

2016

## You Can't Take My Land! Is *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015), Transformative Law or a Political Anomaly?

Adam W. Kauffman

*University of Nebraska College of Law*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Adam W. Kauffman, *You Can't Take My Land! Is Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015), *Transformative Law or a Political Anomaly?*, 95 Neb. L. Rev. 548 (2016)

Available at: <https://digitalcommons.unl.edu/nlr/vol95/iss2/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Note\*

# You Can't Take My Land! Is *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015), Transformative Law or a Political Anomaly?

## TABLE OF CONTENTS

I. Introduction .....	549
II. Background.....	551
A. Political Plaintiffs: A Summary of <i>Thompson v.</i> <i>Heineman</i> .....	551
1. Popular Background .....	552
2. Case Background .....	553
B. Constitutional Supermajority Requirement.....	555
C. Nebraska's Law on Standing to Sue .....	557
III. Analysis .....	560
A. Minority's Explanation Understands and Protects Nebraska's Law on Standing .....	560
1. Jurisdictional Requirements Should be Decided Before an Opinion is Rendered .....	561
2. Underlying Policies of the Law of Standing Are Closer to the Minority .....	561
B. Minority's Supermajority Interpretation Mirrors the Court's Past Application .....	567
1. Insufficient-Majority Provides An Impracticable Rule on Standing .....	568
2. Asserting the Difference Between Holding and Dicta .....	569

---

© Copyright held by the NEBRASKA LAW REVIEW

\* Adam W. Kauffman, J.D. candidate, 2017, University of Nebraska College of Law. The author wishes to thank Michael Sholes for his suggestions and guidance, Executive Editor Colton Williams for his patience and effort cleaning up this piece for publication, and the author's family and friends for putting up with mundane talk about the Nebraska Constitution and standing doctrine. A special thank you to my late uncle, Fredric H. Kauffman, whose mentorship through life and law school has been invaluable. And, as always, AMDG.

3. Cases from Nebraska's Past and Ohio Prove  
 Illustrative ..... 570  
 IV. Conclusion ..... 572

I. INTRODUCTION

From the romantic days of untilled prairie to the established farms of Nebraska's modern life, the people of the plains have always treasured their land. They know that a person's land is a vital part of her identity.<sup>1</sup> Although today's urbanites might have difficulty grasping this concept,<sup>2</sup> history clearly illustrates the connection between land and identity. American Indians were tied to their land.<sup>3</sup> Everything from their religion to their way of life was indelibly intertwined with the land around them.<sup>4</sup> The ancients of the Near East were no different. The Judeo-Christian tradition's attention to a "promised land" demonstrates how engrained the notion of land is with identity.<sup>5</sup> The law recognizes this connection as a fundamental principle of human flourishing.<sup>6</sup> Takings Clause jurisprudence demonstrates how American law is designed to protect this connection.<sup>7</sup> Land is serious business tied to serious rights. When confronted with issues that affect an individual's right to land, a court must take great care to get every element of legal analysis right.

The Nebraska Supreme Court recently faced one such issue. After a great deal of debate in the Unicameral<sup>8</sup> and on the national political stage, a group of litigants questioned the State's right to acquire cer-

---

1. For an overview of the relationship between personal identity and land, see EDWARD C. RELPH, *PLACE AND PLACELESSNESS* (Allen J. Scott ed., 1976).  
 2. *Id.*  
 3. LUTHER STANDING BEAR, *LAND OF THE SPOTTED EAGLE* 247 (1933) ("The American Indian is of the soil, whether it be the region of forests, plains, pueblos, or mesas. He fits into the landscape, for the land that fashioned the continent also fashioned the man for his surroundings.")  
 4. *Id.*  
 5. See, e.g., *Genesis* 12:7; *Exodus* 6:8; *Leviticus* 20:24; *Deuteronomy* 31:20.  
 6. See generally Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257 (2014) (explaining the connection between public and private land ownership in terms of human flourishing).  
 7. *Id.*; see also *Horne v. Dep't. of Agric.*, 135 S. Ct. 2419, 2431 (2015) (evidencing the Court's reverence for property by applying the Fifth Amendment Takings Clause to personal property). See generally *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 435 (1982) (demonstrating the Court's respect for property by holding a permanent physical occupation a total elimination of property rights).  
 8. The Nebraska legislature is composed of one group of lawmakers, called the Unicameral. UNICAMERAL INFO. OFFICE, NEBRASKA LEGISLATURE, *INSIDE OUR NATION'S ONLY UNICAMERAL 1* (2015), <http://nlcs1.nlc.state.ne.us/epubs/L3300/H001-2015.pdf> [<https://perma.unl.edu/4RK4-3XFG>]. Nebraskans adopted the Unicameral in 1934 to reduce the cost of government and increase its productivity. *Id.* To keep national politics out local elections, the Unicameral is a nominally non-

tain landowner's property through the power of eminent domain. Landowners, angry about losing certain "sticks" in their "bundle" of property rights,<sup>9</sup> partnered with environmentalists to combat the State's cooperation with a Canadian oil company to build the Keystone XL Pipeline through Nebraska. The goal of the odd coalition was to preserve Nebraska ecosystems and reduce American dependence on unclean energy.<sup>10</sup> Randy Thompson, Susan Luebbe (now Susan Straka), and Susan Dunavan, a group of Nebraska taxpayers,<sup>11</sup> filed in the District Court of Lancaster County to protect the rights of all Nebraskans from an unconstitutional eminent domain procedure.<sup>12</sup> The issue climaxed with the decision's appeal to the Nebraska Supreme Court in *Thompson v. Heineman*.

By asking the Nebraska Supreme Court to decide whether Legislative Bill 1161 (L.B. 1161) unconstitutionally delegated eminent domain powers, the plaintiffs in *Thompson* presented a constitutional issue that affects hundreds of Nebraskans' substantial property rights and, in effect, their right to flourish. Despite the outcome's tragic effect on certain landowners' property rights, this Note will outline how the minority opinion applied Nebraska's law correctly, and therefore the case's ultimate result was right. In Part II, this Note summarizes the Nebraska Supreme Court's holding in *Thompson v. Heineman* and provides a historical background of both the provision in Nebraska's constitution that requires a "super-majority"<sup>13</sup> to render legislation

---

partisan body. *Id.* at 2. However, as the legislation involved in *Thompson* suggests, national politics are not easily removed from local decisions.

9. Over the last century, American jurisprudence has compared American property rights metaphorically to a "bundle of sticks." See Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 877 (2013). Like a bundle of sticks, each property comes with a "bundle" of distinct entitlements. *Id.* at 878. In this context, the right-of-way for the oil pipeline at issue in *Thompson* is simply one "stick" in the "bundle" of rights the Nebraska landowners own.
10. See *Thompson v. Heineman*, 289 Neb. 798, 803, 857 N.W.2d 731, 740.
11. While the Nebraska Supreme Court does not mention the plaintiffs' full names, their names are listed in Judge Stacy's opinion for the Nebraska District Court of Lancaster County. *Thompson v. Heineman*, CI12-2060, 2014 WL 631609 (Neb. Dist. Ct. Feb. 19, 2014).
12. *Thompson*, 289 Neb. 798 at 810, 857 N.W.2d at 744.
13. I refer to Nebraska's requirement for a five judge concurrence as requiring a "supermajority." While there is no official designation for the type of vote the Nebraska State Constitution requires for judicial review, legal academics from other jurisdictions with similar requirements have labeled it a "super-majority" vote. See, e.g., 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, 442 (2001) (describing the Ohio constitution's former supermajority requirement). The court in *Thompson* also uses this designation. *Thompson*, 289 Neb. at 804, 857 N.W.2d at 739. However, writers have also referred to the requirement as the "five judge" rule. See Paul W. Madgett, *The "Five Judge" Rule in Nebraska*, 2 CREIGHTON L. REV. 329

unconstitutional<sup>14</sup> and Nebraska's standing law. Part III goes on to analyze the law's application in the insufficient-majority<sup>15</sup> and minority opinions. First, this Note will describe how the minority's explanation understands and protects Nebraska's law on standing better than the insufficient-majority opinion does. Next, this Note will explore what the insufficient-majority intended to accomplish with their opinion. It will go on to describe how the insufficient-majority's reasoning may be mere dicta. Finally, this Note will explain that the minority's opinion on the Nebraska constitution's supermajority requirement mirrors how the Court has applied the provision in the past. This Note will ultimately provide a guide for how the insufficient-majority's opinion fits in to Nebraska's law on standing.

## II. BACKGROUND

The context of the Nebraska Supreme Court's decision in *Thompson v. Heineman* is vital to analyzing the insufficient-majority and minority opinions. The complicated legal and political dispute that led to the plaintiffs' case in *Thompson* presents motivating factors for the plaintiffs, and explains the judges' consternation. While the law behind its outcome is convoluted at best, the history of the supermajority provision in Article V of Nebraska's constitution and the development of Nebraska's law on standing help to make sense of the opinion. Both summarizing the facts of the case and detailing the historical progression of the relevant Nebraska law are necessary to appreciate how the insufficient-majority radically departed from the traditional law of standing in Nebraska.

### A. Political Plaintiffs: A Summary of *Thompson v. Heineman*

While *Thompson* addresses several complex issues of Nebraska legislative and constitutional law, the context of the plaintiffs' case is as informative as the development of Nebraska law to the Nebraska

---

(1969); William J. Riley, Comment, *To Require that a Majority of the Supreme Court Determine the Outcome of Any Case Before It*, 50 NEB L. REV. 622 (1970).

14. NEB. CONST. art. V, § 2 ("No legislative act shall be held unconstitutional except by the concurrence of five judges.").

15. Even naming the four-judge opinion in *Thompson* is contentious. Judge Connolly, writing the four-judge opinion, would have me call it the "majority" opinion. *Thompson*, 289 Neb. at 847, 857 N.W.2d at 766 ("But the four judges who have determined that L.B. 1161 is unconstitutional, while a *majority*, are not a supermajority . . ." (emphasis added)). Conversely, Chief Justice Heavican, writing for the minority, would assert the term "plurality" is more appropriate. *Id.* at 848, 857 N.W.2d at 767 (minority opinion of Heavican, C.J.) ("According to the *plurality*, all that is now required for standing to challenge the constitutionality of a statute is a tax receipt and a cause." (emphasis added)). Throughout this Note, I will refer to the four-judge opinion as the "insufficient-majority" to respect the ambiguity.

Supreme Court's decision. National environmental and energy policies as well as global economic forces are at play between the parties and, perhaps, even in the minds of the judges. As discussed below, to understand the case an individual must review the economic and environmental factors that influence public opinion and understand both Nebraska's constitutional provisions and the legislation *Thompson* addresses.

### 1. *Popular Background*

Humanity has an oil addiction. In 2014, global consumers used 92.4 million barrels of petroleum and other liquid fuels per day, and the demand is expanding.<sup>16</sup> However, experts estimate that 1,492.9 billion barrels of proven oil reserves were available worldwide at the end of 2014.<sup>17</sup> At the same time, the Environmental Protection Agency (EPA) reported that 26% of greenhouse gas emissions in the United States come from the use of fossil fuel for our cars, trucks, ships, trains, and planes.<sup>18</sup> Environmental interests clearly run against construction of a pipeline promising to increase emissions. However, when the legislation leading to the action in *Thompson* was debated in the Unicameral, crude oil's per-barrel cost was rapidly increasing.<sup>19</sup> Consequently, politicians at the time of the decision were advocating the development of domestic oil reserves.<sup>20</sup> Conflict was bound to arise. Environmental interests allied with those of landowners hesitant to give up one of the sticks in their bundle of property rights.<sup>21</sup> The fight against oil and eminent domain gave birth to a

---

16. U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY OUTLOOK SEPTEMBER 2015 2 (2015).

17. *OPEC Share of World Crude Oil Reserves, 2014*, ORG. OF THE PETROLEUM EXPORTING COUNTRIES, [http://www.opec.org/opec\\_web/en/data\\_graphs/330.htm](http://www.opec.org/opec_web/en/data_graphs/330.htm) [https://perma.unl.edu/NW9M-8RHA].

18. *Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [https://perma.unl.edu/A46L-F857].

19. In 2011, crude oil's average cost was over \$100 per barrel. *See 2011 Brief: Brent Crude Oil Averages over \$100 per Barrel in 2011*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (Jan. 12, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=4550> [https://perma.unl.edu/7BKK-98M9].

20. *See, e.g.*, John M. Broder, *Obama Shifts to Speed Oil and Gas Drilling in U.S.*, N.Y. TIMES (May 14, 2011), [http://www.nytimes.com/2011/05/15/us/politics/15address.html?\\_r=0](http://www.nytimes.com/2011/05/15/us/politics/15address.html?_r=0).

21. Mitch Smith, *Defenders of Tradition in Keystone Pipeline Fight*, N.Y. TIMES (Jan. 22, 2015), [http://www.nytimes.com/2015/01/23/us/defending-family-farm-traditions-in-battle-against-keystone-pipeline.html?\\_r=0](http://www.nytimes.com/2015/01/23/us/defending-family-farm-traditions-in-battle-against-keystone-pipeline.html?_r=0) (describing family farms fighting the pipeline to continue the legacy of their family farms); *see also News Tagged #KXL Pipeline Info*, BOLD NEBRASKA, <http://boldnebraska.org/tag/kxl-pipeline-info/> [https://perma.unl.edu/WKP2-H7CT] (providing articles with environmental and legal reasons the Keystone XL Pipeline should not traverse Nebraska).

political movement.<sup>22</sup> Neither Nebraska's Unicameral nor her courts could escape it.

## 2. Case Background

These issues came to a head in *Thompson v. Heineman*.<sup>23</sup> In 2008, TransCanada negotiated with President Barack Obama and the government of Nebraska to construct the Keystone XL Pipeline through the State of Nebraska.<sup>24</sup> Originally, TransCanada planned for the oil pipeline to traverse Nebraska's ecologically sensitive Sandhills region.<sup>25</sup> After considerable political pressure, Governor Dave Heineman called a special session of the legislature to amend Nebraska's eminent domain statute<sup>26</sup> because it did not have specific provisions governing the construction of oil pipelines.<sup>27</sup> Nebraska's Unicameral enacted the Major Oil Pipeline Siting Act (MOPSA) in 2011.<sup>28</sup> MOPSA required the Public Service Commission (PSC) to approve construction of major oil pipelines in Nebraska.<sup>29</sup> The PSC is an entity the Nebraska State Constitution created to regulate common carriers, like railroads.<sup>30</sup> Two of MOPSA's legislative purposes were to protect "Nebraskan's property rights and the State's natural resources."<sup>31</sup> However, MOPSA explicitly did not apply to pipelines that had pending applications with the United States Department of State at the time MOPSA was enacted, like the Keystone XL Pipeline.<sup>32</sup> The situation changed when President Obama rejected TransCanada's application to build a transnational pipeline through the United States.<sup>33</sup> The rejection meant TransCanada's application was no

---

22. Dave Domina's platform for his Senate campaign was adamant opposition to the construction of TransCanada's Keystone XL Pipeline. See Smith, *supra* note 21. Notably, Domina was also counsel for the plaintiffs in *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015).

23. *Thompson*, 289 Neb. 798, 857 N.W.2d 731.

24. *Id.* at 803, 857 N.W.2d at 740.

25. *Id.* The Nebraska Sandhills are a unique environment where a thin layer of topsoil covers large, fine-grained sand dunes. See CANDACE SAVAGE, PRAIRIE: A NATURAL HISTORY 99–103 (Nancy Flight ed., 2004). The sand deposits are a result of glacial retreat after the last ice age. *Id.* Moderate activity disrupts the topsoil of this sensitive ecosystem, effectively destroying the possibility of plant life. *Id.* Even minimal surface activity can disrupt the topsoil of this sensitive ecosystem. *Id.* Some residents seem to fear burying a pipeline beneath such sensitive soil could easily destroy the productivity of the land.

26. NEB. REV. STAT. § 57-1101 (Reissue 2010) (current version at NEB. REV. STAT. § 57-1101 (Cum. Supp. 2014)).

27. See *Thompson*, 289 Neb. at 803, 857 N.W.2d at 740.

28. *Id.*

29. *Id.* at 803–04, 857 N.W.2d at 739.

30. *Id.* at 802, 857 N.W.2d at 739.

31. *Id.* at 804, 857 N.W.2d at 741.

32. *Id.* at 805, 857 N.W.2d at 741.

33. *Id.* at 806, 857 N.W.2d at 742.

longer active with the Department of State, and MOPSA would apply to the Keystone XL Pipeline if TransCanada were to reapply for a route across Nebraska.<sup>34</sup> MOPSA was a political barrier the pipeline might not circumvent.

To ease the application of MOPSA on the Keystone XL Pipeline, the Unicameral amended MOPSA with L.B. 1161.<sup>35</sup> L.B. 1161 allowed a pipeline constructor to either seek approval from the PSC under MOPSA for the construction of a pipeline or seek approval from the Governor directly after following certain procedures.<sup>36</sup> The amendment also allowed the Nebraska Department of Environmental Quality (DEQ) to seek its own findings on the environmental impact of a proposed pipeline.<sup>37</sup> If a carrier chooses to allow the DEQ to conduct an independent survey, the pipeline carrier must reimburse the DEQ for the procedure.<sup>38</sup> L.B. 1161 was added to MOPSA in 2012.<sup>39</sup> Because TransCanada found a pipeline route through the Sandhills would be unacceptable, it provided a second option route for the pipeline in 2012.<sup>40</sup> TransCanada collaborated with the DEQ to provide an environmental impact report.<sup>41</sup> Governor Heineman approved the plan in 2013.<sup>42</sup>

Randy Thompson, Susan Straka, and Susan Dunavan then filed a complaint against the Governor in the District Court of Lancaster County.<sup>43</sup> They asserted that the provisions in L.B. 1161 “violated the Nebraska Constitution’s equal protection, due process, and separation of powers provisions, and [the constitution’s] prohibition of special legislation.”<sup>44</sup> In the Nebraska District Court for Lancaster County, Judge Stacy found the plaintiffs had standing as taxpayers of the State of Nebraska.<sup>45</sup> She went on to find L.B. 1161’s additions to Nebraska statutory law unconstitutional.<sup>46</sup> The State of Nebraska appealed directly to the Nebraska Supreme Court.<sup>47</sup> Nebraska’s highest court divided to create an insufficient-majority of four judges and a minority of three judges.<sup>48</sup> While it is possible both the insufficient-

---

34. *Id.*

35. *Id.*

36. *Id.* at 807, 857 N.W.2d at 742.

37. *Id.*

38. *Id.* at 808, 857 N.W.2d at 743.

39. *Id.* at 809, 857 N.W.2d at 743.

40. *See id.* at 809, 857 N.W.2d at 744.

41. *Id.* at 809–10, 857 N.W.2d at 744.

42. *Id.* at 810, 857 N.W.2d at 744.

43. *See id.*

44. *Id.*

45. *Thompson v. Heineman*, CI12-2060, 2014 WL 631609 at \*11 (Neb. Dist. Ct. Feb. 19, 2014).

46. *Id.* at \*35.

47. *Thompson*, 289 Neb. at 798, 857 N.W.2d at 731.

48. *Id.*

majority and minority may have agreed on the merits of the constitutional challenge, the opinions differed on how to apply Nebraska's standing law to the plaintiffs' interest in this case.<sup>49</sup> Each of the three plaintiffs may have owned property in the proposed route, but the plaintiffs never clearly asserted as much.<sup>50</sup> Instead, the plaintiffs asserted "[l]and owned by [Thompson] *was, or still is*, in the path of one or more proposed pipeline routes."<sup>51</sup> A majority of the Nebraska Supreme Court held L.B. 1161 unconstitutional.<sup>52</sup> The three minority judges opined the plaintiffs did not have standing to sue.<sup>53</sup> Unfortunately for the plaintiffs, the Nebraska State Constitution contains a provision requiring five of the judges on the Nebraska Supreme Court to overturn legislation as unconstitutional.<sup>54</sup> Because three judges refused to decide the issue of constitutionality due to their opinion on the standing of the plaintiffs, the court could not overturn L.B. 1161.<sup>55</sup>

## B. Constitutional Supermajority Requirement

Although a majority of the court in *Thompson* voted to overturn L.B. 1161 as unconstitutional, the court upheld the law. The unnatural situation where the minority opinion controls unsettles many lawyers and academics.<sup>56</sup> States do not regularly allow the opinion of the minority to rule over the majority.<sup>57</sup> However, the unusual supermajority provision in the Nebraska State Constitution lead to the opinion of the minority of judges to rule the constitutional issue in *Thompson*.<sup>58</sup> To comprehend the effect of the Nebraska Supreme

---

49. *Id.* at 848, 857 N.W.2d at 767.(Heavican, C.J., minority opinion).

50. *See* Appellees' Opening Brief & Brief on Cross Appeal at 4, *Thompson v. Heine-man*, 289 Neb. 798, 818 N.W.2d 731 (2015) (No. S-14-000158), 2014 WL 2997738, at \*4.

51. *Id.* (emphasis added).

52. *Thompson*, 289 Neb. at 847, 857 N.W.2d at 766.

53. *Id.* at 861, 857 N.W.2d at 775 (Heavican, C.J., minority opinion).

54. NEB. CONST. art. V, § 2 ("No legislative act shall be held unconstitutional except by the concurrence of five judges.").

55. *Thompson*, 289 Neb. at 847, 857 N.W.2d at 766.

56. The criticism for supermajority provisions is widespread. *See generally* Entin, *supra* note 13; Madgett, *supra* note 13; Riley, *supra* note 13.

57. *See* Jonathan Remy Nash, *The Majority that Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831 (2008) (describing the role of majorities in judicial decision making and the danger of allowing minorities to create rules of law).

58. Nebraska's constitution specifically names its seven decision makers "judges," rather than the more traditional "justice." NEB. CONST. art. V, § 2 ("The Supreme Court shall consist of seven judges, one of whom shall be the be the Chief Justice."). The abrogation from the conventional name was meant to follow the example of Illinois. For more on this and other eccentricities of the Nebraska State Constitution see ROBERT D. MIEWALD, PETER J. LONGO, & ANTHONY B. SCHUTZ, *THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE* 217 (Univ. of Neb. Press 2d ed., 2009) (1993).

Court's holding in *Thompson*, it is necessary to understand the policies underlying judicial supermajority provisions and how those policies have worked in past Nebraska litigation.

Constitutional provisions that require more than a majority of the justices on a court to decide an issue are rare.<sup>59</sup> Other than Nebraska, only North Dakota has a similar requirement.<sup>60</sup> "Minority-rule" cases result from judicial supermajority provisions in state constitutions.<sup>61</sup> Courts generally require a majority to decide issues. States that have judicial supermajority provisions in their constitutions take majority rule to another level. Where a plaintiff asks a state supreme court to overturn legislation as unconstitutional, judicial supermajority provisions require that more than a majority of the courts members agree to strike it down.<sup>62</sup> Nebraska added the constitutional supermajority provision to its constitution after the state's 1919–1920 constitutional convention.<sup>63</sup> It was largely modeled after a similar provision in the Ohio constitution.<sup>64</sup> The provision was part of the populist wave that inundated the state at the time,<sup>65</sup> and the provision has not changed over time.<sup>66</sup> Article V, Section 2 of the Constitution of the State of Nebraska reads, "No legislative act shall be held unconstitutional except by the concurrence of five judges." Proponents of such provisions thought they gave power to the people by deferring to the acts of the legislature.<sup>67</sup> The court must be absolutely certain a provision is unconstitutional to strike it down.<sup>68</sup>

Nebraska has not used its supermajority provision often.<sup>69</sup> The provision laid dormant in the state's constitution for over half a century. But in the 1960's the Supreme Court reached the kind of deadlock that triggers the provision.<sup>70</sup> The court has never realized the supermajority provision's latent, havoc-wreaking potential the way

---

59. See generally Entin, *supra* note 13, at 468.

60. See *id.*

61. *Id.*

62. *Id.* at 443.

63. 2 PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL CONVENTION 1919–20, at 2824 (1920).

64. See Entin, *supra* note 13, at 468.

65. See Riley, *supra* note 13, at 625.

66. Compare 2 PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL CONVENTION 1919–20, at 2824 (1920), with NEB. CONST. art. V, § 2.

67. Riley, *supra* note 13, at 626; cf. *Bessey v. Bd. of Educ. Lands & Funds*, 185 Neb. 801, 804, 178 N.W.2d 794, 797 (1970) ("The Legislature, and not this court (as the majority unsuccessfully opposed), specifies the protections to the trust.").

68. See Entin, *supra* note 13, at 452 ("[T]he supermajority requirement was intended to remind the supreme court that the people wanted the judiciary to show greater deference to the legislature . . .").

69. See *id.* at 468.

70. *Id.* (citing *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968)).

other jurisdictions have.<sup>71</sup> After its first use, the court followed the supermajority provision in a handful of other cases,<sup>72</sup> inspiring intense criticism.<sup>73</sup> Despite the forces against it, Nebraska's supermajority statute survives to provide controversial litigation from generation to generation.

### C. Nebraska's Law on Standing to Sue

Nebraska's supermajority provision was not the only element of Nebraska law that influenced the court's decision in *Thompson*. Although Nebraska standing doctrine is in many ways unremarkable compared to the doctrine in other jurisdictions, the eccentricities of its application played a key role in *Thompson's* disposition. Therefore, an overview of the key cases in Nebraska's law on standing to sue is vital to understanding the difference between the insufficient-majority and minority in *Thompson*. After providing an outline of the major elements of Nebraska's law on standing to sue, this Note will examine the key cases that established each of the standing exceptions.

To have standing to sue, a plaintiff must have a legal or equitable title or a personal interest in the issue he or she asks the court to address.<sup>74</sup> The doctrine relates to the court's jurisdiction to address the controversy the plaintiff presents.<sup>75</sup> It requires that an individual have a sufficient stake in the matter brought before the court to justify the court's intervention on his or her behalf.<sup>76</sup> The plaintiff must show that he or she is in danger of sustaining direct injury as a result of anticipated action.<sup>77</sup> Therefore, it is not sufficient for a plaintiff to bring a grievance before the court in which he or she shares a general interest in common with the entire public.<sup>78</sup> However, the court has

---

71. *Id.* at 468–69; *see infra* subsection III.B.3 (discussing the disastrous effects of the Ohio constitution's supermajority provision).

72. *DeBacker v. Sigler*, 185 Neb. 352, 175 N.W.2d 912 (1970) (rejecting a constitutional challenge to a statute classifying underage offenders); *State ex rel. Belker v. Bd. of Educ. Lands & Funds*, 184 Neb. 621, 171 N.W.2d 156 (1969) (rejecting constitutional challenge to a statute governing the sale of common school trust land); *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968) (rejecting a challenge to a juvenile court statute).

73. *See Madgett, supra* note 13; *Riley, supra* note 13 (criticizing the “five judge rule” as unpopular and impragmatic).

74. *Ritchhart v. Daub*, 256 Neb. 801, 805, 594 N.W.2d 288, 292 (1999).

75. *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999).

76. *Ritchhart*, 256 Neb. at 805, 594 N.W.2d at 292.

77. *Id.* at 806, 594 N.W.2d at 292.

78. *Id.*; *see also* *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986) (holding that garbage collector which had no office as place of business within sanitary improvement district and was not taxpayer of district lacked standing to contest validity of contract entered into between district and competitor for collection of garbage in district); *Neb. Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985) (holding that school district and taxpayer of

recognized three exceptions to the law of standing.<sup>79</sup> They include the exception for a plaintiff asking for a writ of mandamus for a public duty,<sup>80</sup> the exception for matters of great public concern,<sup>81</sup> and the resident-taxpayer exception.<sup>82</sup>

The oldest of the exceptions to the doctrine of standing to sue is the exception for a plaintiff that asks a public official to do some public act. The court adopted this exception in *State ex rel. Ferguson v. Shropshire*.<sup>83</sup> In that case, an Omaha justice of the peace moved his office out of the precinct he was elected to serve.<sup>84</sup> Functionally, this justice of the peace was not able to serve the population that elected him.<sup>85</sup> Unfortunately, none of the people in the precinct of the justice of the peace had a particular interest sufficient to sue.<sup>86</sup> The Nebraska Supreme Court found an exception to the doctrine of standing “[w]here the question is one of a public right, and the object of the mandamus is to procure the enforcement of a public *duty*” because the people are the real party in interest.<sup>87</sup> The exception has changed little in over a century, and courts almost never find occasion to apply it today.<sup>88</sup>

The second major exception to develop was for resident taxpayers. The resident-taxpayer exception is by far the most used of the exceptions to the doctrine of standing to sue. Its frequent use is possibly attributable to the ease with which a plaintiff can fulfill its basic elements. First, a plaintiff must establish that there has been a misappropriation of public funds.<sup>89</sup> Second, the plaintiff must have made a demand to the municipal or public corporation that was or would be

---

district did not have standing as resident taxpayers of municipality whose subdivision made alleged illegal acquisition of real estate).

79. Dividing the exceptions into discrete legal doctrines is a point of contention between the insufficient-majority and minority. See *infra* note 123; *infra* subsection III.A.2.
80. *City of Crawford v. Darrow*, 87 Neb. 494, 127 N.W. 891 (1910); *Van Horn v. State ex rel. Allen*, 51 Neb. 232, 70 N.W. 941 (1897); *State ex rel. Willard v. Stearns* 11 Neb. 104, 7 N.W. 743 (1881); *State ex rel. Ferguson v. Shropshire*, 4 Neb. 411 (1876).
81. *Cunningham v. Exon*, 202 Neb. 563, 568, 276 N.W.2d 213, 216 (1979).
82. *Project Extra Mile v. Neb. Liquor Control Comm’n*, 283 Neb. 379, 391, 810 N.W.2d 149, 160 (2012); *Chambers v. Lautenbaugh*, 263 Neb. 920, 928, 644 N.W.2d 540, 548 (2002).
83. 4 Neb. at 414.
84. *Id.* at 411–312.
85. *Id.* at 412.
86. *Id.* at 413.
87. *Id.* at 414–15 (quoting JAMES L. HIGH, HIGH ON EXTRAORDINARY REMEDIES § 341 (1874)).
88. See *Thompson v. Heineman*, 289 Neb. 798, 851, 857 N.W.2d 731, 769 (2015) (Heavican, C.J., minority opinion) (“The [mandamus exception] has nearly been lost to antiquity.”).
89. *Chambers v. Lautenbaugh*, 263 Neb. 920, 928, 644 N.W.2d 540, 548 (2002).

ignored.<sup>90</sup> Last, the plaintiff must show that the appropriation of funds would otherwise go unchallenged because no other potential party is better suited to bring the action.<sup>91</sup> The most recent example of the use of the resident taxpayer exception is *Project Extra Mile v. Nebraska Liquor Control Commission*.<sup>92</sup> The plaintiffs alleged that the state agency charged with regulating alcoholic beverages failed to classify certain alcoholic beverages according to Nebraska's statutes.<sup>93</sup> Consequently, these beverages were under-taxed.<sup>94</sup> The regulation's tax advantages disincentivized all challengers who would have had a personal stake in the matter.<sup>95</sup> Because the court determined that under-taxation is a misappropriation of public funds and that the commission would have ignored any demand the plaintiff made, the Nebraska Supreme Court held that the plaintiffs in *Project Extra Mile* had sufficient standing to sue under the resident-taxpayer exception.<sup>96</sup>

The last exception to the doctrine of standing to sue is for matters of great public concern. This exception has two essential elements. First, the plaintiff's complaint must address a matter that is in the public interest.<sup>97</sup> Second, for the exception to apply, no other party can have standing to sue.<sup>98</sup> If another party could have standing, the court will only allow that other party to bring the action.<sup>99</sup> The Nebraska Supreme Court adopted the exception in *Cunningham v. Exon*.<sup>100</sup> Other than *Thompson, Cunningham* is the only case in Nebraska legal history where the court found the exception to apply.<sup>101</sup> In that case, the plaintiff challenged the process by which the legisla-

---

90. *Id.*

91. *See* *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 390–91, 810 N.W.2d 149, 160 (2012).

92. *Id.* at 391, 810 N.W.2d at 160.

93. *Id.* at 383, 810 N.W.2d at 155.

94. *See id.* at 382, 810 N.W.2d at 155.

95. *Id.* at 391–92, 810 N.W.2d at 160–61.

96. *Id.*

97. *Cunningham v. Exon*, 202 Neb. 563, 568, 276 N.W.2d 213, 215 (explaining the standing exception for matters of great public concern as applied in Colorado, Ohio, and Iowa).

98. *See id.* at 568, N.W.2d at 215 (quoting *Howard v. City of Boulder*, 290 P.2d 237 (1955)); *see, e.g., Neb. Against Expanded Gambling, Inc. v. Neb. Horsemen's Ass'n.*, 258 Neb. 690, 605 N.W.2d 803 (2000) (refusing to grant standing to a non-profit that opposed the telecasting of horse races); *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982) (declining to extend the exception for matters of great public concern to a plaintiff-municipality that entered a disadvantageous contract).

99. *Cf. Cunningham*, 202 Neb. 563, 568, 276 N.W.2d 215.

100. *Id.* at 568, 276 N.W.2d at 216.

101. *Thompson v. Heineman*, 289 Neb. 798, 854, 857 N.W.2d 731, 771 (2015) (Heavican, C.J., minority opinion) ("*Cunningham* is the only case in which we have applied this exception to the general rule of common-law standing . . .").

ture amended the Nebraska State Constitution.<sup>102</sup> His main concern was that the ballot did not inform voters of how the amendment provisions worked together.<sup>103</sup> Despite the absence of misappropriated funds, the court found an exception to the normal rules of standing.<sup>104</sup> The amendment was a matter of public interest that may otherwise go unchallenged.<sup>105</sup> No individual in the community by herself had sufficient interest to challenge the amendment.<sup>106</sup>

### III. ANALYSIS

Understanding *Thompson's* parties, their motives, and some of the case's underlying law is essential for analyzing the case's outcome. However, it is much more interesting to actually delve into the law at issue in *Thompson*. *Thompson's* insufficient-majority failed to apply Nebraska's law on standing and misunderstood how the four-judge opinion should be applied in future cases. The *Thompson* minority better explains and protects Nebraska's law on standing to sue. Further, the insufficient-majority tried but failed to accomplish an expansion of the law of standing in *Thompson*. Moreover, the insufficient-majority in *Thompson* misunderstood how the supermajority requirement interacts with law and dicta. Finally, Nebraska District Courts should ignore the insufficient-majority's addition to Nebraska law.

#### A. Minority's Explanation Understands and Protects Nebraska's Law on Standing

Nebraska's law of standing guards the courthouse doors from hearing cases for which the court cannot provide a remedy.<sup>107</sup> Standing is a key jurisdictional element required for a court to exercise its jurisdiction.<sup>108</sup> While three exceptions apply to the law of standing in Nebraska, the Nebraska's Supreme Court has made it clear that these exceptions should be applied carefully "to prevent the exceptions from swallowing the rule."<sup>109</sup> The insufficient-majority did not explain the law on standing correctly because it failed to narrowly apply the law's exceptions. As discussed below, the importance of making jurisdictional determinations first and the policies that underlie the law of

---

102. *Cunningham*, 202 Neb. at 566, 276 N.W.2d at 215.

103. *Id.*

104. *Id.* at 568–69, 276 N.W.2d at 216.

105. *Id.* at 568, 276 N.W.2d at 216.

106. *See id.*

107. *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 568, 773 N.W.2d 349, 354 (2009) (citing *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009)).

108. *Id.*

109. *Id.* at 571, 773 N.W.2d at 355.

standing demonstrate why the minority accurately characterized the law.

1. *Jurisdictional Requirements Should be Decided Before an Opinion is Rendered*

The insufficient-majority opines that a minority opinion on the court's lack of jurisdiction should not force the court to withhold a further holding on pressing constitutional issues.<sup>110</sup> However, the insufficient-majority's opinion does not follow clearly from precedent. For example, the United States Supreme Court requires federal courts to determine jurisdictional elements before reaching the merits of the case.<sup>111</sup> The Court insists that the idea is firmly rooted in the American form of government's "separation of powers."<sup>112</sup> Nebraska's government mirrors the national government in many ways, including the state's separation of powers between the legislative, executive, and judicial branches.<sup>113</sup> Consequently, following the U.S. Supreme Court's lead, the Nebraska Supreme Court has held on several occasions that "it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it."<sup>114</sup> The minority notes the importance of jurisdictional requirements by refusing to decide a case for which they thought the court lacked jurisdiction.<sup>115</sup> In view of the ambiguity, the minority was reasonable not to recognize standing based on lack of jurisdiction.

2. *Underlying Policies of the Law of Standing Are Closer to the Minority*

In view of the minority's insistence that it was their "power and duty" to determine jurisdiction before deciding a constitutional issue, this Note investigates the specific jurisdictional element the minority claims to protect—the law on standing to sue. As discussed below,

---

110. *Thompson v. Heineman*, 289 Neb. 798, 847, 857 N.W.2d 731, 766 (2015) (Conolly, J., insufficient-majority opinion) ("We reject the dissent's interpretation of this provision as requiring five of the seven members of this court to concur on jurisdictional requirements to hear a case, *in addition* to requiring five judges to concur that a legislative enactment is unconstitutional.")

111. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (explaining how reaching jurisdictional elements before the merits of a case is fundamental to the "separation of powers").

112. *Id.*

113. NEB. CONST. art. II, § 1, cl. 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial . . .").

114. *In re Sean H.*, 271 Neb. 395, 398, 711 N.W.2d 879, 882 (2006) (citing *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005)); *Smith v. Lincoln Meadows Homeowners Ass'n, Inc.*, 267 Neb. 849, 851, 678, N.W.2d 726, 729 (2004).

115. *Thompson*, 289 Neb. at 849, 857 N.W.2d at 767 (Heavican, C.J., minority opinion).

this subsection outlines the basic requirements of the law on standing to sue and the policy behind its limited exceptions. It further details the assertions of the parties, and the insufficient-majority's politically-charged response. Lastly, this subsection discusses how the *Thompson* minority's principled reaction to the insufficient-majority's arguments is a better application of the jurisdiction law of standing to sue.

Standing to sue is required for any court to exercise its jurisdiction.<sup>116</sup> Its basic elements are not difficult to grasp. To be able to invoke the court's power, a party must have a legal or equitable interest of some kind in the controversy.<sup>117</sup> Therefore, to be able to sue, a party must have a personal stake in the suit's outcome.<sup>118</sup> Generally, an interest that is shared with the public at large is not enough.<sup>119</sup> The reason for this requirement is simple: adversarial parties ensure that a court is not issuing an advisory opinion<sup>120</sup> and that the judiciary does not become a lawmaking institution.<sup>121</sup> Therefore, the judicial doctrine of standing enforces the Nebraska State Constitution's "separation of powers" provisions.<sup>122</sup> However, the Nebraska Supreme Court has indisputably recognized two exceptions to the standing requirement: the resident-taxpayer exception and the exception for matters of great public concern.<sup>123</sup> The rationale for both is to allow the court to apply justice even if no other party has sufficient interest to have traditional standing.<sup>124</sup> The resident-taxpayer

---

116. *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 568, 773 N.W.2d 349, 353 (2009); *Ritchhart v. Daub*, 256 Neb. 801, 805, 594 N.W.2d 288, 291–92 (1999).

117. *Ritchhart*, 256 Neb. 801, 805, 594 N.W.2d 288, 292.

118. *Id.*

119. *Neb. Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 506–07, 371 N.W.2d 258, 261 (1985).

120. *See Thompson*, 289 Neb. at 848–49, 857 N.W.2d at 767 (Heavican, C.J., minority opinion) (introducing the doctrine underlying the law of standing by saying “[i]t is not the office of this court to render advisory opinions.”).

121. Amy J. Wildermuth & Lincoln L. Davis, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 997 (2010) (describing the rationale for the doctrine of standing in federal courts on which much of Nebraska's law on standing is based).

122. *Id.*; *see also* NEB. CONST. art. II, § 1 (enumerating the Nebraska State Constitution's separation of powers provision).

123. Note the insufficient-majority and the minority disagree on the characterization of the law of standing. The minority finds three historic exceptions to the law of standing to sue, whereas the insufficient-majority divides the exceptions into only two categories: the exception for matters of great public concern and the resident taxpayer exception. *Compare Thompson*, 289 Neb. at 814–15, 857 N.W.2d at 747 (Connolly, insufficient-majority opinion) *with id.* at 851, 857 N.W.2d at 768–69 (Heavican, C.J., minority opinion). The insufficient-majority contends the exception for matters of great public concern is also known as the “public interest exception.” *See id.* at 846, 857 N.W.2d at 765.

124. *See, e.g., Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb., 379, 391, 810 N.W.2d 149, 160 (2012); *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 571, 773 N.W.2d 349, 355 (2009); *Chambers v.*

exception allows a citizen to sue a government official for misappropriating public resources if the citizen has made a demand that was refused or ignored<sup>125</sup> and the government official's action would otherwise go unchallenged.<sup>126</sup> The exception for matters of great public concern allows a party to gain standing to sue for a matter affecting the public interest only if no one else has standing to sue.<sup>127</sup> The court limits both exceptions to cases where no other party with the incentive to sue would have standing.<sup>128</sup> The limitation demonstrates the court's commitment to the separation of powers rationale for judicial standing doctrine.

The *Thompson* appellees tried to fit into the existing exceptions to gain standing to sue.<sup>129</sup> Because the plaintiffs did not allege a personal stake in the dispute, they argued that the resident-taxpayer exception applied.<sup>130</sup> Plaintiffs may have owned land in the path of the proposed pipeline, which would have given them standing to sue.<sup>131</sup> However, the Brief for the Appellees did not clearly set out this fact.<sup>132</sup> The minority noted the appellees' lack of clarity in their analysis.<sup>133</sup> Apparently the appellees were so confident in their claim under the resident-taxpayer exception, they did not feel the need to gain direct standing to sue by clarifying the extent of Mr. Thompson's or another plaintiff's land holdings in the pipeline's path.<sup>134</sup> Consequently, the insufficient-majority and the minority properly noted that the appellees failed to qualify directly for standing to sue.

While the insufficient-majority and the minority both recognized the deficiencies in the appellees' argument for standing, they handled the deficiency differently. The insufficient-majority would grant the court jurisdiction through an expansion to the exception for matters of

---

Lautenbaugh, 263 Neb. 920, 928, 644 N.W.2d 540, 548 (2002); *Cunningham v. Exon*, 202 Neb. 563, 568, 276 N.W.2d 213, 216 (1979).

125. *Chambers*, 263 Neb. at 928, 644 N.W.2d at 548.

126. *Project Extra Mile*, 283 Neb. at 391, 810 N.W.2d at 160.

127. *Cunningham*, 202 Neb. at 568, 276 N.W.2d at 216.

128. *See, e.g., Project Extra Mile*, 283 Neb. at 391, 810 N.W.2d at 160; *State ex rel. Reed*, 278 Neb. at 571, 773 N.W.2d at 355; *Chambers*, 263 Neb. at 928, 644 N.W.2d at 548; *Cunningham*, 202 Neb. at 568, 276 N.W.2d at 216.

129. Appellees' Opening Brief & Brief on Cross Appeal at 9–10, *Thompson v. Heineman*, 289 Neb. 798, 818 N.W.2d 731 (2015) (No. S-14-000158), 2014 WL 2997738, at \*9–10.

130. *Id.*

131. *Id.* at 4, 2010 WL 2997738, at \*4.

132. *Id.* (“Land owned by [Thompson] was, or still is, in the path of one or more proposed pipeline routes . . .”).

133. *Thompson*, 289 Neb. at 857, 857 N.W.2d at 772 (Heavican, C.J., minority opinion) (“Indeed, one or more of the appellees may have a direct interest sufficient to establish traditional standing but simply failed to prove it.”).

134. *See* Appellees' Opening Brief & Brief on Cross Appeal, at 9–10, *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015) (No. S-14-000158), 2014 WL 2997738, at \*9–10.

great public concern.<sup>135</sup> They argue that the exception for matters of great public concern protects constitutional claims in a special way.<sup>136</sup> The minority found no such expansion.<sup>137</sup> As discussed below, although the insufficient-majority's argument for expanding the exception to the law of standing for matters of great public concern is well meaning, the minority is correct in asserting that the exception ultimately dissolves the law on standing altogether.

The insufficient-majority desires to expand the exception for matters of great public concern to protect the constitutional rights of Nebraska citizens.<sup>138</sup> Its analysis begins by incorrectly defining the exceptions to standing doctrine. While the minority finds three exceptions,<sup>139</sup> the insufficient-majority finds only two.<sup>140</sup> They insist that the exception for matters of great public concern is rooted in nineteenth- and twentieth-century mandamus cases.<sup>141</sup> They posit that public protection of rights is the motivating policy behind the exception.<sup>142</sup> Therefore, the insufficient-majority proposes to expand the exception to align the exception's application to its purpose.<sup>143</sup> After all, property rights are central to an individual's identity.<sup>144</sup> What matter could be of greater public concern than protecting a Nebraskan's right to his or her identity? The insufficient-majority opines that the risk of the loss of property rights through unconstitutional eminent domain is great enough concern to the public to warrant using the exception.<sup>145</sup>

The minority understands the history of Nebraska's law on standing to sue more clearly. By outlining three historical exceptions to the

---

135. *Thompson*, 289 Neb. at 857, 857 N.W.2d at 772 (Heavican, C.J., minority opinion).

136. *Id.* at 824, 857 N.W.2d at 753 (Connolly, J., insufficient-majority opinion) ("If the exercise of eminent domain over private property and the constitutional requirements for the organization of state government do not raise matters of great public concern, then no issue could . . .").

137. *Id.* at 859, 857 N.W.2d at 773 (Heavican, C.J., minority opinion) ("The plurality's new and expansive interpretation of the exception for matters of great public concern consumes the time-honored common-law rule in a single gulp.")

138. *Id.* at 823-24, 857 N.W.2d at 752 (Connolly, J., insufficient-majority opinion).

139. *Id.* at 851, 857 N.W.2d at 768 (Heavican, C.J., minority opinion) ("We have recognized three exceptions to traditional standing . . .").

140. *Id.* at 818, 857 N.W.2d at 749 (Connolly, J., insufficient-majority opinion) ("The 'great public concern' exception is another name for the 'public interest' exception that we recognized in our early mandamus cases.")

141. *Id.* ("[I]n our early mandamus cases, we distinguished between private rights and the public's interest and held that a plaintiff has standing to enforce a public right.") (citing *State ex rel. Ferguson v. Shropshire*, 4 Neb. 411 (1876)).

142. *Id.*

143. *Id.*

144. See Alexander, *supra* note 6 (asserting the connection between property rights and human flourishing).

145. *Thompson*, 289 Neb. at 822, 857 N.W.2d at 751.

requirement of having personal stake in the dispute, the minority is more faithful to the constitutional doctrine. Like the insufficient-majority, the minority finds that Nebraska courts have recognized exceptions to standing doctrine for resident taxpayers and matters of great public concern.<sup>146</sup> However, the minority goes on to acknowledge another historic exception.<sup>147</sup> In the early years of the Nebraska Supreme Court, the court recognized an exception to the law of standing for a litigant who sought a writ of mandamus against a public official to enforce a public duty.<sup>148</sup> The minority insists this exception is unique from the other two exceptions.<sup>149</sup> As the minority points out, the court recognized the exception separately in the past:

In the 19th and early 20th centuries, this court discussed an exception to the requirement that a litigant have a personal stake in the outcome of the controversy. We stated that if the question was one of a public right and the object of mandamus was to procure the enforcement of a public duty, the people were regarded as the real party in interest. In that situation, the individual bringing the action, the relator, did not need to show that he had any legal or special interest in the result.<sup>150</sup>

Because the appellees in *Thompson* did not seek to force a public official to perform a public duty, the minority correctly assessed this exception did not apply.<sup>151</sup>

While the insufficient-majority's importation of the mandamus exception into the exception for matters of great public concern describes the evolution of the exceptions to Nebraska's law of standing, it does not describe the law. The two exceptions developed distinctly at very different times in Nebraska history. The court expressly adopted the exception for matters of great public concern in 1979.<sup>152</sup> However, the first appearance of the exception for mandamus to enforce a public duty was over a century prior.<sup>153</sup> Although the exception for mandamus to enforce a public duty may have influenced the court's willingness to adopt the exception for matters of great public concern, insisting the two are one in the same is simply incorrect.

This mischaracterization of the law is fundamental to the insufficient-majority's error. All of the modern exceptions to the law of

---

146. *Id.* at 851, 857 N.W.2d at 769 (Heavican, C.J., minority opinion).

147. *Id.*

148. *See, e.g.,* *City of Crawford v. Darrow*, 87 Neb. 494, 127 N.W. 891 (1910); *Van Horn v. State ex rel. Allen*, 51 Neb. 232, 70 N.W. 941 (1897); *State ex rel. Willard v. Stearns*, 11 Neb. 104, 7 N.W. 743 (1881); *State ex rel. Ferguson v. Shropshire*, 4 Neb. 411 (1876).

149. *Thompson*, 289 Neb. at 851–52, 857 N.W.2d at 769.

150. *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 571, 773 N.W.2d 349, 355 (2009).

151. *Thompson*, 289 Neb. at 851–52, 857 N.W.2d at 769.

152. *Cunningham v. Exon*, 202 Neb. 563, 567–68, 276 N.W.2d 213, 215–16 (1979) (“An exception to the general rule relied upon by defendants has been established in other jurisdictions where matters of great public concern are involved . . .”).

153. *Ferguson*, 4 Neb. 411 (1876).

standing require that no other party be able to raise the claim the plaintiff asserts or that another party that could raise the claim the plaintiff asserts but lack the incentive to do so.<sup>154</sup> The appellees in *Thompson* did not meet this criteria. The minority correctly notes that various other parties could challenge L.B. 1161, including Nebraskans whose land was actually condemned to construct the Keystone XL Pipeline.<sup>155</sup> Further, if the citizens of the State of Nebraska were concerned that the act ignores their rights, they could have petitioned the attorney general to seek a declaratory judgment from the Nebraska Supreme Court invalidating the law.<sup>156</sup>

The projected route of the Keystone XL Pipeline through Nebraska crosses a substantial portion of the state's land.<sup>157</sup> Each of the individual landowners along that route would have a particularized interest in L.B. 1161's constitutionality.<sup>158</sup> To create the easement through their land, the actual landowners stand to lose a stick in their bundle of property rights.<sup>159</sup> Although each appellee was a "resident and a taxpayer" of Nebraska,<sup>160</sup> they do not have the type of interest the law of standing requires to seek a court to exercise its jurisdiction.<sup>161</sup>

While the insufficient-majority is correct to espouse that the "Salvation of the State is Watchfulness in the Citizen,"<sup>162</sup> their political zeal ignores an interesting caveat of Nebraska law that enables Nebraskans to vigilantly guard their rights. When the legislature passes a law that seems facially unconstitutional, the Nebraska Supreme Court has allowed the attorney general to seek a declaratory judgment against the law:

In equity, as in the law court, the Attorney General has the right, in cases where the property of the sovereign or the interests of the public are directly

---

154. See *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 391, 810 N.W.2d 149, 160 (2012) ("But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action."); *Cunningham*, 202 Neb. at 568, 276 N.W.2d at 216 (reasoning that a party has standing under the exception if "no one may have standing to challenge it").

155. *Thompson*, 289 Neb. at 857, 857 N.W.2d at 772.

156. See *State ex rel. Meyer v. Peters*, 188 Neb. 817, 199 N.W.2d 738 (1972); *State ex rel. Sorensen v. State Bd. of Equalization & Assessment*, 123 Neb. 259, 242 N.W. 609 (1932).

157. *Route Maps*, TRANSCANADA: KEYSTONE XL, <http://www.keystone-xl.com/home/keystone-xl-kxl-oil-pipeline-maps/> [<https://perma.unl.edu/YK33-3E79>] (providing a map of the proposed pipeline's route).

158. *Thompson*, 289 Neb. at 857, 857 N.W.2d at 772.

159. *Id.*

160. Appellees' Opening Brief & Brief on Cross Appeal at 9, *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015) (No. S-14-000158), 2014 WL 2997738, at \*9.

161. See *Ritchhart v. Daub*, 256 Neb. 801, 805-06, 594 N.W.2d 288, 292 (1999).

162. *Thompson*, 289 Neb. at 824, 857 N.W.2d at 752 (quoting the inscription above the entrance to Nebraska's state capitol).

concerned, to institute suit by what may be called 'civil information' for their protection. The state is not left without redress in its own courts, because no private citizen chooses to encounter the difficulty of defending it.<sup>163</sup>

Nebraskans need not rely on a "caped crusader" of the courtroom to protect them from unconstitutional laws. The attorney general has standing to challenge unconstitutional laws.<sup>164</sup> By neglecting to acknowledge the attorney general's role, the insufficient-majority would force Nebraskans to resort to litigious vigilantism.<sup>165</sup>

### **B. Minority's Supermajority Interpretation Mirrors the Court's Past Application**

Because the insufficient-majority's opinion allows the exception to "swallow the rule,"<sup>166</sup> a lower court may be disinclined to follow it. Due to the supermajority provision of the Nebraska State Constitution, these courts might not have to do so.<sup>167</sup> This section discusses how cases from Nebraska and other jurisdictions with constitutional supermajority provisions might allow lower courts to relegate the insufficient-majority's holding on standing to the mere dicta of a dissent. The insufficient-majority's rule on the exception to the law of standing for matters of great public concern is too impractical for a lower court to apply. Courts are bound to holdings but guided by dicta. Lastly, historic cases demonstrate that any rule from a case where a supermajority provision has been evoked is not necessarily the binding rule of the court. The circumstances surrounding *Thompson* suggest the insufficient-majority's findings on standing to be more a political anomaly than transformative law.

---

163. *State ex rel. Meyer v. Peters*, 188 Neb. 817, 819–20, 199 N.W.2d 738, 740 (1972) (quoting *State v. Pac. Express Co.*, 80 Neb. 823, 115 N.W. 619 (1908)).

164. *Id.*

165. Admittedly, Nebraska Attorney General Jon Bruning was unlikely to respond to any landowner's request to find L.B. 1161 unconstitutional because of his fervent support of the legislation in court and his political affiliation. See Amy Harder, *Lawsuit by Nebraska Landowners May Decide Keystone Pipeline's Fate*, WALL STREET J. (Nov. 20, 2014, 2:13 PM), <http://www.wsj.com/articles/lawsuit-by-nebraska-landowners-may-decide-keystone-pipelines-fate-1416508187> (discussing how Republicans, like Governor Dave Heineman and Attorney General Jon Bruning, fought together to defend the TransCanada's plan for a pipeline's path through Nebraska). However, the point remains that the landowners did not demonstrate to the court an attempt to contact the Attorney General so he might challenge the law on behalf of all Nebraskans.

166. *Cf. Thompson*, 289 Neb. at 851, 857 N.W.2d at 768 (quoting *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 571, 773 N.W.2d 349, 355 (2009)).

167. NEB. CONST. art. V, § 2 ("No legislative act shall be held unconstitutional except by the concurrence of five judges.").

1. *Insufficient-Majority Provides An Impracticable Rule on Standing*

While the judges in the insufficient-majority reason that the result they advocate flows from a nuanced application of the exceptions to Nebraska's standing doctrine,<sup>168</sup> the relevant case law and policies driving it seem to contradict these judges' reasoning.<sup>169</sup> However, the insufficient-majority opinion does align with a movement to remove standing barriers to the courthouse doors.<sup>170</sup> Scholars who advocate eliminating standing as a barrier to justiciability see the doctrine as a significant restriction to justice.<sup>171</sup> They see the doctrine as a judicially applied wall that shuts real issues out of courts due to a judge's political distaste for the case.<sup>172</sup> The insufficient-majority's agreement with these scholars would explain much of their opinion's exasperation.<sup>173</sup> The plaintiffs' claim that the Unicameral unconstitutionally delegated eminent domain power is so meritorious that the not even a lack of a "horse in the race" should keep the issue from the judge's ears.<sup>174</sup> However, if the insufficient-majority intended to relax Nebraska's standing doctrine for the sake of justice, a constitutional case that required a judicial supermajority was not the best moment to do so. Without a concurrence of five judges on the constitutional issue, the court would have no guarantee of how lower courts will apply any subordinate proposition an insufficient-majority opinion.<sup>175</sup>

168. *Thompson*, 289 Neb. at 823, 857 N.W.2d at 751 (quoting *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 391, 810 N.W.2d 149, 160 (2012)) ("[W]e have recognized taxpayer standing because '[a] good deal of unlawful government action would otherwise go unchallenged.' . . . The same reasoning applies here.").

169. *See supra* subsection III.A.2.

170. *See* Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 463–64 (explaining the failure of standing doctrine to functionally serve any purpose); Wildermuth & Davis, *supra* note 121, at 960 ("[A]gencies increasingly have been able to insulate the *substance* of their decision making based on standing—basically, a *procedural* device . . .") (emphasis added).

171. *See, e.g.*, Wildermuth & Davis, *supra* note 121, at 960; Elliot, *supra* note 170, at 461.

172. *See* Wildermuth & Davis, *supra* note 121, at 961 ("[J]udges will use standing as a subterfuge to make results-oriented decisions without admitting they have done so.").

173. *Thompson*, 289 Neb. at 847–48, 857 N.W.2d at 766–67 ("We believe that Nebraska citizens deserve a decision on the merits. But the super-majority requirement of article V, § 2, coupled with the dissent's refusal to reach the merits, means that the citizens cannot get a binding decision from this court.").

174. *Id.* at 823, 857 N.W.2d at 752 (explaining how eliminating the public's constitutional rights is a matter of great public concern such that the exception should apply).

175. The insufficient-majority admits that lower courts may be uncertain of how to apply their holding issue. *See id.* at 828, 857 N.W.2d at 755. *See infra* subsection III.B.3 describing lower courts in Ohio that refused to follow issues decided in cases requiring a judicial supermajority.

Although well-meaning, the insufficient-majority's relaxation of standing requirements fails the constitutional motivation for the policy: separation of powers. Voices that promote moving away from the strict application of standing usually account for the doctrine's principle rationale.<sup>176</sup> The insufficient-majority did not. Instead of announcing a departure from the traditional standing doctrine, the insufficient-majority attempted to expand an existing exception.<sup>177</sup> Consequently, the court was no longer applying justice to aggrieved parties but rather skillfully applying Nebraska's constitution to L.B. 1161 as if the court were an arm of the Unicameral. Therefore, the insufficient-majority's expansion to the standing doctrine's exception for matters of great public concern may cause as many constitutional violations as it prevents. Thus, insufficient-majority's holding on the exceptions to the law on standing to sue is impracticable because it fails protect the separation of powers.

## 2. *Asserting the Difference Between Holding and Dicta*

Much of the doctrine of stare decisis is built on the distinction between holding and dicta.<sup>178</sup> Even when a judge calls a proposition a holding, the binding effect of the proposition on other courts is not always altogether clear.<sup>179</sup> This ambiguity is apparent in cases like *Thompson*, where a proposition the court addresses to reach the merits of a case has little to do with the injury for which the plaintiffs sought redress.<sup>180</sup> Generally, the doctrine of stare decisis regards a condition that is necessary for a court to reach its conclusion as a holding.<sup>181</sup> Because the insufficient-majority's proposition on standing was necessary for the court to reach the merits of the case, other courts may not be bound by the proposition. The insufficient-majority retaliates to this conclusion decisively: "[T]he supermajority provision is a voting requirement on the resolution of the case—as distinguished from a preliminary requirement that merely determines whether the court can take action."<sup>182</sup> Nevertheless, it is not unreasonable to conclude that the doctrine of stare decisis and Nebraska's constitutional

---

176. See Elliot, *supra* note 170, at 463–64 (demonstrating how the traditional doctrine of standing fails to support its main rationale and developing alternatives that may support the separation of powers better); Wildermuth & Davis, *supra* note 121 (formulating a variety of ways courts can relax the doctrine of standing while preserving the separation of powers).

177. See *Thompson*, 289 Neb. at 823–24, 857 N.W.2d at 752.

178. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 955 (2005).

179. *Id.*

180. *Id.*

181. *Id.* at 1026 (“[A] proposition that is necessary to the disposition (or, by extension, to another holding) itself must count as a holding.”).

182. *Thompson*, 289 Neb. at 828, 857 N.W.2d at 755.

supermajority provision invalidates the *Thompson* insufficient-majority's holding on standing exceptions. Regardless, the political nature of the opinion coupled with the unusual division of judges on the Court should be sufficient to distinguish the *Thompson* insufficient-majority's holding on standing from subsequent cases.

### 3. *Cases from Nebraska's Past and Ohio Prove Illustrative*

The Nebraska State Constitution's judicial supermajority provision has not impacted the court's decision in many cases. In fact, the court has only resorted to the provision a handful of times in Nebraska legal history<sup>183</sup>. Only one case retried a constitutional issue, *State ex rel. Belker v. Board of Education Land and Funds*.<sup>184</sup> While none of the judges changed their opinion on the constitutionality of the law at issue, the opinion of the court followed the constitutional rule the original case's minority set forth.<sup>185</sup> As a result, the court upheld twice a rule of law the minority of the judges decided. Some subsequent jurisprudence was even set around contravening the inconvenient rule of the minority.<sup>186</sup> Nebraska has been fortunate to have such a clean history with the state's supermajority requirement. Precedent from other states suggests that a lower court might be able to disregard a case decided through a supermajority statute altogether.<sup>187</sup>

Ohio is the classic example of lower court confusion,<sup>188</sup> where that state suffered massive confusion as a result of its supermajority requirement.<sup>189</sup> After an unpopular decision in *DeWitt v. State ex rel. Crabbe*,<sup>190</sup> many lower courts were reluctant to follow the state high court's precedent.<sup>191</sup> The Ohio legislature passed a workers' compensation statute that required all employers of more than five employees

---

183. *See, e.g., id.* at 798, 875 N.W.2d at 731; *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990) (rejecting a constitutional challenge to legislation that transferred a state college to the University of Nebraska); *State ex rel. Belker v. Bd. of Educ. Lands & Funds*, 184 Neb. 621, 171 N.W.2d 156 (1969) (rejecting constitutional challenge to a statute governing the sale of common school trust land); *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968) (rejecting a constitutional challenge to a statute classifying underage offenders).

184. 185 Neb. 270, 175 N.W.2d 63 (1970).

185. *Id.*

186. *Bessey v. Bd. of Educ. Lands & Funds*, 185 Neb. 801, 803, 178 N.W.2d 794, 796 (1970) ("[T]he very contention of the majority of this court that ultimate supervisory power over the sale of these lands was curtly and almost summarily rejected by the controlling minority in *Belker*.").

187. *See Entin, supra* note 13, at 455 (describing Ohio courts of appeals that refused to follow the judgment of cases involving supermajority requirements).

188. *Id.*

189. *Id.* (explaining the confusion that resulted from the Ohio Supreme Court ruling on a controversial workers' compensation issue).

190. 141 N.E. 551 (Ohio 1923).

191. *See Entin, supra* note 13, at 455.

to pay for workers' compensation insurance.<sup>192</sup> If a business used an independent contractor, the business was not responsible to pay for the workers' compensation premiums of the independent contractor's employees.<sup>193</sup> Problems arose when both an independent contractor and the business that hired it failed to pay for worker's compensation insurance.<sup>194</sup> In *DeWitt*, a minority of the Ohio Supreme Court upheld an act that allowed the State to seek damages for the cost of workers' compensation from a business that used the services of an independent contractor.<sup>195</sup> The damages were allowed only if both the business and the independent contractor failed to pay for workers' compensation insurance.<sup>196</sup> Naturally, the court's holding uneased many Ohio businesses.<sup>197</sup> Lower courts did not understand which opinion bound them.<sup>198</sup> Some courts even refused to follow the Ohio Supreme Court's decision.<sup>199</sup> The insubordination led the Ohio Supreme Court to overturn its decision just five years later.<sup>200</sup> An attorney may argue for Nebraska district courts to do the same.

The ambiguity the constitutional supermajority leaves after the court's decision in *Thompson* clouds the status of the law of standing in Nebraska. If an attorney needed to argue her opponent lacked standing based on the matter of great public concern exception to the standing requirement, she could draw precedent set forth in *Belker* to argue the majority's approach to standing is binding on the court. She would have to assert the standing requirement was a necessary condition to the court's decision in *Thompson*.<sup>201</sup> Her opponent could try to separate constitutional decisions from preliminary ones, like the insufficient-majority.<sup>202</sup> The extent of the exception to the law of standing for matters of great public concern is now questionable. However, it would be unusual for anyone to find themselves in the position of the parties in *Thompson*. The plaintiff would have to lack traditional standing, and not fit squarely into any of the three established exceptions. The exception for matters of great public concern would have to

---

192. *DeWitt*, 141 N.E. at 553 (Jones, J., insufficient-majority) (enumerating the specific details of Ohio's Workmen's Compensation Act).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 564 (Allen, J., minority opinion) (asserting the minority opinion bound the lower courts).

197. *See* Entin, *supra* note 13, at 455.

198. *Id.*

199. *Id.*

200. *See* State *ex rel.* Brendwell v. Hershner, 161 N.E. 334 (Ohio 1928).

201. *See* Abramowicz & Stearns, *supra* note 178, at 1026.

202. *Thompson v. Heineman*, 289 Neb. 798, 827, 857 N.W.2d 731, 755 (2015) ("The dissent, however, does not have four votes for its constitutional interpretation, and we, the majority, conclude that the dissent's interpretation is not warranted and, in any event, is not controlling.").

be the last recourse of a desperate plaintiff. In short, the extent of the exception for matters of great public concern may not come up again, and as a result, *Thompson* is likely more a political anomaly than transformative law.

#### IV. CONCLUSION

The circumstances surrounding the plans for the Keystone XL Pipeline almost seem more appropriate for the armchair juries of prime-time television. The drama is uncanny. Emotions run high in an odd clash of political and traditional interests. Environmentalists have combined with farmers to combat the construction of a pipeline designed to quench American's addiction to oil. In this dizzying array of law and politics, any legal thinker can easily lose himself. By examining the background of the case, Nebraska's judicial supermajority requirement, and Nebraska's law on standing to sue, it is possible to see how the insufficient-majority misunderstood the law of standing. In *Thompson v. Heineman*, the insufficient-majority tried to apply the exception for matters of great public concern to plaintiffs who did not merit it. With land, the environment and the nation's oil economy at stake, four of the seven judges let compassion rule their decision in a way Nebraska's standing doctrine does not allow. Instead, the *Thompson* minority correctly applied Nebraska's judicial doctrine of standing to sue because they found that exceptions to the law of standing only apply when there is no other suitable party to seek the jurisdiction of the court.

On November 6, 2015, President Obama rejected TransCanada's attempts to build the Keystone XL Pipeline.<sup>203</sup> However, until the moment the President announced his plans, Nebraska landowners never gave up their attempts to combat L.B. 1161.<sup>204</sup> Sixty Nebraskans who own land in the way of the pipeline planned to further challenge the statute in court.<sup>205</sup> They refused to relinquish a stick in their bundle of rights without a fight.<sup>206</sup> They should not have to. After all, it is their rights at issue. These owners have a personal stake in the litigation they pursued. Their land and the identity that goes with it were stake. They would have had the right to pursue recourse in court for an unconstitutional delegation of eminent domain

---

203. Press Release, The White House, Statement of the President on the Keystone Pipeline (Nov. 6, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline> [https://perma.unl.edu/UTX7-269U].

204. Nicolas Bergin, *TransCanada Could Face Long Legal Battle despite Surprise Play*, LINCOLN J. STAR, (Oct. 7, 2015), [http://journalstar.com/news/national/trans-canada-could-face-long-legal-battle-despite-surprise-play/article\\_0df424bf-6b08-5bb8-9af8-6c816322a1c0.html](http://journalstar.com/news/national/trans-canada-could-face-long-legal-battle-despite-surprise-play/article_0df424bf-6b08-5bb8-9af8-6c816322a1c0.html) [https://perma.unl.edu/JD77-FL7Q].

205. *Id.*

206. See di Robilant, *supra* note 9, at 877 (explaining the comparison of property rights to a "bundle of sticks").

power. However, the court cannot manufacture parties when the Unicameral passes a statute that might be unconstitutional. The Nebraska Supreme Court does not issue advisory opinions.<sup>207</sup> The insufficient-majority's holding on standing relaxed the exceptions to law of standing to sue in Nebraska. They may have even "let the exception swallow the rule."<sup>208</sup> Who knows if the relaxation will carry to lower courts? The court decided *Thompson* under anomalous political circumstances, but only time will tell whether insufficient-majority's expansion of standing exceptions will be transformative law.

---

207. *Thompson*, 289 Neb. at 848–49, 857 N.W.2d at 767 (Heavican, C.J., minority opinion) ("It is not the office of this court to render advisory opinions.").

208. *Id.*