



POLICY BRIEF

Citizens' Guide to Initiative 1185 *To Affirm the Two-thirds Vote Requirement for Tax Increases*

by Jason Mercier
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September 2012



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Key Findings

1. Initiative 1185 would require that any tax increase be passed with a two-thirds vote in the legislature or by a direct vote of the people.
2. Voters have enacted or reaffirmed the two-thirds vote requirement for tax increases four times, in 1993, 1998, 2007 and 2010.
3. Since then the legislature has suspended the two-thirds vote requirement three times. This occurred most recently in 2010, when lawmakers passed a significant tax increase.
4. Despite suspending it repeatedly, the legislature has never fully repealed the voter-approved requirement that tax increases receive a two-thirds vote.
5. Eighteen states (counting Washington) have enacted some form of supermajority vote requirement for tax increases.
6. If approved for the fifth time, the two-thirds requirement should be added to the state constitution, to prevent lawmakers from suspending it again.

Introduction

In November the people of Washington will vote on Initiative 1185. The measure would reaffirm the nearly 20-year-old state law requiring that tax increases pass with a two-thirds vote in the legislature or receive voter approval. Washington Policy Center has long recommended a two-thirds vote requirement protection for taxpayers and believes such a policy would serve the public interest by limiting the financial burden state government places on the people.¹

This study explains what Initiative 1185 would do, gives a short history of the two-thirds requirement and also proposes a constitutional amendment that would end the state's cycle of repeatedly passing and then suspending the two-thirds vote requirement.

Text of Initiative 1185

The text of Initiative 1185 is simple. It reaffirms the state's two-third vote requirement and protects the full force of the tax limit law for at least two years. Initiative 1185's official ballot measure summary says:

This measure would restate the existing statutory requirement that any action or combination of actions by the legislature that raises taxes must be approved by two-thirds vote in both houses of the legislature or approved in a referendum to the people. It would restate the existing statutory definition of "raises taxes," restate the requirement that new or increased fees must be approved by majority vote in both houses of the legislature, and correct statutory references.²

The intent section of Initiative 1185 says:

This initiative should deter the governor and the legislature from sidestepping, suspending, or repealing any of Initiative 1053's policies which voters approved by a huge margin in 2010. The people insist that tax increases receive either two-thirds legislative approval or voter approval and fee increases receive a simple majority vote. These important policies ensure that taxpayers will be protected and that taking more of the people's money will always be an absolute last resort.³

¹ "Policy Guide For Washington State," edited by Paul Guppy, Washington Policy Center, Seattle, Washington, 4th Edition, 2012.

² "Proposed Initiatives to the People – 2012," Washington Secretary of State, Olympia, Washington, at www.sos.wa.gov/elections/initiatives/Initiatives.aspx?y=2012&t=p.

³ "Initiative Measure No. 1185," Washington Secretary of State, Olympia, Washington, at sos.wa.gov/_assets/elections/initiatives/FinalText_187.pdf.

If Initiative 1185 is adopted by the voters, the legislature would be prohibited for two years from suspending the two-thirds vote requirement with a simple majority vote, because of the constitutional rules concerning amending voter-approved initiatives. Legislative changes to initiatives during the first two years of enactment require a two-thirds vote.

Supermajority Requirements in Other States

Requiring a supermajority vote in the legislature to increase taxes is not unique to Washington. Eighteen states (including Washington) have some form of supermajority vote requirement for tax increases. The other states are:

- Alabama – State income and property taxes cannot be increased without a constitutional amendment
- Arizona – Requires a two-thirds vote in the legislature
- Arkansas – Requires a three-fourths vote in the legislature
- California – Requires a two-thirds vote in the legislature (includes fee increases)
- Colorado – Voter approval required for all tax increases
- Delaware – Requires a three-fifths vote in the legislature
- Florida – Requires a two-thirds vote in the legislature
- Kentucky – Requires a three-fifths vote in the legislature
- Louisiana – Requires a two-thirds vote in the legislature
- Michigan – Requires a three-fourths vote in the legislature to raise property taxes
- Mississippi – Requires a three-fifths vote in the legislature
- Missouri – Requires voter approval to raise taxes above a set revenue cap
- Nevada – Requires a two-thirds vote in the legislature (includes fee increases)
- Oklahoma – Requires a three-fourths vote in the legislature
- Oregon – Requires a three-fifths vote in the legislature
- South Dakota – Requires a two-thirds vote in the legislature
- Wisconsin – Requires a two-thirds vote in the legislature

Of the states with supermajority tax limitations, only the requirements in Washington and Wisconsin are ordinary law. The requirements in all other the states are part of the state constitution.

History of Two-thirds Vote Requirement in Washington

Voters in Washington have enacted or affirmed the two-thirds vote requirement four times.

- 2010: Initiative 1053 required a two-thirds vote in the legislature or voter approval for tax increases (passed with 64% yes vote).
- 2007: Initiative 960 required a two-thirds vote in the legislature or voter approval for tax increases (passed with 51% yes vote).
- 1998: Referendum 49 affirmed the tax limitation provisions of 1993's Initiative 601 (passed with 57% yes vote).
- 1993: Initiative 601 required a two-thirds vote in the legislature or voter approval for tax increases (passed with 51% yes vote).

Voters also approved Initiative 695 in 1999 which required voter approval of increased state taxes, fees and charges (the measure was later ruled unconstitutional by the state's Supreme Court).

Ironically, using only a simple majority vote, the legislature has suspended the voter-approved two-third vote requirement three times. This occurred most recently in 2010 when lawmakers passed SB 6130. Lawmakers also suspended the two-thirds vote requirement in 2002 (SB 6819) and 2005 (SB 6078).

Although they have altered the section of law (RCW 43.135) containing the two-thirds vote requirement, lawmakers have never fully repealed the mandate from voters that tax increases pass with a two-thirds vote.

In fact, in 2006 the legislature shortened its own 2005 suspension period and voted to reinstate the two-thirds vote requirement a year earlier than planned (SB 6896).

2010 Suspension and New Tax Increases

One of the most contentious acts of the 2010 legislative session was lawmakers' decision to suspend the two-thirds vote requirement passed by the voters in 2007. This decision proved to be very unpopular.

A KING-TV poll of state residents showed 68% of respondents called the suspension of Initiative 960 "the wrong thing to do." When asked about the policy of having a two-thirds vote in the legislature to raise taxes, 74% said such a limit should be required.⁴

By suspending the two-thirds vote requirement, lawmakers were able to adopt nearly \$800 million (\$6.7 billion over ten years) in tax increases with a simple majority vote.⁵ These tax increases included:

- Business & Occupation tax increases and modifications
- Taxing soda, bottled water, beer, candy and gum
- Increasing tobacco taxes
- Eliminating exemptions for the Real Estate Excise Tax
- Increasing taxes paid by public utility districts
- Increasing the 911 excise tax
- Taxing hospital beds

Based on the roll call votes, none of these tax increases would have passed if lawmakers had not suspended the two-thirds vote requirement first.

In 2010 voters not only re-imposed the two-thirds vote requirement, they repealed many of the new taxes lawmakers had passed earlier in the year.⁶ At the same election, voters also rejected a proposed "high earners" income tax by defeating Initiative 1098 (with a 64% no vote).

⁴ "Poll: Suspending I-960 was the wrong choice," KING 5 News, February 24, 2010, at www.king5.com/news/politics/Poll-Suspending-I-960-was-the-wrong-choice-85269127.html; and SurveyUSA News Poll #16309, February 24, 2010, at www.surveyusa.com/client/PollReport.aspx?g=ad7e51a1-a6d4-415f-be78-ab0246a3a467&c=28.

⁵ "Report on 2010 Tax Increases in Washington State," Policy Brief, Washington Policy Center, July 15, 2010, at www.washingtonpolicy.org/sites/default/files/2010GuideToTaxIncreases_0.pdf.

⁶ Initiative 1053 (64% yes vote) to restore the tax restriction; Initiative 1107 (60% yes vote) to repeal several of the tax increases imposed, 2011.

Initiative 1185's Impact on Road Tolls

There has been some concern expressed that under Initiative 1185, a highway or bridge toll increase would be subject to the same two-thirds vote requirement as tax increases. Nothing in the text of the measure supports this interpretation, however.

Initiative 1185 does not change the relationship between fee and tax increases in current law. Lt. Gov. Brad Owen, as president of the senate, has already issued parliamentary rulings that road tolls are fees and not subject to the two-thirds vote requirement.⁷

The Office of Financial Management (OFM) also defines tolls as fees, not taxes (emphasis added):

What is a tax? Response. A tax is generally thought of as a required contribution to the support of government exacted by legislative authority, ordinarily without regard to receipt for particularized or special benefits. It is generally a collection of revenue for general governmental purposes, as opposed to a charge levied in return for a particular benefit or service.

What is a fee? Response. A fee is a charge, fixed by law, for the benefit of a service or to cover the cost of a regulatory program or the costs of administering a program for which the fee payer benefits. For example, professional license fees, which cover the cost of administering and regulating that category of professions, are fees. **Other charges that are categorized as fees include tolls and tuition.**⁸

In addition, the attorney general's office defines tolls as fees and not taxes (emphasis added):

Those four terms, "tax," "fare," "fee," and "toll," cover a range of revenue sources, but the process for imposing a tax is not at issue with regard to the Transportation Commission. The Transportation Commission's authority includes the authority to impose and **increase fares and tolls. These are varieties of fees**, assessed for the use of, for example, ferries, bridges, or roads.⁹

These three state authorities make it clear that tolls are not taxes and thus not subject to the two-thirds vote requirement but instead require the same simple majority threshold as other fees. The OFM fiscal impact statement for Initiative 1185, however, does note that any fee increases (including tolls) that have not taken effect by December 6, 2012 (the effective date of Initiative 1185) would require reauthorization based on the guidance provided by an informal opinion by the attorney general's office on Initiative 1053:

⁷ "Rulings of Lieutenant Governor Brad Owen: 1997-2012," April 11, 2012, Office of the Lieutenant Governor, Olympia, Washington, at www.ltgov.wa.gov/rulings/PRESIDENT%20OWEN%20RULINGS.pdf.

⁸ Ibid.

⁹ "Office of Attorney General Information Opinion discussing I-1053 – Roach," Office of the Attorney General, Olympia, Washington, December 20, 20110, at www.ofm.wa.gov/initiatives/2012/ATG_Informal_Opinion_Roach.pdf.

This statement of intent indicates that the voters intended I-1053 to require the future approval of the legislature for fee increases. Statutory amendments are generally presumed to operate prospectively, addressing events that occur after the statute takes effect. It, therefore, follows that the voters intended I-1053 to provide that fees can be increased only if, after the effective date of I-1053, the legislature so approves. In a manner of speaking, I-1053 hit the “reset” button on legislative approval of the imposition or increase of fees, limiting such actions to those approved anew by the legislature after the effective date of the measure.¹⁰

This interpretation was challenged by sponsors of Initiative 1185 but upheld by Thurston County Superior Court Judge James Dixon on August 24, 2012.

Legal Challenge to the Four-time Voter-approved Tax Restriction

Undeterred by four straight losses at the ballot box, opponents of the supermajority vote requirement for tax increases are once again trying to have the voter-approved requirement declared unconstitutional. They believe the constitution requires only a simple majority vote for tax bills to pass and additional vote restrictions are unconstitutional.

In its brief defending the nearly 20-year-old supermajority vote requirement, the attorney general’s office argues the opponents are making a political case that is not ripe for legal review:

[Plaintiff] is simply urging the Court to ease the political environment for some legislators by judicially excising the people’s policy preference with respect to tax increases in an abstract exercise. Adjudicating a constitutional question because it might lessen political discomfort for some legislators is not the role of the judiciary. And it would be particularly inappropriate where, as here, such adjudication prematurely and unnecessarily would inject the Court into the people’s legislative check and balance in our system of government. The supermajority vote and voter approval provisions of RCW 43.135.034 may make it politically uncomfortable for some legislators to pass a bill that raises taxes or that raises taxes in excess of the state spending limit, but neither provision prevents the Legislature from passing any bill that a majority of the Legislature chooses to pass.¹¹

On the direct question of whether a supermajority vote requirement for tax increases is constitutional, the attorney general’s office says that the constitution creates a floor but not a ceiling concerning the number of votes needed for final passage:

Article 2, section 22, by its plain language, simply establishes a constitutional minimum of a majority vote for bill passage. It does not, either expressly or by fair inference, prohibit statutes that require greater than a majority vote for passage. (And, of course, any bill receiving a supermajority vote has necessarily received a majority). Absent such

¹⁰ Ibid.

¹¹ “League of Education Voters, et al. v. State of Washington – State’s Opening Brief,” July 20, 2012, at www.washingtonpolicy.org/sites/default/files/AG23.pdf.

a prohibition, the Legislature, or the people, are free to express their legislative policy judgment in a statute that certain type of bills warrant greater than simply majority consensus for passage. RCW 43.135.034(1) expresses such a statutory policy judgment — that a two-thirds majority vote of each house should be required for passage of bills raising taxes. Because article 2, section 22’s plain language does not prohibit such a statute, the statute must stand.¹²

The state Supreme Court is scheduled to hear oral argument on September 25 in the challenge to the four-time voter approved supermajority vote requirement. A ruling is expected to be issued sometime before the 2013 legislative session.

Initiative 1185’s Impact on the State Budget

Washington budget writers are faced with a projected \$1 billion budget shortfall for the 2013–15 biennium despite projected revenue growth of \$1.5 billion.¹³ Without a two-thirds vote restriction, the legislature is likely to consider passing additional tax increases, potentially increasing the burden lawmakers impose on citizens by billions of dollars each biennium.

Should the voters pass Initiative 1185 in November, however, lawmakers would be under the two-thirds vote requirement for at least two years, making new tax increases without voter approval highly unlikely.

Policy Recommendation: Constitutional Protections Needed if Voters Pass Initiative 1185

As shown by the relative ease with which the legislature over the years has repeatedly suspended the two-thirds vote requirement, constitutional protections are ultimately needed. These protections, however, should not be limited to state taxpayers but should extend to local taxpayers as well. For a number of years Washington Policy Center has recommended the legislature send voters a constitutional amendment requiring either a two-thirds vote in the legislature or voter approval to raise taxes.¹⁴

To help government officials build a strong consensus when the need for a tax increase arises, a two-tiered approach should be taken. Government officials could raise the tax burden:

1. With a two-thirds vote of the state or local legislative body, or
2. With a simple majority vote along with approval by the voters

Either option would assure a broad agreement is reached and the taxpayers are included on any decision to increase their tax burden.

¹² Ibid.

¹³ “Four-year Outlook,” Washington Office of Financial Management, Olympia, Washington, August 2012, at www.ofm.wa.gov/budget/info/august2012outlook.pdf.

¹⁴ “Policy Guide For Washington State,” edited by Paul Guppy, Washington Policy Center, Seattle, Washington, 4th Edition, 2012.

Since state officials refuse to honor voter-approved statutory protections, the Washington State Constitution should be amended to require a two-thirds vote of a legislative body or voter approval via a referendum for any state or local tax increase to take effect.

This is similar to constitutional supermajority or voter-approval requirements in California and South Dakota (as described in the appendix).

Conclusion

Initiative 1185 provides voters with an opportunity to clearly frame the state's budget debate. As has been the case over the past 20 years that the supermajority vote for tax increases has been in effect, if reaffirmed for the fifth time, lawmakers' attention would shift away from ways to raise new taxes and would focus on fundamental budget reform and restructuring state spending. If Initiative 1185 fails, voters will have indicated their openness for potential tax increases passed by a simple majority vote in the legislature.

Rarely does the vote on one ballot initiative provide policymakers with so much clarity about what policy path voters would like them to take.

Aside from the impact on the state budget, if the two-thirds vote requirement is adopted for the fifth time, constitutional reform is ultimately needed. The voters have voiced their support for a two-thirds vote restriction on four separate occasions, only to have the legislature routinely suspend these requirements.

Rather than continue the current practice of "suspending" the law every time lawmakers want to raise taxes, while at the same time saying they are honoring the will of the voters and technically leaving the law on the books, leaders in Olympia should refer the question to voters in the form of a constitutional amendment. An example of how such an amendment could be drafted is shown in the appendix. This would put the debate about a two-thirds vote requirement to rest once and for all, while providing predictability on whether this taxpayer protection will exist from year to year.

Appendix

Examples of state constitutional provisions requiring a supermajority vote in the Legislature to raise taxes:

California Constitution, Article 13a, Section 3

(a) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.¹⁵

South Dakota Constitution, Article 11, Section 14

Vote required to impose or increase taxes. The rate of taxation imposed by the State of South Dakota in regard to any tax may not be increased and no new tax may be imposed by the State of South Dakota unless by consent of the people by exercise of their right of initiative or by two-thirds vote of all the members elect of each branch of the Legislature.¹⁶

¹⁵ “California State Constitution,” California Legislature, at www.leginfo.ca.gov/.const/.article_13A.

¹⁶ “South Dakota State Constitution,” South Dakota Legislature, at legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=0N-11-14.

About the Author

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