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To Require That a Majority of the Supreme Court Determine the Outcome of Any Case Before It

William J. Riley
University of Nebraska College of Law, kschneiss@ce8.uscourts.gov

Comment

TO REQUIRE THAT A MAJORITY OF THE SUPREME COURT DETERMINE THE OUTCOME OF ANY CASE BEFORE IT

Working within the authorization of Legislative Bill 244 of the 1969 Legislature,[1] the Nebraska Constitutional Revision Commis-

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[1] L.B. 244, 80th Neb. Leg. Sess. (1969):

"Section 1. There is hereby established the Nebraska Constitutional Revision Commission to consist of twelve members. The Legislature shall name six members of the commission, only three of whom shall be acting legislators, with one legislator and one nonlegislator residing in each of the present Congressional districts. The Governor shall name three members of the commission, with one of such members residing in each of the present Congressional districts. The Supreme Court shall name three members of the commission, with one of such members residing in each of the present Congressional districts. Such members shall be named within fifteen days of the operative date of this act.

"Sec. 2. The members named to the commission under the provisions of section 1 of this act shall meet in the State Capitol within fifteen days of their appointment and organize by selecting a chairman and such other officers as it may desire.

"Sec. 3. The commission shall make a complete study of the Constitution of Nebraska to determine what changes, if any, should be made therein. The commission shall place special emphasis on simplifying and condensing the Constitution for the purpose of giving the Legislature broad powers, rather than numerous individual amendments. In making such study, the commission may hold such hearings throughout the state as it may find desirable and employ all necessary personnel. . . .

"Sec. 4. The commission shall report its findings and any recommendations for changes in the Constitution to the Legislature through the Executive Board of the Legislative Council within one year after adjournment of the 1969 session of the Legislature. The report shall be made public at the time of its submission to the Executive Board. The recommendations of the commission shall be considered at the next regular session of the Legislature to determine which of them, if any, should be submitted to the voters for approval or rejection.

. . . .

"Sec. 6. The commission's existence shall be terminated at such time as the Legislature may direct, but not before the commission has reported pursuant to section 4 of this act.

"Sec. 7. This act shall become operative ten days after adjournment sine die of the 1969 regular session of the Legislature.

"Sec. 8. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law."

sion[2] drafted a proposed Nebraska Constitution which it submitted to the people, the governor, and the legislature on September 24, 1970.[3] One of the major recommendations concerning the judicial article was to eliminate the requirement that five judges (one more than a majority) must concur to declare an act of the legislature unconstitutional.[4] Under the proposed constitution, a majority of the members sitting would pronounce a decision in all cases.[5] The commission could find "no good reason" to keep the extraordinary majority provision.[6]

After almost forty-seven years of dormancy,[7] Nebraska's "five judge rule"[8] has determined the outcome in three significant series of appeals: *State v. Cavitt;*[9] *DeBacker v. Brainard*[10] and *DeBacker*

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[2] *Id.* § 1. The Nebraska Constitutional Revision Commission consisted of 12 members: 6 named by the legislature, only 3 of whom could be acting legislators, with 1 legislator and 1 nonlegislator residing in each of the present congressional districts; 3 named by the governor, with 1 of such members residing in each of the congressional districts; and 3 named by the supreme court, one each from the present congressional districts.

[3] REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION (1970).

[4] NEB. CONST. art. V, § 2. After stating that the supreme court shall consist of seven judges, the constitution declares: "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."

[5] REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION, *supra* note 3, at 52. The commission changed article V, § 2 to read: "A majority of the members sitting shall have authority to pronounce a decision in all cases."

[6] *Id.* at 64.

[7] The present 5 judge concurrence rule concerning the constitutionality of legislative acts was adopted by the people of the state in a special election on September 21, 1920 (NEBRASKA LEGISLATIVE COUNCIL, NEBRASKA BLUE BOOK 103 (1968)), but the 5 judge rule did not control the result of a case until State v. Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968), *appeal dismissed,* 396 U.S. 996 (1970). It is highly probable that the rule was a latent force that weighed upon the minds of the judges during the intervening years and possibly influenced the court's decision indirectly in some instances.

[8] This article is indebted to Comment, *The "Five-Judge" Rule in Nebraska,* 2 CREIGHTON L. REV. 329 (1969).

[9] 182 Neb. 712, 157 N.W.2d 171 (1968), *appeal dismissed,* 396 U.S. 996 (1970).

[10] 183 Neb. 461, 161 N.W.2d 508 (1968), *appeal dismissed,* 396 U.S. 28 (1969). The Court held that the writ of certiorari had been improvidently granted.

v. Sigler;[11] *State ex rel. Belker v. Board of Educational Lands and Funds*[12] and *State ex rel. Bessey v. Board of Educational Lands and Funds*.[13] Following an analysis of the history of the present judicial article and a consideration of the constitutionality of the five judge rule, these recent Nebraska cases will be examined along with cases from other states that have felt the thrust of a similar constitutional restriction.[14] Finally, a balance sheet of the advantages and disadvantages of such a restraint on judicial authority will be drawn and appraised.

I. HISTORY

The Nebraska Supreme Court originally had no majority or extraordinary majority requirement for deciding constitutional questions,[15] but in 1872, the court applied a simple majority rule in declaring a legislative act unconstitutional.[16] The Nebraska Constitution of 1875 adopted this judicial decision,[17] and the majority requirement was continued when the judicial article was revised in 1908.[18] On April 21, 1917, the Nebraska Legislature resolved that a proposal calling for a constitutional convention be voted upon by the people of the state.[19] The electorate accepted the proposal in the November 5, 1918 election and in the subsequent November election of 1919, one hundred delegates were selected to attend the 1919-1920 Constitutional Convention.[20] The body of delegates to the convention was considered to be a distinctively conservative

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[11] 185 Neb. 352, 175 N.W.2d 912 (1970).

[12] 184 Neb. 621, 171 N.W.2d 156 (1969), *aff'd on rehearing*, 185 Neb. 270, 175 N.W.2d 63 (1970).

[13] 185 Neb. 801, 178 N.W.2d 794 (1970).

[14] N.D. CONST. § 89; OHIO CONST. art. IV, § 2 (1912).

[15] The Kansas-Nebraska Act, c. 59, § 9, 10 Stat. 277 (1854) and the NEB. CONST. art IV, § 1 (1866) contained no requiremnt as to the number needed for a decision of the supreme court. The court was made up of a chief justice and two associate justices.

[16] Brittle v. People, 2 Neb. 198 (1872), was decided by two of the three judges, who declared unconstitutional a legislative act allowing only white males to serve on juries.

[17] NEB. CONST. art VI, § 2 (1875).

[18] The number of supreme court justices was increased to 7. NEB. CONST. art VI, § 2 (1908).

[19] Neb. Laws c. 241, §§ 1-2 (1917); 1917 NEB. H.R. JOUR. 1292.

[20] The 100 delegates consisted primarily of attorneys (46) and farmers (28). 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1919-20, at iii-vi (1920) [hereinafter cited as PROCEEDINGS].

group,[21] and their philospohy was later reflected in many of their recommendations.

During the 1919-1920 Constitutional Convention, several proposals were offered pertaining to the voting restraints to be placed upon the supreme court, including one that the court could declare an act of the legislature unconstitutional only upon a unanimous vote.[22] On February 5, 1920, the Committee on the Judicial Department recommended that the convention adopt Proposal Number 313 which called for the concurrence of at least five of the seven supreme court justices in order to declare void an act of the legislature.[23] With little dissent, the convention incorporated Proposal Number 313 into their proposed constitution,[24] and the five judge rule was placed on the ballot as Proposed Amendment Number 16.[25]

Besides the conservative nature of the convention, two major factors gave impetus to the limitation placed upon the court in deciding constitutional issues. One of these was the Non-Partisan League. The League originated in North Dakota and embodied much of the Populist spirit although it went a great deal further in demanding state action for the benefit of farmers. The League advocated state ownership of mills, processing plants and other farm related industries.[26] The courts were an obstacle to many of its plans because of their rigid defense of the capitalistic system. In 1937 before the United States Senate Committee on the Judiciary, L. J. TePoel, Dean of Creighton College of Law, expressed the sentiment of the 1919-1920 Constitutional Convention's judiciary committee concerning the Non-Partisan League:

> I happened to be on the committee of the judiciary branch of the government at that convention. At that time what was known as the nonpartisan league was high in Nebraska. . . . They appeared before

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[21] J. OLSON, HISTORY OF NEBRASKA 276 (2d ed. 1966). The members of the convention were elected without party designation from the same districts and on the same basis as the members of the then state house of representatives (as required by Neb. Laws c. 196, §§ 1, 3, 9 (1919) and NEB. CONST. art. XV, § 2 (1875)). "The issues in the campaign were not clear, but in the main the contest seems to have been between the progressive and conservative elements of the state." *Id.* at 275.

[22] Proposal Number 54: "No law, or act of the legislature, or an act initiated by the people, shall be declared unconstitutional except by a unanimous decision of the supreme court." 1 PROCEEDINGS 115.

[23] *Id.* at 676.

[24] 2 *id.* at 2697. The vote on Proposal Number 313 was 85 for and 9 against.

[25] *Id.* at 2824.

[26] J. OLSEN, *supra* note 21, at 264.

> the committee on the judicial branch of the government demanding that the constitution be so amended as to take from the court the the power to declare an act of the legislature unconstitutional. We refused to even entertain their views.... But there were a majority on that committee who were a little afraid of what might happen when we got to the people at that time, with the nonpartisan sentiment running so high in the State, and they were ready and willing to compromise with them, and they said, "We will increase the required number from four to five."[27]

The foes of the court's power to strike down legislative acts by a simple majority also found able support in the words of such individuals as Abraham Lincoln[28] and, most particularly, William Jennings Bryan. The second factor in bestowing the five judge rule upon the state of Nebraska was the verbal support given by Bryan. Throughout his career, he desired and advocated limitations upon the judiciary's power to declare acts of the legislature void.[29] On January 12, 1920, Bryan addressed the Nebraska convention:

> 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 one judge.[30]

Bryan's opinion was held in high esteem by the members of the convention and by the people of Nebraska. Thus, Proposed Amendment Number 16 was primarily the result of the efforts of the Non-

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[27] *Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong., 1st Sess., pt. 6, at 1772 (1937).

[28] Abraham Lincoln in his inaugural address of 1861 referred to the Dred Scott decision saying, "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." THE PRESIDENTS SPEAK (3d ed. 1969).

[29] In Bryan's famed "Cross of Gold" speech, he attacked the Supreme Court's declaration that the income tax was unconstitutional, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). COMMANGER, DOCUMENTS OF AMERICAN HISTORY 626 (1963). Bryan gave his solid support to the Borah Amendment, which sought to require the concurrence of seven Supreme Court Justices before the Court could declare a statute unconstitutional. LAVINE, DEFENDER OF THE FAITH, WILLIAM JENNINGS BRYAN 225 (1965).

[30] 1 PROCEEDINGS 307, 319.

Partisan League, the pleas of William Jennings Bryan, and the conservative makeup of the convention.

The five judge rule was presented to the people in a special election along with forty other amendments, and on September 21, 1920, all forty-one proposed amendments were adopted by the electorate at the special election.[31] The vote that established the five judge rule and the other constitutional provisions in issue was extremely light, with about one-sixth of the qualified electors turning out.[32] The tally on Proposed Amendment Number 16 was 77,586[33] which hardly compares favorably to the presidential election vote just six weeks later of 382,653.[34] The 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 within the state.

II. CONSTITUTIONALITY

Although the constitutional validity of the five judge rule has been questioned in dissenting opinions,[35] the Nebraska Supreme Court has not concerned itself with the issue, and in *DeBaker v. Sigler*,[36] it specifically found it "unnecessary to consider" the question of the constitutionality of Article V, section 2.[37] In 1930, the Supreme Court of the United States in *Ohio v. Akron Park District*[38] considered the validity of the Ohio Constitution's limitation upon

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31 NEBRASKA BLUE BOOK 103 (1968).

32 *Id.* at 104.

33 *Id.* The highest total vote on any of the amendments was 83,250 on Proposed Amendment Number 3 which declared English to be the official language of the state and which required common school branches to be taught in that language. Separate ballots were provided for the women electors at the special election because there was some doubt whether women could legally vote upon constitutional questions.

34 *Id.* at 763.

35 Justice Spencer has approached the constitutional issue in his dissents filed in DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970) and State *ex rel.* Beiker v. Board of Educ. Lands & Funds, 184 Neb. 621, 171 N.W.2d 156 (1969).

36 185 Neb. 352, 175 N.W.2d 912 (1970). The constitutionality of the 5 judge rule was placed squarely before the court by *DeBacker*. *See* Brief for Appellant, DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970).

37 185 Neb. at 355, 175 N.W.2d at 913.

38 281 U.S. 74 (1930).

the Ohio Supreme Court's power to review constitutional issues.[39] In an opinion written by Chief Justice Hughes, the Court held the Ohio constitutional restriction valid against due process[40] and equal protection[41] claims and alleged violations of the guarantee to every state of a republican form of government.[42] The *Akron Park* decision was adhered to in a later case in an Ohio federal district court[43] just eight years before the people of Ohio withdrew the constitutional restraint.[44]

Viewing the Nebraska five judge rule with respect to the *Akron Park* holding and the Ohio constitutional restriction, the Nebraska rule appears in one respect more oppressive and in another much less confusing. The Ohio Supreme Court could declare a law void by majority vote if the court of appeals had also invalidated the law;[45] the Nebraska Supreme Court on the other hand must have a concurrence of five judges to hold an act of the legislature unconstitutional even though the district court struck down the act. But in several instances, Ohio found itself with a law in force in one or more appellate districts and of no effect in another appellate district;[46] at least in Nebraska, the minority decision upholding a legislative act by a vote of three to four takes effect throughout the state.

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[39] The Ohio Constitution stated: "The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges . . . . No law shall be held unconstitutional and void by the supreme court without a concurrence of at least all but one of the judges, except in affirmation of a judgment of the court of appeals declaring a law unconstitutional and void." OHIO CONST. art. IV, § 2 (1912).

[40] 281 U.S. at 80.

[41] *Id.* at 80-81.

[42] *Id.* at 79-80.

[43] Toth v. Silbert, 184 F. Supp. 163 (N.D. Ohio 1960).

[44] OHIO CONST. art. IV, § 2 was amended May 7, 1968 to read: "A majority of the Supreme Court shall be necessary to constitute a quorum or to render a judgment." See note 39 *supra* for the text of the former section.

[45] *See* note 39 *supra* for the text of the Ohio Constitution.

[46] For example, in City of East Cleveland v. Board of Educ., 112 Ohio St. 607, 148 N.E. 350 (1925), a statute providing that a municipality shall furnish water to a public school with charge was held constitutional in the court of appeals, and the supreme court affirmed that decision although 5 of the 7 judges considered it invalid. Subsequently in Board of Educ. v. City of Columbus, 118 Ohio St. 295, 160 N.E. 902 (1928), the supreme court was able to strike down the same act because a different court of appeals had invalidated the law. The effect was that the statute was void in one appellate jurisdiction and constitutional in another.

The reasoning of the Court in *Akron Park* may be put in some doubt by later decisions of the Supreme Court and by further analysis of the restraint. It can hardly be doubted that the high court has taken an expanded view of the Due Process Clause and the Equal Protection Clause pertaining to individual and minority rights since the *Akron Park* decision in 1930. The recent holdings of *Reitman v. Mulkey*[47] and *Hunter v. Erickson*[48] illustrate the concept that a state by constitutional amendment or a city by charter amendment can not encumber the assertion of federal constitutional rights. Because the five judge rule applies equally to federal constitutional rights as well as to state constitutional rights, the extraordinary majority rule may in some instances make it more difficult to exercise federal rights. A minority of three judges could deprive a person of a right arising under the United States Constitution.[49] The aggrieved party could appeal the decision to the Supreme Court of the United States or he possibly could have brought the suit originally in federal district court.[50]

It also can be argued that Nebraska litigants are denied equal protection of the laws and are not entitled to all the privileges of citizens in the several states[51] because in almost all other states a simple majority may hold a legislative act unconstitutional, which more easily assures the protection of federal and state rights. The

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[47] 387 U.S. 369 (1967) (where a California constitutional amendment allowing property owners to discriminate in the sale of real property was held unconstitutional as a violation of the U.S. CONST. amend. XIV).

[48] 393 U.S. 385 (1969) (where an Akron, Ohio city charter provision made it substantially more difficult to secure enactment of open housing legislation than to pass other ordinances, the Supreme Court declared such a system unconstitutional).

[49] This definitely would not be the case in every situation for it "is only in the areas where new constitutional principles are emerging that the kind of question likely to split a court will arise. Because the federal courts are the source of the great mass of innovative constitutional jurisprudence, such questions are quite likely to be federal questions." Comment, *The "Five-Judge" Rule in Nebraska, supra* note 8, at 337.

[50] The vehicle for entry to the federal courts may be the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1964) or, possibly, a three judge panel, 28 U.S.C. § 2284 (1964), for injunctive relief against the enforcement of a state statute, 28 U.S.C. § 2281 (1964), or relief from a person who, acting under color of state law, has deprived the complainant of a right, privilege, or immunity secured by the Constitution, 42 U.S.C. § 1983 (1964).

[51] U.S. CONST. amend. XIV, § 1.

five judge rule places a potential roadblock in the path of constitutional claims, a roadblock found in only one other state.[52]

Since 1930, the purview of the Due Process Clause has been particularized to a test of whether a certain state procedure is in conformity with fundamental or necessary Anglo-American views of ordered liberty.[53] Majority rule itself is a traditional Anglo-American concept, and from the inception of this nation, majority rule has been the fundamental principle in court declarations as to the constitutionality of legislative acts.[54] Thus the five judge rule may be in violation of due process.

The Supreme Court has taken a less restrictive view of some political questions, which raises the point that the Guarantee Clause may contain more impact today. Finally, the potential hindrance of the five judge rule to a successful assertion of federal rights may run into conflict with the Supremacy Clause of the Constitution.[55]

All of these possible attacks upon the constitutionality of the five judge rule are necessarily based upon the hypothetical that five judges will not recognize and adhere to some constitutional mandate. Although the federal courts are the source of much constitutional and social change today, the Nebraska Supreme Court has had an enviable record in sustaining constitutional rights when its decisions have been reviewed by the United States Supreme Court.[56]

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[52] North Dakota; N.D. CONST. § 89.

[53] "In one sense recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. For example, Palko v. Connecticut, 302 U.S. 319 . . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968).

[54] Not until the Populist fervor of the late nineteenth and early twentieth centuries did supreme courts find themselves under extraordinary majority rules in dealing with constitutional issues.

[55] Comment, *The "Five-Judge" Rule in Nebraska, supra* note 8, at 335-38.

[56] *Id.* at 338, 341.

III. RECENT EFFECT OF THE FIVE JUDGE RULE

State v. Cavitt[57] in 1968 was the first case to patently realize the full force of the five judge rule when a minority of three judges upheld a legislative act which allowed the board of examiners to examine each potential dischargee from the Beatrice State Home to determine whether, as a condition precedent to discharge, that person should be sterilized.[58] *DeBacker v. Brainard*[59] soon followed with the minority of the court overriding the majority's opinion that a juvenile under the proper circumstances had a right to trial by jury and could be found guilty only if his guilt was proven beyond a reasonable doubt.[60] Then came the "school land" cases where the majority of the court in *State ex rel. Bessey v. Board of Educational Lands and Funds*[61] adhered to the opinion of the controlling minority of three in *State ex rel. Belker v. Board of Educational Lands and Funds*[62] concerning the constitutionality of the statute but refused to give effect to the minority's interpretation of the act. Instead, the majority followed the interpretation of the statute which they had argued in *Belker* made the act unconstitutional.

In *Belker*, the minority of three judges sustained the validity of the mandatory sale of school lands saying:

> [T]he constitutional provision which vests the general management of all school lands and funds in the Board of Educational Lands and Funds "under the direction of the Legislature" authorizes the Legislature to direct the sale of school lands. Article VII, § 1, Constitution of Nebraska. . . .
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> [T]here is nothing in the act, nor in any legislative history alluded to, which in any way limits or attempts to limit the jurisdiction or power of the courts to determine, in a proper proceeding, whether

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[57] 182 Neb. 712, 157 N.W.2d 171 (1968). *See* note 7 *supra.*

[58] NEB. REV. STAT. § 83-504 (Reissue 1966). The mental health act, NEB. REV. STAT. §§ 83-501 to -508 (Reissue 1966), was repealed by Neb. Laws c. 825, § 1 (1969), and the Interstate Compact on Mental Health was enacted in NEB. REV. STAT. §§ 83-801 to -806 (Supp. 1969). The sterilization provision was omitted.

[59] 183 Neb. 461, 161 N.W.2d 508 (1968), *appeal dismissed,* 396 U.S. 28 (1969).

[60] NEB. REV. STAT. §§ 43-206.03(2)-(3) (Reissue 1968). A majority of the U.S. Supreme Court in McKeiver v. Pennsylvania, 39 U.S.L.W. 4777 (June 21, 1971) held that due process does not require extension of the Sixth Amendment's jury trial guarantee to juvenile delinquency hearings.

[61] 185 Neb. 801, 178 N.W.2d 794 (1970).

[62] 184 Neb. 621, 171 N.W.2d 156 (1969), *aff'd on rehearing,* 185 Neb. 270, 175 N.W.2d 63 (1970).

> the sale of any school lands was conducted in the manner required by law.[63]

The majority in *Belker* feared deprivation of the Board of Educational Lands and Funds' trustee supervision over individual sales and over the volume of sales that would occur in 1975 when over half of the land leases expire. The majority saw an erosion of the court's 1943 decision that any act by which the legislature sought to assume direct control over the public school lands and remove the control of the board was null and void.[64] The unsuccessful majority in *Belker* interpreted the words of the statutes[65] and the legislative history as requiring finality of sale upon a bid above the appraisal price and payment within ninety days; thus the board and the courts would be denied the right to question or to strike down the sale as not in the best interests of the state.[66]

In *Bessey*, the state asked the supreme court to exercise its supervisory trust jurisdiction over the school lands to set aside a successful bid and order a new sale. The majority, which had not succeded in nullifying the law previously, denied relief holding that the "statute was strictly complied with . . . 'in the manner required by law.' "[67] In this "prophetic sequel"[68] to *Belker*, the absurdity of the five judge rule came full circle:

> In State ex rel. Belker v. Board of Educational Lands and Funds, on rehearing, . . . the majority of this court said: "The history of the

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[63] 185 Neb. at 270-71, 175 N.W.2d at 63.

[64] State *ex rel.* Johnson v. Central Neb. Pub. Power & Irrigation Dist., 143 Neb. 153, 8 N.W.2d 841 (1943).

[65] NEB. REV. STAT. § 72-257 (Reissue 1966): "All lands, now owned or hereafter acquired by the state for education purposes, shall be sold at the expiration of the present leases. . . . Prior to such sale, the land shall be appraised for sale purposes in the same manner as privately owned land by a representative appointed by the Board of Educational Lands and Funds, and thereafter shall be sold at public sale at not less than the appraised value." And the complementary section, NEB. REV. STAT. § 72-258 (Reissue 1966), declares: "Such land shall be sold, at public auction, by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest bidder. The appraised value for sales purposes as provided in § 72-257 shall be the starting bid price."

[66] NEB. CONST. art. VII, § 1: "The general management of all lands and funds set apart for educational purposes, and for the investment of school funds, shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds."

[67] 185 Neb. at 802, 178 N.W.2d at 796.

[68] *Id.* at 801, 178 N.W.2d at 796.

> act shows conclusively that the Legislature intended that the appraisal, sale, and payment were to constitute the sole basis for the passing of ownership. . . ."
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> ....
>
> Now that the statute is declared constitutional we adopt and declare the above holding herein as the proper and only interpretation the statute could and should be given.[69]

The minority that had prevailed in *Belker* could not in *Bessey* impose its interpretation of the statute.[70] Because of this absurdity, seven judges now considered the law unconstitutional as interpreted. This embarrassing situation is likely to occur often when the extraordinary majority rule controls the outcome of a case.

Nebraska is just beginning to realize the effect of its five judge rule, but Ohio and North Dakota have experienced similar court limitations for many years. The Ohio Supreme Court attempted to avoid the force of their constitutional restriction[71] in some measure by declaring in *Village of Brewster v. Hill*[72] that a municipal ordinance was not a law within the meaning of the Ohio Constitution.[73] And in *R.K.O. Radio Pictures, Inc. v. Department of Education*,[74] the Ohio Supreme Court circumvented the constitution's limitation by accepting a censorship statute but holding that any exercise of the censoring power under it would be unreasonable and unlawful.[75] Ohio had many instances of confusion in its intermediate appellate jurisdictions,[76] and statutes were sustained by an embarrassing two to five controlling minority until the people amended the Ohio Constitution on May 7, 1968, to allow a majority to render all judgments.[77]

The North Dakota Supreme Court has acquiesced, for the most part, to their requirement of at least four of the five justices con-

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[69] *Id.* at 803, 178 N.W.2d at 796-97.

[70] The minority believed the board and the courts had the power to set aside a sale and accept a higher bid. *Id.* at 808-14, 178 N.W.2d at 799-802.

[71] OHIO CONST. art. IV, § 2 (1912). *See* notes 14, 39, 44, 45 and 46 and accompanying text *supra*.

[72] 128 Ohio St. 354, 191 N.E. 366 (1934).

[73] *Id.* at 358, 191 N.E. at 367.

[74] 162 Ohio St. 263, 122 N.E.2d 769 (1954).

[75] *Id.* at 268, 122 N.E.2d at 771.

[76] Note 46 *supra*.

[77] "A majority of the Supreme Court shall be necessary to constitute a quorum or to render a judgment." OHIO CONST. art. IV, § 2 (1969).

curring to overturn a legislative enactment or law.[78] The court has said that the amendment to limit the court's constitutional review was "a rebuke to the courts for having gone too far in declaring statutes to be void because of defects in the title or the procedure,"[79] and that the power to declare acts unconstitutional "is too dangerous and arrogant for use except on occasions very extraordinary."[80] The 1919-1920 Constitutional Convention and the newly proposed Nebraska Constitution, as well as various constitutional amendments in between, have remedied many of the title and procedure encumbrances upon the Nebraska Legislature. And as will be discussed later, although the power of judicial review may be dangerous and arrogant on rare occasions, it is the absolute duty of the judiciary to protect the will of the people as codified in their constitutional compact.

Nebraska and North Dakota are the only states which have constitutional provisions that require more than a majority concurrence to hold a legislative act unconstitutional. Except for South Carolina that requires either a unanimous decision of its five supreme court justices or a majority decision by those five justices with the inclusion of the sixteen circuit court judges,[81] all other states by constitutional provision, statute, court rule, or court practice allow a

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[78] "The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum or pronounce a decision . . . provided, however, that in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges shall so decide." N.D. CONST. § 89 (1908).

[79] Wilson v. City of Fargo, 48 N.D. 447, 455, 186 N.W. 263, 266 (1921).

[80] Daly v. Beery, 45 N.D. 287, 307, 178 N.W. 104, 111 (1926).

[81] S.C. CONST. art. 5, § 12: "Whenever, upon the hearing of any cause or question before the Supreme Court, in the exercise of its original or appellate jurisdiction, it shall appear to the Justices thereof, or any three of them, that there is involved a question of constitutional law, or of conflict between the Constitution and Laws of this State and of the United States, or between the duties and obligations of her citizens under the same, upon the determination of which the entire Court is not agreed; or whenever the Justices of said Court, or any two of them, desire it on any cause or question so before said Court, the Chief Justice, or in his absence, the presiding Associate Justice, shall call to the assistance of the Supreme Court all of the Judges of the Circuit Court: *Provided, however* That when the matter to be submitted is involved in an appeal from the Circuit Court, the Circuit Judge who tried the case shall not sit. A majority of the Justices of the Supreme Court and Circuit Judges shall constitute a quorum. The decision of the Court so constituted or a majority of the Justices and Judges sitting, shall be final and conclusive."

simple majority of the full court or of a quorum of the court to decide a constitutional issue properly before the court.[82]

The extraordinary majority requirement placed upon a state supreme court may cause confusion and embarrassment to both the court and the litigants before the court. It would seem that the parties on appeal would more readily accept the opinion of a majority of the court than that of the minority; in fact, justice may demand it.

IV. ADVANTAGES AND DISADVANTAGES IN PERSPECTIVE

From the addresses of William Jennings Bryan[83] and Abraham Lincoln[84] and from the policies of the Non-Partisan League,[85] the theme that can be extracted from the five judge rule is that the will of the people as represented by the acts of their elected legislature should not be too easily thwarted by an independent judiciary. This tends to overlook the fact that the courts interpret the constitution as well as statutes, and the constitution is the first and last expression of the will of the people.[86] The courts and particularly the supreme court are obligated to defend the individual and the minority from the caprices of the majority; whether corporate president or laborer, small businessman or criminal, the court has a duty to protect their constitutional rights. In the words of Chief Justice John Marshall:

> It is, emphatically, the province and duty of the judicial department, to say what the law is.... So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.[87]

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[82] Comment, *The "Five-Judge" Rule in Nebraska, supra* note 8, at 349-51.

[83] *See* note 30 and accompanying text *supra.*

[84] *See* note 28 *supra.*

[85] *See* notes 26 and 27 and accompanying text *supra.*

[86] Of course, the point can be made that if the constitution is the supreme will of the people, then the 5 judge rule which is contained within the constitution is also the supreme will of the people. The answer may be that the expression of the will of the people in 1920 is inadequate to express the total will of the people today. *See* notes 32, 33, 34 and accompanying text, concerning the vote on the 5 judge rule, *supra.*

[87] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

And in the expressive text of the address of John Lee Webster, president of the Constitutional Convention of 1875, given before the 1919-1920 Nebraska Constitutional Convention:

> Mere majorities, majorities for the occasion—like the act of a particular executive, or the will of a particular legislator—rule only for the occasion. Over them all rules the Constitution, whose organ of utterance is the judiciary established by it.
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> ....
>
> [W]e have no hesitation in saying that the Department of the Judiciary exercises an essential and potent force in protecting the rights of the minorities in commanding respect for the laws enacted by the Legislature. It is, likewise, the trustee of the Constitution in and by which the inalienable rights of the individuals are preserved.
>
> ....
>
> We can see the wisdom of the framers of the Constitution in hedging it around with defenses against the attacks of popular majorities, against their excited delusions and hasty errors, as well as to guard it against the faithless and corruptible officers who may, for a time, administer it.
>
> ....
>
> Had not the framers of our system of government supposed it possible that legislative bodies might fall into error, they would not, in their sovereign capacity, have adopted a written Constitution, superior alike over themselves and the Legislature.[88]

The Nebraska governmental system is divided into three coordinate branches: legislative,[89] executive,[90] and judicial.[91] Any major dilution of the powers of one branch may injure the balance of that system.[92] Although it may be argued that the five judge rule is a legitimate limitation upon the power of the judiciary, the fact that the legislative branch in Nebraska is represented by a unicameral, and the "checks and balances" of a two-house legislature are absent, makes it more probable that there would be a greater need for an independent and unhampered judiciary and supreme court.

An exchange between James W. R. Brown[93] and Senator Ramey

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[88] 1 PROCEEDINGS 276-79.

[89] NEB. CONST. art. III.

[90] *Id.* art IV.

[91] *Id.* art. V.

[92] *See* Mr. Justice Spencer's dissenting opinions in *DeBacker v. Sigler* and *State ex rel. Belker v. Board of Educ. Lands and Funds.*

[93] Mr. Brown, appointed by the supreme court from Omaha, was the chairman of subcommittee 1 of the Nebraska Constitutional Revision Commission which was assigned the judicial article of the constitution.

C. Witney[94] during the proceedings of the Constitutional Revision Commission illustrate some of the above points:

> Mr. Brown—It is a matter of judicial judgment with respect to whether it invades the constitutional rights of the person. Now I can grant you that perhaps a minority in some instances may be, let's say arrive at a better conclusion than the majority. I would think that the contrary would most likely be the situation and certainly that is what we generally accede to and that is the majority is more likely right than a minority, and, therefore, on this one I feel rather strongly in favor of our recommendation.
>
> Sen. Witney—The thing I have in mind is that in my judgment the courts have tended to do more than interpret the Constitution. In many cases in my judgment they are attempting to make the law, rather than to interpret the law and if they tend to make the law that is a philosophy then there should be an extra person there who should have the vote with reference to the interpretation of the Constition in order to make it valid.
>
> Mr. Brown—Well, I would agree with you that in some instances that is true and the courts do attempt to make law. I would be hopeful that the larger number of judges do not do that; and therefore, I think the requiring a majority is more likely to accomplish your objective than permitting a minority who may depart from what we expected as the proper norm for judges would do. In other words there you might have a couple who would be departing from what we expect from our judges; and, therefore, the majority might be going down the proper line. We would . . . again, I would expect that that would be more likely than not and that therefore the permitting a minority to control might very well implement what you don't like and what I don't like.[95]

Shortly following this exchange, the proposed Article V, section 2 abrogating the five judge rule was accepted by the commission with nine affirmative votes, two negative votes and one abstention.[96]

A frequent observation is that the supreme court has unlimited power to strike down legislative acts. This, of course, is not true, first, because the court is confined to only those controversies that enter the court system and are appealed to it; second, because a constitutional issue must be properly before the court, having climbed the procedural ladder on appeal; and third, because the

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[94] Sen. Whitney, appointed by the legislature from Chappell, served on subcommittee 2 of the commission which dealt with the legislative and executive articles. Sen. Whitney also was the chairman of the commission as a whole.

[95] 1970 PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL REVISION COMmission).

[96] REPORT OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION, *supra* note 3, at 150.

court is reluctant to set a legislative act aside,[97] therefore it imposes upon itself court rules and rules of practice (often referred to as judicial restraint) to restrict constitutional claims.[98] Some of the judicial restraints that the Nebraska Supreme Court has impressed upon itself and interested parties are:

1. Written notice must be given to the clerk of the court that a case has been filed which raises the constitutionality of a statute as an issue.[99] The legislature and executive are thereby given notice and may enter the dispute to preserve the statute.

2. It is a fundamental rule that "[a]ll acts of the Legislature are presumed to be constitutional."[100]

3. "In construing an act of the Legislature, all reasonable doubts must be resolved in favor of its constitutionality."[101]

4. The invariable practice of the court is to avoid constitutional questions unless they are imperatively required.[102]

5. "A litigant who invokes the provisions of a statute . . . may not seek the benefit of it and at the same time question its constitutionality."[103] And the litigant must have been adversely affected by the statute.[104]

6. A constitutional issue must normally have been raised in the

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97 *Wenham v. State,* 65 Neb. 394, 91 N.W. 421 (1902).

98 There is an analysis of these judicial restraints in Comment, *The "Five-Judge" Rule In Nebraska, supra* note 8, at 339-41.

99 NEB. SUP. CT. R. 18.

100 Stanton v. Mattson, 175 Neb. 767, 774, 123 N.W.2d 844, 849 (1963). *See* Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N.W.2d 119 (1970); Arrow Club, Inc. v. Nebraska Liquor Control Comm'n, 177 Neb. 686, 131 N.W.2d 134 (1964); Metropolitan Util. Dist. v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961).

101 State *ex rel.* Meyer v. County of Lancaster, 173 Neb. 195, 200, 113 N.W.2d 63, 67 (1962). *See* Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

102 Central Markets West, Inc. v. State, 186 Neb. 79, 180 N.W.2d 880 (1970); Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963); Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

103 Shields v. City of Kearney, 179 Neb. 49, 51, 136 N.W.2d 174, 175 (1965). *See* Kansas-Nebraska Nat. Gas Co., Inc. v. City of Sidney, 186 Neb. 168, 181 N.W.2d 682 (1970); Peterson v. Vasak, 162 Neb. 493, 76 N.W.2d 420 (1956).

104 Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967); Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966); Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963).

trial court[105] at the earliest practical opportunity, or it will be forfeited by the failure to make a timely assertion.[106]

7. If the legislative act is susceptible of more than one meaning, the court will adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid.[107]

8. Since the Nebraska Constitution is not a grant but a restriction of legislative power, the court will enforce only those limitations that the constitution imposes.[108]

9. If the invalid portions of a statute can be seperated from the valid portions and the constitutional part enforced independent of the rest, and the unconstitutional part did not constitute such an inducement to the passage of the valid part that the statute would not have been passed without it, the constitutional portions may be upheld.[109] It is the court's duty, if possible, not only to construe as a whole and harmonize all valid legislation on the same subject, but also to adopt a construction making all provisions valid.[110]

10. The wisdom and propriety of a legislative act are not relevant factors in a test of constitutionality.[111]

11. Even though an invalid statute furnished the only basis for

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105 State v. Tucker, 183 Neb. 577, 162 N.W.2d 774 (1968); State v. Mayes, 183 Neb. 165, 159 N.W.2d 203 (1968); State v. Schwade, 177 Neb. 844, 131 N.W.2d 421 (1964). State v. Goodseal, 186 Neb. 359, 183 N.W.2d 258 (1971) is an example where the court overlooked the failure to raise the constitutionality of NEB. REV. STAT. § 29-114 (Supp. 1969), the Self-Defense Act, and declared the act invalid.

106 Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N.W.2d 119 (1970).

107 State v. Workman, 186 Neb. 467, 183 N.W.2d 911 (1971); State *ex rel.* Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968); State *ex rel.* Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962); Metropolitan Util. Dist. v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961).

108 Snyder v. Woxo, Inc., 185 Neb. 545, 177 N.W.2d 281 (1970); United Community Serv. v. Omaha Nat'l Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

109 State *ex rel.* Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968); Safeway Stores, Inc. v. Nebraska Liquor Control Comm'n, 179 Neb. 817, 140 N.W.2d 668 (1966).

110 Hinman v. Temple, 133 Neb. 268, 274 N.W. 605 (1937); Dinuzzo v. State, 85 Neb. 351, 123 N.W. 309 (1909).

111 State *ex rel.* Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

the judgment of a court in a prior proceeding, the judgment is not thereby rendered subject to collateral attack.[112]

These self-imposed restraints have greatly limited the supreme court's review of constitutional questions. An examination of the cases where the court has struck down legislative acts reveals the fact that the court has not abused its judicial discretion[113] and the court's own restraints have probably proven more of an inhibiting factor than the five judge rule.[114]

The finality of a legislative act does not rest ultimately in the supreme court, for the court's decision can be circumvented by three direct methods and one indirect method. First, by passing a new statute that has remedied the imperfections in the invalid act, the legislature may effectively nullify the supreme court's decision.[115] The second method of reversal is by appealing the Nebraska Supreme Court's decision to the United States Supreme Court. However, this procedure is limited.[116] The third direct attack upon the court's holding is by amending the constitution in one of the two constitutionally prescribed manners.[117] Finally, the indirect method of avoiding the impact of the court's decision is to remove one or more of the justices by the electoral process,[118] by impeach-

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[112] Norlanco, Inc. v. County of Madison, 186 Neb. 100, 181 N.W.2d 119 (1970).

[113] Comment, *The "Five-Judge" Rule In Nebraska, supra* note 8, at 341-46, 348.

[114] *Id.* at 346-47.

[115] For example, in Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961), the supreme court held the Rural Cemetery District Act, NEB. REV. STAT. §§ 12-901 to -908 (Reissue 1962), unconstitutional, which led the legislature to repeal the act, Neb. Laws c. 27, § 14 (1961), and pass a new Rural Cemetery District Act, Neb. Laws c. 27, §§ 1-13 (1961).

[116] This method can only be taken by two routes: first, through an appeal where the validity of a treaty or a federal statute is denied or where a state statute prevails over the Constitution, treaties, or laws of the United States; or second, by a writ of certiorari where the validity of a treaty or statute of the United States is questioned, where a state statute's validity is contested on the ground that it is repugnant to the Constitution, treaties, or laws of the United States, or where some right, immunity or privilege is claimed under the Constitution, treaties, or laws of the United States. 28 U.S.C. § 1257 (1964).

[117] The constitution may be amended by the legislature calling a constitutional convention, NEB. CONST. art. XVI, § 1, or by the legislature proposing amendments and submitting them to the people for their assent, NEB. CONST. art. XVI, § 2.

[118] NEB. CONST. art. V, § 21.

ment,[119] or by a citizen recommending to the Commission on Judicial Qualifications that it examine the judicial qualifications of the judge.[120]

V. CONCLUSION

The Nebraska Legislature has before it now Legislative Bill 304 which would abolish the five judge rule and allow a simple majority of the members sitting to pronounce a decision in all cases.[121] Considering the role of the judiciary in the governmental system, the limited nature of the supreme court and its self-imposed restraints, and the efficiency of litigating private and public interests, the legislature should submit LB 304 to the electorate, and the people of the state should ratify it as a necessary and desirable adjunct to the preservation of constitutional limitations and rights. Referring to the proposed constitution and its expanded powers for the legislature, Robert McKelvie,[122] a member of the Constitutional Revision Commission, stated:

> [W]e're expected to delegate and have confidence in the Legislature to pass a certain amount of legislation that we're deleting from the Constitution; and I likewise would like to feel that we should have a corresponding confidence in the court not to legislate but to make their type of interpretations. I think the greater majority of them do anyway.[123]

William Jay Riley '72

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[119] NEB. CONST. art. III, § 17 and art. IV, § 5.

[120] NEB. CONST. art. V, § 30.

[121] L.B. 304, 82d Neb. Leg., 1st Sess. (1971).

[122] Mr. McKelvie, from Alma, was appointed by the governor and chaired subcommittee 3 of the Nebraska Constitutional Revision Commission which was assigned the articles on revenue, counties, and corporations.

[123] 1970 PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL REVISION COMMISSION, *supra* note 95, at 327.