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PULLMAN ABSTENTION AFTER *PENNHURST*: A COMMENT ON JUDICIAL FEDERALISM

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I. INTRODUCTION

Within the flow of Supreme Court decisions, opinions occasionally surface that capture the essence of the justices' shared jurisprudence during a particular period. For example, *Lochner v. New York*¹ readily comes to mind as the paradigm, and symbol, of the Court's protection of the free enterprise ideal during the early decades of this century.² Justice Peckham's majority opinion in *Lochner*, and Justice Holmes' dissenting opinion, classically state the cases for and against the interventionist posture of the Court during the "*Lochner* era." These opinions typify the competing judicial techniques that were available to the Court as it reviewed the legitimacy of the approaching welfare state. One reads these opinions and intuitively the importance of *Lochner*.

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1. 198 U.S. 45 (1905).

2. See G. GUNTHER, CONSTITUTIONAL LAW 441-42 (11th ed. 1985); R. McCLOSKEY, THE AMERICAN SUPREME COURT 150-57 (1960); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (1978).

The Court's recent decision in *Pennhurst State School & Hospital v. Halderman*³ (*Pennhurst II*) can be characterized similarly. In *Pennhurst II*, the Court held that the eleventh amendment to the United States Constitution bars federal courts from issuing injunctions against state officials on the basis of state law.⁴ The simplicity of this holding, and its apparent technicality, are deceiving. One superficial clue to the significance of *Pennhurst II* is the length and intensity of both Justice Powell's majority opinion and Justice Stevens' rejoinder for the four dissenting justices. These opinions fundamentally clash concerning the basic principles underlying the eleventh amendment, and leave no doubt that the debate will continue.

The importance of *Pennhurst II*, however, lies deeper than a disagreement concerning the scope of eleventh amendment immunity.⁵ As was true of *Lochner*, *Pennhurst II* is a symbol—this time illustrating the Court's recently altered perception of judicial federalism. The concept of judicial federalism generally is described best as including the weave of doctrines spun by the Supreme Court to allocate cases and controversies between the federal and state judicial systems.⁶ The Court developed these doctrines to

3. 465 U.S. 89 (1984).

4. *Id.* at 117, 121. The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

5. The diverse foci of the principal commentaries on the decision illustrate the richness of *Pennhurst II*. See, e.g., Brown, *Beyond Pennhurst II—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643 (1985); Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149; Rudenstine, *Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71 (1984); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); Smith, *The Eleventh Amendment, Erie, and Pendent State Law Claims*, 34 BUFFALO L. REV. 227 (1985).

6. The concept of judicial federalism stems from the structural assumptions underlying the Constitution that states would continue to exist under the new national government and that the states' role as lawmakers and governing bodies would be preserved. See *Younger v. Harris*, 401 U.S. 37, 44 (1971); L. TRIBE, *supra* note 2, § 3-30; THE FEDERALIST No. 40 (J. Madison). The tenth amendment to the United States Constitution reflects this understanding. See U.S. CONST. amend. X. Although the eleventh amendment is the only explicit constitutional limitation on the power of federal courts to review state government actions,

control the tension inherent in a dual system of government. As an issue, it is constant. Considerations of judicial federalism must be addressed, expressly or implicitly, in any litigation that affects state and national interests. As a legal conception, however, it is variable. The allocation of the nation's litigation that judicial federalism dictates at any particular time reflects the jurisprudential orientation of the Court.

Because of this variability in application, judicial federalism in operation is more a stance of the Court than a legal doctrine. As a general matter, if the Court is inclined to interpret federal rights broadly and solicitously, it probably will resolve judicial federalism issues in favor of allowing access to federal courts. Conversely, if the Court highly values state autonomy, it probably will channel litigants into state courts.⁷ Over the last four decades, following an extended period of trial and error, the Supreme Court carefully has built flexibility into the judicial federalism framework. Since the beginning of the Court's modern era in 1937, the justices have been

"there nonetheless exists a substantial body of law which restricts the authority of the federal judiciary in order to preserve state autonomy." L. TRIBE, *supra* note 2, § 3-30, at 114. These limitations come both from Congress and from the federal judiciary. This Article focuses on the judge-made components of judicial federalism, although it does not purport to do so completely.

Commentators tend to highlight the restrictive aspect of judicial federalism. See L. TRIBE, *supra* note 2, §§ 3-30, 3-39; Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1193-94 (1977). This emphasis is understandable because the Court's typical invocation of judicial federalism operates to restrict access to federal courts in deference to state autonomy. See Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981). This emphasis, however, can be misleading. Properly viewed, judicial federalism operates as a neutral regulator of the federal system. In one of the modern Court's most expansive descriptions of judicial federalism, Justice Black made this point clear:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). As Justice Black's remarks so aptly demonstrate, judicial federalism implies in some cases that state autonomy must give way to the need to secure a federal forum for the exposition and protection of federal rights. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908).

7. See Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 604 (1967).

wary of absolutes that mandate or foreclose federal jurisdiction. Instead, the Court has fashioned methodologies that have allowed it to weigh with some precision the federal and state interests implicated in each particular case.⁸

Pennhurst II crystallized a change in that approach. The absoluteness of the Court's preclusion of federal injunctions directed to state officials based on state law is the most striking feature of the Court's simple and technical resolution of the *Pennhurst* litigation. *Pennhurst II*, like *Lochner*, however, is no aberration. It builds on a number of trends that began to develop in the early 1970's. The decision itself reflects recent doctrinal shifts by the Court, including the expansion of eleventh amendment immunity⁹ and the contraction of pendent jurisdiction.¹⁰ More generally, *Pennhurst II* illustrates recent decisions, under a variety of doctrinal headings, in which the Court has constricted the availability of federal courts to litigants challenging state and local government actions, particularly in "institutional lawsuits."¹¹

8. See Wells, *supra* note 6, at 60. With a few noteworthy exceptions, the Court's tendency toward moderation and flexibility is characteristic of its traditional approach to constitutional decisionmaking. See R. McCloskey, *supra* note 2, at 138, 168.

9. Compare *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (Federal Employers' Liability Act authorized federal suit for damages against state-owned-and-operated railroad despite a claim of eleventh amendment immunity) with *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment barred award against state agency for retroactive benefits wrongfully withheld by state officials) and *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (Fair Labor Standards Act did not authorize suit for overtime pay and damages against state agency that had not consented to federal jurisdiction).

10. Compare *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (federal court that entertained individual's suit against union for violation of Labor Management Relations Act had pendent jurisdiction to hear individual's suit against union based on state tort law) with *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (when federal jurisdiction is based on diversity of citizenship, plaintiff may not assert claim against third party defendant without an independent basis for federal jurisdiction over that claim) and *Aldinger v. Howard*, 427 U.S. 1 (1976) (doctrine of pendent jurisdiction does not extend jurisdiction over a party for whom no independent basis for federal jurisdiction exists). See generally Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 Nw. U.L. Rev. 245, 246-47 (1980) (noting that expansive use of pendent jurisdiction by federal judges has been limited by recent Supreme Court decisions).

11. See *Brown*, *supra* note 5, at 344, 361; Rudenstine, *supra* note 5, at 72. "Institutional lawsuits" are actions brought in federal court against state and local governments, asserting constitutional violations and alleging that more than a prohibitory injunction is required as a remedy. Typically, institutional decrees place affirmative requirements on state and local officials, require expenditures of state resources, and provide for judicial supervision over

These features of *Pennhurst II* converge when considered in light of the decision's curious effect on "*Pullman* abstention," a doctrine that the Court designed more than forty years ago as a binding thread of judicial federalism.¹² *Pullman* abstention addresses a particularly sensitive type of lawsuit in our federal system—namely, an action in federal court challenging the constitutionality of actions taken by state or local officials.¹³ The doctrine allows federal judges discretion to delay constitutional review in such public law litigation¹⁴ if the judge sees an uncertain question of state law that could dispose of or transform the case. The judge exercises this discretion by remitting the state law question to the state court system. Under *Pullman* abstention, the federal judge must decide the constitutional question only if the case returns to

the operation of government instrumentalities. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 949 (1978); see Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 44-46 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 715-17 (1978). Federal courts have been especially inclined to grant these expansive remedies against state governments. See Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661-62 (1978). The Court's wariness of assuming jurisdiction over institutional lawsuits has been apparent for more than a decade. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (standing); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (political question).

12. *Pullman* abstention derives its name from *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Although similar judicial abstentions may have occurred before *Pullman*, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 988-89 (2d ed. 1973) [hereinafter cited as *HART & WECHSLER*], Justice Frankfurter's majority opinion in *Pullman* first articulated the doctrine fully. See Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1076 (1974). *Pullman* abstention is the oldest and most clearly established of several Supreme Court abstention doctrines. See 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* 449 (1978).

13. *Pullman* abstention is not available when state action is challenged only on statutory grounds. *Propper v. Clark*, 337 U.S. 472, 490 (1949); see 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 12, at 454-55.

14. Professor Chayes has used the term "public law litigation" to describe lawsuits brought both to settle grievances concerning the administration of public programs and to vindicate public policies traced to statutory or constitutional provisions. See Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4 (1982) [hereinafter cited as Chayes, *Foreword*]; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). Professor Chayes has observed some hostility in the Supreme Court's approach to public lawsuits since the mid-1970's. See Chayes, *Foreword, supra*, at 7, 8-26.

federal court because final resolution of the state issue has not resolved the controversy.¹⁵

The configuration of the *Pennhurst* litigation was identical to the litigation in *Pullman*. Both cases involved lawsuits filed in federal court, which raised both state claims and federal constitutional claims against state officials, but which could have been resolved on the state law claims alone. The Supreme Court, however, did not consider *Pullman* abstention as a potential resolution of the *Pennhurst* litigation.¹⁶ Instead, the Court replaced the methodology of a discretionary stay envisioned in *Pullman* with a rule of mandatory dismissal. As a result, the role of *Pullman* abstention in allocating decisionmaking responsibility in suits against state officials was transmuted substantially without a word of explanation by the Court.

This Article considers the effect of the inflexible eleventh amendment rule announced in *Pennhurst II* on the role of *Pullman* abstention in implementing judicial federalism. The Article begins by developing the interplay of judicial federalism doctrines in the context of public law litigation presenting the *Pullman-Pennhurst* configuration of parties and claims. The *Pennhurst* litigation then is summarized against that backdrop. Next, the Article speculates on the altered role of *Pullman* abstention in the post-*Pennhurst* world of public law litigation. Finally, the Article reflects on the message of *Pennhurst II*, and concludes that the Court must return to a moderate vision of judicial federalism.

II. JUDICIAL FEDERALISM: THE DOCTRINAL WEAVE

Since its inception, the Supreme Court has struggled with the task of allocating judicial business in a federal system. Although the framers of the Constitution had no difficulty perceiving the need for a supreme, national court to exercise the nation's judicial

15. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 304 (4th ed. 1983); see also *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-19 (1964) (plaintiff may elect to litigate constitutional claim in state court or may elect to reserve the claim for disposition in federal court after state proceeding has terminated).

16. In his majority opinion, Justice Powell referred to *Pullman* abstention only in passing, and not as a potential vehicle for deciding *Pennhurst II*. See 465 U.S. at 122.

power,¹⁷ the corresponding need for a system of lower federal courts was a matter of much debate. The question generated great controversy at the Constitutional Convention of 1787, and it produced a split between those who supported a system of national trial courts to protect federal rights and interests and those who feared that such a rival judicial system would threaten state autonomy.¹⁸ The compromise between these polar positions was pragmatic, but brilliant. The delegates simply framed the question and passed it along to Congress for resolution. Article III of the Constitution established a supreme court and authorized Congress to create inferior courts as it deemed appropriate.¹⁹

The spirit—or perhaps necessity—of compromise again prevailed when the First Congress took up the question that the framers had deferred. Both sides won important victories in the Judiciary Act of 1789.²⁰ Those who had sought constitutional creation of a system of federal trial courts won statutory establishment of just such a system. Those who were jealous of state autonomy and who wished to preserve the power and influence of state courts, however, also won a significant victory. The power that Congress provided the federal courts was quite limited, consisting primarily of

17. See Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52 (1975).

18. *Id.* at 53-54. According to Professor Redish and Mr. Woods, the supporters of a system of lower federal courts, led by James Madison, argued that appellate review by the Supreme Court would not provide adequate protection against potential bias by state judges. *Id.* at 53. The opponents of federal trial courts, on the other hand, believed such courts would be an expensive redundancy of state court systems already in place. The opponents also argued that a federal judiciary would encroach on the states' jurisdiction and sovereignty. *Id.* at 53-54. At various times during the Convention, each position carried the day. *Id.*

19. *Id.* at 53-54. Article III reads, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The Supreme Court has interpreted article III as providing Congress with plenary power to create lower federal courts and to authorize their exercise of the judicial power delineated in article III or any lesser power that Congress deems appropriate. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 21-24 (1980). For a challenge to the conventional interpretation, see Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

20. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The continuation of the tendency toward compromise is hardly surprising, because the First Congress, which enacted the Judiciary Act, included many members who had participated in framing and ratifying the Constitution. See C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 41 (1972).

admiralty and diversity jurisdiction.²¹ Most significantly, Congress failed to grant the lower federal courts general power to hear cases arising under federal law.²² Because of these features, the Judiciary Act of 1789 largely appeased the opponents of lower federal courts. Under the Act, state courts generally would resolve suits involving questions of constitutional construction or the application of acts of Congress, subject to Supreme Court review in certain categories of cases.²³

A. *From Compromise to a Nationalist Extreme: Chisholm v. Georgia*

Against this background of compromise and finesse, the Supreme Court decided *Chisholm v. Georgia*.²⁴ Alexander Chisholm was the executor of a deceased South Carolina merchant's estate. Georgia had purchased war supplies from the merchant in 1777. Chisholm filed suit in the Supreme Court of the United States seeking payment for the supplies, and Georgia responded with a claim of sovereign immunity.²⁵ Only Justice Iredell agreed with

21. See Schenkier, *supra* note 10, at 252. Judge Hufstедler has observed wryly that Congress, when creating lower federal courts in 1789, "lavished little acclaim and less jurisdiction on its offspring." Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. Rev. 841, 843 (1972).

22. The judicial power that Congress could have repositied in the lower federal courts extends to, among other things, "all Cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1; see *supra* note 19. Of course, after passage of the Judiciary Act, Congress remained free to authorize lower federal courts to hear specific types of federal questions. See, e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Professor Weinberg has suggested that Congress' reluctance to grant general federal question jurisdiction may have stemmed from a fear of federal injunctions against state judicial proceedings and state executive actions. See Weinberg, *supra* note 6, at 1197. The provisions of the Judiciary Act of 1789 delineating the jurisdiction of lower federal courts are summarized in HART & WECHSLER, *supra* note 12, at 33-35.

23. See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85. The Act essentially provided for Supreme Court review of decisions by the highest state court if the state court had sustained state action against federal objections or if the state court had invalidated federal action. See G. GUNTHER, *supra* note 2, at 55.

24. 2 U.S. (2 Dall.) 419 (1793).

25. See C. JACOBS, *supra* note 20, at 46-48. Chisholm first had sought payment from the Georgia legislature. The legislators had refused to pay and had advised Chisholm to sue the commissioners whom the State had charged to pay the amount due. The commissioners, however, were insolvent. Chisholm therefore had brought suit against the State in a Georgia federal court, seeking the amount due under the contract, interest, and consequential

Georgia's assertion. The other four justices concluded that article III, which extends federal judicial power to cases "between a State and Citizens of another State,"²⁶ allowed jurisdiction over the case.²⁷ As one commentator has noted, *Chisholm* "was the first case directly pitting the Court against a state government, and raised the perennial issue of state sovereignty under the Constitution."²⁸ This point was not lost on the justices. Justice Wilson, who wrote the principal opinion for the prevailing justices, left no doubt concerning the structural outcome when he argued that, "as to the purposes of the Union, Georgia is not a sovereign state."²⁹

damages. That court, which included Supreme Court Justice James Iredell, had dismissed the suit for lack of jurisdiction because of Georgia's sovereign immunity from suit. The indomitable *Chisholm* then filed an original action in the Supreme Court. *See id.* at 47. For useful historical background on the *Chisholm* litigation, see Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19 (1967); C. JACOBS, *supra* note 20, at 41-55.

26. U.S. CONST. art. III, § 2, cl. 1. Traditionally, commentators have concluded that the framers did not intend the state-citizen diversity clause of article III to abrogate state immunity from suit. *See, e.g.,* L. TRIBE, *supra* note 2, at 130-31; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (1922); *see also* THE FEDERALIST No. 81 (A. Hamilton) (explaining why states' sovereign immunity from suit would not be affected by ratification of the Constitution by noting: "[T]here is no color to pretend that the State governments would, by adoption of [the Constitution], be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."). Some recent scholarship contests that conclusion. *See, e.g.,* C. JACOBS, *supra* note 20, at 40; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527 (1977); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1913-14 (1983). The most prudent, and probably most correct, conclusion is that the original understanding of the state-citizen diversity clause is unclear. *See* M. REDISH, *supra* note 19, at 139-40.

27. Article III vests original jurisdiction in the Supreme Court over cases "in which a State shall be Party." U.S. CONST. art. III, § 2, cl. 2. That constitutional grant was implemented in section 13 of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80.

28. C. JACOBS, *supra* note 20, at 46-47. Indeed, *Chisholm* may be viewed as the Court's first constitutional decision. *See* Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1054 (1983).

29. 2 U.S. (2 Dall.) at 457 (emphasis deleted). One observer has described Justice Wilson as "the most theoretically inclined of the Justices" sitting on the Court when it decided *Chisholm*. *See* Fletcher, *supra* note 28, at 1056. The rich, separate opinions of Justices Iredell and Wilson and Chief Justice Jay have produced interesting analyses offering different perspectives of *Chisholm*. *See, e.g.,* C. JACOBS, *supra* note 20, at 41-55; Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 7-10 (1972); Gibbons, *supra* note 26, at 1920-26.

If *Chisholm* was "the most celebrated case of the pre-Marshall period,"³⁰ that notoriety did not come from its success in establishing constitutional doctrine. According to one commentator, the Court in *Chisholm* made two mistakes.³¹ First, the *Chisholm* doctrine jeopardized the treasuries of many states. *Chisholm* was decided at a time when "the states had been playing fast and loose in fiscal matters for years,"³² particularly with respect to their substantial debts accumulated during the Revolutionary War.³³ Second, Justice Wilson's opinion included strong nationalist language³⁴ that alarmed those who feared a powerful federal judiciary.³⁵

This combination of practical and philosophical objections provided the binding of interests usually lacking when states' rights advocates sought to challenge the accretion of national power during the early period of constitutional development.³⁶ Put simply, the Court had overreached in *Chisholm*. It had established a decisively nationalistic position when the political leaders of the day largely had chosen a compromise between the polar approaches to judicial federalism.

30. C. JACOBS, *supra* note 20, at 46.

31. See R. McCLOSKEY, *supra* note 2, at 35.

32. *Id.* at 34.

33. *Id.*; see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821) (opinion of Marshall, C.J.); L. TRIBE, *supra* note 2, § 3-35, at 130; 1 C. WARREN, *supra* note 26, at 99; Fletcher, *supra* note 28, at 1058. The flurry of *Chisholm*-type litigation that was pending in federal courts at the time confirms the condition of state financial affairs. See C. JACOBS, *supra* note 20, at 43-64. Professor Jacobs, however, challenges the conventional wisdom that *Chisholm* jeopardized state monetary stability. See *id.* at 69-70.

34. See *supra* note 29 and accompanying text.

35. R. McCLOSKEY, *supra* note 2, at 35; see C. JACOBS, *supra* note 20, at 71; Fletcher, *supra* note 28, at 1058. Charles Warren has downplayed the philosophical opposition to *Chisholm*, arguing that "the real source of the attack on the *Chisholm* case was the very concrete fear" of impending litigation on war debts in the federal courts. See 1 C. WARREN, *supra* note 26, at 99.

36. Professor Jacobs has described well the paradoxical difficulty faced by states' rightists:

The history of the Supreme Court is replete with specific decisions having both immediate incidence upon particular states and wide import for "states' rights." Although such decisions normally evoke intense local, and occasionally sectional, opposition, the reaction of states not immediately and practically affected has often been disappointing to those that are.

C. JACOBS, *supra* note 20, at 57; see R. McCLOSKEY, *supra* note 2, at 59.

The public response was swift. Within days of the Court's decision, Congress began considering a constitutional amendment that would reverse the Court's holding.³⁷ Two years later, in early 1795, the eleventh amendment was ratified.³⁸ The Court's first significant attempt to prescribe the judicial relationship between the nation and the states thus became the first decision to be reversed by constitutional amendment.

B. A Swing to the Opposite Extreme of States' Rights: Hans v. Louisiana

The Court's misstep in *Chisholm* set a pattern of sorts for its development of eleventh amendment doctrine. The Court's expansive reading of article III in *Chisholm* was more than matched by its disobedience of the eleventh amendment in *Hans v. Louisiana*.³⁹ Like *Chisholm*, *Hans* involved a suit in federal court against a state for money due on a contract—in this case, interest on bonds issued by the state legislature.⁴⁰ If anything, however, the case for federal jurisdiction seemed far more respectable in *Hans* because, unlike *Chisholm*, the litigation involved a federal

37. C. JACOBS, *supra* note 20, at 64-65; Fletcher, *supra* note 28, at 1058-59. According to Charles Warren, "The [*Chisholm*] decision fell upon the country with a profound shock." 1 C. WARREN, *supra* note 26, at 96. The Supreme Court has accepted that reading of public reaction. See, e.g., Edelman v. Jordan, 415 U.S. 651, 662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 11 (1890). Judge Gibbons, however, has challenged vigorously what he terms the "profound shock thesis." See Gibbons, *supra* note 26, at 1926.

38. U.S. CONST. amend. XI. Congress also enacted the first anti-injunction statute less than two weeks after the Court decided *Chisholm*. Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333, 334 (codified as amended at 28 U.S.C. § 2283 (1982)). That statute prohibited any Supreme Court Justice from issuing injunctions "to stay proceedings in any court of a state." *Id.* § 5, 1 Stat. at 335. Although the timing of this statute seems to indicate that it also was a legislative reaction to *Chisholm*, most commentators agree that this characterization would be incorrect. See Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 481 n.46 (1965) (listing the relevant commentaries). Outwardly, the anti-injunction act and the eleventh amendment both clearly seem to reflect a sentiment that state governments should maintain a significant measure of independence. See Weinberg, *supra* note 6, at 1197, 1199. Professor Mayton has argued, however, that the anti-injunction act may not have been motivated by any concern of federalism. See Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978). Although these commentators disagree concerning Congress' motivation, all seem to concede that the legislative history of the original anti-injunction act likely will remain obscure.

39. 134 U.S. 1 (1890).

40. *Id.* at 1-3.

constitutional claim. Instead of simply alleging a common law breach of contract, as the plaintiff in *Chisholm* had done, the plaintiff in *Hans* claimed that the state had repudiated its obligations under the bonds in violation of the contract clause of the United States Constitution.⁴¹ Federal jurisdiction seemed appropriate in *Hans* not only because the involvement of a constitutional claim placed the case within the heart of the federal judicial power, but also because the eleventh amendment exception to that power did not bar the suit expressly. Hans had sued his own state, and the eleventh amendment applies to litigation against a state only when brought by "Citizens of another State, or by Citizens or Subjects of any Foreign State."⁴²

Although the Court in *Hans* readily acknowledged that the text of both article III and the eleventh amendment pointed toward the presence of federal jurisdiction,⁴³ the justices denigrated that conclusion as deriving solely from the "letter" of the Constitution.⁴⁴ The Court maintained that to accept jurisdiction in *Hans* would create the "anomalous result" of subjecting states to federal suits brought by their own citizens, while protecting them from suits by noncitizens.⁴⁵ The Court thus rejected the textual interpretation in favor of what the justices presumed to be the intent underlying the amendment—denial to the federal courts of any power to entertain suits by individuals against the states without the consent of the state being sued.⁴⁶

41. U.S. CONST. art. I, § 10, cl. 1; see 134 U.S. at 3.

42. See *supra* note 4.

43. See 134 U.S. at 10.

44. *Id.* at 15.

45. *Id.* at 10. The Court also noted that a literal reading of the eleventh amendment would allow a state to close its courts to a citizen-claimant by maintaining its sovereign immunity, but the state would be unable to prevent that claimant from seeking recovery in a federal court. *Id.*

46. *Id.* at 12. The validity of the Court's assumption concerning the intent underlying the eleventh amendment is open to question. Readers of the opinion need not accept the Court's implicit conclusion that the provision merely represented a drafting mistake. One possible construction, for example, is that the drafters of the eleventh amendment simply did not intend "to answer all the evils" generated by *Chisholm*. See Engdahl, *supra* note 29, at 31.

Professor Fletcher, however, has posited a more sophisticated reading of the eleventh amendment. See Fletcher, *supra* note 28, at 1033-38. Professor Fletcher began with the universally-shared premise that Congress intended the eleventh amendment to overturn the result in *Chisholm*. Unlike many commentators, however, he noted the result in *Chisholm*

In rejecting the literal reading of the eleventh amendment, the Court seemed haunted by the ghost of *Chisholm*. Acceptance of jurisdiction in *Hans*, the Court feared, would be a "result . . . no less startling and unexpected than was the . . . decision [in *Chisholm*]." ⁴⁷ The justices believed that in *Chisholm* the Court had been "more swayed by a close observance of the letter of the Constitution," in disregard of "history and experience and the established order of things." ⁴⁸ The justices resolved not to repeat that mistake.

In a fundamental sense, however, the Court in *Hans* followed the same path it had taken in *Chisholm*. Once again, the justices had moved too far toward a polar approach to judicial federalism—this time toward the states' rights extreme rather than the nationalist extreme. Once again they had left public sentiment behind. The "established order of things" evoked in *Hans* had changed dramatically with the Civil War and Reconstruction, and federalism had

with care. In *Chisholm*, Professor Fletcher noted, the Court held that article III allows federal jurisdiction over any case between a state and citizens of another state. This provision, under the Court's interpretation, predicates jurisdiction solely on the status of the parties. In Professor Fletcher's view, Congress intended in its eleventh amendment response to *Chisholm* to correct that reading of the state-citizen clause. The amendment, according to Professor Fletcher, "was intended to require that the state-citizen diversity clause of article III be construed to confer federal jurisdiction only over disputes in which the state was a plaintiff." *Id.* at 1035. Professor Fletcher concluded that the eleventh amendment simply "limited [the] grant of jurisdiction" by the state-citizen clause; it "forbade nothing." *Id.* Professor Fletcher's reading of the eleventh amendment eliminates the anomaly that the Court perceived in *Hans* because, under his interpretation, the amendment does not affect suits, such as *Hans*, that assert federal questions and thus come within an independent head of the judicial power.

Professor Field also has offered a construction of the eleventh amendment that explains the anomaly perceived in *Hans*. She argued that Congress intended the eleventh amendment to correct the mistaken assumption in *Chisholm* that article III abrogated state sovereign immunity. Congress did not intend the eleventh amendment itself to constitutionalize that immunity, according to Professor Field. *See* Field, *supra* note 26, at 536-46. For a useful summary of several competing theories of eleventh amendment construction advanced by commentators in recent years, *see* M. REDISH, *supra* note 19, at 141-54.

47. 134 U.S. at 11. This concern had a practical basis that parallels the historical setting of the public response to *Chisholm*. At the time, Louisiana was only one of a number of southern states that wished to repudiate their revenue bonds in apparent violation of the contract clause of the Constitution. To make this repudiation effective, Louisiana had to seek to foreclose federal jurisdiction to consider the constitutional challenges that bondholders could use to enforce these obligations. *See* Fletcher, *supra* note 28, at 1087-88; Gibbons, *supra* note 26, at 1998-2002.

48. 134 U.S. at 12, 14.

been fundamentally redefined, albeit extrajudicially. The Reconstruction amendments to the Constitution reflected these changes by providing a federal role for the protection of individual rights from actions taken by the states.⁴⁹ Congressional legislation also reflected these changes, particularly enactments that paralleled the constitutional movement in protecting the civil rights of private citizens against state action.⁵⁰ These modifications in the constitutional structure and the state-citizen relationship necessitated a corresponding change in the concept of judicial federalism. To ensure enforcement of these newly-pronounced federal rights, Congress in 1875 enacted a general federal question statute, thereby securing a federal forum for the adjudication of these rights.⁵¹ In short, judicial federalism had been restructured to accommodate the post-Civil War perception of the nation-state relationship.

In *Hans*, however, the Court was not ready to acknowledge this structural shift. In fact, the *Slaughter-House Cases*,⁵² in which the Court first had interpreted the Reconstruction amendments, already had illustrated the Court's reluctance.⁵³ In those cases, the Court had strained to limit the substantive rights created by the amendments—rights which federal courts would be asked to enforce against the states.⁵⁴ By limiting those rights, the Court was

49. See U.S. CONST. amends. XIII-XV. Professor Orth has observed that the Reconstruction Era was "the first time in history [that] amendments decreased the power of the states and increased the power of the national government." Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. ILL. L.F. 423, 432 (1983).

50. The most prominent of these Reconstruction Era statutes was the Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (1982)).

51. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. (part 3) 470, 470 (codified at 28 U.S.C. § 1331 (1982)). The general federal question statute was the culmination of this expansionary period of federal jurisdiction. See Schenkier, *supra* note 10, at 253-55. Earlier in the Reconstruction Era, Congress had taken other steps to expand federal jurisdiction. For example, Congress had authorized removal to federal court if a person litigating in state court claimed that the state court could not enforce his civil rights. Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, 27 (codified at 28 U.S.C. § 1443 (1982)). In addition, Congress had granted federal jurisdiction in cases that involved alleged deprivations of civil rights. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified at 28 U.S.C. § 1343(3) (1982)).

52. 83 U.S. (16 Wall.) 36 (1873).

53. See G. GUNTHER, *supra* note 2, at 408; L. TRIBE, *supra* note 2, § 7-2.

54. G. GUNTHER, *supra* note 2, at 408. Professor Tribe has argued that, in the *Slaughter-House Cases*, the Court "quickly dismantled" the goal of those who had drafted the Reconstruction amendments. L. TRIBE, *supra* note 2, § 7-2, at 418.

attempting to protect the pre-Civil War conception of federalism, which represented the "established order of things," against the claim that the basic nation-state relationship had been changed.⁵⁵ In its approach to the federal judiciary's role in monitoring the relationship between states and their citizens, therefore, *Hans* represents the jurisdictional counterpart of the *Slaughter-House Cases*. In both decisions the Court sought to preserve a system of state autonomy that no longer retained vitality.⁵⁶

Neither decision endured. Within a generation, the *Slaughter-House Cases* had yielded to the economic due process orientation of the Court, symbolized by *Lochner*.⁵⁷ Even after *Lochner*, however, the expansive reading of the eleventh amendment established in *Hans* appeared to block any systematic attempt to invoke the reinvigorated substantive rights delineated in the fourteenth amendment.⁵⁸ Because the Court's stance in *Hans* was inconsistent with the activist judicial role prescribed in *Lochner*, it needed alteration.

55. See 83 U.S. (16 Wall.) at 81-82. Justice Miller explained the Court's stance in the *Slaughter-House Cases*:

[W]e do not see in [the Reconstruction] amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

Id. at 82; see A. BICKEL, *THE MORALITY OF CONSENT* 45 (1975).

56. The kinship between the two decisions, however, should not be overdone. The Court in the *Slaughter-House Cases* was closely divided, and the dissenting opinions were sharp. *Hans*, on the other hand, produced unanimity. The *Slaughter-House Cases*, therefore, represented a more contested and controversial reading of the Reconstruction amendments than *Hans* represented of the eleventh amendment. Underscoring this point is the fact that Justice Bradley, who wrote for the Court in *Hans*, dissented in the *Slaughter-House Cases*.

57. See *supra* notes 1-2 and accompanying text; G. GUNTHER, *supra* note 2, at 409; L. TRIBE, *supra* note 2, § 7-3, at 421.

58. See L. TRIBE, *supra* note 2, § 3-35, at 132. In *Lochner*, for example, a criminal defendant attempted to invoke substantive rights to overturn a prosecution in state court. See *Lochner v. New York*, 198 U.S. 45, 45-47 (1905).

C. *Back to Nationalism: Ex Parte Young and Siler v. Louisville & Nashville Railroad*

The necessary alteration came in *Ex Parte Young*,⁵⁹ in which the Court ensured that *Hans* would not eclipse the *Lochner* vision. *Young* had followed a rather unconventional route to the Supreme Court.⁶⁰ Like other cases in the *Lochner* prototype, however, it involved a challenge by a business entity to the constitutionality of a state regulatory system. The State argued in *Young* that the eleventh amendment immunized it from such challenges in federal court. Under the *Hans* doctrine, the State's position seems reasonable because when state officials enforce a statute, the state in reality acts in its sovereign capacity.⁶¹ The Court, however, answered that the officials lacked authority to use the State's name to enforce an unconstitutional statute,⁶² explaining:

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior

59. 209 U.S. 123 (1908).

60. *Young* came to the Supreme Court on a petition for a writ of habeas corpus filed by Edward T. Young, the Attorney General of Minnesota. The writ challenged a lower federal court judgment finding Attorney General Young guilty of contempt. The alleged contempt had occurred when Young had filed an action in state court to enforce a state rate regulation statute. The federal court had entered an injunction just the day before, which had forbidden Young from enforcing the statute, in response to a constitutional challenge by railroad company shareholders. *Id.* at 126-34.

61. *See id.* at 159. Indeed, if a court finds that enforcement of a state regulatory scheme violates the due process clause of the fourteenth amendment, as the Court did find in *Young*, *id.* at 145-49, the Court also must find, at least implicitly, that the enforcement constitutes state action. *See* L. TRIBE, *supra* note 2, § 3-39, at 146. Despite the logic of the State's position in *Young*, the Court after *Hans* was inconsistent in responding to similar claims of immunity by state officials. *See* C. JACOBS, *supra* note 20, at 106-38.

62. 209 U.S. at 159. In the Court's view, the injunction did not affect the State in its sovereign or governmental capacity because "the officer is simply prohibited from doing an act which he had no legal right to do." *Id.* With this approach to the State's claim of immunity, the Court was able to avoid deciding whether, as a matter of formal law, the fourteenth amendment affected the scope of the eleventh amendment. *See id.* at 150.

The Court subsequently addressed an aspect of that question squarely in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In that case, the Court held that "the Eleventh Amendment and the principle of state sovereignty which it embodies, *see Hans v. Louisiana*, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456. In essence, the Court's holding means that Congress, when enforcing the fourteenth amendment, can authorize private suits in federal court against states or state officials that otherwise would violate the eleventh amendment. *Id.*

authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.⁶³

In this respect, the *Young* doctrine represents the jurisdictional counterpart to *Lochner*, opening the courthouse door to active federal control over state economic policy.⁶⁴

Young, however, did not offer a complete jurisdictional complement to the substantive mandate charted in *Lochner*. Because state and federal law often overlap in a federal system, an action taken by a state official often poses substantial questions arising under both state and federal law.⁶⁵ In such circumstances, a private party adversely affected by the state action can be expected to join the state and federal claims in one lawsuit. To fulfill the promise in *Young* of a federal forum to challenge unconstitutional state

63. 209 U.S. at 159-60.

64. See C. JACOBS, *supra* note 20, at 142, 144-45; Duker, *Mr. Justice Rufus W. Peckham and the Case of Ex Parte Young: Lochnerizing Munn v. Illinois*, 1980 B.Y.U. L. REV. 539; Weinberg, *supra* note 6, at 1199.

Justice Harlan, who wrote dissenting opinions in both *Young* and *Lochner*, did not miss the importance of *Young* to the ambition of *Lochner*:

[The *Young* doctrine], if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were "dependencies" or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land.

Lochner, 209 U.S. at 175 (Harlan, J., dissenting). Justice Harlan was not alone in his dismay concerning *Young*. In fact, one commentator has stated that the "outcry was reminiscent of that following the decision in *Chisholm v. Georgia*." C. JACOBS, *supra* note 20, at 146.

The result of the protest after *Young*, however, was considerably more modest than the constitutional amendment that resulted from the protest after *Chisholm*. Congress failed to adopt proposals that would have deprived lower federal courts of jurisdiction to grant injunctions against state officials charged with enforcing state statutes. *Id.* at 147. Congress responded in a limited way in 1910, enacting legislation that, while it remained fully effective, mandated three-judge district courts for certain categories of suits that were authorized by *Young*. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557 (codified as amended at 28 U.S.C. § 2284 (1982)); see C. JACOBS, *supra* note 20, at 148-49; Hufstedler, *supra* note 21, at 848.

65. See Chisum, *The Tensions of Judicial Federalism*, 33 STAN. L. REV. 1161, 1179 (1981); Schenkier, *supra* note 10, at 245.

actions, a lower federal court considering the party's federal claim also would need the power to determine the related state claim. Without this power, the litigant would be encouraged to seek redress in the state court system, which would have jurisdiction to resolve both claims.⁶⁶ To allow this practical result would undo the Court's theoretical tour de force in *Young*, which was designed to open the federal forum to such litigants.

Just one year after *Young*, the Court in *Siler v. Louisville & Nashville Railroad*⁶⁷ cemented the power of lower federal courts to entertain state claims in such cases. *Siler*, like *Young*, fit the *Lochner* paradigm. In *Siler*, a railroad company had sued in federal court to enjoin enforcement of a rate regulation order issued by the Kentucky Railroad Commission.⁶⁸ The railroad had charged not only that the order had violated the federal Constitution, but also that the state commission had violated its enabling act.⁶⁹ The Court upheld the lower federal court's decision to invalidate the commission's order, grounding its ruling solely on the state law claim. The Court held that federal jurisdiction could rest on the federal question raised in the railroad's constitutional claim, and that once the court had obtained jurisdiction in this manner, it could decide all questions of law presented in the case.⁷⁰ The Court added that, in view of its usual preference for avoiding unnecessary

66. See Brown, *supra* note 5, at 357; Schenkier, *supra* note 10, at 255-56. State courts have power to resolve cases that raise federal questions unless Congress has provided exclusive jurisdiction in a federal court. See M. REDISH, *supra* note 19, at 109-15.

67. 213 U.S. 175 (1909). Chief Justice Marshall had laid the groundwork for *Siler* in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824):

[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [lower federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.

Id. at 823. In Chief Justice Marshall's view, this reading of the federal judicial power under the Constitution was a functional necessity. According to Chief Justice Marshall, few cases exist for which "every part . . . depends on the constitution, laws, or treaties of the United States." *Id.* at 820. If the presence of state law questions defeated federal judicial power, Chief Justice Marshall suggested, federal question jurisdiction would be a practical nullity. See *id.* at 819-20.

68. 213 U.S. at 176-77.

69. *Id.* at 190-91.

70. *Id.* at 191. The grant in *Siler* of jurisdiction over pendent state claims was broad, but not unlimited. Under *Siler*, the Court could not take jurisdiction if "the Federal question [was] merely colorable or fraudulently set up for the mere purpose of endeavoring to give

constitutional decisions, resolution of mixed claim cases on state law grounds was preferable.⁷¹ Pendent jurisdiction over related state claims, the Court reasoned, allowed it to do just that.

In *Siler*, the Court completed its basic framework for active federal judicial review of state economic regulation. In this framework, the expansive interpretation of the fourteenth amendment due process clause embodied in *Lochner* provided federal courts with the substantive mandate, and the general grant of jurisdiction over federal questions embodied in the Judiciary Act of 1875 provided them with the jurisdictional mandate. *Young* and *Siler* completed the picture. In *Young*, the Court minimized problems of sovereign immunity under the eleventh amendment, while in *Siler* it ushered in an expansive rule of pendent jurisdiction which allowed federal courts to overturn state regulations on the basis of state law if the case also involved a bona fide federal question.

Justice Peckham, who wrote the majority opinions in *Lochner*, *Young*, and *Siler*, carefully had assembled a model of judicial review of state action in just four years. Like the Court's prior view of judicial federalism in *Hans*, however, the *Lochner-Young-Siler* framework did not endure. On the judicial federalism spectrum, the Court again had moved to the opposite polar position. The Supreme Court had disregarded concerns for state autonomy, including both substantive concerns relating to the regulatory policy judgments by state legislatures and jurisdictional concerns relating to the maintenance of a limited role for federal courts.

The Court's push to a nationalist extreme is illustrated most graphically in *Siler* itself. After Justice Peckham sustained the federal court's jurisdiction to hear the state law claim, he ruled that the state railroad commission had violated its enabling act by issuing the rate regulation order,⁷² even though the enabling act never had received an interpretation from the highest state court.⁷³ While the lack of a state court interpretation was not necessarily

the court jurisdiction." *Id.* at 191-92. The Court later tightened the restrictions on its exercise of pendent jurisdiction. See *infra* note 75.

71. *Id.* at 193. The classic statement of the doctrine prescribing avoidance of constitutional questions came after the Court decided *Siler*. See *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

72. *Siler*, 213 U.S. at 193-98.

73. See *id.* at 179-80, 194.

disabling, Justice Peckham exacerbated the difficulty by failing to use the customary tools in arriving at his "interpretation" of the state statute in *Siler*. By showing little regard for the statutory text, the discernible legislative intent, the state commission's interpretation, or the precedent from the Kentucky courts, he betrayed a disregard for the expositors of state law. In effect, Justice Peckham engaged in a wholly independent interpretation of the statute, and he found it wanting.⁷⁴ His opinion offered nothing more than the free-wheeling judicial approach of *Lochner* in state law clothing. Indeed, if Justice Peckham had invoked federal norms to constrict state autonomy, as he had done in *Lochner*, his approach would have been far less offensive to notions of judicial federalism. Like other judicial federalism approaches before it, the *Young-Siler* jurisdictional model needed adjustment.

D. A Position Between the Extremes: Pullman Abstention

The Court's principal moderating response to the *Young-Siler* jurisdictional model came several decades later in *Railroad Commission v. Pullman Co.*⁷⁵ In *Pullman*, just as in *Siler*, a private

74. The thrust of the Court's position in *Siler* was that, to exercise the "enormous power" of issuing a general tariff of rates, a state agency must trace its authority to an explicit statutory grant. *Id.* at 193-94. This rule of construction came from the Court, not from Kentucky law.

75. 312 U.S. 496 (1941). Later, the Court further moderated Justice Peckham's jurisdictional model by refining the eleventh amendment doctrine of *Young* and the pendent jurisdiction doctrine of *Siler*. The principal modification of the *Young* doctrine, at least before *Pennhurst II*, occurred in *Edelman v. Jordan*, 415 U.S. 651 (1974), in which the Court limited the application of *Young* to suits seeking prospective relief. *Id.* at 664. The Court in *Edelman* held that the eleventh amendment prohibited equitable restitution awards against state officials in their official capacities. *Id.* at 664-67.

The principal modification of the *Siler* doctrine came in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In *Gibbs*, the Court essentially framed a three-part test to determine whether a federal court has power to decide a state claim under the doctrine of pendent jurisdiction. To allow adjudication of the state claim under the test, the Court held that (1) the federal claim must be substantial enough to convey subject matter jurisdiction; (2) the state and federal claims must derive from a common nucleus of operative fact; and (3) one ordinarily must expect to try the two claims in one judicial proceeding. *Id.* at 725. Even if the claims in a particular case pass this test, the Court suggested in *Gibbs* that a federal court need not exercise pendent jurisdiction because that jurisdictional concept "is a doctrine of discretion, not of plaintiff's right." *Id.* at 726. According to the Court, the doctrine's justification "lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over

party had filed a lawsuit in federal court challenging an order issued by a state railroad commission. The complaints in both *Pullman* and *Siler* had asserted both federal constitutional claims and pendent state claims alleging that the railroad commission's order was not authorized by the commission's enabling act.⁷⁶ In *Siler*, the Court had forged ahead, asserting pendent jurisdiction over the state claim and invalidating the state commission's order on that basis. In *Pullman*, however, Justice Frankfurter took a more careful look at the state claim before deciding whether to resolve it. Justice Frankfurter acknowledged that the Court had jurisdiction to resolve the state claim, and he sympathized with the preference expressed in *Siler* for avoiding "sensitive" constitutional decisions by first deciding the state claims.⁷⁷ He refused to decide the state claim in *Pullman*, however, because he felt ill-equipped to do so.

Unlike the Court in *Siler*, which prior to *Erie* had decided the state law question based on its own preferences concerning social policy, the Court in *Pullman* recognized its duty under the *Erie* doctrine to apply state law to adjudicate the state claim.⁷⁸ When Justice Frankfurter examined the state enabling statute in *Pullman*, he found that the commission's authority to issue the order

state claims." *Id.*; see C. WRIGHT, *supra* note 15, at 105-07; Schenkier, *supra* note 10, at 248-51.

Recently, the Court has shown signs that it will take a restrictive approach to pendent jurisdiction. A primary example is its hesitance to allow use of the doctrine to join pendent parties in federal court. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); Schenkier, *supra* note 10, at 247, 275-87.

76. *Pullman*, however, differed from *Siler* and *Young* in the nature of the state action at issue. Typical of their day, *Siler* and *Young* involved challenges to economic regulations. See R. McCLOSKEY, *supra* note 2, at 104-05. *Pullman*, on the other hand, raised the issue of racial discrimination, which was to become a focus of the Court's attention in the post-World War II period. See *id.* at 180-81. In *Pullman*, the Texas Railroad Commission had required that Pullman conductors, rather than porters, control sleeping cars operated on railway lines within the State. At the time, Pullman porters were black, and conductors were white. The order prompted challenges from the Pullman Company, the affected railroads, and the porters. See 312 U.S. at 497-98.

77. 312 U.S. at 498.

78. *Id.* at 499. In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court had turned away from the most troubling aspect of *Siler*—the disregard of state law in resolving state claims. In *Erie*, the Court explicitly had rejected the concept of general federal common law, holding that state law applies unless federal law controls the particular matter. *Id.* at 78. The *Erie* doctrine thus obliges federal courts to apply state law in resolving state claims within its pendent jurisdiction. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

was "far from clear."⁷⁹ Justice Frankfurter's proffered solution, which has come to be known as *Pullman* abstention, was for the federal district court to stay the case while the parties resorted to the state judiciary for resolution of the state law claim.⁸⁰ As later refined by the Court, *Pullman* abstention allows a plaintiff challenging state action either to assert the federal constitutional claim in state court or to preserve the federal claim for ultimate resolution in federal court if the state ruling does not terminate the controversy.⁸¹

Pullman abstention is a valuable variation on *Siler*. As distilled over the years, the *Pullman* doctrine prescribes abstention "when

79. 312 U.S. at 499. The federal district court had held that the state enabling act did not authorize the commission's order. See *Pullman Co. v. Railroad Comm'n*, 33 F. Supp. 675 (W.D. Tex. 1940) (per curiam), *rev'd*, 312 U.S. 496 (1941). Justice Frankfurter did not question that opinion, but he was diffident in his evaluation of the state law issue:

Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. The lower court did deny that the Texas statutes sustained the Commission's assertion of power. And this represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.

312 U.S. at 499.

Professor Field, commenting on *Pullman*, suggested that the state decisional law interpreting the enabling statute was "relatively unambiguous." See Field, *supra* note 12, at 1078 n.23. Judge Hufstedler raised a more cynical argument in favor of the federal district court's decision to adjudicate the pendent state claim. Judge Hufstedler asked rhetorically, but pointedly: "How likely was it in 1941 that the Texas courts would hold that the Commission did not have authority under state law to adopt rules discriminating against black porters in favor of white conductors?" See Hufstedler, *supra* note 21, at 861.

80. 312 U.S. at 501-02; see *supra* notes 12-15 and accompanying text. As a predicate to staying the federal action, the Court found that Texas law appeared "to furnish easy and ample means for determining the Commission's authority." *Id.* at 501. The Court also assumed that the state judiciary's "methods for securing a definitive ruling in the state courts [would] be pursued with full protection of the constitutional claim." *Id.*

81. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). In *England*, the Court explained why the *Pullman* abstention doctrine gave this option to the challenger: "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.* at 415 (footnote omitted).

a federal court is faced with an unclear issue of state law whose resolution might avoid or modify a federal constitutional question.”⁸² *Pullman* abstention thus reflects a more solicitous view of state autonomy because it recognizes “the role of state courts as the final expositors of state law.”⁸³

This structural recognition carries a functional justification as well, because *Pullman* abstention allocates issues between state and federal courts in a way that optimizes each forum’s expertise.⁸⁴ Furthermore, although Justice Frankfurter’s worry about the effect of an unconstrained *Young-Siler* model on the “reign of law”⁸⁵ perhaps was exaggerated, it hardly was chimerical. Especially in the context of modern public law litigation, the interpretation of state governing statutes poses subtle problems for a court. The task of intuiting how the highest state court would approach these issues is not always easy for federal judges. Regardless of how a federal court decides an uncertain issue of state law, an incorrect prediction subsequently “supplanted by a controlling decision of a state court”⁸⁶ has an unfortunate effect on the workability of the judicial federalism system. At times, these incorrect predictions are profoundly damaging.⁸⁷

82. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977); see *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). In an early consideration of *Pullman* abstention, Professor Wright described the doctrine as one of “comity rather than of jurisdiction, and [one which] concerns fundamentally the timing of federal decision rather than the propriety of any federal decision at all.” Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815, 825 (1959).

83. *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); see *Pullman*, 312 U.S. at 500; Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1114 (1974); Field, *supra* note 12, at 1084. In this way, the doctrine allows the Court to control a long-standing problem of judicial federalism—namely, conflicting decisions of local law offered by state and federal courts. See Bezanson, *supra*, at 1115-16. This was the problem that had led to the Court’s undoing in *Erie* of the regime of federal common law that had prevailed under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

84. See Bezanson, *supra* note 83, at 1135-36; Field, *supra* note 12, at 1083; Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487-88 (1959).

85. *Pullman*, 312 U.S. at 500.

86. *Id.*

87. Regardless of the result of a federal court’s ruling on an unclear state claim, an incorrect ruling causes the judicial federalism system to malfunction. If the court erroneously sustains the state claim, it will have interfered needlessly with a valid state policy. If the court wrongly rejects the claim, on the other hand, it needlessly will have decided a

In spite of the sound rationale that underlies *Pullman* abstention, the doctrine justifiably has engendered a great deal of criticism. Most fundamentally, critics have argued that the doctrine usurps Congress' plenary power to delineate the jurisdiction of lower federal courts. These critics challenge Justice Frankfurter for allowing judicial abstention from cases that Congress has required federal courts to hear under the general federal question statute.⁸⁸ Some commentators also argue that even if the federal courts do have power to regulate their jurisdiction in this manner, *Pullman* abstention is not a sound mechanism for doing so. According to these commentators, Justice Frankfurter invoked abstract values of federalism that his doctrine fails to advance.⁸⁹ The most telling criticism of *Pullman* abstention, however, is functional. Virtually all observers acknowledge that litigants pay a high price when *Pullman* abstention mandates severance of cases for partial adjudication in the state and federal judicial systems.⁹⁰ The financial burden imposed by the delay and expense of *Pullman* abstention can be so great in some cases that it forecloses a federal forum for a litigant seeking adjudication of a constitutional right.⁹¹

Although these criticisms to some extent ring true, *Pullman* abstention has endured for good reason. Justice Frankfurter's call for

constitutional question despite the strong federal policy against doing so. *See id.*; Field *supra* note 82, at 590.

88. This challenge to *Pullman* abstention was voiced early. *See* Kurland, *supra* note 84, at 489. Only recently, however, has it received its most forceful articulation. *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984). The usual, but not wholly satisfying, response to this criticism is that *Pullman* abstention only delays the exercise of jurisdiction. C. WRIGHT, *supra* note 15, at 306; Field, *supra* note 12, at 1086-87; Redish, *supra*, at 90.

89. *See* Chisum, *supra* note 65, at 1179; Hufstedler, *supra* note 21, at 860-63.

90. *See, e.g.*, Chisum, *supra* note 65, at 1179; Field, *supra* note 12, at 1095. As an example of the cost of *Pullman*, Professor Field cited the litigation in *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964), in which the Court established the procedure for using *Pullman* abstention. *See supra* note 81 and accompanying text. In *England*, Professor Field reports, a final decision on the merits came nine years after the complaint was filed and five years after the federal court ordered abstention. Field, *supra* note 12, at 1085-86.

91. *See* Field, *supra* note 12, at 1085-87; Redish, *supra* note 88, at 90. In roughly half the states, a statutory procedure ameliorates these costs. Under this procedure, a federal court can retain the case and certify questions of state law to the highest state court for an advisory opinion. Plaintiffs are not required to complete their litigation in the state court system. *See* C. WRIGHT, *supra* note 15, at 313-15; Note, *Certification Statutes: Engineering a Solution to the Pullman Abstention Delay*, 59 NOTRE DAME L. REV. 1339 (1984).

restraint in federal resolution of state law issues is wise counsel. More fundamentally, *Pullman* offers a solution to a problem that has haunted the Court since *Chisholm* because it offers a mechanism that, from both a structural and a functional standpoint, appropriately allocates public law litigation between the federal and state judicial systems. The *Pullman* doctrine avoids the polar extremes of the judicial federalism spectrum. Instead, it allows the Court to move flexibly and moderately to assess judicial federalism implications on a case-by-case basis. *Pullman* abstention is the culmination of an evolutionary process. It is also a compromise, pure and simple.⁹²

The overriding value of *Pullman* abstention to the concept of judicial federalism is that, properly applied,⁹³ it keeps the federal forum operating within its capacity. Under the *Young-Siler-Pullman* jurisdictional model for resolving dual claims against state officials, federal courts normally resolve controversies on the basis of state law and then, if necessary, on the basis of federal constitutional law. That system functions properly only if the federal court is confident of its ability to ascertain and to apply governing state law. In the limited number of cases in which state law is "far from clear,"⁹⁴ however, a federal shot in the dark on the state law issue is hardly desirable. Federal judicial control of the manner in which state officials perform their official duties is sensitive business, and a federal court should hesitate to proceed if it is

92. See Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 606 (1967).

93. *Pullman* abstention, of course, may not always receive proper application. For example, the doctrine's "lack of definition," see Kurland, *supra* note 84, at 488-89, and the unpredictable results that stem from the doctrine's flexibility, see Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 697 (1981), may cause problems in application. Professor Field also has found that, at times, federal courts have misused *Pullman* abstention. These misuses, according to Professor Field, involve invocation of the doctrine for reasons other than clarification of state law. See Field, *supra* note 82, at 602-04. Indeed, this charge can be leveled against the use of abstention in *Pullman* itself. See *supra* note 79.

94. See *Pullman*, 312 U.S. at 499; *supra* note 79 and accompanying text. The Court has indicated that *Pullman* abstention is appropriate only in "narrowly limited special circumstances." *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). As the Court has explained many times, "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (quoting *Colorado River Water Dist. v. United States*, 424 U.S. 800, 813 (1976)); see *Propper v. Clark*, 337 U.S. 472, 492 (1949); *Meredith v. Winter Haven*, 320 U.S. 228, 234-35 (1943).

not confident of its resolution of a state law claim. In the unusual cases envisioned under *Pullman*, preservation of the federal claim while the parties litigate the state law issue is a sensible accommodation of federalism values. Used properly, *Pullman* abstention operates as an essential ultimate regulator of the judicial federalism system.

III. THE *Pennhurst* ALTERATION

One astute commentator has observed: "The history of judicial interpretation of the [eleventh] amendment illustrates in miniature much of the political and legal controversy since the early days of the Republic."⁹⁵ The same may be said of the larger concept of judicial federalism, as the preceding section reflects. The major Supreme Court decisions that helped design the modern pattern of judicial federalism were responses to lawsuits that typified their times. *Young* and *Siler*, decided in the first decade of this century, involved the standard economic due process challenges to state regulation for which that period has become known. *Pullman* was an early racial discrimination case of the type that was to constitute a staple of the modern Court's diet.⁹⁶ Similarly, the several decisions that constituted the *Pennhurst* litigation⁹⁷ arose from a claim that typified, albeit dramatically, the institutional lawsuits against state officials that flourished in many federal district courts during the 1970's.⁹⁸ As a result, the Court's use of *Pennhurst* as the setting for its alteration of judicial federalism concepts is fitting, in an ironic way.

A. Initial District Court and Circuit Court Consideration

The *Pennhurst* litigation began in May 1974, when Terri Lee Halderman, a resident of Pennhurst State School and Hospital near Philadelphia, filed a class action in federal district court against the state and county officials responsible for her institu-

95. Shapiro, *supra* note 5, at 61.

96. See *supra* notes 59-81 and accompanying text.

97. The ten-year litigation in *Pennhurst* produced a number of judicial decisions, but this Article discusses only the principal opinions in detail. See *infra* notes 99-153 and accompanying text.

98. See *supra* note 11.

tionalization. Halderman represented a class of mentally retarded persons who resided, or who had resided, at Pennhurst. The class' primary claim was that hospital officials had violated rights secured by state and federal statutes and by the United States Constitution.⁹⁹

Against a backdrop of factual findings that depicted Pennhurst Hospital as a Gothic nightmare,¹⁰⁰ the district court had no difficulty holding that the State had violated the legal rights of the mentally retarded residents of Pennhurst.¹⁰¹ At the core of the district court's analysis was the belief that, once a state involuntarily¹⁰² commits retarded persons, it assumes a legal duty to provide them with habilitation¹⁰³ sufficient to afford them "a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit."¹⁰⁴ According to the district court, the residents' rights to such minimally adequate habilitation were grounded in the Constitution,¹⁰⁵ federal statutes,¹⁰⁶

99. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1298, 1300 (E.D. Pa. 1977), *aff'd en banc*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981). The district court granted the United States leave to intervene as a plaintiff in January 1975. *Id.* at 1301.

100. The district court described the deficiencies of Pennhurst in great detail. *See id.* at 1303-10. Even the State admitted that Pennhurst did not meet minimum state, federal, or professional standards for the habilitation of its residents. *Id.* at 1302 & n.14. The district court's findings of fact followed a thirty-two day bench trial on the issue of liability. *Id.* at 1298, 1300.

101. *Id.* at 1313. The court introduced its discussion of the residents' legal claims by noting, ironically, that the state officials before the court apparently shared the primary institutional aims of the residents. According to the court, the State had envisioned closing Pennhurst and moving the patients to appropriate community facilities by 1980. *Id.* at 1312. "All agree," the court concluded, "that institutions such as Pennhurst are inappropriate and inadequate for the habilitation of the retarded." *Id.* at 1313.

102. The district court found that "the notion of voluntariness in connection with admission as well as in connection with the right to leave Pennhurst is an illusory concept." *Id.* at 1311.

103. According to the district court, "habilitation" is a "term of art used to refer to that education, training and care required by retarded individuals to reach their maximum development." *Id.* at 1298.

104. *Id.* at 1317-18.

105. The court apparently found that the residents received this right under the due process clause of the fourteenth amendment. *See id.* at 1319. The plaintiffs had alleged violations of not only the fourteenth amendment, but also the first, eighth, and ninth amendments. *See id.* at 1298 n.3.

106. The court found a violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). *See* 446 F. Supp. at 1323-24.

and Pennsylvania's Mental Health and Mental Retardation Act of 1966¹⁰⁷ (MH/MR Act).

To remedy the violations at the hospital, the court ordered the State to close Pennhurst and to replace it with "suitable community living arrangements."¹⁰⁸ The court also ordered the State to develop "a written individualized program plan" for each class member,¹⁰⁹ as well as "such community services as are necessary to provide . . . minimally adequate habilitation."¹¹⁰ The court appointed a special master to implement the decree.¹¹¹

On appeal, the district court's judgment presented the United States Court of Appeals for the Third Circuit with a classic institutional decree that offered a menu of substantive bases.¹¹² The difficulty of the case for the court of appeals is demonstrated by the court's decision to set the appeal for en banc consideration because the first panel to hear the case had been unable to agree on a majority opinion.¹¹³ The difficult choices facing the court of appeals involved legal, not factual, issues. Indeed, the state and county officials did not challenge the district court's factual findings concerning what the Third Circuit called "the abominable conditions to which Pennhurst residents have been subjected."¹¹⁴ Instead, their challenge focused on the legal bases for, and scope of, the decree. In particular, the hospital officials challenged the district court's

107. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969); see 446 F. Supp. at 1322-23.

108. 446 F. Supp. at 1325-26. The court found that "an institution such as Pennhurst" could not provide adequate habilitation. *Id.* at 1318; see *id.* at 1319-20.

109. *Id.* at 1326.

110. *Id.* The court ordered state and county officials to monitor the adequacy of the community arrangements and services provided under the decree. *Id.*

111. *Id.* at 1326. The court found that implementing the decree would be "impossible without the appointment of a Special Master," whose implementation plan would be subject to the court's approval. *Id.*

112. See *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd*, 451 U.S. 1 (1981). Both the district court and the court of appeals refused to stay the decree pending appeal. See *id.* at 90; 451 F. Supp. 233 (E.D. Pa. 1978), *denying stay* of 446 F. Supp. 1295 (E.D. Pa. 1977). The appellate court's refusal to grant a stay essentially meant that implementation of the district court judgment had continued during appellate review. See 612 F.2d at 90. Later, the court of appeals issued a partial stay that disallowed "transfers out of Pennhurst of any resident whose parents or guardian fails to sign a written consent to such transfer." *Id.*

113. See 612 F.2d at 90.

114. *Id.* at 92.

ruling that institutionalized mentally retarded persons have a legal right to habilitation in the least restrictive environment.¹¹⁵

The court of appeals upheld the district court's ruling. The court found that the right to habilitation articulated by the district court was protected by a federal statute, the Federal Developmentally Disabled Assistance and Bill of Rights Act of 1975.¹¹⁶ Having found a proper legal basis for the residents' asserted rights, the court of appeals had no difficulty concluding that the State had violated those rights:

[I]t goes almost without saying that Pennhurst, as it was constituted and operated at the time of the lawsuit, was in flagrant violation of those rights. The conditions at Pennhurst were unsanitary, programming was nonexistent, enforced idleness was substituted for meaningful habilitation, physical and chemical restraints were wantonly applied, and overcrowding and understaffing were the prevailing and institutional norms.¹¹⁷

The court of appeals supported the district court's mandate for deinstitutionalization of the State's mentally retarded patients.¹¹⁸ It stopped short, however, of closing Pennhurst.¹¹⁹ According to the court, the federal and state statutes on which the residents had

115. *Id.* at 92, 94.

116. 42 U.S.C. §§ 6000-6081 (1982); *see* 612 F.2d at 95-100, 104-07. The plaintiffs had asserted a cause of action under the statute, but the district court had not ruled on that claim. *See id.* at 95.

The court of appeals also held that Pennsylvania's MH/MR Act provided an alternative basis for a right to receive "adequate treatment or habilitation." 612 F.2d at 102. The court did not indicate, however, whether the state law also required that those services be provided in the least restrictive setting. The Third Circuit declined to rule on the residents' claims under the United States Constitution, *see id.* at 104, and the Federal Rehabilitation Act, *see id.* at 107-08.

117. 612 F.2d at 108.

118. The court advised that "deinstitutionalization is the favored approach to habilitation." *Id.* at 115. In implementing the decree, the court added, the presumption should favor transfer from Pennhurst. *Id.*

119. *Id.* at 114. The court required individualized determinations concerning deinstitutionalization for each patient, explaining:

All that we need to recognize is that there may be some individual patients who, because of advanced age, profound degree of retardation, special needs or for some other reason, will not be able to adjust to life outside of an institution and thus will be harmed by such a change.

Id.

grounded their rights did not foreclose all institutionalization of the mentally retarded.¹²⁰

B. Initial Supreme Court Consideration: Pennhurst I

Pennhurst Hospital's fortunes finally brightened when the case made its first trip to the United States Supreme Court. In *Pennhurst State School & Hospital v. Halderman*¹²¹ (*Pennhurst I*), the Court held that the Developmentally Disabled Assistance Act, on which the court of appeals had grounded its affirmance of the decree, does not provide institutionalized mentally retarded individuals with a judicially enforceable right to habilitation in the least restrictive environment.¹²² The Court interpreted the statute as simply providing the states with "funding incentives" to improve the lot of the mentally retarded.¹²³ As Justice Rehnquist's majority opinion repeatedly emphasized, the Court was hesitant to view the statute as an attempt to intrude on "traditional state authority" by imposing "affirmative obligations on the States to fund certain services."¹²⁴ According to Justice Rehnquist, Congress' failure explicitly to enact the rights added to the Court's reluctance, especially because these rights would "impose massive financial obligations on the States."¹²⁵ Justice Rehnquist explained:

In no case . . . have we required a State to provide money to plaintiffs, much less required a State to take on such open-ended and potentially burdensome obligations as providing "appropriate" treatment in the "least restrictive" environment. And because this is a suit in federal court, anything but prospective

120. *Id.* at 114-15. The court warned, however, that "state and federal laws plainly require that if Pennhurst is to remain open for at least some patients, it must be dramatically improved so as to provide adequate habilitation." *Id.* at 116. The district court's decree had ordered this type of improvement. See 446 F. Supp. at 1328-29.

121. 451 U.S. 1 (1981).

122. See *id.* at 5, 10-11, 15-27; see also *supra* note 116 and accompanying text (citing the act and noting the circuit court's reliance on it).

123. *Id.* at 31.

124. *Id.* at 16-17 (emphasis by the Court).

125. *Id.*; see *id.* at 17, 18, 24-25, 31-32.

relief would pose serious questions under the Eleventh Amendment.¹²⁶

Having dismantled the foundation of the Third Circuit's affirmation, Justice Rehnquist remanded the case to the court of appeals.

C. Court of Appeals Consideration on Remand

Justice Rehnquist's opinion forced the Third Circuit to face essentially the same choices on remand that it had confronted when it initially reviewed the case. In a legal sense, the Supreme Court simply had withdrawn one basis for the plaintiffs' right to treatment. Although the Developmentally Disabled Assistance Act no longer was available to support a decree against Pennhurst, the State MH/MR Act, the Federal Rehabilitation Act, and the United States Constitution remained candidates to support such a decree. The court chose the state statute.¹²⁷

A convergence of considerations may have led the court of appeals to settle on the state statute. One consideration may have been the tone of Justice Rehnquist's opinion for the Court in *Pennhurst I*. Justice Rehnquist left no doubt about his disinclination to imply broad rights to treatment from federal statutes, and he gave no signal that the Court stood ready to find a constitutional basis for the district court's institutional decree.¹²⁸ These

126. *Id.* at 29-30 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)); see also *supra* note 75 (describing the expansion of eleventh amendment immunity created by the Court's ruling in *Edelman*).

127. *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647, 651-56 (3d Cir. 1982) (en banc), *rev'd*, 465 U.S. 89 (1984).

128. See 451 U.S. at 15-18. Although Justice Blackmun largely agreed with the Court's interpretation of the Act in *Pennhurst I*, he wrote a separate opinion. One reason for writing separately was his desire to disassociate himself from what he considered a strong intimation that a majority of the justices would "not view kindly any future positive holding in [the] direction" of the plaintiffs' claims. 451 U.S. at 32. Although Justice Blackmun's observation refers only to the Court's view of the plaintiffs' remaining claims under the Federal Developmentally Disabled Assistance and Bill of Rights Act of 1975, it also applies to the Court's view of the plaintiffs' remaining claims under other federal statutes.

Just a few months after the Third Circuit disposed of the *Pennhurst* remand, the potential constitutional basis arguably brightened. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court did find a due process right for institutionalized, mentally retarded people. *Youngberg* also involved the conditions at Pennhurst. *Id.* at 309, 310. In fact, the plaintiff in *Youngberg* also was a class member in *Pennhurst* and, consequently, his claim for injunctive relief in *Youngberg* had been dropped. *Id.* at 311.

judicial declarations, which clouded the prospect for a right to habilitation based on federal law, starkly contrasted with declarations of the Pennsylvania Supreme Court concerning the right to habilitation under Pennsylvania's MH/MR Act. In *In re Schmidt*,¹²⁹ which was decided while *Pennhurst I* was pending before the United States Supreme Court, the Supreme Court of Pennsylvania first interpreted the MH/MR Act and, as a result, solidified the *Pennhurst* plaintiffs' state law claims considerably. In *Schmidt*, the state court unequivocally found a legislative mandate requiring the State to habilitate its mentally retarded patients in the least restrictive environment.¹³⁰ In addition, the language of *Schmidt*, albeit often dicta, seemed fully consonant with the thrust of the presumption against institutionalization delineated by the Third Circuit:¹³¹

This Commonwealth has committed itself to a rejection of the former view that indiscriminate institutionalization was the panacea for the resolution of the problems presented by citizens who were not self-sufficient because of mental retardation. We also embrace the view that a mentally retarded person shall not

In *Youngberg*, the plaintiff claimed damages against state officials for sixty-three injuries he allegedly had suffered during his stay at *Pennhurst*. The plaintiff also sought damages for undue physical restraints and for failure to provide minimally adequate habilitation. *Id.* at 310-11, 316, 317. Justice Powell, writing for the Court, had no difficulty finding that institutionalized mentally retarded people have a substantive due process right to enjoy safe conditions and to be free from bodily restraint. *Id.* at 315-16. Justice Powell had difficulty with the claimed right to habilitation, however, terming this issue "more troubling." *Id.* at 316. Despite this difficulty, Justice Powell recognized a limited right to habilitation that applies only to retarded people who are institutionalized, *id.* at 317, and that extends only to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319. He reserved "the difficult question" of "whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom." *Id.* at 318 (footnote omitted).

The Court's standard concerning the right to habilitation was not only limited in scope, but also consciously deferential. To satisfy substantive due process under the standard, a state only had to demonstrate that it made a "professional" judgment. *Id.* at 321-25. This limited right, and its deferential application, provided little comfort to the plaintiffs in *Pennhurst*. If the Supreme Court were going to sustain its position on constitutional grounds in its second consideration of *Pennhurst*, it would have to extend its holding in *Youngberg* considerably.

129. 494 Pa. 86, 429 A.2d 631 (1981).

130. See *id.* at 94-98, 429 A.2d at 635-37.

131. See *supra* note 118.

be determined to require involuntary residential placement unless the degree of retardation shows an inability to provide for the most basic personal needs and provision for such needs is not available and cannot be developed or provided for in the existing home or in the community in which the individual resides.¹³²

The allure of a state law disposition also must have been heightened by the prospect that such a ruling would not be reviewed by the Supreme Court on the merits.¹³³ Pennsylvania's interpretation of the MH/MR Act must have seemed like a godsend, considering the displeasure with the Third Circuit's decree that the Supreme Court had expressed in *Pennhurst I*.

Perhaps motivated by all of these considerations, the Third Circuit seized on *Schmidt* as providing a "definitive" resolution of *Pennhurst*.¹³⁴ In doing so, the court not only correctly read the decision of the Pennsylvania Supreme Court,¹³⁵ but also proceeded appropriately through the methodology of judicial federalism. By disposing of the case on the basis of the state law claim, the court of appeals acted consistently with the preference announced in *Siler* and in *Pullman* for avoiding unnecessary constitutional rulings. Indeed, the Supreme Court's remand in *Pennhurst I* had directed the court of appeals not only to reevaluate the state law claim, but also to perform that reevaluation in light of *Schmidt*.¹³⁶

132. 494 Pa. at 92, 429 A.2d at 633-34 (citation and footnote omitted).

133. In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), the Court indicated that it lacked jurisdiction to review a federal circuit court decision that was based on independent and adequate state grounds. *Id.* at 292. On remand in *Pennhurst*, the Third Circuit concluded that the MH/MR Act provided an independent and adequate ground for the decree. 673 F.2d at 656. The State therefore did not challenge the merits of the state law ruling before the Supreme Court. See Brief for PARC in Opposition at 17-18, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

134. 673 F.2d at 651-56.

135. At least one lower Pennsylvania state court has read *Schmidt* as recognizing the right of a mentally retarded person "to placement in the least restrictive alternative available." See *In re Stover*, 443 A.2d 327, 329 (Pa. Super. Ct. 1982).

136. See 451 U.S. at 30-31 & n.24. Such direction on remand is not unusual for cases with a postural resemblance to *Pennhurst* after its first remand. See, e.g., *Estelle v. Bullard*, 459 U.S. 1139 (1983); *Mills v. Rogers*, 457 U.S. 291 (1982); see also *Schmidt v. Oakland Unified School Dist.*, 457 U.S. 594 (1982) (federal court of appeals abused its discretion by deciding federal constitutional claim and declining to consider pendent state claim that could have enabled the court to avoid the constitutional question).

Understandably, the State responded to the Third Circuit's reliance on state law by fundamentally shifting its litigating position to focusing on whether the federal court had the power to base an injunction on state law. In arguing the case before the Third Circuit on remand, the State invoked *Pullman* abstention, which was the traditional method for disabling federal jurisdiction. The court of appeals, however, rejected it out of hand.¹³⁷ This was the first time the State raised abstention,¹³⁸ and its timing could not have been less appropriate. Eight years had elapsed since Halderman had filed the complaint, the State already had argued the merits of the state law claim before the district court and the court of appeals, and, perhaps most importantly, the highest state court already had resolved the governing issue of state law definitively.¹³⁹ The State also attempted to argue, with an equal lack of success, that the eleventh amendment bars pendent jurisdiction over state law claims for the prospective relief lodged against state officials.¹⁴⁰ The court appreciated the novelty of the argument, but it recognized that the argument was incompatible with the *Young-Siler* model for public law litigation against state officials.¹⁴¹

137. 673 F.2d at 659-60.

138. Brief for Respondent at 24, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

139. On appeal, these considerations made the State's position on this issue difficult because of the Supreme Court's reluctance to mandate *Pullman* abstention when the request follows substantial delay in the litigation. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964). But see Rudenstine, *supra* note 5, at 91-92 (arguing that the Supreme Court could have invoked *Pullman* abstention in *Pennhurst II*).

140. 673 F.2d at 656-59. The State conceded the court's jurisdiction to decide the federal claims. *Id.* at 656. As with *Pullman* abstention, the State's argument on remand represented the first time this eleventh amendment issue received consideration. See *id.* at 656-59.

During the Third Circuit's first consideration of *Pennhurst*, the State had argued that the district court's decree violated the eleventh amendment because it required the expenditure of state funds. 612 F.2d at 109. The Third Circuit had rejected this argument, holding that all of the relief ordered by the district court was prospective and that the expenditure of funds required to comply with the decree simply was ancillary to that prospective relief. *Id.*; see *Quern v. Jordan*, 440 U.S. 332, 346-49 (1979); *Edelman v. Jordan*, 415 U.S. 651, 667-78 (1974); *supra* note 75.

141. *Id.* at 656-59. Chief Judge Seitz and Judge Hunter were somewhat more intrigued by the State's revamped eleventh amendment challenge. They suggested, however, that the court could not adopt the argument because of the clarity of contrary Supreme Court precedent. *Id.* at 662 (Seitz, C. J., dissenting in part). The United States also believed that *Siler* was "a sufficient answer" to the State's eleventh amendment argument. See Brief for the

D. *A Second Trip to the Supreme Court: Pennhurst II*

The State's arguments met with greater success upon a return to the Supreme Court. In *Pennhurst II*, a closely divided Court reversed on the eleventh amendment issue, thereby abandoning the *Young-Siler-Pullman* model. Justice Powell, writing for the Court, held that the eleventh amendment prohibits federal courts from awarding injunctive relief against state officials on the basis of state law.¹⁴²

To reach its result, the Court limited the application of *Young* to claims challenging the constitutionality of state officials' actions.¹⁴³ In *Young*, the Court noted, it had established a "fiction" to promote the supremacy of federal law. The purpose behind that fiction, according to the Court in *Pennhurst II*, disappears when a federal court is asked to review actions by state officials on the basis of state law.¹⁴⁴ Justice Powell viewed the assertion of pendent jurisdiction over state law claims against state officials as fundamentally inconsistent with eleventh amendment values: "[I]t 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."¹⁴⁵ The Court concluded that the doctrine of pendent jurisdiction, "a judge-made doctrine inferred from the general language

United States in Opposition at 9, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

142. *Pennhurst II*, 465 U.S. 89 (1984).

143. See *id.* at 102-03, 104-06.

144. *Id.* at 104-06. In buttressing his limitation of *Young*, Justice Powell hammered at the illegitimacy of the *Young* doctrine. He noted its "irony" when juxtaposed against the state action requirement of the fourteenth amendment, *id.* at 105, and he denigrated the doctrine as "a fiction that has been narrowly construed," *id.* at 114 n.25. The Court stopped short of overruling *Young*, however, contenting itself to "do no more than question the vitality of the *ultra vires* doctrine in the Eleventh Amendment context." *Id.* At least one commentator has speculated that the Court is not likely to overrule *Young*, notwithstanding the Court's skepticism about the doctrine it provides. See Rudenstine, *supra* note 5, at 99.

145. 465 U.S. at 106. Professor Brown has questioned Justice Powell's concern that a federal court's injunction grounded on state law significantly intrudes on state autonomy. See Brown, *supra* note 5, at 360; see also Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PRR. L. REV. 759, 780 (1972) ("[T]he idea that it is undesirable for federal courts to decide issues involving questions of state law is based on an oversimplified approach to federalism.").

of Art[icle] III," should not displace "the explicit limitation on federal jurisdiction contained in the Eleventh Amendment."¹⁴⁶ With this statement, the Court effectively overruled *Siler*, at least as it applied to suits brought against state officials.¹⁴⁷

In an opinion written by Justice Stevens, the four dissenting justices decried the Court's conclusion.¹⁴⁸ In language indicative of his harsh dissent, Justice Stevens rejected the result as "perverse." Justice Stevens stated: "[T]he Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania itself has prohibited. No rational view of the sovereign immunity of the States supports this result."¹⁴⁹ The dissenting justices would have applied the same eleventh amendment standard to the state claim and to the federal claim. Whether a claim for an injunction is based on state law or federal law, according to the justices, "conduct that exceeds the scope of an official's lawful discretion is not conduct the sovereign has authorized and hence is subject to injunction."¹⁵⁰ In other words, the

146. 465 U. S. at 117-18. Of course, the eleventh amendment did *not* apply "explicitly" to this case, because *Pennhurst* was a suit brought by citizens of Pennsylvania. See *supra* note 42 and accompanying text. The Court's application of the eleventh amendment relied on the "judge-made doctrine" of *Hans v. Louisiana*, 134 U.S. 1 (1890). See *supra* notes 39-48 and accompanying text. In dissent, Justice Stevens reminded Justice Powell of the importance of *Hans* to his argument. See 465 U.S. at 140 (Stevens, J., dissenting).

147. Justice Powell attempted to defuse "*Siler* and subsequent cases" by arguing that the Court in those cases did not "mention the Eleventh Amendment in connection with the state-law claim." *Id.* at 118; see 465 U.S. at 119 n.28 ("Nothing in our decision is meant to cast doubt on the desirability of applying the *Siler* principle in cases where the federal court has jurisdiction to decide the state-law issues."). Justice Peckham, however, wrote the opinion in *Siler* just one year after he wrote the opinion in *Young*. Viewed in this light, Justice Peckham's failure to discuss the eleventh amendment in *Siler* most likely reflected his belief that it was inapplicable because of the precedent in *Young*. See Brief for the United States in Opposition, *supra* note 141, at 9-10.

148. By Justice Stevens' count, "at least 28 cases, spanning well over a century of this Court's jurisprudence," were "repudiated" by the Court's construction of the eleventh amendment as barring jurisdiction over pendent state claims against state officials litigating in federal court. 465 U.S. at 127 (Stevens, J., dissenting); see *id.* at 159-63.

149. *Id.* at 126. "In such a case," Justice Stevens argued, "the sovereign's interest lies with those who seek to enforce its laws, rather than those who have violated them." *Id.* at 150. In his commentary on *Pennhurst II*, Professor Shapiro observed that no sovereign immunity available under state law could have applied to the case. See Shapiro, *supra* note 5, at 78.

150. 465 U.S. at 139. "Whether that conduct also gives rise to damage liability," Justice Stevens added, "is an entirely separate question." *Id.*; see *id.* at 146 n.29.

dissenters were willing to apply the *Young* doctrine to the state law claim, but the majority was not.¹⁵¹

The Court remanded *Pennhurst* yet again to the Third Circuit. This time, it instructed the court of appeals to consider the remaining federal statutory and constitutional claims.¹⁵² The parties had had enough though, and they settled the litigation once the State agreed to make good on its original intention to close *Pennhurst*, albeit several years later than planned.¹⁵³ In the wake of the State's decision to settle, however, lay not only the waste of eleven years of litigation, but also a transmutation of *Pullman* abstention and an altered concept of judicial federalism.

IV. *Pullman* ABSTENTION AFTER *Pennhurst*

Reduced to their essentials, *Pullman* and *Pennhurst* share an identical factual configuration. In both suits, private parties sought injunctions against state officials to prevent alleged constitutional violations. In addition, the challengers in both cases argued alternatively that the officials' actions were contrary to the relevant state enabling statute. Given the similarity between the two cases, the Supreme Court's failure in *Pennhurst* to consider *Pullman* abstention seriously is curious.¹⁵⁴ Even more remarkable is that the Court, without explanation, swept aside the traditional role of *Pullman* abstention as a flexible regulator of judicial federalism

151. *Id.* at 144-50, 158-59. The doctrinal basis for the disagreement between the majority and the dissent was Justice Stevens' view that Justice Powell incorrectly portrayed *Young* as based on the "unprincipled accommodation between federal and state interests." Justice Stevens asserted instead that the stripping principle of *Young*, see *supra* note 63 and accompanying text, had "deep roots in the history of sovereign immunity." *Id.* at 146. According to Justice Stevens, the key question was not whether the state officials had acted unconstitutionally, but rather whether they had acted illegally. *Id.* at 147-49; see *id.* at 150, 157-58.

152. *Id.* at 125.

153. Under the settlement, "[t]he state is to close the institution by July 1, 1986, move its 435 patients to other community facilities and spend about \$43 million to provide care for the mentally retarded." N.Y. Times, Apr. 6, 1985, at 6, col. 5; see also *supra* note 101 (noting the original plan to close *Pennhurst* by 1980).

154. The state officials abandoned their *Pullman* abstention contention during argument before the Supreme Court in *Pennhurst II*. See 465 U.S. at 97. Justice Powell made passing reference to abstention in his opinion, *id.* at 122 & n.32, but he did not consider the application of *Pullman* abstention to *Pennhurst* or the effect his eleventh amendment ruling would have on the *Pullman* doctrine.

concerns in public law challenges to state action, and replaced it with a fixed jurisdictional bar to consideration of the state law claim in those suits.

The significance of the change that the Court silently effected in *Pennhurst* is seen best by outlining the method district judges should use to handle lawsuits fitting the factual configuration of *Pullman* and *Pennhurst*.¹⁵⁵ Under *Pullman* abstention, district judges protect judicial federalism values essentially by focusing on the nature of the state law claim and on the sufficiency of state processes to resolve the claim expeditiously. More specifically, the judges assess their ability to predict what the outcome of the state claim would be if it were presented to the highest state court.¹⁵⁶ In making this determination, the judges concentrate mainly on the certainty of state law governing the claim.¹⁵⁷ While no judge could predict another court's resolution of a particular claim with absolute certainty,¹⁵⁸ district judges usually have enough schooling in local law to determine whether they can make such a prediction with confidence.¹⁵⁹ Only when the judge lacks this confidence or, in Justice Frankfurter's words, when the state law is "far from clear," is abstention an appropriate option.¹⁶⁰ *Pullman* abstention thus envisions a flexible, case-by-case analysis.¹⁶¹

155. When exploring the concept of judicial federalism, as Professor Tribe has observed, "the Court's chief doctrinal concern has focused on the federal district courts." L. TRIBE, *supra* note 2, § 3-39, at 149.

156. See *Pullman*, 312 U.S. at 499-500; Field, *supra* note 12, at 1090.

157. See C. WRIGHT, *supra* note 15, at 304; Field, *supra* note 82, at 602.

158. See Field, *supra* note 93, at 697.

159. See Field, *supra* note 12, at 1090. This schooling comes from several sources. Perhaps the most important source is the judges' knowledge of state law acquired from their years of legal practice within a particular state. This schooling also derives from district judges' frequent application of state law, primarily when resolving suits within the court's diversity jurisdiction, see 28 U.S.C. § 1332 (1982); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), or pendent jurisdiction, see *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). See M. REDISH, *supra* note 19, at 234.

160. See *Pullman*, 312 U.S. at 499. Professor Field has observed that "as state law becomes increasingly clear in whatever direction, abstaining becomes increasingly purposeless." Field, *supra* note 12, at 1105; see 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 12, at 455-58.

161. See *Baggett v. Bullitt*, 373 U.S. 360, 375 (1964); Field, *supra* note 12, at 1101; see also H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 94 (1973) (although author originally favored codification of abstention, he now favors case-by-case analysis).

Under *Pennhurst II*, on the other hand, this particularized, discretionary balancing of federalism values has no place. Instead, district judges must dismiss the state law claims in all cases. In effect, the Supreme Court overruled *Pullman* as it applies to the type of litigation for which it was designed—pendent state claims against state officials in federal cases that present alternative federal constitutional claims. Under *Pennhurst II*, district judges never consider whether the governing state law is clear or whether they can predict the ultimate resolution by the highest state court with confidence. The judges do not even consider whether the state itself offers an effective means of resolving the state law claim. Under *Pennhurst II*, the district court *never* has jurisdiction to hear the state law claim.

The *Pullman* doctrine nevertheless retains some signs of life after *Pennhurst II*. Ironically, however, it retains its clearest vitality in cases involving two potential factual configurations that differ from the factual configuration in *Pullman*. The first of these factual configurations involves a suit for prospective relief against state or local officials for a violation of the federal Constitution, when resolution of that federal question is entwined with a question of state law. For example, a federal constitutional challenge to a state statute that contains ambiguous operative provisions would fall into this category.¹⁶² Although the interpretation of the challenged state statute in such a case would not be relevant to the separate state law claim, as it was in *Pennhurst*, the district judge still would have to interpret the state statute before resolving the federal constitutional claim. The Supreme Court has applied the *Pullman* analysis in cases of this type since *Pennhurst*.¹⁶³

The second factual configuration in which *Pullman* retains a primary role involves a case in which the district court has exercised

162. Professor Field has termed this type of lawsuit a "construction case." Field, *supra* note 12, at 1111. For an in depth discussion of *Pullman* abstention as it applies to this type of lawsuit, see *id.* at 1111-21.

163. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (*Pullman* abstention not appropriate because state law was clear); see also *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2804 (1985) (O'Connor, J., concurring) ("Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law.").

federal question jurisdiction over a constitutional claim and pendent jurisdiction over a state law claim, but in which the defendants are not state officials and thus are not protected by the eleventh amendment. Clearly, the *Pullman* doctrine still applies when the defendants are private parties. Situations involving private parties as defendants, however, are unusual because of the state action requirement for most constitutional claims.¹⁶⁴

More commonly, cases of this type involve defendants who are local officials or officials of other governmental subdivisions of a state. *Pullman* abstention arguably applies to these cases as well, but its application has been clouded by *Pennhurst II* because some of the defendants in that case were county, as opposed to state, officials. The plaintiffs argued in *Pennhurst II* that the Third Circuit could affirm the decree on state law grounds because the eleventh amendment does not bar claims against local government officials.¹⁶⁵ The Supreme Court understandably rejected this argument, noting quite correctly that the decree operated primarily against the state officials who were charged with operating *Pennhurst*, which, after all, was a state institution.¹⁶⁶

Justice Powell, however, was not content to rest matters there; he added that the eleventh amendment might bar the state law claim against the county officials in any event.¹⁶⁷ Although Justice Powell noted the common understanding that "the Eleventh Amendment does not apply to 'counties and similar municipal corporations,'" ¹⁶⁸ he indicated that immunity nevertheless might

164. See 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 12, at 453.

165. See *Pennhurst II*, 465 U.S. at 123; see also 673 F.2d at 656 (finding this argument persuasive).

166. 465 U.S. at 123-24. The Court resorted to its discretion under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to dismiss the state law claim against the County. *Id.* at 921; see *supra* note 75 (discussing *Gibbs*). The Court's resolution of this issue was consistent with the Pennsylvania Supreme Court's holding in *Schmidt* that, under the MH/MR Act, the State has primary authority for ensuring the provision of appropriate services to its mentally retarded citizens. See *In re Schmidt*, 494 Pa. 86, 94-95, 429 A.2d 631, 635 (1981).

167. 465 U.S. at 124 n.34.

168. *Id.* at 123 n.24 (quoting *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977)). Justice Powell also cited *Lincoln County v. Luning*, 133 U.S. 529 (1890), to support this proposition. 465 U.S. at 123 n.24. The exclusion of counties and municipalities from eleventh amendment immunity, as explained by the Court in *Luning*, stems from the text of the amendment: "The Eleventh Amendment limits the jurisdiction [of federal courts] only as to suits against a state." *Luning*, 133 U.S. at 530. Cities and counties do not share the

attach in a case such as *Pennhurst* because, "[g]iven that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials, when exercising their functions under the MH/MR Act, effectively runs against the State."¹⁶⁹

The Court in *Pennhurst II* might well have signaled an intention to revisit the applicability of eleventh amendment immunity to local officials.¹⁷⁰ In light of the Court's heightened regard for state autonomy, and its apparent ambivalence toward pendent jurisdiction, this type of suit might provide the next extension of eleventh amendment immunity and a corresponding abandonment of the *Pullman* doctrine.

The most intriguing speculation concerning the viability of *Pullman* abstention after *Pennhurst*, however, does not concern the doctrine's primary, and intended, role of determining which state law issues remain within the cognizance of federal courts. Instead, this speculation centers on what can be called the secondary application of *Pullman*, that is, the use of the doctrine to avoid or to delay adjudication of constitutional issues in federal courts. Consideration of the effect on district court litigation against state officials helps explain the effect of *Pennhurst II* on *Pullman* in this regard.

A plaintiff who wishes to initiate litigation within the *Pullman-Pennhurst* configuration has several options. One option is to abandon the state law claim and simply to file the federal constitutional claim in federal district court. Although *Pennhurst II* poses no eleventh amendment barrier to the adjudication of such a claim, a litigant justifiably may hesitate to forego a promising state law claim simply to secure a federal forum.

A second option is to join the state and federal claims in a state court proceeding. This course carries the benefit of preserving the state law claim, but it may jeopardize an appropriate disposition of the constitutional claim because the plaintiff has opted out of the

states' immunity, according to the Court in *Luning*, because they are separate entities. *Id.* ("[W]hile the county is territorially a part of the state, yet politically it is also a corporation created by and with such powers as are given to it by the state.").

169. 465 U.S. at 124 n.34.

170. Professor Shapiro has noted this prospect with some disappointment. See Shapiro, *supra* note 5, at 81-82.

federal forum.¹⁷¹ Even if this option presented no tactical disadvantage in many cases, a system that forced too many of these litigants into state court would frustrate the animating premise of the *Young* doctrine, highlighted by Justice Powell, that lower federal courts should be available to citizens asserting federal rights against state officials.¹⁷² After *Pennhurst II*, however, the tactical incentive for litigants to file federal claims in state courts is real. As a result, the *Pennhurst* decision has operated insidiously to undermine a result that the Court purported to reaffirm by limiting the *Young* doctrine to federal claims.¹⁷³

Neither of the options set out above includes a role for *Pullman* abstention. At the same time, for the reasons mentioned, neither option is wholly satisfying. Faced with that dilemma, a litigant may choose the third option available after *Pennhurst II*: filing the state law claim in state court and the federal claim in federal court.¹⁷⁴ If the litigant can afford to split the claims and to carry two concurrent cases, this course avoids the tactical costs associated with opting to let either the state or federal judicial system resolve a controversy with state officials.

Even if the plaintiff is willing to pursue simultaneous litigation, however, the state may not be, and it may move to stay the federal litigation pending the outcome of the state claim. In this situation, the district judge arguably should invoke *Pullman* abstention, resulting in what is referred to here as the secondary application of the doctrine. Invocation of *Pullman* abstention in this situation would fulfill a purpose animating the doctrine: avoidance of unnecessary and premature constitutional decisions.¹⁷⁵ Because this

171. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). For a rejoinder to Professor Neuborne's thesis that federal courts are more competent than state courts in adjudicating federal questions, see Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 629-35 (1981).

172. *Pennhurst II*, 465 U.S. at 89.

173. This criticism of *Pennhurst II* has been labeled the "forum-access critique." Brown, *supra* note 5, at 356; see Rudenstine, *supra* note 5, at 83. Although Justice Powell acknowledged that the Court's holding could have this effect, he felt that the prospect was "not uncommon" and that, in any event, his interpretation was compelled by the eleventh amendment. See 465 U.S. at 122.

174. Justice Powell identified this option in *Pennhurst II*. See 465 U.S. at 121.

175. See M. REDISH, *supra* note 19, at 234; Field, *supra* note 12, at 1096-1101; see also *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis J., concurring) (containing the

purpose is not the only justification for the doctrine, however, the Court has observed that "the opportunity to avoid decision of a constitutional question does not alone justify abstention by a federal court."¹⁷⁶

The other purpose of *Pullman* abstention, respecting state autonomy and expertise by allowing state courts to resolve uncertain questions of state law, actually is the primary justification for the doctrine.¹⁷⁷ This justification is implicated to some degree in a simultaneous litigation situation because a federal decision on the constitutional claim might moot the controversy underlying the state lawsuit. In that event, state interests might be impaired because the state judiciary would lose its opportunity to define the scope of the state officials' authority under state law. This potential impairment of state interests, juxtaposed with the federal judiciary's desire to avoid unnecessary and premature decision of constitutional questions, may indicate to the district judge that the most prudent course would be to await the outcome of the state litigation. The state court may have a more weighty, immediate interest in resolving the controversy than the federal court.

This reasoning is more alluring than convincing, however, because it does not reflect the precise federalism concern articulated in *Pullman*. Justice Frankfurter's majority opinion in *Pullman* focused on the problems attendant to a federal judge's prediction of a state judiciary's resolution of an unclear state law issue.¹⁷⁸ When a plaintiff splits claims between state and federal courts in response to *Pennhurst*, these difficulties in prediction cannot arise, because the federal court never has the opportunity to act as an expositor of state law. Consequently, by asserting *Pullman* abstention, the state would be asking the federal court to forego its role as expositor of federal law.

When the state asserts *Pullman* abstention in this split claim situation, the posture of the federal litigation resembles cases in which federal courts consider whether to stay or to dismiss the

Court's classic statement that it should avoid adjudication on constitutional grounds if it has an alternate basis of decision).

176. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976).

177. *Bezanson*, *supra* note 83, at 1144; *Field*, *supra* note 12, at 1084.

178. *Pullman*, 312 U.S. at 499-500.

litigation before them in deference to parallel state proceedings. After wavering in recent years, the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹⁷⁹ recently reaffirmed its stance in *Colorado River Water Conservation District v. United States*¹⁸⁰ against stays or dismissals in such situations, absent "exceptional circumstances."¹⁸¹ The Court has eschewed a "hard-and-fast rule" against such stays and dismissals,¹⁸² however, preferring instead a balancing methodology:

[T]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case.¹⁸³

Under this "parallel litigation" line of precedent, a district judge, absent an unusual situation,¹⁸⁴ would have to determine whether the split of state and federal claims triggered by *Pennhurst II* justifies a stay of the federal case.

179. 460 U.S. 1 (1983).

180. 424 U.S. 800 (1976).

181. See *Moses H. Cone*, 460 U.S. at 19. The Court had articulated this stance in *Colorado River*, see 424 U.S. at 817-18, but Justice Rehnquist had questioned the principle in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (plurality opinion). In *Will*, Justice Rehnquist had suggested that federal district judges enjoy a broad and largely unreviewable discretion to stay proceedings because of pending state litigation. 437 U.S. at 665. In *Moses H. Cone*, however, the Court repudiated Justice Rehnquist's suggestion and reaffirmed its general stance against such stays. See 460 U.S. at 16-19; Redish, *supra* note 88, at 97.

182. *Moses H. Cone*, 460 U.S. at 15.

183. *Id.* at 16; see *Colorado River*, 424 U.S. at 818-19. To illustrate the factors a district judge should consider in reaching a decision, the Court in *Moses H. Cone* described the criteria it originally had delineated in *Colorado River*: (1) an act of Congress prescribing a "clear federal policy" of avoiding piecemeal adjudication ("[b]y far the most important factor," according to the Court); (2) the lack of "substantial progress" in the federal litigation; (3) the presence in the federal lawsuit of "extensive rights governed by state law"; (4) the inconvenient location of the federal courthouse; and (5) the federal government's willingness to litigate similar suits in the state system. *Moses H. Cone*, 460 U.S. at 16; see *Colorado River*, 424 U.S. at 819-20.

184. One unusual situation that might justify a stay involves a case in which state litigation began long before the federal case. See *Colorado River*, 424 U.S. at 818. If the federal suit were vexatious in nature, it also might justify a stay. See *Moses H. Cone*, 460 U.S. at 18 n.20.

This split claim situation might be sufficient to overcome the presumption that a federal court must exercise the jurisdiction Congress has dictated. In the first place, the policies underlying the presumption against the stay assume that "considerations of proper constitutional adjudication and regard for federal-state relations" do not apply.¹⁸⁵ Instead, these policies rest solely on considerations of efficient judicial administration and case management.¹⁸⁶ Although these policies apply to bifurcated litigation along the lines that the Court suggested in *Pennhurst II*, more is at work. The policies underlying *Pullman* abstention, which are not present in the usual parallel litigation setting, also are implicated. The subtle problem now facing the federal courts is whether the distinctly different policies present in bifurcated litigation under the *Pennhurst II* model warrant a secondary application of *Pullman* abstention, and whether these policies constitute the "exceptional circumstances" that the Court referred to in *Colorado River* and *Moses H. Cone*.

Understandably, federal judges have had insufficient time to assimilate the effect of *Pennhurst II* on their usual approach to *Pullman* abstention. The decision of the United States Court of Appeals for the First Circuit in *Rogers v. Okin*¹⁸⁷ illustrates the confusion of federal courts concerning their role in constitutional litigation against state officials after *Pennhurst II*. The *Rogers* litigation closely resembled *Pennhurst*. Involuntarily institutionalized mental patients sued state officials in federal district court, asserting a right to refuse antipsychotic drugs.¹⁸⁸ The patients, who resided at Boston State Hospital, won an injunction against the officials in district court based on both federal constitutional and state law grounds.¹⁸⁹ In its first consideration of *Rogers*, the First Circuit

185. *Colorado River*, 424 U.S. at 817.

186. *Id.*

187. 738 F.2d 1 (1st Cir. 1984).

188. *Id.* at 2.

189. *Id.*; see *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). The patients also won an injunction against the State's forcible seclusion of patients during nonemergencies. 478 F. Supp. at 1371-75. The district court rejected the patients' claims for damages. *Id.* at 1375-89.

affirmed the district court's decision, at least in part.¹⁹⁰ The Supreme Court granted certiorari to determine whether involuntarily committed mental patients had a constitutional right to refuse treatment with antipsychotic drugs.¹⁹¹ While the case was pending, the Supreme Judicial Court of Massachusetts decided that, absent an emergency, only a judge could require a noninstitutionalized mentally incompetent person to receive medication forcibly. According to the Massachusetts court, no other state official or doctor could authorize such forced treatment.¹⁹² The Massachusetts decision, which was based both on Massachusetts common law and on the United States Constitution,¹⁹³ prompted the Supreme Court to remand *Rogers* to the First Circuit, with instructions to determine whether it could resolve the controversy based on state law alone.¹⁹⁴ On remand, the First Circuit certified nine questions of state law to the Supreme Judicial Court of Massachusetts.¹⁹⁵ In response, the state court delineated procedural and substantive rights of institutionalized mental patients under state law that, in the opinion of the First Circuit, exceeded the rights guaranteed by the fourteenth amendment due process clause.¹⁹⁶ Before the First Circuit could act on the basis of that response, however, the Supreme Court decided *Pennhurst II*.

The First Circuit recognized that the Court's decision in *Pennhurst II* had deprived it of power to issue any relief based on the rights identified by the state courts. It also noted, however, that Justice Powell's eleventh amendment ruling had not deprived it of

190. See *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom. Mills v. Rogers*, 457 U.S. 291 (1982).

191. See *Okin v. Rogers*, 451 U.S. 906 (1981), *granting cert. to* 634 F.2d 650 (1st Cir. 1980).

192. See *In re Guardianship of Roe*, 383 Mass. 415, 433-43, 421 N.E.2d 40, 51-56 (1981).

193. See *id.* at 417 & n.1, 433 n.9, 421 N.E.2d at 42 & n.1, 51 n.9.

194. See *Mills v. Rogers*, 457 U.S. 291, 306 (1982). The Court found a distinct possibility "that Massachusetts recognizes liberty interests of persons adjudged incompetent that are broader than those protected directly by the Constitution of the United States." *Id.* at 303. The Court also invoked its "settled policy to avoid unnecessary decisions of constitutional issues." *Id.* at 305.

195. See 738 F.2d at 3.

196. *Rogers v. Commissioner of Dep't of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983); see 738 F.2d at 3.

jurisdiction over the federal constitutional claim.¹⁹⁷ In light of the state court's responses to the certified questions, however, the hospital officials argued that the court of appeals should abstain from deciding the federal claim because the state court's responses had provided sufficient state law grounds to dispose of the case and, in effect, had mooted the constitutional claim.¹⁹⁸

Applying conventional principles of *Pullman* abstention, the First Circuit summarily rejected the hospital officials' argument. The court held that *Pullman* abstention was inappropriate because the "certification process [had] amply accommodated state interests and [had] yielded an unambiguous elucidation of relevant state law."¹⁹⁹ Because the rights had been delineated only in the form of an advisory opinion and not an enforceable judgment, the court rejected the officials' mootness argument and proceeded to resolve the federal claims.²⁰⁰

The court's decision to proceed with adjudication of the federal claim in *Rogers* vividly illustrates the confusion that has followed *Pennhurst II*. The First Circuit relied on the state court's responses to the certified questions to determine rights established by state law that trigger procedural due process protection.²⁰¹ The First Circuit also concluded that Massachusetts law provided mental patients with greater procedural protections than were required by the fourteenth amendment due process clause.²⁰² Although the way the State ran Boston State Hospital fell short of both state law and federal substantive due process requirements, the court concluded rather easily that the state procedural rights newly articulated by the Massachusetts high court satisfied federal

197. 738 F.2d at 3. The First Circuit recognized the "irony" that the Supreme Court in *Pennhurst II* had deprived the First Circuit of the power to carry out the Supreme Court's own mandate in *Mills*. *Id.* at 4.

198. *Id.* at 4.

199. *Id.* at 5.

200. *Id.* at 4. The state court opinion was a response to questions certified by the First Circuit, not to a judgment rendered by a lower state court. *See id.* The court of appeals also was troubled by the state officials' refusal to enter into a binding agreement to abide by the state court's opinion. *Id.* at 5.

201. *Id.* at 6-7. The court had recognized at the outset that the due process clause provides procedural protection for liberty interests created by state law. *Id.* at 5.

202. *Id.* at 8. Indeed, the court of appeals held that "the Massachusetts procedures rise well above the minima required by any arguable due process standard." *Id.*

procedural due process requirements.²⁰³ Because the mental patients' rights under state law exceeded the procedural protections given to those rights under fourteenth amendment due process, however, the court found itself in a curious position when it sought to frame an appropriate remedy. An injunction requiring hospital officials only to follow the procedures mandated by fourteenth amendment due process would have made little sense in light of the more stringent state law requirements delineated in the Massachusetts advisory opinion. An injunction requiring hospital officials to comply with the more stringent state requirements, on the other hand, would have run afoul of *Pennhurst II*.²⁰⁴ As a result of this dilemma, the patients in *Rogers* won the lawsuit but received no relief.²⁰⁵ Given this result, the court of appeals achieved little by formally refusing to abstain from deciding the federal claim, because clearly it did so in effect.²⁰⁶

The blind alley down which the First Circuit traveled in *Rogers* should serve as a warning to federal courts following *Pennhurst II*. Although the express terms of Justice Powell's opinion do not affect the federal courts' obligation to apply federal law, such an effect nonetheless is likely because of the subtle interweaving of state and federal claims in modern public law litigation involving state officials. To understand this phenomenon, one must recall that *Pennhurst II*, in essence, forbids federal district courts from exercising pendent jurisdiction over any state law claim against state officials. One also must recall the functional necessity of the pendent jurisdiction doctrine. Without the power to decide pendent state law claims, Professor Wright has argued, "a court of

203. *Id.* at 9.

204. *See id.*

205. The court of appeals directed the district court, on remand, to issue a declaratory judgment that the state law rights identified on certification to the Massachusetts court create liberty interests protected by the due process clause. *Id.* at 9. At the same time, however, the court of appeals ordered the district court to terminate its injunction forbidding forced medication. According to the court of appeals, this did not mean that the plaintiffs received nothing, because the litigation had triggered the Massachusetts high court's advisory opinion delineating protections against forcible medication afforded by state law. *Id.*

206. In truth, the court had gone beyond *Pullman* abstention, because it had dismissed the federal lawsuit rather than staying it. *See Pullman*, 312 U.S. at 501-02.

original jurisdiction could not function."²⁰⁷ The dilemma faced at the remedy stage of *Rogers* reflects the void left by *Pennhurst II*. When a litigant wishes to assert federal and state claims against state officials, a common occurrence in the world of public law litigation, federal courts are unable to resolve the controversy fully. In short, they cannot function as courts. If a state court can hear both federal and state claims fully in one integrated case, but federal courts cannot, prudent litigants will abandon the federal courts in favor of state courts.

More intriguing, and unsettling, than these tactical implications is that *Pennhurst II* also will encourage federal judges to abandon adjudication of federal claims against state officials. The recent decision of the United States District Court for the Southern District of New York in *Canady v. Koch*²⁰⁸ hints at the drive toward this secondary application of *Pullman*. In *Canady*, several homeless mothers sued state and city officials, claiming that the officials had denied them emergency shelter in violation of state and federal law.²⁰⁹ The plaintiffs previously had filed an action in state court based on state law grounds, seeking comparable, but broader, relief than they requested in the federal case. The state trial court had denied a preliminary injunction, and that denial was on appeal when the plaintiffs filed the federal complaint.²¹⁰ The federal court decided to stay the federal proceedings pending resolution of the parallel state proceeding.²¹¹

The court's holding that abstention was appropriate because of the pendency of the state action²¹² is particularly interesting. The district court saw value in avoiding the "piecemeal litigation" that would take place if it immediately decided the federal issue. After *Pennhurst II*, the court noted, it was unable to litigate the state law claims against the state defendants.²¹³ The state court, by contrast, was well-situated to "provide a comprehensive decision on

207. C. WRIGHT, *supra* note 15, at 103; see Brown, *supra* note 5, at 357.

208. 608 F. Supp. 1460 (S.D.N.Y.), *aff'd*, 768 F.2d 501 (2d Cir. 1985).

209. *Id.* at 1462-63.

210. *Id.* at 1463-65.

211. *Id.* at 1466, 1475.

212. *Id.* at 1473-75.

213. *Id.* at 1473-74.

the rights of homeless families.”²¹⁴ Given these circumstances, the court invoked *Colorado River* and *Moses H. Cone* “to defer to the state court.”²¹⁵

Canady was not a pristine test of the role of abstention after *Pennhurst*. Several factors in *Canady* pointed toward abstention in any event.²¹⁶ Nonetheless, the plaintiffs’ bifurcation of state and federal claims in the manner suggested by *Pennhurst II*—or, as the court put it, the “piecemeal litigation”—certainly played a role in *Canady*, and these considerations no doubt will continue to be a focus of concern for federal courts in similar settings. The district court’s reliance in *Canady* on the importance of avoiding “piecemeal litigation,” though initially plausible, is not convincing.

The court in *Canady* misread *Colorado River* and *Moses H. Cone* when it held that the avoidance of piecemeal litigation is of paramount concern.²¹⁷ Piecemeal litigation always results when a federal court denies a stay in a case involving parallel state litigation. If the district court in *Canady* was correct, the federal court in a bifurcated litigation situation generally would grant a stay or dismiss the action. The holdings in *Colorado River* and *Moses H. Cone* that a stay is justified only in “exceptional circumstances”²¹⁸ make clear, however, that the court in *Canady* was incorrect. In *Colorado River*, for example, the avoidance of piecemeal litigation was important to the Court because Congress had passed legislation that articulated “a clear federal policy” of avoiding “piecemeal adjudication of water rights in a river system.”²¹⁹ In *Moses H. Cone*, on the other hand, the need to avoid piecemeal litigation had “no force” because “the relevant federal law require[d] piecemeal resolution when necessary to give effect to an arbitration agreement.”²²⁰ According to these two decisions, then, the

214. *Id.* at 1474. According to the district court, the federal litigation raised “only a single aspect of a complex problem.” *Id.* The court also believed that “the primary battleground [of the controversy was] state law, and unsettled state law at that.” *Id.*

215. *Id.* at 1475. The court also favored a stay because of the substantial progress of the state litigation and the failure of the federal case to progress on any substantive issue. *Id.* at 1473.

216. *See id.* at 1468-75.

217. *Id.* at 1473-74.

218. *See supra* notes 179-84 and accompanying text.

219. *Colorado River*, 424 U.S. at 819.

220. *Moses H. Cone*, 460 U.S. at 19, 20 (emphasis deleted).

governing federal law dictates the weight, if any, that a district court should accord to the policy of avoiding piecemeal litigation.

The bifurcated litigation situation created by *Pennhurst II* corresponds more closely to *Moses H. Cone* than to *Colorado River*. Justice Powell foresaw the bifurcation of claims as a predictable result of his opinion in *Pennhurst II*. He believed, however, that the relevant federal law—the eleventh amendment—mandated his holding.²²¹ Moreover, he downplayed bifurcation as “not uncommon” when private parties litigate against state officials.²²² This relaxed view of the piecemeal litigation caused by *Pennhurst II* is difficult to square with the demands of the “exceptional circumstances” test in *Colorado River* and *Moses H. Cone*.

Although the district court’s approach in *Canady* is troublesome in its application of conventional doctrine, it is nonetheless understandable because the formalism of *Pennhurst II* has caused an essential dysfunction in the jurisdictional model for public law litigation. Predictably, federal district judges now feel enormous pressure to escape the awkwardness of Justice Powell’s replacement model. The Ninth Circuit, for example, has observed that when state courts become “the sole forum for effective relief of state law claims” in litigation involving federal and state claims, “very persuasive grounds for abstention” are provided.²²³ Such holdings demonstrate how *Pennhurst II*, which purported to leave *Young* intact with respect to federal claims against state officials, can vitiate the “fiction” that so troubled Justice Powell. These holdings also demonstrate how significantly the Court has altered the concept of judicial federalism.

221. See *Pennhurst II*, 465 U.S. at 121-23.

222. *Id.* at 122.

223. *Kollsman v. City of Los Angeles*, 737 F.2d 830, 837 n.18 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985) (noting the effect of *Pennhurst II* in land use cases); *accord* *Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440, 1452 (D.R.I. 1985) (when *Pennhurst* is applied to dismiss a pendent state claim, *Pullman* abstention of the related federal constitutional claim “appears mandatory”). Commentators also have noted the possibility that a federal judge may abstain from adjudicating a federal claim that has been split from a state claim being litigated in state court. See Smith, *supra* note 5, at 272-75; Note, *The Eleventh Amendment’s Lengthening Shadow Over Federal Subject Matter Jurisdiction*; *Pennhurst State School & Hospital v. Halderman*, 34 DEPAUL L. REV. 515, 549-50 (1985).

V. JUDICIAL FEDERALISM AFTER *Pennhurst*

Throughout its development, the concept of judicial federalism has been characterized by both flexibility and flux. Justice Frankfurter, long before joining the Court, captured this essence when he observed: "The only enduring tradition represented by the voluminous body of congressional enactments governing the federal judiciary is the tradition of questioning and compromise, of contemporary adequacy and timely fitness."²²⁴ His insight describes as well the development of judge-made doctrines that govern public law litigation against state officials, including not only pendent jurisdiction and *Pullman* abstention, but also principles such as state immunity from suit.²²⁵ In crafting the concept of judicial federalism, the Court has remained focused on two sets of values worthy of respect: meaningful state autonomy, and state governance in conformity with the Constitution. Because these values often pull in different directions, judicial federalism necessarily retains a certain ambivalence. Because both values are legitimate, however, the Court has sought to accommodate them rather than to choose between them.²²⁶

The Supreme Court has been unwilling, or perhaps unable, to sustain fixed jurisdictional rules that tilt the balance too heavily toward either of the competing interests. In truth, judicial federalism is less a theoretical concept than a device for allocating the

224. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 514-15 (1928). In this article, preceding the observation quoted in the text, Justice Frankfurter offered the following explanation for the pattern of jurisdictional statutes he had surveyed:

Not inherent reasons, then, but practical justifications explain the past judiciary acts and must vindicate existing jurisdiction. The force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary administering law over a continent, the dependability of state courts, the convenience of suitors, shifting economic and political sentiments,—such influences, with varying incidence, have shaped the accommodations of authority distributed between the national judiciary and the state courts. The present jurisdiction cannot rely on tradition. Always have the accommodations been temporary.

Id. at 514.

225. Although the states' immunity from suit is grounded in the eleventh amendment, the doctrines that guide application of the amendment only can be considered "judge made." See Brown, *supra* note 5, at 359; *supra* notes 39-66 and accompanying text.

226. See Weinberg, *supra* note 6, at 1205.

nation's judicial business between state and federal courts. As Justice Frankfurter recognized, such a system cannot be animated by ideology; it must seek "practical justifications"²²⁷ that allow each forum to serve its role in the federal system. Viewed this way, the Court's flexible, moderate stance in *Pullman* was proper, because it sought to guide, rather than to foreclose, the discretion of federal district judges to make case-specific assessments of the interplay of federalism interests before them. Though the course had wavered during the years before *Pennhurst II*, *Pullman* abstention had cemented that approach to judicial federalism.²²⁸

Perhaps the most far-reaching effect of *Pennhurst II* has been the abandonment of that moderating approach. As one commentator has noted, the jurisdictional bar of the eleventh amendment is too blunt an instrument to accommodate the "delicate" federalism concerns that were present in *Pennhurst*.²²⁹ This criticism may seem odd given the frequent reference in *Pennhurst II* to federalism values and to the appropriate roles of state and federal courts in reviewing state officials' actions, but Justice Powell's discussion was so abstract, and his assessment of state autonomy so reverential, that he failed to account for the differing balances of state and federal interests that occur in each case. A federal court mandate to state officials based on state law is not always a serious intrusion on state autonomy. On the contrary, the implications for state policymaking can range widely depending on the circumstances.²³⁰ *Pullman* abstention accounted for those differences, but the jurisdictional bar imposed in *Pennhurst II* does not.

The First Circuit's opinion in *Rogers* again is illustrative. As mentioned above, the factual configuration in *Rogers* mirrored *Pullman* and *Pennhurst* because it involved a federal claim and a pendent state claim lodged by private parties against state officials in federal court. Because the law governing the state claim in *Rogers* was unclear, the federal court certified several questions to the highest state court. The state court responded with a definitive ruling that, in effect, resolved the state claim in the plaintiffs'

227. See *supra* note 224.

228. See *supra* notes 92-94 and accompanying text.

229. Shapiro, *supra* note 5, at 79.

230. See Brown, *supra* note 5, at 360.

favor. After the state court's ruling, all that remained for proper resolution of the controversy was the entry of an injunction requiring the state officials to follow the rules laid down by the state court. The state court surely would not have hesitated to enter such an injunction if the questions had been presented to it in the context of a case within its jurisdiction. After *Pennhurst II*, however, the First Circuit was unable to afford any meaningful relief, even though the cost to state autonomy caused by entry of an injunction to comply with state law would have been trivial, at most.²³¹

The federal court had alleviated any concerns about state autonomy by following a *Pullman*-type approach of staying its hand while the state judiciary resolved the state law issues. *Pullman* abstention had worked as intended. The state judiciary had delineated formerly uncertain state-created rights, and thus had preserved its role as expositor of its own law. Under *Pennhurst II*, however, the federal court as a practical matter could not provide a forum to enforce the state-based rights that the plaintiffs had established in *Rogers* after ten years of litigation.

In fact, *Pennhurst* itself demonstrates the overkill of the Court's approach. In *Pennhurst*, the Third Circuit had predicated relief on the plaintiff's state law claim only after the highest state court definitely had resolved the legal underpinning of the claim. Under *Pullman*, the federal court had no reason to hesitate in applying the newly defined state law. Federal courts do not necessarily intrude on state prerogatives simply by enforcing the clear mandates of state laws. Indeed, the contrary conclusion rings true. Given the context of the *Pennhurst* litigation, which Justice Powell all but ignored in his opinion, the Court's federalism concerns were misplaced. The dragons threatening state autonomy that Justice Powell perceived in reality were windmills.

This is not to say that *Pennhurst* presented no federalism concerns. The federal court's decree ordering state officials to deinstitutionalize the residents at Pennhurst Hospital obviously intruded on the operations of a state instrumentality. The affirmative obligations that the decree imposed on the hospital officials would have proven costly to the state treasury if the Supreme Court had

231. See *supra* notes 187-206 and accompanying text.

upheld them. Perhaps an even greater intrusion would have resulted from the close supervision given to decisions on appropriate placement and habilitation of former Pennhurst residents by the district court and by the court's special master under the federal court's decree.²³²

The court order in *Pennhurst* was a classic institutional decree that required the State to reorganize the way it cared for its mentally retarded patients. As such, the decree raised a series of difficult questions concerning how federal courts should function when they are called on to remedy legal violations by state officials.²³³ In both *Pennhurst I* and *Pennhurst II*, the Court responded to these questions by clearly articulating its unease with, and even hostility to, the relief that the federal court had afforded.²³⁴ Unfortunately, however, the Court in *Pennhurst II* evaded the difficult remedial issues inherent in institutional decrees. Instead, it erected a jurisdictional bar with an effect that ripples far beyond the mandate to deinstitutionalize the residents of Pennhurst Hospital.²³⁵

The Court's evasion of such issues did not begin with *Pennhurst II*. In recent years, a number of commentators have detected a tendency by the Court to manifest its displeasure with institutional and public law litigation by refusing access to federal courts on a number of grounds.²³⁶ Moreover, just as *Pennhurst II* does not represent a beginning, it also does not represent a culmination. Its continuing effect on the system of judicial federalism in controversies involving overlapping state and federal claims will be subtle, yet steady. As a result, *Pullman* abstention may be transmuted from a doctrine that focuses on determining which state questions a federal court should decide into a doctrine that focuses only on determining which federal questions should be delayed or dismissed. Whether by design or by accident, the Court in *Pennhurst II* has rendered federal tribunals less fit to resolve cases that

232. See *supra* notes 108-11 and accompanying text.

233. These difficulties are treated in depth in Mishkin, *supra* note 11.

234. See *supra* notes 124-26 and accompanying text; *Pennhurst II*, 465 U.S. at 106, 108.

235. See Brown, *supra* note 5, at 365-66.

236. See, e.g., *id.* at 363; Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Neubourne, *Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977).

include both state and federal questions. The Court thus has imbalanced the system of judicial federalism by promoting state judiciaries as the only fully functioning courts able to resolve these types of suits against state officials. Although *Pennhurst II* is neither a beginning nor a culmination, it marks a point of acceleration in the drive toward "deferential federalism"²³⁷ that characterizes the High Court's recent approach to public law litigation against state instrumentalities and officials.

Given the turbulent history of judicial federalism, however, advocates of a more moderate approach should not concede the eventual effectuation of the state-oriented trend embodied in *Pennhurst II*. In the past, the Court's concerted pushes toward one pole or the other have created tempering responses. *Chisholm* produced the eleventh amendment. *Young* and *Siler* followed *Hans. Pullman*, in turn, moderated the nationalist pull of *Young* and *Siler*.²³⁸

Some signals indicate that *Pennhurst II* may have contributed to a similar reaction among members of the Court. For all the inflexibility of *Pennhurst II*, and the expansive rhetoric of the majority opinion, only four justices joined Justice Powell. Moreover, the four dissenters have not remained silent since *Pennhurst II*. In *Atascadero State Hospital v. Scanlon*,²³⁹ an otherwise unremarkable eleventh amendment case decided at the close of the 1984 Term, these four justices joined in a dissenting opinion that urged a fundamental rethinking of eleventh amendment immunity.²⁴⁰ The lengthy dissent, authored by Justice Brennan, took direct aim at the conception of state sovereign immunity currently prevailing on the Court: "The flawed underpinning [of the doctrine] is the premise that either the Constitution or the Eleventh Amendment embodied a principle of state sovereign immunity as a limit on the federal judicial power."²⁴¹ The four dissenters in *Atascadero*

237. "Deferential federalism" is a term coined by Professor Brown. See Brown, *supra* note 5, at 363.

238. See *supra* notes 24-94 and accompanying text.

239. 105 S. Ct. 3142 (1985).

240. See *id.* at 3150 (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens joined Justice Brennan in dissent. In *Atascadero*, the majority principally held that Congress' enactment of section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), had not abrogated the eleventh amendment immunity of states and state agencies. *Id.*

241. *Id.* at 3156. Justice Brennan, relying heavily on recent eleventh amendment scholarship, argued that "the Framers never intended to constitutionalize the doctrine of state

pushed as vigorously away from the state autonomy pole as Justice Powell and his four adherents had marched toward it in *Pennhurst II*, stating: "There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court."²⁴² To ensure that no reader would miss the dissenters' direction, Justice Blackmun added a brief, separate dissent²⁴³ in which he linked the Court's current eleventh amendment doctrine with the tenth amendment immunity doctrine of *National League of Cities v. Usery*,²⁴⁴ which the Court overruled recently in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁴⁵

V. CONCLUSION

Justice Brennan wrote his dissenting opinion in *Atascadero* to lay the theoretical groundwork for a fundamental shift in eleventh amendment immunity. In effect, Justice Brennan sought to reintroduce the doctrine as it had existed before *Hans*. Whether he will be able to convince another of his colleagues to join him and to form a new majority on the Court is uncertain.²⁴⁶ The more likely prospect, at least for the immediate future, is that the justices will remain almost evenly divided at the poles of the judicial federalism continuum, and that they will continue to argue past one another. This rift may prove the most unfortunate consequence of the pressure caused by *Pennhurst II*. Development of a workable system

sovereign immunity as a limit on the federal judicial power." *Id.* at 3156 & n.11; see *supra* note 46 (noting recent commentary concerning the eleventh amendment).

242. *Id.* at 3156. Justice Brennan argued that the eleventh amendment principles now prevailing on the Court lack "a textual anchor, a firm historical foundation, or a clear rationale." *Id.* at 3155. In addition, he assailed the majority for putting "the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our nation." *Id.* at 3150.

243. *Id.* at 3178 (Blackmun, J., dissenting).

244. 426 U.S. 833 (1976).

245. 105 S. Ct. 1005 (1985). For a thoughtful attempt to reconcile the state sovereignty themes of *Atascadero* and *Garcia*, which the Court decided during the same term, see Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985).

246. The majority in *Atascadero* did not respond in kind to Justice Brennan's substantial treatment, contenting themselves with adhering to their federalism-based position in a footnote. See 105 S. Ct. at 3146 n.2.

for allocating public law litigation against state officials never has been easy. The task will be impossible, however, if the lack of common ground increasingly apparent in the justices' opposing visions of judicial federalism continues to prevail. The Court in *Pennhurst II* has set off centrifugal forces that push toward the nationalist and states' rights poles of the judicial federalism continuum. The accommodation of these interests, which is essential for a balanced, workable system, must await a future consensus on the Court concerning the appropriate role of federal courts in reviewing the actions of state officials.