

# Washington State Supreme Court rules unconstitutional initiatives that require two-thirds majority for tax hikes

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In a landmark ruling 20 years in the making, the [Washington State Supreme Court this morning struck down](#) Initiative 1053 as unconstitutional. The court majority said the constitution controls the majority needed for tax hikes and the constitution requires only a majority of the members of the House and Senate.

That means the only way for backers of the so-called super-majority for tax hikes can achieve that goal is to go through the more-burdensome method of amending the constitution which itself requires a two-thirds vote of both houses and then a majority vote of the people.

“The language and history of the constitution evince a principle favoring a simple majority vote for legislation,” wrote Justice Susan Owens for the 6-3 majority (previous posts mistakenly said Chief Justice Madsen wrote majority). “The State’s proposed reading of article II, section 22 would fundamentally alter our system of government, and such alteration is possible only through constitutional amendment. Washington’s government was founded as a representative democracy based on simple majority rule.”

“The Supermajority Requirement unconstitutionally amends the constitution by imposing a two-thirds vote requirement for tax legislation. More importantly, the Supermajority Requirement substantially alters our system of government, thus enabling a tyranny of the minority.”

Two dissents were written by Justice James Johnson and Justice Charles



Johnson.

“We affirm the trial court’s decision regarding the justiciability and the constitutionality of the Supermajority Requirement. Article II, section 22 states that “[n]o bill shall become a law unless ... a majority of the members elected to each house” vote in its favor. The plain language, constitutional history, and weight of persuasive authority support reading this provision as setting both a minimum and a maximum voting requirement,” Owens wrote.

“Therefore, the Supermajority Requirement violates article II, section 22 by requiring certain legislation to receive a two-thirds vote.”

Joining Owens’ majority opinion were Chief Justice Barbara Madsen and Justices Mary Fairhurst, Tom Chambers, Charles Wiggins and Steven Gonzalez.

In his dissent, Charles Johnson scolded the court for getting into a political debate.

“In its eagerness to embroil itself in the political arena, the majority abandons any semblance of judicial restraint to declare the process of legislative enactment constitutionally infirm,” he wrote. “For the past two decades, the people of this state have repeatedly voted for the supermajority provision, as has the legislature when no initiative occurred. The majority hardly recognizes, let alone analyzes, that this court has been repeatedly asked to step in and decide this issue, and we have consistently held and rejected that invitation.”

And in the other dissent, Justice James Johnson wrote this: “Article II of our constitution, as modified by Amendment 7 to authorize initiatives and referenda, requires action on the part of the legislature or a direct vote of the people to resolve legislative political issues such as

taxation. The majority ironically overrides our constitution and prior case law to enforce an invented policy concern: the fear that laws requiring a supermajority to raise taxes permit a “tyranny of the minority.” Majority at 20. There is, of course, no historical evidence justifying such a concern in Washington.”

Joining the two Johnsons in dissent was Justice Debra Stephens.

The first big issue for the court was whether the case presented a justiciable controversy. Here is what Owens wrote about that:

“The failed passage of SHB 2078 satisfies the four elements of a justiciable controversy. The legislator respondents “have a plain, direct and adequate interest in maintaining the effectiveness of their votes.” *Coleman v. Miller*

“The legislator respondents’ interest in maintaining the effectiveness of their votes was harmed by the Supermajority Requirement when a bill they voted for failed to pass despite receiving a simple majority. “[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Raines v. Byrd*)

“The specific example of SHB 2078 moves the legislator respondents’ claim from the realm of abstract diluted legislative power to the realm of actual vote nullification. Consequently, there is an actual dispute between the State and LEV. Finally, neither party disputes that a determination from this court will be final and conclusive. Thus, the failed passage of SHB 2078 demonstrates that the Supermajority Requirement’s constitutionality presents a justiciable controversy.”

Owens dismissed the state’s argument that the case shouldn’t be before the court.

“Further, we note that the State’s position would effectively insulate the Supermajority Requirement from review. Under the State’s theory, review would be proper only if the legislature ignored the Supermajority Requirement and passed a tax bill without a two-thirds majority vote,” Madsen wrote.

“The State’s position, however, would require the legislature to ignore the well-established principle that statutes are presumed constitutional, *Island County v. State*, Given that the

legislator respondents cannot ignore the Supermajority Requirement without violating their obligation to uphold the laws of the state, the State's position would render the Supermajority Requirement unreviewable and is therefore unacceptable.”

“This preference for simple majority rule is evident from the very language of the constitution, which required only a simple majority vote for ordinary legislation and reserved a supermajority vote for special circumstances,” Owens wrote. “The seven supermajority requirements in the original constitution were all relegated to special circumstances, not the passage of ordinary legislation? These circumstances included expelling a member of the legislature or overriding a veto. Thus, the framers were aware of the significance that a supermajority vote requirement entailed and consciously limited it to special circumstances; the passage of ordinary legislation is not one of those.”

“Our holding today is not a judgment on the wisdom of requiring a supermajority for the passage of tax legislation. Such judgment is left to the legislative branch of our government. Should the people and the legislature still wish to require a supermajority vote for tax legislation, they must do so through constitutional amendment, not through legislation.”

This case began as a scripted question and answer session between three Democratic House members and Speaker Frank Chopp at the end of the 2011 Legislative session. Chopp was asked how many votes it would take to end a tax loophole and devote the money to schools.

Chopp answered that current law, based on Initiative 1053, required a two-thirds vote of both houses or a majority vote of the people. Could the speaker rule instead that the initiative is unconstitutional? No, he answered. Well then, could the members override his ruling and therefore declare the two-thirds requirement unconstitutional? No, Chopp said, that is the role of the courts.

That was used as the basis for the lawsuit. Plaintiffs won in King County Superior Court in a ruling by Judge Bruce Heller on May 30. The case was appealed directly to the Supreme Court which heard oral arguments Sept. 25. It was the fourth time the court had been asked to rule whether a two-thirds requirement or public vote for tax increases demanded a constitutional amendment or could be done by statute or initiative. The first came nearly 20 years ago in the case *Walker v. Munro*.

Other cases were *Farm Bureau v. Gregoire* and *Brown v. Owens*. In the previous cases, the court found that they were not properly before the court or ruled on less-than-constitutional grounds.

There is also a technical difference between the case ruled upon today and the earlier decisions. Both *Walker* and *Brown* were requests for the court to mandate action by another elected official – the secretary of state in the first case and the lieutenant governor sitting as the presiding officer of the state Senate in the second.

The *League of Education Voters* case asked for a declaratory judgment, in essence asking the court to declare what the law is and how it might apply to initiatives.

The court first had to decide whether the case presented it with a “justiciable controversy.” That is, whether the people filing the suit have standing to ask the question and whether the facts present the court with a real and not hypothetical issue. In this case, the plaintiffs argued that the ruling by Chopp prevented them from passing the bill, that they had exhausted the parliamentary options and that an appeal under the House rules wouldn’t have helped.

But being nonjusticiable isn’t always a fatal flaw. The court has decided to take on such cases if the issues involved are important enough. That is what the plaintiffs hoped for if the court found they hadn’t brought a justiciable case to the court.

Initiatives have protected status for the first two years after they pass. That is, to amend them the Legislature has to muster a two-thirds majority. After two years, however, initiatives can be amended with a majority of all House and Senate members, something that has been done to past two-thirds tax vote initiatives.