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THE IMPACT OF SUBSTANTIVE INTERESTS ON THE LAW OF FEDERAL COURTS

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Federal courts scholarship tends to focus on the reasoning and implications of Supreme Court decisions for specific jurisdictional problems, such as standing, Supreme Court review of state decisions, federal-state comity, and the eleventh amendment. Although this kind of scholarship is illuminating and useful, it is necessarily limited in its aspirations. Scholars pay too little attention to aspects of the Court's work that transcend the case at hand or the area of doctrine in which it arises. To fully understand the law of federal courts, one must examine developments over a range of doctrinal categories and study the patterns that emerge from comparing them.

One such theme is the role of substantive interests in explaining federal courts doctrine. The thesis of this Article is that substantive factors exert a powerful and often unrecognized influence over the resolution of jurisdictional issues, and have done so throughout our history. The chief substantive factors at issue are the government's interest in regulating behavior on the one hand, and the

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individual's interest in enforcing constitutional restraints upon government on the other. Decisions easing access to federal district court, like the taxpayer standing rule of *Flast v. Cohen*¹ or the liberal construction of 42 U.S.C. § 1983 laid down in *Monroe v. Pape*,² reflect a desire to promote the individual's substantive interests. Burger Court decisions such as *Younger v. Harris*³ and *Allen v. Wright*,⁴ which restrict availability of a federal forum, and *Michigan v. Long*,⁵ which broadens Supreme Court review of state court judgments favoring the constitutional claimant, are based on a preference for the state's substantive interests.

The Supreme Court rarely adverts to such concerns in explaining its decisions. On the contrary, the Court persistently denies their importance.⁶ The Court treats the law of federal courts as a body of autonomous rules wholly separate from the merits of the underlying litigation. Supreme Court opinions give two kinds of reasons for holdings on federal courts issues. First, as in all areas of the law, some decisions are based on fidelity to precedent⁷ and to legislative⁸ and constitutional⁹ intent. Second, to the extent courts are not bound by these universal constraints, they make law in this area by identifying and implementing various jurisdictional poli-

1. 392 U.S. 83 (1968) (in spite of previous decisions denying standing to federal taxpayers seeking to challenge federal expenditures, federal taxpayers have standing to assert that congressional aid to religious schools violates the establishment clause of the first amendment).

2. 365 U.S. 167 (1961) (42 U.S.C. § 1983 creates a federal cause of action for damages or injunctive relief against any state officer who acts under pretense of state authority, even if his acts were not authorized or condoned by state law).

3. 401 U.S. 37 (1971) (federal-state comity bars suit in federal court seeking injunctive relief against state proceedings on constitutional grounds).

4. 468 U.S. 737 (1984) (black parents lacked standing to challenge IRS policy toward segregated private schools).

5. 463 U.S. 1032 (1983) (Supreme Court will presume that state court has relied on federal grounds when state court opinion is ambiguous, and therefore will deem the state decision subject to Supreme Court review).

6. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 484 (1982); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

7. See, e.g., *Pennzoil Co. v. Texaco*, 481 U.S. 1, 12-13 (1987); *Younger v. Harris*, 401 U.S. 37, 45-49 (1971).

8. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972); *Monroe v. Pape*, 365 U.S. 167, 172-87 (1961).

9. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346-47 (1816).

cies bearing on the proper role of the federal courts in our system of government. In particular, the law-making task here is to promote efficient judicial administration,¹⁰ guarantee supremacy¹¹ and uniformity¹² of federal law, prevent unwarranted intrusions into the affairs of state governments,¹³ and maintain the separation of powers by avoiding unnecessary constitutional decisions.¹⁴

Recent examples of the Court's approach include *Michigan v. Long*,¹⁵ which held that uniformity of federal law demands Supreme Court review of ambiguous state court rulings. *Younger v. Harris*¹⁶ and its progeny¹⁷ oblige federal courts to abstain from deciding constitutional issues, in deference to state courts, because of federal-state comity. Under *Pennhurst State School & Hospital v. Halderman*,¹⁸ the principle of state sovereignty embodied in the eleventh amendment prohibits federal courts from granting relief against state officers on state law grounds. In *Allen v. Wright*,¹⁹ the Court denied standing to litigants who had suffered no "distinct and palpable injury" out of respect for the principle of separation of powers.²⁰ Always the Court's premise is that the jurisdictional issue is ancillary to the litigation and that the resolution of the jurisdictional issue turns on factors quite distinct from the substantive merits of the dispute between the parties.

Federal courts scholars typically endorse the Court's concern with jurisdictional policy. For example, Ann Althouse celebrates *Pennhurst* and *Long* for permitting states to control the development of state law and making state courts accountable for their

10. *E.g.*, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943).

11. *E.g.*, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

12. *E.g.*, *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

13. *E.g.*, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108-13 (1981); *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976).

14. *E.g.*, *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472-74 (1982).

15. 463 U.S. 1032 (1983).

16. 401 U.S. 37 (1971).

17. *E.g.*, *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987); *Juidice v. Vail*, 430 U.S. 327 (1977).

18. 465 U.S. 89 (1984).

19. 468 U.S. 737, 751 (1984).

20. *Id.* at 752.

decisions,²¹ while Paul Bator defends the *Younger* doctrine by stressing the institutional costs associated with federal interference in state judicial processes.²² Critics like Martha Field, Gene Nichol, and Martin Redish point out serious shortcomings in the Court's treatment of jurisdictional policy, complain that the cases are inconsistent or even "schizophrenic,"²³ and propose reforms that would give jurisdictional policy its due.²⁴ The implicit premise of the whole debate, shared by the Court, its academic allies, and its critics, is that substantive interests should not influence federal courts doctrine.

This Article challenges the Court's account of the foundations of the law of federal courts. The root of the problem is that a wide gap exists between what the Court says and what it does in federal courts cases. Calling into question the Court's sincerity within the confines of a single doctrinal area is hard, and critics must resort to arguments against the cogency of the reasons the Court offers. When cases from different areas are compared, however, a powerful attack can be mounted on the credibility of the Court's proffered explanations. The Court's account of the values underlying jurisdictional decisions changes dramatically from one context to another, and this divergence raises serious doubts as to the Court's commitment to any of its purported reasons.

Although the Court invokes the conventional tools of judicial decision making, including legislative intent, precedent, and a number of jurisdictional policies in support of its decisions on federal courts questions, the results reflect a strong tendency to

21. See Althouse, *How To Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

22. See Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

23. See, e.g., Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 684 (1981) (much of the law of federal courts manifests "schizophrenia"); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 70 (1984) (standing law is "schizophrenic"); Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 483-84 (1978) (*Younger* cases are inconsistent); Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory: Michigan v. Long*, 18 CREIGHTON L. REV. 1 (1984). Dean Nichol has since come to appreciate the importance of substantive considerations in standing doctrine. See Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915 (1986).

24. See, e.g., Nichol, *Rethinking Standing*, *supra* note 23, at 87-101; Redish, *supra* note 23, at 477-87.

subordinate each and every one of these considerations in favor of promoting the substantive interests of one side or the other in the litigation on the merits. Over a range of topics in the law of federal courts, including standing, the eleventh amendment immunity, federal-state comity, and Supreme Court review of state judgments, the Court's rulings are reconcilable only on the premise that they are directed at furthering substantive goals. The seemingly "schizophrenic" nature of the cases is not due to ineptitude or confusion on the part of the Court. It is instead the visible manifestation of a concealed and powerful substantive subtext.²⁵

Part I of this Article examines the relationship between jurisdictional rules and substantive consequences, Part II describes the Court's conventional account of federal courts doctrine in terms of jurisdictional policy and institutional roles, and Part III shows that the reasons set forth in the Court's opinions lack credibility. The rulings fit into a coherent pattern only when viewed from the perspective of the Court's substantive agenda.

25. Everyone would agree that the Court sometimes manipulates jurisdictional rules to achieve other goals. In *Naim v. Naim*, 350 U.S. 985 (1956), for example, the Court refused to hear an appeal from a state court decision upholding an antimiscegenation statute, based on the wholly specious ground that the case presented no substantial federal question. The case arose shortly after *Brown v. Board of Education*, 347 U.S. 483 (1954), and the Court's motive was to avoid the unpalatable choice between upholding the statute on the one hand, or further inflaming racial tensions in the South, inviting defiance of its mandate, and perhaps eroding its own authority in the process. See Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-60: An Oral History*, 100 HARV. L. REV. 817, 845-47 (1987). Alexander Bickel argued in a brilliant and controversial book that this and other avoidance tactics are necessary adjuncts to the Supreme Court's role as an unelected arbiter in a nation founded on democratic principles. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 174 (1962). Cf. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (criticizing Bickel's thesis).

The argument this Article advances is different. The argument is not about the Supreme Court's special and delicate role as antidemocratic defender of constitutional values, or with the Court's practice of distorting or ignoring jurisdictional rules in order to reach the result it seeks in a particular case. This Article addresses the policy foundations of the case law on jurisdictional issues, and shows that the warp and woof of federal courts doctrine is founded largely on substantive aims, and not, as the Court maintains, jurisdictional policy or fidelity to precedent or to legislative intent. This Article is concerned not with ad hoc manipulation of the rules in special cases, but with the underpinnings of the rules themselves.

I. THE INTERPLAY BETWEEN SUBSTANCE AND JURISDICTION

Separating substantive law from jurisdiction and procedure for purposes of analysis is often useful, for these two broad bodies of rules deal with different kinds of problems.²⁶ Substantive rules are directed at individuals and governments and tell them to do or abstain from certain conduct on pain of some sanction. Substantive rules are based on legislative and judicial assessments of the society's wants and needs, and they help to shape the world of primary activity outside the courtroom. Jurisdictional and procedural rules are addressed to lawyers and judges in their professional roles and govern the means by which disputes regarding the content or application of substantive rules should be resolved. The purpose of these rules is to achieve accuracy, efficiency, and fair play in litigation, without regard to the substantive interests of the parties.

The distinction should not be overstated, however, for procedural rules may have substantive consequences. For example, free speech is protected not only by substantive constitutional rules barring criminal prosecution for materials that are merely suggestive rather than obscene, but also by procedural rules requiring a judicial determination of obscenity before or immediately after the materials are seized.²⁷ Jurisdictional rules, which define the powers of courts and allocate power among courts, may also affect the substantive rights and obligations of litigants. Some of these effects are obvious enough. The availability of post-conviction remedies in federal district court to reconsider claimed constitutional deprivations on behalf of federal and state prisoners is a means of reinforcing the substantive protection those rights afford.²⁸ Other jurisdictional rules affect substantive interests in a more subtle and

26. See, e.g., *Moragne v. States Marine Lines*, 398 U.S. 375, 403-04 (1970); *Hanna v. Plumer*, 380 U.S. 460, 475-76 (1965) (Harlan, J., concurring). See also P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 815-17 (3d ed. 1988) [hereinafter *HART & WECHSLER*] (on the substance/procedure distinction in connection with the *Erie* doctrine). Cf. *Mackey v. United States*, 401 U.S. 667, 689-93 (1971) (Harlan, J., concurring in part and dissenting in part) (procedural/substantive distinction drawn with regard to prospective application of new rules in habeas).

27. See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 532 (1970). See also *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958) (the procedures used to determine the facts are as important as the substantive law to be applied).

28. See Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-46 (1977).

oblique manner. This part of the Article identifies the substantive interests typically at stake in constitutional litigation and shows how those interests may be influenced significantly by jurisdictional rules.

A. The Substantive Conflict in Constitutional Litigation

Most important issues in the law of federal courts arise in the course of constitutional litigation over the scope of individual rights. Constitutional litigation may address a wide variety of specific issues, yet the basic clash of substantive values is always the same. On the one hand the government seeks to achieve some aim the electorate favors, like regulating behavior or aiding religion, and wishes to pursue these ends without interference from courts enforcing constitutional restrictions on government conduct. The other value at stake is the individual's interest in expanding the scope of her rights against government by extending the reach of constitutional and other limits on governmental power.

It may seem rather crude and simplistic to ignore the differences between one constitutional right and another, lump them all together, and conceive of the whole law of constitutional rights as a struggle between the individual's interest in liberty and the government's interest in control; and indeed it is. For present purposes, however, this perspective on constitutional litigation is appropriate. Abstracting away from the wide variety of features relating to the resolution of the substantive merits of specific constitutional issues allows us to focus on the interplay between substance and jurisdiction. Jurisdictional rulings do not influence the *content* of substantive constitutional doctrine. Rather, they operate on the more general level of individual and state interests in liberty and control. Deciding a jurisdictional issue one way or the other does not affect the rules embodied in constitutional doctrine, but favors one or the other of these broader, more diffuse interests.

B. The Substantive Impact of Jurisdictional Rules

The opportunity to serve these substantive agendas arises from the realities of litigation in our complex judicial system. In practice, if not in theory, jurisdictional decisions carry consequences for the substantive rights of the parties. Success and failure in consti-

tutional litigation turn not only on rules of law, but also on ease of access to judicial relief and a sympathetic forum.

Three major areas in the law of federal courts, and the principal areas of concern in this Article, are standing to sue, Supreme Court review of state judgments, and federal-state comity. When the Court finds a lack of standing, or decides to review an ambiguous state judgment, or closes the door of the federal court in favor of a state forum, it makes no explicit decision on the merits of the litigation which spawned the jurisdictional issue. In *Valley Forge Christian College v. Americans United For Separation of Church & State*,²⁹ a group of taxpayers opposed to government aid to religion was denied standing to challenge a transfer of property to a religious school, but the Court was careful to avoid any comment on the substantive merit of their establishment clause theory. In *Michigan v. Long*,³⁰ the Michigan Supreme Court had invalidated a police search, in an opinion that cited both federal and state authorities. The jurisdictional issue presented was whether the United States Supreme Court could review this judgment. In finding that it could, the Court made no final determination on the merits of the federal fourth amendment issue.³¹ Statutory or judge-made limits on federal jurisdiction for the sake of federal-state comity, like the rule of *Younger v. Harris*,³² are predicated on the availability of a fair state forum.³³ Again, the jurisdictional issue is merely where the suit should be litigated, and not who should win on the merits.

Even so, jurisdictional rules have subtle and significant substantive implications. Spelling them out, as I do in the ensuing paragraphs, is an essential first step in my argument. At this point, only the substantive *effects* of jurisdictional rules will be identified.

29. 454 U.S. 464 (1982).

30. 463 U.S. 1032 (1983).

31. The Court held that the initial search was permissible under the fourth amendment. The Michigan Supreme Court had not ruled on the question of the constitutionality of the subsequent search of the trunk, however. The Court therefore declined to decide this question, and remanded the issue. *Id.* at 1053.

32. 401 U.S. 37, 53-54 (1971).

33. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). See generally Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C.L. Rev. 49, 51 (1987) (discussing the situations under which the noninterference rules will not apply).

Whether these rules are *motivated* by substantive considerations is a more complicated inquiry, and is examined in Part III.

1. *Standing*

Standing addresses the question of who can litigate a constitutional issue.³⁴ If every dispute could be litigated to a resolution on the merits by someone, at some time, then standing would have no substantive implications. However, standing rules sometimes place obstacles in the way of *anyone* who may seek to raise certain kinds of issues. If an organization of taxpayers, like the plaintiffs in *Valley Forge*, cannot challenge a transfer of property to a religious school, because as taxpayers they have suffered no discrete injury, then courts may never have the opportunity to rule on the validity of such a transfer. On account of the jurisdictional rule, the government's substantive interest in supporting religion will prevail over the contrary substantive interest in separation of church and state.

Nor is this effect the only way in which standing rules have substantive impact. As part of the standing requirement, the Court requires a causal connection between the injury and the relief sought. In *Warth v. Seldin*,³⁵ for example, low income residents of nearby communities sought to challenge on constitutional grounds the zoning practices of Penfield, a wealthy suburb of Rochester. The plaintiffs were denied standing because the Court thought they were too poor to afford to move into the town even if the zoning rules were overturned. As in tort law, this rule on causation has an impact on substantive rights and duties.³⁶ The stricter the causation requirement, the weaker the government's constitutional obligations, however demanding they may appear in the abstract.

34. See, e.g., *Valley Forge Christian College*, 454 U.S. at 473-74 (1982); *Flast v. Cohen*, 392 U.S. 83, 98-100 (1968).

35. 422 U.S. 490 (1975).

36. See Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 19 (1982); Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

2. *Supreme Court Review*

Because Supreme Court review benefits only the losing party in the state court, rules that broaden access to Supreme Court review when the grounds for the state judgment are unclear will favor that party's substantive interests. If the rules on Supreme Court review had a random impact, sometimes helping one substantive interest and sometimes another, then it would be wrong to say that the rules themselves have substantive impact. The myriad random applications would cancel each other out. In practice, the problem of whether Supreme Court review is appropriate commonly comes up in just one fact pattern, and the party who profits substantively from expanded review is readily identifiable. This fact pattern arises when a criminal defendant in state court raises two defenses to the prosecution, one based on the federal Constitution, the other on a parallel state constitutional provision. For example, in *Michigan v. Long*³⁷ a defendant challenged the admission of evidence against him on both state and federal fourth amendment grounds. If the state court relies on the state ground, then the Supreme Court is powerless to review, because such a ruling is adequate to support the judgment no matter how the federal issue is decided. Supreme Court review is available only if both the state and federal issues are decided against the individual raising the federal claim, or if the state court finds in his favor by relying on the federal issue.

Suppose the grounds for the state decision are unclear. The Court then has a choice to make, and the choice will indirectly affect the substantive rights and duties of the individual and the state. *Long* expanded Supreme Court review in these cases, ruling that the Court will presume reliance on the federal ground if the state court opinion is ambiguous.³⁸ By giving the state a chance to challenge the state court judgment, this holding obliquely furthers the state's interest in regulating conduct free of federal restraints. The individual asserting a constitutional claim never gains by expansions of Supreme Court authority like *Long*, because under settled law he already has access to the Supreme Court when he loses

37. 463 U.S. 1032 (1983).

38. *Id.* at 1040-42.

in state court. Expanding Supreme Court review to more cases when the state loses in state court can only help the state.

3. Access to Federal District Court

If no differences existed between federal and state courts, then the question of how to allocate constitutional cases between them would stir little controversy. In that event, both sides would be indifferent to forum rules. Yet, whether to permit access to federal court for litigants with constitutional claims is one of the hardest fought issues in the law of federal courts. For example, in *Younger v. Harris*³⁹ the Supreme Court denied access to federal district courts to litigants who could raise their federal claims in pending state proceedings, citing as its justification comity between federal and state courts.

The reason litigants care so much about this seemingly arid topic is that, in reality, significant differences exist between federal and state courts, and these differences influence outcomes in constitutional litigation. Federal courts are more likely to favor constitutional claimants, even in the Reagan era, while state courts are relatively more sympathetic to positions the state espouses.⁴⁰ Because of this divergence, the rules on access to federal court have substantive impact. Granting access to federal court will tend to promote the individual's interest in imposing constitutional limits on government, while channelling those cases to state court will further the state's interest in regulation.

The differences in outlook between federal and state courts stem from institutional differences between them. Article III grants life tenure to federal judges; most state judges are elected or appointed for fixed terms. Federal judges are far fewer in number, and they are chosen from a larger pool.⁴¹ For example, California has more

39. 401 U.S. 37 (1971).

40. See Cover & Aleinikoff, *supra* note 28, at 1050-52; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-28 (1977); Redish, *supra* note 23, at 483-84; Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 611-17 (1985). On the impact of the Reagan appointments, see Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987); Noble, *Not Many Judges Practice What the President Preaches*, N.Y. Times, Nov. 29, 1987, at E4, col. 1.

41. Neuborne, *supra* note 40, at 1121.

state trial judges than the entire federal court system.⁴² Consequently, as a group federal judges are probably more talented.⁴³ They are generally paid more, and the selection process for federal judges focuses more on competence and less on patronage.⁴⁴ For all of these reasons, federal judges are likely to be bolder and more self-confident in striking down state legislative or executive decisions. Federal judges often face constitutional questions in the more detached setting of a habeas proceeding or a request for declaratory or injunctive relief, rather than in the milieu of a criminal courtroom.⁴⁵ Less exposed to the rough and tumble of criminal litigation, federal judges may be less cynical than state judges regarding the value of constitutional rights of criminal defendants.⁴⁶

In view of these differences, constitutional claimants quite naturally seek to litigate in federal court,⁴⁷ and the state often prefers state court, each party seeking whatever edge it can get from the forum choice. The point is not that either federal or state judges have an improper bias in favor of one set of litigants. Every judge must exercise judgment, and judgment is in part the product of the experiences of a person's life and the attitudes he has formed as a result of them. Allocation rules will have an indirect, but important, substantive impact on the resolution of close issues of fact or law, where the conscious or unconscious attitudes judges bring to their task may prove decisive.⁴⁸

II. JURISDICTIONAL POLICY, INSTITUTIONAL ROLES, AND FEDERAL COURTS DOCTRINE

Although jurisdictional decisions have substantive consequences, Supreme Court opinions always deny any substantive motivation for them. Rather, the Court explains this body of law in terms of the institutional role of the federal courts in our system of government. This part of the Article lays out the Supreme Court's ac-

42. *Id.*

43. *Id.*

44. *Id.* at 1122.

45. *Id.* at 1125.

46. *Id.* at 1125-26.

47. See, e.g., Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 655 n.72 (1987).

48. See Wells, *Is Disparity A Problem?*, 22 GA. L. REV. 283, 319-26 (1988).

count of the reasons behind the rules of federal jurisdiction. The discussion is necessary background for the argument, advanced in Part III, that the Court's explanation is largely a facade, behind which it promotes substantive aims. Keep in mind that the following account is written from the perspective of an observer who takes the Court's opinions at face value. The aim is to show, in Part III, that the opinions deserve a more skeptical reading.

A. The Federal Courts and the Federal System

Thanks to the circumstances of its birth as a nation, the United States is endowed with a rather complex governmental structure. The United States began as a union of thirteen previously independent states, whose leaders had recently fought a war against what they perceived to be a tyrannical government. The framers' mistrust of power, and the insistence of the state governments on keeping some of it for themselves, produced a division of governmental authority between the Nation and the states; each holding some law-making power, each maintaining its own judicial system, and each judicial system capable of deciding both state and federal issues. Within the national government, power is divided among the executive, legislative, and judicial branches, so that each branch may serve as a check on the others.

These features of American government make it necessary to define the duties and prerogatives of the federal courts in relation both to the other branches of the national government and to state officers and state courts. The case law generated by this effort is the subject matter of courses on federal courts. In each instance, the fundamental problem is to decide how much power federal courts may exercise, and, conversely, when they must defer to another branch of the federal government or to state courts. The resulting body of doctrine is intricate and elusive, because there are good arguments both on the side of an expansive role for the federal courts and in favor of restrictions on their power, and some fine distinctions must be made.

B. Jurisdictional Policies and Their Implementation

In defining the role of the federal judiciary, the Court draws from several sources. The basic rules are laid down in article III of the Constitution, which marks the outer boundaries of federal ju-

risdiction, and in federal statutes covering the scope of Supreme Court review and district court jurisdiction.⁴⁹ Here, as in other areas of the law, the Court professes fidelity to legislative intent,⁵⁰ and to its own precedents as well.⁵¹ On issues that cannot be resolved by reference to the Constitution, statutes or prior cases, the Court follows a number of policies derived from or linked to the Constitution and its aims. These policies all bear in one way or another on the institutional role of the federal courts in the federal system. The policies are: (1) maintaining the supremacy and uniformity of federal law; (2) showing due respect for state courts and state governments; (3) enforcing the separation of powers within the national government; and (4) economizing on the use of judicial resources. Each of these policies deserves a brief explanation.

One prominent feature of the constitutional plan, which advocates of a strong central government insisted on, is the supremacy of federal law over state law.⁵² An essential element of any sound legal system is some means for reconciling divergent decisions by lower courts to achieve and maintain a uniform body of law.⁵³ Toward these ends, article III mandates the creation of a national

49. For example, 28 U.S.C. § 1257 (1982) governs Supreme Court review of state judgments, and 28 U.S.C. § 1331 (1982) controls the federal question jurisdiction of federal district courts.

50. *E.g.*, *Allen v. McCurry*, 449 U.S. 90 (1980) (on the scope of 28 U.S.C. § 1738); *Mitchum v. Foster*, 407 U.S. 225 (1972) (on the scope of 28 U.S.C. § 2283).

51. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 751-52 (1984); *Younger v. Harris*, 401 U.S. 37, 45-49 (1971).

52. U.S. CONST. art. VI. *See* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 473 (1969). It is important to keep separate the supremacy policy and the constitutional claimant's interest in winning the lawsuit. Sometimes these factors will be congruent, but they will often diverge. The supremacy policy is directed at assuring that settled constitutional law prevails in case of conflict with federal statutes or state law. The constitutional claimant's interest in winning operates in situations in which no settled constitutional rule exists, and when the question of law or fact at issue may be legitimately decided either for or against him. *Cf.* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-12 (1958) (legal terms have a core of settled meaning and a penumbra of debatable meaning). Because the state's interest in pursuing its objectives free of constitutional restraints is itself a value with constitutional dimensions, *see* Bator, *supra*, note 22, at 631-34, maintaining constitutional supremacy may actually require rejecting the constitutional claimant's position.

53. *See* Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1041 (1981-82).

Supreme Court and authorizes Congress to institute and assign judicial business to other federal courts.⁵⁴

Supremacy and uniformity of federal law, taken alone, would call for a prominent role for the federal courts; but our Constitution is complex. It creates a federal system, in which power is divided between the national and state governments. Sometimes, as in the eleventh amendment's bar on suits in federal court against state governments, deference to states is constitutionally required.⁵⁵ More often, federal statutes such as the anti-injunction act,⁵⁶ or the Supreme Court's common law "principle of comity" enforce such deference.⁵⁷

Within the national government, the separation of powers among three branches calls for limitations on judicial power. Sensitive to its status as the antidemocratic branch of government in a nation founded on the principle of majority rule, the Court seeks to avoid unnecessary constitutional decisions and to eschew judicial intervention unless the litigant seeking it makes a compelling case that he is so entitled.⁵⁸ In recent years the Court has implemented these policies chiefly through its standing doctrine.⁵⁹

In addition to these weighty considerations of public policy, the Court also considers the need to encourage efficiency in litigation and economy in the use of judicial resources in making federal courts decisions. The Court accomplishes this end chiefly through rules that disfavor duplicative litigation. For example, the doctrine of pendent jurisdiction announced in *United Mine Workers v. Gibbs* allows federal and state claims arising out of the same factual background to be tried in one federal court suit,⁶⁰ and *Allen v.*

54. U.S. CONST. art. III § 1. See HART & WECHSLER, *supra* note 26, at 3-5, 10-11.

55. 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.

56. 28 U.S.C. § 2283 (1982) (forbidding federal courts to enjoin state proceedings except in certain specified circumstances).

57. *E.g.*, *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 105 (1981).

58. See, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471-76 (1982).

59. In addition to *Allen* and *Valley Forge*, see *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth v. Seldin*, 422 U.S. 490, 498-502 (1975).

60. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

*McCurry*⁶¹ precludes relitigation of issues already adjudicated in state court.

The Court invokes one or more of these policies to explain virtually every aspect of its doctrine on standing, Supreme Court review, and the division of jurisdiction between federal and state courts. This Article now turns to the Court's account of each of these doctrines.

1. Supreme Court Review of State Judgments

The premier case on this topic is *Martin v. Hunter's Lessee*,⁶² in which the state of Virginia challenged the constitutional validity of Supreme Court review of state court judgments. The Court upheld its authority, relying on the need for federal review to assure the uniformity of federal law and the supremacy of federal law over state law.⁶³ No doubt *Martin* is right, for the framers had agreed on creation of a national Supreme Court for just this reason.⁶⁴

In later cases the Court refined the *Martin* principle, giving weight to the more restrictive policies. In *Murdoch v. Memphis*,⁶⁵ the Court limited its review to the federal issues in the case, reasoning that the uniformity and supremacy policies did not support review of state law issues. At the same time, leaving the state law issues untouched avoided undue friction with the state courts.⁶⁶ After *Murdoch* the Court cut back further on the scope of review. When the state court has relied on a state as well as a federal ground, the Court will not even review the federal issue so long as the state ground is adequate to support the judgment.⁶⁷ The policy basis of this rule is avoidance of unnecessary constitutional decisions and economy of judicial resources.⁶⁸

61. 449 U.S. 90 (1980).

62. 14 U.S. (1 Wheat.) 304 (1816).

63. *Id.* at 340-48.

64. See C. WARREN, *THE MAKING OF THE CONSTITUTION* 326 (1929).

65. 87 U.S. (20 Wall.) 590 (1875).

66. *Id.* at 631-33. See Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1133-34 (1986).

67. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). On the question of what counts as an adequate state ground, see Meltzer, *supra* note 66, at 1137-45.

68. See *Herb*, 324 U.S. at 125-26.

What if the state opinion cites both federal and state law, leaving it unclear whether it relies on the federal or state grounds or both? The Court formerly remanded the case for clarification,⁶⁹ or closely examined the state court's opinion for guidance,⁷⁰ or presumed that the decision rested on state law grounds.⁷¹ Each of these approaches can be justified under the principle that the Court should decide constitutional questions only when they can not be avoided. However, in *Michigan v. Long*, the Court discarded all three of these techniques, and, invoking the uniformity principle, announced that henceforth it would presume reliance on the federal ground when the state court's opinion is ambiguous.⁷² Without federal review of state decisions that may have relied on federal law, courts in different states may reach divergent results on federal issues.⁷³ Only a "plain statement" by the state court that its judgment rests on state law will save it from Supreme Court review.⁷⁴

2. *The Allocation of Constitutional Adjudication Between Federal and State Courts*

Our focus now shifts from Supreme Court review to the division of jurisdiction between federal district courts and state courts. Ordinarily, federal courts may hear any case in which the plaintiff's cause of action arises under federal law. The hard issue is how to handle lawsuits in which the plaintiff seeks to challenge some action by state or local government on federal constitutional grounds. This type of case presents a sharp clash between the supremacy and uniformity policies and the desire to avoid undue interference with state court prerogatives. Here the need to maintain federal supremacy through federal jurisdiction seems especially great, because state courts may be loathe to interfere with state officers. At

69. *E.g.*, *Department of Motor Vehicles v. Rios*, 410 U.S. 425, 427 (1973) (Douglas, J., dissenting); *Minnesota v. National Tea Co.*, 309 U.S. 551, 555 (1940).

70. *E.g.*, *Texas v. Brown*, 460 U.S. 730, 732-33 n.1 (1983) (plurality opinion); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 489-92 (1965).

71. *E.g.*, *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). *See also* *Philadelphia Newspapers v. Jerome*, 434 U.S. 241, 244-45 (1978) (Rehnquist, J., dissenting).

72. 463 U.S. 1032, 1040 (1983).

73. *See id.*

74. *Id.* at 1041.

the same time, the Court recognizes that a state has a strong interest in settling these matters in its own courts, and that the eleventh amendment sometimes accords constitutional status to the state's interest in freedom from suit in federal court.

According to the Court, this sharp clash between contrary jurisdictional policy aims is largely responsible for the convoluted body of law permitting access to federal court for some of these cases, and allocating some of them to state court. In summarizing the rules, it is helpful to distinguish between plaintiffs seeking damages and those requesting injunctive or declaratory relief. Under *Monroe v. Pape*⁷⁵ and *Monell v. Department of Social Services*,⁷⁶ most suits against local governments and state officials to recover damages for constitutional violations may be brought in federal court. The foundation for these rulings is the Court's reading of the legislative intent of a statute passed in 1871, 42 U.S.C. § 1983. Damage suits against the state itself are barred in federal court by the policy against intrusion on the states, embodied in the eleventh amendment.⁷⁷ The immunity against federal damages suits can be abrogated only if Congress has specifically authorized suit against the state.⁷⁸

*Ex Parte Young*⁷⁹ established an exception to the eleventh amendment immunity for suits to obtain injunctive relief against unconstitutional action by a state officer, and the Court also applies this exception to requests for declaratory relief. The Court explains *Young* as a compromise between the anti-intrusion policy and the supremacy policy. Injunction suits must be allowed to enforce the fourteenth amendment, but permitting actions for damages would too severely compromise state sovereignty.⁸⁰ *Edelman*

75. 365 U.S. 167 (1961).

76. 436 U.S. 658 (1978).

77. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974).

78. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *Fitzpatrick* held that Congress may abrogate the immunity when it acts pursuant to the power granted it in section 5 of the fourteenth amendment to enforce the substantive provisions of that amendment. Whether Congress may abrogate the immunity when acting under its other powers is still an open question. See, e.g., *Welch v. Department of Highways*, 107 S. Ct. 2941, 2946 (1987). It may be resolved in a case to be decided this term, *United States v. Union Gas Co.*, 832 F.2d 1343 (3rd Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988).

79. 209 U.S. 123 (1908).

80. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104-06 (1984).

v. Jordan limited this exception to suits for prospective relief, explaining that retrospective relief, even if it is labeled "equitable restitution," was too much akin to damages.⁸¹

Some limits on federal jurisdiction apply to both damages and injunctions. Relying on the eleventh amendment's anti-intrusion policy, *Pennhurst State School & Hospital v. Halderman*⁸² barred any monetary or injunctive federal relief against a state officer on state law grounds. The doctrine of *Younger v. Harris*⁸³ denies access to federal court to enjoin pending state proceedings, because the cost of these intrusions into state prerogatives is too high,⁸⁴ and because there is no lack of parity between federal and state courts.⁸⁵ Lower federal courts have applied this rule to bar federal suits for damages as well, but the Supreme Court has not yet ruled on that issue.⁸⁶

3. *Standing*

Standing deals with whether the party seeking relief is an appropriate litigant to assert the issues he raises.⁸⁷ The problem is that many constitutional rights, unlike common law rights, are held in common. Virtually anyone may plausibly claim harm from certain kinds of unconstitutional government action, such as aid to religion in violation of the establishment clause. On the other hand, no one may be able to show any particular harm to himself, apart from the generalized grievance.⁸⁸

Should anyone, or no one, be allowed to bring suit to redress such a violation? In answering this question, the Court has focused on the role of the federal courts in our system of government. The jurisdictional policy of assuring the supremacy of federal law favors broad standing to raise such issues, for only the courts can

81. 415 U.S. 651, 665 (1974).

82. 465 U.S. at 106.

83. 401 U.S. 37 (1971).

84. See *Moore v. Sims*, 442 U.S. 415, 427-30 (1979); *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974).

85. See, e.g., *Moore*, 442 U.S. at 430; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

86. See HART & WECHSLER, *supra* note 26, at 1431-32.

87. See Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297-98 (1979).

88. See Nichol, *Injury and the Disintegration of Article III*, *supra* note 23, at 1919-22 (1986).

ultimately determine whether the challenged practice is constitutional, and a relaxed injury requirement is necessary to get the issue before the courts. In *Flast v. Cohen*,⁸⁹ decided in 1968, the Court endorsed this reasoning, permitting taxpayers to challenge congressional aid to religious schools on first amendment grounds.

The jurisdictional policy against standing to assert generalized grievances is sensitivity to the separation of powers, which in this context refers to a policy of restricting the exercise of judicial power by avoiding unnecessary constitutional decisions. In 1982, the Court abandoned the policy foundation of *Flast*. Emphasizing the federal courts' limited role, the Court ruled in *Valley Forge Christian College v. Americans United For Separation of Church & State* that taxpayers have no standing to challenge a transfer of property by the executive branch of government to a religious school.⁹⁰

*Allen v. Wright*⁹¹ illustrates another aspect of the contemporary Court's standing doctrine. In *Allen*, blacks challenged an IRS policy that allegedly permitted segregated private schools to obtain tax-exempt status. As a result, the plaintiffs' children were deprived of the opportunity to attend integrated public schools. The Court found that the injury was sufficiently discrete. The Court denied standing, however, because the plaintiffs could not show a causal connection between the alleged illegality and the claimed injury.⁹² Even if the IRS acted illegally, a change in IRS policy might not result in any change in the policy of the segregated schools. Such schools may prefer to remain segregated despite the loss of tax-exempt status. Again, the Court relied on the separation of powers, and, more specifically, on the need to limit the exercise of judicial power to situations in which a compelling need for judicial intervention exists.⁹³

89. 392 U.S. 83 (1968).

90. 454 U.S. 464, 471-82 (1982). See generally Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798 (1983) (discussing the Supreme Court's rejection of shared constitutional injury as adequate to support standing, and suggesting a new analysis that would permit diffuse constitutional norms to support standing).

91. 468 U.S. 737 (1984).

92. *Id.* at 758-59.

93. *Id.* at 759-61.

III. DISCERNING JUDICIAL MOTIVATION

Jurisdictional policy is far less important in accounting for federal courts doctrine than the Court says it is. Closer examination of the cases reveals serious inadequacies in the Court's technique for justifying its rules. Cases that are alike in terms of jurisdictional policy are routinely treated differently, while legislative intent and precedents are ignored with disconcerting regularity. The decisions make sense only when we bring their substantive effects into the analysis. A more convincing explanation for much of the law in this area is that the Court's invocation of jurisdictional policy, precedent, and statutory or constitutional purpose is often merely a facade, behind which the Court designs jurisdictional rules in an effort to achieve substantive goals.

The method employed here for determining the true motivation for federal courts decisions is to compare the Court's treatment of a variety of doctrinal problems. In this way the persuasive force of the Court's reasons and the Court's fidelity to those reasons can be evaluated as it moves from one discrete issue to another. If the Court's jurisdictional policy reasons are not persuasive grounds for the result it reaches, there is a good chance the Court has some hidden agenda. Even when the Court's reasons in a given case can withstand scrutiny, they may not be the real, or the most important, bases for the holding. If the Court applies its analysis consistently over a range of problems, where the substantive effects of its rulings vary from one case to the next, then we can conclude confidently that the institutional role of the federal courts is the focus of the Court's attention, as the Court claims it is. However, if glaring inconsistencies appear as we move from one context to the next, if many of the seemingly inconsistent rules have the same substantive impact, and if the Court discards jurisdictional policy reasons advanced in one area and replaces them with other jurisdictional policy reasons in the next area, then there are good grounds to suspect that jurisdictional policy is not what really counts. Rather, jurisdictional policy is merely a convenient rationalization for results whose true motivation is their substantive impact.

Seeking to divine concealed motivations by comparing cases and by evaluating the persuasive force of the Court's stated reasons is a tricky business, and any conclusions drawn must be tentative ones.

Nonetheless, the inquiry is worthwhile. To disdain it because it is speculative would be to foreclose the possibility of getting closer to the truth about this unruly body of cases. The better course is to go ahead with the analysis in spite of its hazards, set forth the reasons for believing the Court pursues a concealed substantive agenda, and let the reader decide for himself whether this approach contributes something of value to the discussion of these decisions.

A. *Pennhurst and Respect for State Courts*

*Pennhurst State School & Hospital v. Halderman*⁹⁴ is the most important eleventh amendment case handed down in recent years. *Ex Parte Young*,⁹⁵ decided in 1908, held that the eleventh amendment prohibition on suits against states in federal court did not bar a suit to enjoin unconstitutional action by a state official. The official was "stripped of his official or representative character"⁹⁶ when he acted unconstitutionally. *Young* was a landmark in the law of constitutional remedies, because it allowed persons to challenge state action on fourteenth amendment grounds via a federal suit for injunctive relief rather than solely by violating the law, submitting to a state prosecution, and raising the federal issue as a defense.⁹⁷

Such a request for injunctive relief may rely on state law as well as federal law. A year after *Young*, in *Siler v. Louisville & Nashville Railroad Co.*,⁹⁸ the Court told federal courts faced with such a case to try first to resolve it on the state law ground, in order to avoid unnecessary constitutional decisions. Seventy-five years later, *Pennhurst* repudiated *Siler*, finding it a violation of the eleventh amendment to grant injunctive relief against a state officer on state law grounds.⁹⁹ So stated, *Pennhurst* seems a proper application of the policy against unwarranted intrusion by federal courts

94. 465 U.S. 89 (1984).

95. 209 U.S. 123 (1908). See generally C. WRIGHT, LAW OF FEDERAL COURTS 286-92 (4th ed. 1983) (an historical review of federal restraint on state officials).

96. 209 U.S. at 160.

97. See C. WRIGHT, *supra* note 95, at 290.

98. 213 U.S. 175, 192-93 (1909).

99. 465 U.S. 89, 106 (1984). See Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 62, 65 & nn.29-30 (1984).

on state authority. True, the decision ignores seventy-five years of practice to the contrary, the avoidance policy suffers, and efficiency in the use of judicial resources is impeded if litigants bifurcate their suits between federal and state court. However, the eleventh amendment is a constitutional prohibition, and to the extent the noninterference policy has constitutional stature it must prevail against other considerations. In any event, even if the Court's policy choice was unwise, the problem seems to be strictly one of jurisdictional policy with no substantive dimension.

A careful examination of *Pennhurst* casts doubt on this "institutional role" explanation for limiting federal court power. The problem with the case is in specifying precisely how a federal injunction based on state law amounts to an unwarranted intrusion into matters within the state's authority. In *Pennhurst*, there was no federal interference with a state judicial proceeding, as in *Younger v. Harris*.¹⁰⁰ If the objection is that federal courts should never tell state officers what to do, then the ruling squarely contradicts *Ex Parte Young*,¹⁰¹ which found the eleventh amendment no impediment to such federal orders. If *Young* is distinguished on the ground that the court there invoked federal law, while the injunction in *Pennhurst* was based on state law, a curious anomaly appears. An intrusion is acceptable when founded on a body of law outside the state's control, but not when a federal court enforces the state's own law.

Ann Althouse offers an explanation for this distinction. She thinks that *Pennhurst* is justified by the state's interest in controlling the development of state law. In her view, "a state's loss of control over its statutory creations inhibits a state's functioning," and "the risk of finding themselves bound to expensive and burdensome federal injunctions would provide states with a major disincentive to reform their own institutions."¹⁰² The danger that can give rise to these perverse results is that federal courts might misunderstand and misinterpret state law.¹⁰³ As long as federal courts

100. 401 U.S. 37 (1971).

101. 209 U.S. 123 (1908).

102. Althouse, *supra* note 21, at 1513.

103. *Id.* at 1522.

construe state law correctly, they do not take control over the state's creations and the state need fear no usurpation.

However, if federal court mistakes are the problem, then *Pennhurst* is a wildly disproportionate and costly solution, especially when a less disruptive alternative device is already available. The *Pullman* abstention doctrine was designed to deal with the problems that arise when federal courts face unsettled state law issues on which they may err.¹⁰⁴ *Pullman* directs federal courts to hold the case in abeyance while the parties seek an authoritative answer from the state courts on the state law issue.¹⁰⁵ When state law is clear, as it was in *Pennhurst*,¹⁰⁶ federal application of state law does not result in "a state's loss of control over its own statutory creations."¹⁰⁷

For these reasons, I am unpersuaded that *Pennhurst* rests on any jurisdictional policy. A more likely explanation for the result is that the Court was influenced by the substantive implications of its holding. The Court's rejection of injunctions based on state law has important consequences for the litigation of *federal* claims. After *Pennhurst* a litigant with both state and federal theories of recovery must either litigate both theories in state court or split up the case into two parts, at increased expense. If he chooses the latter alternative to preserve access to federal court for his federal

104. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499-501 (1941). See Shapiro, *supra* note 99, at 79 & n.109.

105. See *England v. Board of Medical Examiners*, 375 U.S. 411, 429-30 (1964) (Douglas, J., concurring).

106. The court of appeals relied on a recent state supreme court opinion that spoke directly to the substantive state law issue. *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647, 651-56 (3d Cir. 1982), *rev'd*, 465 U.S. 89 (1984) (reviewing *In re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981)).

107. Althouse, *supra* note 21, at 1513. *Pullman* abstention may not be the best solution. Professor Field has argued that *Pullman* abstention is itself a clumsy, expensive device that is sometimes manipulated to serve substantive ends and that ought to be abandoned in favor of certification of state issues to the state supreme court. See Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 602, 605 (1977). The facts of *Pennhurst*, where a federal court undertook to oversee the reform of a large state institution, suggest that federal deference may be appropriate even when the abstract commands of state law are crystal clear. Perhaps the appropriate response to these problems is to institute a more flexible abstention doctrine. See Shapiro, *supra* note 99, at 78-79 & n.108. See also *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) (calling for more focus on the purpose of abstention doctrines in easing tensions between state and federal court, and more flexibility in their application).

issues, and if the state litigation moves through the courts faster, then he may find himself bound to the state court's adjudication of issues common to the two cases under the principle of collateral estoppel.¹⁰⁸ Indeed, he may find that the whole federal suit is barred because he could have brought the federal cause of action in his state litigation.¹⁰⁹

The substantive angle to this strategy relies on the premise that state courts are more likely to favor state substantive interests than federal courts.¹¹⁰ By encouraging litigation of the whole case in state court, the Court may be trying to give the state an edge in the underlying substantive litigation. The plaintiff with federal constitutional claims is encouraged to go to state court because of the expense of bifurcating, but then must face an unsympathetic forum. If *Pennhurst* were the only piece of evidence for this conclusion, I would be reluctant to read such a machiavellian design into the case. Discussion of more of the Court's federal courts cases will show that this substantive reading of the case fits neatly into a broader theme.

B. Michigan v. Long and Uniformity of Federal Law

The policy of avoiding unnecessary constitutional decisions is the basis of the Court's three traditional approaches to the issue of whether to review ambiguous state decisions. The problem in this area is that the Court only reviews decisions resting on a federal ground, and some state court opinions cite both federal and state law in support of their holdings. How should the Court proceed? One technique is to presume that the decision rests on a state ground, another is to send the case back to state court for clarification, and the third is for the Supreme Court itself to examine the decision and its reasoning and determine whether it turns on state or federal law.¹¹¹ Under each of these approaches the Court takes

108. *Allen v. McCurry*, 449 U.S. 90 (1980).

109. See *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984). See also P. Low & J. JEFFRIES, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 835-38 (1987); Shapiro, *supra* note 99, at 80-81.

110. See sources cited *supra* note 40.

111. See HART & WECHSLER, *supra* note 26, at 547-52.

care to avoid decision of a constitutional issue if a state ground adequate to support the judgment exists.

*Michigan v. Long*¹¹² was a state criminal prosecution in which the defendant challenged the introduction of evidence as a violation of the federal fourth amendment and a breach of the parallel state constitutional provision. The state court excluded the evidence, citing both federal and state authority in the opinion. Addressing the question of its own jurisdiction to review, the Supreme Court recounted its history of shifting back and forth among the three alternatives, and concluded that it should discard all three. In their place the Court raised a presumption that ambiguous decisions rest on the federal ground.¹¹³ This approach extends Supreme Court review over state judgments, and thus expands the Court's opportunity to decide federal constitutional issues. The Court's approach is therefore altogether incompatible with the avoidance policy.

That *Long* is based on a substantive aim of making it easier to reverse state decisions that favor persons with constitutional claims does not follow simply from the abandonment of avoidance policy. Perhaps some other jurisdictional policy is more important than avoidance in the *Long* context. The majority in *Long* stressed the need for uniformity in federal law.¹¹⁴ Because state courts may reach divergent decisions on federal law, state decisions that *may* have rested on federal grounds must be reviewable by the Supreme Court. The flaw in this rationale is its reliance on the paramount importance of uniformity. In comparison with other contexts, uniformity shows itself to be a policy of exceedingly variable strength.

Uniformity would be served by rules that generally allocated federal law decision making to the federal rather than the state courts, because fewer differences are likely to exist between a dozen or so federal appellate courts than among fifty state supreme courts, and the differences that arise are resolved more easily. Yet the Supreme Court allocates federal decision making to state courts routinely, both in defining the "arising under" jurisdiction

112. 463 U.S. 1032 (1983).

113. *Id.* at 1038-42.

114. *Id.* at 1040-41.

of federal district courts,¹¹⁵ and in restricting access to federal court for constitutional challenges to state action.¹¹⁶ Uniformity of federal law would also be served by making federal common law rules of national applicability when a sufficient federal interest justifies a departure from *Erie v. Tompkins*.¹¹⁷ Yet the contemporary Supreme Court often chooses to borrow state law in this situation.¹¹⁸ Why then does uniformity become so important in the context of Supreme Court review of state judgments? In view of the Court's neglect of uniformity in other contexts, it is hard to give credence to *Long*'s reliance upon that policy as the justification for the new rules.

Ann Althouse does not think uniformity is an adequate basis for the rule in *Long*. She defends the decision on another process-oriented ground. State courts should be accountable to their state constituencies in the development of state law. If state courts can avoid Supreme Court review by using ambiguous reasoning to explain a decision, the voters and state legislatures may be misled into thinking that the decision rests on federal grounds and cannot be changed. The state court will have succeeded in avoiding accountability to the Supreme Court by mixing in some state grounds, and in avoiding accountability to the state legislature by mixing in some federal grounds.¹¹⁹

The defect in this defense of *Long* is the gap between means and ends. If the goal is state court accountability, then the correct approach to the problem of ambiguity is to ask them what they meant. The Court can then be absolutely sure whether the decision rests on state or federal law, and it will be clear whether the state court is accountable to the citizens and legislature of the state or to the Supreme Court. The Court's presumption, on the other hand, allows federal review of *some* cases in which the state court

115. See *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

116. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

117. 304 U.S. 64 (1938).

118. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Miree v. DeKalb County*, 433 U.S. 25 (1977).

119. Althouse, *supra* note 21, at 1509.

really did mean to rely on state law and to be accountable to state authorities and not the Supreme Court.

The Court's presumption permits it to extend its reach to cases in which there is no serious ambiguity, and hence no serious problem of accountability. An example is *Kentucky v. Stincer*,¹²⁰ in which the state court opinion overturning a conviction mentioned the federal Constitution only in passing. The issue was whether excluding a criminal defendant from a hearing to determine the competency of a witness violated the right to confront one's accusers, a right found in both the federal and Kentucky Constitutions. The state court dwelt on state law and state cases interpreting state law.¹²¹ No fair reading of the opinion would find any serious ambiguity as to its grounds or danger that the opinion might be lacking in accountability.¹²² Yet the Court seized on the brief reference to federal law, addressed the federal issue, and reversed the state court judgment.¹²³

It is hard to locate *any* credible jurisdictional policy foundation for the result in *Long*. When the focus turns to the substantive impact of the decision, however, the decision fits easily into a major theme of the Burger Court. *Long* extends jurisdiction over issues of criminal procedure when state courts, guided by ambitious Warren Court precedents, have expanded the rights of criminal defendants. On the merits of these issues, the Court since 1970 has retreated steadily from those precedents. *Long* facilitates the

120. 482 U.S. 730 (1987).

121. See *Stincer v. Commonwealth*, 712 S.W.2d 939, 940-41 (Ky. 1986), *rev'd*, 482 U.S. 730 (1987). Although the opinions in *Stincer* and its precursors mention the federal Constitution, by far the dominant theme in each of them is the right of confrontation granted by the Kentucky Constitution.

122. See Dershowitz, *John Hart Ely: Constitutional Scholar*, 40 STAN. L. REV. 360, 367 (1988).

123. A defender of *Long* might point out that the state court is free to reinstate its decision by relying exclusively on state law. In this regard the sequel to *Stincer* is revealing. The Kentucky Supreme Court faced, and rejected, just such a request in a later case, See *v. Commonwealth*, 746 S.W.2d 401 (Ky. 1988). What is noteworthy is the court's framing of the issue. The court did not ask whether its own state's constitution required that the defendant be present. It asked whether "the exclusion of a defendant from a hearing to determine the competency of a witness is so violative of a basic right guaranteed by the Kentucky Constitution that we should place ourselves in direct opposition to an opinion of the United States Supreme Court." *Id.* at 402 (emphasis added). It is hard to escape the inference that a majority of the Kentucky court felt intimidated by the United States Supreme Court. See also *id.* at 404 (Stevens, C.J., dissenting).

Court's substantive program by removing an obstacle to review of state opinions that reflect Warren Court heresies.¹²⁴

C. *Younger and its Progeny*

*Younger v. Harris*¹²⁵ was the first of a series of cases by which the Court has shifted some kinds of constitutional litigation from federal to state courts. In *Younger* the federal court plaintiff was a criminal defendant in state court, charged with violating a law against inciting revolution. Asserting first amendment rights, he sought a federal injunction to stop the state proceeding. The Court dismissed his case without reaching the merits of his first amendment claim. The Court relied on the policies against unnecessary federal intrusions on state courts and efficiency in litigation. In particular, enjoining a state proceeding would insult state judges, disrupt the administration of justice in state courts, and duplicate the work already begun by the state court.¹²⁶ The Court gave these institutional costs more weight than the countervailing interest, based on uniformity and supremacy, in a federal forum for the assertion of federal claims.

In *Younger*, and some early post-*Younger* cases, the Court did not let these countervailing values go unheeded. The Court observed that in general federal law may be enforced by raising the federal claims as a defense in the state proceeding.¹²⁷ When the state tribunal is biased,¹²⁸ or the prosecution was brought in bad faith,¹²⁹ or the state tribunal lacks jurisdiction over the federal

124. If the Court took state cases upholding federal claims, and then affirmed the state courts in a large share of them, its practice might be explained in terms of the supremacy and uniformity policies. In fact, it generally reverses state courts in these cases, and in this respect its practice differs sharply from that of the Warren Court. See *Michigan v. Long*, 463 U.S. 1032, 1069-70 (1983) (Stevens, J., dissenting); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1243-44 (1978). Examples of post-*Long* reversals of ambiguous state judgments favoring the constitutional claimant include *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Ohio v. Johnson*, 467 U.S. 493 (1984); *Florida v. Meyers*, 466 U.S. 380 (1984); *Oliver v. United States*, 466 U.S. 170 (1984); *California v. Ramos*, 463 U.S. 993 (1983). See also Hart & Wechsler, *supra* note 26, at 554.

125. 401 U.S. 37 (1971).

126. See *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

127. 401 U.S. at 46.

128. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

129. *Younger v. Harris*, 401 U.S. 37, 48-49, 53 (1971).

claim,¹³⁰ a federal court may go forward. The plaintiff in *Younger* sought to enjoin a *pending* state proceeding. In *Steffel v. Thompson*¹³¹ the Court said the federal case survives when the state has instituted no prosecution. The Court explained that in such a case the justifications for abstention were absent; because there was no state proceeding, there was no interference with state processes, and thus no danger of disruption, duplication and insult.¹³²

If this account stated the full scope of *Younger* abstention, then that doctrine could be explained persuasively in terms of jurisdictional policy. In fact, the Court has pushed it well beyond these modest bounds, invoking *Younger* to justify deference to state courts when the institutional costs of federal intervention are far less compelling. A good illustration is *Hicks v. Miranda*,¹³³ in which the federal suit was filed first, but a state prosecution was brought soon afterward. In terms of the institutional costs analysis, the federal suit should go forward, yet the Court dismissed it, explaining that a contrary result would "trivialize" *Younger*.¹³⁴ This characterization strongly implies that the real reason for *Younger* was to prefer a state forum whenever one is readily available, and not the policy of minimizing disruption, insult, and duplication advanced in *Steffel*.¹³⁵

Nor is *Hicks* an isolated case. The Court has ordered abstention when the federal claims are merely permissive counterclaims and not defenses,¹³⁶ when the state administrative proceeding is judicial in nature,¹³⁷ when the constitutional claim cannot be raised in the administrative proceeding itself but only on later judicial review of it,¹³⁸ and when the plaintiff is not involved in any state proceeding but complains about state executive action like police

130. *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975).

131. 415 U.S. 452 (1974).

132. *Id.* at 462-63 (holding that declaratory relief may be awarded in such circumstances even if injunctive relief is inappropriate).

133. 422 U.S. 332 (1975).

134. *Id.* at 349-50. See Field, *supra* note 23, at 722-23.

135. See Wells, *supra* note 48, at 316.

136. See *Moore v. Sims*, 442 U.S. 415, 429-30 & n.12 (1979).

137. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

138. See *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986). See also *id.* at 633-34 n.5 (Stevens, J., concurring).

brutality,¹³⁹ or illegal tax collection.¹⁴⁰ At the same time the Court insists that no disparity between federal and state courts exists,¹⁴¹ so that the plaintiff's interest in access to a federal forum is minimal at best.¹⁴²

Because the institutional costs argument for federal restraint is weak in the absence of a pending state judicial proceeding, and because federal and state courts are really not interchangeable,¹⁴³ there are good grounds to be wary of the Court's rationale for its rulings in this area. Given the Court's general preference for state substantive interests in constitutional litigation in the years since *Younger*,¹⁴⁴ the Court more likely uses these jurisdictional rulings as an indirect means of pursuing that substantive agenda. State courts, on account of their institutional characteristics, are more likely to decide close constitutional issues in favor of the state. Consequently, allocating constitutional cases to state court will insidiously promote state substantive interests.

Before leaving *Younger*, it is worthwhile to consider the contrast between this doctrine and *Michigan v. Long*¹⁴⁵ with regard to respect for state courts. In the *Younger* line of cases, the Court returns to this theme again and again. The Court speaks of "the

139. See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976).

140. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110-16 (1981). In addition to the restrictions the *Younger* doctrine imposed, another group of Burger Court decisions limits access to federal court on habeas corpus for state prisoners seeking to raise constitutional objections to their confinement. See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986) (federal habeas may be barred by attorney error in state court); *Kuhlman v. Wilson*, 477 U.S. 436 (1986) (limiting successive petitions); *Rose v. Lundy*, 455 U.S. 509 (1982) (all claims in a habeas petition must be exhausted through state courts before the federal court will consider any of them); *Sumner v. Mata*, 449 U.S. 539 (1981) (admonishing district courts generally to defer to state court fact-finding); *Stone v. Powell*, 428 U.S. 465 (1976) (barring habeas for fourth amendment claims if the state provides a full and fair opportunity for raising them in state court).

141. See, e.g., *Deakins v. Monaghan*, 108 S. Ct. 523, 530 (1988); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

142. See *Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976).

143. See sources cited *supra* note 40.

144. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987); *Bowers v. Hardwick*, 478 U.S. 186 (1986). See also Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155 (1984); Stone, O. T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition, 19 GA. L. REV. 15 (1984).

145. 463 U.S. 1032 (1983).

principle of comity,"¹⁴⁶ "a proper respect for state functions,"¹⁴⁷ the "threat to our federal system"¹⁴⁸ of government if federal adjudication is allowed, and the need to minimize the "friction between our federal and state systems of justice."¹⁴⁹ By contrast, in *Long* the Court instructed state courts on the composition of their opinions. The *Long* majority brazenly declares that its rule shows respect for state courts,¹⁵⁰ but the rule itself belies this assertion. Under *Long*, state courts must include a "plain statement" indicating that the result turns on state law,¹⁵¹ and hence are left with much less discretion in the reasoning and phrasing of their decisions. Even an explicit declaration might not be enough to save a state decision from Supreme Court review.¹⁵² Whatever the merits of *Long*, it hardly manifests deference to state courts.¹⁵³ The Court's lack of respect in *Long* for the prerogatives of state courts reinforces doubts about the supposed "comity" foundations for *Younger*.

Although tensions exist between *Younger* and *Long* in terms of jurisdictional policy, from a substantive perspective, the two doctrines are entirely harmonious. Both of them favor state substantive interests in regulating conduct or otherwise governing as it pleases, over the individual's interest in imposing constitutional restraints on state action. *Younger* pursues this end by allocating cases to state courts, which will be more likely than federal courts to favor state interests in adjudicating close questions of fact or law. In the event a state court rules in favor of a constitutional claimant, *Long* furthers state regulatory interests by extending the availability of Supreme Court review over the state court decision. The case for *Long* and *Younger* is shaky in terms of jurisdictional

146. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 105 (1981).

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

148. *Moore v. Sims*, 442 U.S. 415, 423 (1979).

149. *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

150. 463 U.S. at 1040-41.

151. *Id.* at 1044.

152. *Id.* at 1041 & n.6.

153. See also *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) (shielding military contractors from suit under state tort law by creating a federal common law immunity that displaces state tort law).

policy, but both rulings promote the contemporary Court's substantive agenda.

D. Standing

If the substantive implications of *Pennhurst*, *Long*, and *Younger* are subtle and attenuated, standing decisions like *Valley Forge*¹⁵⁴ and *Allen v. Wright*¹⁵⁵ have a more straightforward substantive impact: when constitutional challengers are denied standing, constitutional violations will sometimes go uncorrected. Such a result, standing alone, is hardly a sufficient basis on which to question the Court's credibility when it asserts jurisdictional policy grounds for its rulings. Once again, a broader perspective furnishes firmer grounds for doubting the Court's motives. Compare *Valley Forge* with the 1968 case of *Flast v. Cohen*,¹⁵⁶ in which opponents of aid to religious schools were granted standing in spite of arguments based on the separation of powers and the avoidance policy. The Court in *Valley Forge* refused to follow *Flast*, explaining that in *Flast* the plaintiffs challenged a congressional spending program, while *Valley Forge* involved an attack on a decision by an official of the executive branch.¹⁵⁷ This difference is a dubious ground for distinguishing the earlier case. From the perspective of keeping the federal courts within their proper bounds and avoiding unnecessary constitutional decisions, which the Court in *Valley Forge* viewed as the keystone of standing doctrine,¹⁵⁸ this difference is unimportant.

Perhaps *Valley Forge* and *Flast* reflect differences in the value the Court accords uniformity and supremacy on the one hand, versus avoidance on the other. Under this view of the cases, the War-

154. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982).

155. 468 U.S. 737 (1984).

156. 392 U.S. 83 (1968). See Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 10-11 (1982).

157. 454 U.S. at 478-80. This distinction was available to the Court in *Valley Forge* because *Flast* had relied on the "nexus" between the claimed establishment clause violation and the congressional spending power for standing. This result was necessary to avoid a conflict with *Frothingham v. Mellon*, 262 U.S. 447 (1923), which had held that suits by taxpayers to challenge federal expenditures were generally not justiciable. See P. Low & J. JEFFRIES, *supra* note 109, at 40-42.

158. 454 U.S. at 488-90.

ren Court's broad standing rule in *Flast* gave more weight to uniformity and supremacy, while the Burger Court's restriction on standing in *Valley Forge* was based on avoidance. The decisions differ, but both were founded on jurisdictional policy and not substance. The difficulty with this explanation is that rulings in other contexts undermine the premise that the Warren Court really cared much about uniformity for its own sake, and that avoidance was truly important to the Burger Court.

With regard to *Valley Forge* and the Burger Court, recall that *Long* spurned avoidance in favor of uniformity, while *Pennhurst* rejected avoidance when it conflicted with protecting state sovereignty. The low regard for avoidance in these cases is all the more striking, because the Court had to break with settled practice to achieve its aims. When uniformity of federal law conflicted with the Warren Court's egalitarian substantive program, that Court chose to ignore uniformity. In *United States v. Yazell*,¹⁵⁹ the issue was whether to apply a uniform federal common law rule or to follow varying state laws on what property would be exempt from attachment to satisfy a defaulted federal loan. Specifically, the Court had to decide whether an impoverished woman's separate property could be attached, when she and her husband had defaulted on a federal disaster loan and state law would shield her assets. The Court explained that national uniformity was not important in this context and held state law applicable.¹⁶⁰

To conclude that the two decisions on standing reflect differences in the weight given the values underlying the establishment clause by the Burger and Warren Courts is more plausible. The Warren Court's broad standing rule helped to enforce establishment clause restraints on government aid to religion, while the Burger Court's narrow rule weakened them. This explanation is consistent with the Court's shift, in substantive decisions on the establishment clause, from a vigorous opposition to government sponsored religion in the sixties to a more relaxed attitude in the

159. 382 U.S. 341 (1966).

160. *Id.* at 354-58. Similarly, if the Warren Court had been interested in uniformity for its own sake, then surely it occasionally would have found state court decisions going too far in the protection of federal rights. See Sager, *supra* note 124, at 1244 & n.101 (finding not even one reversal of a state court decision favoring the claimant on a constitutional civil liberties issue between 1960 and 1969).

seventies and eighties.¹⁶¹ The explanation also accords with the Court's use of jurisdictional rules to attain substantive ends in *Pennhurst*, *Long*, and the *Younger* doctrine.

Allen v. Wright,¹⁶² read in isolation, may reflect a policy of judicial abstinence when judicial action probably will not help the party seeking relief. But the sincerity with which the Court holds this view is open to serious doubt.¹⁶³ *Duke Power Co. v. Carolina Environmental Safety Group*¹⁶⁴ allowed a fifth amendment challenge to a federal statute limiting liability for nuclear power plant disasters, although no disaster had yet occurred.¹⁶⁵ The "injury" complained of was environmental harm from the ordinary operation of the power plant, but it was far from clear that the relief sought, striking down the statute, would lead to the abandonment of the power plant and an end to the plaintiffs' injury.¹⁶⁶

To understand why the Court granted standing, one must keep in mind the importance to the nuclear power industry of getting an early answer to the substantive question,¹⁶⁷ and the Court's ruling upholding the damage ceiling on the merits.¹⁶⁸ *Duke Power* and

161. Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (addition of crèche by city in Christmas display held not violative of establishment clause) and *Mueller v. Allen*, 463 U.S. 388 (1983) (state income tax deduction for expenses incurred in providing "tuition, text books and transportation" for children attending elementary or secondary school held not violative of establishment clause) with *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (state or local school board action requiring recitation of Bible passages in public schools held violative of establishment clause) and *Epperson v. Arkansas*, 393 U.S. 97 (1968) (state "anti-evolution" statute held violative of establishment clause).

162. 468 U.S. 737 (1984). See also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

163. Even on its own terms, *Allen* and other decisions obliging the plaintiff to meet strict causation requirements have significant substantive effects. The stricter the causation requirement, the weaker will be the protection afforded constitutional rights. See *Nichol, Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 Ky. L.J. 185, 195-96, 205-06, 217-18 (1980-81); *Tushnet, The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 681-84 (1977); cf. *Malone*, *supra* note 36 (demonstrating that rules on cause in fact in tort law reflect substantive policy choices). However, if the Court were consistent in applying this strict test, a tenable argument could be made that its substantive impact is a side effect of a rule motivated by separation of powers concerns.

164. 438 U.S. 59 (1978).

165. See *Chayes*, *supra* note 36, at 20-22 (1982).

166. See *Nichol*, *supra* note 163, at 200-01, 206-08.

167. See 438 U.S. at 95 (Rehnquist, J., dissenting).

168. *Id.* at 82-94.

other cases in which the Court has allowed attenuated causal relationships to suffice¹⁶⁹ show that when the Court values a substantive interest highly enough it will find a way to decide the merits. When the plaintiffs are black or poor, this aspect of standing becomes a stringent test. The operative difference between when standing is allowed and when it is denied is the nature of the substantive rights at stake, not differences in the strength of jurisdictional policies.¹⁷⁰

E. Historical Perspectives

Comparisons among recent cases make a persuasive argument that the modern Supreme Court habitually employs jurisdictional rules to achieve substantive ends. Yet the practice is hardly unique to the current Court. On the contrary, it is a theme running through the Court's work since the early nineteenth century. This Article will not undertake to prove this assertion through a lengthy series of comparisons of opinions from earlier eras in the Court's history. Rather, this section considers three landmark cases, and explains why substance is the most likely foundation for each of them.

1. Osborn v. Bank of the United States and the Scope of District Court Jurisdiction

In *Osborn v. Bank of the United States*,¹⁷¹ the issue was the scope of the jurisdiction of the federal courts under the article III provision extending federal judicial power to cases "arising under" federal law.¹⁷² Chief Justice Marshall's opinion for the Court set down an extraordinarily broad rule, allowing federal jurisdiction whenever a federal issue forms an "ingredient" of the case, in the

169. See, e.g., *Orr v. Orr*, 440 U.S. 268, 271-78 (1979); *University of Cal. Regents v. Bakke*, 438 U.S. 265, 283-99 (1977). For a good discussion of these cases, see Nichol, *supra* note 163, at 208-12.

170. See Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 658-59 (1985). See also *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (when the plaintiffs seeking to assert constitutional rights were religious conservatives, the liberal wing of the Court voted against standing, and conservatives voted for standing, each group breaking from its usual approach).

171. 22 U.S. (9 Wheat.) 738 (1824).

172. *Id.* at 818.

sense that a federal issue *might* be litigated.¹⁷³ Under this test, a suit by the federally chartered Bank of the United States to recover in contract is within the "arising under" jurisdiction, even though state contract law is the basis of the suit.¹⁷⁴ This case is within the arising under jurisdiction because the issue of the Bank's authority to sue may be raised. The resolution of this issue depends on the construction of the Bank's charter from Congress and hence is a federal question. A federal court can hear the case even if the federal issue is never actually raised.¹⁷⁵ *Osborn* has been criticized for the breadth of its holding,¹⁷⁶ and rightly so, for no jurisdictional policy plausibly supports the "ingredient" rule. Federal uniformity and supremacy are implicated only when a federal issue does arise, and litigating state law issues in federal court in these circumstances seems an unwarranted intrusion on state court authority.

Osborn only makes sense when viewed in its substantive setting.¹⁷⁷ In the early nineteenth century many state governments were hostile to the Bank because its domination of monetary matters diminished state power. As Justice Johnson pointed out in dissent, the Court was concerned that state courts might harm the Bank by rulings that the Supreme Court could not correct easily on appeal.¹⁷⁸ For example, in the suit on a contract, the state court might make findings of fact adverse to the Bank or read state law so as to deny the Bank its putative rights. The substantive aim of shielding the Bank against this possibility,¹⁷⁹ and, more generally, the policy of national control over money, are the motivating forces behind the *Osborn* rule. If jurisdictional policy were the basis of the rule, we might expect to see it applied more generally than merely to the context for which it was invented. Yet the Court has virtually always construed jurisdictional statutes far more narrowly

173. *Id.* at 821-24.

174. *See Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 904-05 (1824).

175. *Osborn*, 22 U.S. (9 Wheat.) at 824-25.

176. *See, e.g., Textile Workers' Union v. Lincoln Mills*, 353 U.S. 448, 481-82 (1957) (Frankfurter, J., dissenting). *See also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-93 (1983).

177. *See Lincoln Mills*, 353 U.S. at 481-82 (Frankfurter, J., dissenting).

178. *See* 22 U.S. (9 Wheat.) at 871-72 (Johnson, J., dissenting).

179. *See HART & WECHSLER, supra* note 26, at 984.

than *Osborn* would permit,¹⁸⁰ even when Congress seems to have intended to allow jurisdiction as broad as *Osborn*.¹⁸¹

2. *Ex Parte Young and the Scope of Federal Remedies for Unconstitutional State Action*

*Ex Parte Young*¹⁸² addresses the challenge of reconciling the eleventh and fourteenth amendments. The eleventh amendment bars suits against state governments in federal court.¹⁸³ It dates from 1798, an era when few constitutional limits on state governments existed. The fourteenth amendment, enacted in 1868, imposes significant federal restrictions on state governments. *Young* permitted federal suits against state officers for injunctive relief on fourteenth amendment grounds in spite of the eleventh amendment. The reasoning of the opinion, that the state officer is "stripped of his official or representative character"¹⁸⁴ when he acts unconstitutionally, is transparently false. The Court now calls it a "fiction."¹⁸⁵ In policy terms, the Court explains *Young* as a compromise between the eleventh and fourteenth amendments. To assure the supremacy of federal fourteenth amendment rights, suits for injunctive relief must be allowed; out of respect for state sovereignty, damages and other retrospective relief are prohibited.¹⁸⁶

The weakness in this account of *Young* lies in its premise that a federal forum is necessary to vindicate federal rights. On the day the opinion came down, the Court also decided *General Oil Co. v. Crain*.¹⁸⁷ *General Oil* was also a suit to enjoin state action on constitutional grounds, but here the plaintiffs sued in state court rather than federal court. The state court dismissed the suit under a state law denying state courts jurisdiction to grant injunctions

180. See, e.g., *Merrell-Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

181. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (1983). See also HART & WECHSLER, *supra* note 26, at 995-96.

182. 209 U.S. 123 (1908).

183. U.S. CONST. amend. XI.

184. 209 U.S. at 160.

185. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984).

186. *Id.* at 104-06.

187. 209 U.S. 211 (1908).

against the state, and the Supreme Court reversed. The Court held that state courts could not dismiss on state law grounds a challenge to state action founded on the federal Constitution.¹⁸⁸ This ruling undercuts the "ensuring federal supremacy" rationale for *Young*, because the availability of a state court forum means that federal supremacy can be attained without the intrusion on state sovereignty that a federal cause of action entails.

What then is the justification for *Ex Parte Young*? Recognizing a federal cause of action can be explained plausibly only on the premise of disparity between federal and state courts.¹⁸⁹ If no gap between federal and state courts exists, then nothing is gained in the way of enforcing federal rights by providing a federal forum. There is nothing positive to weigh in the balance against the intrusion on state sovereignty, and *Young* makes no sense. On the other hand, if state courts are less sympathetic than federal courts to the substantive values underlying constitutional claims, then a sound substantive justification exists for allowing access to federal court: constitutional claimants will prevail on the merits more often if they are permitted to sue in federal court. Notice that this rationale is quite distinct from any argument based on jurisdictional policy or institutional role.¹⁹⁰

188. *Id.* at 225-28.

189. See sources cited *supra* note 40.

190. If state courts were so unsympathetic to federal rights that they could not provide a constitutionally adequate forum for their adjudication, state court adjudication would not serve federal supremacy, even with Supreme Court review to correct errors of law. *Cf.* *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (*Younger* does not apply if state tribunal is biased). In that event, *Ex Parte Young* could be justified in terms of the supremacy policy, notwithstanding *Crain*.

This rationale fails because the Court has never made a blanket judgment that state courts are inadequate to provide a fair hearing for constitutional claims. On the contrary, the Court has consistently refused to recognize a constitutional right to litigate constitutional claims in federal court. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 102-05 (1980); *Palmore v. United States*, 411 U.S. 389, 400-02 (1973); *Lockerty v. Phillips*, 319 U.S. 182, 187-89 (1943). *Cf.* *Neuborne*, *supra* note 40, at 1119 (although differences between state and federal courts exist, and these differences affect outcomes, nonetheless "[w]e are not faced today with widespread state judicial refusal to enforce clear federal rights."). Institutional differences matter on "arguable issues" that could legitimately be decided either way. *Id.* at 1119-20. Accordingly, the basis for granting access to a federal trial forum in *Young* must be a preference for the individual's substantive interests and not the neutral supremacy policy.

For more on the distinction between jurisdictional rules based on the supremacy policy and rules based on substantive considerations, see *supra* note 52.

The historical context in which the case arose bolsters this explanation of *Young*. In the early part of this century, the Court's doctrine of substantive due process for the protection of economic interests was at its zenith.¹⁹¹ The federal plaintiff in the litigation giving rise to *Young* was a railroad objecting on due process grounds to state ceilings on freight rates. The jurisdictional rule announced in *Young* was designed to help plaintiffs like this railroad to prevail on the merits and thereby enhance the Court's substantive agenda of protecting economic interests against state regulation.¹⁹² *Young* is the mirror image of *Younger*. Just as the latter case allocates constitutional litigation to state court in an effort to diminish the effective scope of constitutional protection, *Young* channels litigation to federal court in order to broaden that protection.

3. *Monroe v. Pape and the Emergence of Constitutional Tort*

In *Monroe v. Pape*¹⁹³ the Court revived a statute passed ninety years earlier, finding that in enacting the Civil Rights Act of 1871¹⁹⁴ Congress intended to create a federal cause of action for damages or injunctive relief arising from virtually any fourteenth amendment violation. The holding on injunctive relief is superfluous in view of *Young*, but the newly available damages remedy has

191. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905). See also Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 383 (1988) (citing *Young* as an example of judicial activism on behalf of economic substantive due process).

192. See Neuborne, *supra* note 40, at 1106-08 (discussing *Young* as well as other cases from the period).

193. 365 U.S. 167 (1961). See generally Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

194. The statute is now codified at 42 U.S.C. § 1983 (1982). It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

spawned one of the major areas of contemporary federal litigation. On the face of the opinion, *Monroe* is merely an exercise in statutory interpretation and has nothing to do with either jurisdictional policy or substantive values; but Justice Frankfurter and others have demolished the Court's reading of legislative intent. The legislative history suggests strongly that the framers of the statute intended to reach unconstitutional conduct sponsored or condoned by the state, and not every violation committed by a state officer.¹⁹⁵ Moreover, studies of the case law on a range of section 1983 issues raise further doubts about the Court's sincerity; for the Court is highly selective in its treatment of legislative intent as a guide to resolving these issues, invoking or ignoring historical materials from one case to another as suits its own purposes.¹⁹⁶

A more plausible explanation for *Monroe* begins by noting that it, like *Young*, was decided at a time of intense judicial activism on behalf of broader constitutional rights against state governments. In the 1960s, beneficiaries of this activism were blacks, criminal defendants, unpopular speakers, rather than railroads, but this difference merely highlights the continuity of the Court's preoccupation with substance. In the 1960s, as at the turn of the century, there was reason to doubt that state courts would protect those federal rights as forcefully as federal courts. Just as *Young* made an exception to the eleventh amendment, so *Monroe* poured new content into an old statute. In both cases the Court acted with a motive to achieve the substantive goal of advancing constitutional protection.¹⁹⁷ In pursuit of that goal *Young* authorized federal courts to order a halt to constitutional violations and to hold offenders in contempt. *Monroe*'s damage remedy deters violations of

195. See *Monroe*, 365 U.S. at 211-46 (Frankfurter, J., dissenting). See also Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 VA. L. REV. 499 (1985) (recapitulating Frankfurter's dissent); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484-522 (1982) (a more general examination of legislative intent).

196. See Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1983*, 133 U. PA. L. REV. 601, 604-11 (1985); Wells, *The Past and the Future of Constitutional Torts*, 19 CONN. L. REV. 53, 60-65 (1986).

197. See Neuborne, *supra* note 40, at 1108-10.

federal rights and enhances those rights by making violators compensate their victims for the harm they do.¹⁹⁸

IV. CONCLUSION

Supreme Court opinions explain the law of federal courts in terms of fidelity to precedent and legislative intent, and pursuit of such jurisdictional policies as maintaining the supremacy and uniformity of federal law, promoting comity between federal and state courts, and achieving efficiency in litigation. Yet the effort to understand the cases in these terms ends in frustration, for the Court's actions belie its words. The Court gives short shrift to congressional intent and its own prior cases. A given jurisdictional policy takes on more or less weight as we move from one doctrinal context to another, contradictions pile up, and the suspicion grows that something else must be at work here.

What lurks behind all the decorative rhetoric about institutional values is an oblique and shadowy struggle between two competing substantive interests: the state's desire to pursue its legislative goals unhindered by constitutional limits and the individual's interest in imposing constitutional restraints upon state action. Jurisdictional rules have subtle but significant implications for the resolution of the merits of constitutional cases. As a result, opportunities arise for pursuing substantive goals by jurisdictional means. By favoring the litigating interest of one side or the other as it makes jurisdictional decisions, the Court can and does promote one or the other of these broad substantive ends. Much of the contemporary law of federal courts, and some landmark decisions throughout our history, can be accounted for more persuasively as the product of this substantive conflict than as an effort to realize any of the various jurisdictional policies. Substantive values are woven into the very fabric of federal courts doctrine.

198. Other Warren Court decisions that opened up federal courts to constitutional challenges, doubtless with the aim of boosting the substantive interests of the constitutional claimant, include *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayer standing to assert establishment clause issues); *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (easing access to federal court for constitutional challenges to state criminal statutes); *Fay v. Noia*, 372 U.S. 391 (1963) (permitting federal district courts to hear habeas petitions in spite of procedural default in state court).