Barriers to Vindicating State Constitutional Rights in Civil Litigation

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Introduction

In 1977, as the U.S. Supreme Court shifted rightward under the leadership of Chief Justice Burger, Justice William Brennan published a seminal law review article discussing the important role of state constitutions in protecting individual rights.[1] That article—among the most influential of the past century—launched what has been called the "New Judicial Federalism," a movement among courts and advocates toward greater reliance on state constitutional protections in addition to, or in lieu of, those guaranteed by the U.S. Constitution.

The New Judicial Federalism is a story of mixed success. In some areas of the law, state courts proved themselves willing and able to take a different path from the Burger court. For example, in the 1980s and 90s, some state supreme courts adopted more stringent restrictions on law enforcement searches and authority to conduct stops.[2] Others interpreted state constitutional provisions limiting criminal punishment more broadly than the federal Eighth Amendment's similar prohibition on cruel and unusual punishment.[3] And of course the story of marriage equality for the LGBTQ+ community is incomplete without the numerous state court decisions that laid the groundwork for *Obergefell v. Hodges*, the U.S. Supreme Court decision holding that state refusal to recognize same-sex marriage violates the federal due process and equal protection clauses.[4]

But even today, roughly fifty years after Justice Brennan called for greater attention to state constitutions, many litigants still do not raise state constitutional arguments when suing state and local governments and officials for rights violations. Instead, in civil litigation at least, they continue to rely on 42 U.S.C. § 1983, a federal civil rights statute, to argue that state and local entities have violated their *federal* constitutional rights. Moreover, even when litigants do raise state constitutional claims, those arguments often receive short shrift in resulting decisions.

Scholars and jurists have posited a number of reasons for the continued underdevelopment of state constitutional law, citing, for example, state supreme court opinions that consider federal constitutional claims before, or instead of, state ones; shortcomings in legal training; and oversights by attorneys who do not fully recognize or pursue state constitutional claims

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[1] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

[2] *See, e.g.*, City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988); People v. Torres, 543 N.E.2d 61 (N.Y. 1989); State v. Hempele, 576 A.2d 793 (N.J. 1990).

[3] *See, e.g.*, Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989), *superseded by statute on other grounds*, Turpin v. Hill, 498 S.E.2d 52 (Ga. 1998); State v. Fain, 617 P.2d 720 (Wash. 1980) (en banc).

[4] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); *see also* Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 Rutgers U. L. Rev. 1481 (2016).

available to their clients.[5] Some commentators have offered steps that courts, law schools, and litigants can take to address these shortcomings.[6]

In our view, these explanations, while important, tell only part of the story. Our assessment in this respect is informed by our experience: we are two practicing litigators who focus on representing constitutional claimants—usually plaintiffs in the civil litigation context—and we have litigated in both federal and state courts.

From our perspective, those studying what ails state constitutional law would do well to focus more attention on the structural and procedural impediments that stymie plaintiffs seeking to vindicate their state constitutional rights in both federal and state courts. These impediments loom large in civil litigation where state constitutional arguments typically must be raised affirmatively (as opposed to defensively, as in criminal cases).[7] Any attempt to explain why litigants forgo state constitutional arguments that appear available to them in civil litigation must account for the direct impact of these impediments, and the much broader uncertainty that these impediments create for legal advocates.

First, even though federal courts have generally been the preferred venue for civil rights litigation since the 1960s,[8] a substantial portion of individuals whose state constitutional rights are violated have no option to bring state constitutional claims in federal court. That is so because of a U.S. Supreme Court decision holding that state officials—not just states themselves—are entitled to sovereign immunity in federal court for alleged violations of state law.[9] Moreover, where sovereign immunity does not apply—for example, in the context of suits against municipalities—federal abstention doctrines still create significant risks for plaintiffs who bring state constitutional claims in federal court, with or without an analogous federal constitutional claim in tow.

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[5] *See infra* Part II.

[6] *See generally* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN. ST. L. REV. 783 (2011); Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALB. L. REV. 1353 (2019); Hon. Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1 (2023).

[7] Our article focuses on state constitutional claims in civil litigation. Of course, state constitutional arguments arise in criminal cases as well. And while there certainly are barriers to raising those arguments, by and large the doctrines we discuss are unique to affirmative civil litigation. *Cf.* Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1270 (1985) (discussing reasons that state constitutional claims are more often found in appellate criminal cases as opposed to civil cases).

[8] *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106, 1116 n.45 (1977) (noting civil rights plaintiffs' "long-standing preference for federal courts" and arguing that federal courts "are superior" to state courts for resolving federal constitutional claims); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599 (1999) (acknowledging that "civil rights lawyers" agree that it is preferable "to litigate in federal, not state, court" but arguing that this is a flawed view).

[9] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

Second, even in state court, litigants bringing state constitutional litigation face significant barriers, often in the form of procedural rules that were not designed with affirmative constitutional or impact litigation in mind. From rules on appeal of temporary injunctive relief to those on class actions, procedures in state court may diverge substantially from those on which impact litigators typically rely in federal court.

Third, in state *and* federal court, state constitutional litigants must contend with the fact that most states lack a statutory analogue to 42 U.S.C. § 1983, a reality recently captured by Professor Alexander Reinert and colleagues.[10] State constitutional claimants in these states must identify an alternative source of law that permits their state claims in court, a requirement that is particularly impactful in the context of a litigant's ability to recover damages. And just as important, without a § 1983 analogue, it is more difficult for state constitutional litigants to recover attorney's fees, even if they win outright. In this respect, state law is strikingly different from federal law, where 42 U.S.C. § 1988 permits prevailing plaintiffs in federal constitutional litigation under § 1983 and several other civil rights statutes to recoup their attorney's fees, thus creating incentives for a pool of private attorneys to represent individuals whose constitutional rights have been violated.

Fourth, bringing state constitutional claims, at least on issues that are underdeveloped, often takes an enormous amount of time to do well. That is in part a function of litigating on a nearly blank slate in some states. But it also reflects an absence of key resources that litigators often take for granted when they litigate federal rights. For example, some states do not have well-kept, electronic records of constitutional debates, even recent ones. State courts lag behind federal ones in making briefing and other filings available online, thus limiting the extent to which constitutional litigants can learn from one another's efforts. And even today, Westlaw—one of the most common databases used for conducting legal research—does not provide a straightforward way to search simultaneously all state supreme court decisions across the country, making it more difficult for advocates and judges to understand how other state high courts deal with similar issues.

State constitutions offer a wealth of opportunity to expand civil rights and liberties. This has always been true, but it is especially important as the federal courts are poised to become more hostile to many individual rights under President Trump's second administration. To realize the full potential of state constitutions, significant work is necessary to deconstruct the barriers litigants face. At the very least, we hope this article helps to explain why the problem is not just one of education and interest, and to address how state and federal courts, along with state legislatures where possible, can address this problem.

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[10] Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737, 760 (2021).

I. Common Explanations for the Underdevelopment of State Constitutional Law

It is hardly controversial to observe that state constitutional rights are underprotected, and state constitutional law underdeveloped. For decades jurists and scholars from across the ideological spectrum have lamented the lack of attention to state constitutionalism.

Judge Jeffrey Sutton, for example, has observed that few litigants bring state constitutional claims, particularly in federal court, and those who do often do not sufficiently explain why those rights are distinct from similar federal rights.[11] State courts have directly urged litigants to bring them arguments that might allow the courts to dive more deeply into their state constitutions.[12]

Scholars and jurists have offered a range of reasons to explain this underdevelopment. We pause to highlight four of the most common here.

First, some court doctrines and practices prioritize consideration of federal over state law claims. In some states, this prioritization takes the form of ordering: a court considers a plaintiff's federal claims before turning to any state-law arguments.[13] As a result, the court reaches the scope of state constitutional protections only if the plaintiff falls short under those afforded by federal law, and only after the court has been primed to deny the plaintiff relief.[14]

In addition, some state courts interpret their state constitutional protections in lockstep with analogues under federal constitutional law,[15]

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[11] Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7-9, 186-87 (2020).

[12] *See, e.g.*, State v. Brillon, 995 A.2d 557, 560 (Vt. 2010) ("[W]e encourage litigants to address claims under our state charter . . . ."); State v. Morris, 229 N.E.3d 152, 167 (Ohio Ct. App. 2023) (Crouse, P.J., concurring) ("I write separately to encourage litigants to continue to develop constitutional arguments under the Ohio Constitution."); Grisham v. Van Soelen, 539 P.3d 272, 281 n.7 (N.M. 2023) ("encourag[ing] thoughtful and reasoned argument in the future addressing whether the interstitial approach [to state constitutional interpretation] is the proper method to ensure the people of New Mexico the protections promised by their constitution").

[13] *See, e.g.*, State v. Lynch, 74 P.3d 73, 75-76 (N.M. 2003) (explaining that the court first analyzes claims under the federal constitution, only moving to the state constitution if the "rights are [not] protected under the federal constitution"); State v. Kono, 152 A.3d 1, 27 (Conn. 2016) ("Ordinarily, if the issue has been definitively resolved under the federal constitution . . . there is little reason to undertake the kind of searching and painstaking analysis that invariably will be necessary to resolve a state constitutional issue . . . .").

[14] *See, e.g.*, Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 258-63 (Iowa 2007); State v. Ferreira, 988 P.2d 700, 705-08 (Idaho Ct. App. 1999).

[15] *See, e.g.*, William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1227-32 (2020) (compiling state courts that interpret their state punishment provisions in lockstep with federal Eighth Amendment precedent); John Fahner, *Free Conscience in Decline: The Insignificance of the Free Exercise Clause and the Role of the Religious Freedom Restoration Act in the Wake of* Hobby Lobby, 2 Belmont L. Rev. 185, 208 & n.202 (2015) (noting that, in the context of state free exercise clauses, "[t]he relevant body of law is often undeveloped in state courts because of the unfortunate (and overused) practice of interpreting state and federal constitutional provisions identically" and citing examples); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective*

even in instances where the state language is quite distinct from that of the U.S. Constitution.[16] Although this practice of "lockstepping" has received substantial—and in our view well-deserved—criticism,[17] it remains common in courts around the country, particularly in cases where advocates do not object to its application.

Second, legal advocates and judges are often never trained in state constitutional law.[18] In many, if not most, law schools around the country, state constitutional law remains relegated to a proverbial footnote. "Constitutional Law" courses are, in reality, federal constitutional law classes,[19] and the coursework that teaches law students how to litigate—classes on civil procedure, evidence, and jurisdiction—frequently starts from the assumption that students will practice in federal court.[20] That assumption often carries over in post-graduate work, too. For example, students at the most competitive law schools who complete clerkships typically work in federal, rather than state, courts, and thus start their careers in a court system where, as discussed in Part II, state constitutional claims are less likely to arise.[21]

This model of training might make sense for both judges and litigators if state constitutional law necessarily mirrored federal protection. But state constitutions in fact look more like each other than they do the federal Constitution,[22] and in our federalist system, U.S. Supreme Court decisions

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Lockstepping?, 46 Wm. & Mary L. Rev. 1499, 1502-18 (2005). *See generally* Friedman, *supra* note 6 (explaining how and why state courts get locked into following federal doctrines).

[16] *E.g.*, State *ex rel.* Cincinnati Enquirer v. Bloom, 251 N.E.3d 79, 89-95 (Ohio 2024) (declining to adhere on stare decisis grounds to earlier decisions assuming that the state's guarantee that "all courts . . . be open" was coextensive with federal First Amendment protections and emphasizing textual differences).

[17] *See generally* Brennan, *supra* note 1; Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 Md. L. Rev. 309 (2017); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89 (2014); Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 Widener J. Pub. L. 343 (1993).

[18] *See, e.g.*, Sutton, *supra* note 11, at 194-95; Hon. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 n.37 (2017); Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703, 730-31 (2016).

[19] Professors Katie Eyer and Robert Williams of Rutgers Law School have worked to remedy this issue with The State Constitutional Law Casebook Supplement, designed to provide professors of first-year federal Constitutional Law courses with materials for a unit on state constitutions. Robert F. Williams & Katie R. Eyer, State Constitutional Law Supplement (2d ed. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418938 [https://perma.cc/WL8H-FJA8]; *see also* Katie Eyer, *All Law Students Should Be Educated About State Constitutions*, State Ct. Rep., https://statecourtreport.org/our-work/analysis-opinion/all-law-students-should-be-educated-about-state-constitutions [https://perma.cc/M4LP-6NJZ] (last updated Sept. 26, 2024).

[20] Dodson, *supra* note 18, at 736-37.

[21] For instance, since 2015, University of Chicago law school graduates have completed 542 federal appellate clerkships compared to 70 in state appellate courts. *Judicial Clerkships*, U. Chi. L. Sch., https://www.law.uchicago.edu/clerkships [https://perma.cc/876F-FG24] (last visited Feb. 19, 2025).

[22] *Cf.* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021) (discussing state constitutions and comparing them to the federal one).

"are not and should not be dispositive of questions regarding [state constitutional] rights."[23]

Third, and likely related to the lack of training, litigants sometimes overlook state constitutional claims, or raise state constitutional claims in litigation without explaining why state protections are broader in scope than those under federal law.[24] Courts can hardly be faulted for failing to resolve claims that litigants have never made, and decisions in which courts admonish litigants for attempting to raise state constitutional arguments for the first time on appeal are legion.[25] Of course, not all courts treat issues of waiver and forfeiture in litigation in the same way, and courts have available to them numerous options to make inadvertent waiver less likely. But by the time litigants get to appeal, and even more so at the state supreme court stage, it is fair to say that it is often too late in the day to argue for the first time that a state constitutional right has been violated.

Fourth, there is the issue of need: state constitutional law is likely to remain underdeveloped (or at least underenforced) if litigants can get the relief they seek using federal protections, if for no other reason than that their attorneys are well-versed in doing so and a large body of federal constitutional law already exists. With some exceptions, civil rights litigators—correctly or not—tend to focus on the federal constitution and assume that federal rights are best resolved in federal court. Scholars have debated at-length the advantages of federal courts compared to states in this context,[26] but the "long-standing preference for federal courts"[27] has undoubtedly shaped the underdevelopment of state constitutional law.

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[23] Brennan, *supra* note 1, at 502; *see also* Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const. L.Q. 115, 130 (2022).

[24] *See* Sutton, *supra* note 11, at 7-9; *see also* Nathaniel M. Fouch, *"A Document of Independent Force": Towards a Robust Ohio Constitutionalism*, 49 U. Dayton L. Rev. 1, 40 (2023); J. Thomas Sullivan, *Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. Rev. 407, 416-17 (2009).

[25] *See, e.g.*, Anderson v. Motorsports Holdings, LLC, 926 A.2d 261, 270 (N.H. 2007) ("We will not address a party's state constitutional argument on appeal if the party does not specifically invoke in its brief a provision of the State Constitution."); State v. Toone, 872 S.W.2d 750, 752 n.4 (Tex. Crim. App. 1994) ("Appellee's brief otherwise contains no statement, suggestion or authority in support of an argument based upon the Texas Constitution or any indication that the Texas Constitution should provide different protection than the federal constitution with respect to anticipatory searches. Accordingly, appellee has preserved nothing with respect to a claim under the Texas Constitution.").

[26] *See generally* Neuborne, *supra* note 8, at 1106, 1116 n.45 (noting the "long-standing preference for federal courts" for civil rights plaintiffs and arguing that federal courts "are superior" to state courts "as forums for constitutional enforcement"); Rubenstein, *supra* note 8 (critiquing Neuborne's analysis); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233, 233-36 (1988) (summarizing the parity debate and arguing that "the debate about parity is unresolvable"); John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723 (2008) (discussing the parity debate and critiquing the assumption that state courts are not suitable to adjudicating constitutional tort claims).

[27] Neuborne, *supra* note 8, at 1106.

In his seminal law review article on state constitutionalism, Justice Brennan nodded to this dynamic during the mid–twentieth century, when the U.S. Supreme Court under Chief Justice Warren held much of the Bill of Rights enforceable against the states. As he explained, it was perhaps "only natural" that when "our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by the state constitutions."[28] But as the Burger Court took federal constitutional law in a more crabbed direction, state courts increasingly took an independent, and more robust, approach to interpreting their own state constitutions.[29]

Justice Scott Kafker of the Massachusetts Supreme Judicial Court has posited a similar dynamic today against the backdrop of a "new 6-3 super majority on the Supreme Court" that is certain to "reshape federal constitutional law in its own image."[30] In his view, "[r]etrenchment (that is the reversal or reduction in federal constitutional protection) and uncertainty will promote more independent state constitutional analysis by many state courts in order to provide a double protection of constitutional rights."[31]

II. What Are the Alternatives to Bringing a State Constitutional Claim?

Each of the reasons discussed above no doubt contributes to the underdevelopment of state constitutional law. But it seems to us that these considerations present an incomplete picture in the civil litigation context.

In particular, common explanations for why so few litigants bring, and so few courts resolve, constitutional claims do not fully capture how plaintiffs and their counsel think about the benefits and drawbacks of raising and foregrounding state constitutional arguments. Any assessment of those benefits and drawbacks must begin with an understanding of the nature of available alternatives.

A. Federal Constitutional Claims Under § 1983

In many, if not most, instances in which a person has a colorable state constitutional claim against state or local actors, they will also have a colorable claim to relief under the federal Constitution. Many (though certainly not all) state constitutional provisions have some counterpart in federal constitutional law. And even when a state constitution appears more specific in establishing a right, the federal Constitution may create a different or complementary right that prohibits the same government action. In these

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[28] Brennan, *supra* note 1, at 495.

[29] *See, e.g.*, *id.* at 498-502.

[30] Kafker, *supra* note 23, at 115.

[31] *Id.* at 115-16.

instances, as an alternative to state constitutional litigation, plaintiffs may choose to bring only federal constitutional claims under § 1983 to challenge state or local government action. They may do so in both state and federal court.[32]

This is a fairly well-trod path, albeit increasingly narrowed by U.S. Supreme Court precedent. By adopting 42 U.S.C. § 1983, Congress created an express cause of action that imposes liability on "[e]very person who, under color of any [state law]," subjects another person "to the deprivation of any rights, privileges, or immunities secured by the [U.S.] Constitution and laws."[33] In appropriate cases, § 1983 permits declaratory and injunctive relief, alongside the imposition of damages.[34]

In addition, under 42 U.S.C. § 1988, a plaintiff who prevails in "any action or proceeding to enforce" § 1983 may recover "a reasonable attorney's fee as part of the costs."[35] Section 1988's fee-shifting regime applies to § 1983 claims brought in federal and state court.[36] It displaces what is called the "American Rule," under which "parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser."[37]

To qualify as a prevailing party under § 1988, "a civil rights plaintiff must obtain at least some relief on the merits of his claim."[38] The U.S. Supreme Court has unfortunately whittled away at fees available under § 1988 in numerous cases,[39] including *Lackey v. Stinnie* just this Term.[40] But attorney's fees remain available where, for example, a plaintiff obtains permanent equitable relief or even nominal damages.[41] Importantly, § 1988's

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[32] States may not adopt requirements for their court systems that effectively impair a § 1983 claim. *See generally* Williams v. Reed, 145 S. Ct. 465 (2025); Haywood v. Drown, 556 U.S. 729 (2009); Howlett v. Rose, 496 U.S. 356 (1990); Felder v. Casey, 487 U.S. 131 (1988).

[33] 42 U.S.C. § 1983.

[34] *See, e.g.*, Wilkinson v. Dotson, 544 U.S. 74, 76 (2005).

[35] 42 U.S.C. § 1988.

[36] *See* Maine v. Thiboutot, 448 U.S. 1, 9-11 (1980) (approving state-court fee award under § 1988 and emphasizing that § 1988 "states that fees are available in *any* § 1983 action"); Dawson v. Birenbaum, 968 S.W.2d 663, 666 (Ky. 1998) (directly rejecting argument that § 1988 does not apply to state-court actions).

[37] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 602 (2001).

[38] Farrar v. Hobby, 506 U.S. 103, 111 (1992).

[39] *E.g.*, *Buckhannon*, 532 U.S. at 605; *see* Isaac M. Green & Seth E. Montgomery, *All Cases Great and Small: Fulfilling the NMCRA's Promise of Attorney Fees*, 54 N.M. L. Rev. 385, 390-401 (2024). *See generally* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 Wm. & Mary L. Rev. 641 (2023).

[40] *See generally* 145 S. Ct. 659 (2025) (holding that plaintiff who obtained a preliminary injunction before case was later rendered moot by the government's repeal of the challenged law was not "prevailing" for the purpose of § 1988).

[41] *See id.* at 668-69.

fee-shifting mechanism permits prevailing *defendants* to recoup fees only where a plaintiff's claim is frivolous or filed in bad faith.[42]

Section 1988's fee-shifting mechanism, which appears in numerous other federal laws,[43] is critical to the vindication of federal constitutional rights. As a Senate Report leading to the adoption of § 1988 explained, "[e]nforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."[44]

Litigants asserting § 1983 claims in *federal* court may also rely on procedural aspects of federal law that lend themselves to the enforcement of constitutional rights, particularly where large numbers of people are harmed. Litigants who seek preliminary injunctive relief to block unconstitutional action have an automatic right to appeal in federal court if that relief is denied.[45] Given that constitutional litigation can last for years, this opportunity to obtain judicial review to prevent harm in the meantime is key.

In addition, Federal Rule of Civil Procedure 23 authorizes the use of class actions to remedy harm for a large number of affected people. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[46]

This discussion is not intended to suggest that recovery for federal constitutional violations is easy. U.S. Supreme Court decisions on the scope of §§ 1983 and 1988 have over the years increasingly impaired a plaintiff's ability to vindicate federal constitutional rights.[47] Nevertheless, § 1983

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[42] *See* Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n, 434 U.S. 412, 412-13 (1978).

[43] *See* Hensley v. Eckerhart, 461 U.S. 424, 444 (1983) (Brennan, J., concurring in part and dissenting in part) ("In enacting § 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned.").

[44] S. Rep. No. 94-1011, at 6 (1976), *as reprinted in* U.S.C.C.A.N. 5908, 5913.

[45] 28 U.S.C. § 1292(a)(1).

[46] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[47] *E.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (§ 1983 claimants suing a local government must demonstrate the alleged unconstitutional act is the product of a governmental policy or custom); Pearson v. Callahan, 555 U.S. 223 (2009) (reaffirming holding that officers are entitled to qualified immunity in § 1983 suits for damages so long as it was not clearly established that the act was unconstitutional when it occurred); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598 (2001) (ruling out catalyst theory as a basis for attorney's fees under § 1988); *see also, e.g.*, Schwartz, *supra* note 39.

remains an important alternative to state constitutional claims in the civil litigation context.

B. Federal or State Statutory Claims

Litigants who believe their state constitutional rights have been violated may nevertheless decline to bring claims to enforce those rights where they see benefits to relying exclusively on distinct federal or state *statutory* protections instead and believe they are likely to recover under those.

For example, individuals who experience race, sex, or disability discrimination may opt to file lawsuits against state and local government entities using federal guarantees, such as those under Titles VI and VII of the Civil Rights Act of 1964, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act of 1973.[48] Some people who assert a violation of their religious exercise rights can bring suit against a state or local government entity using the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA").[49]

In some instances, individuals may also have *state* statutory claims that appear to mirror or sweep more broadly than state constitutional protections. Some states have adopted, for example, laws modeled on the federal Religious Freedom Restoration Act and thus require heightened scrutiny of claims alleging a religious-exercise violation, including as applied to claims against state and local government entities.[50] State and local government

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[48] *E.g.*, Barnes v. Gorman, 536 U.S. 181, 184-85 (2002) (noting federal private causes of action to remedy race and disability discrimination); Jensen v. Bd. of Cnty. Comm'rs, 636 F. Supp. 293 (D. Kan. 1986) (Title VII claims against county employer). Like § 1983, Titles VI and VII, the ADA, and the Rehabilitation Act each authorize recovery of at least some damages and an award of attorney's fees to prevailing plaintiffs. *See* Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 346 (11th Cir. 2012) (noting that individuals can recover compensatory damages under Title VI in cases of intentional discrimination (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607 n.27 (1983))); 42 U.S.C. § 1988 (attorney's fees for Title VI); 42 U.S.C. § 1981a (compensatory and punitive damages available for intentional discrimination under Title VII); 42 U.S.C. § 2000e-5(k) (attorney's fees for Title VII); *Barnes*, 536 U.S. at 185 ("[T]he remedies for violations of § 202 of the ADA and § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964 . . . ."); 42 U.S.C. § 12205 (attorney's fees for ADA); 29 U.S.C. § 794a(b) (attorney's fees for Rehabilitation Act).

[49] *See* Hudson v. Dennehy, 538 F. Supp. 2d 400 (D. Mass. 2008), *aff'd sub nom.* Crawford v. Clarke, 578 F.3d 39 (1st Cir. 2009) (state department of corrections' refusal to provide Halal menu to Muslim inmates violated RLUIPA); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007) (zoning board's denial of application for special use permit by private religious day school violated RLUIPA). Prevailing plaintiffs may recover attorney's fees for RLUIPA violations. *See* 42 U.S.C. § 1988(b). They may also be able to recover damages against local officials, but the law is unsettled and varies circuit to circuit. *See, e.g.*, Williams v. Redman, No. 20-CV-196, 2021 WL 1907224, at *3 (N.D. Ind. May 12, 2021) (noting this "open question").

[50] *See, e.g.*, Ariz. Rev. Stat. § 41-1493.01 (2025); Conn. Gen. Stat. § 52-571b (2025); Fla. Stat. Ann. § 761.03 (2025); 71 Pa. Stat. Ann. § 2404 (2025); *see also Federal and State RFRA Map*, Becket, https://becketfund.org/research-central/rfra-info-central/map/ [https://perma.cc/W6M2-JJJC] (last visited Mar. 25, 2025).

employees fired for speaking out about issues of public concern may turn to specialized state whistleblower statutes that prohibit retaliatory action.[51] Where they exist, these types of specialized statutes may be more attractive to litigants than state constitutional claims, particularly where the statutes carry a possibility of damages and attorney's fees, or where they are clearer in scope than similar state constitutional protections.

C. Foregoing Litigation Altogether

Even in cases where an individual does not have another colorable federal or state claim, there still remains an alternative to bringing a state constitutional claim: not bringing suit at all. To put a finer point on it, attorneys considering whether to represent an individual whose state constitutional rights have been violated may nevertheless decline to do so for a number of reasons, and many litigants lacking counsel will not proceed to court pro se.

Private attorneys whose livelihood depends on the ability to generate a profit, or at least cover their litigation costs, may decline to represent would-be state constitutional claimants if the prospect of fee recovery is insufficient to compensate them for their time and expenses, even if their client prevails.[52] Similarly, private attorneys must discount any prospect of recovery as a prevailing party based on the likelihood of success. The more uncertain the contours of a state constitutional right (or any right for that matter), the less likely that private attorneys will step in to litigate the case, even if there is an outside chance of recouping fees after winning. As Professor Joanna Schwartz has persuasively argued, "the lack of lawyers able and willing to represent people whose constitutional rights have been violated" may be "the biggest threat to civil rights enforcement."[53]

While public interest attorneys working in a non-profit setting do not have the same profit considerations as the private bar, they still must consider—perhaps to a greater degree than other attorneys—whether taking on clients with state constitutional claims will crowd out other worthy cases on which they could spend their limited time and resources.[54] That consideration is all the more important given that the effects of any one state constitutional precedent will apply, at least directly, only to the population of that state, while positive federal precedent established on appeal will apply much more broadly.[55] In addition, public interest litigators may depend on

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[51] *See, e.g.*, Conn. Gen. Stat. § 4-61dd (2025). *See generally* Jason J. Hawkins, Cong. Rsch. Serv., Selected Anti-Retaliation Provisions for Reporting Wrongdoing in State Whistleblower Statutes, False Claims Statutes, and Other State Laws (2025).

[52] *See generally* Schwartz, *supra* note 39.

[53] *Id.* at 641.

[54] *Id.* at 662.

[55] Of course, state constitutional decisions can, and often do, have important *indirect* effects on other states (and potentially even the federal courts) by virtue of other courts considering them, and in some cases adopting their reasoning. *See, e.g.*, Bonauto, *supra* note 4, at 1494; Williams & Eyer, *supra* note 19, at 5-6.

co-counsel at law firms, particularly for large or otherwise complex cases. Where there is no prospect of fee recovery, it may be more difficult to find private-practice partners for those cases.

III. A Litigator's Perspective on the Challenges to Litigating State Constitutional Rights

Recognizing that litigants and their counsel may have alternatives to bringing state constitutional claims does not explain why so few claims are brought. Particularly where an individual is already planning to litigate another federal or state claim, one might assume that they would add any related and available state constitutional claim into the mix, too. In a memorable analogy, Judge Sutton has described a litigant's decision to bring federal constitutional claims while forgoing state ones as comparable to a basketball player at a championship game who takes only one of two free-throw shots, thus forfeiting an equally advantageous opportunity to score.[56] In a similar vein, one might assume that individuals whose state constitutional rights have clearly been violated would, even in the absence of a parallel federal claim, go to court.

In our view, there are important—and often overlooked—reasons that these assumptions about constitutional claimants and their counsel simply do not hold. In this section, we lay out some of those key reasons, starting with concerns unique to bringing state constitutional claims in federal court. We then turn to concerns unique to litigating those claims in state court, and end with a series of factors that make litigating state constitutional rights in state *and* federal court difficult.

A. Challenges Unique to Federal Court

As one professor quipped in 1999, "[g]et a group of civil rights lawyers together and there is at least one thing they would agree upon—they prefer to litigate in federal, not state, court."[57] Scholars have noted and debated civil rights plaintiffs' "long-standing preference for federal courts"[58] for decades, with federal court advocates pointing, for example, to perceived strengths of federal court judges and political insulation.[59] Whatever merit these arguments had when originally made, the premise for them has no

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[56] Sutton, *supra* note 11, at 7-8.

[57] Rubenstein, *supra* note 8, at 599; *see also* Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 Wm. & Mary L. Rev. 725, 731 (1981).

[58] *See* Neuborne, *supra* note 8, at 1106.

[59] The foremost scholar in this arena is Burt Neuborne, who first introduced, and challenged, the concept of "parity" between state and federal court systems in 1971. *See generally* Neuborne, *supra* note 8 (arguing that federal courts are preferable for constitutional plaintiffs because of superior judges who are more politically insulated than their state court counterparts). Constitutional law scholars continue to debate Neuborne's thesis. *See, e.g.*, Chemerinsky, *supra* note 26.

doubt changed given the current U.S. Supreme Court's open hostility to some civil rights and liberties cases. But, to the extent that individual rights plaintiffs or their attorneys still prefer federal court, particularly for litigation of federal rights, vindicating similar rights under *state* constitutions in federal court can be difficult terrain.

1. Sovereign Immunity and Pennhurst State School & Hospital v. Halderman

Perhaps the most significant challenge to litigating state constitutional rights in federal court—assuming of course that the federal court has subject-matter jurisdiction—stems from the doctrine of sovereign immunity, which is grounded in the Eleventh Amendment to the U.S. Constitution.[60] That provision states that the "judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[61]

Although the text of the Eleventh Amendment would seem to protect states only from suits brought by citizens of *other* states or nations, the U.S. Supreme Court long ago held that the principle of sovereign immunity also protects states from lawsuits brought by their own citizens in federal court.[62] This immunity likewise extends beyond the state itself to protect state agencies from the burden of litigating in federal court.[63]

Despite the bar imposed by sovereign immunity, individuals harmed by violations of the *federal* Constitution may still bring suit in federal court to obtain at least some relief that addresses unconstitutional action by states and local governments.

If state officers are responsible for violating the federal Constitution, individuals harmed by those violations may sue the state officers in their official capacity in federal court under the doctrine established in the U.S. Supreme Court's decision in *Ex parte Young*.[64] The *Ex parte Young* doc-

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[60] *See* Michael T. Morley, *Litigating Imperfect Solutions: State Constitutional Claims in Federal Court*, 35 CONST. COMMENT. 401, 421 (2020) (reviewing SUTTON, *supra* note 11) (describing sovereign immunity as a "major obstacle" in this respect).

[61] U.S. CONST. amend XI.

[62] *See* Hans v. Louisiana, 134 U.S. 1, 15-17 (1890) (Eleventh Amendment bars federal suits against a state by residents of that state); *see also* Alden v. Maine, 527 U.S. 706, 754 (1999) (state sovereign immunity extends to suits brought in states' own courts); Franchise Tax Bd. v. Hyatt, 587 U.S. 230, 236 (2019) (immunity extends to suits brought in other states' courts). The U.S. Supreme Court has explained that state sovereign immunity, although often referred to as "Eleventh Amendment immunity," "neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ." *Alden*, 527 U.S. at 713.

[63] *See* Alabama v. Pugh, 438 U.S. 781, 781 (1978) (per curiam).

[64] 209 U.S. 123, 155 (1909). *See generally* 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2002).

trine is based on the legal fiction that because each state must abide by the federal Constitution, an officer who acts in derogation of the Constitution's guarantees is not acting on the state's behalf, and a suit against him for prospective equitable relief is not in effect a suit against the state.[65] Moreover, the U.S. Supreme Court has held that a constitutional claimant may sue state officers in their personal capacity for damages without offending sovereign immunity.[66] Although significant constraints still apply to personal- and official-capacity state officer suits,[67] they remain an important, albeit imperfect, mechanism for vindicating federal rights.[68]

When localities and local officials, as opposed to states, violate someone's federal constitutional rights—such as when a local police officer arrests a protestor for protected speech, or a city adopts an ordinance barring the free exercise of a person's religion—the Supreme Court has held that sovereign immunity does not apply regardless of the type of relief sought because these entities are not the state nor arms of the state.[69] And unlike a state,[70] these entities constitute a "person" subject to § 1983's prohibition.[71] Accordingly, individuals whose federal constitutional rights have been violated may bring § 1983 claims against cities, towns, counties, and local officials to enforce their federal constitutional rights, albeit with substantial caveats imposed by U.S. Supreme Court precedent chipping away at protections in this area.[72]

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[65] 209 U.S. at 155-56; *see also* Edelman v. Jordan, 415 U.S. 651, 664 (1974).

[66] *See Alden*, 527 U.S. at 757.

[67] *E.g.*, Whole Woman's Health v. Jackson, 595 U.S. 30, 39 (2021) (recognizing that the *Young* exception applies only where officers have some relation to the enforcement of the challenged act); *Edelman*, 415 U.S. at 658-59 (recognizing that sovereign immunity imposes a limitation on retroactive relief paid from the state treasury, even if the suit is one against an official); Lane v. Franks, 573 U.S. 228, 243 (2014) (qualified immunity protects state officials from suits in their personal capacity unless the official violated a clearly established statutory or constitutional right).

[68] In addition, plaintiffs who have suffered a federal constitutional violation may sue the responsible state official in their *personal* capacity, but some courts have held that these personal-capacity suits may seek only damages, not injunctive relief. *Compare, e.g.*, Redondo-Borges v. U.S. Dep't of Hous. & Urb. Dev., 421 F.3d 1, 7 (1st Cir. 2005) (injunction available); MCI Telecomm. Corp. v. Bell Atl. Pa., 271 F.3d 491, 506 (3d Cir. 2001) (same), *with* Scott v. Flowers, 910 F.2d 201, 206 (5th Cir. 1990) (injunction unavailable). In our view, cases holding that injunctive relief should be available in these circumstances are correct. *See Young*, 209 U.S. at 160 (explaining that where a government official acts in contravention of the federal Constitution, he may be "subjected *in his person* to the consequences of his individual conduct" (emphasis added)).

[69] Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890).

[70] Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).

[71] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

[72] For example, to establish liability against a municipality or a municipal employee in an official-capacity suit under § 1983, claimants must demonstrate the alleged unconstitutional act is the product of a governmental policy or custom. *Id.* This requirement applies "irrespective of whether the relief sought is monetary or prospective." L.A. Cnty. v. Humphries, 562 U.S. 29, 39 (2010). *See generally* Reinert et al., *supra* note 10, at 754-55; Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989).

Options for individuals whose *state* constitutional rights have been violated are significantly more constrained in federal court due to sovereign immunity. That is so because, in *Pennhurst State School & Hospital v. Halderman*,[73] the U.S. Supreme Court held that allowing state-law suits against state officials in their official capacity, and not just the states, in federal court would directly conflict "with the principles of federalism that underlie the Eleventh Amendment."[74] The Court in *Pennhurst* explained that the rationale of *Young* was that a state or state agency or official that acts contrary to the U.S. Constitution is "stripped of his official or representative character" and "subjected to the consequences of his official conduct."[75] The *Young* doctrine "has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'"[76]

But the *Pennhurst* Court concluded that any "need to reconcile competing interests is wholly absent" in a suit against state officials in their official capacity for a violation of *state* law.[77] The Court held:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* . . . [is] inapplicable in a suit against state officials on the basis of state law.[78]

Accordingly, due to federal sovereign immunity, plaintiffs are categorically unable to bring state constitutional claims against states and state officials in their official capacity in federal court. That is true even if the plaintiffs also raise, alongside state constitutional claims, federal § 1983 claims alleging analogous violations of the U.S. Constitution, or other federal statutory claims.

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[73] 465 U.S. 89 (1984).

[74] *Id.* at 106.

[75] *Id.* at 102 (citing *Ex parte* Young, 209 U.S. 123, 160 (1909)).

[76] *Id.* at 105 (citing *Young*, 209 U.S. at 160); *id.* ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." (collecting cases)); *see also* Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex Parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.").

[77] 465 U.S. at 102.

[78] *Id.*

A state can, of course, waive its sovereign immunity or otherwise consent to suit in a federal forum.[79] A state might, for instance, remove a case filed in state court by a plaintiff asserting a § 1983 claim and a state constitutional claim, on the ground that the former "arises under" federal law, thereby making the entire action litigable in federal court.

But plaintiffs wishing to seek prospective relief in a federal forum in the first instance cannot do so; they must instead roll the dice by filing in state court and seeing whether their opponent seeks removal.[80] And their opponent may, in turn, lack authority to remove the case to federal court, depending on whether state statutory or constitutional provisions limit who can waive the state's sovereign immunity and under what circumstances.

Another alternative in federal court, though uncommon, would be for a constitutional litigant to raise both a § 1983 claim against state officials in their official capacity for violating federal rights, and—to avoid sovereign immunity—a state constitutional claim seeking only damages and naming state officials in their personal, as opposed to official, capacity.[81] That option, although preserved by *Pennhurst*, is limited in utility for a number of reasons, including that many constitutional litigants cannot demonstrate that they have suffered monetary damages, particularly where they challenge an unconstitutional law in a pre-enforcement posture. And, as discussed below, other barriers—such as the absence of a clear mechanism under state law to obtain damages—may also apply.

Moreover, because sovereign immunity is an immunity from suit, not just a defense to liability, a denial of "a claim by a State or a state entity to Eleventh Amendment immunity from suit in federal court may be appealed under the collateral order doctrine."[82] Those appeals can substantially delay resolution of a case. For example, numerous courts have held that, where a non-frivolous appeal is taken from a sovereign-immunity denial, "ordinarily the district court should not proceed to trial, nor even impose substantial pretrial burdens, pending appeal."[83] Some courts have gone still further,[84]

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[79] 28 U.S.C. § 1441; Lapides v. Bd. of Regents, 535 U.S. 613, 616 (2002) (holding that a state waives sovereign immunity when it removes state law claims for which it does not have immunity in state court).

[80] The U.S. Supreme Court has not addressed whether removal to federal court waives *state* sovereign immunity if such immunity would have applied in state court. *See* Jessica Wagner, Note, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 Va. L. Rev. 549, 553 (2016) (describing a split among lower courts).

[81] *See Pennhurst*, 465 U.S. at 111 n.21; *see also, e.g.*, Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 530-31 (1st Cir. 2009) (discussing case law making clear that sovereign immunity does not apply to personal capacity damages actions against state officers in federal court, whether arising from federal or state law). *But see* Koch v. Dep't of Nat. Res., 858 F. App'x 832, 840 (6th Cir. 2021) (Bush, J., concurring) (recognizing that Sixth Circuit precedent bound court "to assert jurisdiction over Koch's state-law damages claims against the defendant state officials in their personal capacities" but urging court to overrule that precedent).

[82] Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 (1993).

[83] 15A Wright & Miller, *supra* note 64, § 3914.10.8.

[84] *Id.*

holding, quite incorrectly in our view, that a district court should stay proceedings on pending motions for emergency injunctive relief.[85] Accordingly, a plaintiff seeking to raise a state constitutional claim in federal court against an actor claiming sovereign immunity risks significant costs in time and money from disputes over sovereign immunity and related interlocutory appeals.

2. Abstention and Other Doctrinal Barriers

In light of *Pennhurst*, a plaintiff generally cannot bring state constitutional claims in federal court against states *or* state officials, even in their official capacity. To the extent that one sees state constitutional claims in federal court, they arise in litigation where a state or state official either waived sovereign immunity, perhaps by removing the case to federal court,[86] or where the claims are brought against local officials or municipalities, to whom the *Pennhurst* rule does not apply.

Even in those cases, however, barriers exist to having federal courts resolve state constitutional claims. Most notably, the U.S. Supreme Court has recognized doctrines that permit federal courts to abstain from exercising their jurisdiction over particular types of claims.[87]

The most important in this context is known as *Pullman* abstention. In 1941, in *Railroad Commission of Texas v. Pullman*,[88] the Court held that federal courts should not decide "federal constitutional issues that may be unnecessary" after state court "resolution of an unsettled issue of state law."[89] In other words, litigants who challenge a state law or action in federal court may be required to go first to state court for the resolution of their state claims. The majority of *Pullman* abstention cases are civil rights "actions to enjoin state or local officers from enforcing an allegedly unconstitutional state law."[90]

The U.S. Supreme Court has explained that *Pullman* abstention is not appropriate as a general tool to avoid answering federal constitutional questions simply because a challenged law might likewise violate the applicable

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[85] *Id.*; *see, e.g.*, Whole Woman's Health v. Jackson, 13 F.4th 434, 445-46 (5th Cir. 2021), *aff'd in part, rev'd in part, and remanded*, 595 U.S. 30 (2021).

[86] *See generally* Wagner, *supra* note 80, at 553 (discussing this circuit split). To the extent that removal does *not* waive an applicable immunity and requires remand or dismissal of the claim in federal court, the claim would remain litigable in state court.

[87] Morley, *supra* note 60, at 414.

[88] 312 U.S. 496, 500 (1941) ("In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." (citation omitted)).

[89] Morley, *supra* note 60, at 414, 425.

[90] 17A WRIGHT & MILLER, *supra* note 64, § 4242.

state constitution. For example, in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, the Court considered whether to apply *Pullman* abstention in a case where a Puerto Rico law that permitted only U.S. citizens to practice privately as civil engineers was challenged as violating federal due process protections.[91] As the Court explained, "to hold that abstention is required because [the challenged law] might conflict with the cited broad and sweeping constitutional provisions[] would convert abstention from an exception into a general rule."[92]

However, state constitutional claims may in some cases be bound up with other state-law questions about the proper interpretation of a challenged law. In some contexts—such as vagueness challenges under due process principles, for example—those state-law interpretive questions are arguably unavoidable. And where that is the case, government defendants might argue that federal courts should abstain under *Pullman*.

Some courts have even held—incorrectly in our view—that *Pullman* abstention is appropriate where there is not actually a pending state-court proceeding. For example, in *Planned Parenthood of Greater Texas Surgical Health Services v. City of Lubbock*, a federal district court held that abstention would be the proper course in a case where plaintiffs brought a § 1983 claim, along with an "ultra vires" action claim under state law arguing that the challenged local ordinance exceeded the city's authority.[93] It so held despite the fact that there was no pending state-court proceeding at the time that would have resolved that state-law question.[94] Similarly, in *West Virginia Citizens Defense League, Inc. v. City of Martinsburg*, a federal district court abstained from deciding a question of federal constitutional law where the plaintiff had also raised state constitutional claims, even in the absence of an ongoing state court proceeding.[95]

By recounting the existence of such judicial decisions, we by no means endorse them. But in considering why litigants do or do not bring state constitutional claims in federal court, even where sovereign immunity imposes no clear bar, the potential for difficult questions of abstention to derail, and at the very least prolong, the litigation is a significant factor for litigants to consider.

Some might argue that the prospect of abstention in these circumstances poses no impediment to plaintiffs because they could always initiate proceedings in state court to get an answer on the state-law question. Such litigants can, theoretically, reserve the right to go *back* to federal court for

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[91] 426 U.S. 572 (1976).

[92] *Id.* at 598.

[93] 542 F. Supp. 3d 465 (N.D. Tex. 2021), *appeal voluntarily dismissed*, 2022 WL 1554993 (5th Cir. Jan. 21, 2022).

[94] *Id.* at 495-96.

[95] No. 11-CV-5, 2011 WL 4074684, at *3 (N.D. W. Va. Sept. 13, 2011), *aff'd*, 483 F. App'x 838 (4th Cir. 2012).

resolution of their federal claims after the state court action. The Supreme Court's 1964 decision in *England v. Louisiana State Board of Medical Examiners*[96] allowed for this specific form of claim reservation as an exception to res judicata, which would ordinarily prevent plaintiffs from returning to federal court with their federal claims.[97]

But as Judge Michael Morley has explained in discussing this option for state constitutional litigants, relying on an *England* reservation to preserve the right to bring a federal claim in a federal forum carries some risk of res judicata, as courts have been inconsistent in how they apply *England*.[98] Additionally, an *England* reservation requires litigants to go to court twice, which is resource-intensive, time-consuming, and costly,[99] without a guarantee they will succeed on the merits. These doctrines thus serve as "significant deterrent[s]" to bringing state-law claims in federal court.[100]

3. Delayed Ability to Certify State-law Questions

In some instances, federal courts considering questions of state law may opt to certify them to a state's high court in lieu of abstention.[101] "Certification" allows a "federal court to submit an unsettled issue of state law to the highest court of that state."[102] Forty-nine states and the District

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[96] 375 U.S. 411 (1964).

[97] *See* San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323, 339 (2005) ("[W]hen a federal court abstains from deciding a federal constitutional issue to enable the state courts to address an antecedent state-law issue, the plaintiff may reserve his right to return to federal court for the disposition of his federal claims." (citing *England*, 375 U.S. at 419)).

[98] *See* Morley, *supra* note 60, at 423-24.

[99] *See, e.g.*, Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 83 (2008) ("Abstention also can create unnecessary delay, causing the parties more harm and increasing the total cost of litigation. By abstaining, a federal court may delay justice by several years. The increased costs from protracted litigation may deprive a litigant of justice. While *Pullman* abstention permits a plaintiff to reserve the right to return to federal court to adjudicate his federal constitutional claims under the '*England* procedure,' this bouncing back and forth may cause further delay and harm to the litigants.").

[100] Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 90 (1984); *see also, e.g.*, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1251-52 (1977) ("[L]itigants temporarily foreclosed from federal court by the abstention doctrine may well waive their right to return by submitting all questions to the state court in order to avoid a subsequent round of litigation. Where they do not, the delay in the final resolution of the suit and the costs of piecemeal litigation represent a substantial burden both for the parties and for the judicial system. In either case, though, abstention serves at least to burden, if not to eliminate, the plaintiff's legitimate choice of a federal forum to adjudicate his claims. And it does so without any guarantee that the highest court of the state will ever hear the suit and rule authoritatively on the disputed state law issues.").

[101] *See, e.g.*, Morley, *supra* note 60, at 414; SUTTON, *supra* note 11, at 197-98.

[102] Rachel Koehn Breland, *Avoiding Rejection: Studying When and Why State Courts Decline Certified Questions*, 92 FORDHAM L. REV. 1429, 1431 (2024).

of Columbia have mechanisms to accept such certified questions; North Carolina, however, does not.[103]

In theory, plaintiffs seeking a federal forum could attempt to have any novel state-law issues brought there certified to their state supreme court for decision during the litigation. But the certification procedure "involves a twofold exercise of discretion."[104] "First, the federal court must decide whether the question or questions before it are appropriate for certification" by examining the requirements in the state's certification rule and any other relevant considerations the federal courts have recognized.[105] Second, even if the federal court decides to certify, "the receiving state court must decide anew whether certification is warranted" under its certification scheme.[106]

Inevitable in this process "are occasions when, despite the able federal court's conclusion that a particular case calls for certification, the state court is convinced of the opposite and declines the certification request."[107] These denials are surprisingly frequent,[108] and cause a whole host of problems for both federal courts and, more importantly, litigants. For instance, most states provide no deadline by when the state court must accept or deny the certified question.[109] "This creates the potential for certification requests to languish before the state court, only to be declined and returned to the federal court at the same stage as when they were certified."[110] Additionally, some states allow "briefing or oral argument on . . . whether the state court should accept or decline certification, requiring the parties to expend resources litigating this threshold issue that may result only in a cursory and unexplained relegation to federal court."[111]

Equally concerning is that as of 2020 ten states authorized certification only from the U.S. Supreme Court or federal courts of appeals, not federal district courts.[112] As a result, litigants in these states considering whether to

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[103] *See id.* at 1438 & nn.52-53; Jason A. Cantone & Carly Giffin, Fed. Jud. Ctr., Certified Questions of State Law: An Examination of State and Territorial Authorizing Statutes 1 (2020), https://www.fjc.gov/sites/default/files/materials/04/Certified%20Questions%20of%20State%20Law-Statutes.pdf [https://perma.cc/A2M2-5TEE].

[104] Breland, *supra* note 102, at 1431.

[105] *Id.* at 1431-32; *see id.* at 1442 (discussing the U.S. Supreme Court's guidance in this area); *id.* at 1443-45 (compiling the considerations that guide the federal court inquiry in each federal circuit court).

[106] *Id.* at 1432; *see id.* at 1446 (discussing state court criteria for whether to accept or decline certification).

[107] *Id.* at 1432.

[108] *See generally* Breland, *supra* note 102.

[109] *Id.* at 1480.

[110] *Id.* at 1450.

[111] *Id.*; *see also id.* at 1450-51 ("Several jurisdictions also expressly retain the power to rescind acceptance of certified questions, providing the opportunity for an even longer delay without progress toward resolving the case.").

[112] *See* Cantone & Giffin, *supra* note 103, at 7-11. The District of Columbia's certification rules are to the same effect, but since the District lacks a constitution, we have omitted it from this count.

bring novel state constitutional claims in federal court may wait years before litigating in front of a federal court actually in a position to request a state court's interpretation of the relevant law. Such delay can add significant costs, particularly if, by the time the case reaches appeal, the parties have already built the evidentiary foundation for its resolution and have done so in the absence of state court input on the prevailing state-law standard.

Although the cost of litigating unsettled questions of state law is still present to some extent in state courts, it is likely lower in that forum. State trial-court judges may follow trends in their supreme court's development of state case law more closely than federal judges. In addition, some states' rules authorize interlocutory appeal in broader circumstances than would be permitted in federal court, or permit the state supreme court to exercise its original jurisdiction in cases involving important, novel questions of state law, without any trial-court proceeding at all.[113]

B. Challenges Unique to Litigating State Constitutional Claims in State Courts

Federal court is of course just one potential site for civil litigation over individual rights. State courts also generally have—and are expected to exercise—concurrent jurisdiction over federal claims, including those brought pursuant to § 1983. In this way, "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law."[114]

Accordingly, individuals whose federal and state rights have been violated can file those claims in state court, free of concerns identified above with respect to federal court abstention doctrines and federal sovereign immunity principles.[115] However, by asserting a federal claim of any kind, litigants risk removal of the entire action to federal court upon agreement of the defendants.[116] As noted above, that may seem desirable if a plaintiff would prefer to litigate in a federal forum. By removing, state officials would waive concerns over state sovereign immunity.[117] But federal district courts still may bifurcate the litigation where abstention principles or other factors weigh against a federal district court's exercise of its pendent jurisdiction over state claims.[118] "In addition to their discretion under § 1367(c), district courts may be obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines articulated by

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[113] *E.g.*, S.C. App. Ct. R. 245.

[114] Haywood v. Drown, 556 U.S. 729, 735 (2009).

[115] *Cf.* Friesen, *supra* note 7, at 1271-72 (stating the view that development of state constitutional law "must occur in state courts rather than federal court" due to federal courts' reluctance to address such claims and the associated barriers).

[116] *See* 28 U.S.C. § 1441; *see also id.* § 1446 (addressing defendant consent to removal).

[117] *See* Lapides v. Bd. of Regents, 535 U.S. 613, 624 (2002).

[118] *See* 28 U.S.C. § 1367(c).

[the Supreme Court] applies."[119] As noted above, the prospect of bifurcated proceedings can be daunting because it adds significant time and other costs to litigating state constitutional claims.

Other aspects of state procedural rules may also make it harder for plaintiffs to bring, and prevail on, their state constitutional claims, as compared with a federal forum.

For example, while federal law expressly authorizes a party to appeal from a grant or denial of a preliminary injunction,[120] that is not uniformly true in state courts. In Nebraska, for example, a denial of a preliminary injunction is not appealable,[121] so litigants seeking to bring a swift end to unlawful government action in a case there must contend with the real possibility that they will have to litigate for months or even years without temporary injunctive relief, even if they later are determined to have meritorious claims and clear injury.

Nebraska and North Dakota also have "judicial supermajority" clauses that require a heightened number of justices to agree before a law is struck down.[122] Accordingly, convincing a simple majority of justices on a state high court that a law violates the state constitution (say a 3-2 decision) is not enough there.

Similarly, although many states have adopted a rule equivalent to, or broader than, Federal Rule of Civil Procedure 23 for class actions,[123] that is not uniformly true. Virginia and Mississippi, for example, do not authorize class actions at all,[124] thus creating a barrier to comprehensive relief in cases involving constitutional harm to a large number of individuals.

C. The Challenge of Litigating State Constitutional Rights in Any Forum in the Absence of a § 1983 Analogue

Another significant barrier to litigating state constitutional claims—and one that exists in both state and federal courts—is the absence in many states of an express statutory cause of action to enforce state

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[119] City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 174 (1997).

[120] *See* 28 U.S.C. § 1292(a).

[121] *See* Shasta Linen Supply, Inc. v. Applied Underwriters, Inc., 861 N.W.2d 425, 430 (Neb. 2015) ("[A] temporary injunction is not a final, appealable order." (citing Pennfield Oil Co. v. Winstrom, 673 N.W.2d 558, 566 (Neb. 2004))).

[122] *See generally* Sandra B. Zellmer & Kathleen Miller, *The Fallacy of Judicial Supermajority Clauses in State Constitutions*, 47 U. Toledo L. Rev. 73 (2015).

[123] *E.g.*, Phillip Stephen Fuoco & Robert F. Williams, *Class Actions in New Jersey State Courts*, 24 Rutgers L.J. 737, 738 (1993) (noting that New Jersey's class action rule "is in many ways better than the federal rule for the class action practitioner and provides more flexibility for the courts").

[124] *See* USF&G Ins. Co. of Miss. v. Walls, 911 So.2d 463, 464 (Miss. 2005). Last year, the Virginia Legislature passed House Bill 418, which would have created a vehicle for class action claims in Virginia state courts, but Governor Glenn Youngkin vetoed the bill. *See* H.B. 418, 2024 Leg., Reg. Sess. (Va. 2024).

constitutional rights. As discussed in Part II, § 1983 allows individuals whose federal constitutional rights have been violated to bring suit against state and local officials in federal and state court. Although the power of § 1983 has been significantly limited by the U.S. Supreme Court,[125] it nonetheless provides plaintiffs with an express avenue through which they can vindicate their federal constitutional rights.

In stark contrast, only eight states have adopted § 1983 analogues—that is, statutes that authorize at least some state constitutional claims: Arkansas,[126] California,[127] Colorado,[128] Connecticut,[129] Maine,[130] Massachusetts,[131] New Jersey,[132] and New Mexico.[133] Professors Alexander Reinert, Joanna Schwartz, and James Pfander have compiled state practices in their 2021 article *New Federalism and Civil Rights Enforcement*, which includes a survey of state laws on causes of action for state constitutional violations as Appendix A.[134] The absence of these analogues affects state constitutional claimants seeking to litigate in state *and* federal courts.

To be clear, direct statutory rights of action analogous to § 1983 are not strictly necessary to bring state constitutional claims, but in the absence of a § 1983 analogue, there can be considerable uncertainty regarding the types of relief a plaintiff can obtain when suing to enforce the state constitution.

Declaratory and injunctive relief should generally be available as a function of a court's inherent equitable authority.[135] Sixteen states, for example, recognize implied rights of action under specific parts of their state constitutions.[136] But many states have very few recent cases addressing this authority, and in our experience state and local governments regularly argue that constitutional guarantees are not self-executing, i.e., that state legislatures have not authorized suit to enforce the constitutional provisions.[137]

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[125] *See generally* Beermann, *supra* note 72 (discussing the U.S. Supreme Court's limitations on § 1983 and critiquing the same).

[126] Ark. Code Ann. § 16-123-105 (2025).

[127] Cal. Civ. Code § 52.1(c) (2025).

[128] Colo. Rev. Stat. § 13-21-131 (2025).

[129] Conn. Gen. Stat. § 52-571k (2025).

[130] Me. Stat. tit. 5, § 4682(1)(A) (2025).

[131] Mass. Gen. Laws Ann. ch. 12, §§ 11H-11I (2024).

[132] N.J. Stat. Ann. § 10:6-2 (2025).

[133] N.M. Stat. Ann. § 41-4A-3 (2025).

[134] Reinert et al., *supra* note 10, at 806-08. As litigators focused on state constitutions, we refer to this article and Appendix A often.

[135] *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326-27 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.").

[136] Reinert et al., *supra* note 10, at 761.

[137] For this reason, some more recent state constitutional amendments, for example ones protecting abortion rights, expressly confirm that their terms are self-executing. *E.g.*, Mich. Const. art. I, § 28(5); Ohio Const. art. I, § 22(D).

In these equitable-relief cases, litigants may wish to rely on other statutes, where they apply, to bolster their arguments. For example, every state has adopted a version of the Administrative Procedure Act, thus providing judicial review of agency actions that are contrary to law, including because they are unconstitutional. And states may have interpreted their Declaratory Judgment Acts to authorize standalone causes of action to enforce the state constitution. While these statutes are of course useful, they nevertheless contribute to what can best be described as a state-by-state patchwork of available relief for state constitutional violations.

Greater uncertainty surrounds the availability of damages to vindicate state constitutional rights. The Michigan Supreme Court, for example, held in *Bauserman v. Unemployment Insurance Agency* that state constitutional rights are generally enforceable via damage awards, unless the state constitution "has specifically delegated enforcement of the constitutional right at issue to the Legislature or the Legislature has enacted an adequate remedy for the constitutional violation."[138] But some courts have ruled that, absent legislative authorization, damages are entirely unavailable for violations of state constitutions.[139] The Iowa Supreme Court recently reversed its 2017 decision in *Godfrey v. State* to hold that money damages are not an available judicially crafted remedy for violations of the Iowa Constitution.[140]

Relatedly, states may "allow government officials to be sued for state torts—assault, battery, false imprisonment, and the like."[141] But, as scholars have noted, the "state tort option offers little practical recourse for constitutional harms," in part because the "interests protected by state tort law . . . do not always align well with constitutional interests."[142]

Even in the eight states with § 1983 analogues, courts have in some circumstances "imported the same federal law barriers that stand in the way of Section 1983 litigation."[143] For instance, state supreme courts in Arkansas, Maine, and Massachusetts have interpreted their § 1983 analogues to apply federal qualified immunity doctrine to state law claims.[144] States may also incorporate state law immunity doctrines to limit claims.[145]

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[138] 983 N.W.2d 855, 859-60 (Mich. 2022).

[139] *See generally* Sharon N. Humble, Annotation, *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R. 5th 619 (2000) (collecting cases).

[140] *See* Burnett v. Smith, 990 N.W.2d 289 (Iowa 2023) (overruling Godfrey v. State, 898 N.W.2d 844 (Iowa 2017)); *see also* Marcus Gadson, *Iowa Supreme Court Reverses Itself on Lawsuits for Constitutional Rights Violations*, State Ct. Rep. (June 15, 2023), https://statecourtreport.org/our-work/analysis-opinion/iowa-supreme-court-reverses-itself-lawsuits-constitutional-rights [https://perma.cc/N63G-A5WJ].

[141] Reinert et al., *supra* note 10, at 760.

[142] *Id.* at 761.

[143] *Id.* at 762.

[144] *Id.*; Robinson v. Langdon, 970 S.W.2d 292, 296 (Ark. 1998); Clifford v. MaineGeneral Med. Ctr., 91 A.3d 567, 588-89 (Me. 2014); Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989); *see also* Lapolla v. Cnty. of Union, 157 A.3d 458, 467 (N.J. Super. Ct. App. Div. 2017).

[145] *See, e.g.*, Reinert et al., *supra* note 10, at 763 (discussing California); *see also id.* at 768-82 (detailing a proposal to expand and improve state § 1983 analogues).

D. The Problem of Attorney's Fees in State Constitutional Litigation in State and Federal Court

As discussed above, under 42 U.S.C. § 1988, prevailing *federal* constitutional claimants can recover their attorney's fees and costs against state and local defendants. But there is typically no express basis for such fee-shifting in the context of state constitutional claims unless the state has adopted a § 1983 analogue or some other relevant statutory provision that authorizes prevailing plaintiffs to recover fees.

In the sixteen states that recognize an implied right of action for state constitutional violations, for example, most of them have no provision or case law addressing attorney's fees.[146] Although such fees may still be available under a court's inherent equitable authority,[147] the lack of an established route for fee-shifting is a disincentive for attorneys to take on cases with state constitutional claims.[148]

The attorney's fees and costs involved in constitutional litigation are often quite significant. In an Iowa state constitutional case litigated by one of the authors, for example, a victory in the trial court at final judgment, after more than a year of litigation and the expenditure of hundreds of attorney hours, entitled the plaintiff to recover no attorney's fees and just a few hundred dollars in printing costs. Compare that to fee awards in § 1983 cases, which can reach millions of dollars, especially in hotly contested and long-running matters.[149]

Prevailing plaintiffs who bring state constitutional claims *along with* federal § 1983 claims should be able to recover fees under § 1988 for time spent on the state law claim (or state law arguments) so long as they are related.[150] A broad construction of relatedness is consistent with

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[146] *Id.* at 759-60.

[147] For example, the Oregon Supreme Court allows attorney's fees for state constitutional litigation when (1) the proceeding is in equity, (2) the party requesting fees is the prevailing party, and (3) "in filing the action, the party requesting attorney fees must have been seeking to vindicate an important constitutional right applying to all citizens without any gain peculiar to himself." Swett v. Bradbury, 67 P.3d 391, 393 (Or. 2003) (providing an overview of the doctrine and collecting cases); *cf.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 272 (1975) (Marshall, J., dissenting) (discussing history of courts using powers of equity to award attorney's fees); Hall v. Cole, 412 U.S. 1, 4 (1973) (discussing established exceptions to American Rule in federal court).

[148] *See, e.g.*, Paul D. Reingold, *Requiem for Section 1983*, 3 Duke J. Const. L. & Pub. Pol'y 1, 12-16 (2008); Reinert et al., *supra* note 10, at 761.

[149] *See, e.g.*, Order on Motions for Attorney's Fees, Nontaxable Expenses, and Costs at 45, Whole Woman's Health v. Hellerstedt, No. 14-cv-284-LY (W.D. Tex. Aug. 9, 2019), ECF No. 297 (granting Whole Woman's Health nearly $2.3 million in attorney's fees in a case that lasted several years and included a decision by the U.S. Supreme Court).

[150] *See* Hensley v. Eckerhart, 461 U.S. 424, 435 (1983) ("The congressional intent to limit awards to prevailing parties requires that . . . unrelated claims be treated as if they had been raised in separate lawsuits . . . .").

congressional intent and the liberal construction to be accorded § 1988.[151] It ensures that litigants are not penalized for bringing state constitutional or other arguments in a § 1983 action, and helps to encourage legal representation for constitutional plaintiffs.[152] Nevertheless, the degree of relatedness that a district court will require may not be capable of accurate prediction prior to suit, and thus may stand as a disincentive for bringing state constitutional claims that have no attorney's fee entitlement of their own.

E. Lack of Available Resources and Roadmaps for Litigating State Constitutional Claims in Any Forum

One additional substantial barrier that we see as litigators of state constitutional issues is the dearth of materials to support such litigation efforts. Constitutional interpretation done well requires resources, including time to study potentially complicated language and to parse the history of provisions that may have been layered over time in the frequent state amendment process.

In some situations, a constitutional issue may truly never have been raised in a state before or is relatively undeveloped. Utah, for example, was the second state in the country behind Wyoming to adopt an Equal Rights Provision guaranteeing equality of the sexes.[153] That provision dates to the late 1800s, yet it has been cited by the Utah Supreme Court on only seventeen occasions, and only three in the twenty-first century.[154] Similarly, Tennessee is one of forty-eight states with a constitutional right to petition,[155] but the Tennessee Supreme Court has cited this provision only seven times and only twice since 1948.[156]

Even where the scope of a state constitutional provision has been litigated before, it can be difficult or impossible for litigants to find or access information on previous or other pending cases. "Many state cases do not result in written final orders with findings of law and fact"—if you want to

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[151] *See* Webb v. Bd. of Educ. of Dyer Cnty., 471 U.S. 234, 252 n.13 (1985) (Brennan, J., concurring) (discussing H.R. REP. NO. 94-1558, at 4 n.7 (1976), which stated that if a "constitutional claim is substantial and arises out of [a] 'common nucleus of operative fact' with non-constitutional claims, courts may award fees even though relief is obtained solely on nonconstitutional grounds").

[152] *E.g.*, Bartholomew v. Watson, 665 F.2d 910, 914 (9th Cir. 1982) (holding that where a federal district court invoked *Pullman* abstention in a § 1983 case, and the plaintiff subsequently expended time litigating unsettled issues of state law in state court, § 1988 authorized an award of fees).

[153] UTAH CONST. art. IV, § 1 ("Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.").

[154] As compiled by Westlaw's citing references tool.

[155] TENN. CONST. art. I, § 23; *see* Bridget Lavender, *The Right to Petition in State Constitutions, Explained*, STATE CT. REP., https://statecourtreport.org/our-work/analysis-opinion/right-petition-state-constitutions-explained [https://perma.cc/G6BY-BRS7] (last updated Apr. 1, 2025).

[156] As compiled by Westlaw's citing references tool.

know what happened, you had to be there.[157] And even when those written orders or opinions do exist, in our experience the vast majority are unpublished or not available on Westlaw or Lexis.[158]

State court dockets are often similarly inaccessible, and when they are, they may not provide all of the information that litigants and their counsel are seeking.[159] "States have different case management and data collection systems, many of which are relatively unsophisticated and were created merely to track cases' progress through the court, record filings and events, and schedule hearings. Such systems rarely capture other case-specific or substantive information."[160] Some for-profit entities (such as UniCourt) and public interest groups are trying to address these shortcomings in certain states,[161] but there remains substantial work to do.

This lack of transparency plagues virtually every aspect of state courts to some extent. Our own research involving state supreme courts, which are often the most transparent of the state courts, still finds them significantly lacking.[162] For example, while most state supreme court opinions are generally accessible online,[163] party briefing is electronically available to the public in fewer than half of the state supreme courts.[164] Often, access to party briefing is more helpful for litigants than a final court decision, which may or may not even address a state constitutional issue.[165]

In addition, as others have rightly explained, the availability of historical materials one might normally turn to in order to understand the context in which a constitution was adopted or amended may be more difficult

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[157] Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 Wis. L. Rev. 249, 267.

[158] This sparsity creates a barrier not only for plaintiffs bringing state constitutional claims, but for academics and scholars as well. *See, e.g.*, Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 480 (2005) (noting that "the vast majority of tort litigation occurs in state courts," but that "[u]nfortunately for researchers," "very few state trial court opinions are published or are available on electronic database services such as Westlaw or Lexis-Nexis"); *see also* Natalie Murphy, Note, *Give Me Liberty or Give Me the Source Code: Challenging a Black-Box Computer Algorithm Under* Daubert, 30 Rich. J.L. & Tech. 348, 386 n.199 (2024); Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 928 n.64 (2017).

[159] Carpenter et al., *supra* note 157, at 266-67.

[160] *Id*. at 266.

[161] *See generally Court Coverage*, UniCourt, https://unicourt.com/coverage [https://perma.cc/BF4W-445D] (last visited Apr. 7, 2025).

[162] *Scorecard for State Supreme Court Transparency: How Does Your State Stack Up?*, Am. C.L. Union (Dec. 9, 2024), https://www.aclu.org/publications/scorecard-for-state-supreme-court-transparency [https://perma.cc/BXX9-9C72].

[163] *But see generally* Adam B. Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. Rev. 1449 (2024).

[164] *Scorecard for State Supreme Court Transparency*, *supra* note 162.

[165] *Compare* Brief of Amici Curiae The Institute for Justice, American Civil Liberties Union of Virginia, and American Civil Liberties Union in Support of Appellee, Bd. of Supervisors of Fairfax Cnty. v. Leach-Lewis, 902 S.E.2d 57 (Va. 2024) (No. 230491), *with* Bd. of Supervisors of Fairfax Cnty. v. Leach-Lewis, 902 S.E.2d 57 (Va. 2024) (court opinion deciding the issue solely under the federal constitution without addressing the state constitutional argument).

to locate, or even nonexistent.[166] Some state constitutional conventions "occurred behind closed doors," while others "were simply documented poorly."[167] But often, "extensive records of the work of state constitutional conventions exist," but no one has undertaken the enormous "work of collating, editing, and interpreting these records."[168]

As an illustration from one of our litigation experiences, in South Carolina, historical records of a commission charged with studying and recommending changes to that state's constitution in the 1970s were relevant to a fast-moving case in 2022, but only a single unindexed paper copy was available, located at the University of South Carolina. Attorneys for various parties in the case had to take turns reserving time to review binders of materials in person. Scholars have made important advances in electronically compiling these types of records, but much of this resource-intensive work remains to be done.

One scholar in Utah who has compiled an impressive array of historical information about amendments to that state's constitution even found that the official text of the Constitution, as printed by the Utah Legislature, includes "unauthorized amendments" that appear to have no basis in the actual history of the document.[169]

Similarly, even the process of researching state constitutional precedent is more difficult in state as compared to federal court. Westlaw, for example, does not provide a straightforward way to search simultaneously all state supreme court decisions across the country, thus reinforcing state-specific silos even where a state's constitutional protections were intentionally drafted to mirror those in other states. Researchers can still narrow down state opinions, but it requires specialized terms or additional effort unlike that needed to review federal law.[170]

And until relatively recently, there was no ready-made collection of all states' constitutions available for public use. A compilation of these documents is useful to understand which states use similar constitutional

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[166] *See* Dan Friedman, *Miles to Go: A Response to Dr. Nicholas Cole's Speech at the Third Annual Robert F. Williams Lecture on State Constitutional Law*, 76 Rutgers U. L. Rev. 895, 896-900 (2024); Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 Wis. L. Rev. 1169, 1173-80.

[167] Brady, *supra* note 166, at 1173-74.

[168] Nicholas P. S. Cole, *Writing America's Constitutions: Understanding the Drafting and Re-Drafting of America's Foundational Texts*, 75 Rutgers U. L. Rev. 1069, 1072 (2023).

[169] Adam R. Brown, *Historical Development of the Utah Constitution*, Adam Brown, https://adambrown.info/p/research/utah_constitution [https://perma.cc/9NDZ-QU4Z] (last visited Apr. 21, 2025) (stating that Article XVI, section 8 of the Utah Legislature's official publication of the state constitution "erroneously omits the word 'health' from this clause: 'comfort, health, safety and general welfare'").

[170] Westlaw does not permit users to manually filter results by type of court for all fifty states simultaneously. To review only state supreme court decisions for all fifty states in Westlaw, researchers must use the "All States" database and then know to include the limitation "co(high)" along with their search terms. We identified this research method only through an extended conversation with a Westlaw representative.

language and when that language was first adopted. Fortunately, the State Democracy Research Initiative at the University of Wisconsin filled this gap with its "50 Constitutions" project.[171] The project provides a free and easily accessible central repository of each state's constitutional text and, importantly, a "Tracking Constitutional Change" tool for a subset of states that allows users to "compare a provision's language as it existed on different dates and pinpoint textual changes."[172]

The lack of resources and roadmaps for litigating state constitutional claims is particularly likely to play a role when there exists a federal constitutional analogue. No matter how much a state court wants to foster independent state constitutionalism, "the work of the U.S. Supreme Court . . . looms exceedingly large" in these contexts.[173] As Professor Lawrence Friedman has explained, "the path first established by the U.S. Supreme Court exhibits a powerful hold on both the development and application of constitutional doctrine by state courts resolving individual rights challenges under state constitutions."[174] When this path is easy to find, and there exist ample resources and roadmaps for litigating under it, the barriers discussed in this section are heightened, not just for courts but for constitutional litigants themselves.

Conclusion

In recent years, litigators across the country have developed strong state constitutional claims that protect abortion rights[175] after the U.S. Supreme Court overturned *Roe v. Wade*,[176] established greater protections against cruel and unusual punishments[177] even as the Supreme Court weakens similar federal guarantees,[178] and obtained meaningful wins under state constitutional provisions completely absent in the federal document.[179]

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[171] Roughly two decades ago, the University of Maryland and the National Bureau of Economic Research compiled a website of state constitutions with basic search capability, but it includes only those amendments added by 2000, with few exceptions. *See* NBER/Maryland State Constitutions Project, http://www.stateconstitutions.umd.edu/index.aspx [https://perma.cc/P4HA-X2NE*J* (last visited Mar. 3, 2025).

[172] *About*, 50 Constitutions, https://50constitutions.org/pages/about [https://perma.cc/D2AS-R9EJ] (last visited Mar. 3, 2025).

[173] Friedman, *supra* note 6, at 796.

[174] *Id.* at 805.

[175] *See, e.g.*, Hodes & Nauser, MDs, P.A. v. Stanek, 551 P.3d 62, 80 (Kan. 2024) (holding legal regime restricting abortion "does not survive strict scrutiny and is constitutionally infirm" under the Kansas Constitution); Planned Parenthood Ass'n of Utah v. State, 554 P.3d 998, 1046 (Utah 2024) (affirming district court order blocking enforcement of near-total abortion ban in light of state constitutional challenge).

[176] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[177] *See, e.g.*, People v. Stovall, 987 N.W.2d 85 (Mich. 2022); *In re* Williams, 496 P.3d 289 (Wash. 2021).

[178] City of Grants Pass v. Johnson, 603 U.S. 520 (2024).

[179] *See, e.g.*, Held v. State, 560 P.3d 1235 (Mont. 2024).

When done well, state constitutional litigation can dramatically change the landscape of civil rights and liberties in the United States, even under a hostile federal administration.

But despite the New Judicial Federalism movement, and renewed interest in state constitutions in this moment, a collection of barriers remains in place that make litigating state constitutional rights difficult, if not impossible, in some circumstances. Additional training for law students, attorneys, and judges would be helpful, as would other efforts to change the legal culture that to date has too often prioritized federal rights and federal court litigation.

But these efforts alone will not overcome the barriers we have identified here. So what would?

In some states, there may be sufficient legislative will to adopt new statutory causes of action for the violation of state constitutional rights. Legislatures could, for example, follow the lead of New Mexico, which in 2021 adopted the New Mexico Civil Rights Act[180] to allow New Mexicans to bring claims against state officials who violate the state constitution.[181] That law notably forbids the use of qualified immunity, and it provides a range of relief, including damages and attorney's fees. Advocates could also consider citizen ballot initiatives in states that allow them or constitutional amendments that more directly and robustly protect individuals' ability to sue for a violation of their state constitutional rights.

Even in the absence of new statutory or constitutional mechanisms to enforce state constitutional rights, advocates and courts could consider whether other tools can be used in new or clearer ways to promote state constitutionalism.

For example, nearly all states have a "right-to-remedy" clause in their state constitutions, yet few state supreme courts have delved into the meaning of these provisions, and particularly whether they authorize claims to challenge the violation of other state constitutional rights. These clauses may also support awards of damages and attorney's fees to remedy state constitutional violations.

Even in the absence of a right-to-remedy clause, there remains a long history of courts exercising their equitable authority to remedy constitutional violations, both state and federal, including through awards of attorney's fees.[182] State supreme court decisions unequivocally confirming the contin-

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[180] N.M. STAT. ANN. §§ 41-4A-1 to -13 (2024).

[181] *Id.* § 41-4A-4. For more information and commentary on the New Mexico Civil Rights Act, see generally Linda M. Vanzi & Rheba Rutkowski, *The New Mexico Civil Rights Act: Look Before You Leap*, 54 N.M. L. REV. 363 (2024); Green & Montgomery, *supra* note 39; Arne R. Leonard, *New Mexico True: Crafting a More Inclusive and Independent Method of State Constitutional Interpretation for Claims Under the New Mexico Civil Rights Act*, 54 N.M. L. REV. 425 (2024); Matthew R. Segal, *The Promise and Perils of State Civil Rights Legislation*, 54 N.M. L. REV. 355 (2024).

[182] *See supra* note 147.

ued vitality of this authority in state constitutional cases could go a long way in assuring plaintiffs and their would-be counsel that state constitutional claims are worth making.

Changes to federal court doctrines could also play a significant role in promoting state constitutionalism. As Judge Morley has explained, a variety of barriers to state constitutional enforcement arise from cases permitting federal court abstention and interpreting sovereign immunity, particularly under *Pennhurst*.[183] Efforts to reexamine those precedents, or at least cabin them, could prove fruitful.

Finally, courts could amend procedural rules in ways that advance the protection of state constitutional rights. State courts could, for example, ensure that their rules permit certification of state law issues directly from federal district courts, not just appellate bodies. They could consider whether their rules on amicus briefs and argument encourage participation in state constitutional cases, where judicial and advocate resources are already scarce and additional history and analysis may prove useful to the courts. And they could assess their rules on waiver to ensure, at a minimum, that constitutional claimants are not held to a heightened briefing standard to preserve state constitutional claims, as opposed to all others. They might also apply a presumption against waiver of state constitutional claims where the relevant state provisions are similar to or mirror federal constitutional guarantees.

Ultimately, to realize the full potential of state constitutions, courts, policymakers, and advocates alike must work together to deconstruct the barriers litigants face to the effective vindication of their state rights.

[183] Morley, *supra* note 60, at 426, 429.