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The Wages of Hitching Wagons

Thomas B. Bennett

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INTRODUCTION

If you hitch your wagon to spooked horses, you may end up somewhere unexpected.

This is the problem faced by states whose constitutions are in lockstep with federal doctrine. Lockstepping is the practice by state courts and legislatures of dynamically incorporating federal standards into state law.[2] Lockstepping is a commitment to follow federal law wherever it might lead.

States often have good reason to hitch their wagons to federal horses. For example, states may lockstep their law with federal law out of a desire for uniformity.[3] Also, having the same legal rule can help fend off forum-shopping.[4] And when state and federal law are the same, it is easier for the public to learn and understand their obligations.

Yet uniformity does not imply stability. Indeed, hitching the wagon of state law to the wild horses of federal law creates a new source of potential instability: federal

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* Associate Professor and Wall Family Fellow, University of Missouri School of Law & Kinder Institute on Constitutional Democracy. Thanks to the editors of the *Kentucky Law Journal* for inviting me to participate in their annual symposium entitled *State Supreme Courts and the Great American Experiment: Honoring Chief Justice John D. Minton, Jr.*, for which this paper was prepared.

[2] *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1509 (2005) (describing "prospective lockstepping" as when a state court "announces that not only for the instant case, but also *in the future*, it will interpret the state and federal clauses the same").

[3] *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1061 (2003) (noting that lockstepping can occur when state courts, after a thorough analysis, find that the benefits of adopting federal law outweigh the downsides); *see also* State v. Florance, 527 P.2d 1202, 1209 (Or. 1974) ("There are good reasons why state courts should follow the decisions of the Supreme Court of the United States on questions affecting the Constitution of the United States and the rights of citizens under the provisions of that Constitution, as well as under identical or almost identical provisions of state constitutions . . . ."); Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 314 (2007) ("Some have urged state courts to adopt parallel federal constitutional interpretations . . . to simplify the implementation of legal requirements by law enforcement officials and others, and to minimize litigation costs and legal uncertainty.").

[4] *Cf.* Hanna v. Plumer, 380 U.S. 460, 467–69 (1965) (noting that differences between state and federal rules of decision can affect litigants' choice of forum in undesirable ways).

law itself. As the underlying federal law changes, state law will be led to new places in lockstep. This, too, can be desirable, as when federal law changes in response to new facts or new understandings. But it's not always so good. Consider what happens when states lockstep their law to federal law despite differences in constitutional or statutory text.[5] In this scenario, changes in federal law that were easy to justify based on federal constitutional or statutory text may be much harder to square with state constitutional or statutory text. And when that happens, states face a choice between continued lockstepping and fidelity to the plain meaning of state law.

Kentucky and other states may soon face this choice in the context of standing to sue. Students of standing doctrine are most familiar with its federal form, which derives loosely from the text of Article III of the federal Constitution.[6] But by its terms, Article III applies only to federal courts; in state courts, standing doctrine is controlled purely by state law.[7] Kentucky's standing doctrine has undergone several key changes in the last 50 years, the result of which is that it is now in lockstep with federal standing doctrine.[8] This doctrinal similarity arose despite significant textual differences.[9] The result is that it is much easier to see why the text of the Kentucky Constitution requires modern standing doctrine than it is to see why the text of the federal Constitution does.

As originalism has swept the courts as a newly dominant form of constitutional interpretation, a handful of originalist federal judges have questioned one of the central tenets of Article III standing doctrine: injury in fact. Justice Clarence Thomas has openly questioned whether anything in the original public meaning of Article III requires a plaintiff to prove injury in fact.[10] Judge Kevin Newsom of the Eleventh Circuit, another committed originalist, has led the charge in the lower courts, writing two influential concurrences raising serious doubts about the provenance of modern standing doctrine.[11]

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[5] *See* Thomas B. Bennett, *State Rejection of Federal Law*, 97 NOTRE DAME L. REV. 761, 792–94 (2022) (describing the phenomenon of state-federal textual divergence paired with doctrinal convergence) [hereinafter Bennett, *State Rejection*]; *see also* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 718–19 (2016) (describing the phenomenon of state conformity with federal procedural law under dissimilar rules).

[6] U.S. CONST. art. III, § 2, cl. 1; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (describing standing doctrine as a "landmark" of the limits of federal judicial power derived from Article III).

[7] *See* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction Over Federal Claims*, 105 MINN. L. REV. 1211, 1229–31 (2021) [hereinafter Bennett, *Paradox*]; *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (holding that state courts are not bound by Article III's standing rules).

[8] *See infra* Part I.B; *see also* City of Pikeville v. Kentucky Concealed Carry Coalition, Inc., 671 S.W.3d 258, 263-64 (Ky. 2023) (explaining that Kentucky has adopted the federal test for standing).

[9] Commonwealth v. Sexton, 566 S.W.3d 185, 194–96 (Ky. 2018) (discussing the differences in Kentucky Constitutional text and federal Constitutional text and adopting the federal standing test).

[10] *See* TransUnion v. Ramirez, 141 S. Ct. 2190, 2219–21 (2021) (Thomas, J., dissenting).

[11] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring) ("The absence of any solid grounding in Article III's text or history is enough to condemn modern standing doctrine's focus on whether the plaintiff suffered an 'injury in fact' rather than on whether the plaintiff has a cause of action."); Laufer v. ARPAN LLC, 29 F.4th 1268, 1288 (11th Cir. 2022) (Newsom, J., concurring) ("Far better, I think, to tether Article III standing doctrine to the objectively verifiable original meaning of the written text.").

So far, at least, this originalist rethinking of standing doctrine has yet to take hold. Justice Thomas and Judge Newsom have expressed these views only in separate dissents or concurrences rather than majority opinions that have binding authority. But the originalist scholarship holds no satisfying answers to their critiques,[12] and it's not hard to imagine a world where their view becomes law.[13]

What will happen, then, to Kentucky's standing doctrine? After all, the originalist case for Kentucky's standing doctrine is much stronger than it is for federal standing doctrine. So a thoroughgoing originalist might reasonably jettison the federal injury-in-fact requirement but retain Kentucky's version of it. But of course that would pose a serious dilemma for Kentucky's efforts at lockstepping.

By hitching its wagon to federal law, which is itself in the midst of an originalist overhaul, Kentucky and other states like it face a choice: stick with lockstepping or stick with text. This choice teaches two key lessons. First, prospective lockstepping is tricky because federal law may develop in surprising ways that state judges do not want. Second, whether to lockstep is a complicated question that has both advantages and disadvantages, and changes to federal law would reignite debate over those tradeoffs.

Here's our roadmap. Part I traces the development of standing doctrine in federal court, under Article III, and Kentucky, under the Kentucky Constitution. Part II unpacks the originalist case against a federal injury-in-fact requirement and reveals the nascent efforts to cease enforcing such a requirement in federal court. Part III explores the dilemma faced by Kentucky and similarly situated states and argues that the choice involves tradeoffs between methods of constitutional interpretation, principles of federalism, and what it means for the law to be stable.

I. HITCHING THE WAGON: AN EXERCISE IN LOCKSTEPPING

To see how Kentucky law and federal law of standing converged, let us begin by outlining the historical development of the doctrine. As we will see, federal law's development in this area is mainly a twentieth-century phenomenon, and Kentucky's conforming came about only in the last decade. Yet in each case, there are relevant historical developments that are substantially older. And because the dilemma

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[12] *But cf.* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("We do not claim that history *compels* acceptance of the modern Supreme Court's vision of standing, or that the constitutional nature of standing doctrine was crystal clear from the moment of the Founding on. . . . We do, however, argue that history does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

[13] Judge Paul B. Matey of the Third Circuit recently joined the ranks of originalist standing skeptics. *See* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 148 (3d Cir. 2024) (Matey, J., concurring in part, dissenting in part, and dissenting in the judgment) ("'Standing' is a term found in every first-year law school outline, but absent from the text of the Constitution, Founding-era discussions, English and Roman history, and the reported decisions of our federal courts throughout most of the twentieth century.").

described here largely stems from newfound enthusiasm for originalism as a method of constitutional interpretation, that history matters quite a bit.[14]

A. The Federal Rule

Article III is the textual wellspring of federal constitutional standing doctrine.[15] In particular, the grant of specific bases of subject-matter jurisdiction to federal courts in Article III, section 2 has been read to limit the subject matter of disputes federal courts can hear to "Cases" or "Controversies."[16] This case-or-controversy language gives rise to most of the constitutional justiciability doctrines, including not only standing but also ripeness and mootness.

The exact origins of standing doctrine applied in federal courts today are somewhat obscure, but most commentators trace them to a trio of Supreme Court cases decided in 1922 and 1923.[17] By constitutional terms, a 100-year provenance is short, and therefore gives rise to accusations that standing doctrine is a modern judicial invention.[18] This dubious historical pedigree is important to the story here, and we will return to it later.[19]

The modern test for standing doctrine is still yet newer, dating to the 1980s at the earliest.[20] It has three components: injury in fact, causation, and redressability.[21] Our focus is on injury in fact. That rule demands that the plaintiff suffered an injury that

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[14] Originalism is a family of beliefs about how to interpret a constitution; this family shares at least two fundamental commitments. The fixation thesis holds that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified." Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015). The constraint principle, meanwhile, "holds that the original meaning of the constitutional text should constrain constitutional practice." *Id.*

[15] *See* Allen v. Wright, 468 U.S. 737, 751 (1984) ("The requirement of standing . . . has a core component derived directly from the Constitution.").

[16] U.S. CONST. art. III, § 2, cl. 1 ("The judicial power shall extend to . . . Cases . . . and . . . Controversies . . . ."); *accord* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) ("Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'").

[17] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923); Fairchild v. Hughes, 258 U.S. 126 (1922); *see also* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) ("There was no doctrine of standing prior to the middle of the twentieth century."); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375–76 (1988) ("The notion that standing is a bedrock requirement of constitutional law has a surprisingly short history. *Frothingham v. Mellon* . . . is generally thought of as the first modern standing case. In fact, . . . *Fairchild v. Hughes*, decided a year [earlier] . . . was the first . . . ."); *but see* Woolhandler & Nelson, *supra* note 12, at 717–18 ("The twentieth-century Court's decisions in *Massachusetts v. Mellon* and *Frothingham v. Mellon*—sometimes portrayed as ushering in a radical break with the past—are continuous with these older cases." (citations omitted)).

[18] *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179–81 (1992); Winter, *supra* note 17, at 1452–57; Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816–19 (1969); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 290–95 (2008).

[19] *See infra* Part II.

[20] *See* Allen v. Wright, 468 U.S. 737, 750–51 (1984).

[21] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (enunciating test).

is concrete, particularized, and either actual or imminent. [22] Although the injury-in-fact requirement first appeared in 1970,[23] it was not given its modern, constitutionalized form until 1975.[24]

Yet no matter how we got here, federal standing doctrine today is demanding, constitutional, and jurisdictional. The latter two features mean that judges must raise the issue sua sponte, and litigants cannot waive it. This is to be contrasted with standing rules in state court, which can be much looser.[25]

Even though the tripartite test for standing is easily stated, its application has continued to divide and confuse the federal courts. Two recent cases highlight this phenomenon. In *Spokeo v. Robins*, the Court held for the first time that the existence of a statutory cause of action is not necessarily a "concrete" injury under Article III.[26] More recently, in *TransUnion v. Ramirez*, the Court doubled-down on its holding in *Spokeo*, finding that thousands of members of a federal statutory class action lacked standing, even though they met all the elements of the cause of action.[27] These questions have proven sufficiently difficult even to the Supreme Court that it recently decided *Acheson Hotels, LLC v. Laufer* on late-breaking mootness grounds rather than take a stab at the tricky standing question presented in the case.[28]

Despite these practical challenges, the federal doctrinal standing test has proved extremely influential on state courts. Roughly half of states incorporate some version of federal standing doctrine into state law.[29] This trend of state courts adopting federal standing doctrine accelerated in the latter half of the twentieth century, just as the U.S. Supreme Court was elaborating the modern test for federal standing.[30] And states are now trying to decide whether to follow the Supreme Court's recent cases like *Spokeo* and *TransUnion*.

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[22] *Id.*; *see also* Bennett, *Paradox*, *supra* note 7, at 1222–24 (noting the role *Lujan* played in the development of modern standing doctrine).

[23] *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test.").

[24] *See* Warth v. Seldin, 422 U.S. 490, 525, 527–28 (1975) (Brennan, J., dissenting) (citation omitted) ("[I]t is abundantly clear that the harm alleged satisfies the 'injury in fact, economic or otherwise,' requirement which is prerequisite to standing in federal court.").

[25] *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing with approval state courts' varied justiciability rules).

[26] Spokeo v. Robins, 578 U.S. 330, 341 (2016).

[27] TransUnion v. Ramirez, 141 S. Ct. 2190, 2214 (2021).

[28] Acheson Hotels, LLC v. Laufer, No. 22-429, slip op. 1, 1 (U.S. Dec. 5, 2023) (accepting respondent's argument that "mootness is easy and standing is hard").

[29] *See* Bennett, *Paradox*, *supra* note 7, at 1232–34; *see also* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 349, 353–98 (2015) (conducting fifty-state survey).

[30] *See* Bennett, *State Rejection*, *supra* note 5, at 792–810 (tracing three states' reactions to the Supreme Court's decision in *Lujan*).

B. The Kentucky Rule

Kentucky has been in the thick of these issues. As we will see, the Bluegrass State has settled on an interpretation of its state constitution that aligns its standing doctrine exactly with its federal counterpart. But the path to get there is at least as interesting as the current snapshot is.

Kentucky's current constitution—its fourth—was adopted in 1891.[31] But the 1891 constitution, as originally adopted, did not have any language speaking specifically to justiciability.[32] Even so, Kentucky courts began enforcing a version of standing doctrine as early as 1957.[33] That early version, however, was different from the modern form of federal standing doctrine: it was judicially imposed and non-constitutional.[34]

In 1975, however, Kentucky voters approved the Kentucky State Courts Restructuring Referendum.[35] The Referendum restructured the entire Kentucky judiciary. It created a new Supreme Court to act as a second level of appellate review, reorganized the lower courts, and set new rules for judicial eligibility, election, removal, compensation, and conduct.[36] But it also rewrote the provisions of the 1891 constitution setting out the subject-matter jurisdiction of commonwealth courts. Most importantly for our purposes, it added a new provision—Section 112(5)—providing that Kentucky's trial courts of general jurisdiction "shall have original jurisdiction of all *justiciable* causes not vested in some other court."[37]

Despite the sweeping change to the constitutional provisions governing Kentucky courts, standing doctrine did not change much at first. And it was not the case that Kentucky standing doctrine mirrored its federal analog.[38] Indeed, it was not until after the U.S. Supreme Court's landmark decision in *Lujan v. Defenders of Wildlife*[39] that

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[31] Ky. Gen. Assembly, *Constitution of Kentucky*, https://apps.legislature.ky.gov/law/constitution [https://perma.cc/CY3Z-48EB].

[32] *See* KY. CONST.

[33] Lexington Retail Beverage Dealers Ass'n v. Dep't of Alcoholic Beverage Control Bd., 303 S.W.2d 268, 269–70 (Ky. 1957); *see* Sassman, *supra* note 29, at 369–70.

[34] *See* Commonwealth v. Sexton, 566 S.W.3d 185, 194 (Ky. 2018) ("Kentucky courts have seemingly created a judicially—as opposed to constitutionally—imposed standing requirement.").

[35] Commonwealth of Ky., State Board of Elections, *1975 Primary and General Election Results: Constitutional Amendments*, https://elect.ky.gov/SiteCollectionDocuments/Election%20Results/1973-1979/75const.pdf [https://perma.cc/5ZTV-AZYS].

[36] *Id.*; *see also* Kurt X. Metzmeier, *Constitutional Amendment To Reform Kentucky's Courts*, *in* UNITED AT LAST: THE JUDICIAL ARTICLE AND THE STRUGGLE TO REFORM KENTUCKY'S COURTS 27, 34–40 (Kurt X. Metzmeier, Jason Nemes & Michael Whiteman eds.) (2006) (chronicling the campaign to win adoption of the referendum).

[37] KY. CONST. § 112(5).

[38] *See, e.g.*, Price v. Commonwealth, Transp. Cabinet, 945 S.W.2d 429, 431 (Ky. Ct. App. 1996) ("From the more recent case of *Gillis v. Yount, Ky.*, 748 S.W.2d 357 (1988), to cases from the last century, Kentucky has consistently recognized taxpayer standing to challenge the constitutionality of city, county and state taxes and expenditures."); Rosenbalm v. Com. Bank of Middlesboro, 838 S.W.2d 423, 427 (Ky. Ct. App. 1992) (setting out the elements of a taxpayer's cause of action to invoke taxpayer standing) ("This state has long recognized that a valid taxpayer's action may be properly maintained.").

[39] 504 U.S. 555 (1992).

Kentucky courts started to follow federal standing doctrine more closely. But even that took a while. A 2010 case marked the Kentucky Supreme Court's first mention of *Lujan*,[40] and it was only in passing. Then, in 2013, in pure dicta, the Kentucky Supreme Court began revising its standing doctrine to be both (1) more closely tied to state constitutional text; and (2) more closely aligned with federal standing doctrine.[41] In an opinion that concerned only statutory standing, the Kentucky Supreme Court nevertheless noted that standing was "an integral component of the 'justiciable cause' requirement underlying the trial court's jurisdiction."[42] And in citing to a leading U.S. Supreme Court case on Article III standing, it noted that "standing" can also "refer to various judicially-created limitations on the exercise of jurisdiction."[43] Because this was just dicta, though, Kentucky standing doctrine remained quite different from federal standing doctrine.[44]

But in 2018's *Commonwealth v. Sexton*, the Kentucky Supreme Court squarely held that the three-part test for federal standing applied in commonwealth courts. The court also held standing was jurisdictional, and that it derived from the language added to Kentucky's constitution in the 1975 Referendum.[45] *Sexton*'s facts and procedural history are unusually complicated. To simplify: the question was whether a person can exercise a statutory right to appeal an administrative agency's order even if they have not suffered a concrete injury.[46] This is strikingly close to the question presented in *Lujan*.[47]

The court held that the statutory right to appeal was not enough to give the appellant standing.[48] The majority opinion, written by then-Chief Justice Minton, looked to two sources to determine the extent of constitutional standing in Kentucky: the United States Supreme Court's standing cases and Section 112(5) of the Kentucky Constitution.[49] The court's discussion began with "elementary principle[s]," U.S. Supreme Court precedent, and the text of Article III of the federal Constitution.[50] After a thorough primer on justiciability doctrines applicable in federal court, the *Sexton* majority clarified that they did not apply in Kentucky courts:

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[40] Commonwealth *ex rel.* Brown v. Interactive Media Ent. & Gaming Ass'n, Inc., 306 S.W.3d 32, 38–39 (Ky. 2010).

[41] *See* Lawson v. Office of Atty. Gen., 415 S.W.3d 59, 67 (Ky. 2013).

[42] *Id.*

[43] *Id.* (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

[44] *See* Sassman, *supra* note 29, at 369–70 (noting differences).

[45] Commonwealth v. Sexton, 566 S.W.3d 185, 188 (Ky. 2018) ("[W]e hold as a matter of first impression that the existence of a plaintiff's standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth, adopting the United States Supreme Court's test for standing as espoused in *Lujan v. Defenders of Wildlife*.").

[46] *Id.*

[47] 504 U.S. 555, 558 (1992) ("The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.").

[48] *Sexton*, 566 S.W.3d at 188 ("Under that test, we conclude that Medicaid beneficiary Lettie Sexton, the putative petitioner in the present case, does not have the requisite constitutional standing to pursue her case in the courts of the Commonwealth.").

[49] *Id.* at 195–96 (tying these authorities together).

[50] *Id.* at 192–93.

> To be clear, these standing requirements as outlined above are discussed in the context of application to the limit on federal judicial power, not state judicial power. Under principles of federalism, "[l]ong-established precedent holds that Article III standing requirements do not apply in state courts and courts of the territories." So we now examine Kentucky's current standing doctrine.[51]

The court then noted, relying on Professor Sassman's survey, that "Kentucky courts have seemingly created a judicially—as opposed to constitutionally—imposed standing requirement."[52] This might have been the end of it. If standing doctrine is not constitutionally grounded, there is little to stop the legislature from changing it by, for example, creating a right to appeal even in the absence of an injury in fact. But the court took a different course.

Next, the court said, it had to "ascertain what, if any, constitutional standing requirements exist in Kentucky," a task that led it to look to the "Kentucky Constitution first and foremost." [53] Ironically, this review of the Kentucky Constitution led the court to copy federal standing doctrine exactly. Despite the irony, the logic is simple. Section 112(5), the court reasoned, limits the jurisdiction of Kentucky courts to "justiciable causes."[54] It then noted that standing doctrine is a rule about which cases are justiciable and which are not.[55] For the final step in the proof, the court concluded that Section 112(5) "adopted some notion of the justiciability doctrines articulated by the U.S. Supreme Court."[56] The "formal adopt[ion]" of federal standing doctrine as a gloss on state constitutional text was necessary, the court concluded, "[t]o provide clarity to Kentucky's standing doctrine."[57] The lone dissent did not even challenge the adoption of federal standing doctrine.[58]

And that's how Kentucky hitched its wagon to federal standing doctrine. The hitch has held fast. Many cases have reaffirmed *Sexton*'s holding.[59] Yet the clarity that the *Sexton* court sought may yet prove elusive.

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[51] *Id.* at 193 (quoting John W. Curran, *Who's Standing in the District After* Grayson v. AT&T Corp.*? The Applicability of the Case-or-Controversy Requirement in D.C. Courts,* 62 Am. U. L. Rev. 739, 740 (2012)).

[52] *Id.* at 194 (quoting Sassman, *supra* note 29).

[53] *Id.*

[54] *Id.* at 195–96.

[55] *Id.*

[56] *Id.* at 195.

[57] *Id.* at 196.

[58] *Id.* at 199 (Wright, J., dissenting) ("Constitutional standing has three requirements: (1) injury, (2) causation, and (3) redressability.").

[59] *See, e.g.*, City of Pikeville v. Kentucky Concealed Carry Coal., Inc., 671 S.W.3d 258, 263 (2023) ("Standing must be addressed as a threshold matter because 'all Kentucky courts have the constitutional duty to ascertain the issue of constitutional standing, acting on their own motion, to ensure that only justiciable causes proceed in court, because the issue of constitutional standing is not waivable.' . . . This Court has adopted the federal Lujan test to determine whether a party has standing." (quoting *Sexton*, 566 S.W.3d at 192)); Cameron v. EMW Women's Surgical Ctr., 664 S.W.3d 633, 647–48, 650 (Ky. 2023) ("[I]n 2018, this Court explicitly adopted the constitutional standing test established by the U.S. Supreme Court in *Lujan* in *Sexton*."); Ward v. Westerfield, 653 S.W.3d 48, 54 (Ky. 2022) ("In *Sexton*, we made clear that constitutional standing is a jurisdictional prerequisite to bring a justiciable cause of action. As a

II. SPOOKING THE HORSES: SEEDS OF DOCTRINAL CHANGE

The horses would soon spook. Less than three years after *Sexton* reoriented Kentucky standing doctrine, a pair of influential federal judges began reexamining the foundations of federal standing doctrine. Both judges—Kevin Newsom of the Eleventh Circuit and Clarence Thomas of the U.S. Supreme Court—are committed originalists. That makes them more likely than most to reconsider precedent.[60] And so they have considered whether to do away with injury in fact.

Judge Newsom went first. *Sierra v. City of Hallandale Beach* involved a suit under Title II of the Americans with Disabilities Act against a Florida town for not including closed captions with the videos posted to the town website.[61] The question presented on appeal was whether the plaintiff had suffered a concrete injury in fact because he was denied the ability to fully understand the videos.[62] The panel, applying precedent recognizing that stigmatic injuries are concrete for purposes of Article III, held that the plaintiff had standing.[63]

Judge Newsom concurred in an opinion five times longer than the majority's.[64] He did so to express his "doubt that current standing doctrine—and especially its injury-in-fact requirement—is properly grounded in the Constitution's text and history, coherent in theory, or workable in practice."[65] Judge Newsom's critique of current doctrine had two parts. First, he argued that Article III is satisfied any time a plaintiff has a "legally cognizable cause of action."[66] The result would be a wholesale elimination of the injury-in-fact requirement.[67] Second, however, he argued that the

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result, all litigants, including voters, must allege a concrete and particularized injury-in-fact to invoke the jurisdiction of Kentucky courts."); Ky. Unemployment Ins. Comm'n v. Nichols, 635 S.W.3d 46, 50 (2021) ("In [*Sexton*], we adopted the federal courts' standard for constitutional standing. ... *Sexton* also clarified that constitutional standing cannot be waived, and it is a court's duty to ensure it only addresses purely justiciable claims."); Overstreet v. Mayberry, 603 S.W.3d 244, 252 (Ky. 2020) ("To sue in a Kentucky court the plaintiff must have the requisite constitutional standing, which is defined by three requirements: (1) injury, (2) causation, and (3) redressability." (citing *Sexton*)).

[60] *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1925–26 (2017) (summarizing the theoretical tension between originalism and stare decisis); *see also* John O. McGinnis & Michael B. Rappaport, *The Normative Theory of Precedent*, *in* ORIGINALISM AND THE GOOD CONSTITUTION 195 (2013) ("Precedent is often seen as an embarrassment for originalists."); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 4 (2011) ("[S]everal textualist commentators have declared that their interpretive commitments forbid the justices to rely on precedents except when those precedents represent proper textual constructions of the Constitution."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727 (1988) ("[I]nsistence upon original intent as the only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order.").

[61] Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1114 (11th Cir. 2021).

[62] *Id.* at 1113–14.

[63] *Id.*

[64] *Id.* at 1115. (Newsom, J., concurring) ("It has taken me a while to come to this conclusion, and unpacking it will likewise take some doing.").

[65] *Id.*

[66] *Id.*

[67] *Id.* at 1125 ("Again, then, 'injury in fact' was neither necessary nor sufficient; a cause of action was both."); *see also id.* at 1126 ("[T]here's little defense for the current standing doctrine's injury-in-fact requirement.").

language in Article II vesting the executive power in the president limited Congress "from empowering private plaintiffs to sue for wrongs done to society in general or to seek remedies that accrue to the public at large."[68]

His critique of injury in fact has two prongs. First, it is a recent judicial innovation with no clear connection to the Constitution's text or original meaning.[69] And second, it is confusing, arbitrary, and inescapably value laden.[70] Moreover, the upshot of Judge Newsom's critique is that, because standing doctrine cannot derive from Article III, it cannot be jurisdictional.[71] And finally, because of the role he ascribed to Article II's vesting clause, there would remain limits on the extent to which Congress could create limitless causes of action enforceable in federal court by private plaintiffs.[72]

Justice Thomas picked up on Judge Newsom's ideas in his dissenting opinion in *TransUnion v. Ramirez*, decided less than two months after *Sierra*.[73] *TransUnion* involved a suit brought by a class of thousands of consumers whose credit reports falsely claimed that they were on a government list of terrorists and serious criminals.[74] The class sued under the private-suit provision of the Fair Credit Reporting Act.[75] Victorious plaintiffs under that law are entitled to statutory damages, so they typically need not prove damages as an element of their cause of action.[76] Yet precisely because they did not need to prove any injury to prove their cause of action, the standing question was a tricky one. Does Congress's decision to create a right against false credit reports enforceable by a federal cause of action suffice to render the violation of that right a concrete injury in fact?

The Court said "no," doubling down on its holding in *Spokeo*.[77] The plaintiffs had to show more than that their statutory rights were violated, the Court said. Instead, they had to prove an additional concrete injury. And so the Court sliced up the class into two groups: those whose false credit reports had been sent to third parties (and who therefore had standing) and those whose reports had not been sent to anyone else (who therefore lacked standing).[78]

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[68] *Id.* at 1115.

[69] *See id.* at 1121–26.

[70] *See id.* at 1126–31.

[71] *See id.* at 1131–32 ("[T]he question whether an Article III 'Case' exists—as properly focused on whether the plaintiff has a cause of action—runs to the merits of the plaintiff's claim, rather than to the reviewing court's jurisdiction.").

[72] *Id.* at 1136.

[73] TransUnion v. Ramirez, 141 S. Ct. 2190, 2219–20 (2021).

[74] *Id.* at 2190.

[75] *Id.* at 2200–01.

[76] *See* Fair Credit Reporting Act, 15 U.S.C. § 1681n(a) (allowing for an award of between $100 and $1000 in statutory damages, plus punitive damages and attorney's fees).

[77] *TransUnion*, 141 S. Ct. at 2200, 2205 ("Importantly, this Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" (quoting *Spokeo*, 578 U.S. at 341)).

[78] *Id.* at 2214 ("No concrete harm, no standing. The 1,853 class members whose credit reports were provided to third-party businesses suffered a concrete harm and thus have standing as to the reasonable-procedures claim. The 6,332 class members whose credit reports were not provided to third-party businesses did not suffer a concrete harm and thus do not have standing as to the reasonable-procedures claim.").

Justice Thomas dissented, joined by the Court's three liberals, in an opinion that struck many of the same chords that Judge Newsom had in *Sierra*.[79] The most forceful critique was of the injury-in-fact requirement:

> [I]t is worth pausing to ask why 'concrete' injury in fact should be the sole inquiry. After all, it was not until 1970—"180 years after the ratification of Article III"—that this Court even introduced the "injury in fact" . . . concept of standing. And the concept then was not even about constitutional standing. . . .[80]

Justice Thomas reasoned that, under the original meaning of Article III, a constitutional case exists only when "an individual asserts his or her own rights."[81] If so, Article III was no bar. If, however, the plaintiff "sued based on the violation of a duty owed broadly to the whole community ... courts required" not only legal injury but also damage.[82] Thus, in Justice Thomas's view, there is no basis in the original meaning of Article III to require that a plaintiff asserting her own private rights prove injury in fact.[83] And because he concluded that the FCRA created a private right of action belonging to each class member, he viewed it as a mistake to hold that the courts lacked jurisdiction over most of the class.[84]

These two judges' reform proposals are radical in their sweep, and it remains too early to say whether they will resonate. But their efforts continue. In a 2022 case, Judge Newsom again concurred (this time with his own panel majority opinion) to elaborate on his critique of standing doctrine.[85] And already one additional judge—Paul Matey of the U.S. Court of Appeal for the Third Circuit—has joined their ranks.[86]

Although Judge Newsom elsewhere expressed his happiness that the Supreme Court had "stepped in" to provide those "in middle management" with eagerly awaited "guidance,"[87] that guidance has been delayed or postponed altogether with the Supreme Court's disposal of *Laufer* on mootness grounds.[88] Even still, the originalist arguments against standing doctrine are formidable, and the Supreme

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[79] *Id.* at 2214 (Thomas, J., dissenting).

[80] *Id.* at 2219 (Newsom, J., concurring) (citing *Sierra*, 996 F.3d at 1117).

[81] *Id.* at 2216–17.

[82] *Id.* at 2217.

[83] *TransUnion*, 141 S. Ct. at 2220 ("A statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing. . . . A statute that creates a private right and a cause of action, however, does gives plaintiffs an adequate interest in vindicating their private rights in federal court.").

[84] *Id.* at 2218–19 ("The plaintiffs thus have a sufficient injury to sue in federal court.").

[85] *See* Laufer v. ARPAN LLC, 29 F.4th 1268, 1283 (11th Cir. 2022) (Newsom, J., concurring) ("This is a sequel of sorts to my concurring opinion in *Sierra* . . . .").

[86] Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 148 (3d Cir. 2024) (Matey, J., concurring in part, dissenting in part, and dissenting in the judgment) (writing "separately to explain how the wandering [path of standing doctrine] began"). In *Barclift*, Judge Matey reviewed the history from before the founding until today, with stops to ponder the views of James Madison, George Mason, William Blackstone, Thomas Cooley, and Joseph Story. *Id.* at 150–52. He concluded that, "[f]or most of American history, if [a plaintiff] sued as a private individual to enforce a private right created by Congress, her case would be heard without any obligation to make a threshold showing of factual injury." *Id.* at 152–53.

[87] Laufer v. ARPAN LLC, 65 F.4th 615, 616, 618 (11th Cir. 2023) (en banc) (Newsom, J., concurring in the denial of rehearing en banc).

[88] *See* Acheson Hotels, LLC v. Laufer, No. 22-429, slip op. 1, 3 (U.S. Dec. 5, 2023).

Court is today more committed to originalist methodology than ever before. For that reason alone, Judge Newsom and Justice Thomas's critiques demand our attention.

III. GRABBING THE REINS

Where does that leave Kentucky and the other states that have hitched their wagon to federal standing doctrine, just as it stands on the verge of complete overhaul? One way to answer that question is to look at the tradeoffs of lockstepping—both before and after a potential change in federal standing doctrine. Doing so reveals that Kentucky courts would face hard decisions between competing values.

In the status quo, there are two main benefits that are offset by two main costs. The first benefit of the present wagon hitching is jurisdictional symmetry between state and federal courts in Kentucky. Such symmetry can eliminate jurisdictional gaps and simplify standing inquiries when cases are removed to federal court or remanded to state court. Second, Kentucky courts can benefit from federal courts' elaboration of federal standing doctrine, which can in theory clarify how to apply that doctrine in new contexts.[89]

The status quo, however, did not win these benefits cheaply. Because Kentucky mirrors federal standing doctrine, there are many claims under both state and federal law that cannot be vindicated in any court.[90] This substantial cost impinges one's access to justice. And more broadly, lockstepping robs federalism of one of its key advantages: variation and experimentation among the states. Absent lockstepping, each state court system can develop its own jurisdictional rules tailored to its institutional context. These different jurisdictional regimes may differ not only from that governing federal court but also from one another. This multiplicity can reflect the unique values and interests of each state while also providing fertile ground to test new ideas.

One tradeoff the status quo does not demand is one between fidelity to state constitutional text and following federal standing doctrine. Indeed, because the textual basis for injury in fact is clearer under the Kentucky Constitution than it is under Article III, Kentucky courts can claim that lockstepping is not just a good idea but also constitutionally required.

That could all change if federal courts rethink standing doctrine. Kentucky's courts would be whipsawed between a desire to remain in lockstep with federal standing doctrine and a desire to give faithful effect to the text of the Kentucky Constitution.[91] Put slightly different, Kentucky could choose to reverse the tradeoffs in lockstepping by remaining faithful to the injury-in-fact requirement it embraced

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[89] Of course, a critic like Judge Newsom would say that further elaboration of standing doctrine from the Supreme Court "has raised more questions that it [has] answered." *Sierra*, 996 F.3d at 1121 (Newsom, J., concurring); *accord Laufer*, 29 F.4th at 1284 (Newsom, J., concurring).

[90] *See* Bennett, *Paradox*, *supra* note 7, at 1239 ("For those plaintiffs who are (a) injured in states that mirror federal standing rules (b) by defendants who reside in such states, there is no court able to grant the relief to which Congress has entitled them. Here the calculus is not one of forum choice or parity but of raw access to justice.").

[91] Perhaps it is possible to read Section 112(5) of the Kentucky constitution and its "justiciable cause" language as *dynamically* incorporating federal justiciability principles. But such an argument was not present in *Sexton* and would require deeper analysis to prove.

in *Sexton*. Or it could maintain the status quo as to lockstepping, but only by sacrificing its prior reading of Section 112(5) of the Kentucky Constitution.

Neither solution is immediately satisfying. That *Sexton* found that Article III and Section 112(5) pointed in the same direction was a happy accident. In turn, then, the prospect that federal courts may alter their interpretation of Article III represents a kind of unhappy accident. To see why, imagine yourself in a wagon hitched to a spooked horse, bolting off in an unknown direction. You have only two choices. You can unhitch your wagon, leaving you unassisted in reaching your destination. Or you can consign yourself to go wherever the wild horses may take you.