

Bills for Raising Revenue: Whittling Oregon's Supermajority Requirement

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In this installment of SALT Policy Pickles, Dobay and Newgard explore the historical, legal, and practical context of one of the most outrageous and unfortunate attempts to circumvent Oregon's rules governing revenue-raising measures.

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There are 17 states that require a higher standard for enacting tax increases than other policy measures.¹ Some states have a supermajority threshold for lawmakers to pass a tax increase, while others require voter approval for a legislative tax to take effect. Equally some of the most beloved

and detested features of state tax politics, these requirements remain a fixture of many state legislatures and are one of those pickles that is more political than legal.

In recent years, lawmakers and funding advocates have exploited workarounds to these constitutional supermajority requirements. Oregon is not an outlier in these developments; however, the gamesmanship behind the scenes to exploit perceived loopholes is arguably among the most egregious examples. In this article, we explore the historical, legal, and practical context of one of the most outrageous and unfortunate attempts to circumvent the rules governing revenue-raising measures. Further, we caution lawmakers and advocates about testing the bounds of these rules.

Analytical Framework of Oregon's Supermajority Requirement

As often as tax controversies arise in Oregon politics, only a few court cases provide guidance on applying the state's constitutional supermajority requirement on bills for raising revenue. And, like most tax litigation, these cases focus on narrow inquiries about the application of the requirement, leaving lawmakers and advocacy groups with a fragmented understanding of the rule. These conditions have unleashed a new willingness in the Oregon legislature to test the bounds of the supermajority requirement, seeking to open the floodgates and eviscerate the voter-approved control over legislative tax increases.

Oregon's Measure 25

In 1995 Oregon lawmakers referred a measure to voters amending Article IV, section 25 of the Oregon Constitution to require the support of at least three-fifths of each legislative chamber to

¹See Jason Mercier, "Protect Taxpayers by Putting Supermajority for Tax Increase Requirements in State Constitution," Mountain States Policy Center, Oct. 23, 2023.

pass bills for raising revenue.² The following spring, voters approved the measure, with 55 percent support.

In addition to Oregon's supermajority clause, the state constitution includes an origination clause, requiring all bills for raising revenue to start their legislative journeys in the House of Representatives.³ Since both provisions contain the identical phrase "bills for raising revenue," the case law encompassing one provision typically carries over to the other.

In the official documents for the amendment, the legislature explained, "Ballot Measure 25 would thus ensure that higher tax rates or new taxes could be passed by the legislature only if there was broad consensus throughout the state on the need for such measures."⁴ As with other supermajority requirements enacted around the country in the 1990s and early 2000s, Measure 25 was an expression of the antitax attitude that had become a significant part of the political landscape of the time.

Bobo v. Kulongoski

The Oregon Supreme Court first analyzed the supermajority requirement in a case involving the legislature redirecting federal Medicaid resources from the general fund to reduce the state's unique kicker refund to taxpayers.⁵ In *Bobo v. Kulongoski*, the court held that the maneuver violated neither the origination nor the supermajority clause, relying on a two-part test.⁶ The court concluded that a measure is only a bill for raising revenue if it collects or brings money into the treasury. If that is not the effect of the legislation, the inquiry ends; if the bill brings money into the treasury, however, the second prong of the test determines whether

the bill contains the "essential features of a bill levying a tax."

Thus, if the effect of legislation is to shuffle money around state accounts and not bring new funds into the treasury, the measure is not a bill for raising revenue subject to the enhanced supermajority requirement. It also must contain the essential features of a tax, although the court left those terms undefined.

City of Seattle v. Oregon Department of Revenue

A decade later, the Oregon Supreme Court had the opportunity to apply both parts of the *Bobo* framework, elaborating on the essential features of a bill levying a tax. In *City of Seattle*, the court considered whether a Senate bill eliminating a property tax exemption for an out-of-state municipal corporation owning an interest in electrical transmission capacity was a bill for raising revenue under the origination clause.⁷

During the 2009 session, lawmakers introduced a measure seeking to broaden the property tax exemption to include domestic electric cooperatives, effectively leveling the playing field by providing the same exemption to all electric utilities. As the bill progressed through the legislative process, the House replaced the contents of the Senate measure to instead eliminate the property tax exemption, and the bill was enacted into law. The Oregon Tax Court ruled that the measure did not run afoul of the origination clause because the measure's contents that bore the revenue effect — eliminating the property tax exemption — effectively originated in the House.

Rather than accepting the tax court's basis for rejecting the taxpayer's claim that the bill violated the origination clause, the Oregon Supreme Court turned to the *Bobo* analytical framework. The court concluded that the measure clearly brought money into the treasury, satisfying the first prong of the *Bobo* framework. However, it determined that the bill did not satisfy the second prong by containing the essential features of a bill levying a tax because it merely regulated the tax base. Consequently, the ruling drastically narrowed the

² See HJR 14 (Or. 1995). Or. Const. Art. IV, section 25 states: "Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue."

³ Or. Const. Art. IV, section 18 states: "Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives."

⁴ See Voters' Pamphlet, Oregon biennial primary election, May 21, 1996.

⁵ If tax collections into Oregon's general fund exceed 2 percent of revenues estimated at the start of the state's two-year budget cycle, the state constitution requires the excess to be refunded to taxpayers. To avoid a higher kicker refund, the legislature specified that the Medicaid funds were set aside to remove them from the calculation of the refund amount.

⁶ See *Bobo v. Kulongoski*, 338 Or. 111, 107 P.3d 18 (Or. 2005).

⁷ See *City of Seattle v. Oregon Department of Revenue*, 357 Or. 718, 731-742, 357 P.3d 979 (Or. 2015).

spectrum of measures subject to the requirements of bills for raising revenue to those directly levying a new tax or increasing the rate of an existing tax.⁸

Changing the Rules of the Game

Until *City of Seattle*, the legislature exercised caution over its tax and revenue measures. If a measure was believed to result in money going into the treasury, Oregon's Legislative Counsel would include an advisory statement informing lawmakers that the bill likely required the supermajority vote. For example, the 2013 legislature considered a measure sunsetting most personal and corporate income tax deductions, following a similar process to that used by the state for tax credits and other expenditures.⁹ In the catchline for the measure, the drafter specified, "providing for revenue raising that requires approval by a three-fifths majority."

City of Seattle also unleashed a wave of creative thinking among tax-friendly advocacy groups and lawmakers seeking to raise revenue for new and expanded public services on a simple majority vote. Although debates over new and higher taxes remain a fixture of Oregon legislative politics, some of the most controversial tax increases now come in the form of tax regulations. The court rulings limiting the application of the supermajority requirement to bills levying a tax with a rate make the politics surrounding tax increases less scary for vulnerable politicians fearful of appearing to favor higher taxes. It is easy to excite opposition over new or higher tax rates, but explaining the intricacies of federal conformity, apportionment, and sourcing is difficult — perhaps impossible — to distill to a bumper sticker.

⁸ Not all the justices agreed in the narrow application of revenue-raising bill requirements. In his concurrence, Justice Rives Kistler, who authored *Bobo*, agreed with the Tax Court holding that the repeal of the exemption effectively originated in the House, which would keep other parts of the constitutional controls intact. He wrote: "In a rate-based system, where the tax rate is set, making property subject to that rate automatically results in its being taxed. It thus becomes more difficult in a rate-based system to say that a bill that increases property subject to tax is not a bill for raising revenue." *City of Seattle*, 357 Or. at 740-741.

⁹ See H.B. 2001 (2013). These advisory statements do not bear any weight on a bill requiring a constitutional supermajority to become law; they merely provide guidance to the legislature on the situations in which a drafter believes the requirement would apply.

There also seems to be newfound willingness in the legislature to test the bounds of the courts' narrow application of the requirements of bills for raising revenue. During the 2023 session, Oregon lawmakers seriously considered a novel legal theory to evade the supermajority requirement to drastically reshape the state's corporate activity tax.¹⁰ Theory proponents believed the courts would accept tax rate increases coupled with an equal amount of tax relief, effectively making the measure revenue neutral, and thus not contravening the supermajority requirement.

Under the theory, advocates asserted that the measure would fail the first prong of the *Bobo* framework because it would not ultimately bring *new* money into the treasury and, thus, end the inquiry. While certainly creative, the notion is unfounded in the case law. If anything, the case law disputes such a claim. In 2019 the Oregon Tax Court explored this idea in a complaint challenging the state decoupling from the federal deduction for qualified business income created in the Tax Cuts and Jobs Act of 2017.¹¹ Judge Robert Manicke explained that the court left open "the possibility that a single bill that imposes a new kind of tax, while abolishing an existing one, might 'raise' revenue, even if the amount collected by the new tax is projected to be less than the amount that would have been collected by the tax being repealed."

In other words, the net revenue effect of a measure that increases rates to pay for new tax expenditures likely would not end the inquiry. In a bill that raises tax rates for one class while creating new tax expenditures for another, the action clearly brings money into the treasury, allowing the state to spend those funds. It is no different than the legislature raising tax rates and allocating the money for general government spending, which nobody disputes would trigger the requirements under the origination and supermajority clauses. Thus, the theoretical measure would not bypass the first prong of the *Bobo* analysis and certainly would not survive the

¹⁰ Oregon's corporate activity tax is a gross receipts tax imposed on businesses with activity, minus a select few exclusions, exceeding \$1 million. The tax was enacted during the 2019 session.

¹¹ See *Boquist v. Department of Revenue*, TC 5332 (Or. T.C. Mar. 21, 2019).

second prong if it increases rates or levies a new tax.

Although the legislature decided not to proceed with testing the workaround theory, once out, one cannot put the cat back in the bag. It is perhaps only a matter of time before the legislature tests the theory, baiting litigation, creating substantial uncertainty for the state's revenue stream, and putting the state in a potentially serious revenue pickle. While we believe the underlying theory is fatally flawed and that the courts will rule accordingly, the willingness to break the procedural rules risks inflicting irreparable damage on legislative tax politics.

Heeding the Advice of Counsel

As taxpayer advocates, our preference would be for lawmakers to respect the will of the voters and avoid creative workarounds to constitutional controls on raising revenue. We would hope that any rational state legislator wants to avoid this revenue pickle. Barring that, the next best action would be for the legislature to listen to the advice of its own lawyers. In testimony before the House Revenue Committee and Senate Finance and Revenue Committee briefing lawmakers on *City of Seattle* in 2016, Legislative Counsel advised lawmakers to establish a process for taxpayers to expedite legal complaints involving the supermajority provisions to the Oregon Supreme Court.¹² During the 2017 session, the House Revenue Committee proposed establishing an expedited review process. Unfortunately, the bill never received a public hearing, let alone a vote.¹³

As a matter of good governance, states should make their tax systems as simple, effective, and painless as possible. While we often think about these principles in the context of tax policy and administration, they should also apply to how tax laws and regulations are enacted. Politicians should refrain from exploiting loopholes to rig the rules of the game in the policymaking process. If the political course is inevitable and these loophole efforts continue, the least a state can do

is streamline access to legal review. Ultimately, the outcome of these suits would benefit the process by increasing the amount of guidance on permissible actions and, hopefully, hasten the end of these workaround games. ■

¹² See "Recent State Supreme Court Decisions on Bills for Raising Revenue," Oregon Senate Interim Committee on Finance and Revenue, May 23, 2016.

¹³ See H.B. 2053 (Or. 2017).