1970, 1980, 1990, and each of the last ten years, according to data from the Kansas Department of Revenue.

Kansas presently collects a level of revenue that is average among the 50 states. Using the latest available U.S. Census Bureau data, the Rockefeller Institute of Government finds Kansas has the 26<sup>th</sup> highest level of state and local taxes per capita among the 50 states. Kansas also has the 26<sup>th</sup> highest level of state and local taxes as a share of personal income. (These Census data are recognized widely as the only comprehensive survey of state and local government finances that allows for state-to-state comparisons.) Using a slightly broader measure – total general revenue -- Kansas has the 34<sup>th</sup> highest level of total state and local general revenue per capita, and the 35<sup>th</sup> highest level of total state and local general revenue as a share of personal income.<sup>5</sup>

## **A Supermajority Requirement May Place a State on a Path Toward Even More Restrictive Limitations Such as TABOR.**

A supermajority requirement could move Kansas in the direction of enacting a full-fledged “Taxpayers’ Bill of Rights” or “TABOR” amendment like the one that was enacted in Colorado in 1992. In Colorado, TABOR, has led to declines in funding for K-12 schools, higher education, health and hospitals, among other areas.

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<sup>5</sup> Source: Rockefeller Institute of Government, “State Fiscal Rankings,” <http://rfs.rockinst.org/data/fiscal> (accessed October 21, 2005).

TABOR supporters favor a supermajority requirement if they cannot enact TABOR this year, as a second-best policy. It is tempting to believe that by enacting a constitutional amendment that is not as extreme as TABOR, such as the proposed supermajority requirement, Kansas might in the longer term avert a more restrictive limit such as TABOR. This is not likely to be the case, and in fact the reverse may be true.

The experiences of states like Arizona, California, Nevada, Oklahoma, and Oregon – each of which already has a supermajority requirement to raise taxes – are instructive. In each case, political supporters of a supermajority requirement have been strengthened by their success and have used that additional strength to build momentum for even more restrictive limits. Indeed, three of those states (Nevada, Oklahoma, and Oregon) presently face strong movements to enact Colorado-style TABOR limits. In each of those states, the campaign for a supermajority requirement appears to have been merely one step in a multi-year campaign designed to severely restrict the legislature's flexibility and capacity to enact appropriate tax policies.