THE FALLACY OF JUDICIAL SUPERMAJORITY CLAUSES IN STATE CONSTITUTIONS*

Sandra Zellmer** and Kathleen Miller***

DEDICATION TO SUSAN MARTYN (BY SANDRA ZELLMER)

WHEN I arrived at the University of Toledo College of Law as a brand new assistant professor in 1997, like many new professors, I knew very little about two of the pillars of academic life: teaching and scholarship. I had been a successful practitioner in both the private sector and the federal government, but this was a whole new ball game, and the expectations and demands were far different from anything I had ever experienced. Enter Susan Martyn.

I knew from the beginning that Susan would have a significant impact on my life, both personally and professionally. On the personal front, the day I arrived in town she arrived on my doorstep on Goddard Road, which was only a few blocks away from her own abode, and insisted on mowing my lawn. Well, in truth, Susan was curious about the efficacy of our brand new push reel mower, but she dove into the task with the zeal that I soon realized was her personal hallmark. As a neighbor, my husband Randy and I got to know Susan, as well as her husband Peter and their daughters, Angie and Sarah. Throughout the years, we frequently shared meals (the cinnamon roll contest was especially rewarding) and exchanged pet-watching and other services. Now, long after I have left Toledo, Susan’s joie de vivre and indomitable spirit continue to uplift me through both good times and bad.

On the professional front, Susan led by example and by careful tutoring in teaching me how to be a teacher. I spent hours in her classroom, observing her techniques and her interactions with students, and even more hours in our offices and over lunch at Ferdo’s on Bancroft Street, going over my own experiments, challenges, and teaching evaluations. Ever patient, ever enthusiastic, ever creative. That is Susan. And that is why I am still a teacher and why I strive for some fraction of the excellence she brought to the task. As for scholarship, her guidance and insights were unparalleled, especially in drafting my first few articles. Susan always pushed me to dig deeper, to reach farther, to write more clearly and concisely, and to believe in myself as a persuasive scholar and not


** Robert B. Daughtery Professor, University of Nebraska College of Law.

*** J.D. Candidate, 2016, University of Nebraska College of Law.
just an advocate. Her remarkable productivity continues to be nothing short of inspirational.

But the reason I wanted to contribute to this tribute issue and to write a piece with a student of my own is because of Susan’s lasting impact as a mentor. Just as she never failed to welcome me and my questions and concerns into her office, her home, and her email inbox, I hope to carry on the traditions and values she instilled in me by paying it forward to the next generation of lawyers and academics. That our topic explores an unusual facet of both Nebraska and Ohio law puts icing on that cake. Here’s to you, Susan!

INTRODUCTION

In 2008, when TransCanada proposed its Keystone XL (hereinafter “KXL”) pipeline route from Alberta, Canada through the heartland of the United States, it likely did not believe the proposal would generate much attention. After all, TransCanada already had another pipeline running through Nebraska and several other affected states. The thought that the Keystone XL project would be at a standstill seven years later seemed unfathomable. The possibility that a rarely invoked constitutional supermajority clause would play a key role in the controversy seemed equally unlikely.

Opposition to the project developed quickly. By 2011, the debate over the pipeline had surged to the forefront of the national stage, with Nebraska squarely in the middle of the controversy. Following a 2011 special session in which Nebraska legislators passed a series of bills dealing with the state’s pipeline-permitting process, Nebraska passed an additional piece of legislation in the 2012 regular session: Legislative Bill 1161 (hereinafter “LB 1161”). Whereas legislation passed during the 2011 special session required pipeline applicants to obtain approval from the Public Service Commission (hereinafter “PSC”), LB 1161 allowed “major oil pipeline” carriers to bypass the PSC and receive approval from the Governor to exercise eminent domain in the state.

Landowners challenged the law on the grounds that it was unconstitutional for a variety of reasons, including that it was an unlawful delegation of power to the governor. By the time Thompson v. Heineman reached the Nebraska Supreme Court, it appeared the case would definitively decide LB 1161’s fate and, possibly, the fate of KXL as well.

However, the manner in which the court eventually decided Thompson did not resolve the constitutional issues surrounding LB 1161. Invoking a moribund rule, four out of seven judges found LB 1161 unconstitutional, but the Supreme Court vacated the entirety of the lower court’s decision due to Nebraska’s judicial supermajority or “five judges” clause. In Thompson, only four judges

3. Id.
4. Id.
5. Id. at 766-67.
decided LB 1161 was unconstitutional—one judge short of the five needed to strike down the law.  

Part I of this essay discusses the history of the judicial supermajority clause in the three states that have enacted one: Ohio, North Dakota, and Nebraska. Part II examines the impact of the supermajority clause on several high stakes constitutional cases and, in particular, how the clause came into play in Thompson v. Heineman. Importantly, Thompson demonstrates how such clauses allow statutes to evade judicial review and thereby prevent important constitutional issues from being resolved on the merits. Part III concludes that Nebraska should follow Ohio’s lead and repeal its supermajority clause.

I. THE UNDERPINNINGS OF THE JUDICIAL SUPERMAJORITY CLAUSE

While judicial supermajority clauses are rare in American law, they are not unprecedented. Provisions that require legislatures to muster two-thirds or more votes to enact certain kinds of measures are more common than judicial supermajority provisions. The U.S. Constitution includes seven legislative supermajority provisions applicable to Congress, ranging from presidential impeachment to treaty consent to overriding vetoes, but none apply to the judiciary. Generally speaking, legislative supermajority provisions are designed to effectuate separation of powers and to address only the most important matters: “extraordinary situations implicating either individual rights or interbranch or intergenerational checks and balances.”

As is the case with most types of legislative action, judicial review by the U.S. Supreme Court requires only a simple majority, whether the case in question involves a constitutional challenge or anything else. Although proposals to impose a two-thirds supermajority requirement on the U.S. Supreme Court to invalidate statutes on constitutional grounds occasionally arise from time to time,

6. Id.
7. See U.S. Const. art. I, § 3, cl. 6 (impeachment); U.S. Const. art. I, § 5, cl. 2 (congressional expulsion); U.S. Const. art. I, § 7, cl. 2-3 (veto override); U.S. Const. art. II, § 2, cl. 2 (treaty consent); U.S. Const. art. V (constitutional amendments); U.S. Const. amend. XIV, § 3 (rebellion); U.S. Const. amend. XXV, § 4 (presidential incapacity). Article V also requires supermajorities of the states for constitutional conventions and amendments. For a discussion of the history of supermajority provisions in the U.S. Constitution, see Brett W. King, The Use of Supermajority Provisions in the Constitution: The Framers, the Federalist Papers and the Reinforcement of a Fundamental Principle, 8 Seton Hall Const. L.J. 363 (1997).
9. U.S. Const. art. III. See also Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1504 (1990) (noting Hamilton’s position on judicial review in Federalist No. 78: “[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.”).
none have passed. Arguably, whether in the legislative or judicial context, “the Framers knew the dangers of supermajorities, and they realized that any government that was to maintain its vitality over time would be wise to avoid them except in extraordinary circumstances.”

Notably, the U.S. Supreme Court itself recognizes that declaring legislation unconstitutional is “the gravest and most delicate duty that this Court is called on to perform.” As a result, it has adopted various mechanisms that serve as a judicial “check” on declaring legislative acts unconstitutional. One of the most frequently invoked mechanisms is a presumption in favor of constitutionality where “if any state of facts reasonably can be conceived that would sustain [the legislation], there is a presumption of the existence of that state of facts.”

According to the Court, this presumption shows respect for Congress’s conclusions that its enactments are constitutional, promotes democratic principles by preventing undue judicial interference with congressional prerogatives, and recognizes Congress’s institutional superiority over the judiciary with regard to public policy matters and certain kinds of factual determinations. In addition, the doctrine of constitutional avoidance—where courts decide cases on statutory grounds whenever possible—serves as another form of judicial check.

Legislative supermajority provisions are not uncommon in state constitutions, but only three states, Ohio, North Dakota, and Nebraska, have enacted a judicial supermajority. All three states adopted their judicial supermajority requirements during the Progressive Era, seemingly in response to

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10. See, e.g., Eule, supra note 9, at 1522; Martin Wishnatsky, Taming the Supreme Court, 6 Liberty U. L. Rev. 597, 673 (2012) (arguing “[j]udicial repeal of legislation is surely as solemn and significant an event as an impeachment trial, expulsion of a legislator, override of a Presidential veto, or ratification of a constitutional amendment” and, therefore, should require a two-thirds majority); Jed Handelsman Shugerman, A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court, 37 Ga. L. Rev. 893, 994 (2003) (advocating for a six-three judicial supermajority requirement and arguing that “the Supreme Court … has aggrandized itself and encroached upon the power of Congress over the past decade”).


the U.S. Supreme Court’s decision in *Lochner v. New York*, as well as populist sentiment. As the Progressive movement swept across the country at the turn of the twentieth century, several hard-fought reforms faced a swift death in the courts when challenged as unconstitutional. One such case was the infamous *Lochner v. New York* decision, in which the U.S. Supreme Court struck down a New York law limiting bakery workers to sixty hour work weeks. Seeking to protect such reforms from the threat of destruction at the hands of the judiciary, Ohio adopted a judicial supermajority clause requirement in 1912, North Dakota in 1919, and Nebraska in 1920.

Ohio’s 1912 Constitutional Convention was a clash of ideologies between conservative business interests seeking to change the tax system and progressives trying to enact a series of reforms, including reform of the state’s complicated court system. Much like the wider concerns raised by the *Lochner* ruling, the progressives were particularly upset that the Ohio Supreme Court had invalidated a series of laws dealing with workers’ rights and other subjects championed by the progressive movement. Early on, one delegate proposed a provision that would require a unanimous decision by the court to invalidate a statute. Delegate Hiram V. Peck explained the rationale for the proposal:

“There have been too many judgments that have been made by the supreme court which seem to the people not well grounded, in view of existing circumstances, and which operate as stumbling blocks to progress, upsetting statutes which were desirable in themselves …”

Additionally, Peck voiced his fear that judges were acting on their own political beliefs, pointing to the fact that the Ohio Supreme Court had recently struck down a mechanics’ law similar to one the U.S. Supreme Court had recently upheld.

“[W]e didn’t want the legislation of the people tinkered with too easily. We were afraid [political expediency] had been in fact in some later decisions… [T]here was a great deal of kicking about the mechanics’ lien law. An act in identical terms has been sustained by the supreme court of the United States and the supreme courts

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22. *Id.* at 443-44.
23. *Id.* at 445.
24. *Id.* at 446 (quoting PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1028 (E.S. Nichols ed., 1912) [hereinafter OHIO PROCEEDINGS]).
Two distinguished visitors to the Ohio Constitutional Convention also voiced support for stronger restraints on the judiciary. Former President Theodore Roosevelt denounced recent decisions, such as *Lochner*, and advocated for the ability to recall major opinions by a vote of the people.26 In Roosevelt’s opinion, “the American people as a whole have shown themselves wiser than the courts in the way they have approached and dealt with such vital questions of our day as those concerning the proper control of big corporations and of securing their rights to industrial workers.”27 William Jennings Bryan, a dominant populist force in the Democratic Party who was known as “The Great Commoner” due to his faith in the wisdom of the common people, echoed similar rhetoric while addressing the convention, specifically in advocating for the election of judges: “The people are much more apt to deal justly with [elected] judges than they are to receive justice at the hands of judges who distrust the intelligence and the good intent of the masses.”28 Along the same lines, Bryan believed a judicial supermajority requirement would be a reasonable measure as well.29 The proposed judicial supermajority provision was later heavily debated but eventually passed, requiring “all but one” of the judges of the Ohio Supreme Court to agree in order to invalidate a state law.30

Ohio’s judicial supermajority clause came under fire soon after it was passed. The Ohio Supreme Court characterized the “drastic limitation[]” as an ill-conceived “compromise” between the polar positions of allowing the court to continue to rule on cases with a simple majority and abolishing judicial review entirely.31

Ultimately, the clause was relatively short-lived. By the 1960s, issues with the supermajority requirement were readily apparent.32 Many of the problems were a result of Ohio’s unique court structure and how the lower courts of appeal ruled on challenged statutes.33 For example, if a lower appellate court held the law was unconstitutional, the state supreme court only needed a simple majority to hold the statute unconstitutional.34 If, on the other hand, the court of appeals had upheld the law, the Ohio Supreme Court could only reverse and find the law unconstitutional by having all but one judge rule against the statute.35 Since there

28. Id. at 669.
29. Id. at 669-70.
32. Entin, supra note 17, at 464.
33. Id.
34. Id. at 448-49.
35. Id. at 449.
were several courts of appeals, it was possible that a law might be upheld in one court and struck down in another. This created a perplexing problem—unless the Ohio Supreme Court met the “all but one” requirement to invalidate the law, the law could be constitutional in one district and unconstitutional in another.36

Additional issues arose, including whether the supermajority clause applied to rulings on municipal ordinances or only to state statutes and whether a statute could be invalidated with less than the full bench of the court in play when disability or recusal forced one or more justices not to sit in particular cases.37 Of particular embarrassment, several statutes that limited free speech were found to be unconstitutional—but remained on the books due to the supermajority clause—only to be later overturned by the U.S. Supreme Court on First Amendment or other constitutional grounds.38

Ohio’s supermajority requirement was repealed in 1968, sparking almost no debate.39 As Professor Entin notes, Ohio’s supermajority clause was a “well-intentioned experiment [that] was at best a noble failure, at worst a disaster that endured far too long.”40

North Dakota adopted its supermajority requirement in 1918.41 The amendment had been proposed as part of an omnibus provision by the Nonpartisan League (hereinafter “NPL”), which controlled the North Dakota House of Representatives.42 Similar to the concerns expressed by Ohio delegates in 1912, the proponents of North Dakota’s “four judges” clause worried the state supreme court might undo hard-fought legislative reforms.43 In particular, NPL “feared a Supreme Court, dominated by justices linked to its opponents, might invalidate important parts of its measures to aid farmers against business interests seen as antithetical.”44 While the omnibus provision was defeated by the state senate, the amendment survived when it was offered by non-NPL senators as an individual resolution.45 The amendment passed during the general election of 1918 and is still in place today.46 It has saved several statutory provisions that a majority found unconstitutional, including the state’s statutory method for distributing funding for primary and secondary education47 and a referendum

36. Id. at 456-57.
37. Id. at 457-58.
40. Id. at 466.
42. Id. at 247.
43. Id.
44. Id.
45. Id. at 248.
46. Id.
measure to reinstate the “Fighting Sioux” nickname for the state’s intercollegiate athletic teams.  

Similar to Ohio’s judicial supermajority clause, Nebraska’s clause resulted from the state constitutional convention of 1919-1920. The legislature called for a constitutional convention to address several perceived shortcomings within the Nebraska Constitution of 1875. The main problem with the 1875 Constitution was that it was nearly impossible to amend. At the same time, unrest in the Midwest had reached its peak over hot-button social and economic issues, such as farm welfare, elitism, post-World War I anti-German prejudices, Prohibition, and anti-monopoly sentiments. Progressives in Nebraska sought a variety of reforms, including tax reforms, a unicameral legislature, and new judicial procedures. Both major political parties in the state soon found themselves “caught up in the general desire for a constitutional convention to carry out a general overhauling of the basic law of the state.”

When it finally convened, nine of the 336 proposals at the convention dealt with the power of the Nebraska Supreme Court to declare acts of the legislature unconstitutional. Two elements greatly influenced the adoption of the “five judge” requirement: the presence of the NPL (as in North Dakota) and the support of William Jennings Bryan. The NPL, with strong support among populists in the state at the time, fiercely advocated for a proposal that would prevent the state supreme court from invalidating a legislative measure on constitutional grounds at all. Mindful of the public’s views and worried about how the proposal might be received if it were put to a public vote, the delegation compromised with the NPL and raised the required number of justices for a finding of unconstitutionality from a simple majority to the “five judges” requirement.

In addition to pressure from the NPL, Bryan himself directly addressed the Nebraska Convention. Bryan’s remarks reflected both Ohio’s and North Dakota’s reasons for enacting a judicial supermajority requirement—restraining the judiciary’s power to overturn decisions made by the people and their elected representatives. In his remarks, Bryan stated:

52. Winter, supra note 50, at 585.
53. Id.
55. William Jay Riley, To Require that a Majority of the Supreme Court Determine the Outcome of Any Case Before It, 50 NEB. L. REV. 622, 625-26 (1971).
56. Id. at 626.
57. Id. at 633.
The fundamental principle of popular government, whether coercive or co-operative, is that the people have a right to have what they want in government… Not that the people will make no mistakes, but that the people have a right to make their own mistakes, and that few people have a God-given right to make mistakes for the rest of the people. 

...The supreme court only should have power to declare a law unconstitutional, and it only by three-fourths vote of the court. It is not fair to the legislators or to those who elect them—especially when we have the referendum—to allow what they have declared to be the people’s will to be overthrown by one judge.

In keeping with his deeply rooted populist sentiments, Bryan’s remarks highlighted the perceived sanctity of popular initiatives and referendums where the people themselves come together to make legislative change. However, the supermajority proposal under consideration was not limited to such provisions but, rather, extended to all types of legislation, however enacted.

Additional debates on the clause illuminated the further reasoning for the adoption of Nebraska’s supermajority clause. Delegates pointed to a series of progressive reforms struck down by the U.S. Supreme Court on a 5-4 vote. Members of the convention viewed the supermajority clause as lending stability to the judicial process by preventing 5-4 decisions that might be later overturned by yet another 5-4 decision, leading to abrupt 180-degree changes in the law. Others argued for giving the public, through its elected representatives, the benefit of the doubt in cases where the constitutionality of a provision was in question. As voiced by one delegate, “where there is a doubt about the constitutionality of the law, [the public] want[s] the people to have the advantage of that doubt.”

Later, when the “five judge” rule was presented to the public during a special election, only 77,586 voted on the proposal, compared to the presidential election turnout of 382,653 voters only six weeks later. For Nebraska, “[t]he minority control of the supreme court under the five judge rule on constitutional questions was definitely adopted by a distinct minority of the qualified voters

60. Id. at 640-41. Nebraska’s constitution was amended to authorize popular initiatives and referenda just a few years earlier in 1912. Neb. Const. art. III, § 1A (1912), Laws 1911, ch. 223, § 2, at 671 (codified at Neb. Const. art. III, §§ 2-3).
61. In addition to Lochner, these cases included Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895) (striking down an income tax law), and Hammer v. Dagenhart, 247 U.S. 251 (1918) (ruling a child labor law unconstitutional).
63. Id.
64. Id.
65. Riley, supra note 55, at 627.
within the state.” 66 There have been attempts to eliminate the “five judges” clause, including during the 1970 proceedings of the Nebraska Constitutional Revision Commission. 67 While the Commission could find “no good reason” to keep the provision, it was not repealed. 68

II. THE JUDICIAL SUPERMAJORITY CLAUSE AT PLAY IN NEBRASKA COURTS

The requirement that five judges hold a law unconstitutional in order to strike it down is found in Nebraska Constitution art. V § 2:

The Supreme Court shall consist of seven judges, one of whom shall be the Chief Justice. A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges. 69

Effectively, the clause operates to protect legislation that would otherwise be found unconstitutional and allows that legislation to stand. Unlike Ohio or North Dakota, however, Nebraska’s supermajority clause applies whether the litigants are raising a federal or state constitutional challenge. 70

Following its adoption, Nebraska’s judicial supermajority clause lay dormant for several decades. It was first used as a deciding factor in two 1968 cases— In re Cavitt 71 and DeBacker v. Brainard. 72 While occasionally mentioned in subsequent case law, 73 the clause was not employed as the deciding factor again until State ex rel. Spire v. Beermann 74 in 2000 and then not again until Thompson v. Heineman 75 in 2015.

In re Cavitt involved a state statute that required mental patients to be sterilized as a condition of being released from a state home. 76 While four judges found the law unconstitutional, the supermajority clause forced the court to allow the statute to stand. 77 The U.S. Supreme Court noted probable jurisdiction but

66. Id.
67. Id. at 623.
68. Id. at 622-23.
69. NEB. CONST. art. V, § 2 (emphasis added).
70. Caminker, supra note 20, at 90-94 (citing DeBacker v. Brainerd, 161 N.W.2d 508 (Neb. 1968)).
72. DeBacker, 161 N.W.2d at 508.
76. In re Cavitt, 157 N.W.2d at 174-75.
77. Id. at 181 (Newton, J., dissenting).
vacated the case as moot when Nebraska repealed the statute.\textsuperscript{78} A similar situation arose in \textit{Brainard}, where only four judges found the Juvenile Court Act—which allowed juvenile offenders to be tried without a jury trial and applied a “preponderance of the evidence” standard instead of the traditional “beyond a reasonable doubt” standard—to be unconstitutional.\textsuperscript{79}

In \textit{State ex rel. Spire v. Beermann}, the Nebraska Supreme Court considered the constitutionality of legislation that transferred Kearney State College into the University of Nebraska system.\textsuperscript{80} While four judges determined the legislation was unconstitutional, the court upheld the statute based on the judicial supermajority requirement.\textsuperscript{81}

As in \textit{In re Cavitt}, \textit{Brainard}, and \textit{Spire}, the plaintiffs in \textit{Thompson v. Heineman} sought to strike down a state statute as unconstitutional.\textsuperscript{82} Their first argument stemmed from the act’s delegation of powers normally possessed by the PSC to the Governor.\textsuperscript{83} The PSC was incorporated into the Nebraska Constitution in 1906.\textsuperscript{84} Indicative of the Progressive era in which it was enacted, the PSC consists of five elected commissioners wholly independent from the governor.\textsuperscript{85} It was created to minimize the ability of railroads and other carriers, utilities, and public services to influence governors and to make the decision-making processes professional rather than purely political.\textsuperscript{86}

Under Article IV of the Nebraska Constitution, “The powers and duties of [the PSC] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law.”\textsuperscript{87} As four judges of the court pointed out, the PSC constitutes a unique agency under Nebraska law—“an independent regulatory body for common carriers.”\textsuperscript{88} In \textit{Thompson}, four judges determined the proposed KXL pipeline qualified as a “common carrier” and, thus, fell under the PSC’s powers, rendering LB 1161 unconstitutional.\textsuperscript{89} The same four judges further found LB 1161 unconstitutional because it unlawfully

\begin{thebibliography}{99}
\bibitem{79} DeBacker, 161 N.W.2d at 509.
\bibitem{80} Beermann, 455 N.W.2d at 750.
\bibitem{81} Id. at 749.
\bibitem{82} Thompson, 857 N.W.2d at 740.
\bibitem{83} Id. at 756.
\bibitem{84} Id. at 757.
\bibitem{85} Thompson v. Heineman, 857 N.W.2d 731, 757 (Neb. 2015).
\bibitem{87} NEB. CONST. art. IV, § 20.
\bibitem{88} Thompson, 857 N.W.2d at 757.
\bibitem{89} Id. at 759.
\end{thebibliography}
delegated the power to grant eminent domain to private organizations to the Governor when only the legislature has the legal authority to grant eminent domain powers.90

The plaintiffs in Thompson would have won the day before almost any other appellate court in the country with a simple majority of the justices. Four out of seven judges found LB 1161 unconstitutional.91 However, the three remaining judges did not reach any conclusions on the constitutionality of LB 1161, finding instead that the plaintiffs lacked standing as “resident taxpayers.”92

Due to Nebraska’s judicial supermajority clause, LB 1161 was allowed to remain on the books while the case was remanded back to the district court.93

The court was not wrong in hinging its decision on the judicial supermajority clause; the court is constitutionally bound to have five concurring judges in order to strike down a state law as unconstitutional.94 However, Thompson highlights the negative impacts of a judicial supermajority clause.

First, while the Thompson decision did not conclusively rule on the constitutionality of LB 1161, every judge reaching the merits of the case determined LB 1161 was unconstitutional.95 Effectively, the clause allowed LB 1161 to remain good law in the state, not because any court determined it passed constitutional muster, but only because the plaintiffs failed to convince a fifth judge to reach the merits of their arguments. Arguably, this tips the balance of power between the state branches of government too far in favor of the legislature. Nebraska’s unique unicameral legislature already consolidates power into one house.96 Without a second legislative body, Nebraska’s legislature is not constrained by the traditional “checks and balances” of a two-house legislature, resulting in fewer hurdles for legislation to pass before being enacted into state law.97 In light of this structure, an “independent and unhampered judiciary” seems even more critical to preserve the balance of power between the three branches.98 Instead, the judicial supermajority clause allows the legislature to

90. Id. at 765.
91. Id. at 739.
92. Id. at 773-74 (Heavican, C.J., dissenting in part and concurring in part in the result). While Nebraska “allows resident taxpayers to, without showing any [peculiar] interest or injury, … bring an action to enjoin the illegal expenditure of public funds,” courts grant standing under this exception rarely and only when the matter is one of “great public concern.” Project Extra Mile v. Neb. Liquor Control Comm’n, 810 N.W.2d 149, 157, 159-60 (Neb. 2012). See, e.g., Cunningham v. Exxon, 276 N.W.2d 213 (Neb. 1979); Nebraskans Against Expanded Gambling, Inc. v. Neb. Horseman’s Benevolent & Protective Ass’n, 605 N.W.2d 803, 805 (Neb. 2000); State ex rel. Reed v. State Game & Parks Comm’n, 773 N.W.2d 349, 353 (Neb. 2009).
93. Thompson, 857 N.W.2d at 766-67.
94. Id. at 754.
96. Riley, supra note 55, at 636.
97. Id.
98. Id. See also JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 167 (Gaillard Hunt & James
insulate itself from being held accountable when it passes laws that may be unconstitutional.

Second, imposing a supermajority requirement on the judicial branch undermines the ability of the court to protect the constitutional rights of vulnerable individuals and groups. Although the Thompson plaintiffs are Nebraska landowners, taxpayers, and electors of the State, rather than disenfranchised individuals, they allege violations of due process and other bedrock constitutional rights. Democracy turns not only on majority rule, but also on the human rights that enable all individuals and groups to participate meaningfully in political, economic, and social life. As Justice Aharon Barak said, protecting the rights of minorities, in particular, “cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion.”

Requiring a supermajority of the court to invalidate laws as unconstitutional makes unpopular racial and religious minorities and others whose characteristics or viewpoints are disfavored by mainstream public opinion more vulnerable to what James Madison called the “transient impressions” of the people and their elected representatives. Indeed, both the Bill of Rights and constitutional provisions for judicial review exist in large part to protect unpopular individuals and groups from being trampled by political majorities. In exercising its responsibility within our constitutional framework, the U.S. Supreme Court has invalidated state laws that denied the fundamental right to marry to same-sex couples, overturned a provision of the Defense of Marriage Act that denied federal benefits to married same-sex couples, held that disparate-impact claims are cognizable under the Fair Housing Act, and, in

Brown Scott eds., 1999) (arguing the Senate was a necessary addition to Congress to check the “demagogues” of the more popular body, the House of Representatives).

102. Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 HARV. L. REV. 43, 75 (1989). In some cases, a judicial supermajority clause could arguably protect the rights of minorities by preventing the court from overturning legislation designed to protect minority interests. While this might be true in theory, it has not been true in practice, as demonstrated by the case law from both Ohio and Nebraska discussed above. As for the U.S. Supreme Court, for the past few decades, at least, the vast majority of its opinions have been rendered either unanimously or by 5-4 votes, rather than 6-3, 7-2, or 8-1 splits. Eric Posner, Supreme Court Breakfast Table: Why Does the Court Usually Decide Cases Either 9-0 or 5-4?, SLATE (July 1, 2014), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_why_are_most_cases_either_9_0_or_5_4.html.
Miranda v. Arizona, found a requirement to inform defendants of their constitutional rights, all on 5-4 votes. The principle established in Miranda is now woven into our cultural fabric, and, in time, several of the others may follow suit. Of course, there are instances where courts have failed to go against the grain of majoritarian viewpoints. Professor Somin noted that many of the U.S. Supreme Court’s “worst decisions were cases where it chose not to strike down an oppressive unconstitutional policy—cases like Plessy v. Ferguson, which permitted racial segregation, and Korematsu v. United States, which permitted the expulsion of Japanese-Americans from the West Coast during World War II.” History tends to hold such decisions in poor regard, whether or not they were rendered by wide judicial majorities.

Finally, as seen in the Thompson case, the supermajority clause works against judicial efficiency. By blocking the court from ruling on the constitutionality of LB 1161, further litigation is required to resolve the issues. This in turn has led to the controversy surrounding KXL to be drawn out even further on both regional and national scales.

At the end of the day, the court’s decision to invoke the supermajority clause did not conclusively spell disaster for landowners, nor did it hand a clear victory for TransCanada. Not surprisingly, two more cases challenging LB 1161 are proceeding in the lower courts. Both were brought by landowners asserting traditional standing after TransCanada began eminent domain proceedings against them. At least some of the issues raised by KXL are virtually certain to work their way back up to the Nebraska Supreme Court.

107. Ilya Somin, Opinion, The Supreme Court Is a Check on Big Government, Protection for Minorities, N.Y. TIMES (July 7, 2015, 2:14 AM), http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-a-check-on-big-government-protection-for-minorities. By the same token, in some cases, 5-4 decisions have undermined civil rights by, for example, shifting the burden to plaintiffs to produce sufficient facts to make their claims viable and survive the government’s motion to dismiss, Ashcroft v. Iqbal, 556 U.S. 662 (2009), and by upholding a state sodomy law as applied to homosexuals, Bowers v. Hardwick, 478 U.S. 186 (1986). The latter case was overturned in a 6-3 decision in 2003. Lawrence v. Texas, 539 U.S. 558 (2003). Empirical research is necessary to determine whether more 5-4 cases have protected civil rights than have undermined them, but the key point remains: judges—whether they act individually in the lower courts or in even the slimmest of majorities on appellate courts—tend to stand as a bulwark against abuse by majority groups and legislative bodies.


109. Somin, supra note 107 (citing Plessy v. Ferguson, 163 U.S. 537 (1896), a 7-1 decision, and Korematsu v. United States, 323 U.S. 214 (1944), a 6-3 decision) (emphasis added). Dred Scott v. Sandford, 60 U.S. 393 (1856), a 7-2 decision denying citizenship to African American slaves, belongs on this list as well.

III. CONCLUSION

Judicial supermajority clauses make bad policy and bad law. It may be true that decisions generating either a unanimous vote or a supermajority vote can inspire greater public confidence and popular legitimacy, but confidence and legitimacy are warranted only if those decisions are logical and constitutionally sound.111 It is also possible, as the Progressives believed, that such clauses could strengthen the separation of powers among the branches of government by acting as a check on the judiciary’s power of judicial review. As explained above, however, Nebraska’s supermajority clause tips the balance too far in favor of the legislature.

Most importantly, judicial supermajority provisions prevent very real constitutional issues from being definitively resolved, and they allow unconstitutional laws to continue to exist even when due process and other important human rights are violated.112 That only three states have ever adopted a judicial supermajority clause strongly indicates that these concerns outweigh any potential advantages of such provisions.

When the delegates in Nebraska, North Dakota, and Ohio adopted their respective supermajority clauses, the protection of the common citizen was arguably at the forefront of their minds. Yet, if this was the objective, in practice, it has been turned on its head. While the legislature can be—and often is—a vehicle for progress, it is not infallible. The beauty of the system of checks and balances is that each branch can step in with corrective measures when another branch missteps. In the case of the judiciary, the ability to rule on the constitutionality of the actions of the other two branches is critical. The irony here is that by enacting the judicial supermajority requirement, these states chose to hobble the judicial branch. As Chief Justice John Marshall proclaimed in Marbury v. Madison, “It is emphatically the province and duty of the judicial department to say what the law is.”113 Marshall emphasized “that the constitution is to be considered, in court, as a paramount law” and advised courts not to “close their eyes on the constitution,” as “the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.”114

For now, the judicial supermajority clause lives on in Nebraska. As Thompson demonstrates, litigants raising constitutional challenges to state laws


111. See THE FEDERALIST NO. 38, at 243 (James Madison) (George W. Carey & James McClellan eds., 2001) (suggesting unanimous legislative decisions deserve more weight than those reached by a simple majority).


114. Id. at 178, 179-80.
in Nebraska should remain vigilant about the potential effects the clause may have on their case. Even if they obtain a resounding victory in the lower courts, should they reach the state’s highest court, they will not be attempting to persuade a simple majority of the bench—they will have to persuade a fifth judge in order to prevail. This requires the supermajority to not only reach the merits of the case rather than side-step the constitutional issues through standing or other procedural or technical measures, but also to find that the provision in question violates the state or federal constitution. This is a tall order, considering the deferential rules of judicial interpretation applied to constitutional issues.  

Nebraska should follow Ohio’s lead and rescind the supermajority requirement. Constitutional amendments may be adopted in Nebraska by popular initiative and adoption by the people independent of the legislature or by a vote of 60% of the Unicameral followed by a vote by a majority of the voters in the state. Given that the Unicameral may be unlikely to make itself more vulnerable to judicial reversal, popular initiative—which itself arises from the state’s progressive inclinations—may be the most plausible pathway forward. Doing so will restore equilibrium to the system of checks and balances within the state and will prevent serious constitutional violations—such as LB 1611—from remaining in place long after their deficiencies become apparent.

115. See supra text accompanying notes 10-12.