RADICAL STATE CONSTITUTIONALISM

Jason Mazzone[*]

In 51 Imperfect Solutions: States and the Making of American Constitutional Law*, Jeffrey Sutton rightly highlights the past significance and future potential of state constitutions and state courts to our system of constitutional government. But Sutton does not push his argument as far as he might. This review essay assesses and builds upon Sutton's approach in order to offer a more radical version of state constitutionalism than Sutton himself proposes. The essay argues that almost every legal claim, whether in state or federal court, that state government has violated the federal Constitution requires determining whether the state constitution itself permits or prohibits the challenged state governmental action. That issue is relevant even if the plaintiff has not asserted a state law cause of action. For if the state constitution forbids a challenged state law or state executive conduct, and a ruling to that effect fully remedies the complained-about state action, the case can end with a judgment in the plaintiff's favor, without a ruling on whether the federal Constitution itself was violated. Radical state constitutionalism puts state constitutions at the very center of American constitutional law.*

I.

Toward the end of his book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*,[1] Jeffrey Sutton recommends a series of practices by which state courts could play a greater role in advancing constitutional rights under their own state constitutions. One of his recommendations, borrowed from an earlier proposal by Hans Linde,[2] concerns the sequence in which state courts decide federal and state claims that are raised in a single case. Sutton, like Linde, urges state courts to decide first the claims asserted under the state constitution before considering next the federal constitutional claims. He argues that adopting this sequence would promote independent consideration of state constitutional claims and thus help remedy the problem of "lock-stepping"[3] that

[*] Albert E. Jenner, Jr. Professor of Law and Director, Program in Constitutional Theory, History and Law, University of Illinois at Urbana-Champaign. My thanks to Vik Amar for helpful comments.

1. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 5 (2018).

2. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 133 (1970).

3. SUTTON, *supra* note 1, at 174.

occurs when state courts, interpreting state constitutions, just follow along with how federal courts interpret analogous provisions of the federal Constitution. More importantly, Sutton observes, resolution of the state constitutional claims might give the plaintiff full relief and make a decision on the federal claims unnecessary.[4] That possibility matters, Sutton explains, because a state court decision holding that state government has violated the state constitution should be understood as an element of state action for purposes of deciding a federal claim, particularly one brought under the Fourteenth Amendment.[5] Sutton writes: "When a state court arrests the relevant state action under its own constitution, any deprivation of life, liberty or property or denial of equal protection evaporates."[6] This is because, as Linde had explained, "[w]hether . . . [the Fourteenth Amendment] has been violated depends on what the state has finally done" and if the state court holds that the state government has violated the state constitution, then "[b]y the action of the state court under the state constitution, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it."[7]

This short essay, prepared for a symposium on *51 Imperfect Solutions*, picks up on the relationship Sutton and Linde identify between resolution of a state constitutional claim and the Fourteenth Amendment. Sutton and Linde make the case for understanding state court decisions under state constitutions as potentially resolving federal constitutional claims in cases challenging state governmental actions.[8] But neither Sutton nor Linde takes the point to its logical conclusion. Both authors focus on how courts, and particularly state courts,[9] should resolve cases in which the plaintiff asserts claims under both the state and federal Constitution. Their shared assumption is that there is no role for the state constitution unless the plaintiff challenging what the state government has done has actually brought a state constitutional cause of action as part of the case.[10] The difficulty in that, as Sutton points out, is that in many challenges to state laws or state governmental action, litigants assert only federal constitutional claims—a phenomenon that short-circuits efforts to revitalize state constitutional law because "[t]here's not much a state court can do when it comes to vindicating the independence of its state constitution if lawyers don't raise claims under their own charters."[11]

4. *Id.* at 178–79.

5. Sutton also notes that first resolving the state law claim would be consistent with the federal doctrines of constitutional avoidance (by which federal courts themselves do not resolve federal constitutional claims if there is another basis for deciding the case) and abstention (to allow for resolution in state court of an unsettled question of state law) and so serves also inter-sovereign comity. *Id.* at 181–82.

6. *Id.* at 181.

7. Linde, *supra* note 2, at 133.

8. SUTTON, *supra* note 1, at 181; Linde, *supra* note 2, at 134–35.

9. This is not to say that Sutton and Linde are not concerned with how federal courts faced with state and federal claims might act to enhance state constitutional law. *See, e.g.*, SUTTON, *supra* note 1, at 197–202 (discussing sequencing in federal court, certification of state law questions, and increased federal review of state court criminal cases as mechanisms by which federal courts could increase the salience of state constitutions).

10. *Id.* at 199.

11. *Id.* at 191.

That, however, is not the necessary or even the most obvious conclusion. Once a state constitution is understood to be part of the state law that is at issue in determining whether the state has violated the Fourteenth Amendment or another provision of the federal Constitution, a far grander—indeed radical—project emerges. *Every* claim that a state government has acted in violation of the federal Constitution potentially requires a determination as to whether the state constitution itself permits or prohibits the challenged state governmental action.[12] That issue is relevant whether or not a plaintiff actually asserts a state law cause of action in the particular case. The state constitution might well give rise to a state constitutional claim and, if one is brought, courts should consider it. But even when only a federal claim is brought, courts—state and federal—necessarily look at what state government has done in hearing the claim.[13] What the state has done should include consideration of what the state constitution actually permits. If the state constitution forbids a challenged state law or state executive conduct, and a ruling to that effect fully remedies the complained-about state action, the case can end, with a judgment in the plaintiff's favor, without a ruling on whether the federal Constitution itself has been violated.

Sutton himself edges close to this very point, as did Linde before him,[14] but they avoid embracing it because while they begin with state constitutions as relevant to the Fourteenth Amendment question, they then shift to the decisions of state courts and to claims that are actually raised under state law as the pertinent considerations. Sutton writes:

> If the state constitution prevents state law from being enforced or prohibits a state official from acting, what work is left for the Federal Constitution to do? . . . Nothing prohibits a state constitution from forming 'part of the total state action in a case,' . . . . When a *state court* arrests the relevant state action under its own constitution, any deprivation of life, liberty, or property or denial of equal protection evaporates.[15]

It is not, though, a state court decision that matters so much as it is that the state constitution renders the challenged state governmental action invalid.[16] To

12. *Id.* at 192.

13. *Id.*

14. *See* Linde, *supra* note 2, at 182–83 ("The obligation to dispose of questions of state law, including constitutional law, before holding the state in violation of a federal command applies in strict logic when the case originates in federal court just as in a state court, except insofar as the federal court is bound by a state decision on state law. Where a favorable disposition under the state constitution is available, a claim of unconstitutionality in federal court should not vault past the state constitution to the federal issue any more than in a state court.").

15. SUTTON, *supra* note 1, at 180–81 (citations omitted) (footnote omitted) (emphasis added).

16. Compare also Linde's approach. He writes:

> Whether . . . [the Fourteenth Amendment] has been violated depends on what the state has finally done. Many low-level errors that potentially deny due process or equal protection are corrected within the state court system; that is what it is for. The state constitution is part of the state law, and decisions applying it are part of the total state action in the case. When the state court holds that a given state law, regulation, ordinance, or official action is invalid and must be set aside under the state constitution, then the state is not violating the fourteenth amendment. . . . *By the action of the state court under the state constitution*, the state has accorded the claimant the due process and equal protection commanded by the fourteenth amendment, not denied it.

Linde, *supra* note 2, at 133 (emphasis added). Again, the assumption is that avoidance of the federal constitutional issue occurs when a state court first adjudicates the state constitutional law claim asserted in the case. *See also*

be sure, if a plaintiff in state court presents a state constitutional claim and (as Sutton recommends) the state court addresses that claim first and determines that the state has violated the state constitution, then there may be no need to address the related federal claim the plaintiff has made.[17] But that is not the only possibility. A refusal on the part of the state attorney general to implement an unconstitutional state law also renders unnecessary litigation under the federal Constitution—as does a superior's decision to block, on state constitutional grounds, a state officer's challenged actions. In addition, a federal constitutional claim brought in state court or in federal court might itself be resolved by a ruling that the state constitution prohibits what the state government has done. The relevance of the state constitution to determining what state law provides and permits does not depend upon a litigant asserting in a separate cause of action that the state constitution has been violated.[18]

II.

Radical state constitutionalism has several significant consequences. The most obvious consequence is that the state constitution would potentially be at issue in every case that raises a challenge under the federal Constitution to a state law or the actions of state government. This would be true whether the challenge is brought in state court or in federal court and whether or not the plaintiff actually asserts a state constitutional law cause of action.[19] Federal courts and state courts alike would thus routinely determine the requirements and limitations imposed upon state government by the state constitution.

At the same time, state supreme courts would retain the final word on the meaning of the state constitution and their interpretations would be authoritative in federal proceedings. Of course, if a state's highest court has not ruled on an issue of state constitutional law, the federal court will be required to do so.[20] Accordingly, at times, the federal court will face an uncertain question of state constitutional law (as federal courts, in some instances, do now). In such circumstances, the federal court might elect to abstain from a decision on the state law issue so as to allow the state courts first to resolve the question.[21] Alternatively, if certification is available, a federal court might certify an issue to the state's

id. at 135 ("*Claims* raised under the state constitution [in state court] should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection.") (emphasis added).

17. SUTTON, *supra* note 1, at 178–79.

18. *Id.* at 180.

19. *Id.*

20. *See* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301–02 (2003).

21. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498–500 (1941) (holding that federal courts may abstain from ruling on a federal constitutional issue when the state's highest court has yet to give the challenged state law a definitive interpretation, and that interpretation may obviate the need to decide the federal constitutional issue).

highest court for resolution.[22] Given existing limitations to abstention[23] and certification,[24] however, in many cases the federal court will be required to decide the state constitutional issue, as federal courts already do in other contexts.[25]

The proposal might usefully be situated in the context of doctrines of constitutional avoidance under which federal courts "ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable."[26] Articulated most prominently by Justice Brandeis in *Ashwander*,[27] the doctrine requires disposition of statutory questions before constitutional questions[28] and construction (where possible) of statutes in a way such as to avoid a constitutional issue[29] (and, in a modern formulation that Sutton highlights, resolution of state law claims before adjudication of federal constitutional claims).[30] Here of course, the proposal is for federal courts to resolve, if they can, cases on state constitutional law grounds rather than on the basis of the federal Constitution. Perhaps that form of avoidance has less intuitive appeal than does the now standard practice

22. *See, e.g.*, Virginia v. Am. Booksellers Ass'n., Inc., 484 U.S. 383, 393–98 (1988) (certifying two questions of statutory interpretation to the Virginia Supreme Court in a First Amendment case).

23. *See* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) ("[A]bstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain, but should proceed to decide the federal constitutional claim. We would negate the history of the enlargement of the jurisdiction of the federal district courts if we held the federal court should stay its hand and not decide the question before the state courts decided it.") (citation omitted) (footnote omitted).

24. State courts are not required to answer certified questions. *See* Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* , 29 SUFFOLK U. L. REV. 677, 681 (1995) (collecting cases in which the state supreme court refused to answer a certified question and provided either no explanation (or a terse one) for the refusal). State courts might also take a long time before announcing their refusal. *See, e.g.*, Am. Mun. Power, Inc. v. Bechtel Power Corp., 146 Ohio St. 3d 251 (Ohio 2016) (refusing, in a one sentence order, to answer a question of state law certified by a federal district court eighteen months previously). Federal judges themselves might be disinclined to certify. *See* Calabresi, *supra* note 20, at 1301 ("Federal judges don't like to certify, because we think we know, better than the states, what state law ought to be.").

25. As the Supreme Court has explained, in diversity cases the task of the federal court is to apply state law as construed by the state's highest court. If the state's highest court has not ruled on the issue, the federal court is to apply state law in the way it believes the state court would apply it. *See* Comm'r of Internal Revenue v. Bosch, 387 U.S. 456, 465 (1967) (citing Berhardt v. Polygraphic Co., 350 U.S. 198 (1956)) ("[T]he State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect it may be said to be, in effect, sitting as a state court.").

26. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).

27. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (identifying a "series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.").

28. *See id.* at 347 (citing Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909)) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

29. *See id.* at 348 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)) ("When the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, . . . [the Court] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

30. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 87 (5th ed. 2003) (discussing applicability of avoidance doctrine when a plaintiff seeking "relief on federal constitutional grounds also asserts a right to relief under a federal statute or regulations or on state law grounds").

of federal courts deciding issues on statutory grounds in order to avoid constitutional questions. After all, one might wonder whether there is much benefit to a federal court potentially resolving an uncertain question of state constitutional law just to avoid a ruling under the federal Constitution with which federal courts are likely to be more familiar and which might even provide a more certain result. Nonetheless, at the end of the day, a federal court invalidating state action as prohibited by the state constitution is more accommodating of the state than is the more dramatic step of holding that the state has violated the federal Constitution.[31] A ruling on state constitutional grounds returns the issue to the states to address and correct (if they choose) including by amending the state constitution.[32]

There is thus likely to be an increase in the frequency with which federal courts address issues of state law, but the change would not impose any novel duties upon the federal judiciary. Federal courts already decide state law issues (most often in diversity cases), including issues of state constitutional law, and there is no reason to think they cannot continue to do so in cases involving federal constitutional challenges to state action.[33]

More generally, under the approach suggested here, state constitutions would be secured as a basic and ordinary element of the constitutional landscape. State and federal courts alike would interpret and apply provisions of state constitutions in the same way they both already interpret and apply provisions of the federal Constitution. Accordingly, the importance of state constitutions would not depend, as it does in Sutton's own proposal,[34] on the willingness of litigants to file separate state constitutional claims and for state courts to prioritize state claims and interpret the state constitution independently of the federal Constitution. Instead, state constitutional law would be in play in virtually every constitutional challenge to state governmental action.

The new significance of state constitutional law would also arise without any diminishment of the rights of parties. A plaintiff could still bring a lawsuit in federal court or in state court and raise state claims along with federal claims or assert only a federal cause of action.[35] The proposal offered here would entail a kind of exhaustion of the state law issue before proceeding to the federal claim but it would not require the exhaustion of remedies available in state court (or from other state tribunals) prior to litigating in federal court.[36]

31. *See Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

32. Significantly, a federal court's constructions of a statute so as to avoid a constitutional question does not depend on the plaintiff having asserted some kind of statutory claim. *See id.* at 346–48. Likewise, under the proposal offered here, there would be no requirement that a plaintiff assert a state constitutional law claim to make the state constitution a relevant—indeed an essential—element of the federal challenge to state action.

33. *See* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1436 (1999) ("[F]ederal adjudication of state constitutional claims might represent a desirable instance of crossfertilization, rather than a necessary evil.").

34. SUTTON, *supra* note 1, 192–93.

35. *See supra* text accompanying notes 11–13.

36. *See, e.g.*, McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 671–72 (1963) (explaining that § 1983 plaintiffs need not exhaust state court remedies before bringing suit in federal court). From a different angle, the approach suggested in this essay also does not raise the issue of ripening and then claim

In many cases, there would exist considerable motivation for parties and courts to engage in serious and independent explication of state constitutional provisions. Consider a case in which a plaintiff goes to federal court to enjoin under the First Amendment a city's denial of a permit to hold a political rally in a public space. The court will ask whether state law permits what the city has done before turning to First Amendment considerations.[37] The plaintiff might not have thought of asserting a state law claim but now has a strong incentive to explain the limitations of the state constitution. The city, for its part, cannot prevail solely by showing it has acted consistently with the state constitution.[38] But it likely has an incentive to avoid an adverse ruling on state constitutional grounds—and thus to explicate the meaning of the state constitution—even if the final result is that it loses under the First Amendment. The court may have an incentive also to determine what the state constitution permits and prohibits, because doing so may provide an opportunity to avoid the heavy-handed measure of invalidating state action on federal constitutional grounds or because there is no clearly correct answer as a matter of federal constitutional law.

Naturally, incentives will vary across cases and thus generate different strategies. Sometimes, a plaintiff will want to get to the federal constitutional issue, perhaps because the plaintiff expects to win and perceives a decision grounded in the federal Constitution as more robust or secure. In some cases, the state might prefer a determination that the state constitution has been violated because then there exists the possibility of amending the state constitution to permit the challenged conduct. A court might decide that the state constitution is inadequate to address the problem at issue and proceed to a ruling on federal constitutional grounds. Overall, then, lock-stepping might not be eliminated but the change in the role of state constitutions is likely to make the phenomenon less common.

III.

Considering the potential of radical state constitutionalism—as well as how to implement it—requires grappling with several lines of doctrine. One consideration is the *Pennhurst* rule that the Eleventh Amendment bars federal courts from enjoining state officials from violating state law, including in cases involving pendent state-law claims.[39] While *Ex Parte Young* permits suits in federal courts for prospective injunctive relief against state officials for violations of

preclusion in Fifth Amendment Takings claims under Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) and San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005).

37. *See supra* text accompanying notes 35–36.

38. *See supra* text accompanying notes 35–36.

39. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984) ("[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. . . . [T]his principle applies as well to state law claims brought into federal court under pendent jurisdiction."). Citing earlier holdings, *Pennhurst* also affirms that monetary damages against the state are also barred on pendent state law claims. *See id.*

federal law, the Court in *Pennhurst* refused to allow the same approach with respect to violations of state law.[40] The Court's rationale reflected principles of federalism. The Court wrote:

> A federal court's grant of relief against state officials on the basis of state law . . . 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.[41]

Accordingly, the Court held, *Ex Parte Young* is "inapplicable in a suit against state officials on the basis of state law."[42]

By barring federal courts from enjoining state officers from violating state law, *Pennhurst* might thus operate to limit the sort of relief a court could impose under radical state constitutionalism.[43] Yet *Pennhurst* involved pendent state law statutory claims.[44] It is not obvious that the *Pennhurst* rule should apply (or apply in the same way) when the question is whether a state officer has violated the state constitution, particularly a provision of the state constitution designed to limit state government action and protect individual rights. As Professor Schapiro observes in discussing *Pennhurst*, "federal adjudication of state constitutional claims need not be seen as a perversion of federalism. . . . [T]o the extent one understands federalism as a protection of individual liberty, rather than a protection of state dignity, federal enforcement of state constitutional rights advances, rather than undermines, federalist principles."[45] It also bears underscoring that *Pennhurst* involved state law *claims* brought as part of the plaintiff's complaint, not the consideration, in adjudicating a *federal* constitutional claim, of whether the state action at issue is consistent with the state constitution.[46] Moreover, Eleventh Amendment defenses are subject to waiver[47] and thus, even if *Pennhurst* is understood very broadly, it need not stand in the way of radical state constitutionalism. It is conceivable that a defendant state would give up its Eleventh Amendment protection so as to avoid a ruling that it has violated the federal Constitution. In other words, the state might much prefer the federal court to reach a decision on state constitutional grounds.[48]

Cases in which the Supreme Court has construed § 1983 also have relevance to the prospects of radical state constitutionalism.[49] In *Monroe v. Pape*,

40. *Id.* at 121–23.
41. *Id.* at 106.
42. *Id.*
43. *See id.*
44. *Id.* at 117–19.
45. Schapiro, *supra* note 33, at 157–58.
46. *See Pennhurst*, 465 U.S. at 92.
47. Atascadero State Hosp. v Scanlon, 473 U.S. 234, 238 (1985).
48. We should keep in mind also that while the Eleventh Amendment applies to lawsuits based on federal law in state court, Alden v. Maine, 527 U.S. 706 (1999), the Eleventh Amendment does not bar state courts from enjoining state officials from violating state law.
49. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978).

the Court held that a plaintiff may bring a § 1983 claim for monetary damages for a state actor's violation of a federal statutory or constitutional right even if there exists a remedy under the state constitution.[50] *Pape* means that in a § 1983 case asserting a federal constitutional violation, the court's determination—in the way this essay proposes—that the state constitution prohibits what the state has done is not going to resolve the actual claim. Instead, in accordance with *Pape*, the court would proceed to decide whether the federal Constitution was violated and, if so, provide the remedy that § 1983 makes available.[51] *Pape* would thus limit the potential scope of radical state constitutionalism. Perhaps, then, the conclusion is that radical state constitutionalism will not displace all federal causes of action even as it brings state constitutions more frequently to bear.

Yet perhaps *Pape*—involving the Court's construction of a federal statute—itself no longer makes sense. It is no longer 1961 when *Pape*—which involved Chicago police officers without a warrant breaking into a family's residence in the middle of the night, searching the home while the parents stood naked, arresting the father and taking him to the police station for interrogation in connection with a murder investigation, with no charges ever being filed[52]—was decided. It is also not 1871 when the 42nd Congress enacted the Civil Rights Act that is the precursor to § 1983.[53]If Sutton is correct about the robust role that state constitutions (and state courts) have played and can play in protecting individual rights, perhaps the assumption of *Pape*—that a state remedy will never be truly adequate—lacks the force it may have once had.

Indeed, even on its own terms, *Pape's* logic is uncertain. Writing for the Court, Justice Douglas described § 1983 as "supplementary" to any state law cause of action.[54] But he seemed really to mean that § 1983 is *independent of* state remedies. He wrote:

> It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence, the fact that Illinois, by its constitution and laws, outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.[55]

In other words, even if state law offers a full remedy, a § 1983 claim can proceed. Yet in explaining why this is the proper reading of the statute, Douglas invoked three goals that he said Congress had in enacting 1871: (1) to override

50. *See id.* The availability of injunctive relief in § 1983 cases is severely constrained. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 379 (1976) (explaining that while injunctions are a possible remedy in a § 1983 case, "principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances").

51. *Rizzo*, 423 U.S. at 384–85.

52. *Pape*, 365 U.S. at 169.

53. *Id.* at 171.

54. *Id.* at 183.

55. *Id.* at 184.

discriminatory state laws; (2) to "provide[] a remedy where state law was inadequate;" and (3) to "provide a federal remedy when the state remedy, though adequate in theory, was not available in practice." [56] Here, then, it really does sound as though § 1983 is just supplemental—available when state-level protections are lacking. If that is the basis for *Pape*, then *Pape* itself leaves open the door for a future court to limit the availability of § 1983 claims to instances where state remedies are in fact unavailable or inadequate.[57] One need not look far for the means to construe § 1983 narrowly. In his partial dissent in *Pape*, Justice Frankfurter took the position that the "under color of" state law language of § 1983 required that state law actually authorize the challenged action.[58] In his view, state actors who violated state law were not acting "under color of" state law and thus their actions did not fall within the scope of the remedy Congress had created.[59] Justice Frankfurter explained that "all the evidence converges to the conclusion that Congress . . . created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some statute, ordinance, regulation, custom, or usage sanctioned the grievance complained of" and there thus lay no § 1983 claim in cases where the state itself provided "effective and adequate reparation."[60] Frankfurter had in mind state tort remedies—with recovery available because state officials who violated state law would lose immunity from private lawsuits—rather than claims under a state's constitution. Nonetheless, there exists common ground between Frankfurter's approach and the one I have offered here: in considering federal constitutional claims one should take account of state law, whether a state law claim has been asserted or not.

In a series of cases after *Pape* the Court reiterated the position that the availability of a state remedy does not defeat a § 1983 claim, holding, for example, in *McNeese v. Board of Education*[61] and *Patsy v. Board of Regents*[62] that exhaustion of state remedies is not a prerequisite to bringing a § 1983 action. With the

56. *Id.* at 173–74.

57. In 1979, the Court denied certiorari in a case involving fired police officers who brought a § 1983 claim against the city of Columbus, Ohio after initially seeking (but then abandoning) administrative review before the Police Hearing Board of their terminations. *See* City of Columbus v. Leonard, 443 U.S. 905, 905 (1979) (Rehnquist, J., dissenting). The district court had held that once the officers began the administrative process, they could not switch to a district court lawsuit; the Fifth Circuit reversed. Dissenting from the denial of certiorari, Rehnquist, in addition to arguing that plaintiffs be required to exhaust state remedies before proceeding in federal court under § 1983, wrote: "[T]he time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the 'federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' . . . [T]he [Monroe] Court believed that this conclusion followed from the purpose of the Civil Rights Act 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.' . . . But this purpose need not bar exhaustion where the State can demonstrate that there is an available and adequate state remedy." *Id.* at 910–11 (citations omitted). One point to note is the interest in revisiting *Monroe*. The second, though, is the confusion (on the part of Rehnquist) between an exhaustion requirement—so that a § 1983 plaintiff must first pursue the state remedy—and the availability of a state remedy such that a § 1983 case cannot be brought. *Id.*

58. *See Pape*, 365 U.S. at 187 (Frankfurter, J., dissenting).

59. *See id.*

60. *Id.* at 236–37 (Frankfurter, J., concurring in part and dissenting in part).

61. McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 676 (1963).

62. Patsy v. Bd. of Regents, 457 U.S. 496, 512 (1982).

large increase in § 1983 cases that followed *Pape*, however, the Court also soon developed some limiting doctrines.[63] Most significant for present purposes is the holding of *Parratt v. Taylor* (and decisions that followed it)[64] that, in cases involving Fourteenth Amendment claims of deprivations of property without due process, the availability of an adequate state law remedy—whether pre- or post-deprivation—prevents a § 1983 claim even if the state procedure is more limited than or does not provide the same relief as would § 1983.[65] *Parratt* thus limits the scope of *Pape* to claimed violations of substantive rights.[66] *Parratt* is also a departure from *McNeese* and *Patsy*. Indeed, *Parratt* precludes a § 1983 claim entirely whereas an exhaustion requirement, at issue in *McNeese* and *Patsy*, would mean only that the plaintiff must make use of the state process before bringing the federal claim.[67]

Parratt dealt with property and procedural due process. But certain lower courts have extended the approach to liberty interests protected by the Fourteenth Amendment on the rationale that it makes little sense to divvy up the procedural scope of the Due Process Clause.[68] So far, the line between substantive and procedural claims holds.[69] But that too could be made to collapse. Explaining that it does not make sense to treat substantive and procedural claims differently, the

63. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 234–35 (1988) (discussing doctrines that serve to limit the availability of § 1983).

64. *Parratt* involved a negligent deprivation of property. *See* Parratt v. Taylor, 451 U.S. 527, 530 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327, 330–31 (1986). After *Parratt*, the Court ruled in *Logan v. Zimmerman Brush Co.* that the *Parratt* rule applies only to unauthorized acts by persons acting under color of state law and it does not apply if the plaintiff was deprived of property under an established state procedure without adequate pre-deprivation procedural safeguards. 455 U.S. 422, 436 (1982). *Logan*'s logic is that if action occurs pursuant to an *established* state procedure there exists the opportunity to provide procedural process *before* the deprivation occurs. On the basis of that reasoning, *Hudson v. Palmer* extended *Parratt* to instances where a deprivation (one not pursuant to an established state procedure) was intentional because it made no sense to distinguish negligent from intentional deprivations. 468 U.S. 517, 533 (1984).

65. *Parratt*, 451 U.S. at 554.

66. *See id.* at 543–44.

67. *See id.*

68. *See* Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) ("Though *Parratt v. Taylor* concerned the loss of property, we see nothing in its underlying rationale which would require a different treatment of due process claims for deprivation of liberty."); Engblom v. Carey, 677 F.2d 957, 963–66 (2d Cir. 1982) (holding that an adequate state post-deprivation remedy provided due process where privacy (i.e. liberty) interests were at issue); Mills v. Smith, 656 F.2d 337, 340 n.2 (8th Cir. 1981) (holding *Parratt* applicable to the liberty interests of a prisoner who was negligently shot while being handcuffed after his attempted escape). *But see* Burch v. Apalachee Cmty. Mental Health Servs., Inc., 840 F.2d 797, 801 (11th Cir. 1988) (holding that *Parratt* does not apply to a violation of a liberty interest when the state had an opportunity to provide a pre-deprivation process). It bears mentioning also a pre-*Paratt* case, Ingraham v. Wright, 430 U.S. 651 (1977), which involved a procedural due process claim by students subjected to corporal punishment immediately after a teacher accused them of misconduct. The Supreme Court agreed that corporal punishment implicates a liberty interest under the Due Process Clause but, rejecting the students' claim that they were entitled to notice and a hearing before the punishment was carried out, held that the procedural requirement was satisfied by the availability of post-deprivation remedies under state law. *Ingraham*, 430 U.S. at 682.

69. So far, lower courts have tended to distinguish between procedural and substantive claims. *See* Martin v. Dallas Cty., 822 F.2d 553, 555 (5th Cir. 1987) (Fourth Amendment claim based on false imprisonment not subject to *Parratt*); Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987) (excessive force claim not subject to *Parratt*); Mann v. City of Tucson, Dep't of Police, 782 F.2d 790, 792–93 (9th Cir. 1986) (per curiam) (holding that substantive constitutional claims are not barred by *Parratt*); Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc) (distinguishing procedural and substantive due process claims).

Court could hold that henceforth *Parratt* applies across the board (perhaps not even overruling *Pape* but confining it to its facts or a set of unusual circumstances).[70]

If this sounds unlikely, return to the rule that plaintiffs are not required to exhaust state court remedies before bringing a § 1983 claim against state government in federal court.[71] While that rule still holds, there is an associated trap for § 1983 plaintiffs. For the Court has also ruled that state court proceedings are preclusive of subsequent § 1983 claims brought in federal court.[72] In *Allen v. McCurry*, the Court held that a state court ruling in a criminal case had collateral estoppel effect in a later § 1983 action.[73] *Allen* involved a criminal defendant who made a Fourth Amendment objection at trial to admission of evidence allegedly obtained pursuant to an unlawful search; the state court rejected his argument and he was convicted; he later filed a § 1983 suit against the officers who conducted the search.[74] The Supreme Court ruled that the state court determination that the search was lawful precluded relitigating the issue in a federal § 1983 action.[75] In *Migra v. Warren City School District*, the Court further held that res judicata prevents plaintiffs in § 1983 suits from raising claims that *could have* been litigated in a prior state court action.[76] *Migra* involved a fired school board employee who prevailed on a state law contract claim in state court and then brought a § 1983 claim in federal court based on the First Amendment.[77] The *Migra* Court ruled that because the plaintiff's § 1983 claim was based on the same set of facts as her state lawsuit, and therefore could have been brought at the same time as her state court case, res judicata barred the federal action.[78] So far, the lesson seems to be that plaintiffs should avoid state court so as not to later face preclusion on a § 1983 claim in federal court. As *Allen* demonstrates, however, this is not likely to be a viable option for criminal defendants, who are not in state court by choice and who, as a result of the speedy trial requirement, will typically receive a faster resolution of the criminal case than of any related civil action.[79] State civil plaintiffs, like the plaintiff in *Migra*, face a separate problem:

70. *Cf.* Jason Mazzone, *Subprecedents*, 33 CONST. COMMENT. 389, 400–05 (2018) (describing judicial strategies for narrowing precedents without overruling them).

71. Patsy v. Bd. of Regents, 457 U.S. 496, 500–16 (1982); Monroe v. Pape, 365 U.S. 167, 183 (1961); *see also* Mitchum v. Foster, 407 U.S. 225, 243 (1972) (holding that the federal Anti-Injunction Act, 28 U.S.C. § 2283 (2006), does not prevent a federal court from ordering equitable relief in cases brought under § 1983 because the latter expressly authorizes such relief).

72. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 45–49 (1971).

73. Allen v. McCurry, 449 U.S. 90, 102–04 (1980) (holding that collateral estoppel precludes a § 1983 claim based on a Fourth Amendment violation following the state court proceeding).

74. *Id.* at 91–93.

75. *Id.* at 91–93, 95.

76. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84–85 (1984).

77. *Id.* at 78–80.

78. *Id.* at 84–85. Significantly, state proceedings only have preclusive effect if there was a full and fair opportunity to present the federal claim. *McCurry*, 449 U.S. at 101.

79. *Cf. Allen*, 449 U.S. at 104–05. In addition, the defendant in *Allen* could not have raised the Fourth Amendment claim in a federal habeas petition. *See* Stone v. Powell, 428 U.S. 465, 481–82 (1976) (holding that where the state provided an opportunity for full and fair litigation of a claim for exclusion of evidence under the Fourth Amendment, the claim cannot later be brought in a habeas petition).

Pennhurst's bar on federal courts from hearing pendent state law claims against state officers.[80] Once *Pennhurst* is combined with *Migra*, a plaintiff with both state and federal claims against a state officer might choose to split the claims, but that presents the risk that the state court will decide the state claims first, precluding the federal court from deciding the federal claims.[81] If, in that scenario, the state court rules against the plaintiff on the federal claims, the only federal court option left is a grant of certiorari by the U.S. Supreme Court. The odds of that are slim.[82] While, therefore, plaintiffs are not required to exhaust state processes before bringing a § 1983 claim, they may face strong pressures to litigate in state court and, if they do, later find the federal courthouse door closed.

IV.

Jeffrey Sutton's *51 Imperfect Solutions* offers considerable wisdom about the role that state constitutions have played and can play in our legal order. Yet as the title of his book demonstrates, Sutton treats state constitutions and the federal constitution as separated entities. Throughout the book, Sutton distinguishes state constitutional rights from federal constitutional rights, state claims from federal claims, and state courts from their federal counterparts. Radical state constitutionalism provides a different approach under which state constitutions and the federal constitution are entwined and federal constitutional claims regularly—and perhaps always—implicate questions of state constitutional law. The result is to put state constitutions at the center in the making and remaking of American constitutional law.

80. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 120–21 (1984).

81. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.10, at 592 (5th ed. 2007).

82. Of course, there exists no possibility of review by the U.S. Supreme Court if, as in *Migra*, the federal claim was never decided by a state court because the dispute was resolved on state law grounds. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. at 83–84.