THE FIFTH JUDGE:
THOMPSON V. HEINEMAN AND NEBRASKA'S JUDICIAL SUPERMAJORITY CLAUSE

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Introduction: History of the Case

When TransCanada proposed its Keystone XL route in 2008, it likely did not believe that the proposal would face much opposition. After all, TransCanada already had another pipeline running through Nebraska. The thought that the project would be at a standstill seven years later seemed unfathomable.

Things changed 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, LB 1161. Whereas legislation passed during the 2011 special session required pipeline applicants to obtain approval from the Public Service Commission ("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.[1] 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*[2] reached the Nebraska Supreme Court, it appeared that the case would definitively decide LB 1161's fate.[3]

However, the manner in which the Court eventually decided *Thompson* did not resolve the constitutional issues surrounding LB 1161. Invoking a rarely used rule, four out of seven judges found LB 1161 unconstitutional, but vacated the entirety of the lower court's decision due to Nebraska's "judicial supermajority" or "five judges" clause. The requirement that five judges hold a law unconstitutional in order to strike it down is found in NEB. CONST. 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.*[4]

In *Thompson*, only four judges decided that LB 1161 was unconstitutional – one judge short of the five needed to strike down the law.

Part I of this article discusses the history of the judicial supermajority clause in both Nebraska and other states. Part II of this article examines the effects of the supermajority clause on cases before the Nebraska Supreme Court and how the clause came into play in *Thompson v. Heineman*.

Part I: The Origins of the Judicial Supermajority Clause

Judicial supermajority clauses are extremely rare in American law, but are not a new idea. Several states have contemplated amending their constitutions to include a supermajority clause. Additionally, proposals to require the Supreme Court of the United States to have a "six-three" supermajority requirement occasionally arise from time to time.[5] However, only Ohio, North Dakota, and Nebraska have ever actually enacted a judicial supermajority. All three states adopted their supermajority requirements during the Progressive Era, all seemingly in response to the Supreme Court's decision in *Lochner v. New York* or by populist sentiment.[6] Ohio adopted the requirement in 1912, North Dakota in 1919, and Nebraska in 1920. [7]

For Ohio, its 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.[8] The Progressives were particularly upset that the Ohio Supreme Court had recently invalidated a series of laws passed by the Progressive movement, mainly dealing with workers rights.[9] Early on, one delegate proposed a provision which would require a unanimous decision by the Court to invalidate a statute.[10] The proposed provision was 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.[11] Yet, Ohio's judicial supermajority clause was short-lived. By the 1960's, issues with the "all but one" requirement were easily apparent.[12] Many of the problems were a result of Ohio's unique court structure and whether the lower court had held the challenged law as constitutional or unconstitutional.[13] Of particular embarrassment, several statutes concerning limits on freedom of speech were found to be unconstitutional, but remained on the books due to the supermajority clause – only to be later overturned by the United States Supreme Court on First Amendment or other constitutional grounds.[14] The supermajority requirement was repealed on May 7, 1968, sparking almost no debate.[15] For Ohio, the judicial supermajority clause was a "well-intentioned experiment [that] was at best a noble failure, at worst a disaster that endured far too long."[16]

North Dakota implemented its "four judges" supermajority requirement in 1919.[17] The amendment was proposed as part of an omnibus provision by the Nonpartisan League ("NPL"), which controlled the North Dakota House of Representatives.[18] Similar to concerns expressed by Ohio delegates, the proponents of North Dakota's "four judges" clause worried that the state Supreme Court might undo hard-fought legislative reform. 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."[19] While the omnibus provision was defeated by the North Dakota Senate, the amendment survived when it was offered by non-NPL senators as an individual resolution.[20] The amendment passed during the general election in November 1918 and is still in place today.[21]

Similar to Ohio' judicial supermajority clause, Nebraska's clause resulted from a state constitutional convention. Facing a series of shortcomings within the Nebraska Constitution of 1875, the Legislature called for a constitutional convention in 1917.[22] Nine of the 336 proposals at the convention dealt with the powers of the state Supreme Court to declare acts of the legislature unconstitutional.[23] Two elements in play greatly influenced the adoption of the "five judge" requirement: the existence of the NPL (as in North Dakota) and the support of William

Jennings Bryan. The NPL, a populist movement with strong support in the state at the time, fiercely advocated for a proposal which would prevent the state Supreme Court from invalidating a legislative measure on constitutional grounds at all.[24] Mindful of the public's views, and worried about how the amendments might be received when they were put to a public vote in light of the "high nonpartisan sentiment", 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.[25] In addition to the NPL's popularity, Bryan himself directly addressed the Nebraska Convention. Bryan's remarks reflected both Ohio and North Dakota's reasons for enacting a judicial supermajority requirement – restraining the judiciary's power to conduct judicial review. In his remarks, Bryan stated:

> 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 … 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 referendum – to allow what they have declared to be the people's will to be overthrown by a judge.[26]

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 six weeks later of 382,653.[27] For Nebraska, "[t]he minority control of the supreme court under the five judge rule was definitely adopted by a distinct minority of the qualified voters within the state."[28] There have been attempts to eliminate the five judges clause, including during the 1970 proceedings of the Nebraska Constitutional Revision Commission.[29] While the Commission could find "no good reason" to keep the provision, it was not repealed. [30]

Part II: The Judicial Supermajority Clause in Nebraska Courts

Following its adoption to the Nebraska Constitution, the judicial supermajority clause lay dormant for several decades. It was first used as a deciding factor in two 1968 cases – *In re Cavitt*[31] and *DeBacker v. Brainard*[32]. While occasionally mentioned in subsequent case law[33], the clause was not employed as the deciding factor in a case again until *State ex rel. Spire v. Beermann*[34] in 2000, and then not again until *Thompson.*

Effectively, the clause operates to protect legislation that would otherwise be found to be unconstitutional and allows that legislation to stand. In *re Cavitt* involved a state statute that required mental patients to be sterilized as a condition of being released from a state home.[35] While four judges found the law to be unconstitutional, the supermajority clause forced the Court to allow the statute to stand.[36] A similar situation arose in *Brainard*, in which 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.[37] In *State ex rel. Spire v. Beermann*, the Nebraska Supreme Court considered the constitutionality of legislation which transferred Kearney State College into the University of Nebraska system.[38] While four judges determined

that the legislation was unconstitutional, the Court upheld the statute based on the judicial supermajority requirement.[39]

The judicial supermajority clause was not used again as a determining factor in a case until *Thompson v. Heineman.* In *Thompson,* the plaintiffs sought to strike down LB 1161 as unconstitutional. Their first argument stemmed from the Act's delegation of powers to normally possessed by the Public Service Commission to the Governor. As four judges of the court pointed out, the PSC constitutes a unique agency under Nebraska law – "an independent regulatory body for common carriers."[40] Under NEB. CONST. ART. IV, § 20, "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."[41] In *Thompson,* four judges determined that the proposed KXL pipeline qualified as a "common carrier" and thus fell under the PSC's powers, rendering LB 1161 unconstitutional.[42] The same four judges further found LB 1161 unconstitutional because it unlawfully delegated the power to grant eminent domain to private organizations by the governor, when only the legislature may grant eminent domain powers.[43]

With a simple majority of the bench, in any other case, before almost any other appellate court in the country, the plaintiffs would have won the day. Four out of seven judges found LB 1161 unconstitutional. However, the three remaining judges did not reach any conclusions on the constitutionality of LB 1161, finding instead that the plaintiffs' grounds for standing under a "resident taxpayer" rule insufficient.[44] Due to Nebraska's judicial supermajority clause, LB 1161 was allowed to remain on the books as good law while the case was remanded back to the district court.

The Court was not wrong in hinging its decision on the provision – the majority only had four judges, and the court is constitutionally bound to have five concurring judges in order to strike down a state law as unconstitutional. Still, perhaps more vividly than other cases before it, *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 that LB 1161 is unconstitutional.[45] Effectively, the clause allows LB 1161 to remain good law in the state, not because any judge reaching the merits of the case determined that it passed constitutional muster, but only because the plaintiffs failed to convince a fifth judge on the court to find the law unconstitutional. 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.[46] Without a second legislative body, Nebraska's legislature is not confined 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.[47] In light of this structure, an "independent and unhampered judiciary" seems even more critical to preserve the balance of power between the three branches.[48] Instead, the judicial supermajority clause allows the legislature to insulate itself from being held accountable when it passes laws that are arguably unconstitutional. Second, in the case of *Thompson,* the clause works against judicial efficiency – by blocking the Court from conclusively ruling on the constitutionality of LB 1161, further litigation is required to definitely resolve the constitutional issues. On a larger scale, this in turn has led to the controversy surrounding the Keystone XL pipeline to be drawn out even further.

Conclusion

At the end of the day, the Court's decision to invoke the supermajority clause did not conclusively spell disaster for landowners or a clear victory for TransCanada. The *Thompson* case remained very much alive after it was vacated, and could work its way back up to the Nebraska Supreme Court. Meanwhile, two other cases challenging LB 1161, one in York County and the other in Holt County, are currently proceeding based on traditional standing after TransCanada began eminent domain proceedings against landowners in those counties.[49] The constitutionality of LB 1161 will likely come before the Court again soon.

However, the merits of Nebraska's judicial supermajority clause remains an open question. On one hand, the measure strengthens the separation of powers in the state by acting as a check on the judiciary's power of judicial review. Nevertheless, it prevents very real constitutional issues from being definitively resolved and allows potentially unconstitutional laws to continue to exist based on a mere technicality.[50] Further, it hinders judicial efficiency and arguably tips the balance of powers too far in favor of the legislature.

For now, the judicial supermajority clause remains alive and well in Nebraska. As *Thompson* demonstrates, litigants raising constitutional issues against state laws in Nebraska should remain vigilant about the potential effects the clause may have on their case. Should they ever reach the Nebraska Supreme Court, they will have to focus on more than a simple majority of the bench – they will have to persuade a fifth judge in order to prevail.

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[1] Thompson v. Heineman, 289 Neb. 798, 802, 857 N.W.2d 731, 240 (2015).
[2] *Id.*
[3] Joe Duggan, *Ruling on Keystone XL pipeline could come down to two key points,* Omaha World Herald (Sep. 2, 2014), http://www.omaha.com/news/nebraska/ruling-on-keystone-xl-pipeline-could-come-down-to-two/article_8b64c55d-21de-5bfa-a246-4e4fe5002a66.html.
[4] NEB. CONST. art. V § 2.
[5] Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).
[6] Sandra Zellmer, *Keystone XL Pipeline Route through Nebraska Upheld on Constitutional Technicality – for Now*, CPRBlog (Jan. 15, 2015), http://www.progressivereform.org/CPRBlog.cfm?idBlog=EEC8FFCB-942B-4764-55172CC3E973EEF8.
[7] Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rules: Lessons from the Past*, 78 IND. L. J. 73, 90-94 (2003).
[8] Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote,* 52 CASE W. RES. L. REV. 441, 443 (2001).
[9] *Id.* at 443-44.
[10] *Id.* at 445.
[11] *Id.* at 451.
[12] *Id.* at 464.

[13] The Ohio supermajority clause applied to cases of original jurisdiction and cases from one of the state's lower courts of appeal if that court had upheld the challenged law as constitutional. If the lower court found the law to be unconstitutional, only a simple majority of the Ohio Supreme Court was needed to affirm. *Id.* at 455.
[14] *Id.* at 463. (citing *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960) *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); *Superior Films, Inc. v Dep't of Educ.,* 159 Ohio St. 315, 112 N.E.2d 311 (1953), *overruled by Superior Films, Inc. v. Dep't of Educ.*, 346 U.S. 587 (1954) (per curiam)).
[15] Entin, *supra* note 8, at 465-66.
[16] *Id.* at 466.
[17] Herbert L. Meschke and Ted Smith, *The North Dakota Supreme Court: A Century of Advances,* 76 N.D. L. REV. 217, 248 (2000).
[18] *Id.* at 247.
[19] *Id.*
[20] *Id.* at 248.
[21] *Id.*
[22] Paul W. Madgett, Comment, *The "Five Judge" Rule in Nebraska,* 2 CREIGHTON L. REV. 329, 330 (1969).
[23] *Id.* at 330.
[24] William Jay Riley, Comment, *To Require that a Majority of the Supreme Court Determine the Outcome of Any Case Before It,* 50 NEB. L. REV. 622, 625 (1971).
[25] *Id.* at 626
[26] *Id.* (citing 1 Proceedings of the Constitutional Convention 1919-20, 307, 319 (1920)).
[27] *Id.* at 627.
[28] *Id.*
[29] *Id.* at 647.
[30] *Id.* at 622-23.
[31] In re Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968).
[32] DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968).
[33] *See State ex rel. Belker v. Bd. of Educ. Lands and Funds*, 185 Neb. 270, 175 N.W.2d 63 (1970) (dismissed on jurisdictional grounds); *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005) (decided on other grounds).
[34] State v. Beermann, 235 Neb. 384, 455 N.W.2d 749 (1990).
[35] *In re Cavitt*, 182 Neb. at 714-15, 157 N.W.2d at 174.
[36] *Id.* at 726-27, 157 N.W.2d at 181 (Newton, J. dissenting).
[37] DeBacker v. Brainard, 183 Neb. 461, 461, 161 N.W.2d 508, 509 (1968).
[38] *Beermann*, 235 Neb. at 386, 455 N.W.2d at 750.
[39] *Id.* at 385.
[40] Thompson v. Heineman, 289 Neb. at 831, 857 N.W.2d at 757.
[41] NEB. CONST. art. IV, § 20.
[42] *Thompson*, 289 Neb. at 835, 857 N.W.2d at 759.
[43] *Id.* at 845, 857 N.W.2d at 765.
[44] *Id.* at 859, 857 N.W.2d at 773-74 (Heavican, C.J.) (dissenting in part, and in part concurring in the result).

[45] In addition to the four judges in *Thompson*, the trial court judge also found LB 1161 unconstitutional. *See* Thompson v. Heineman, CI 12-2060 (Feb. 19, 2014).
[46] Riley, *supra* note 24, at 636.
[47] *Id.*
[48] *Id.*
[49] Joe Duggan, *Nebraska opponents of Keystone XL pipeline reignite legal fight over state routing law*, Omaha World Herald, Jan. 17, 2015, http://www.omaha.com/news/nebraska/nebraska-opponents-of-keystone-xl-pipeline-reignite-legal-fight-over/article_e9729cfe-af5c-5bf4-8774-45b157adcaa3.html.
[50] Zellmer, *supra* note 6.