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## Litigating Imperfect Solutions: State Constitutional Claims in Federal Court

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LITIGATING IMPERFECT SOLUTIONS:  
STATE CONSTITUTIONAL CLAIMS IN  
FEDERAL COURT

**51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW.** Jeffrey S. Sutton.\* New York, N.Y.: Oxford University Press. 2018. Pp. xi + 278. \$29.95 (Hardcover).

*Michael T. Morley*<sup>1</sup>

INTRODUCTION

It is somewhat ironic that a sitting federal judge, Jeffrey S. Sutton, would write a book challenging the standard model of American constitutional law, which presents life-tenured federal judges enforcing the U.S. Constitution as the primary defenders of individual liberty against racist states, craven elected officials, overzealous police, and heartless bureaucrats.<sup>2</sup> In *51 Imperfect Solutions: States and the Making of American Constitutional Law*, Sutton contends that state courts, constitutions, and even legislatures have played—and should continue to play—critical roles in promoting individual liberty (p. 2). In particular, Sutton

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1. Assistant Professor of Law, Florida State University College of Law. Special thanks to Barbara Atwood, Michael Collins, Andrew Hessick, Jack Landau, Caprice Roberts, and Alan Trammell for their comments, suggestions, and feedback. I am also grateful to Brian Bix for his editorial assistance throughout this process, as well as Margaret Clark, Dylan Dunn, and Felicia Warren for their invaluable help in revising this piece.

2. See Owen Fiss, *Law Is Everywhere*, 117 YALE L.J. 257, 270 (2007); Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 555 (2005). Consistent with this traditional view, Sutton acknowledges that the “U.S. Supreme Court recognized many of the rights it did between the 1940s and 1960s *because* many state courts (and state legislatures and state governors) resisted protecting individual rights, most notably in the South but hardly there alone” (p. 14).

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joins the chorus of federal<sup>3</sup> and state judges,<sup>4</sup> as well as scholars,<sup>5</sup> who argue that state constitutions, interpreted and enforced by state judges, are an important source of potentially greater protection for many rights than the U.S. Constitution (pp. 1–2).

Sutton contends that we “see American lawyers regularly taking just one shot rather than two to invalidate state or local laws,” by failing to raise or sufficiently brief arguments under state constitutions (p. 7). He reiterates this point throughout the book (pp. 8, 10, 15). It is difficult to gauge the empirical validity of Sutton’s claim that state constitutional rights are presently neglected by litigants and underenforced by courts. Although this was certainly the case in decades past, it is unclear whether state constitutions remain unnoticed and ignored; by the 1990s, commentators were acknowledging the depth of attention state

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3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); Diane Sykes, *The “New Federalism”:* *Confessions of a Former State Supreme Court Justice*, 38 OKLA. CITY U. L. REV. 367, 392–93 (2013); *see also* *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016) (Scalia J., for the Court) (“The state courts may experiment all they want with their own constitutions, and often do so in the wake of this Court’s decisions.”); *United States v. Miller*, 425 U.S. 435, 454–55 (1976) (Brennan, J., dissenting) (endorsing “the emerging trend among high state courts of relying upon state constitutional protections of individual liberties”); *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 133 n.100 (1973) (Marshall J., dissenting) (“Nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”).

4. *See, e.g.*, [Wisconsin Supreme Court Justice] Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 724 (1991); [California Supreme Court Justice] Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 396–97 (1988); [Oregon Supreme Court Justice] Hans Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980); [New Jersey Supreme Court Justice] Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS U. L. REV. 707, 717 (1983); [Indiana Supreme Court Chief Justice] Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U. L. REV. 421, 440 (1996); *cf.* [Massachusetts Appeals Court Justice] Joseph A. Grasso, Jr., “*John Adams Made Me Do It*”: *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*, 77 MISS. L.J. 315, 342–43 (2007); *see also* Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 n.4 (2003) (citing articles by state court judges about the importance of relying on state constitutions to protect individual rights).

5. *See* Williams, *supra* note 4, at 211 (explaining that theorizing about the distinct role that state constitutions play in protecting individual rights “cannot be described as ‘new’ anymore”); *see, e.g.*, Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 98–99 (2000); Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1073–74 (1997); Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 837–38 (2011).

constitutions had received.<sup>6</sup>

Sutton specifically points out the lack of state constitutional claims in federal court. He explains that, throughout his fifteen-year tenure as a Sixth Circuit judge, he saw “many constitutional challenges to state or local laws,” yet can “recall just one instance in which the claimant meaningfully challenged the validity of a law on federal *and* state constitutional grounds” (p. 8). Attorneys’ ignorance of state constitutions or overreliance on federal protections may not be the main cause of Sutton’s experience, however. Rather, federal jurisdictional and procedural restrictions pose substantial obstacles—obstacles that Sutton largely does not acknowledge—to the adjudication of state constitutional claims in federal court. Since *51 Imperfect Solutions* is aimed at least partly at a general audience, one would not expect it to offer a detailed discussion of the nuances of federal jurisdiction and procedure. This Review explores the major doctrines that hinder plaintiffs from pursuing state constitutional claims in federal court and suggests some initial reforms.<sup>7</sup>

Part I begins by summarizing Sutton’s analysis of the role of state constitutions, courts, and legislatures in protecting individual liberty. This Part discusses the various ways in which Sutton contends that state constitutional law and federal constitutional law may interact with each other, briefly sketching the case studies he uses to illustrate each possible type of

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6. See, e.g., G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 841 (1991) (“Among the most noteworthy developments in constitutional law during the past two decades has been the renewed reliance by state courts on state constitutions as independent sources of rights. . . . The willingness to look at state constitutions is no longer confined to a few adventuresome courts. . . .”); see also Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1018 (1997) (“The question of whether, and under what circumstances, it is legitimate for state courts to reach conclusions under their state constitutions that are more protective of rights than United States Supreme Court decisions is one of the most important questions of American constitutional federalism.”).

7. I am grateful to Professor Andrew Hessick for pointing out that one major reason why federal courts do not adjudicate state constitutional claims more frequently is that the federal habeas statute allows a state criminal defendant to collaterally attack his or her conviction only on the grounds that it violates the U.S. Constitution (or a federal law or treaty), rather than state constitutions, as well. 28 U.S.C. § 2254(a) (2018); e.g., *Wills v. Engler*, 532 F.2d 1058, 1059 (6th Cir. 1976); *Velez v. Martinez*, 510 F.2d 605, 606 (1st Cir. 1975). The scope of federal habeas review is primarily within Congress’ control, however. This Review focuses on judicially created doctrines that may deter litigants from pursuing state constitutional claims in federal court or preclude federal courts from adjudicating them.

relationship.

Part II explains how abstention doctrine under *Railroad Commission of Texas v. Pullman* often precludes federal courts from adjudicating state constitutional claims,<sup>8</sup> but in inconsistent ways that fail to fully respect the independence of federal and state constitutional provisions. Challenging current doctrine, this Part recommends that federal courts should apply a single uniform standard when deciding whether to apply *Pullman* abstention due to a state constitutional provision, rather than basing abstention decisions on whether that provision has an analogue in the U.S. Constitution, or is worded broadly or narrowly. It further suggests that a federal court should not consider *Pullman* abstention in a federal constitutional challenge to a state or local legal provision based on potential state constitutional infirmities unless the federal suit actually includes a claim under the state constitution. This Part also contends that federal courts should ensure that their judgments concerning state constitutional issues do not prevent other rightholders from relitigating them in state court. Thus, federal courts should neither certify statewide classes nor grant statewide defendant-oriented injunctions in cases involving state constitutional claims.

Part III demonstrates that Eleventh Amendment sovereign immunity is another obstacle to federal adjudication of state constitutional claims. The *Pennhurst* Doctrine protects states, state agencies, and state officials from being sued in federal court for alleged violations of state law, including the state constitution.<sup>9</sup> This Part argues that the Supreme Court should mitigate the effects of the *Pennhurst* Doctrine by creating an exception to res judicata principles. When the doctrine forces litigants to split their federal and state constitutional claims between federal and state courts, the state court judgment should not give rise to a res judicata effect in federal court.<sup>10</sup>

Part IV explains that, even when district courts are permitted to adjudicate state constitutional claims, they frequently decline to do so by exercising their discretion under the supplemental jurisdiction statute.<sup>11</sup> Rather than establishing a purely discretionary or completely independent standard for refusing to

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8. *R.R. Comm'n v. Pullman*, 312 U.S. 496, 500 (1941).

9. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

10. *Cf. England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 417–19 (1964).

11. 28 U.S.C. § 1367(c)(1) (2018).

hear state law claims, the supplemental jurisdiction statute should be read consistently with *Pullman*. A federal court should apply the same standard to decide whether to exercise supplemental jurisdiction over pendent state law claims as it would to decide whether to abstain from adjudicating a state law issue in a case involving a federal constitutional claim. Part V concludes.

## I. THE RELATIONSHIP BETWEEN FEDERAL AND STATE CONSTITUTIONAL LAW

*51 Imperfect Solutions* consists primarily of case studies illustrating the various ways in which federal and state constitutional law interact with each other. Sutton argues that state constitutions—as well as state courts, legislatures, and executive officials—have often provided greater protection for individual rights than the U.S. Constitution. This most obviously occurs when a state constitution contains provisions that either lack analogues in the U.S. Constitution or are phrased more broadly than their federal counterparts (pp. 33, 35). Many state constitutions, for example, expressly protect the right to privacy<sup>12</sup> and contain requirements or guarantees relating to public education.<sup>13</sup> In contrast, Sutton explains that, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court declined to recognize education as a fundamental right under the U.S. Constitution.<sup>14</sup> Rejecting wealth as a suspect classification for Equal Protection purposes, the *Rodriguez* Court also upheld the constitutionality of disparities in per-pupil spending among states' public school districts.<sup>15</sup> In the years following that ruling, however, numerous state supreme courts construed provisions of their respective state constitutions that require states to establish public school systems<sup>16</sup> to mandate some degree of equalized

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12. See, e.g., ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; MONT. CONST. art. II, § 10; see also ARIZ. CONST. art. II, § 8.

13. ILL. CONST. art. X, § 1; N.J. CONST. art. VIII, § IV, ¶ 1; PA. CONST. art. III, § 14; W. VA. CONST. art. XII, § 1.

14. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973).

15. *Id.* at 28–29, 54–55.

16. See, e.g., OHIO CONST. art. VI, § 2 (“The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state. . . .”); TEX. CONST. art. VII, § 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools. . . .”).

spending among school districts (pp. 30–32, 35).<sup>17</sup>

A state supreme court also may provide additional protections for individual liberty by interpreting and applying a state constitution's language differently than federal courts have construed similar or identical provisions in the federal charter (p. 16).<sup>18</sup> Sutton describes how, in *Wolf v. Colorado*, the U.S. Supreme Court held that the Fourth Amendment's prohibition on unreasonable searches—but not the exclusionary rule—was incorporated against state governments.<sup>19</sup> This ruling allowed state law enforcement officials to use evidence seized in violation of the Fourth Amendment in state prosecutions. Nearly half the states went on to reject *Wolf* by adopting their own state-specific exclusionary rules, either through the legislature's enactment of statutory restrictions or the state supreme court's interpretation of the state constitution's analogue to the Fourth Amendment (pp. 58–59).

Likewise, a few decades later, when the U.S. Supreme Court recognized the “good faith” exception to the Fourth Amendment's exclusionary rule in *United States v. Leon*,<sup>20</sup> many state supreme courts declined to follow suit, refusing to create such an exception under their state constitutions (p. 67). Sutton also points out that, in the three years between the Supreme

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17. Sutton points out, “[t]he fortunes of school-funding advocates markedly improved when they shifted their theories of the case from the negative equal-protection-like clauses of the state constitutions to the positive school-funding clauses of the state constitutions” (p. 35). For a more detailed discussion of the use of state constitutional provisions to reform public school funding systems, see Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 2 (1997).

18. The California Constitution expressly disclaims any reliance on the U.S. Supreme Court's interpretation of U.S. Constitution, stating: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” CAL. CONST. art. I, § 24. Under this provision, “even when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical to the federal courts' interpretation of the corresponding provision contained in the federal Constitution.” *Am. Acad. of Pediatricians v. Lungren*, 940 P.2d 797, 808 (Cal. 1997). Proposition 115 added the qualification that the state constitution “shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States.” CAL. CONST. art. I, § 24 (1990). The California Supreme Court held that this provision was invalid because it was “so far reaching as to amount to a constitutional revision beyond the scope of the initiative process.” *Raven v. Deukmejian*, 801 P.2d 1077, 1086 (Cal. 1990).

19. *Wolf v. Colorado*, 338 U.S. 25, 27–29, 31 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 644–45, 651 (1961).

20. *United States v. Leon*, 468 U.S. 897, 922 (1984).

Court's ruling in *Gobitis v. Minersville School District* that public school students may be compelled to salute the American flag<sup>21</sup> and the Court's repudiation of that conclusion in *West Virginia Board of Education v. Barnette*,<sup>22</sup> a few state supreme courts construed their state constitutions differently, protecting students from such coerced expression (pp. 160, 170).

Sutton explains that state constitutional rulings also affect federal constitutional law, both by providing a model that may influence the U.S. Supreme Court's construction of comparable language in the U.S. Constitution, as well as by demonstrating the benefits and drawbacks of various possible constructions (pp. 20, 82, 212). He declares, for example, "[t]he development of the exclusionary rule followed (and continues to follow) a Hegelian path, as the state and federal courts respond to strengths and weaknesses of their own decisions *and* to those of other sovereigns" (p. 67). As mentioned above, the Supreme Court had initially declined in *Wolf v. Colorado* to apply the exclusionary rule to searches by state and local officials that violated the Fourth Amendment.<sup>23</sup> One of the main factors that ultimately led the Court to overturn *Wolf* in *Mapp v. Ohio*<sup>24</sup> was the fact that many state supreme courts had adopted the exclusionary rule under their respective state constitutions (p. 61). Those rulings allowed the Court to assess states' practical experience with extending the rule to state and local police (p. 69). Moreover, Sutton suggests that the state courts' rulings enhanced *Mapp's* legitimacy by contributing to a perception that the Court was responding to "shifting norms," rather than its own subjective preferences (pp. 69–70).

Beyond emphasizing the importance of state constitutions in the protection of individual rights, Sutton also seeks to rehabilitate the frequent image of state legislators and executive officials as the villains of American constitutional law. He offers a counternarrative to the standard model, arguing that such actors have sometimes been more effective than federal courts in protecting individual rights (pp. 2, 6). When the U.S. Supreme Court refuses to recognize rights under the federal Constitution,

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21. *Gobitis v. Minersville Sch. Dist.*, 310 U.S. 586, 600 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

22. *Barnette*, 319 U.S. at 638.

23. *Wolf*, 338 U.S. at 27–29, 31.

24. *Mapp*, 367 U.S. at 644–45, 651.



Sutton claims, state officials sometimes step in to fill the gap as a matter of policy.

Following *Wolf*, for example, some state legislatures enacted statutes applying the exclusionary rule to unconstitutional seizures by state and local police (p. 59). And after the Supreme Court's ruling in *Buck v. Bell* upholding Virginia's involuntary sterilization law,<sup>25</sup> it was state legislatures, rather than federal or state courts, that ultimately eliminated or greatly narrowed most statutes of that nature (pp. 124–127). Sutton contends, “[t]he state legislatures became the eventual heroes of their own story” (p. 125)—though of course it was state legislatures that had enacted compulsory sterilization laws in the first place. Even while sterilization laws remained on the books, Sutton maintains, state executive officials were often reluctant to implement them, providing an additional layer of protection for reproductive freedom (pp. 91–92, 119, 125–126).

These case studies lead Sutton to conclude, similarly to Alexander Bickel,<sup>26</sup> that federal courts should sometimes refrain from adjudicating important constitutional issues (p. 5)—though he does not provide concrete guidance on how they should make that decision. “Maximizing liberty,” Sutton asserts, “does not invariably follow from a national rule” (p. 77). As a corollary, he adds, “[i]n a democracy, there is something to be said for allowing the gravitational forces of representative government to cure problems of its own making” (pp. 127, 215–216).

Sutton further cautions that, when the Supreme Court recognizes a right, it often applies what he calls a “federalism discount”: defining the right narrowly since it will apply in a wide range of circumstances across the entire nation (p. 17).<sup>27</sup> He states, “[o]ne potential price of . . . a nationwide rule on any constitutional right . . . may be a nationwide ebbing of the underlying standard, if not cutbacks on other constitutional rights and principles” (p. 75). This argument is a variation of Daryl Levinson's “remedial equilibration” theory, which teaches that

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25. *Buck v. Bell*, 274 U.S. 200, 207–08 (1927).

26. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF AMERICAN POLITICS* 131–33 (2d ed. 1986).

27. See also Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 389–90, 396 (1984) (explaining that state supreme courts need not take into account the same “federalism concerns” when construing their state constitutions as the U.S. Supreme Court must consider when interpreting the federal Constitution).

the practical consequences of recognizing a right often influence the Court's definition of that right.<sup>28</sup> A state court may have greater flexibility than the U.S. Supreme Court when interpreting its constitution, Sutton contends, because its rulings apply only to a single state and can be tailored to that state's particular circumstances, culture, and needs, to which its judges are attuned (pp. 16, 36).<sup>29</sup>

For example, Sutton suggests that the Supreme Court has been quick to recognize exceptions to the exclusionary rule, such as *Leon's* good faith exception, as a way of limiting the rule's impact on the criminal justice system because *Mapp v. Ohio* extended it to state and local police (pp. 71–73). Sutton speculates that, had the rule remained limited solely to federal law enforcement officials, as it had been under *Wolf*, the Court might have been willing to define it more robustly, subject to far fewer exceptions (p. 71). He likewise attributes the Court's refusal in *Linkletter v. Walker*<sup>30</sup> to apply the rule retroactively to its desire to contain *Mapp's* consequences (p. 74).

Moreover, a Supreme Court ruling affirmatively refusing to recognize a right may lead state courts to construe their state constitutions similarly, reducing those charters' potential as alternate sources of individual liberties. Sutton points out that, prior to *Buck v. Bell*, many state courts had invalidated coercive sterilization measures on federal or state constitutional grounds (pp. 92, 107). "Unlike the state courts' nearly uniform resistance to eugenics legislation before *Buck*," however, "most of the state courts fell in line after *Buck*, even when it came to their independent, uniquely sovereign, and *final* authority to construe their own constitutions" (p. 118; see also pp. 125, 131). Sutton argues that the Court's "clanging endorsement of eugenics policy" even caused legislative repeal of such laws to come about "more slowly" (p. 126).

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28. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–90 (1999) (discussing remedial deterrence).

29. Cf. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993) (arguing that it is likely "an anachronism or romantic myth" to assume that each state is a unique political community). Sutton further suggests that state supreme courts are often better situated than a federal court to force legislatures to raise taxes (p. 38). And, if a state supreme court's interpretation of a state constitution proves erroneous or unworkable, it is more readily correctable than a U.S. Supreme Court ruling, whether through subsequent cases or constitutional amendment (pp. 18, 36).

30. *Linkletter v. Walker*, 381 U.S. 618, 628–29 (1965).

This reasoning leads Sutton to suggest that public school students in indigent school districts may have been better off in the long run as a result of losing *Rodriguez* (p. 35). Had the Supreme Court established a federal right to an education, or to equal funding for education, Sutton contends, it likely would have applied a federalism discount, defining the scope of that right much more narrowly than state courts have construed their state constitutions (pp. 36–37). And state supreme courts may have been tempted to adopt that same narrow baseline in interpreting those state constitutions. Thus, Sutton hypothesizes, the U.S. Supreme Court can sometimes best protect liberty by refraining from even considering the merits of an issue, leaving it instead to state officials and state constitutions—a surprising reversal of the traditional narrative of American constitutional law.

## II. ABSTENTION AND STATE CONSTITUTIONS

Sutton explains that, despite the importance of state constitutions in protecting individual rights, he has heard only a single state constitutional claim over the course of his entire career as a federal judge (p. 8). A major reason why litigants might refrain from pursuing state constitutional claims in federal court is because, in the modern era, the U.S. Supreme Court often requires federal courts to abstain from adjudicating them. Current abstention doctrine is internally inconsistent, however, and not well-tailored to protecting the prerogative of state courts to interpret their respective state constitutions.

Throughout the nineteenth and early twentieth centuries, in the era prior to *Erie Railroad Co. v. Tompkins*,<sup>31</sup> state supreme courts did not always have the last word on the meaning of their state constitutions. At the time, the Supreme Court construed the Rules of Decision Act<sup>32</sup> as requiring federal courts sitting in diversity to generally apply state constitutions and statutes, as well as state court rulings interpreting them.<sup>33</sup> Federal courts in diversity cases were also required to follow state courts' rulings on issues of local law, such as property rights.<sup>34</sup>

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31. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

32. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92, *codified at* 28 U.S.C. § 1652 (2018).

33. *See* *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

34. *See id.* (holding that a federal court sitting in diversity was generally required to follow state court rulings concerning “rights and titles to things having a permanent

“[Q]uestions of a more general nature,” in contrast—particularly commercial matters—were governed by general law rather than state common law.<sup>35</sup> General law was viewed not as the law of a particular sovereign or jurisdiction, such as the federal government or a state, but rather a set of universally applicable principles.<sup>36</sup> Whereas states were required to follow the U.S. Supreme Court’s interpretations of federal law, they were not similarly bound regarding its view of general law. Thus, federal and state courts within a jurisdiction could apply different bodies of law to the same case, with a federal court invoking an ostensibly nationally uniform body of general law, and a state court relying upon its own common law.<sup>37</sup>

Over time, the domain of general law spread, extending beyond commercial transactions to embrace questions of “negligence, punitive damages, and property rights.”<sup>38</sup> When a state statute or even state constitutional provision touched on an area that fell within the federal judiciary’s conception of general law, federal courts would apply general law principles rather than the state supreme court’s otherwise definitive interpretation of that provision.<sup>39</sup> “[T]he federal courts gave independent and

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locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character”).

35. *Id.* at 18–19. Federal courts during this era took a similar approach to equity, applying a uniform body of traditional equitable principles derived from the English Court of Chancery to all cases that came before them, including diversity cases, rather than state statutes or court rulings concerning equitable issues. Despite *Erie*’s abolition of general law, federal courts continue—without a valid foundation—to apply this approach to equitable remedies. See Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 247–49 (2018) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 105–06 (1945)).

36. *Swift*, 41 U.S. at 18–19.

37. Anthony J. Bellia, Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 698–99 (2013); 19 CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE—JURISDICTION AND RELATED MATTERS* § 4502 (3d ed. 2019).

38. Bellia & Clark, *supra* note 37, at 698–99; see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75–76 (1938); see, e.g., *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 373 (1893); *Collins v. Robbins*, 67 U.S. (2 Black) 418, 428–29 (1862).

39. Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1265 (2000); see also Bellia & Clark, *supra* note 37, at 699 n.187 (citing *Capital City State Bank v. Swift*, 290 F. 505, 509 (E.D. Okla. 1923)); Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 132 (2007) (“[F]ederal courts would sometimes refuse to follow state statutes or state constitutions, as interpreted by state courts, if the federal court found that the state law violated more universal principles of jurisprudence.”). “Most notoriously, in some 250 cases, the Supreme Court held that the general common law trumped statutes agrarian states had enacted to protect local debtors against Eastern-owned railroad creditors, provoking resentment in state courts.” David

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largely uniform readings to a variety of ostensibly state constitutional questions including takings of property, taxing and spending for public purposes, rate making and delegation doctrines, and the permissible limits of governmental power.”<sup>40</sup>

In *Gelpcke v. Dubuque*, for example, a municipality had issued bonds under a state law that the Iowa Supreme Court had repeatedly held constitutional in several cases both before and after the bonds were issued.<sup>41</sup> The Iowa Supreme Court later overturned those earlier cases in *State ex rel. Burlington & Missouri River R.R. Co. v. County of Wapello*, holding that the underlying law violated the state constitution and any bonds issued under it were invalid.<sup>42</sup>

The municipality subsequently stopped paying interest on the bonds, and the bondholders sued in diversity in federal court. The U.S. Supreme Court recognized that it was generally required to apply state courts’ interpretations of state constitutions but, since this was an “exceptional case,” it declined to follow *Wapello*.<sup>43</sup> Importantly, the Court did not hold that *Wapello* was contrary to the U.S. Constitution.<sup>44</sup> Rather, it declared that it would not “follow every such oscillation, from whatever cause arising, that may possibly occur” in state courts’ interpretations of their constitutions.<sup>45</sup> Accordingly, it chose to follow the Iowa Supreme Court’s earlier rulings upholding the challenged law, because they were “sustained by reason and authority” and “in harmony with” sixteen other states’ rulings.<sup>46</sup> The Court memorably concluded: “We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.”<sup>47</sup>

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Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1269 (2007).

40. Collins, *supra* note 39, at 1265.

41. *Gelpcke v. Dubuque*, 68 U.S. 175, 202-05 (1864).

42. *Id.* at 205 (citing *State ex rel. Burlington & Mo. River R.R. Co. v. Cnty. of Wapello*, 13 Iowa 388 (1862)).

43. *Id.* at 206.

44. *Cf. id.* at 209 (Miller, J., dissenting) (“[I]t is not pretended that either the statute of Iowa, or its constitution, or the decision of its courts thereon, are in conflict with the Constitution of the United States. . . .”); *see also* James B. Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311, 319 (1891).

45. *Gelpcke*, 68 U.S. at 205.

46. *Id.* at 205-06.

47. *Id.* at 206-07; *see also* *Douglass v. Cnty. of Pike*, 101 U.S. 677, 686 (1879) (“[W]here different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights

Professor James B. Thayer defended *Gelpcke* on the grounds that federal courts exercising diversity jurisdiction had a special obligation to interpret state law independently of state courts to ensure fair treatment of other states' citizens.<sup>48</sup> Since *Gelpcke* involved a matter of general law<sup>49</sup> rather than federal law, it was not binding on state courts. Thus, the Iowa Supreme Court, applying its own precedents, could continue to treat the challenged state law as unconstitutional and refuse to enforce bonds that a federal court, applying *Gelpcke's* conception of general law, would deem legally valid and enforceable.<sup>50</sup>

The U.S. Supreme Court expressly invoked general law in *Pine Grove v. Talcott*, in which it similarly refused to follow the Michigan Supreme Court's rulings concerning the state constitution because they were "not satisfactory to our minds."<sup>51</sup> The *Pine Grove* Court declared, "The question before us"—whether a Michigan law governing bond issuances violated the state constitution—"belongs to the domain of general jurisprudence."<sup>52</sup> Mechanically following the state supreme court's construction of its state constitution on an issue of general law would make a "solemn mockery" of the U.S. Supreme Court's appellate jurisdiction.<sup>53</sup>

In *Erie*, the Court rejected the notion of general law, holding that federal courts sitting in diversity must apply both state statutes and judicial rulings, regardless of whether a matter would be deemed "local," except when federal law requires otherwise.<sup>54</sup> Following *Erie*, the Court reconceptualized its role in construing state constitutions and statutes as trying to anticipate how the state supreme court would resolve the matter.<sup>55</sup> This generally,

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which have accrued under earlier rulings will be injuriously affected."); *Havemeyer v. Iowa Cnty.*, 70 U.S. 294, 303 (1866).

48. See Thayer, *supra* note 44, at 320.

49. David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836–1864*, 1983 DUKE L.J. 471, 494 (suggesting that *Gelpcke* was an extension of general law).

50. See *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 452 (1924).

51. *Pine Grove v. Talcott*, 86 U.S. 666, 677 (1873).

52. *Id.*

53. *Id.* at 678; see also *Olcott v. Supervisors*, 83 U.S. 678, 690 (1872) (holding that the issue of whether certain state and local taxes were imposed for a "public" purpose is "not a question of constitutional construction," but rather a "question of general law," and "[i]ts solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts").

54. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

55. Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie*

though not always, meant following the most recent state supreme court ruling on the issue.<sup>56</sup> Questions remained, however, about the federal judiciary's proper role in cases where a state's caselaw did not clearly reveal how the state judiciary would interpret or apply the state constitution.

Over the years, the Court has developed a series of abstention doctrines that prevent federal courts from resolving doubtful state law issues. Most saliently, *Railroad Commission of Texas v. Pullman* requires federal courts to abstain from adjudicating federal constitutional issues that may be unnecessary to address, based on how a state court resolves an unsettled question of state law.<sup>57</sup> Federal courts typically engage in *Pullman* abstention to give state courts an opportunity to interpret a vague or ambiguous state legal provision in a manner that would eliminate federal constitutional concerns.<sup>58</sup> Litigants who initiate state court proceedings due to *Pullman* abstention may reserve their right to return to federal court, if necessary, to litigate their federal claims.<sup>59</sup> Although res judicata would ordinarily prohibit claim splitting of this sort, *England v. Louisiana State Board of Medical Examiners* created an exception to res judicata to allow litigants forced into state court by *Pullman* abstention to have their federal claims adjudicated back in federal court, instead.<sup>60</sup>

As an alternative to complete abstention, a federal court may instead certify state law issues to the state supreme court for resolution, when state law authorizes that process.<sup>61</sup> Whether a federal court engages in abstention or certification, a litigant who devoted time and resources to pursuing pendent state constitutional claims is unable to have them adjudicated in its chosen forum.<sup>62</sup>

*Pullman* abstention arises from the constitutional avoidance

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*World*, 46 WM. & MARY L. REV. 1399, 1424 (2005).

56. See Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 292–93 (1946) (explaining that federal courts should be able to draw upon the same range of authorities as a state supreme court to predict whether that state supreme court would overturn one of its precedents).

57. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941).

58. See *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); see, e.g., *Bellotti v. Baird*, 428 U.S. 132, 146–47 (1976).

59. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 417–19 (1964).

60. *Id.*

61. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997); see also *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188 (2019).

62. 15A WILLIAM MOORE, FEDERAL PRACTICE, § 106.64.

doctrine and Article III's prohibition on advisory opinions.<sup>63</sup> Potentially dispositive state law issues—such as a pendent state constitutional claim or a question of statutory interpretation—should be resolved prior to a federal constitutional claim, to prevent a potentially unnecessary ruling under the U.S. Constitution. Such concerns do not explain, however, whether the federal or state court should resolve the state law issue.<sup>64</sup>

*Pullman* requires a federal court to defer to state courts primarily to avoid the risk of reaching an erroneous state law ruling.<sup>65</sup> Federal courts' incorrect predictions or conclusions about state law "inevitably skew the decisions of persons and businesses who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court; they may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent."<sup>66</sup> Abstention is also a matter of comity, demonstrating respect for the state judiciary's primary role in interpreting state law.<sup>67</sup>

In other contexts, however, such as diversity cases, the Supreme Court has held that federal courts generally may not abstain from adjudicating unresolved state law issues due to their difficulty or indeterminacy.<sup>68</sup> And many circuits have held that, in federal question cases, concerns about erroneously resolving state law issues do not always permit abstention, such as when the case involves federal statutory claims rather than claims under the U.S. Constitution,<sup>69</sup> or cases in which the plaintiffs seek damages rather

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63. See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, at 499–500 (1941).

64. Cf. *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 191 (1909) (holding that a federal court may resolve a case that raises both federal and state claims by adjudicating the state law issue).

65. *Pullman Co.*, 312 U.S. at 499–500.

66. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1681 (1992).

67. See *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415–16 (1964).

68. See *Meredith v. Winter Haven*, 320 U.S. 228, 236 (1943); accord *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974). The Supreme Court has recognized a few exceptions to *Meredith*, as in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). *Thibodaux* requires federal courts to abstain from adjudicating difficult, unresolved state law issues that are "intimately involved with sovereign prerogative," such as eminent domain. Cf. *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 196 (1959) (holding that federal courts may not abstain from state eminent domain cases where state law is "clear and certain"). The *Thibodaux* exception is "narrow," however, Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1683–84, 1684 n.39 (2003), and thus seldom likely to prevent a federal court from adjudicating state constitutional claims.

69. WRIGHT, *supra* note 37, § 4242; MOORE, *supra* note 62, § 122.21[d].



than equitable relief.<sup>70</sup>

The Court's approach to *Pullman* abstention is similarly conflicted in federal constitutional challenges to legal provisions that also may violate a state constitution. In *Wisconsin v. Constantineau*, the Supreme Court held that the plaintiff could bring a Fourteenth Amendment procedural due process challenge to a state law without first (or also) challenging it under the state constitution's due process provision.<sup>71</sup> It emphasized that plaintiffs are not required to exhaust state court remedies before invoking a federal court's broad federal question jurisdiction.<sup>72</sup> Read in isolation, *Constantineau* appears to hold that abstention is appropriate only when a state court could eliminate the need to adjudicate a federal constitutional claim by resolving some ambiguity or vagueness in the legal provision at issue, rather than by considering potential state constitutional challenges to it.<sup>73</sup>

*Reetz v. Bozanich* complicates the issue, however.<sup>74</sup> There, the plaintiff challenged state fishing laws and regulations under both the Fourteenth Amendment's Equal Protection Clause, as well as a provision of the Alaska Constitution specifically relating to fishing that lacks any federal analogue.<sup>75</sup> The district court held that the law violated the Equal Protection Clause, but the Supreme Court reversed and remanded, holding that the lower court should have abstained to give the state courts a chance to consider the state constitutional challenge first.<sup>76</sup>

The upshot of *Constantineau* and *Reetz* appears to be that federal courts must abstain from adjudicating a federal constitutional claim only when the legal provision at issue may be challenged under a state constitutional provision that lacks a federal analogue and specifically applies to a particular subject area.<sup>77</sup> Abstention is not required when the potentially relevant

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70. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996) (holding that a federal court may dismiss or remand to state court a suit seeking equitable or discretionary relief, but only "stay actions for damages based on abstention principles").

71. *Wisconsin v. Constantineau*, 400 U.S. 433, 437–38 (1971).

72. *Id.* at 439.

73. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 12.2, at 839–40 (7th ed. 2016).

74. *Reetz v. Bozanich*, 397 U.S. 82 (1970).

75. *Id.* at 84 (citing ALASKA CONST. art. VIII, § 15).

76. *Id.* at 87.

77. *Id.*; e.g., *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 84–85 (1975) (holding that the lower court should have abstained from adjudicating a federal equal protection challenge to a redistricting statute to allow state courts to consider whether the measure

state constitutional provision is “broad,” “sweeping,”<sup>78</sup> and comparable to a provision in the U.S. Constitution,<sup>79</sup> such as an Equal Protection<sup>80</sup> or Due Process Clause. This rule applies regardless of whether the plaintiff in the federal lawsuit includes a state constitutional challenge in its complaint.<sup>81</sup> Not all Supreme Court precedents are entirely consistent with that dichotomy, however.<sup>82</sup>

The Court’s unconvincing primary explanation for this dichotomy is that some limiting principle is necessary to prevent federal courts from abstaining too frequently in constitutional cases.<sup>83</sup> Since most state constitutions have general due process and equal protection clauses, requiring abstention whenever a litigant brings a federal due process or equal protection claim would interfere with a wide swath of federal constitutional litigation and amount to de facto exhaustion requirement.<sup>84</sup>

While Sutton contends that most plaintiffs are indifferent to the grounds on which they win a case (p. 9), many public interest

violated state constitutional provisions concerning the length of officeholders’ terms); *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (holding that the lower court should have abstained from adjudicating a federal equal protection challenge to changes to the state’s system for funding public schools to allow state courts to first determine whether they violated the state constitution); see WRIGHT, *supra* note 37, § 4242 (“The proper line appears to be that abstention is in order if the case may turn on the interpretation of some specialized state constitutional provision, but not if the state provision is substantially similar to the federal provision that is the basis of the federal challenge.”); CHEMERINSKY, *supra* note 73, § 12.2, at 840.

78. *Examining Bd. of Engrs., Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976) (holding that abstention was not required to allow Puerto Rican courts to consider the validity of the challenged statute under the Puerto Rico Constitution’s anti-discrimination and equal protection provisions).

79. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984).

80. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971).

81. *Compare Reetz*, 397 U.S. at 87 (requiring *Pullman* abstention in case involving both federal and state constitutional challenges), with *Askew*, 401 U.S. at 478 (requiring *Pullman* abstention where plaintiff brought only a federal constitutional challenge).

82. *See, e.g., City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639, 641 (1959) (holding, in a case involving claims under both the federal and state constitutions’ Contracts Clauses, that when a state court’s “evaluation of [a state law’s] validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily”).

83. *Flores de Otero*, 426 U.S. at 598 (declining to require abstention so that Puerto Rico’s courts could determine whether the challenged statute violated “broad and sweeping” provisions in Puerto Rico’s Constitution to avoid “convert[ing] abstention from an exception into a general rule”).

84. Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1426–27 (1999).

organizations that bring constitutional challenges would often prefer to generate favorable precedents in federal courts of appeals or the Supreme Court under the federal Constitution, because they would be much more widely applicable than a state supreme court's ruling.<sup>85</sup> Indeed, a federal court's ruling on a matter of state constitutional law, while a potentially persuasive precedent, would not even be binding on state courts.<sup>86</sup>

Despite Sutton's disappointment that litigants have generally avoided pursuing state constitutional claims in federal court (p. 8), he embraces abstention and certification of state constitutional questions to state courts (p. 197). He explains that abstention ensures that federal courts do not "intrud[e] on sensitive and complicated issues of state law without giving the state courts a chance to review, and perhaps resolve, the matter first" (p. 197). He also promotes certification as an alternative that "state courts should welcome" (p. 198).

This Review is not the appropriate venue for a comprehensive theory of federal court review of state law claims, but four initial observations are in order. *First*, most basically, if the Supreme Court were to agree with Sutton that litigants should assert state constitutional claims in federal court more frequently, it must revisit *Pullman* abstention and other related doctrines, such as certification, that may deter or hinder them from doing so. Under the Court's current approach, a plaintiff who challenges a state or local legal provision under both the federal and state constitutions increases the risk of having its federal claim delayed. Although a federal court may abstain regardless of whether a plaintiff actually asserts a state constitutional claim,<sup>87</sup> framing a strong claim under the state constitution and affirmatively bringing it to the court's attention underscores its importance. Whether the federal court abstains in favor of separate state litigation or instead certifies the state law question to the state supreme court, the plaintiff must participate in an entirely new set of proceedings.<sup>88</sup> Moreover, the state court may be less hospitable

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85. Public interest groups' desire to secure the broadest possible impact for favorable judicial rulings has contributed to controversies over the validity of nationwide injunctions. See Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

86. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); see also Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 76 (2015).

87. See, e.g., *Askew v. Hargrave*, 401 U.S. 476, 478 (1971).

88. See *Lehman Bros. v. Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring)

to the plaintiff's claims, and its findings or reasoning may negatively influence the federal court if the case returns there.

*Second*, in any event, the Supreme Court should revisit the *Constantineau-Reetz* dichotomy. State supreme courts have the prerogative to construe their constitutions differently from the federal Constitution, even when both documents' language is identical.<sup>89</sup> Accordingly, a state court's opportunity to interpret or apply its constitution generally should not depend on whether a parallel provision happens to exist in the U.S. Constitution, or the provision can be characterized as broad or narrow.<sup>90</sup> The federal judiciary's interests in both avoiding legally inaccurate conclusions and minimizing friction with state courts is the same regardless of how broadly or narrowly a state constitutional provision is drafted. Thus, at a minimum, the Supreme Court should adopt a standard for *Pullman* abstention that applies consistently across all types of state constitutional provisions—regardless of whether that standard ultimately entrusts the task of resolving state constitutional issues in federal cases to federal courts, state courts, or some combination of the two.<sup>91</sup>

*Third*, when a plaintiff brings a federal constitutional challenge to a state or local legal provision, the federal court should not consider abstaining on the grounds that the provision may be subject to challenge under the state constitution unless the

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(“While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.”); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 293–94 (1968).

89. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 293 (1982); Brennan, *supra* note 3, at 489; cf. Michael T. Morley, *Beyond the Elements: Erie and the Standards for Preliminary and Permanent Injunctions*, 52 AKRON L. REV. 457, 486–90 (2018) (demonstrating how various jurisdictions may adapt different interpretations of the same legal standard).

90. Concerns about state constitutional provisions that are part of a detailed, integrated regulatory scheme may instead be addressed in the context of abstention under *Burford v. Sun Oil*, 319 U.S. 315, 334 (1943) (requiring federal courts to abstain from adjudicating difficult state law issues when states have created complex regulatory schemes implemented by administrative agencies); see, e.g., *Ala. Pub. Serv. Comm'n v. So. Ry. Co.*, 341 U.S. 341, 348 (1951); see also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (defining the “*Burford* doctrine”).

91. Part IV of this Review suggests that the standard governing *Pullman* abstention in constitutional cases involving unsettled issues of state law should also apply to a district court's decision about whether to decline supplemental jurisdiction in a federal question case over a pendent state law claim that raises a novel state law issue, see 28 U.S.C. § 1367(c)(1) (2018).

plaintiff has included a state constitutional claim in the complaint.<sup>92</sup> The plaintiff is master of its complaint and may determine the causes of action it wishes to pursue<sup>93</sup> and, through its choice of claims or parties,<sup>94</sup> the forum that will adjudicate the matter.<sup>95</sup> A federal court should not compel a plaintiff to pursue a different cause of action in a different court as a condition of having its federal constitutional claim adjudicated. Under current law, a federal court will generally not decline to adjudicate a federal constitutional claim on the grounds that the plaintiffs could have brought a federal statutory challenge instead. Potential causes of action under state constitutions should not pose greater obstacles to the adjudication of federal constitutional claims.

*Pullman* abstention is appropriate where an antecedent state law question, such as the proper meaning of a state law, poses an obstacle to the accurate resolution of a federal constitutional claim. But the fact that a state or local legal provision may be invalid on state constitutional grounds should not preclude a plaintiff from pursuing their federal constitutional claims. Such an approach impermissibly turns abstention into an exhaustion requirement.<sup>96</sup>

*Finally*, and perhaps most importantly, when federal courts adjudicate state constitutional claims, they should not preclude or seriously impede the state judiciary from reconsidering the issue in subsequent cases. Thus, a federal court should not certify a statewide plaintiff class of all rightholders throughout the state in cases involving a state constitutional challenge to a legal provision.<sup>97</sup> Similarly, federal courts should generally decline to

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92. *Cf. Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (“The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke this rule [of avoiding constitutional questions].”).

93. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398–99 (1987).

94. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005), quoting *MOORE*, *supra* note 62, § 107.14[2][c], at 107–67.

95. *See Caterpillar*, 482 U.S. at 398–99; *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 39 (1909) (“The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”).

96. *Cf. Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). Additionally, *Pullman* abstention is categorically unnecessary based on a state constitutional provision when the state supreme court has adopted a strict, exceptionless “lockstep” interpretation of the provision at issue. In such cases, since the meaning of the state constitution tracks the federal constitution, there is no need for the federal court to delay in adjudicating the federal constitutional issue—even if the state courts have never addressed it.

97. *See* FED. R. CIV. P. 23(b)(2).

enforce a state constitution by entering a statewide defendant-oriented injunction completely prohibiting enforcement of a legal provision against anyone, anywhere in the state.<sup>98</sup> Statewide classes and defendant-oriented injunctions impact rightholders throughout the state, typically precluding or mooted subsequent relitigation, including in state courts. If a federal court believes these types of measures would be appropriate or necessary, it should either abstain or, as discussed in Part IV, decline to exercise supplemental jurisdiction over the state constitutional claim.<sup>99</sup>

Though these proposed reforms do not purport to address the central question of the federal judiciary's role in adjudicating either state law issues in general, or state constitutional issues in particular, they would eliminate arbitrary distinctions in current doctrine, minimize unnecessary abstentions, and ensure that federal courts do not completely displace the state judiciary in resolving state constitutional questions.

### III. SOVEREIGN IMMUNITY AND STATE CONSTITUTIONS

The Eleventh Amendment is another major obstacle to litigating state constitutional claims in federal court. On its face, the Eleventh Amendment prohibits suits in federal court against a state by citizens of other states.<sup>100</sup> The Supreme Court has held that the underlying sovereign immunity principle the amendment codifies also protects a state from lawsuits by its own citizens.<sup>101</sup> Sovereign immunity extends not only to lawsuits against the state itself, but also state agencies<sup>102</sup> and state officers acting in their official capacity.<sup>103</sup>

*Ex parte Young* created an exception to state sovereign

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98. See Morley, *supra* note 85, at 28 (defining “defendant-oriented injunctions”); see also *id.* at 25–27 (discussing the risk of overbroad associational injunctions completely prohibiting enforcement of a legal provision against anyone within a jurisdiction).

99. See 28 U.S.C. § 1367(c)(4) (2018) (allowing district courts to decline supplemental jurisdiction in “exceptional circumstances,” for “compelling reasons”).

100. U.S. CONST. amend. XI.

101. *Hans v. Louisiana*, 134 U.S. 1, 15–16 (1890). These prohibitions extend to lawsuits in both state and federal court. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (holding that a state is immune from private suits in other states' courts); *Alden v. Maine*, 527 U.S. 706, 754 (1999) (same for a state's own courts).

102. *Alabama v. Pugh*, 438 U.S. 781, 781 (1978) (per curiam).

103. *Kentucky v. Graham*, 473 U.S. 159, 165–67 (1985).

immunity, holding that the Eleventh Amendment generally does not prohibit suits against state officers for injunctive relief against violations of the U.S. Constitution.<sup>104</sup> The Court reasoned that state officers who violate the U.S. Constitution act without official authority, since a state cannot authorize constitutional violations.<sup>105</sup> In such cases, the officer is “stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.”<sup>106</sup> The suit “does not affect the State in its sovereign or governmental capacity.”<sup>107</sup>

The Court refused to extend this approach to state officials’ alleged violations of state constitutions, however. In *Pennhurst State School & Hospital v. Halderman*, the Supreme Court held that the Eleventh Amendment protects states, state agencies, and state officers from being sued in federal court for violations of state law, including a state constitution.<sup>108</sup> Even when a plaintiff brings a federal constitutional challenge under *Ex parte Young*, sovereign immunity still applies to any pendent claims under the state constitution.<sup>109</sup> *Pennhurst* explained that the *Young* exception arises from the special “need to promote the vindication of federal rights,” which is categorically inapplicable to a state constitutional claim.<sup>110</sup> Furthermore, instructing “state officials on how to conform their conduct to state law” is a much greater “intrusion on state sovereignty” than enforcing the U.S. Constitution.<sup>111</sup>

*Pennhurst* does not completely preclude federal courts from adjudicating state constitutional claims; for example, they may still hear suits against counties, municipalities, and their officials, who are all unable to invoke sovereign immunity.<sup>112</sup> Nevertheless, the ruling impairs plaintiffs’ ability to litigate state constitutional claims in federal court, since certain claims may be brought only against state agencies or officials. If rightholders suing such defendants wish to preserve their right to a federal forum, they

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104. *Ex parte Young*, 209 U.S. 123, 159–60 (1908). To fall within the *Young* exception, the injunctive relief must be prospective, rather than retrospective, in nature. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

105. *Young*, 209 U.S. at 160.

106. *Id.*

107. *Id.* at 159.

108. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

109. *Id.*

110. *Id.* at 105–06.

111. *Id.* at 106.

112. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

must pursue their federal constitutional claims in federal court and state constitutional claims separately in state court. This approach involves substantial expense, inconvenience, and duplicative use of judicial resources. Perhaps more importantly, unlike with *Pullman* abstention, whichever case concludes first will give rise to res judicata, preventing the other proceeding from concluding.<sup>113</sup> Alternatively, litigants may forego federal court by bringing both their federal and state constitutional challenges in state court, subject to the possibility of Supreme Court review.

Scholars have thoroughly debated whether *Pennhurst* accurately interprets the Eleventh Amendment.<sup>114</sup> Putting aside such larger-scale critiques, the Court could somewhat mitigate the obstacle that the *Pennhurst* Doctrine poses to the litigation of state constitutional claims through a simple procedural device: allowing plaintiffs to assert *England* reservations in state court cases brought due to the *Pennhurst* Doctrine. As noted earlier, *England v. Louisiana State Board of Medical Examiners* provides that a plaintiff that is forced to litigate state law issues or claims in state court because a federal court has engaged in *Pullman* abstention may “reserve” the right to return to federal court to litigate its federal claims, if necessary.<sup>115</sup> *England* is an exception to the res judicata principle that the state court’s judgment concerning state law claims or issues typically precludes subsequent litigation in federal court of federal constitutional claims arising from the same operative facts.<sup>116</sup>

The Supreme Court has implied that *England* reservations apply only in cases involving *Pullman* abstention<sup>117</sup> and repeatedly

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113. Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 658–59 (1985).

114. See, e.g., Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 52–62 (1988) (arguing that, although *Pennhurst* was based on a more historically accurate view of state sovereign immunity than *Young*, the Court’s conclusion was erroneous); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 84–85 (1984) (arguing that *Pennhurst* is based on a historically inaccurate view of sovereign immunity).

115. See *supra* notes 59–60 and accompanying text.

116. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84–85 (1984); see also *Allen v. McCurry*, 449 U.S. 90, 98 (1980). Federal law requires federal courts to apply state law to determine the res judicata effect of a state court judgment. 28 U.S.C. § 1738 (2018); *Allen*, 449 U.S. at 96.

117. See *Migra*, 465 U.S. at 85 n.7 (holding that, when “federal and state-law claims are sufficiently intertwined,” a “plaintiff can preserve his right to a federal forum for his federal claims” if the “federal court abstains from passing on the federal claims to first allow the state court to address the state-law issues”). Some lower courts, however, have



declined to expand exceptions to res judicata principles.<sup>118</sup> Some commentators have likewise concluded that federal courts must afford full res judicata effect to state court judgments issued in the *Pennhurst* context<sup>119</sup> and decline to recognize *England* reservations.<sup>120</sup> *England*'s reasoning, however, squarely supports recognizing an exception to res judicata when *Pennhurst* precludes plaintiffs from pursuing state constitutional claims against state officers in federal court.<sup>121</sup>

*England* held that a "litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims" should not be compelled, "without his consent and through no fault of his own, to accept instead a state court's determination of those claims."<sup>122</sup> A state court's role in interpreting state law cannot limit the federal judiciary's "primacy . . . in deciding questions of federal law."<sup>123</sup> A plaintiff's

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nevertheless enforced *England* reservations to allow plaintiffs who litigated state constitutional claims in state court due to the *Pennhurst* Doctrine to later turn to federal court to litigate federal constitutional issues. See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1268 & n.178 (2004) (citing cases).

118. See *Migra*, 465 U.S. at 84–85 (declining to recognize an exception to res judicata for § 1983 claims); *Fed. Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (declining to recognize an exception to res judicata because the doctrine "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case"); see also *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917) (holding that res judicata "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts" (quotation marks omitted)).

119. See, e.g., James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 750–51 (1999); Robert H. Smith, *Pennhurst v. Halderman: The Eleventh Amendment, Erie, and Pendant State Law Claims*, 34 BUFF. L. REV. 227, 277 (1985). But see David Shapiro, *The Supreme Court, Comment, 1983 Term: Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 81 (1984).

120. See, e.g., Louise Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075, 1082 (1985) ("[T]he reservation procedure approved in *England v. Louisiana State Board of Medical Examiners* now appears to be unavailable outside the narrow 'abstention' context of the *England* case itself. That seems to be so even though [a] plaintiff's post-*Pennhurst* litigation can scarcely be said to be voluntarily in state court."); see also Barbara Ann Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59, 80 (1982); Leanne B. De Vos, Comment, *Claim Preclusion and Section 1983 Civil Rights Actions: Migra v. Warren City School District Board of Education*, 70 IOWA L. REV. 287, 303 (1984).

121. See, e.g., *Del. Valley Transplant Prog. v. Coye*, 722 F. Supp. 1188, 1198–99 (D.N.J. 1989); cf. Friedman, *supra* note 117, at 1268–69.

122. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415 (1964).

123. *Id.* at 415–16.

ability to seek a writ of certiorari from the U.S. Supreme Court from a state court's ruling on a federal issue is no substitute for the right to litigate that federal claim in federal court in the first instance.<sup>124</sup>

Although *England* concerned the right to return to federal court after litigating state law issues in state court as a result of *Pullman* abstention, this reasoning is equally applicable in the context of the *Pennhurst* Doctrine. Both *Pullman* abstention and the *Pennhurst* Doctrine are constitutionally rooted, judicially created principles that require litigation of certain state law claims in state court to protect state sovereignty. Applying res judicata in either context would impede plaintiffs' access to a federal forum for the adjudication of their federal rights.

On the other hand, a major difference between *Pullman* abstention and the *Pennhurst* Doctrine is that the former can be completely unavoidable, whereas a plaintiff may always avoid the latter by foregoing its state law claims. *Pullman* abstention applies whenever resolution of an unsettled issue of state law—including a state constitutional issue—could alleviate the need for a federal court to reach a federal constitutional ruling.<sup>125</sup> Accordingly, a federal court may engage in *Pullman* abstention and require a plaintiff to litigate a state law issue in state court even when a complaint raises only federal claims.<sup>126</sup> In such cases, there is no way for a plaintiff with federal claims to retain its right to a federal forum without an exception to res judicata principles.

With the *Pennhurst* Doctrine, in contrast, a plaintiff may guarantee its right to litigate its federal constitutional claims against state officials in a federal forum simply by foregoing any pendent claims under the state constitution. State sovereign immunity poses no obstacle to pursuing federal constitutional claims against state officials in federal court;<sup>127</sup> *Pennhurst's* restrictions are triggered only by a plaintiff's choice to also pursue state law claims for which the state enjoys sovereign immunity. If federal courts wish to follow Sutton's advice and promote state constitutions as vibrant, independent sources of rights, however, they should not force plaintiffs to forego state constitutional claims as a condition for litigating their federal constitutional

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124. *Id.* at 416–17.

125. *See supra* notes 57–58, 63 and accompanying text.

126. *See Askew v. Hargrave*, 401 U.S. 476, 478 (1971).

127. *See Ex parte Young*, 209 U.S. 123, 159–60 (1908).

rights in federal court. Assuming the Supreme Court intends to retain its current conception of state sovereign immunity, including the *Pennhurst* Doctrine, it should enforce *England* reservations in that context. In other words, when the *Pennhurst* Doctrine requires a plaintiff to litigate state constitutional claims against state officials in state court, *res judicata* should not preclude that plaintiff from subsequently litigating its related federal constitutional claims against those defendants in federal court.

#### IV. DECLINING SUPPLEMENTAL JURISDICTION OVER STATE CONSTITUTIONAL CLAIMS

When neither abstention requirements nor the Eleventh Amendment prohibits a federal court from adjudicating state constitutional claims, it usually may still decline to exercise supplemental jurisdiction over such claims in federal question cases. District courts do not have subject-matter jurisdiction over state constitutional claims *per se*. They may exercise diversity jurisdiction over such claims, in the rare circumstances they arise in litigation between citizens of different states.<sup>128</sup> Most opportunities to adjudicate state constitutional claims, however, arise in federal question cases. Plaintiffs pursuing federal causes of action may invoke the court's supplemental jurisdiction under 28 U.S.C. § 1367 to assert state law claims arising from the same "core nucleus of operative fact" as their federal claims.<sup>129</sup> In *City of Mesquite v. Aladdin's Castle*, for example, the United States Court of Appeals for the Fifth Circuit invalidated a local ordinance under parallel provisions of the federal and Texas constitutions.<sup>130</sup>

Unlike most other grants of subject-matter jurisdiction,<sup>131</sup>

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128. 28 U.S.C. § 1332(a) (2018); see Roger F. Williams, *Foreword: Continued Commitment to State Constitutional Law*, 38 VAL. U. L. REV. 317, 318 (2004); see also Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 60 & n.295 (2007).

129. 28 U.S.C. § 1367(a) (2018); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

130. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 291 (1982). The Supreme Court remanded the case so the Fifth Circuit could clarify whether its ruling on the state constitutional claim constituted independent and adequate state law grounds for its judgment. *Id.* at 295.

131. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (discussing the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

however, supplemental jurisdiction is discretionary.<sup>132</sup> In a federal question case, § 1367(c)(1) allows a district court to decline jurisdiction over a state law claim that raises “a novel or complex issue of State law.”<sup>133</sup> A separate provision allows the court to similarly refuse jurisdiction over pendent claims, including state constitutional claims, when all of the federal claims in the suit have been dismissed.<sup>134</sup> The Supreme Court has directed lower courts to exercise this discretion “in the manner that best serves the principles of economy, convenience, fairness, and comity.”<sup>135</sup> Whereas *Pullman* abstention applies only when a plaintiff has brought a federal constitutional challenge,<sup>136</sup> district courts may decline supplemental jurisdiction regardless of the nature of the underlying federal causes of action.

District courts frequently refuse to exercise supplemental jurisdiction over state constitutional challenges to state and local legal provisions,<sup>137</sup> particularly where the state supreme court does not construe its state constitution in lockstep with the U.S. Constitution<sup>138</sup> or the relevant provisions of the two charters materially differ from each other.<sup>139</sup> Federal courts explain that such dismissals demonstrate “respect for the right of a state court system to construe that state’s own constitution.”<sup>140</sup> This

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132. See *City of Chicago v. Int’l College of Surgeons*, 522 U.S. 156, 173 (1997).

133. 28 U.S.C. § 1367(c)(1) (2018).

134. *Id.* § 1367(c)(3); see, e.g., *Watson v. City of Allen*, 821 F.3d 624, 642 (5th Cir. 2016).

135. *Int’l College of Surgeons*, 522 U.S. at 172–73 (quoting *Carnegie-Mellon v. Cohill*, 484 U.S. 343, 357 (1988)).

136. See *supra* notes 57–58, 63 and accompanying text.

137. E.g., *Peterson v. Miami Corr. Facility*, No. 3:07-CV-397, 2008 U.S. Dist. LEXIS 34565, at \*17 (N.D. Ind. Apr. 18, 2008); *Mulgrew v. Fumo*, No. 03-CV-5039, 2004 U.S. Dist. LEXIS 14654, at \*7 (E.D. Pa. July 29, 2004); *Lansing Mercy Ambulance Serv. v. Tri-Cnty. Emergency Med. Cont. Auth., Inc.*, 893 F. Supp. 1337, 1348 (W.D. Mich. 1995); see also *Patel v. City of Los Angeles*, No. 2:13-CV-09358-SVW-AS, 2014 U.S. Dist. LEXIS 196990, at \*7 (C.D. Cal. Sept. 18, 2014); *Akrawi v. Remillet*, No. 10-13234, 2011 U.S. Dist. LEXIS 115134, at \*38 (E.D. Mich. Aug. 18, 2011); *Summum v. Pleasant Grove City*, No. 2:05-CV-638 (DAK), 2010 U.S. Dist. LEXIS 55024, at \*10 (D. Utah June 2, 2010).

138. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1354 (10th Cir. 1997) (holding that the district court should have declined to exercise supplemental jurisdiction over the plaintiff’s free exercise and establishment clause claims under the Utah Constitution, because the Utah Supreme Court’s interpretation of those provisions does “not follow federal constitutional models” and “appears to be undergoing an evolution”), *aff’d in relevant part and rev’d in part on other grounds*, 159 F.3d 1227 (10th Cir. 1998) (en banc).

139. *Trump Hotels & Casino Resorts v. Mirage Resorts*, 140 F.3d 478, 483, 487 (3d Cir. 1998).

140. *Doe v. Sundquist*, 106 F.3d 702, 708 (6th Cir. 1997); see also *Collins v. Daniels*, No. 1:17-CV-00776-RJ, 2017 U.S. Dist. LEXIS 225034, at \*67 (D.N.M. Dec. 11, 2017);

consistent reluctance to adjudicate state constitutional claims is another contributing factor that deters plaintiffs from devoting time and resources to attempting to litigate them in federal court.

Sutton's concern about the lack of state constitutional claims in federal court (p. 8) suggests that lower courts should reconsider their consistent reluctance to exercise supplemental jurisdiction over them. In the post-*Erie* world, state courts are the final expositors of state law, including state constitutional law. When a federal court adjudicates a state constitutional issue, it is primarily performing a dispute resolution, rather than law exposition, function<sup>141</sup>—particularly since its interpretation of the state constitution is not binding on state courts. Viewed from that perspective, allowing federal courts to resolve state constitutional issues expedites resolution of cases and reduces litigants' costs by eliminating the need for parallel state court litigation.

Moreover, Professor Robert Schapiro argues that federal courts' adjudication of state constitutional issues facilitates cross-pollination of ideas and can provide greater protection than elected state judges for members of politically unpopular groups.<sup>142</sup> Input from federal courts may improve the quality of state courts' constitutional interpretation by promoting a dialogue between the courts. As an alternate forum for construing state constitutional provisions—albeit not definitively—federal courts can also act as a check, deterring state courts from underenforcing state constitutional norms.<sup>143</sup>

On the other hand, federal courts' adjudication of state constitutional claims can hinder the ability of state courts to develop their own body of state constitutional law distinct from federal constitutional law. Every state constitutional issue that a federal court adjudicates is a missed opportunity for state courts to articulate state constitutional norms for themselves. And as a body of federal precedent concerning the meaning of state constitutional provisions develops, it may exert a gravitational force on state courts' reasoning, even though it is not formally binding.<sup>144</sup> As noted earlier, federal courts also risk reaching

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Smith v. Carrasco, 334 F. Supp. 2d 1094, 1099 (N.D. Ind. 2004).

141. See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 494 (1994).

142. Schapiro, *supra* note 84, at 1441–48.

143. *Id.* at 1450–51.

144. Cf. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV.

erroneous conclusions about state constitutional provisions without the opportunity for correction by the state supreme court.

Thus, § 1367(c)(1) raises many of the same questions concerning the proper role of federal courts in construing state law as the *Pullman* abstention doctrine.<sup>145</sup> Rather than treating these as distinct issues, the Court should apply a single, consistent standard to both. *Pullman* abstention occurs when an unsettled issue of state law arises in a case involving a claim under the U.S. Constitution.<sup>146</sup> Section 1367(c)(1) applies when a novel issue of state law arises in a federal question case.<sup>147</sup> The former may therefore be seen as simply a special case of the latter. Instead of construing § 1367(c)(1) as an independent, broad grant of discretion to district courts,<sup>148</sup> it should be read as codifying the same standard for declining supplemental jurisdiction as *Pullman* establishes for abstention—however the Court chooses to define it.

## V. CONCLUSION

*51 Imperfect Solutions* demonstrates the various ways in which federal and state constitutional law interact. Sometimes, state courts construe state constitutions to protect individual rights to a greater extent than the U.S. Constitution. In other cases, the U.S. Supreme Court's narrow interpretation of the federal Constitution induces state courts to adopt similarly limited constructions of analogous provisions within their own constitutions. And in still others, state supreme courts' interpretations of their respective charters influence the U.S. Supreme Court to broaden its approach to the U.S. Constitution.

While Sutton emphasizes the important role that state courts

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703, 725–26 (2016).

145. See David D. Siegel, Practice Commentary: The 1990 Adoption of § 1367, Codifying “Supplemental” Jurisdiction, 28 U.S.C.A. § 1367, at 834–35 (West 1993); Deborah J. Challener & John B. Howell, III, *Remand and Appellate Review When a District Court Declines to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)*, 81 TEMP. L. REV. 1067, 1099 n.195 (2008); cf. Schapiro, *supra* note 84, at 1421 n.52 (“Section 1367’s codification of novelty and complexity presents some tension with the doctrine of *Pullman* abstention.”); Joseph N. Akrotirianakis, Comment, *Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c)*, 31 LOY. L.A. L. REV. 995, 1021 (1998) (arguing that § 1367(c)(1) does not codify *Pullman* abstention).

146. R.R. Comm’n v. *Pullman Co.*, 312 U.S. 496, 500 (1941).

147. 28 U.S.C. § 1367(c)(1) (2018).

148. Cf. *City of Chicago v. Int’l College of Surgeons*, 522 U.S. 156, 173 (1997).

play in construing state constitutions, the book leaves unanswered questions about the role of federal judges. Current Supreme Court doctrine is riddled with inconsistencies. A federal court's ability to resolve unsettled issues of state law differs depending on whether a case arises under its federal question or diversity jurisdiction.<sup>149</sup> For state constitutional claims, a federal court's power depends on whether the provision at issue has an analogue in the federal constitution.<sup>150</sup> The Court should synthesize its precedents in this area and articulate a coherent theory—a theory rooted in considerations of federalism, comity, judicial economy, and concern for the adequate and accurate enforcement of litigants' underlying substantive rights—about federal judges' responsibility, if any, for addressing unsettled state law issues.

Scholars such as Professor Robert Schapiro urge a broad role, emphasizing the value of inter-court dialogue.<sup>151</sup> Others, such as Judge Dolores Sloviter of the Court of Appeals for the Third Circuit, are more concerned about federal judges' limited ability to correctly anticipate how state supreme courts will resolve unsettled state law issues.<sup>152</sup> As a first step, this Review suggests initial procedural reforms to reduce friction between federal and state courts and promote consistency and predictability in the litigation of state constitutional issues. *51 Imperfect Solutions* helpfully spotlights state constitutions as an important substantive source of rights, but we must give equal consideration to the challenging procedural issues they raise under “Our Federalism.”<sup>153</sup>

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149. Compare *Pullman*, 312 U.S. at 500 (requiring federal courts to abstain from adjudicating unsettled issues of state law in cases involving a claim under the U.S. Constitution), with *Meredith v. Winter Haven*, 320 U.S. 228, 236 (1943) (generally prohibiting federal courts from abstaining from adjudicating unsettled issues of state law in diversity cases).

150. Compare *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (requiring federal courts to abstain from adjudicating federal constitutional claims to allow state courts to first address potential claims under narrow, unique provisions of state constitutions), with *Wisconsin v. Constantineau*, 400 U.S. 433, 437–38 (1971) (prohibiting federal courts from abstaining from adjudicating federal constitutional claims to allow state courts to first address potential claims under analogous state constitutional provision).

151. Schapiro, *supra* note 84, at 1441–48.

152. Sloviter, *supra* note 66, at 1681.

153. *Younger v. Harris*, 401 U.S. 37, 44 (1971).