STATE COURTS — STATE STANDING DOCTRINE — IDAHO SUPREME COURT RETAINS FEDERAL FRAMEWORK FOR ASSESSING STANDING TO SUE IN STATE COURT. — *Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021).

From the earliest days of statehood, the Idaho Supreme Court has addressed questions of citizens' standing to sue in state courts.[1] But in the 1980s, nearly a century after statehood, the Idaho Supreme Court began applying federal standing doctrine to its own state courts. What started with resorting to federal doctrine for "instructive" examples[2] turned into embracing a "case or controversy" limitation,[3] then "look[ing] to decisions of the United States Supreme Court for guidance,"[4] and finally asserting that "Idaho has adopted the constitutionally based federal justiciability standard,"[5] including the three-part framework for standing set forth in *Lujan v. Defenders of Wildlife*.[6] But throughout this period, "[t]he appellate courts of Idaho . . . never based their standing holdings on constitutional requirements of the Idaho constitution,"[7] nor did they explain why they specifically looked to *federal* standing principles for guidance.[8] Recently, in *Reclaim Idaho v. Denney*,[9] the Idaho Supreme Court continued to apply federal standing doctrine to its state courts, holding that an individual plaintiff did not have standing to challenge a statute restricting the citizen initiative power.[10] The court's application of the federal standing doctrine in the case shows why the common practice of mirroring federal doctrines in state courts is particularly inapt in the context of standing.

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[1] *See, e.g.*, Orr v. State Bd. of Equalization, 28 P. 416, 417–18 (Idaho 1891); Dunn v. Sharp, 35 P. 842, 844 (Idaho 1894); Nuckols v. Lyle, 70 P. 401, 401 (Idaho 1902).

[2] Bear Lake Educ. Ass'n v. Bd. of Trs. of Bear Lake Sch. Dist. No. 33, 776 P.2d 452, 457 (Idaho 1989) (citing Glengary-Gamlin Protective Ass'n v. Bird, 675 P.2d 344, 347 (Idaho Ct. App. 1983)).

[3] Miles v. Idaho Power Co., 778 P.2d 757, 763 (Idaho 1989) (citing Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 79 (1978)).

[4] Koch v. Canyon County, 177 P.3d 372, 375 (Idaho 2008) (citing *Miles*, 778 P.2d at 763).

[5] ABC Agra, LLC v. Critical Access Grp., Inc., 331 P.3d 523, 525 (Idaho 2014) (citing Davidson v. Wright, 151 P.3d 812, 816 (Idaho 2006)).

[6] 504 U.S. 555, 560–61 (1992); *see* State v. Philip Morris, Inc., 354 P.3d 187, 194 (Idaho 2015) (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157–58 (2014) (quoting *Lujan*, 504 U.S. at 560–61)).

[7] Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, 31 IDAHO L. REV. 509, 588 (1995). Gilmore is one of the plaintiffs discussed in *Reclaim Idaho v. Denney*, 497 P.3d 160 (Idaho 2021). *Id.* at 173 n.6.

[8] *See* Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25, 451 P.3d 25, 41 (Idaho 2019) (Stegner, J., dissenting).

[9] 497 P.3d 160 (Idaho 2021).

[10] *Id.* at 176.

In 1912, twenty-two years after statehood, Idahoans "reserve[d] to themselves"[11] through constitutional amendments the powers to demand referenda and to propose initiatives for popular vote, restricted only by the Legislature's ability to prescribe the "conditions" and "manner" of these powers.[12] But over the past century, the State Legislature has set many onerous requirements for getting a measure onto the ballot, each time after contentious ballot measures and bitter disputes with the Governor.[13] For example, the Legislature imposed more requirements in 1997 after an initiative to establish term limits for legislators passed,[14] and again in 2013 after the people used referenda to repeal a series of education reform laws the Legislature had enacted.[15] In 2021, in the wake of two controversial ballot initiatives in 2018,[16] the Legislature imposed yet another onerous restriction.[17] Previously, to get on the ballot, an initiative needed the signatures of six percent of voters in eighteen of the state's thirty-five legislative districts.[18] The new law required signatures from six percent of voters in *every* district.[19]

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[11] *See* S.J. Res. 12, 1911 Leg., 11th Sess. (Idaho 1911) (referendum power); S.J. Res. 13, 1911 Leg., 11th Sess. (Idaho 1911) (initiative power); *see also Reclaim Idaho*, 497 P.3d at 167.

[12] IDAHO CONST. art. III, § 1 ("[V]oters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation . . . .").

[13] *See Reclaim Idaho*, 497 P.3d at 167–69.

[14] *Id.* at 168. The Legislature in turn repealed this term limit requirement, over the Governor's veto, less than a decade later. *See* Michael Janofsky, *Idaho Legislature Repeals Term Limit Law, Undoing Voter-Approved Measure*, N.Y. TIMES (Feb. 2, 2002), https://www.nytimes.com/2002/02/02/us/idaho-legislature-repeals-term-limit-law-undoing-voter-approved-measure.html [https://perma.cc/4SK9-3Y6W].

[15] *Reclaim Idaho*, 497 P.3d at 168; *see also* Kevin Richert, *Citing "Luna Laws," Democrats Decry Initiative Bill*, IDAHO EDUC. NEWS (Feb. 20, 2013), https://www.idahoednews.org/kevins-blog/citing-luna-laws-democrats-decry-initiative-bill [https://perma.cc/A28X-V3EU].

[16] *See* LAWERENCE DENNEY, IDAHO VOTERS' PAMPHLET 4–8 (2018), https://sos.idaho.gov/ELECT/Inits/2018/2018%20Voters%20Pamphlet.pdf [https://perma.cc/CYD3-JQZP]. The first of these initiatives would have legalized betting on "historical horse racing" in the state. *Id.* at 4. But this initiative failed to receive majority support on the statewide ballot. Nicole Foy, *Idaho Voters Turn Down Historical Horse Racing Terminals*, IDAHO PRESS (Nov. 7, 2018), https://www.idahopress.com/news/elections/idaho-voters-turn-down-historical-horse-racing-terminals/article_6b73a2d8-d333-524d-9047-2b7a9607ab7a.html [https://perma.cc/P9DB-Y6GK]. The second expanded eligibility for Medicaid under the Affordable Care Act. Bruce Japsen, *Idaho Medicaid Expansion Sails to Victory*, FORBES (Nov. 7, 2018, 1:53 AM), https://www.forbes.com/sites/brucejapsen/2018/11/07/idaho-medicaid-expansion-sails-to-victory [https://perma.cc/SP87-7EGH].

[17] *See* S.B. 1110, 66th Leg., 1st Reg. Sess. (Idaho 2021). Similar legislation had been proposed previously, and after extensive legislative debate and several vetoes by the Governor, the Legislature passed this narrower bill, which was signed into law by the Governor. *See* Betsy Z. Russell, *Governor Has Signed SB 1110 on Future Voter Initiatives*, IDAHO PRESS (Apr. 17, 2021), https://www.idahopress.com/news/local/governor-has-signed-sb-1110-on-future-voter-initiatives/article_ce2a1bf6-c82b-5e24-bb9e-5d06f912976o.html [https://perma.cc/73C7-Z67F].

[18] Idaho S.B. 1110.

[19] *Id.* The decision to expand the geographic distribution requirement was driven in part by the concern that initiative proponents could focus exclusively on gathering signatures in the population centers of the state, whereas the new law forced gatherers to travel to more remote regions. *See* Minutes from Idaho Senate State Affs. Comm. 5 (Feb. 17, 2021) (statement of Sen. Steve Vick),

In response, Idaho voter Michael Gilmore petitioned for a writ of mandamus in the state supreme court,[20] urging the court to declare the new geographic distribution requirement unconstitutional and to enjoin its implementation.[21] Two organizations — Reclaim Idaho and the Committee to Protect and Preserve the Idaho Constitution ("the Committee") — filed a similar challenge,[22] arguing that the increased signature requirement, along with a new limitation that initiatives could only take effect on or after July 1 of the subsequent year, exceeded the Legislature's authority to prescribe the "conditions" and "manners" of initiative elections.[23] The Legislature intervened to oppose the petitions.[24] The two cases were then consolidated for the court's decision.[25]

Justice Moeller wrote the opinion for the court, holding that the Legislature's laws were unconstitutional.[26] But he first addressed questions of justiciability for each plaintiff.[27] He noted that "[t]he origin of Idaho's standing [rule] is a self-imposed constraint adopted from federal practice,"[28] and then recited the traditional standards for standing as put forth in *Lujan*: injury, causation, and redressability.[29] In a footnote, the court declined to "reassess its standing principles and revert to common law standing principles" because Gilmore did not raise the issue.[30] The court then held that Gilmore did not have standing to sue because

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https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/standingcommittees/210217_ssta_0800AM-Minutes.pdf [https://perma.cc/8W2N-EWSZ]; Minutes from Idaho House State Affs. Comm. 2 (Mar. 8, 2021) (statement of Rep. Jim Addis), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/standingcommittees/210308_hsta_0900AM-Minutes.pdf [https://perma.cc/HY6N-XS9W]; *Reclaim Idaho*, 497 P.3d at 189.

[20] *Reclaim Idaho*, 497 P.3d at 170. The Idaho Constitution grants the state supreme court "original jurisdiction to issue writs of mandamus," IDAHO CONST. art. V, § 9, and the court has accepted this jurisdiction where "the petition alleges sufficient facts concerning a possible constitutional violation of an urgent nature," *Reclaim Idaho*, 497 P.3d at 172 (quoting Sweeney v. Otter, 804 P.2d 308, 311 (Idaho 1990)).

[21] Verified Petition for Issuance of a Writ of Mandamus to Order the Secretary of State Not to Implement an Unconstitutional Law at 7–8, *Reclaim Idaho*, 497 P.3d 160 (No. 48760-2021); *see also Reclaim Idaho*, 497 P.3d at 170.

[22] *See* Verified Petition for Writ of Prohibition and Application for Declaratory Judgment at 18, *Reclaim Idaho*, 497 P.3d 160 (No. 48784-2021).

[23] *Id.* at 15–17; *see also Reclaim Idaho*, 497 P.3d at 166.

[24] *Reclaim Idaho*, 497 P.3d at 170.

[25] Order Consolidating Cases and Setting Oral Argument at 2, *Reclaim Idaho*, 497 P.3d 160 (Nos. 48760-2021 & 48784-2021).

[26] *Reclaim Idaho*, 497 P.3d at 194. Justice Moeller was joined by Chief Justice Bevan and Justice Burdick.

[27] *See id.* at 171–80.

[28] *Id.* at 172 (second alteration in original) (quoting Regan v. Denney, 437 P.3d 15, 21 (Idaho 2019)).

[29] *See id.* at 173 ("[T]o establish standing 'a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a like[lihood] that the injury will be redressed by a favorable decision.'" (alterations in original) (quoting State v. Philip Morris, Inc., 354 P.3d 187, 194 (Idaho 2015))).

[30] *Id.* at 173 n.6.

he had shown only a hypothetical injury and had raised merely a generalized grievance.[31] While court precedent allowed relaxed standing requirements when necessary to hear "alleged constitutional violations that would otherwise go unaddressed,"[32] the court declined to do so for Gilmore since it found that Reclaim Idaho and the Committee did have standing.[33] Because both organizations were sponsoring ballot measures, the court held the additional burden imposed on their ability to get them on the ballot constituted sufficient injury.[34] Finally, the court held that the issue did not present a political question.[35]

Next, the majority turned to the merits of the state constitutional issue. The court focused on whether the Legislature exceeded its authority to regulate the conditions and manner of the people's exercise of the legislative power through ballot measures.[36] First, it read the Idaho Constitution as expressing positive — and thus fundamental — rights to the citizens' initiative and referendum powers.[37] Because it found the rights to be fundamental, the court applied strict scrutiny.[38] Then, the court held that the thirty-five-district requirement did not serve a compelling interest — there was no pressing need to restrict the rights to protect minority interests.[39] Nor was it narrowly tailored — the requirement overcorrected for the problem it sought to solve by "placing an absolute veto power into the hands of any one legislative district."[40] Thus, the court held the geographic distribution requirement unconstitutional.[41] Finally, the court also held unconstitutional the delaying of initiatives

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[31] *See id.* at 174–76. In particular, the court rejected Gilmore's reliance on a prior case in which the court had held individuals had standing to challenge an act requiring ballots to have a statement of whether a congressional candidate had violated a term limits pledge, since that act was likely to harm *their own* preferred candidate. *See id.* at 174–75 (distinguishing Van Valkenburgh v. Citizens for Term Limits, 15 P.3d 1129 (Idaho 2000)). The court held that since Gilmore could not point to any specific initiative or referendum he favored, he did not allege a sufficient injury. *Id.* at 176.

[32] *Id.* at 176 (citing Coeur d'Alene Tribe v. Denney, 387 P.3d 761, 767 (Idaho 2015); *Regan*, 437 P.3d at 21).

[33] *Id.* at 176–77.

[34] *See id.* at 177.

[35] *See id.* at 179–80 (discussing, inter alia, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Baker v. Carr*, 369 U.S. 186 (1962); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)). Since the majority deemed the question in the case to be merely one of interpreting the constitutional provisions at issue, there were "judicially discoverable and manageable standards" from past precedents, *id.* at 179 (quoting Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1133 (Idaho 1986)), rendering this case different from evaluating an "inherently political exercise of dispersing political power, such as in the case of gerrymandering," *id.* at 180.

[36] *Id.* at 180.

[37] *Id.* at 181.

[38] *Id.* at 184–85. By applying strict scrutiny, the court noted it could rely on "a significant body of case law from both the Idaho Supreme Court and the United States Supreme Court." *Id.* at 185.

[39] *See id.* at 188–89.

[40] *Id.* at 189.

[41] *Id.* at 191.

until July 1 of the following year.[42] Justice Brody wrote separately to dissent from the court's application of strict scrutiny but concurred that the new requirements were unconstitutional under an alternative test.[43]

Justice Stegner wrote a special concurrence criticizing the majority's reliance on federal standing doctrine.[44] He argued that it was improper because the Idaho Constitution guarantees that the "[c]ourts of justice shall be open to every person,"[45] and that the absence of any analogous "case or controversy" requirement in the Idaho Constitution gives no textual basis for the majority's reliance on federal standing principles.[46] Further, he argued that most states "avoid adopting federal doctrine without regard to their own precedent or circumstances"[47] and that Idaho's neighboring states of Oregon and Utah rejected federal standing requirements specifically because their constitutions also lacked any textual basis for applying them.[48] So, Justice Stegner would have held that Gilmore did have standing to proceed with his petition but concurred with the court's resolution of the constitutional question.[49]

While Justice Stegner was correct to criticize the court's application of the federal standing framework to find that Gilmore did not have standing, the case also shows more broadly the challenges of state court "lockstepping" with federal standing doctrine. First, lockstepping can lead to deep theoretical tensions in state court jurisprudence, as is made evident when state courts justify doctrines in ways that differ from or even conflict with the justifications offered by federal courts. Second, lockstepping on standing ignores the distinct role that state courts play in the federal system and undermines a core assumption of the federal system itself: that state courts will be open to hear claims when federal courts are closed to them. Finally, by attributing doctrines limiting court access to the U.S.

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[42] *Id.* at 192–93. The court reasoned that since laws passed through the initiative process "stand[] on equal footing with laws enacted by the legislature" and the citizens act independently from the Legislature through the process, this action infringed on the people's right. *Id.* at 193.

[43] *Id.* at 197 (Brody, J., concurring in part and dissenting in part). Justice Brody stated that the state constitution expressly provides the Legislature a role in "set[ting] the conditions and manner for the exercise of referendum and initiative rights" and applying strict scrutiny to every legislative action would undermine its ability to do so. *Id.* at 199. Instead, she would have applied a "reasonable and workable" test, which she argued the court had adopted for balancing the "tension that exists between the people's right to an initiative and the legislature's authority to regulate that right." *Id.* at 200. Applying that test, she found the restrictions passed by the Legislature were not reasonable and workable because they gave each legislative district effective veto power, creating a "tyranny of the minority." *Id.*

[44] *See id.* at 195 (Stegner, J., specially concurring).

[45] *Id.* at 197 (quoting IDAHO CONST. art. I, § 18).

[46] *Id.* at 195.

[47] *Id.* at 196 (quoting Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. RES. L. 349, 398 (2016)).

[48] *Id.* at 197 (citing Couey v. Atkins, 355 P.3d 866, 885 (Or. 2015); Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983)).

[49] *Id.* at 195.

Supreme Court, lockstepping disrupts the democratic prerogatives of state voters to control their own court systems and hold state judges accountable. With the U.S. Supreme Court now engaged in major shifts in its own standing jurisprudence, the time has come for the Idaho Supreme Court to decouple its standing jurisprudence from federal doctrine.

Idaho's adoption of federal standing doctrine without grounding in the state constitution reflects the broader trend in state constitutional law toward "lockstepping" — "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution."[50] Some courts and scholars have supported the practice, at least in instances where federal doctrines can be imported after case-by-case consideration of the independent value of a uniform approach.[51] But many others have criticized this practice for myriad reasons.[52] Idaho's "unreflective adoption[]"[53] of federal standing doctrine without substantial explanation bears out many of these negative aspects of lockstepping.

First, lockstepping can lead to theoretically mismatched and ungrounded jurisprudence, as becomes particularly evident when state and federal courts offer competing justifications for the very same doctrines. In *Reclaim Idaho*, the court reiterated its recent assertion that federal standing rules serve principles of judicial administrability, noting that "[t]he origin of Idaho's standing [rule] is a self-imposed constraint adopted from federal practice."[54] The court also recently indicated that it applies these rules, despite there being no constitutional requirement, so as to "identify appropriate or suitable occasions for adjudication by a court."[55] But these purported justifications run counter to the U.S. Supreme Court's recent departure from a "prudential" conception of standing.[56] In *Lexmark International, Inc. v. Static Control Components,*

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[50] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 174 (2018).

[51] *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, 1058–61 (2003); State v. Robinette, 685 N.E.2d 762, 767 (Ohio 1997).

[52] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 224–29 (2009) (collecting arguments against prospective lockstepping).

[53] *See* Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991).

[54] *Reclaim Idaho*, 497 P.3d at 172 (second alteration in original) (quoting Regan v. Denney, 437 P.3d 15, 21 (Idaho 2019)); *see also* Coeur d'Alene Tribe v. Denney, 387 P.3d 761, 766 (Idaho 2015) (asserting this basis for the first time). Before adopting the federal standing doctrine, the Idaho Supreme Court provided a similar justification, grounding its responsibility "to inquire into the underlying interest at stake" in the need to "ensure[] the rational operation of the legal process." Miller v. Martin, 478 P.2d 874, 876 (Idaho 1970).

[55] State v. Philip Morris, Inc., 354 P.3d 187, 194 (Idaho 2015) (citing, inter alia, Miles v. Idaho Power Co., 778 P.2d 757, 761 (Idaho 1989)).

[56] *See, e.g.*, 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 2021) ("The long-settled view that a court may deny standing for prudential reasons even though Article III requirements are met may be

Inc.,[57] the Supreme Court discussed prudential standing at length,[58] noting that it "is in some tension with . . . the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging."'"[59] Troubled by prudential standing's lack of basis in the Constitution, the Court identified alternative bases for two of the three then-existing categories of limitations on standing.[60] So, even as the U.S. Supreme Court has recharacterized standing as a constitutional, and not prudential, requirement, the Idaho Supreme Court has rationalized its adoption of the same principles on *prudential* concerns of judicial restraint. As a result, federal courts are crafting inflexible constitutional doctrines, regardless of whether they strike the right practical balance in regulating the exercise of judicial power, and Idaho courts are presumptively bound to applying those same doctrines to be an effective means of regulating judicial power.

Lockstepping also overlooks the distinct nature of state and federal courts, which is apparent from the fact that Idaho courts have felt the need to craft ad hoc exceptions to the federal framework for standing. For example, as the *Reclaim Idaho* court discussed, one exception "relaxe[s] traditional standing requirements" for cases "involving alleged constitutional violations that would otherwise go unaddressed because no one could satisfy traditional standing requirements."[61] But this exception is largely unprincipled, providing no consistent standard or basis for litigants to access state courts.[62] And by acknowledging the need to relax standing in such "urgent" situations, the court implicitly recognizes that the state courts are the only courts for some claims of exceeding importance.[63] Further, Idaho courts take a more liberal approach to taxpayer standing for one state constitutional provision, a departure that the Idaho Supreme Court has justified on the grounds that failing to provide standing to challenge illegal expenditures "would, in essence, be deleting [this] provision from the Constitution."[64] These exceptions

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coming into question."); *The Supreme Court, 2013 Term — Leading Cases*, 128 HARV. L. REV. 191, 328 (2014).

[57] 572 U.S. 118 (2014).

[58] *See id.* at 125–28.

[59] *Id.* at 126 (quoting Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013)); *accord* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014).

[60] *See Lexmark*, 572 U.S. at 126–27 & n.3; *see also* Joel S. Nolette, *Last Stand for Prudential Standing?* Lexmark *and Its Implications*, 16 GEO. J.L. & PUB. POL'Y 227, 232–35 (2018).

[61] *Reclaim Idaho*, 497 P.3d at 176 (citing, inter alia, Coeur d'Alene Tribe v. Denney, 387 P.3d 761, 767 (Idaho 2015)).

[62] *See* Zeyen v. Pocatello/Chubbuck Sch. Dist. No. 25, 451 P.3d 25, 41–42 (Idaho 2019) (Stegner, J., dissenting) (criticizing the court's refusal to relax standing requirements in the case after it decided to do so in a similar case earlier that year, Regan v. Denney, 437 P.3d 15, 21 (Idaho 2019)).

[63] *Reclaim Idaho*, 497 P.3d at 177.

[64] Koch v. Canyon County, 177 P.3d 372, 376 (Idaho 2008) (collecting cases in which the court "has entertained taxpayer or citizen challenges based upon that constitutional provision").

alleviate some of the worst effects of using federal standing rules in state courts, but their ad hoc creation and justification again show the deep theoretical mismatch of applying federal standing doctrine to state court.

A key feature of this theoretical mismatch is that lockstepping undermines a core assumption of the federal system: state courts will be available to hear federal claims even when federal courts are not.[65] Ostensibly, if state and federal courts were structurally similar, the interests served by federal standing doctrine could militate in favor of its application in state courts.[66] But the juxtaposed language in the Idaho and U.S. Constitutions makes clear that the two court systems are not structurally similar.[67] Rather, "the starting premise in state court is inclusion and a presumption of jurisdiction, as opposed to exclusion and the opposite presumption" in federal court.[68] If standing serves as a floodgate for federal courts, controlling the wash of cases that would otherwise be brought,[69] then state courts could serve as the spillway, picking up the cases that are kicked out of federal courts.[70] But tying state court access to the same rules that block federal court access could shut both gates in unison, thereby denying plaintiffs any mechanism for judicial relief.

This risk is heightened by the fact that lockstepping also undermines the democratic prerogatives of state voters in two key ways. For one, the Idaho Constitution provides, in clear terms, that citizens are to have access to the state courts[71] and that the Legislature has the *sole* authority to prescribe the jurisdiction of Idaho's inferior courts.[72] So, by limiting access to the state courts without relying on any constitutional or statutory authority, the state courts have usurped a power reserved to the more politically accountable branches. Further, Idaho's judges are

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[65] *See, e.g.*, Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 47 (1975).

[66] *Cf. Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1360 (1982) (discussing how "structural differences between federal and state constitutional institutions" can be a "good reason" to consider distinct approaches).

[67] *Compare* U.S. CONST. art. III, § 2, *with* IDAHO CONST. art. V, §§ 9, 20.

[68] *Reclaim Idaho*, 497 P.3d at 195 (Stegner, J., specially concurring).

[69] *Cf.* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1008–09 (2013) (discussing around sixty U.S. Supreme Court cases in which Justices made "floodgates" arguments).

[70] *Cf.* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2224 n.9 (2021) (Thomas, J., dissenting) ("The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts . . . as the sole forum for such cases, with defendants unable to seek removal to federal court."); *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 323, 342 (2021).

[71] IDAHO CONST. art. I, § 18; *see also* Hawley v. Green, 788 P.2d 1321, 1323–24 (Idaho 1990) (asserting that this provision "admonishes the Idaho courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law," *id.* at 1324).

[72] IDAHO CONST. art. V, § 2; *see also* Acker v. Mader, 481 P.2d 605, 607 (Idaho 1971) (noting that this provision "intended the legislature to be the sole authority in determining the jurisdiction of the inferior courts"); State v. L'Abbe, 324 P.3d 1016, 1021 (Idaho Ct. App. 2014) (same).

elected,[73] so decisions tying state court access to federal doctrine can insulate state judges from responsibility by purporting to attribute the limiting of access to state courts to the decisions of *federal* judges, whom Idaho voters have little to no authority over.[74] And there are many cases where the Idaho courts have done just that, such as applying the federal doctrine to prevent "concerned citizens" from challenging the constitutionality of their city council's subsidy to a private party[75] and to prevent the State from obtaining some funds under a settlement with tobacco companies.[76] When courts use federal doctrine to keep parties out of court in cases like these, this practice allows the judges to deflect the blame by effectively saying "the U.S. Supreme Court made them do it."[77]

This lack of accountability is especially prominent given the Supreme Court's shifting standing jurisprudence since the 1970s and '80s. The decades since Idaho first adopted federal standing principles have seen a consistent narrowing of federal standing.[78] A particularly abrupt shift in federal doctrine has stemmed from the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*,[79] decided just two months before the Idaho Supreme Court's decision in *Reclaim Idaho*. In *TransUnion*, the Court denied standing to some members of the plaintiff class, holding that they had not suffered a sufficiently "concrete harm" to bring suit in federal court,[80] even though they brought suit under a congressionally prescribed cause of action.[81] To determine whether a harm is sufficiently "concrete," the Court indicated that plaintiffs must show "a close historical or common-law analogue for their asserted injury."[82] This new test has thrown more confusion into the law of standing, particularly as to individuals' authority to vindicate statutory rights.[83] And it has the potential to radically rework existing standing jurisprudence.[84]

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[73] *See* IDAHO CONST. art. V, §§ 6, 11.

[74] *See* SUTTON, *supra* note 50, at 188–89.

[75] Young v. City of Ketchum, 44 P.3d 1157, 1160 (Idaho 2002).

[76] State v. Philip Morris, Inc., 354 P.3d 187, 193 (Idaho 2015).

[77] SUTTON, *supra* note 50, at 189.

[78] WRIGHT, MILLER & COOPER, *supra* note 56, § 3531.1; Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193–97 (1992).

[79] 141 S. Ct. 2190 (2021).

[80] *Id.* at 2214.

[81] *See id.* at 2205.

[82] *Id.* at 2204.

[83] *See* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 270 (2021) (observing *TransUnion*'s "approach to standing significantly changes the law and places in doubt the ability to sue to enforce countless federal laws").

[84] Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 65 (2021) (describing *TransUnion* as "work[ing] a significant change in the law," as a "radical departure from precedent," and as "hav[ing] dramatic implications"); Andy Grewal, *Congressional Standing and* Transunion v. Ramirez, YALE J. ON REGUL.: NOTICE & COMMENT (July 2, 2021), https://www.yalejreg.com/nc/congressional-standing-and-transunion-v-ramirez [https://perma.cc/A98F-H4D4].

But Idaho has already latched onto the concreteness requirement for injury in fact.[85] By adopting the broader federal tests for standing, the Idaho Supreme Court has effectively forced itself to rework its own doctrine to account for the U.S. Supreme Court's shifts — essentially hitching the state's wagon to a runaway horse.[86] Any time the U.S. Supreme Court changes its *own* standing doctrines, Idaho's doctrines would presumptively change as well. In so doing, the state courts have undermined the state voters' ability to control this essential element of state government.

These significant shifts in the U.S. Supreme Court's standing jurisprudence signal that the time has come for the Idaho Supreme Court to formally decouple its own standing doctrines from those of federal courts.[87] After all, it was a similar retrenchment by the U.S. Supreme Court in the context of individual rights that inspired a resurgence of enhanced state protections and the development of the "New Judicial Federalism," in which the state courts looked to their own constitutions to enhance protection of individual rights.[88] As Justice Brennan wrote at the time in praise of this development, "state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts."[89] The Idaho Supreme Court would do well to take this admonishment to heart in the context of its state standing doctrine. Idaho could return to the development of its own doctrines, as it had done for nearly a century before relying upon the federal doctrines, by looking to its prior precedent and the multiple provisions of the Idaho Constitution that bear on the question of standing, and by looking to other states as illustrative examples. Such an organic jurisprudence would ensure that access to Idaho courts is governed not by an awkward balance between federal standing rules and unprincipled ad hoc exceptions, but by a theoretically grounded and coherent set of doctrines rooted in the Idaho Constitution, state statutes, and the democratic will of Idaho voters.

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[85] *See* State v. Philip Morris, Inc., 354 P.3d 187, 194 (Idaho 2015) ("Idaho has adopted the constitutionally based federal justiciability standard," including "the requirement [that] an injury in fact 'must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."'" (quoting ABC Agra, LLC v. Critical Access Grp., Inc., 331 P.3d 523, 525 (Idaho 2014); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)))); *see also* Coeur d'Alene Tribe v. Denney, 387 P.3d 761, 766 (Idaho 2015) (utilizing "concrete and discrete" language to describe an injury); *Reclaim Idaho*, 497 P.3d at 172 (using "definite and concrete" language (quoting *Philip Morris*, 354 P.3d at 194)).

[86] *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1514–18 (2005).

[87] Idaho is one of just fourteen states that have adopted some part of the federal standing framework without distinguishing it from any state doctrine. *See* Sassman, *supra* note 47, at 353–54 & nn. 17–19.

[88] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–65 (1998); Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977).

[89] William J. Brennan, Jr., *State Constitutions and the Protection of Individiual Rights*, 90 HARV. L. REV. 489, 502 (1977).