THE ROLE OF STATE JUSTICES IN ADVANCING STATE CONSTITUTIONAL LAW: SOME THOUGHTS FROM COLORADO

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Commentators and jurists alike have long criticized advocates for failing to raise state constitutional claims. As the thinking goes, state courts cannot interpret constitutions sua sponte; advocates need to present judges with compelling arguments in appropriate cases. We agree that advocates are critical to state constitutional development but are sympathetic to the ethical and financial constraints which accompany the choice to pursue an untested legal theory. We propose that state supreme court justices ought to take a more active role in the development of state constitutional law, if only to assure advocates that time spent advancing state constitutional law is not time wasted.

This Essay contains three parts. First, we draw on data of the most recent terms of the Colorado Supreme Court to empirically demonstrate that advocates are consistently failing to raise state constitutional arguments, and the state supreme court is failing to rule on them. Next, we survey the various structural barriers inhibiting attorneys from raising potentially successful state constitutional claims, including a lack of educational material, clients' discomfort with using their case to test a novel legal theory, and the cost of state constitutional litigation. Finally, we argue that state justices interested in the development of state constitutional law can—consistent with their ethical obligations—alleviate some of these barriers by commenting on and writing about the importance of state constitutions and the need for state constitutional litigation.

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INTRODUCTION

Lawyers interested in developing new state constitutional law stand in a bind. Doctrines like the party presentation principle and issue preservation mean that clients cannot win on arguments not brought to the courts' attention and, indeed, not raised in the trial courts before they are pursued on appeal.[1] This principle underscores an important truth in our adversarial system: Judges are not advocates and cannot make arguments the parties did not advance (however sincerely those judicial officers may want to). But advocacy is a practice in trade-offs. Pursuing an argument that may assist in legal development beyond an attorney's own case could be in tension with quick resolution or other immediate goals in trial litigation. Appellate courts limit advocates to only so many words in a brief and so many minutes before the tribunal, so the decision to pursue an untested state constitutional claim comes at the expense of more extensive briefing on settled federal constitutional or state statutory arguments.[2] Thus, lawyers and clients interested in winning cases may opt to travel established paths rather than break new ground. As Chief Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit notes, it is an "on-the-ground reality that the vast majority of lawyers start with the federal claim and brief it most thoroughly."[3]

This tension between the desire to explore the boundaries of state constitutional law and the instinct to hew to the safety of established doctrines has made the development of state constitutional law difficult. If parties do not assert state constitutional claims, justices cannot rule on them. And if justices do not explain how they interpret a state constitution, advocates must take a risk to strike out on their own and advance a theory that the court may very well reject. It's the age-old question: Which came first, the jurisprudence or the briefing?

Actors on both sides of the bench have compelling reasons for not being the "first mover" when it comes to state constitutional law.

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1. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation . . . 'in both civil and criminal cases, in the first instance and on appeal …, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'" (alteration in original) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))); *Galvan v. People*, 2020 CO 82, ¶ 45, 476 P.3d 746, 757 (discussing the reasons for the party presentation principle).

2. Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 961 (2018) (discussing restrictions in appellate courts).

3. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 186 (2018).

Expecting lawyers to raise arguments without jurisprudential backing means asking clients to subjugate their own concerns to the advancement of the law. Some litigants may be interested in supporting the development of novel interpretive theories and comfortable with their attorneys using their case as an opportunity to do so, but we should not expect parties to take such a gamble.[4] As Professor Richard Price put it, when "[f]aced with a lack of precedent or guidance on the meaning of state constitutions, most lawyers revert to the familiar territory of federal constitutional doctrine."[5] On the other hand, expecting judges to opine on how to interpret constitutional text in cases where litigants do not ask for that interpretation might contradict our expectations of judicial humility and fair-mindedness.[6] These positions make sense, but if we believe there is value to developing a fuller understanding of state constitutional law, someone has to blink.

A recent decision out of the Wisconsin Supreme Court underscores the importance of raising the state constitutional claim.[7] The case raised the question of whether a child could be adopted by her mother's non-marital partner.[8] Wisconsin law treated a marital partner of a parent differently from a non-marital partner of a parent for purposes of adoption.[9] The mother and non-marital partner sued, challenging that distinction under the Equal Protection Clause of the Fourteenth Amendment.[10] The suit nodded at, but did not develop, a claim under the Wisconsin Constitution's parallel Equal Protection Clause.[11] A unanimous Wisconsin Supreme Court agreed that the state's adoption law survived rational basis review under settled U.S. Supreme Court precedent, as the distinction between marital and non-marital partners is

4. Particularly for attorneys interested in raising civil rights claims, this tension is similar to that identified in Derrick Bell's seminal article *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

5. Richard S. Price, *Lawyers Need Law: Judicial Federalism, State Courts, and Lawyers in Search and Seizure Cases*, 78 ALB. L. REV. 1393, 1453 (2015).

6. *See, e.g.*, Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 BUFF. L. REV. 1029, 1034–35 (2022) ("[Doing so] raises questions about the neutrality and impartiality of the judge, which in turn raises questions about the integrity of the judicial proceeding itself."); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) ("The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decisionmaker who merely listens to both sides and renders a decision based on what she has heard.").

7. *A.M.B. v. Cir. Ct. for Ashland Cnty.*, 2024 WI 18, 5 N.W.3d 238.

8. *Id.* ¶ 1, 5 N.W.3d at 240.

9. *Id.* ¶ 22, 5 N.W.3d at 246.

10. *Id.* ¶ 1, 5 N.W.3d at 240.

11. *Id.* ¶ 58, 5 N.W.3d at 258 (Dallet, J., concurring).

rational based on the state's interest in providing adoptive children with stable families.[12] The opinion did not address the state constitutional claim.

In a concurrence, Justice Rebecca Dallet lamented the fact that "litigants often overlook state constitutional claims, or fail to develop them fully."[13] Justice Dallet was sympathetic to the lawyers in these cases, noting that attorneys "are surely more familiar with the extensive case law interpreting the Fourteenth Amendment" than Wisconsin's version of the Equal Protection Clause.[14] Still, she said, "[i]t is up to us—judges, lawyers, and citizens—to give effect to" portions of state constitutions that depart from their federal analogues.[15]

We agree with Justice Dallet—and we think she is right to start that list with "judges." Of course, judges are bound to consider the cases in front of them and to rule on the questions presented. But judges and justices regularly think publicly, through lectures, articles, books, concurrences, dissents, and sometimes even in majority opinions, about the development of law.[16] Further, because of their independence from client obligations and the financial pressures of modern legal practice, state justices are also well-situated to "move first" in a way that the attorneys in their presence are not. Put differently, if state justices are interested in developing a robust state constitutional jurisprudence, they must, like Justice Dallet, assure attorneys that time spent raising state constitutional arguments is not wasted.[17] This is not to say that state high courts must lay out, in concurrences or unrelated cases, detailed theories of constitutional interpretation. But they should, at the very least, seriously grapple with the merits of an attorney's argument, even if they ultimately deny relief. Even more: State justices, as the ultimate expositors of the meaning of their state constitutions and as leaders in

12. *Id.* ¶¶ 25–33, 5 N.W.3d at 247–50.

13. *Id.* ¶ 58, 5 N.W.3d at 258 (Dallet, J., concurring).

14. *Id.* ¶ 59, 5 N.W.3d at 258 (Dallet, J., concurring).

15. *Id.* (Dallet, J., concurring).

16. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (advancing the notion that state supreme courts ought to protect rights at a greater level than the U.S. Supreme Court); NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024) (discussing the role that overregulation plays in American life); *Hogsett v. Neale*, 2021 CO 1, ¶¶ 71–77, 478 P.3d 713, 727–29 (Hart, J., specially concurring) (writing separately to encourage the legislature to abolish common law marriage in Colorado).

17. Justice Dallet's concurrence provided a roadmap for future claims under the Wisconsin Constitution, suggesting that attorneys begin with the "textual and contextual" differences between the Wisconsin Constitution and its federal counterpart to better realize "the pluralistic approach to state constitutional interpretation [this court has] applied previously." *A.M.B.*, 2024 WI 18, ¶ 53, 5 N.W.3d at 256.

their legal communities, should signal openness to, and sometimes even encourage lawyers to raise, state constitutional claims.

We are hardly the first to broach this topic. Price argued quite forcefully that "lawyers need law" when making state constitutional claims and showed how signals from four state high courts affected the frequency of state constitutional arguments that lawyers made during the latter half of the twentieth century.[18] He reached the same conclusion we do, which is that state justices must provide lawyers with some basis for their argumentation.[19] Chief Judge Sutton, a titan in the field of state constitutional law, places more responsibility directly with lawyers, explaining that he has "little sympathy" for lawyers "intimidated by the lack of guidance from modern state court precedents."[20] What we hope to do here is to offer data and perspectives from one court that might push the conversation forward. We believe state supreme courts and those who litigate before them need to keep thinking about these questions and how to approach them.

In wrestling with these questions, we have turned to the habits and rules of the Colorado judicial system for inspiration, drawing on data and guidance from the Centennial State to offer some answers. We proceed in three parts. First, we look to the last few terms of the Colorado Supreme Court to provide some empirical support for the notion that parties do not often raise state constitutional issues, and state high courts do not often address them. Second, we explore the factors—including ethical obligations, monetary constraints, and client relations—that may keep advocates from raising novel constitutional theories. Finally, we close by briefly discussing how state justices can, consistent with their ethical obligations, be the "first movers" in the quest to develop state constitutional law.

I. A CASE STUDY FROM THE COLORADO SUPREME COURT

Legal luminaries regularly complain that lawyers fail to raise state constitutional claims.[21] We do not disagree with the underlying

18. Price, *supra* note 5, at 1452–54.

19. *Id.*

20. SUTTON, *supra* note 3, at 186.

21. *E.g.*, Robert I. Berdon, *The Connecticut Constitution: An Analytical Framework for Raising State Constitutional Claims in Connecticut*, 14 QLR 191, 196 (1994) ("One of the reasons why Connecticut has been slow to develop a state constitutional jurisprudence is the failure of lawyers to adequately raise state constitutional claims."); Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); SUTTON, *supra* note 3, at 186; Brennan, *supra* note 16, at 502 ("I suggest to the bar that, although in the past it might have been safe

consensus; state constitutional law claims are infrequently briefed and seldom argued. But, as Price observed, there is "frustratingly little data" to support our collective intuitions.[22] To ground our discussion in the latter half of this Essay, we open with a brief look at what the numbers tell us about state constitutional law. A broad, multi-state survey exceeds the constraints of this Essay, so we turned to a court we are both quite familiar with: the Colorado Supreme Court.

We reviewed petitions for certiorari, briefs, and opinions from the Colorado Supreme Court's last five terms (beginning with the term that started in September 2019) to help us better understand how and when litigants raise, and state justices rule on, state constitutional claims.[23] This Part proceeds in two sections, tracking two of the players in this game: advocates and justices. First, we look at petitions for certiorari to see how litigants are raising and framing issues before the court. Then, we look at references to the Colorado Constitution in published opinions to see how often the court leans on its authority to expound state constitutional meaning. The data this study uncovered suggest a bench and a bar whose approach to state constitutional law can charitably be described as cautious.

Before we dive in, a disclaimer: Our empirical assertions here are not meant to be exhaustive; the court considers and disposes of arguments through a variety of procedural mechanisms. Consideration of cases arising through petitions for certiorari and answered with published opinions do not represent the entirety of the court's work.[24] We perceive no reason why cases raised through other mechanisms would be more likely to present novel state constitutional claims; if there is such a disparity, the reasons for its existence would make for an interesting follow-on study.

A. Petitions for Certiorari

The Colorado Supreme Court, like many other state high courts, has a primarily discretionary docket, meaning that the justices largely choose

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for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.").

22. Price, *supra* note 5, at 1452.

23. The database that informs the insights in Part I was created through research and analysis by Jake Mazeitis.

24. 2023 COLO. JUD. BRANCH ANN. STAT. REP. 5, https://www.coloradojudicial.gov/sites/default/files/2023-11/FY2023-Annual-Report-FINAL.pdf [https://perma.cc/ZU3E-UW7A] (showing that, in FY 2023, the court received roughly 977 petitions for certiorari, comprising roughly two-thirds of the 1,451 cases filed with the court).

the cases (and issues) they want to hear.[25] In a petition for certiorari, a party identifies one or more "issues" they want the court to consider.[26] These issues are frequently one to two sentences long and represent the distilled legal question the parties want the court to answer. For example, a recent opinion answered "whether the district court violated petitioner's constitutional right to familial association when it revoked his probation because he lived with his sister and her infant son."[27]

Because the filing and granting of a petition for certiorari is the first opportunity litigants have to ask the court to adopt a particular reading of the state constitution, looking at (1) what arguments litigants include in their petitions and (2) which petitions—and issues presented—the court chooses to accept offers insight into how actors on both sides of the bench think about state constitutional law.

We start first with the petitions themselves, and more specifically, the issues they raise. We surveyed roughly eleven hundred petitions for certiorari filed between 2020 and 2023 to see how many issues presented explicitly asked the justices to interpret a provision of the Colorado Constitution.[28] The results indicate a bar wary of raising state constitutional arguments.

Indeed, among the more than one thousand petitions presenting many thousands of issues included in this survey, fewer than sixty petitions contained any explicit reference in their issues presented to the Colorado Constitution or any of its provisions.[29] Put differently, only

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25. *Supreme Court Protocols*, COLO. JUD. BRANCH, https://www.coloradojudicial.gov/supreme-court/supreme-court-protocols [https://perma.cc/6PEE-L6YD] (July 30, 2024).

26. COLO. APP. R. 53(a)(3) (requiring petitioners to file "an advisory listing of the issues presented for review" and noting that "[o]nly the issues set forth or fairly comprised therein will be considered").

27. *Salah v. People*, 2024 CO 54, ¶ 14 n.2, 550 P.3d 698, 702 n.2. Curiously, Salah did not raise any arguments under the Colorado Constitution, and thus the court did not consider whether the Colorado Constitution protects a right to familial association. *See id.* ¶¶ 19–20, 550 P.3d at 703 (discussing solely federal constitutional standard).

28. At the court, incoming petitions are divided into two categories. Certain petitions are sent directly to the justices for consideration. These often contain heavily factual issues or are cases where the underlying court undisputedly applied the law correctly. These petitions are generally (although not always) denied. *See* COLO APP. R. 49. The other category is distributed among the chambers for preparation of a memo. This category often contains issues which are more legally complex and consume a greater deal of the court's time. Review of these petitions is granted in a higher proportion than non-memo cases. *Colorado Supreme Court Protocols*, *supra* note 25. The numbers described in this Essay are derived from petitions in the latter category.

29. For context, many of the court's recent pathbreaking decisions on state constitutional law—such as questions about gun safety and the use of reverse Google searches in criminal cases—included an "issue presented" explicitly naming the state

5.1% of the petitions in our sample focused the justices' attention on the Colorado Constitution. These petitions span both civil and criminal claims, meaning that even repeat players like the Office of the Attorney General and the statewide Office of the Public Defender rarely advance state-specific claims for relief. These numbers provide broad empirical support for our intuition about the infrequency with which the state constitution is explored as the basis for a claim.

Granted, this number does not reflect what is happening "below the issues," in the bodies of the petitions. Some litigants may phrase their issue as a challenge to a lower court opinion applying a constitutional principle such as equal protection, double jeopardy, or the right to free speech, without referencing the relevant federal or state constitutional provision. But even if we could identify each petition which had a buried state constitutional argument, it is unlikely that there would be enough of them to significantly increase the issue-based numbers we describe here.

Further, many of the cases in which the court ultimately references, or at least cites to, the Colorado Constitution are those cases in which litigants have nominally raised both the state and federal claim, making what we might call a parallel citation. This framing is strategic in the sense that it permits litigants to make claims on both the federal and state constitutions but shows a real reticence to make targeted arguments concerning the meaning of particular state constitutional provisions.

Of course, how the petitioner frames an issue is just the first step in getting a state supreme court to interpret the state constitution. The next step is for the court itself to decide which issues it wants to hear. A quick analysis shows that of the fifty-six petitions we earlier identified as having issues that referenced the Colorado Constitution, the court granted seven of them. However, in two of those cases, the court declined to take up the state constitutional issue, and in two others, the issue presented did not actually raise a question of constitutional interpretation.[30] So, between

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constitution. *See, e.g.*, *People v. Seymour*, 2023 CO 53, ¶ 15 n.3, 536 P.3d 1260, 1269 n.3 (2023) (agreeing to determine "[w]hether a reverse keyword warrant violates . . . Article II, Section 7 of the Colorado Constitution"); *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 5 n.1, 467 P.3d 314, 318 n.1 (noting that the court agreed to determine, among other issues, if a gun safety bill "violates the right to bear arms as set forth in article II, section 13 of the Colorado Constitution"); *but see People v. McKnight*, 2019 CO 36, ¶ 19 n.1, 446 P.3d 397, 401 n.1 (stating that the court agreed to determine "[w]hether an alert by a drug-detection dog that is trained to detect marijuana and other controlled substances can supply probable cause to justify a search" and ultimately ruling on the state constitutional claim regarding probable cause).

30. In the first two cases, the parties raised a claim citing to the state constitution, but the court did not ultimately grant cert on that issue. Combined Cross-Petition for Certiorari and Opposition Brief at 2, *City of Aspen v. Burlingame Ranch II Condo. Owners Ass'n*, 551 P.3d 655 (Colo. 2024) (No. 22SC293) (including an issue on

January 2020 and June 2024, the Colorado Supreme Court granted only three cases through the certiorari process whose issues presented directly cited to or explicitly referenced the Colorado Constitution.[31]

We cannot speculate here why even in the cases directly raising state constitutional questions, the court chose not to grant the petitions for certiorari. If the constitutional issue was not raised in the trial court or the court of appeals, for example, and therefore was not preserved for review, the state supreme court would be unlikely to take it, no matter how interesting.[32] If the facts of a particular case present a poor vehicle for exploring the constitutional question, again, it is unlikely to warrant a grant of certiorari. Like other courts with discretionary review, the Colorado Supreme Court follows certain guidelines in determining whether a case should be considered on its merits.[33] There are many reasons why the court denies a petition, and the presentation of a constitutional question alone is insufficient to merit the court's review.

This survey, limited in scope though it may be, provides evidence of a bar that is reluctant to advocate for direct constitutional change and a court that has, at least during the period examined, granted few questions that explicitly reference or name the state constitution.

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cross-petition as to whether a trial court's order violated Article II, Section 11 of the Colorado Constitution); *Burlingame*, 2024 CO 46, ¶ 22, 551 P.3d at 661 (showing that the court did not grant the constitutional issue); Petition for Writ of Certiorari at 1, *Tarr v. People*, 2024 CO 37, 549 P.3d 966 (2024) (No. 22SC226), 2022 WL 22715832, at *1 (stating the second issue as whether Tarr's conviction violated the Colorado Constitution's promise of equal protection); *Tarr*, 2024 CO 37, ¶ 11 n.1, 549 P.3d at 968 n.1 (listing the only issue granted as whether Tarr's conviction violated the Fourth Amendment). In the other two cases, the petitioners cited to the Colorado Constitution, but only to make a broader argument about what does and does not constitute a non-justiciable political question. *Markwell v. Cooke*, 2021 CO 17, ¶ 16 n.5, 482 P.3d 422, 426 n.5 (agreeing to review a district court's decision on whether the Reading Clause of the Colorado Constitution posed a non-justiciable question); *Polis v. Rocky Mountain Gun Owners*, No. 21S920, 2022 WL 17753638, at *1 (Colo. 2022) (granting a certiorari petition to determine if the court of appeals misinterpreted *Markwell* in determining that interpretation of the state constitution's Reading Clause was non-justiciable).

31. *Pellegrin v. People*, 2023 CO 37, ¶ 1 n.1, 532 P.3d 1224, 1226 n.1 (granting certiorari to review "[w]hether the . . . state constitution[] require[s] that a jury make a [particular] domestic violence finding"); *Sanders v. People*, 2024 CO 33, ¶ 1, 549 P.3d 947, 949 (noting that the court granted certiorari to determine whether a particular decision misinterpreted both the United States' and Colorado Constitution's Due Process Clauses); *Dhyne v. People*, 2024 CO 45, ¶ 7 n.1, 550 P.3d 691, 694 n.1 (noting that the court granted certiorari in a search and seizure case concerning the Fourth Amendment of the U.S. Constitution and Article II, Section 7 of the Colorado Constitution).

32. *See Galvan v. People*, 2020 CO 82, ¶¶ 45–49, 476 P.3d 746, 757–58 ("[W]e cannot review the constitutional question spontaneously reached by the division because neither party raises it here.").

33. *See* COLO. APP. R. 49.

B. Merits Decisions

When the Colorado Supreme Court does talk about the Colorado Constitution, how does it do so? After all, if a court does not seem receptive to a particular type of claim, that could impact the willingness of litigants to raise that type of claim. A lack of citations to the Colorado Constitution in published judicial opinions sends a clear message about the court's receptivity to state constitutional arguments raised through any variety of issues or procedural mechanisms.

To conduct this analysis, we surveyed every opinion written by the court during the last five terms (beginning with the September 2019 sitting). The survey began by inquiring which of these majority opinions cited the Colorado Constitution, then determining whether that citation (1) was part of an actual interpretation of the constitution; (2) was part of an acknowledgement that the state constitution has language or protections similar to the federal constitution; or (3) was cited for a factual background point or to assert judicial or other authority unrelated to the merits of the underlying case.

The distinction between the first two categories matters because the U.S. Supreme Court held in *Michigan v. Long*[34] that, "in the absence of a plain statement that the decision below rested on an adequate and independent state ground," the Court will assume that a state supreme court decision citing both the federal and state constitutions purports to interpret the U.S. Constitution.[35] This is because mere "references to [a] State Constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law."[36] Thus, when a state supreme court opinion cites the federal and state constitutions in parallel without a clear statement of judicial intent to interpret the state constitution, the opinion is not insulated from U.S. Supreme Court review. Such an opinion does not necessarily create state constitutional law (insofar as we understand that law as being insulated from federal review).

Of the 378 opinions we surveyed, 112 cases cited the Colorado Constitution in the majority opinion. This is a citation rate of roughly thirty percent—far higher than the percentage of filed or granted petitions with similar citations in their issues presented. However, digging a bit deeper, the percentage of cases that explicitly interpret the Colorado Constitution is significantly lower. For example, of the 112 cases, forty-four identified the state constitution only after naming the analogous federal provision, suggesting no distinction between the two. These

34. 463 U.S. 1032 (1983).
35. *Id.* at 1044.
36. *Id.* (emphasis omitted).

cannot be said to be developing the Colorado Constitution as they are, under *Long*, not distinguishable from the state court's interpretation of federal law. And, as such, they are subject to review and modification by the U.S. Supreme Court. Thirty-two cases cited the Colorado Constitution for some interstitial logical step, to supply factual background, or as a source of the court's authority to take some action. These decisions invoke, but do not interpret, the Colorado Constitution, any more than it is an interpretation of the U.S. Constitution to say that Congress makes laws pursuant to Article I.

Ultimately, a careful review of the opinions shows that only nineteen majority opinions spent one paragraph or more discussing the meaning of a particular provision of the Colorado Constitution. Those opinions discussed, for example, an explicit ban on retroactive legislation,[37] the state's taxpayer bill of rights,[38] and whether ballot initiatives met Colorado's single-subject requirement.[39] Only eleven cases, representing just about three percent of the original 378 majorities, spent any time discussing how a particular provision of the Colorado Constitution differed from or aligned with its federal counterpart.

Despite the relatively low number of cases in which the court interpreted an analogous provision, it repeatedly indicated that it was open to such argumentation. The court regularly noted when litigants failed to raise or preserve state constitutional claims, particularly in criminal procedure cases, and thus the court's analysis was constrained to only the federal claim.[40]

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We caution readers from taking any absolute lesson from this data. We have looked at only one court's practice during a relatively short snapshot in history; a more comprehensive look at constitutional

37. *Aurora Pub. Schs. v. A.S.*, 2023 CO 39, 531 P.3d 1036.

38. *In re Interrogatory on House Bill 21-1164*, 2021 CO 34, 487 P.3d 636.

39. *E.g.*, *Ward v. State ex rel. Polis*, 2023 CO 45, 534 P.3d 107.

40. *See, e.g.*, *Campbell v. People*, 2020 CO 49, ¶ 23 n.5, 464 P.3d 759, 764 n.5 ("Because Campbell does not argue that Colorado's state constitutional provision requires a different analysis, we discuss only the federal Confrontation Clause."); *People v. Smith*, 2022 CO 38, ¶ 26 n.2, 511 P.3d 647, 653 n.2 ("Because the ruling under challenge relied exclusively on Fourth Amendment jurisprudence, we limit our analysis accordingly."); *People v. White*, 2023 CO 43, ¶ 27 n.2, 531 P.3d 397, 404 n.2 ("Because White doesn't argue, and the district court didn't rule, that our state constitution provides more expansive protection than the federal constitution, we cabin our analysis to the Fourth Amendment."); *Sanders v. People*, 2024 CO 33, ¶ 28, 549 P.3d 947, 952 ("Because neither Sanders nor the People argue for a more protective interpretation of our Due Process Clause than is provided by the federal Due Process Clause, for purposes of this opinion, we will read the federal and state Due Process Clauses coterminously.").

litigation before state high courts could very well fill a book. Still, what we have found supports the generally expressed idea that neither litigants nor state high courts are regularly expounding state constitutional law.[41]

II. THREE EXPLANATIONS FOR ADVOCATE RETICENCE

If our intuition about lawyers failing to raise state constitutional claims is true, we are left with the question of why. This Part does not offer an exhaustive list of reasons; cases are complex, as are the motivations and needs of clients. Still, we want to surface a few of the resource deficits pressuring advocates in state supreme courts to stick to established, often federal, precedents rather than developing new theories. These limitations include a lack of (1) educational materials; (2) jurisprudential support for winning positions; and (3) money.

A. Education and Competence

One of the first barriers potentially keeping advocates from raising state constitutional claims is a lack of knowledge—and, more specifically, educational resources—as to how. A quick search of the Colorado Bar Association's CLE database reveals that there was not a single program offered in 2024 about raising or litigating state constitutional claims.[42] A scan of the Bar Association's practice manuals show titles in commercial leasing, rules of civil and appellate procedure, and title insurance, but nothing concerning how to understand or interpret the Colorado Constitution, particularly its provisions which run analogous to the U.S. Constitution.[43] Of course, bar association websites are not the only place that lawyers can go to prepare. They can also read

41. Despite these findings, we want to note that advocates in Colorado have recently prevailed in affecting state constitutional law. In *McKnight*, the Colorado Supreme Court held, in contravention of federal precedent on the Fourth Amendment, that a sniff from a drug dog trained to alert to marijuana is a search under Article II, Section 7 of the Colorado Constitution. *People v. McKnight*, 2019 CO 36, ¶¶ 62–63, 446 P.3d 397, 414. In *Seymour*, the court recognized that people have a constitutionally protected privacy interest in their internet search histories under that same provision. *People v. Seymour*, 2023 CO 53, ¶¶ 35–36, 536 P.3d 1260, 1273–74. And those developments have not been limited to criminal procedure. In *Rocky Mountain Gun Owners*, the court held that a legislative ban on the sale, transfer, or possession of large capacity magazines was permissible under Article II, Section 13 of the Colorado Constitution. *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 79, 467 P.3d 314, 332.

42. *See Constitutional Law Practice Area Results*, COLO. BAR ASS'N CONTINUING LEGAL EDUC., https://cle.cobar.org/Practice-Area/Constitutional-Law (last visited Sept. 26, 2024) (listing programming going back to 2022).

43. *See Publications*, COLO. BAR ASS'N CONTINUING LEGAL EDUC., https://cle.cobar.org/Books/View-All-Books (last visited Sept. 26, 2024).

opinions and precedent, but as explained in Part I, there is little precedent to read.[44] They could ask other attorneys familiar with the litigation, but again, there is so little litigation happening that an attorney is unlikely to find a relative expert on the subject. Further, state constitutional law is not tested on almost any state bar exam (though federal constitutional law comprises a significant portion of the Uniform Bar Exam).[45] Only a handful of law schools have begun to offer classes on state constitutional litigation.[46] While there is a decent amount of law review literature on state constitutional rights, academic theories of law are not necessarily litigation ready. Similarly, the demands of state practice often mean that a theory developed in one state is difficult to apply to another. In short, state constitutional litigation is an area of law with an unusually wide delta between its ability to impact lives and the educational resources available on the topic.

The lack of information on state supreme court practice is concerning not only because it makes attorneys less able to bring novel constitutional claims, but also because the paucity of resources raises ethical concerns. The first command of the Colorado Rules of Professional Conduct is that attorneys must provide "competent

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44. *See supra* Section I.B.

45. *See* NAT. CONF. OF BAR EXAM'RS, MEE SUBJECT MATTER OUTLINE 4 (2023), https://www.ncbex.org/sites/default/files/2023-07/NCBE%20MEE%20Subject%20Matter%20Outline_0.pdf [https://perma.cc/JLT8-MB9A] (listing all of the constitutional law topics tested and clarifying that any reference to constitutional law is to the federal constitution); NAT. CONF. OF BAR EXAM'RS, MBE SUBJECT MATTER OUTLINE 1–2 (2020), https://www.ncbex.org/sites/default/files/2023-01/MBE_Subject_Matter_Outline.pdf [https://perma.cc/56CE-68HN] (same).

46. For example, Lewis & Clark Law School recognizes an unusual emphasis on state constitutional law in a course called Oregon Constitutional Law. *Oregon Constitutional Law*, LEWIS & CLARK L. SCH. https://law.lclark.edu/courses/catalog/law_412.php [https://perma.cc/CJ6T-DCU5]. USC Gould School of Law has a course entitled California Constitutional Law. *California Constitutional Law LAW-688*, USC GOULD SCH. L., https://gould.usc.edu/academics/courses/california-constitutional-law/ [https://perma.cc/FEN2-5TXQ]. The University of Wisconsin Law School has offered a course titled WI Constitution, Law & Society. *WI Constitution, Law & Society*, UNIV. WIS. L. SCH., https://secure2.law.wisc.edu/courseInfo/courseOverview.php?iCatNBR=904 [https://perma.cc/FZ7E-R3WS]. Denver University Sturm College of Law's course listing includes a course called State Constitutional Law. *Course Descriptions*, DENVER UNIV. STURM COLL. L., https://www.law.du.edu/academics/registrar/course-descriptions [https://perma.cc/NVT2-UKL]. Some law schools, including the University of Colorado, offer research courses specific to state law, including the state constitution. *Course Descriptions*, COLO. L.: UNIV. COLO. BOULDER, https://lawweb.colorado.edu/courses/courses.jsp [https://perma.cc/KE9H-YWD7]. Wake Forest Law School offers "State Constitutional Law," which focuses on the general concept rather than any specific state's constitution. *Course Catalog*, WAKE FOREST L. SCH., https://courses.law.wfu.edu/ [https://perma.cc/LQ7X-ZESA].

representation" to their clients.[47] This includes a duty to possess the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[48] The comments note that, in determining whether they possess the requisite expertise, lawyers should consider, in part, their "training and experience in the field in question" as well as "the preparation and study the lawyer is able to give the matter."[49] The comments also state that "[a] lawyer can provide adequate representation in a wholly novel field through necessary study."[50] These comments regarding study and the development of expertise assume the existence of materials, precedents, and easily available subject matter experts. It is not clear that such information exists in this area, and certainly not readily so. As such, the lack of educational materials on state constitutional argumentation raises concerns about how a lawyer becomes competent to raise such a claim.

B. Ethical Obligations

Putting the education issue aside, lawyers' ethical obligations to their clients might also cause them to hesitate over whether to pursue the development of new or underdeveloped state constitutional claims.

For example, Colorado Rule of Professional Conduct 1.2 requires a lawyer to "abide by a client's decisions concerning the objectives of representation."[51] Assuming a client's goal is not to explore new legal theories but to win the case, how much discretion does the lawyer have to argue a previously untried constitutional claim? Of course, Rule 1.2 does permit the lawyer some discretion as to the "means" by which the client's "objectives" are pursued.[52] And comments to the Rule explain that "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."[53] But it seems unlikely that a novel or underdeveloped state constitutional claim will relate to this type of technical or tactical matter. And even if it did, the distraction from the client's objectives would be an important ethical consideration. It would be understandable for a

47. COLO. R. PROF. COND. 1.1 (2022). The Colorado Rules are identical in this respect to the ABA's Model Rules, and every state has some version of this obligation of competent representation. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

48. COLO. R. PROF. COND. 1.1.

49. *Id.* cmt. 1.

50. *Id.* cmt. 2.

51. *Id.* 1.2(a).

52. *Id.*

53. *Id.* cmt. 2.

lawyer not to ask the client about such a potential state constitutional claim, or for a client to decline to pursue that claim. And in most instances, the lawyer's means and the client's objectives may be quite closely allied and far from focused on innovation, particularly in the fast pace of state criminal litigation, where public defenders' offices are chronically overloaded with work.[54] Similarly, in today's pressured world of client billing, it is hard to imagine a private attorney asking a client to pay for pursuit of a novel state constitutional claim.

Further, in some instances, as we discuss further below, lawyers' interests in exploring the contours of state constitutional provisions could risk presenting conflicts with their clients' interest that require at least the clients' consent under Rule 1.7.[55] This could require the lawyer to explain the conflict to the client in order to obtain informed consent—never a comfortable conversation.[56] And the lawyer could be confronted with the obligation to surrender the opportunity to pursue the constitutional claim to respect the client's rights to, for example, accept a settlement offer or a plea deal.[57]

Other ethical rules may also come into play. For example, Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[58] Of course, this does not require a lawyer to know that their argument will win. The action is frivolous, however, if the lawyer is unable to make a good faith argument. When no one has ever previously argued that a particular state constitutional provision provides distinct protections from those of its federal counterpart, it is unsurprising that lawyers might be cautious about raising that argument.

C. The Costs of Litigation

State supreme courts may not be One First Street, but litigating before them is still expensive. As Chief Judge Sutton notes, one reason for "the unwillingness of many lawyers to do the groundwork needed" to fully brief state constitutional arguments may be "inadequate resources."[59] Part of the resource crunch is the incredible amount of

54. NICOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, RAND CORP., NATIONAL PUBLIC DEFENSE WORKLOAD STUDY 4 (2023).

55. *See* COLO. R. PROF. COND. 1.7.

56. *See id.* 1.4 (describing a lawyer's obligation to communicate with clients).

57. *Id.* 1.2(a).

58. *Id.* 3.1.

59. SUTTON, *supra* note 3, at 186.

money clients and attorneys must invest before their cases can reach state supreme courts. These cases frequently take years to move from the initial incident through trial (or other dispositive motions), then an intermediate appellate court, and then, finally, to a state supreme court.[60] This timeline means more attorneys' fees, more filing fees, and more time spent in legal limbo. This cost is particularly prohibitive in civil cases; a report to the Conference of Chief Justices by its Civil Justice Improvements Committee notes that "[r]unaway costs, delays, and complexity are undermining public confidence" in the civil justice system.[61] The United States performs particularly poorly in international perspective; the World Justice Project ranked it 116th out of 142 countries in terms of "accessibility and affordability of civil justice."[62] The concerns may be lessened in criminal cases, where defendants are frequently represented by public defenders who do not charge for their services and thus both parties are funded by the public fisc, but this is only true in a state—like Colorado—with a public defense system that approaches appropriate funding.[63]

These costs—not only of appellate litigation, but also of the trial work necessary to build a record and raise the state constitutional claim in the first place—can price many litigants and their attorneys out of the fight to develop state constitutional law. Attempts to make state constitutional law without a motivated financial backer can mean that, as Anthony Sanders of the Institute for Justice notes, "the availability of a contingency award or attorney's fees is going to loom large in how to structure the lawsuit."[64] Sanders makes another important point: Federal claims, particularly § 1983 actions against state officials, often allow for

60. For example, in *People v. McKnight*, where the Colorado Supreme Court ruled that a drug dog identifying marijuana does not, standing alone, provide probable cause to search an individual because the Colorado Constitution recognizes an individual right to possess a small amount of that substance, the inciting incident occurred in February 2015. The case was ultimately resolved in May 2019, more than four years later. 2019 CO 36, ¶ 10, 446 P.3d at 400.

61. NAT'L CTR. FOR STATE CTS., CONF. CHIEF JUSTS., CIV. JUST. IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 2 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf [https://perma.cc/X8A9-8EZJ].

62. *U.S. Rank on Access to Civil Justice in Rule of Law Index: 116th out of 142 Countries,* NAT'L COAL. FOR CIV. RIGHT TO COUNSEL (Oct. 25, 2023), https://web.archive.org/web/20240229013223/https://civilrighttocounsel.org/major_developments/217.

63. *See generally* Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207 (2023).

64. Anthony Sanders, *Why Don't We See More State Constitutional Claims in Federal Court? Money & Prudence.*, INST. FOR JUST. (Feb. 6, 2020), https://ij.org/cje-post/why-dont-we-see-more-state-constitutional-claims-in-federal-court-money-prudence/.

the recovery of attorney's fees.[65] There is no similar uniform financial benefit to success on state constitutional grounds.[66]

What remains, frequently, as the best option are legacy organizations and institutional funders, often with their own interests. Organizations like the NAACP, the ACLU, and the Chamber of Commerce have historically been guarantors of rights and leaders in the world of impact litigation.[67] But relying on public interest organizations or even independently wealthy funders comes with a host of ethical and practical issues.

First, the idea of impact litigation as practiced by certain legacy organizations has often centered on the U.S. Supreme Court, in part because decisions by the Court affect every American. Scale of impact is an important part of impact litigation strategy. That might motivate these organizations to pursue state constitutional rulings in high-population states like Texas, California, or New York, but there exists less incentive to attempt to expand constitutional protections in Montana, Rhode Island, or Vermont. Furthermore, the variety of state courts and, more importantly, the justices on those courts, means that arguments must frequently be tailored to the individual state, which requires good relationships, and even dependence, between the organization and local counsel. Legacy organizations have no shortage of goodwill in legal communities across the nation and likely no shortage of attorneys willing to sign on as local counsel. But the particularities of moving a case from pre-trial motions to final state supreme court ruling in an under-resourced state might prove more difficult and less appealing to funders and executives. The ACLU's recent announcement of its State Supreme Court Initiative, which represents the organization's "dedicati[on of] significant new resources to pursuing cases at the state supreme court level," might show that legacy organizations are beginning to appreciate the importance of funding and pursuing state constitutional claims across the country.[68] Still, history shows that legal civil rights organizations have historically (and for good reason) had a federal focus.

Second, involving these organizations in litigation can sometimes confuse the boundary between a lawyer's obligations to their clients and to some particular vision of society. Derrick Bell surfaces this tension in his seminal piece *Serving Two Masters*, where he critiques the NAACP's

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65. *Id.*

66. *Id.*

67. SUTTON, *supra* note 3, at 186 (suggesting that these organizations can help solve the resource crisis in state constitutional litigation).

68. Julie Murray & Matthew Segal, *ACLU Launches New State Supreme Court Initiative To Advance Rights at the State Level*, ACLU (May 2, 2023, 10:00 AM), https://www.aclu.org/press-releases/aclu-launches-new-state-supreme-court-initiative-to-advance-rights-at-the-state-level [https://perma.cc/2FUH-9F5N].

decision to pursue school desegregation at all costs, blurring the lines between what was in the best interests of clients and those of the community more broadly (as understood by the NAACP).[69] These ethical constraints are not insurmountable, but they show that public interest funding strategies have their own set of ethical considerations.[70]

This Part has offered a few reasons why lawyers might not, as a matter of ethical or practical considerations, bring state constitutional claims before state high courts. We close by acknowledging a strong cross-cutting argument: A failure to raise a potentially successful state constitutional claim may, in and of itself, be unethical. The Vermont Supreme Court affirmatively cited former Oregon Supreme Court Justice Hans Linde for the notion that "a lawyer . . . representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice."[71] Lawyers frequently bring ethically sound state constitutional claims to state high courts, but the fact that our legal culture—which otherwise has assets aplenty for lawyers interested in practicing new kinds of law—does not offer educational, monetary, or jurisprudential resources for state constitutional advocacy suggests that the ethics of competence in this field are, at the very least, contested.

III. HOW JUSTICES CAN ADVANCE STATE CONSTITUTIONAL LAW

As we observed at the start, judges are not advocates. They may see arguments that parties failed to present and sincerely wish that those arguments had been presented. In our adversarial system, however, judges cannot consider arguments that the parties did not raise. This fact has made the development of state constitutional law especially difficult. But this does not mean that those serving on their states' highest courts, if they believe that the independent development of state constitutional law is a project of value, have no appropriate role to play in moving this conversation forward. Here, we suggest just a few of the ways that courts might encourage lawyers to raise and develop state constitutional arguments such that the courts can address them.

First, of course, a justice can write a concurring opinion, like that penned by Justice Dallet in *A.M.B. v. Circuit Court for Ashland County*.[72]

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69. Bell, *supra* note 4.

70. *See supra* notes 55–57 and accompanying text.

71. *State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985) (quoting Robert Welsh & Ronald K. L. Collins, *Taking State Constitutions Seriously: The Protection of Civil Liberties Has Been Shifting Away from the U.S. Supreme Court*, CTR. MAG., Sept./Oct. 1981, at 6, 12).

72. *A.M.B. v. Cir. Ct. for Ashland Cnty.*, 2024 WI 18, ¶¶ 49–61, 5 N.W.3d 238, 255–58 (Dallet, J., concurring); *see also supra* notes 13–15.

In such a concurring opinion, a justice can simply point out the possibility of a state constitutional claim in future cases or can, like Justice Dallet, sketch the contours of that claim.[73] Even in majority opinions, by noting directly that the court did not address the state constitutional issue because it was not adequately raised by the parties, the court can send a message to parties about the importance of raising the claims.[74]

Second, justices can make similar observations during oral argument, noting the availability of a particular state constitutional claim or expressing surprise that no one has briefed the issue. This might be a particularly effective tool for repeat litigants—including prosecutors and public defenders—who are likely to attend oral argument.

Third, justices are often invited to speak to the public and offered flexibility as to the topic. The topic of developing state constitutional law is one that cuts across many different fields—certainly criminal law, but also religion, free speech, equal protection, property rights, and myriad other topics. While state supreme courts may decide to interpret analogous provisions of their constitutions differently from the way the U.S. Supreme Court has interpreted the U.S. Constitution,[75] equally often, a particular state constitution will be interpreted differently because of unique language,[76] unique provisions,[77] or specific cultural traditions within the state.[78] All those things make for great potential public talks—and perhaps some fascinating self-education.

Fourth, justices can write in appropriate forums (like the *Wisconsin Law Review*) about the need for increased attention to state constitutions or about problems they see in the development of state law.[79] If they are pressed for time, we recommend inviting a law clerk to join the project.[80]

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73. *Id.* ¶¶ 54–57, 5 N.W.3d at 256–58 (Dallet, J., concurring).

74. *See supra* note 40.

75. For example, in *People v. Sporleder*, the Colorado Supreme Court rejected the U.S. Supreme Court's conclusion that individuals do not possess a legitimate expectation of privacy in information they share with the phone company by virtue of using a phone, *see Smith v. Maryland*, 442 U.S. 735, 742–43 (1979), and concluded that under the Colorado Constitution's equivalent to the Fourth Amendment, a telephone user still has an expectation of privacy in that data. 666 P.2d 135, 140–41 (Colo. 1983).

76. *A.M.B.*, 2024 WI 18, ¶¶ 49–57, 5 N.W.3d at 255–58 (Dallet, J., concurring).

77. The outcome in the Colorado Supreme Court's decision in *McKnight*, for example, was very much shaped by the adoption of Amendment 64, which legalized the possession of a small amount of marijuana in the state. *See People v. McKnight*, 2019 CO 36, ¶¶ 3–4, 446 P.3d 397, 399.

78. *See State v. Wilson*, 543 P.3d 440, 459 (Haw. 2024) (discussing Hawaii's "Aloha Spirit" in relation to the right to bear arms under the state constitution).

79. *See supra* note 21 (citing scholarship by former justices of the Oregon and Connecticut Supreme Courts on this very topic).

80. Like this Essay.

As Chief Judge Sutton has shown, occupying a judicial seat and writing even a book-length account of state constitutional law are not incompatible propositions.

As with all of our observations here, this list is far from complete. The beauty, and indeed, the point, of having a diversity of state supreme courts and state justices is that each approaches problems—including the underdevelopment of state constitutional law—differently.

CONCLUSION

We opened this Essay by discussing the problems faced by advocates raising novel state constitutional claims. We want to close by emphasizing the prospects. The problem we identify—an underdevelopment of state constitutional law—is a source of boundless possibilities. As Chief Judge Sutton notes, the chance to shape new and interesting theories of state constitutional interpretation is a "rare and [for most lawyers] much appreciated opportunity."[81] No less rare and appreciated is the opportunity state justices have to encourage the development of their own state's constitutional jurisprudence. Justice Dallet's concurrence reminds us that state constitutions are replete with their own protections which can exist in parallel with, in contravention of, or wholly apart from, their federal counterparts. Tracing the contours of those rights is a privilege and a duty for those who appear before—and those who sit on—the highest courts in the land.

81. SUTTON, *supra* note 3, at 186.