Pendent Jurisdiction and the Eleventh Amendment

John P. Dwyer†

Institutional reform litigation has become a regular feature of the district court docket. Numerous federal courts have ordered detailed, affirmative relief against state officials to remedy conditions in state institutions violating rights under both the fourteenth amendment[1] and federal and state statutes. In many cases, the federal courts have taken on the task of managing state institutions subject to the court decree.[2]

Because the formulation and implementation of institutional reform decrees pose novel threats to state sovereignty, the Supreme Court has been somewhat ambivalent toward this type of litigation. Although the Court has stated its willingness to use the power of the federal courts to remedy illegal institutional conditions,[3] it also has developed doctrines restricting the availability of this type of relief.[4]

The Court's decision in *Pennhurst State School & Hospital v. Hald-*

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† Acting Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1973, DePauw University; Ph.D. 1978, California Institute of Technology; J.D. 1980, Boalt Hall School of Law, University of California, Berkeley.

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1. The fourteenth amendment provides in part:

> Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . . Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 2, 5.

2. *See, e.g.*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1352-78 (1975) (describing implementation of a decree remedying conditions in Alabama's mental health facilities).

3. Rhodes v. Chapman, 452 U.S. 337, 352 (1981) ("When conditions of confinement amount to cruel and unusual punishment, 'federal courts will discharge their duty to protect constitutional rights.' ") (quoting Procunier v. Martinez, 416 U.S. 396, 405-06 (1974)); Hutto v. Finney, 437 U.S. 678, 685-88 (1978) (upholding a district court order limiting to 30 days the time a state prisoner may spend in isolation as a remedy for unconstitutional conditions in isolation cells).

4. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362, 378 (1976) (holding that "important

erman (Pennhurst II)[5] may be another example of the Court's efforts to protect state sovereignty from institutional reform litigation. In that case the district court issued a detailed, affirmative decree restructuring a state program for institutionalized retarded citizens. The Supreme Court held that the eleventh amendment[6] barred the district court from basing relief against state officials on pendent state claims.[7] The decision ensures that state courts alone will interpret state law and devise and implement corresponding institutional remedies.

Plaintiffs seeking institutional relief surely bear some of the costs of protecting state sovereignty under *Pennhurst II.* Depending on financial and strategic considerations, the decision forces them to bring separate suits for their federal and state claims, to forgo their right to a federal forum and bring all claims in state court, or to drop their state claims. This much the Court anticipated. But the opinion may entail an unexpected cost as well. Read literally, it bars relief based on any pendent state claim, regardless of the nature of the relief requested. *Pennhurst II* thus may also prohibit federal courts from issuing negative injunctions based on pendent state claims (such as an order enjoining enforcement of state law), even though such relief poses virtually no threat to state sovereignty, as traditionally understood under the eleventh amendment. Although the Court has not applied *Pennhurst II* to a pendent claim for noninstitutional relief, some lower federal courts have read the opinion to prohibit such relief.[8]

Part I of this Article analyzes *Pennhurst II* to determine the scope of its holding. In particular, it explores whether the Court made a doctrinal distinction between claims for noninstitutional relief and claims seeking institutional reform. It concludes that although the Court did not consider carefully the importance of pendent jurisdiction, the opinion does

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considerations of federalism" weigh against granting affirmative injunctive relief against state agencies).

5. 465 U.S. 89 (1984).

6. The eleventh amendment states:

> 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. It was ratified in 1795 in response to the Supreme Court's decision in Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

7. As originally conceived, pendent jurisdiction authorized federal courts to decide nonfederal questions necessary to the decision of federal claims. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824). The Court later expanded it to permit federal courts, in certain circumstances, to decide related nonfederal claims. *See, e.g.,* Siler v. Louisville & N.R.R., 213 U.S. 175 (1909). *See generally* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3567-3567.2 (1984 & Supp. 1986).

8. *See, e.g.,* Frceman v. Michigan Dep't of State, 808 F.2d 1174, 1179-80 (6th Cir. 1987); Baker v. Department of Envtl. Conservation, 634 F. Supp. 1460, 1468 (N.D.N.Y. 1986).

not foreclose and perhaps even supports a separate eleventh amendment analysis for noninstitutional and institutional reform cases.

Part II argues that the eleventh amendment analysis for pendent claims should turn on the nature of relief. When plaintiffs seek injunctions compromising state sovereignty, such as a structural reform decree based on state law, the courts should invoke the eleventh amendment to deny relief. But when plaintiffs seek only negative injunctions, which normally create relatively little risk to state sovereignty, the Court should permit the district courts to decide pendent state claims. Extending *Pennhurst II* to such cases would unnecessarily undermine federal jurisdiction and threaten important policies—for instance, avoiding constitutional questions and providing a federal forum for plaintiffs—without significantly reducing federal court intrusion on state autonomy.

I

PENNHURST

A. The Eleventh Amendment Before Pennhurst II

The eleventh amendment is in tension with the fourteenth amendment. Whereas the eleventh amendment bars citizens from suing states in federal court, the fourteenth amendment bars states from denying individuals due process and equal protection, and authorizes Congress to enforce these prohibitions. Thus, one amendment broadly immunizes the states from suit in federal court, while the other potentially gives the federal courts authority to enforce federal rights against state governments. As a result of this tension, the Supreme Court has shaped its doctrines to accommodate the competing interests underlying these two amendments.

The Court reached such an accommodation in *Ex parte Young*.[9] In that case the shareholders of a railroad charged that a state law setting maximum shipping rates violated the due process and equal protection provisions of the fourteenth amendment. Pending a final decision, the federal court enjoined the Minnesota attorney general from enforcing the state law. When the attorney general disregarded this order and filed suit in state court to enforce the statute, the federal court held him in contempt.[10]

In dismissing the attorney general's petition for a writ of habeas

9. 209 U.S. 123 (1908). *Ex parte* Young was not the first case creating an exception to the eleventh amendment for suits against state officers acting in their official capacities, but it is the most famous, probably because it permits a federal court to enjoin a state judicial proceeding. *See* Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1041 n.25 & 1088 n.222 (1983).

10. *Young*, 209 U.S. at 129-34.

corpus, the Supreme Court first held the state statute unconstitutional,[11] and then held that the eleventh amendment did not bar the district court's injunctive order. The Court reasoned that the state officer was "stripped" of his state authority to enforce an unconstitutional statute, and therefore the suit to enjoin the officer was not one "against the state" within the meaning of the eleventh amendment.[12]

The holding in *Young* enabled the lower federal courts to implement the Court's substantive due process doctrine announced three years earlier in *Lochner v. New York.*[13] Without the *Young* exception to the eleventh amendment, plaintiffs could not have challenged state regulatory statutes in federal court; the Court's vision of the fourteenth amendment could have been implemented only through state courts, subject to Supreme Court review.[14] *Young's* importance, however, transcends the *Lochner* era. Today the *Young* exception gives effect to congressional policies, contained for example in the Civil Rights Act of 1871, of providing a federal forum to adjudicate claims of state violation of federal laws.[15]

Only a year after *Young,* the Court decided *Siler v. Louisville & Nashville Railroad Co.*[16] In *Siler,* a railroad company sued in federal court to enjoin enforcement of a state statute regulating railroad rates. Instead of reaching the federal constitutional issues, however, the *Siler* Court decided the case on the basis of a pendent state claim, holding expressly that the court "usually" should avoid constitutional questions.[17] The Court, it seems, did not view the eleventh amendment as

11. *Id.* at 148.

12. *Id.* at 159-60. Ironically, although such a suit is not "against the state" for purposes of the eleventh amendment, the state officer's action is "state action" for purposes of the fourteenth amendment. *See Pennhurst II,* 465 U.S. at 105.

13. 198 U.S. 45 (1905).

14. *See* Werhan, Pullman *Abstention After* Pennhurst: *A Comment on Judicial Federalism,* 27 WM. & MARY L. REV. 449, 465 (1986) ("the *Young* doctrine represents the jurisdictional counterpart to *Lochner,* opening the courthouse door to active federal control over state economic policy"). Arguably challenges to state regulations could arise in private-party litigation, thus avoiding the need for *Young* and *Lochner.* Most cases, however, arise when a regulated party challenges state officials directly.

15. *Young* does not directly address the congressional policy of providing a federal forum for civil rights plaintiffs, for jurisdiction in that case was based on the "arising under" provision originally enacted in 1875, *see* 18 Stat. 470, now found in 28 U.S.C. § 1331. *See Young,* 209 U.S. at 145. The holding in *Young,* however, did not turn on the basis for jurisdiction, but on the need to accommodate the eleventh and fourteenth amendments.

16. 213 U.S. 175 (1909).

17. *See id.* at 193 (the policy of avoiding federal constitutional questions "is not departed from without important reasons"). Werhan suggests that Justice Peckham, who wrote *Lochner, Young,* and *Siler,* wrote *Siler* to encourage plaintiffs to bring their claims in federal court. Without *Siler,* federal courts would have no jurisdiction to hear the pendent state claims, and plaintiffs desiring to avoid two lawsuits would take their federal and state claims to state court. Werhan, *supra* note 14, at 465-66.

barring the federal courts from hearing pendent state claims.[18] Recognizing the need to exercise sparingly its powers of constitutional adjudication, the Court, until quite recently, has not departed much from the *Siler* rule.[19]

When the Court decided *Young* and *Siler,* there was some concern that federal courts would displace state courts and assume a continuing supervisory role over the states.[20] So long as there was a federal claim creating federal jurisdiction,[21] the federal court had authority to interpret state law and implement its reading of state policy.

To reduce that risk, the Court developed doctrines of restraint designed to reduce the "friction" between the federal and state governments. One important doctrinal restraint has been *Pullman* abstention. In *Railroad Commission v. Pullman Co.,*[22] the railroad company sued to enjoin enforcement of an order of the Texas Railroad Commission treating black and white workers differently. The company argued that the commission's order both violated the fourteenth amendment and was unauthorized under state law.

The Court reached neither issue, holding instead that a federal court should abstain from deciding both federal constitutional and pendent state claims involving unsettled issues of state law if state court resolution of the state claims would affect the formulation or disposition of the constitutional question.[23] By invoking *Pullman* abstention, a federal court both reduces federal court interference with state sovereignty by giving state courts the first opportunity to pass upon state law, and avoids unnecessary or premature constitutional decisions.[24] *Pullman* does not permit the federal court to evade constitutional questions

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18. *See infra* note 89.

19. *See* Hagans v. Lavine, 415 U.S. 528, 546-47 (1974) ("*Siler* is not an oddity. The Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims . . . . [A]t the very least, [the doctrine] presumes the advisability of deciding first the pendent, nonconstitutional issue.").

20. *See, e.g., Ex parte* Young, 209 U.S. 123, 175 (1908) (Harlan, J., dissenting) (arguing that *Young* "would enable the subordinate Federal courts to supervise and control the official action of the States as if they were 'dependencies' or provinces"). Congress apparently had similar concerns when it enacted a statute in 1910 requiring injunctions against the enforcement of state statutes to be issued by a three-judge court. *See* Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557; *see also* Werhan, *supra* note 14, at 465 n.64.

21. *See* Hurn v. Oursler, 289 U.S. 238, 240 (1933) (district court has jurisdiction over pendent claims so long as the federal question is "not plainly unsubstantial").

22. 312 U.S. 496 (1941).

23. *Id.* at 500-01; *see also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976); Harrison v. NAACP, 360 U.S. 167, 176-77 (1959). For a thorough discussion of *Pullman* abstention, see Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine,* 122 U. PA. L. REV. 1071 (1974).

24. *See Pullman,* 312 U.S. at 501 (abstention allows federal courts to act with " 'scrupulous regard for the rightful independence of the state governments' ") (quoting Di Giovanni v. Camden

entirely (indeed, a state decision providing the plaintiff no relief under state law may force the federal court to rule on the constitutional issue), but it avoids such questions unless and until they are squarely presented by an authoritative interpretation of state law.[25]

The decision in *Pullman* completed the doctrinal package for cases challenging the constitutionality of state statutes and regulations. With *Young, Siler,* and *Pullman,* the Court was able to accommodate the potentially conflicting policies of providing a federal forum to hear claims of state violations of federal laws, avoiding unnecessary or premature constitutional decisions, and protecting state sovereignty.

B. The Pennhurst *Litigation*

The Court's doctrinal balance of these competing policies has become outmoded in the last two decades as a result of a new style of litigation in which plaintiffs seek not to block enforcement of a state law, but to compel the state to provide a certain type, quantity, and quality of services.[26] In so-called "institutional reform litigation," the plaintiffs look to federal courts to oversee the day-to-day activities of state institutions, or even to create new social service programs. The injunctive decrees, which often specify in minute detail the affirmative obligations of state agencies and institutions, normally require court-appointed officials to implement them. In sharp contrast to the "noninstitutional relief" in *Young* and *Siler,* institutional reform decrees restrict state autonomy by requiring the state to provide funds for new social programs and by dis-

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Ins. Ass'n, 296 U.S. 64, 73 (1935)); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (*Pullman* is a "policy derived from our federalism").

25. A district court invoking *Pullman* has two options. The conventional practice is to send the parties to state trial court to pursue their state law remedies. Alternatively, the federal court may certify the state law issue to the state supreme court. *See* 17 C. WRIGHT, A. MILLER & E. COOPER, supra note 7, § 4248, at 525 n.29; *id.* at 199 n.29 (Supp. 1986) (certification procedures exist in about one-half the states). For a useful discussion of the difference between certification and full abstention, see Field, *The Abstention Doctrine Today,* 125 U. PA. L. REV. 590, 605-09 (1977).

Following a state court ruling, a plaintiff may return to federal court to adjudicate the remaiuing federal claims, *see* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-17 (1964), or for resolution of both federal and state claims if the state court did not decide the state law issues, *see Louisiana Power & Light Co.,* 360 U.S. at 29. Without such a procedure to ensure resolution of state law issues, federal courts would be reluctant ever to invoke *Pullman* abstention.

26. *See generally* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice,* 93 HARV. L. REV. 1 (1979).

For a general description of institutional reform litigation, see Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions,* 65 VA. L. REV. 43, 49-64 (1979); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,* 91 YALE L.J. 635, 637-41 (1982); For examples of detailed decrees, see Gewirtz, *Remedies and Resistance,* 92 YALE L.J. 585, 597 n.26 (1983).

placing state discretionary authority.[27]

In recent years, the Court has moved to limit the availability of this kind of relief.[28] If the *Pennhurst* litigation exemplifies institutional reform litigation, *Pennhurst II* demonstrates the Court's resolve to restrict the authority of federal judges to reform state governmental institutions. In holding that relief based on pendent state claims violates the eleventh amendment, *Pennhurst II* may be one of a series of Supreme Court cases protecting state sovereignty by restricting institutional reform litigation. This view of the decision suggests that the holding in *Pennhurst II* is limited to institutional reform cases, leaving federal courts free to issue negative injunctions or provide other noninstitutional relief based on pendent state claims. Whether *Pennhurst II* applies only to institutional reform litigation is unclear, however, for some of the language in the opinion broadly suggests that the eleventh amendment bars all relief based on pendent state claims.

1. The Litigation

In 1974 public interest lawyers filed suit in federal district court in Pennsylvania on behalf of the mentally retarded residents of Pennhurst State School and Hospital. The suit alleged that the 1400 residents[29]

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27. Institutional reform decrees and the negative injunctions in *Siler* and *Young* are polar extremes in a continuum of prospective relief, and thus are useful paradigms for analyzing the *Pennhurst II* holding. Throughout this Article I refer more generally to "institutional reform" and "noninstitutional" relief. Most forms of relief fall comfortably into one of these two categories.

A mandatory injunction requiring an official to perform a nondiscretionary state duty poses a relatively minor threat to state sovereignty, for it normally neither displaces state discretionary authority nor imposes a burden on the state treasury. As a result, I characterize such relief as "noninstitutional."

Depending on the court's decision, declaratory relief could fall under either category. If the court's order declaring institutional conditions to be illegal was extremely detailed, leaving little doubt what remedial measures would be required, the order would raise many of the same eleventh amendment problems that would arise if the court issued an institutional reform decree. If, on the other hand, the court simply made factual findings describing institutional conditions and declared the ensemble of conditions to be illegal, the threat to state sovereignty would be more attenuated, for the order would not have constrained the state's discretion in remedying the illegality or required expenditure of state funds.

Other kinds of affirmative relief are more difficult to categorize. Even though injunctive relief may be sought for a single individual, it nevertheless may be "institutional reform" relief in that the relief necessarily reforms the institution for a much larger class of potential plaintiffs. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (plaintiff seeking court order to improve police training and keep better records of incidents of police brutality). In other cases the impact of affirmative relief may be more confined. An injunction by one individual for better medical care in an institution does not necessarily require reformation of the agency's practices for all residents. Such relief nevertheless interferes with state discretionary authority and may well require the expenditure of state funds. Moreover, in many cases, it will precipitate institutional reform.

28. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976) (holding that the intrusiveness of federal injunctive relief is a factor to be taken into account in deciding whether to grant relief); *see also infra* notes 117-30 and accompanying text.

29. See Burt, Pennhurst: *A Parable*, in IN THE INTEREST OF CHILDREN 265, 267 (R. Mnookin

lived under inhumane conditions, in violation of state and federal laws. Although the plaintiffs' lawyers originally sued to improve conditions in Pennhurst, they soon amended their complaint to seek a court order both to close Pennhurst and to create a network of small community-based facilities providing proper care and habilitation.[30]

Following a lengthy trial, the district court held that conditions in the state institution violated a variety of state and federal statutes and constitutional provisions.[31] In particular, the court held the conditions in Pennhurst violated a due process right to habilitation,[32] an eighth and fourteenth amendment right to be free from harm,[33] an equal protection right not to be segregated in an institution providing inadequate habilitation,[34] a state statutory right to minimally adequate habilitation,[35] and a federal statutory right to nondiscriminatory treatment.[36] The court ordered the state to close Pennhurst and create community facilities for Pennhurst's residents,[37] and appointed a special master to create and implement a detailed deinstitutionalization plan.[38] Together with its staff, the special master's office comprised a small bureaucracy that would plan the institution's future, monitor the institution's progress, and make many of the daily decisions normally handled by state officials.[39]

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ed. 1985). Before the deinstitutionalization movement began in the late 1960's, Pennhurst housed nearly 4000 residents. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1302 (E.D. Pa. 1977). By 1978, when the district court issued its initial decree, the state had reduced that number to under 1200. Halderman v. Pennhurst State School & Hosp., 542 F. Supp. 619, 624 (E.D. Pa. 1982).

30. For a thorough description of the *Pennhurst* litigation, see Burt, *supra* note 29.

31. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1314-24. The district court found Pennhurst to be an overcrowded, impersonal institution, where violence and injuries among residents were common, the overworked staff relied excessively on physical restraints and psychotropic drugs to control residents' behavior, medical treatment was inadequate, and education and training for residents were virtually nonexistent. *Id.* at 1302-12.

32. *Id.* at 1318.

33. *Id.* at 1321.

34. *Id.* at 1322.

35. *Id.* at 1323.

36. *Id.* at 1324.

37. *Id.* at 1325.

38. The court appointed the special master to oversee the deinstitutionalization and interim operation of Pennhurst, and later appointed a hearing master to hear individual claims from residents resisting transfer from Pennhurst. Halderman v. Pennhurst State School & Hosp., 545 F. Supp 410, 411, 415 (E.D. Pa. 1982). The special master alone had a staff of 14, *see id.* at 419, and at one point a monthly budget of almost $60,000. Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 635 (E.D. Pa. 1981).

39. The special master's plan, adopted by the court, regulated many details of life at Pennhurst. The plan detailed instructions for recognizing and reporting resident abuse; limitations on the use of physical restraints and seclusion; limitations on and procedures for medication and health care (including scheduling of regular medical exams); requirements for wheelchairs; requirements for positioning residents at mealtimes; sanitation regulations; and procedures for reporting and remedying deficiencies—including a chart assigning responsibilities and establishing

The Third Circuit affirmed the district court's holding on liability and substantially affirmed its order for injunctive relief.[40] The court, however, based its judgment on a ground not relied upon by the district court—the rights it read into the federal Developmentally Disabled Assistance and Bill of Rights Act.[41]

The Supreme Court agreed to hear the case.[42] In *Pennhurst I*,[43] the Supreme Court held that there were no implied rights creating a cause of action in the federal statute. Notably, the majority and dissent both strongly suggested that they wanted to limit the scope of institutional relief.[44] The Court remanded the case to the Third Circuit for consideration of the other federal and state claims.[45]

On remand, the Third Circuit held that the Pennsylvania Mental Health and Mental Retardation Act of 1966[46] supported the district court's injunction.[47] The appellate court specifically held that the eleventh amendment did not bar relief based on the pendent state claim.[48] Relying on the Supreme Court's opinion in *Siler*, which it viewed as presenting the "identical problem," the Third Circuit reasoned that it should, if possible, avoid constitutional questions and dispose of the case

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procedures for reporting each type of violation. For each set of regulations, the special master's liaison was to monitor and conduct independent inspections of the practices and premises. *See* Order of Apr. 24, 1980, at 10-24, *Pennhurst* (No. 74-1345) (E.D. Pa.) (establishing special master).

40. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (en banc).

41. Pub. L. No. 94-103, 89 Stat. 486 (1975), *codified at* 42 U.S.C. §§ 6001-6081 (1982). The Court of Appeals affirmed liability on the basis of both the rights it implied in this statute, *see Pennhurst*, 612 F.2d at 95-100, and the state Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969), *see Pennhurst*, 612 F.2d at 100-03. The court, however, affirmed injunctive relief only on the basis of the federal statute. *See id.* at 104-07.

Although the Third Circuit largely affirmed the relief ordered by the district court, it modified the decree in two minor ways. First, the Third Circuit reversed that part of the district court's order requiring the state to provide alternative employment for displaced Pennhurst employees. *Id.* at 113. Second, the court of appeals reversed the order closing Pennhurst entirely, reasoning that Pennhurst may be the best placement available for some individuals. *Id.* at 113-15. The Third Circuit required the district court to hold, or designate a hearing master to hold, individual placement hearings, using a presumption in favor of deinstitutionalization. *Id.* at 114-15.

42. Pennhurst State School & Hosp. v. Halderman, 447 U.S. 904 (1980). During the time between the initial injunction and the first Supreme Court case, the state sought and was denied stays by both the district court and court of appeals. *See, e.g.*, Halderman v. Pennhurst State School & Hosp., 451 F. Supp. 233 (E.D. Pa. 1978) (denying a stay pending the initial appeal); 526 F. Supp. 409 (E.D. Pa. 1981) (denying a stay pending decision by Third Circuit following reversal and remand by Supreme Court in *Pennhurst I*); *see also Pennhurst*, 612 F.2d 84, 90 (3d Cir. 1979) (stating that the injunction's "implementation has gone forward pending appeal").

43. 451 U.S. 1 (1981).

44. *See id.* at 54 (White, J., dissenting) ("In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed."); *id.* at 29, 30 n.23 (majority expressly agreeing with dissent on this point).

45. *Id.* at 31.

46. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969).

47. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647, 656 (3d Cir. 1982) (en banc).

48. *Id.* at 659.

on a state ground.[49]

The Supreme Court again reviewed the Third Circuit's judgment, this time holding that the eleventh amendment barred injunctive relief against state officials based on state claims.[50] Several observers concluded that *Pennhurst II* overruled *Siler*.[51]

2. Pennhurst II

Although there is room for disagreement, the reports of *Siler's* death may be exaggerated. The Court never declared *Siler* overruled.[52] Nor did it evaluate eleventh amendment doctrine in light of the competing policies underlying pendent jurisdiction. Rather, the opinion appears to be largely the product of the Court's preoccupation with the impact of institutional reform litigation on state sovereignty. Arguably, the holding in *Pennhurst II* may be limited to cases requesting institutional reform.

The *Pennhurst II* majority began its analysis with the uncontroversial premise that the importance of the eleventh amendment rests "in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."[53] In defining the jurisdictional limitations imposed by sovereign immunity, the Court was "guided by '[t]he principles of federalism that inform the Eleventh

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49. *Id.* at 658.

50. *Pennhurst II*, 465 U.S. at 124-25.

Despite two Supreme Court reversals, the plaintiffs managed in the end to obtain the relief they wanted. At the behest of attorneys for the Pennsylvania Association for Retarded Citizens (PARC), *see* Response of PARC et al. to the Court's Inquiry on Mootness, at 3-4, Halderman v. Pennhurst State School & Hosp. (Nos. 78-1490, 78-1564, 78-1602), the Third Circuit appointed a senior circuit judge "to hold such prehearing conferences as he deems appropriate." Order of Mar. 19, 1984, *Pennhurst* (Nos. 78-1490, 78-1564, 78-1602). With the judge's guidance, the parties reached a settlement, under which the state agreed to close Pennhurst by July 1986, fund community retardation facilities, create community placements for an additional 200 persons who were not residents of Pennhurst, and pay the plaintiffs' attorneys about $1.55 million in fees. *See* Memorandum & Order of Apr. 5, 1985, at 11, *Pennhurst* (No. 74-1345) (approving final settlement); Order of July 23, 1984, *Pennhurst* (Nos. 78-1490, 78-1574, 78-1602) (approving attorneys' fees settlement agreement).

51. *See, e.g., Pennhurst II*, 465 U.S. at 166 n.52 (Stevens, J., dissenting); Shapiro, *Wrong Turns: The Eleventh Amendment and the* Penuhurst *Case*, 98 HARV. L. REV. 61, 65 n.29 (1984); Werhan, *supra* note 14, at 484.

52. Under the Court's reasoning, however, *Pennhurst II* did not present the question whether *Siler* should be overruled. According to the *Pennhurst II* majority, the Court had never held "directly" that the eleventh amendment permitted a federal court to decide pendent state claims. The question being an "open one," 465 U.S. at 119, there was nothing to overrule. *See infra* text accompanying notes 87-89.

53. 465 U.S. at 98; *see also id.* at 141-42 (Stevens, J., dissenting) ("under our cases it is the doctrine of sovereign immunity, rather than the text of the Amendment itself, which is critical to the analysis of any Eleventh Amendment problem"). While the dissenters agreed that the doctrine of sovereign immunity underlay the eleventh amendment, they took a narrower view than did the majority of its scope. *Id.* at 140-59.

Amendment doctrine.' "[54] From these principles, the Court derived the general rule that the eleventh amendment bars federal suits against the states and their agencies[55] and bars suits against state officers "if the decree would operate against" the state.[56]

The Court accepted *Ex parte Young*[57] as an "important exception" to this general rule.[58] Nevertheless, the *Pennhurst II* Court termed the authority-stripping rationale in *Young* a "fiction"[59] necessary "to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' "[60] Because the *Pennhurst II* Court viewed *Young* as specially designed to protect federal rights, it held the exception "inapplicable"[61] when the judgment under review rested on state law. According to the Court, a federal decree based on state law poses a greater threat to federalism, not only because it fails to vindicate the supremacy of federal law (which would have been a compensating benefit to the injury to state sovereignty), but also because the "intrusion on state sovereignty [is greatest] when a federal court instructs state officials on how to conform their conduct to state law."[62] The desire to protect state autonomy, and thus give meaning to the eleventh amendment, led the *Pennhurst II* Court to confine the *Ex parte Young* exception to claims involving federal rights.

Having defined the basic eleventh amendment doctrine as it applies to pendent state claims, the Court considered two possible exceptions—the ultra vires doctrine and the doctrine of pendent jurisdiction. In the

54. *Id.* at 100 (quoting Hutto v. Finney, 437 U.S. 678, 691 (1978)).

55. *Id.* One application of this rule is that the state may not be named as a defendant. *Id; see also* Alabama v. Pugh, 438 U.S. 781 (1978) (barring suit against the State of Alabama and its Board of Corrections by inmates alleging unconstitutional prison conditions). The eleventh amendment, however, does not bar suits against counties and other substate units of government. *See, e.g.,* Lincoln County. v. Luning, 133 U.S. 529, 530 (1890) (county); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977) (school board).

56. *Pennhurst II,* 465 U.S. at 101 (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963)); *see also id.* at 101 n.11 ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' ") (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).

57. 209 U.S. 123 (1908).

58. *Pennhurst II,* 465 U.S. at 102. Two other, and in this case irrelevant, exceptions are when the state consents to suit in federal court, *see* Edelman v. Jordan, 415 U.S. 651 (1974) (constructive consent), and when Congress, exercising its fourteenth amendment enforcement powers, abrogates eleventh amendment protections, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Court has held that 42 U.S.C. § 1983 is not a congressional abrogation of eleventh amendment immuuity. Quern v. Jordan, 440 U.S. 332, 342 (1979).

59. 465 U.S. at 105.

60. *Id.* (quoting *Young,* 209 U.S. at 160).

61. *Id.* at 106.

62. *Id.*

end, the Court concluded that neither doctrine was weighty enough to overcome the jurisdictional limitation in the eleventh amendment.

a. Ultra Vires Doctrine

The Court's discussion of the ultra vires doctrine was in response to the principal dissenting opinion. Relying on language in both *Larson v. Domestic & Foreign Commerce Corp.*[63] and the plurality opinion in *Florida Department of State v. Treasure Salvors, Inc.*,[64] the dissent argued that the state officials responsible for Pennhurst had acted ultra vires their state authority, and thus outside the shield of sovereigu immunity.[65]

The ultra vires exception to sovereign immunity found modern expression in *Larson. Larson* was a suit to force a federal official to comply with the terms of a contract between the federal government and the plaintiff. The issue before the Court was whether the suit was against the federal government. In the course of holding that the suit was against the government, and thus that sovereign immunity barred the suit, the Court wrote: "Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . [Thus his] actions are *ultra vires* his authority and therefore may be made the object of specific relief."[66]

Treasure Salvors arose from a challenge to a district court order requiring federal authorities to seize historical artifacts that Florida held under a claim of ownership. A plurality of the Court relied on language in *Larson* to write that the eleventh amendment is no bar if the state officer "acted beyond the scope of his statutory authority."[67] As the plurality determined that Florida had no "colorable claim" to the property under state law,[68] state officials were acting ultra vires in retaining the property[69] and thus were subject to suit in federal court.

When they became the dissenters in *Pennhurst II,* the *Treasure Salvors* plurality argued that *Larson* and *Treasure Salvors* stood for the proposition that state officials violating state law were not protected by sovereign immunity. Because the officials violated state law, they were acting beyond their statutory authority. Since "[n]o sovereign would authorize its officials to violate its own law,"[70] such officials were

63. 337 U.S. 682 (1949).

64. 458 U.S. 670 (1982). The author of the plurality opinion in *Treasure Salvors,* Justice Stevens, was the author of the principal dissent in *Pennhurst II.* The dissenters in *Treasure Salvors* became the majority in *Pennhurst II* when the Chief Justice joined them.

65. *Pennhurst II,* 465 U.S. at 153-59 (Stevens, J., dissenting).

66. *Larson,* 337 U.S. at 689.

67. *Treasure Salvors,* 458 U.S. at 689.

68. *Id.* at 694.

69. *Id.* at 697.

70. *Pennhurst II,* 465 U.S. at 155 (Stevens, J., dissenting); *see also id.* at 138 (Stevens, J.,

"stripped of [their] official or representative character"[71] as much as if they had violated the Constitution. In short, "the immunity determination depends upon the merits of the plaintiff's claim."[72] Although the dissenters indicated in passing that they would maintain an eleventh amendment distinction between damages to be paid from the state treasury and injunctive relief,[73] the language in the opinion strongly suggested they would sharply restrict the constitutional doctrine of state sovereign immunity in the federal courts.[74]

The majority in *Pennhurst II* rejected the dissent's ultra vires argument in a thoughtful discussion of their primary concern—ensuring a substantial role for state sovereign immunity. Although the Court found language in both *Larson* and *Treasure Salvors* suggesting that the ultra vires doctrine applies only when an official acts utterly without delegated authority,[75] a standard that would bar suit in this case,[76] it rejected the dissent's ultra vires argument more as a matter of judgment than of deductive logic.

Conceding that the dissent's "authority stripping" theory was a logical extension of *Young*,[77] the Court reasoned that the logic was virtually without limits and would obliterate the eleventh amendment.[78] The majority believed that under the dissent's theory, the eleventh amendment would protect the state only where the plaintiffs failed to find a state statute that the defendants could be charged with violating, or in the rare case where the plaintiffs "foolishly" named the state itself as a

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dissenting) ("it is only common sense to conclude that States do not authorize their officers to violate their legal duties"). This language is reminiscent of *Young*, where the Court wrote that "the use of the name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of . . . the State in its sovereign or governmental capacity." *Ex parte* Young, 209 U.S. 123, 159 (1908).

71. *Pennhurst II*, 465 U.S. at 147 (Stevens, J., dissenting) (quoting *Young*, 209 U.S. at 160).

72. *Id.* at 154 (Stevens, J., dissenting). The dissenters in *Treasure Salvors* had predicted this argument. *See Treasure Salvors*, 458 U.S. at 703.

73. *See Pennhurst II*, 465 U.S. at 146 n.29 (Stevens, J., dissenting).

74. The *Pennhurst II* dissenters later joined Justice Brennan's dissent in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). In a previous case, Justice Brennan had argued that the eleventh amendment did not apply to suits by the state's citizens. *See* Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 315-22 (1973) (Brennan, J., dissenting). In *Atascadero*, however, he adopted a different theory. Implicitly rejecting the dissent's opinion in *Pennhurst II* (which he had signed), he argued that there is "no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court." *Atascadero*, 473 U.S. at 259.

75. *See Pennhurst II*, 465 U.S. at 101 n.11 (quoting *Treasure Salvors*, 458 U.S. at 697) (suit can be brought only when the officer "acts without any authority whatever"); *id.* at 101 n.11 (quoting *Larson*, 337 U.S. at 690) (The ultra vires theory rests on a "lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.").

76. Since the petitioners had "broad discretion" under state statutes to provide services for Pennhurst's residents, their actions were not ultra vires. *Pennhurst II*, 465 U.S. at 101 n.11.

77. *Id.* at 114 n.25.

78. *Id.* (arguing that the dissent's view of the ultra vires doctrine "would virtually eliminate the constitutional doctrine of sovereign immunity").

defendant.[79] As such, the eleventh amendment would be "a pretense," for it would mean that this suit was not "against the state" even though the district court's order required the state both to close Pennhurst and to build and operate community facilities according to detailed instructions.[80]

The Court concluded that even though it might be "difficult to draw principled lines short of" the dissent's result,[81] some line must be drawn to preserve the substance of the eleventh amendment. Recalling that the *Larson* Court "wisely recoiled"[82] from holding that an official's tort is necessarily ultra vires his authority,[83] thus preserving the doctrine of sovereign immunity for the federal government, the *Pennhurst II* Court similarly limited the ultra vires doctrine to keep the eleventh amendment vital.[84]

b. Pendent Jurisdiction Doctrine

The dissent also argued that the Court's opinion was unwise in that it overruled long established precedent, beginning with *Siler v. Louisville & Nashville Railroad Co.*,[85] authorizing federal courts to decide pendent state claims.[86] Unfortunately, the Court did not address the pendent jurisdiction argument as carefully as it handled the slippery ultra vires issue. On the contrary, the Court manipulated labels without much sensitivity for the underlying issues.

The Court readily accepted the general proposition that a "federal court may resolve a case solely on the basis of a pendent state-law claim, and that, in fact, the court usually should do so in order to avoid federal constitutional questions."[87] But the Court concluded, in a curiously

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79. *Id.* at 116; *see also* Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 151 & n.11 (pointing out that sovereign immunity, under the eleventh amendment, must bar more than just suits where the state is a named defendant: "People are not likely to amend constitutions just to change captions on complaints.").

80. *Pennhurst II*, 465 U.S. at 107.

81. *Id.* at 114 n.25.

82. *Id.*

83. *See Larson*, 337 U.S. at 694.

84. Although the ultra vires exception to the eleventh amendment is not a dead letter, the Court strongly hinted it was prepared to abandon the exception.

> [I]t may well be wondered what principled basis there is to the ultra vires doctrine as it is set forth in *Larson* and *Florida Dep't of State v. Treasure Salvors*. . . . For present purposes, however, we do no more than question the continued vitality of the ultra vires doctrine in the Eleventh Amendment context. We hold only that to the extent the doctrine is consistent with the analysis of this opinion, it is a very narrow exception . . . .

Pennhurst II, 465 U.S. at 114 n.25; *see also id.* at 116 (calling the ultra vires doctrine a "narrow and questionable" exception).

85. 213 U.S. 175 (1909).

86. *Pennhurst II*, 465 U.S. at 159-63 & 166 n.52; *see also* Brief of Respondents PARC et al. at 6-12, *Pennhurst II* (No. 81-2101).

87. *Pennhurst II*, 465 U.S. at 117 (citation omitted). For the classic descriptions of the reasons

strained analysis, that neither this general policy nor the Court's past decisions "addressed whether [pendent jurisdiction] has a different scope when applied to suits against the State,"[88] and that therefore the question was "an open one."[89]

Having found the issue open, the Court summarily resolved it. First, the Court listed the long-accepted justifications for pendent jurisdiction:[90] promoting "judicial economy, convenience and fairness to litigants";[91] allowing courts to avoid unnecessary constitutional decisions;[92] and making a federal forum available for federal claims.[93] Then, with virtually no analysis, it dismissed these justifications as mere "considerations of policy"[94] trumped by the eleventh amendment.[95]

The Court's logic has a surface plausibility. To the extent the principle of state immunity in federal court derives directly from a constitutional provision, and the authority for pendent jurisdiction is only inferred from general language in the Constitution, the specific restriction on jurisdiction in the eleventh amendment should prevail when the two conflict. On close examination, however, this logic is unconvincing. The Court's dichotomy—"judge-made doctrine"[96] on the one hand and the "explicit limitation" in the eleventh amendment[97] on the other—fails

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for avoiding unnecessary decision of constitutional questions, see both Justice Brandeis's concurring opinion in Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) and the Court's opinion in Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

88. *Pennhurst II*, 465 U.S. at 118.

89. *Id.* at 119. It is difficult to take seriously the Court's assertion that the question was open. In Greene v. Lousiville & Interurban R.R., 244 U.S. 499, 506-08 (1917), the Court reaffirmed both *Ex parte* Young, 209 U.S. 123 (1908) (holding that a suit challenging state enforcement of an allegedly unconstitutional statute is not "against the state" under the eleventh amendment) and Siler v. Louisville & N.R.R., 213 U.S. 175 (1909) (holding the federal court should decide the case on state grounds). Although the *Greene* Court did not expressly consider whether the eleventh amendment barred the pendent claim, it is apparent that the Court did not see the eleventh amendment as an obstacle to pendent jurisdiction. Indeed, the *Pennhurst II* majority conceded that *Greene* "implicitly" viewed the eleventh amendment as no bar. 465 U.S. at 121.

90. *Pennhurst II*, 465 U.S. at 121-22.

91. *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

92. *See, e.g., Siler*, 213 U.S. at 193.

93. *See Ex parte* Yonng, 209 U.S. 123 (1908). If the plaintiffs may not bring their state claims in federal court, they may choose, or be forced because of limited litigation resources, to bring all claims, state and federal, in state court. To the extent *Pennhurst II* has this effect, it will undercut *Young*'s policy of making available a federal forum to vindicate the supremacy of federal law. *See Pennhurst II*, 465 U.S. at 121-22.

94. *Pennhurst II*, 465 U.S. at 123.

95. The Court did not suggest that pendent jurisdiction doctrine was without foundation. Rather, the Court described it as a doctrine "inferred from the general language of Art. III," *id.* at 117, and therefore subordinate to the "explicit limitation on federal jurisdiction contained in the Eleventh Amendment," *id.* at 118; *see also Gibbs*, 383 U.S. at 725 (describing the constitutional basis for pendent jurisdiction).

96. *Pennhurst II*, 465 U.S. at 120.

97. *Id.* at 118.

to persuade, both because the labels are misleading and because the opinion does not address the meaning behind the labels.

Ironically, the reasoning of *Pennhurst II* itself undermines the distinction between "judge-made doctrine" and "explicit constitutional limitation." Not only does the Court acknowledge that eleventh amendment doctrine is derived from "principles" of sovereign immunity and federalism,[98] and thus is largely judge-made, it spends much of the opinion detailing the judicial development of eleventh amendment doctrine in light of various "policies." Indeed, given the vague contours of sovereign immunity and federalism principles, eleventh amendment doctrine could not be other than judge-made.[99]

More generally, the nature of a constitution requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[100] Necessarily, and quite properly, the Court must look to the purposes or policies underlying these "great outlines" in order to define the scope, applicability, and interplay of the Constitution's various provisions.

There are numerous examples of constitutional doctrines that have been shaped by other constitutional provisions, or even concerns outside the Constitution. For instance, the scope of the free speech clause is limited by the "time, place and manner" doctrine, reflecting not a countervailing constitutional right, but rather the legitimate concerns of governance.[101] Similarly, the eleventh amendment is limited by *Ex parte Young,* which advances the policy, derived from the fourteenth amendment, of making the federal courts available to redress state violations of federal rights. As with the "time, place and manner" and *Ex parte Young* limitations to constitutional provisions, pendent jurisdiction is a judge-made doctrine. Although it was not created to limit the eleventh amendment, the extent, if any, to which the doctrine should shape eleventh amendment doctrine turns in part on the reasons judges made it. Thus, in deciding whether the eleventh amendment bars a federal court from granting relief on a pendent state claim, the Court must weigh the particular need for pendent jurisdiction against the intrusion on state sovereignty.

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98. *Id.* at 98, 100.

99. *See* Brown, *Beyond* Pennhurst*—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court,* 71 VA. L. REV. 343, 359 (1985) (detailing the various ways in which eleventh amendment doctrine is "judge-made").

100. McCulloch v. Maryland, 17 U.S. 159, 200, 4 Wheat. 316, 407 (1819).

101. *See, e.g.,* City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 928-30 (1986); Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972).

c. *The Scope of the* Pennhurst II *Holding*

It is unclear whether the Court intended to hold that the eleventh amendment bars prospective relief for *all* pendent state claims when a state official is a defendant,[102] or whether the Court intended to make a distinction between institutional reform suits and suits seeking noninstitutional relief.[103] On the one hand, the opinion does not explicitly limit the holding to certain types of pendent state claims. Indeed, there is some language suggesting that the source of the claim—state law—was the determinative factor in the Court's eleventh amendment analysis.[104] Nevertheless, the focus of the entire opinion, as well as some of the language, suggests that the Court's new eleventh amendment doctrine will apply only to institutional reform cases such as *Pennhurst.*

To determine the intended scope of *Pennhurst II,* one should begin with the Court's statement that "considerations of policy [supporting pendent jurisdiction] cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State."[105] The critical determination, then, is deciding what factors make a suit one "against a state." More precisely, the issue is whether, under *Pennhurst II,* the Court will characterize every suit enjoining state officials on the basis of state law as one against the state, and therefore barred by the eleventh amendment.

There are several indications in *Pennhurst II* that the Court's conclusion—that the suit was against the state—turned at least as much on the nature of the relief as it did on the source of the claim. These indications are found in what the opinion includes, in what it leaves out, and in the doctrinal context of the opinion. First, the Court in several places emphasizes that the nature of the relief in this case—a structural reform decree—intrudes on state sovereiguty. Second, the Court completely ignores *Pullman* abstention, which would permit the district court to send unsettled state law questions to state court. By leaving the district courts no opportunity to formulate a remedy, even when state law is

102. Because the Court has held that the eleventh amendment bars all retroactive relief against states, *see* Edelman v. Jordan, 415 U.S. 651 (1974), the only concern here is whether, under *Pennhurst II,* the eleventh amendment bars all prospective relief based on state law.

103. *See* Shapiro, *supra* note 51, at 83 (suggesting that the Court may have intended such a distinction).

104. *Pennhurst II,* 465 U.S. at 121 ("We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment."); *id.* at 106 ("[I]t is difficult to think of a greater intrusion in state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *id.* (*Ex parte* Young exception "inapplicable" to state law claims); *cf.* Currie, *supra* note 79, at 166 n.98 (suggesting that the Court's holding that *Young* was "inapplicable" to a suit based on state law "[i]n context, . . . may only mean that the analysis is different in respect to state-law claims, not that the bar [to relief] is absolute").

105. 465 U.S. at 123.

unambiguous, the Court indicated that its principal focus is the threat to sovereignty created when a federal court formulates injunctive relief, not simply when it interprets state law. Third, in the last fifteen years the Court has decided a number of cases restricting the availability of institutional reform relief because of its impact on state sovereignty. In context, *Pennhurst II* may be seen as a variation on this theme.

A clear indication of the Court's focus on the nature of the relief is in the language used in the opinion. In its discussion of pendent jurisdiction, the Court wrote that "a federal suit against state officials on the basis of state law contravenes the eleventh amendment when—as here—the relief sought and ordered has an impact directly on the State itself."[106] The second half of this sentence would be entirely unnecessary if the source of the claim alone—state law—made the suit one against the state. By adding this clause, the Court signaled that something about the relief in *Pennhurst* has a "direct impact," resulting in an eleventh amendment violation. The Court evidently is referring to the institutional reform remedy, the impact of which may be exacerbated because it is based on state law.

Similarly, in discussing the ultra vires doctrine, the Court wrote that "the relief ordered so plainly ran against the State. No one questions that . . . the judgments under review commanded action that could be taken . . . *only* if the State provided the necessary funding."[107] The Court then noted that virtually no prior decisions allowed injunctive relief "against State officials for failing to carry out their duties under State statutes."[108]

A second, more indirect indication that *Pennhurst II* turned as much on the nature as on the source of relief is the Court's failure to invoke *Pullman* abstention.[109] If the Court had been concerned primarily about the federalism problems that arise when a federal court interprets state law, it could have required the district court to abstain under *Pullman,* sending the state law issue to state court.

The Court's decision to ignore *Pullman*[110] did not stem from its belief that state law was clear and therefore that abstention was unavailable. On the contrary, the Court believed that the proper scope of state

106. *Id.* at 117.

107. *Id.* at 109 n.17.

108. *Id.* at 109 (footnote omitted). The Court noted that the only previous case that arguably allowed affirmative relief against state officials was Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887), in which "state officials were ordered to comply with 'a plain ministerial duty,' . . . a far cry from" the district court's decree in *Pennhurst. Pennhurst II,* 465 U.S. at 109 n.18 (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944)). In drawing this distinction the Court implied that the affirmative nature of the decree was important to its eleventh amendment analysis.

109. *See supra* text accompanying notes 22-25.

110. The Court made only a passing reference to the case. *See Pennhurst II,* 465 U.S. at 122 (referring obliquely to "abstention doctrine"). For a discussion of the effect of *Pennhurst II* on the *Pullman* doctrine, see Werhan, *supra* note 14.

rights and remedies was unsettled.[111] More probably, the Court concluded that *Pullman* abstention would not adequately shield the state against federal intrusion in *Pennhurst.*

The Court was troubled by the *Pennhurst* decree because of the inevitable "intrusion on state sovereignty . . . when a federal court instructs state officials on *how* to conform their conduct to state law."[112] Although the state court may readily provide a basic interpretation of state law (in many cases, there may be little dispute over the general formulation of state-created rights), there remains a huge gap between articulation and implementation of state law.

Certifying the state issue for a state court interpretation of state law would not afford much protection for state sovereignty because the greater injury to state sovereignty occurs in the federal court's implementation, rather than interpretation, of state law. A state court declaration of state-created rights would not fix the proper remedy, for rarely, if ever, is there a single acceptable remedy in institutional reform cases.[113] Rather, the federal court, armed with only the general standard provided by the state court, may implement its chosen remedy by using federal officials to make many or most of the decisions in planning and operating a state program or facility.[114]

The Court also may feel that it cannot rely on full abstention (sending the state claims to state court for both a decision on liability and, if necessary, formulation of the corresponding remedy) to protect state autonomy. Under *Pullman,* federal judges should be reluctant to post-

111. *See Pennhurst II,* 465 U.S. at 122 n.32.

112. *Id.* at 106 (emphasis added).

113. The *Pennhurst* case illustrates this point. During the course of the *Pennhurst* litigation, the Pennsylvania Supreme Court decided *In re* Schmidt, 494 Pa. 86, 429 A.2d 631 (1981), which was a dispute between a county and the state over responsibility for care and treatment of a mentally retarded individual. In its opinion, the state court noted that Pennsylvania law required government agencies to adopt a policy of "normalization," meaning that "the mentally retarded person . . . shall have the right to live a life as close as possible to that which is typical for the general population. Consistent with this concept is the requirement that the least restriction consistent with adequate treatment and required care shall be employed." *Id.* at 96, 429 A.2d at 636. The Third Circuit cited this opinion to support its interpretation of state law as providing enforceable, substantive rights. Halderman v. Pennhurst State School & Hosp., 673 F.2d at 651-56. Assuming the federal court correctly interpreted state law, it is apparent that the federal court could implement the state court's broad requirement in a variety of ways.

114. *See* Fletcher, *supra* note 26, at 644-49, 660-63 (pointing out that district court judges have immense discretion in formulating institutional reform decrees, and arguing that it is not practicable for legislatures or appellate courts to control or guide that discretion); *cf.* Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 45 (1984) (arguing that appellate courts should develop "enforceable remedial principles," but recognizing the "task may be formidable"); Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court,* 96 HARV. L. REV. 4, 47 (1982) (arguing that as judges decide more institutional reform cases, the "forms of relief . . . will begin increasingly to converge").

pone exercising federal jurisdiction in favor of state court adjudication,[115] particularly if state law is clear. Moreover, on a human level, district court judges, faced with deplorable institutional conditions, may find it difficult to be sufficiently sensitive to abstract federalism issues and relinquish their remedial power.[116] Their natural inclination to address the pressing social problems before them may be reinforced by a sense that state courts are overly sensitive to the state's interests. To put it bluntly, district court judges cannot be trusted to abstain in favor of state courts. By depriving federal judges of the discretion to formulate institutional reform decrees based on state law, the *Pennhurst II* holding ensures that state courts will both construe state law and devise appropriate remedies.

The third indication that *Pennhurst II* is directed largely at institutional reform relief, and not simply at the source of the claim, may be deduced from other cases revealing the Court's unease with (or perhaps hostility towards) institutional relief. These cases indicate that *Pennhurst II* is emblematic of the Court's evolving concern with the impact of institutional reform decrees on state autonomy.

Since 1971 the Court has restricted the availability of institutional reform decrees against state and local officials. Beginning with *Younger v. Harris,*[117] the Court has held, despite *Ex parte Young,*[118] that principles of federalism are important factors in deciding whether to grant prospective relief that would disrupt the operation of state courts[119] and local agencies.[120] In *Younger,* for example, the Court held that a federal court may not enjoin a pending state criminal trial;[121] in *Rizzo v. Goode,*[122] the

115. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (abstention "is the exception, not the rule").

116. *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better . . . .").

117. 401 U.S. 37 (1971).

118. 209 U.S. 123 (1908).

119. *See, e.g.,* O'Shea v. Littleton, 414 U.S. 488, 500 (1974) (denying injunctive relief against state court officials for alleged discrimination in sentencing and setting bail because such relief would involve "an ongoing federal audit of state criminal proceedings"); Younger v. Harris, 401 U.S. 37, 41 (1971) (absent extraordinary circumstances, a federal court may not declare unconstitutional, or enjoin enforcement of, a state criminal statute if a state criminal proceeding is pending).

120. *See, e.g.,* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (denying injunctive relief prohibiting police use of chokeholds and requiring the police department to improve its training program and keep regular records of chokehold incidents); Rizzo v. Goode, 423 U.S. 362, 380 (1976) (denying injunctive relief requiring city officials to institute a program for handling citizen complaints against police). *See generally* Mishkin, *Federal Courts as State Reformers,* 35 WASH. & LEE L. REV. 949 (1978) (arguing for restraint in issuing institutional relief); Fallon, *supra* note 114 (criticizing the Court's decision in *Lyons* as improperly restricting the availability of injunctive relief).

121. The Court has expanded *Younger* to prevent federal courts from interfering with a variety of pending state proceedings. *See, e.g.,* Pennzoil Co. v. Texaco Inc., 107 S. Ct. 1519 (1987); Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S. Ct. 2718 (1986) (administrative hearing in a civil rights enforcement case); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457

Court held that the district court improperly ordered city officials to create a program for handling citizens' complaints as a means of reducing the number of incidents of police brutality. These cases emphasize that "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws."[123] While some of these cases involved local officials, and thus did not raise an eleventh amendment issue, they all involved the federalism concerns underlying *Pennhurst II.*

Even when the Court has not invoked principles of federalism to bar injunctive relief, it has signaled its doubts concerning the ready availability of institutional reform decrees. For example, in *Bell v. Wolfish,*[124] which rejected a due process challenge to the practice of housing two federal pretrial detainees in a cell designed for one, the Court warned judges not to become "enmeshed in the minutiae of prison operations."[125] In *Rhodes v. Chapman,*[126] rejecting an eighth amendment challenge on similar facts, the Court admonished judges not to assume that state officials "are insensitive to the requirements of the Constitution."[127] Echoing the language in these opinions, both the majority and dissent in *Pennhurst I* agreed that the district court "should not have assumed the task of managing Pennhurst."[128]

The logic of and motivation underlying these cases is hardly limited to suits seeking federal oversight of some aspect of the state criminal justice system. Rather, these cases suggest that a district court should be reluctant to grant remedial relief against state or local institutions when that relief would threaten state sovereignty, whether by impinging on the state fisc[129] or on other aspects of state discretionary authority.[130]

U.S. 423 (1982) (bar disciplinary proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (public nuisance suit to close a movie theater).

122. 423 U.S. 362 (1976).

123. *Lyons,* 461 U.S. at 112.

124. 441 U.S. 520 (1979).

125. *Id.* at 562.

126. 452 U.S. 337 (1981).

127. *Id.* at 352.

128. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 54 (1981) (White, J., dissenting); *id.* at 29, 30 n.23; *see also* Youngberg v. Romeo, 457 U.S. 307, 322 (1982) (in determining whether an institutionalized retarded person has been afforded his constitutional right to minimally adequate training, a court should defer to the judgment exercised by qualified professionals in order to minimize federal court interference with the internal operations of the institutions).

129. In Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), the Court relied on *Younger* to hold that principles of comity and federalism barred a federal damages suit alleging unequal property taxation in violation of due process and equal protection.

130. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 319 (1980) (both *Rizzo* and *Younger* reflect the "desire to avoid federal judicial interference with the discretionary operation of state and local executive agents"); *id.* at 321 (arguing that *Rizzo*

The injunctive relief in *Pennhurst* undercut the state's autonomy by imposing specific, affirmative obligations, nullifying the discretionary authority of state officials to define and implement state law,[131] and effectively requiring the state legislature to allocate funds for state priorities as determined by a federal judge.[132] State officials were subordinated to a federal judicial bureaucracy, and the state fisc was put at the disposal of federal officials. The *Pennhurst* decree—through which the district court reorganized a state program for severely retarded citizens—involved the sort of interference with autonomy with which a doctrine of sovereign immunity ought to be concerned.[133]

Given the nature of the relief in *Pennhurst,* it is no surprise that the *Pennhurst II* Court quoted *Rizzo* in questioning the appropriate scope of institutional relief even if based on federal law.[134] *Pennhurst II* follows the *Younger* line of cases in protecting the discretionary authority of state officials from federal oversight while maintaining the core importance of *Ex parte Young.*

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was directed especially at "administrative" injunctions, that is, injunctions requiring the court to assume "supervisory responsibility for overseeing the ongoing operation of an executive agency"); Fiss, *Dombrowski,* 86 YALE L.J. 1103, 1154 (1977) (*Rizzo* was a "clear signal" that "federal access for administrative injunctions aimed at any state officials was to be curtailed").

131. *See Pennhurst II,* 465 U.S. at 111 n.20 ("discretionary duties have a greater impact on the sovereign because they 'brin[g] the operation of governmental machinery into play' ") (quoting Justice Frankfurter's dissent in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 715 (1949)); *id.* at 113-14 (stating that limitations on the ultra vires doctrine in *Larson* were based on the " 'necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention.' [This need] is even greater when questions of federalism are involved.") (quoting *Larson,* 337 U.S. at 704).

132. The district court's decree required the state to fund the operation of Pennhurst, finance the special and hearing masters' offices, and fund the newly created community retardation facilities. For a discussion of federal judicial authority to use state funds in remedying state violations of federal law, see Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715 (1978).

133. *See Pennhurst II,* 465 U.S. at 122 n.32 ("In cases of ongoing oversight of a state program that may extend over years, as in this case, the federal intrusion is likely to be extensive . . . . Here, the federal courts effectively have been undertaking to operate a major state institution . . . ."); *id.* at 107 ("According to the dissent, the relief sought and ordered here—which in effect was that a major state institution be closed and smaller state institutions be created and expansively funded—did not operate against the State. This view would make the law a pretense.").

134. The *Pennhurst II* Court quoted from *Rizzo* when it wrote:

> We do not decide whether the District Court would have jurisdiction . . . to grant prospective relief on the basis of federal law, but we note that the scope of any such relief would be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.' "

Pennhurst II, 465 U.S. at 104 n.13 (quoting Rizzo v. Goode, 423 U.S. 362, 378 (1976), which in turn quoted Stefanelli v. Minard, 342 U.S. 117, 120 (1951)). One author speculates that this language may mean that the Court will expand its eleventh amendment doctrine (as opposed to relying on the more more flexible principles announced in *Rizzo*) to bar completely institutional reform suits. *See* Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History,* 18 URBAN LAW. 519, 545 (1986).

To be sure, there is language in *Pennhurst II* suggesting that the eleventh amendment bars all relief, not just institutional reform decrees, based on state law.[135] A cursory look at the Court's brief discussion of *Siler*—to the effect that the considerations of policy underlying *Siler* are subordinate to the explicit limitation on jurisdiction in the eleventh amendment—might suggest that *Pennhurst II* eliminated pendent jurisdiction altogether for suits against state officials. But in the context of this case, which involved a detailed affirmative decree and in which federal officials took over much of the discretionary decisionmaking for the state institution, it seems more likely that the Court's concern centered, as it should, on the impact of such decrees on state sovereignty.

II

LIMITING *PENNHURST II* TO SUITS SEEKING INSTITUTIONAL REFORM

I have argued that the Court's opinion in *Pennhurst II* permits, and may actually support, an eleventh amendment distinction based on the nature of the relief sought for pendent state claims.[136] That is, *Pennhurst II* may preserve the *Siler* doctrine for noninstitutional relief cases.

Whether or not the Court actually intended to make such a distinction, I think the distinction should be made.[137] This conclusion rests on an evaluation of both the importance of pendent jurisdiction and the relative threat pendent claims pose to state sovereiguty in noninstitutional and institutional reform cases.

First, there are important constitutional and congressional policies favoring the exercise of pendent jurisdiction. Although pendent jurisdiction would advance these policies in both institutional and noninstitutional cases, it is relatively more important in the latter context. Second, institutional reform cases pose a much greater threat to state sovereignty than do noninstitutional cases. In institutional reforin cases, federal judges set state priorities, effectively gain access to the state treasury, and displace state management authority over the institution. In noninstitutional cases, which may involve, for example, a negative injunction barring enforcement of a statute, federal judges neither displace state management and policymaking authority nor siguificantly burden the

135. *See supra* note 104.

136. *See supra* text accompanying notes 102-35.

137. It should be evident that I accept the eleventh amendment doctrine established by the Court prior to *Pennhurst II,* as well as that case's narrow holding that the eleventh amendment bars institutional reform relief based on state law. Some judges and commentators have posed a more fundamental challenge to the Court's eleventh amendment doctrine. *See, e.g.,* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889 (1983); Fletcher, *supra* note 9.

state treasury. These differences are magnified in cases in which relief is based on state law.

A. Justifications for Pendent Jurisdiction

Generally speaking, the federal courts are "courts of limited jurisdiction marked out by Congress."[138] Congress, however, has not provided expressly for pendent jurisdiction.[139] Lacking explicit congressional guidance, the Court has read the federal question statute[140] as conferring jurisdiction as broadly as the jurisdictional grant in article III,[141] and has concluded that article III permits the federal courts to exercise pendent jurisdiction.[142]

Although the Court has found authority for permitting the federal courts to exercise jurisdiction over pendent state claims, it has been somewhat reluctant, in the face of congressional silence, to allow the lower federal courts to employ this type of jurisdiction expansively.[143] It may be expected to be even more cautious when a case raises substantial concerns about state sovereignty, for the eleventh amendment was adopted specifically to protect state sovereignty by limiting federal court jurisdiction.[144]

The Court has recognized a variety of policies justifying the exercise of pendent jurisdiction, including the need to avoid piecemeal litigation, to make available a federal forum to adjudicate federal claims, and to

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138. Aldinger v. Howard, 427 U.S. 1, 15 (1976).

139. *See id.* ("Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III."). There are minor exceptions to this general observation. *See, e.g.*, 28 U.S.C. § 1441(c) (1982) (permitting pendent jurisdiction over certain claims when federal claims are removed to federal court); 28 U.S.C. § 1338(b) (1982) (permitting jurisdiction over state claims of unfair competition when joined to related copyright, patent, plant variety protection, or trademark claims).

140. 28 U.S.C. § 1331 (1982) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

141. Article III, § 2 states: "The Judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and [its] Treaties."

142. *See Pennhurst II*, 465 U.S. at 117 (pendent jurisidiction derives "from the general language of Art. III"); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966) (if the federal and pendent state claims are sufficiently related, "the entire action before the court comprises but one constitutional 'case' ").

143. *See Gibbs*, 383 U.S. 726-27 (delineating circumstances in which federal courts should decline to consider state claims). When Congress has imposed more explicit limitations on federal jurisdiction, the Court has refused to extend jurisdiction over ancillary claims not covered by the statutory grant. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (in a diversity case, declining to permit ancillary jurisdiction over a claim against a nondiverse third party defendant); Aldinger v. Howard, 427 U.S. 1 (1976) (in a civil rights case, declining to permit ancillary jurisdiction over claims against a "pendent party").

144. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 11 (1890). *But see* Fletcher, *supra* note 9 (arguing that the eleventh amendment was not intended to prohibit federal court jurisdiction, but to narrow existing language authorizing jurisdiction).

avoid constitutional questions. Although the Court has not discussed the issue, it is also apparent that pendent jurisdiction allows the federal court to exercise fully its jurisdiction over federal claims.

1. Avoiding Piecemeal Litigation

In *United Mine Workers of America v. Gibbs,*[145] the Court justified the exercise of pendent jurisdiction on the basis of "considerations of judicial economy, convenience and fairness to litigants."[146] These considerations led the Court in that case to hold that a federal court could exercise pendent jurisdiction so long as the state and federal claims derived "from a common nucleus of operative fact."[147]

Gibbs promotes a policy against piecemeal litigation.[148] Given the limited resources of both courts and litigants, it is sensible, if possible, to consolidate state and federal claims raising substantially similar factual issues. All other things (such as litigation resources) being equal, a policy of consolidating related cases may save more judicial and litigation resources in institutional reform suits than in suits for noninstitutional relief; institutional reform suits, for example, may well involve more protracted disputes over remedies than noninstitutional suits.

Nevertheless, the desire to avoid piecemeal litigation alone does not compel a doctrine of pendent jurisdiction, for in many cases the efficiency gains for the litigants and courts will be modest. Where the state courts have concurrent jurisdiction over the federal claims, pendent jurisdiction is not necessary to reduce piecemeal litigation; the plaintiff can bring all claims in state court. Even where the federal courts have exclusive jurisdiction over the federal claims, the increase in efficiency from pendent jurisdiction may be limited if the state and federal claims raise identical factual issues. Factual questions litigated in one forum may be binding on the same parties in the other forum.[149] In addition, pendent jurisdiction does not aid federal "judicial economy." Rather, the state courts

145. 383 U.S. 715 (1966). *Gibbs* did not involve a claim against either the state or state officials, and thus raised no eleventh amendment issue.

146. *Id.* at 726.

147. *Id.* at 725. In the next sentence, the Court framed the test as whether the "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." *Id.*

148. Although *Gibbs* also spoke of "fairness to litigants" as a consideration in deciding whether to exercise pendent jurisdiction, *id.* at 726, the Court in a later case read that factor as referring to the unfairness to the defendant. *See Aldinger,* 427 U.S. at 14. Thus, the *Gibbs* factors supporting pendent jurisdiction may be characterized as "efficiency" concerns.

149. Issue preclusion of matters decided in state court is covered by the Full Faith and Credit Act, 28 U.S.C. § 1738 (1982) ("The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State."); *see also* Allen v. McCurry, 449 U.S. 90 (1980) (issues decided in state court may not be relitigated in subsequent federal action). Although there is no corresponding statute for issues decided in federal court, there is no dispute that the federal

will have fewer cases, and the federal courts will have more complicated cases. Pendent jurisdiction promotes efficiency no more than a policy encouraging plaintiffs to take all claims to state court.[150]

If in cases between private parties, such as *Gibbs,* efficiency alone is not a compelling reason for "stretching the constitutional concept of a 'case' " in order to extend federal jurisdiction,[151] it is an even weaker justification when the pendent claim undermines state sovereignty. The eleventh amendment, after all, limits federal jurisdiction in order to protect state sovereignty. The justification for pendent jurisdiction in such cases must be found in other policies.

2. *Providing a Federal Forum*

A stronger justification for pendent jurisdiction derives from the policy, inherent in both *Ex parte Young* and the federal jurisdictional statutes, of ensuring the availability of a federal forum to vindicate federal rights. Pendent jurisdiction relieves the plaintiff of the pressure to adjudicate both federal and state claims in state court, thus eliminating practical barriers to the plaintiff's choice of a federal forum.[152]

In a number of statutes, Congress has created federal jurisdiction over federal claims, suggesting a congressional policy of giving plaintiffs the choice of litigating their claims in federal court.[153] *Ex parte Young*

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judgment has preclusive effect on subsequent actions in state court. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 7, § 4468, at 648-54.

Regardless of the general rule for issue preclusion, it may be appropriate to make an exception for claims over which the federal court has exclusive jurisdiction, on the ground that according preclusive effect to state court determinations will undercut the purposes underlying Congress's creation of exclusive federal jurisdiction. Nevertheless, several commentators have concluded that the Court should find a preclusive effect unless there is "clear and manifest" evidence of congressional intent to the contrary. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 694 (4th ed. 1983); Currie, *Res Judicata: The Neglected Defense,* 45 U. CHI. L. REV. 317, 347-48 (1978); *see also* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 675 (1978) (Brennan, J., dissenting) (recognizing that issue preclusion might "make sense" for "specific findings of historical facts," but suggesting other reasons for denying preclusive effect); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations,* 53 VA. L. REV. 1360, 1382-83 (1967) (recognizing the importance of giving preclusive effect to factual determinations, but noting that such a policy may undercut the purposes of exclusive federal jurisdiction).

150. In addition, efficiency may be an insignificant consideration in the many cases in which the facts are stipulated. *See, e.g.,* Steffel v. Thompson, 415 U.S. 452, 455 (1974). In those circumstances, bifurcating the federal and state claims would be a relatively minor burden on the litigants and on judicial economy; *see also Pennhurst II,* 465 U.S. at 122 n.32 (arguing that the goals of efficiency are not advanced when the proper interpretation of state law is uncertain).

151. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & W. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 922 (2d ed. 1973) [hereinafter HART & WECHSLER]; *Aldinger,* 427 U.S. at 15 (suggesting the same in dicta).

152. *See* HART & WECHSLER, *supra* note 151, at 922-23; Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction,* 75 NW. U.L. REV. 245, 251-56 (1980).

153. *See, e.g.,* 28 U.S.C. § 1331 (1982) (creating general federal question jurisdiction); 28 U.S.C. § 1343(3) (1982) (creating federal jurisdiction for claims of state violations of federal laws and the

helped to facilitate that congressional policy. In that case the Court sought to "harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution"[154] by permitting federal suits to enjoin state officers from enforcing unconstitutional state laws.[155] *Young* thus reflects a strong policy, part statutory and part constitutional, of providing a federal forum for plaintiffs seeking prospective relief from state violations of the Constitution.[156]

In the abstract, pendent jurisdiction has little to do with the availability of a federal forum for federal claims. As the *Pennhurst II* Court noted, absent pendent jurisdiction a plaintiff may bifurcate his federal and state claims and thus still vindicate federal rights in federal court.[157]

This reasoning, however, ignores the potential practical and legal consequences of eliminating pendent jurisdiction. Where the federal courts have exclusive jurisdiction over federal claims, a plaintiff with limited litigation resources is put to a hard choice: if he cannot afford to litigate two suits, he is forced to drop either his federal or his state claims. Some plaintiffs will forgo their federal claims (and forum), effectively diminishing the value of the federal right.[158] Even where jurisdiction is concurrent, giving plaintiffs the additional choice of bringing both federal and state claims in state court, some plaintiffs will forgo the federal forum in order to raise all claims in a single suit. As a practical matter, a constitutional prohibition of pendent jurisdiction makes the federal forum less available.

In addition to practical problems, a plaintiff may run into legal doctrines compelling him to bring all of his claims in state court. In *Migra v. Warren City School District Board of Education,*[159] decided the same day as *Pennhurst II,* the Court held that the Full Faith and Credit Act[160] requires federal courts to give the same preclusive effect to federal claims not raised in a state suit that a state court would give to such claims. Because Migra could have, but did not, raise her section 1983 claim in an

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Constitution); *see also* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (stating that the Reconstruction Congress created federal jurisdiction for civil rights claims because it did not trust the state courts to enforce the laws).

154. *Pennhurst II,* 465 U.S. at 105 (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring and dissenting)).

155. *See supra* text accompanying notes 9-15.

156. *See Pennhurst II,* 465 U.S. at 105; *Young,* 209 U.S. at 160.

157. 465 U.S. at 122.

158. It is not surprising that one of the early leading pendent jurisdiction cases was Hurn v. Oursler, 289 U.S. 238 (1933), for that case involved both a copyright claim, for which there is exclusive federal jurisdiction, and a pendent state claim of unfair competition. By allowing the federal court to hear the pendent state claim, the Court promoted the enforcement of the federal right.

159. 465 U.S. 75 (1984).

160. 28 U.S.C. § 1738 (1982).

earlier suit in state court, the federal court was barred from later hearing the claim if it determined that the state court would bar such claims. Conceivably, although perhaps implausibly, the Court will apply *Migra* to cases that are bifurcated as a result of *Pennhurst II*.[161] If so, plaintiffs will be under additional pressure to bring all of their claims in state court.[162]

The policy of making available a federal forum is an important argument favoring pendent jurisdiction. It is difficult to determine, however, whether the availability of pendent jurisdiction will have a greater impact in institutional reform or noninstitutional suits. Because institutional reform suits tend to be more complex and demand more litigation resources than suits for negative injunctions, institutional reform plaintiffs may feel greater economic pressure to bring all claims in state court. At the same time, institutional reform plaintiffs (or more precisely, their lawyers) may feel more strongly than other plaintiffs that the relief they seek is more readily available in federal court.

3. *Avoiding Constitutional Questions*

If, as in the *Pennhurst* litigation, the plaintiff's constitutional and state claims are alternative bases for relief, exercising pendent jurisdiction may permit the federal court to avoid deciding constitutional questions.[163] First set forth clearly in *Siler v. Louisville & Nashville Railroad*

161. Where the Court has required abstention on state issues, it has indicated that the state court litigation does not preclude relitigation of facts essential to the federal issues in federal court. *See* Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964). Thus, by analogy, *Migra* may not apply to cases bifurcated as a result of *Pennhurst II*.

162. *See* Brown, *supra* note 99, at 352; Shapiro, *supra* note 51, at 80-81; Smith, Pennhurst v. Halderman: *The Eleventh Amendment,* Erie *and Pendent State Law Claims,* 34 BUFFALO L. REV. 227, 275-81 (1985).

Instead of applying *Migra* to bifurcated claims, the Court may modify abstention doctrine to require plaintiffs to litigate their state claims in state court before proceeding on their federal claims in federal court, effectively forcing many plaintiffs to bring all claims in state court. Although not required under existing decisions, this version of abstention is compatible with existing doctrine. First, abstention would permit the federal court to postpone, and perhaps avoid, constitutional adjudication by giving the state courts the first opportunity to remedy institutional conditions under state law. The state remedy could obviate the need for federal litigation. *See* Pennzoil Co. v. Texaco Inc., 107 S. Ct. 1519, 1526-27 (1987).

Second, *Younger* established the principle that the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests," should "not unduly interfere with the legitimate activities of the States." Younger v. Harris, 401 U.S. 37, 44 (1971). If the plaintiff had initiated state proceedings, parallel federal proceedings could be disruptive, either because the state and federal decrees might be inconsistent, or because there would be two centers of remedial authority competing for the same resources. Even if the plaintiff initially declined to pursue his state remedies, the Court might conclude that proper regard for federalism requires that the states, through state corrective processes, be given the first opportunity to address institutional shortcomings.

163. Pendent jurisdiction is by no means the only device to avoid deciding constitutional

Co.,[164] this policy of restraint has been considered central to the proper working of constitutional adjudication.[165]

A basic reason for avoiding constitutional questions where possible is that constitutional adjudication is antidemocratic.[166] It reduces the role of politically accountable institutions in making social policy, both by preempting political decisionmaking and by being largely immune from reconsideration by the political branches. For the same reasons, unrestrained social reform in the name of constitutional decisionmaking begins to undermine the perceived legitimacy of the federal courts and thus their practical ability to command respect for their judgments in controversial cases. Although many constitutional decisions, even unpopular ones, will not injure the courts' authority to enforce their reading of the Constitution and may even enhance it, the cumulative impact of routine judicial intervention in the political process risks undercutting the political support that courts require to enforce their mandates.[167] As a result, courts should be sensitive to the "gravity and delicacy" of such decisions.[168]

In addition, decisions modifying or expanding federal constitutional doctrine often have a much wider impact than decisions based on state statutory or constitutional provisions. A Supreme Court decision defining a federal constitutional right affects similarly situated persons throughout the United States, brings into doubt or upholds the validity of a range of state and federal statutes, and causes shifts in related or competing constitutional doctrines. Such a decision may form the basis upon which lower federal courts define the constitutional rights of other classes of persons. Even a district court decision on a constitutional question may influence similar litigation in other districts. A state statu-

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questions. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (setting forth seven "rules" for avoiding constitutional questions, including the *Siler* rule).

Of course, the availability of pendent jurisdiction does not mean that in practice a federal court will avoid the constitutional questions. In the *Pennhurst* litigation, for example, the district court based injunctive relief on both constitutional and pendent state grounds.

164. 213 U.S. 175 (1909).

165. In *Siler*, the Court wrote that a federal court cannot disregard the state issue in favor of the constitutional issue "without important reasons." *Id.* at 193; *see also Pennhurst II*, 465 U.S. at 117 (a court usually should resolve a ease on the basis of a pendent claim "in order to avoid federal constitutional questions"). Until *Pennhurst II*, the Court had given little indication what might constitute "important reasons."

166. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 128 (1962) (characterizing constitutional adjudication as "at least potentially a deviant institution in a democratic society").

167. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94-95 (1970); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 129-70 (1980); United States v. Richardson, 418 U.S. 166, 188-93 (1974) (Powell, J., concurring). *But see* J. ELY, DEMOCRACY AND DISTRUST 47-48 (1980) (arguing that neither the Court's prestige nor its power suffers from making constitutional decisions).

168. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

tory decision, by contrast, need affect only a single provision (or perhaps identically worded provisions) within a single state. Even a state constitutional decision, with its potential to affect a variety of state statutes, is limited to a single state.

Siler's command to decide pendent state issues generally achieves these goals in noninstitutional cases. A decision based on state law does not preempt or displace the power of state political institutions to make substantive policy. If the state legislature disagrees with the federal court's interpretation of state law, it is free to amend the law to make its meaning clearer.

In institutional reform cases, the *Siler* doctrine is less successful in achieving its goal of preserving the primacy of the political branches in policymaking. The state legislature often is unable to reassert its policymaking authority in institutional reform cases because its principal means of making policy, enacting legislation, is too blunt an instrument. In many cases, the legislature will disagree, not with the federal court's interpreting state law to create individual rights and corresponding institutional obligations, but with the numerous discretionary choices the judge makes in formulating the decree.[169] Consequently, amending state law will not shift policymaking authority back to the legislature. The legislature could displace the federal court's decision by repealing the statute, but it may be loathe to do so because it supports the original statute; it is the particular implementation of the statute to which the legislators object. Even if an amendment could set the federal court straight, state officials may be unwilling to unscramble a partially implemented decree, in part because they cannot "unspend" money already spent on reforms, and in part because they may conclude that more harm would occur (because of delay or disruption) by removing federally ordered reform.

Although institutional decrees based on pendent state claims do not entail all of the drawbacks of a constitutionally based decree, these two types of decisions are alike in their invulnerability to legislative reconsideration. Moreover, each imposes significant costs on state sovereignty by shifting the discretionary authority to manage state institutions from state to federal officials.[170] As a result, there is comparatively little advantage in avoiding constitutional questions in institutional reform cases.

4. *Exercising Federal Jurisdiction*

In addition to these bases for exercising pendent jurisdiction, which

169. *See* Chayes, *supra* note 114, at 46 (there is no "unique remedial regime that follows ineluctably from and is measured by the determination of substantive liability").

170. *See infra* text accompanying notes 180-207.

the *Pennhurst II* Court listed but did not discuss, there is a fourth reason that pertains especially to noninstitutional cases: Pendent jurisdiction may be necessary to the exercise of federal jurisdiction.

This argument for pendent jurisdiction may be illustrated by considering a challenge to a state environmental regulation imposing affirmative or financial obligations as a result of conduct that occurred before the enabling statute's enactment. Hoping to avoid a state court determination of his federal rights,[171] the plaintiff seeks a federal injunction enjoining enforcement of the regulation on the grounds that (1) the retroactive application of the regulation violates the federal constitution; (2) the regulation, when properly interpreted, does not cover the plaintiff's conduct; (3) the regulation is unconstitutional under state law; and (4) the regulation was not properly enacted under state law.

Applying a broad reading of *Pennhurst II* to this suit for a negative injunction, the federal court would first dismiss claims (2), (3), and (4), the pendent state claims. After dismissing the state claims, the federal court would construe, or find a state court construction of, the regulation in order to decide the federal question. Three different things might happen. First, the court might construe the regulation to apply to the plaintiff, and hold that so construed it was constitutional. The state could then proceed with the state court litigation. Second, the court might find the regulation applicable to the plaintiff, but hold it unconstitutional, thus barring further state court litigation under this interpretation of the regulation. In both cases, the plaintiff would have had an opportunity to vindicate his federal rights in federal court. Neither of these outcomes deprives the federal court of jurisdiction to decide the case.

But consider a third possibility—that the federal court believes the state regulation, properly construed, does not cover the plaintiff's conduct. For example, the court might conclude that the state legislature did not intend to apply the regulatory statute retroactively. Under *Pennhurst II,* the federal court would be barred from enjoining enforcement of the state regulation because it could not base relief on state law. In addition, having decided that the regulation does not apply to the plaintiff, the federal court would be obligated to dismiss the suit because the case would no longer present a justiciable federal question. The court would have no authority to review alternative, perhaps unconstitutional,

171. If the state authorities initiate state court proceedings "before any proceedings of substance on the merits have taken place in the federal court," the *Younger* line of cases bars federal relief. Hicks v. Miranda, 422 U.S. 332, 349 (1975). As a result, there may be few cases in which both the threat of state enforcement proceedings are sufficiently real to create an actual controversy under art. III, *see* Steffel v. Thompson, 415 U.S. 452, 458-60 (1974), and the state has not initiated proceedings quickly enough to bar federal litigation under *Younger.* Nevertheless, the fact that a broad reading of *Pennhurst II* would permit this unwarranted anomaly in noninstitutional cases supports limiting the holding in that case to suits for institutional reform relief.

interpretations since such decisions would violate the fundamental rule against advisory opinions. Thus, the plaintiff would have no remedy in federal court.

The state court, however, is not bound by the federal court's interpretation of the state statute, and it may read the statute as applying to the federal plaintiff.[172] If the state begins an enforcement action, the *Younger* line of cases will bar a subsequent federal suit to enjoin the state proceedings and decide the resulting constitutional issues.[173] Consequently, the federal claim may well be decided in state court. Although the defendant may seek Supreme Court review of the federal constitutional issue,[174] he will not have had the opportunity, as Congress apparently contemplated, to have a federal district court find the facts and decide the federal questions.

A federal court cannot ensure its ability to exercise jurisdiction over the federal claim by invoking *Pullman* abstention for a state court determination of the state law issues. In many cases, *Pullman* abstention is not available because the proper interpretation of state law may appear to be relatively clear.[175] If the federal court is confident of its interpretation of state law, abstention is inappropriate and it must dismiss the suit. Even assuming the federal court properly abstains under *Pullman,* a deserving plaintiff nevertheless may be unable to obtain relief if the state court will not, or cannot, decide the state issue.[176] Although the entire case would return to federal court,[177] a broad reading of *Pennhurst II* would bar the federal court, as before, from granting relief.

This problem—the inability to ensure federal jurisdiction over federal claims—does not arise if the federal court could exercise pendent jurisdiction.[178] Returning to the hypothetical example, the federal court

172. *See, e.g.,* Dombrowski v. Pfister, 380 U.S. 479, 491 & nn. 6-7 (1965); *see also* Shapiro, *State Courts and Federal Declaratory Judgments,* 74 NW. U.L. REV. 759, 768-70 (1979).

173. *See, e.g.,* Younger v. Harris, 401 U.S. 37 (1971) (criminal prosecution); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (public nuisance suit to close a movie theater).

174. *See* 28 U.S.C. § 1257(2) (1982).

175. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984) ("*Pullman* abstention is limited to uncertain questions of state law . . . .").

176. *See* Field, *supra* note 23, at 1146 & n.202 (noting that some states bar their courts from ruling on state law issues unless they have the power to dispose of the entire case).

177. The *Pullman* doctrine provides that in such circumstances the federal court has jurisdiction to decide the state law issues. *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959).

178. An alternative solution would be to rely by analogy on *Pullman* abstention to permit the federal court to retain jurisdiction, even though it finds state law inapplicable to the federal plaintiff. Although *Pennhurst II* would bar the court from granting injunctive relief on this ground, the court might retain jurisdiction in case state courts later interpret state law as applying to the federal plaintiff. If the litigation to this point constitutes federal "proceedings of substance on the merits," Hicks v. Miranda, 422 U.S. 332, 349 (1975), the *Younger* line of cases may not block the federal court from addressing the federal claims.

could enjoin enforcement of the environmental regulation on the ground that it does not apply to the plaintiff. If a later state court decision makes it clear that the federal court misinterpreted the regulation, and that the regulation does apply to the plaintiff, the federal court can reopen the case to consider the remaining state claims, and if need be, the constitutional claim.[179] Federal jurisdiction over the federal claim is ensured, but only because the federal court could grant relief on the pendent state claims.

This particular need for pendent jurisdiction rarely will arise in institutional reform cases. The constitutional questions in such cases usually are "in parallel" with the state law questions. That is, the state and federal grounds are alternative bases for relief; the constitutional issues turn on institutional conditions, not on the proper construction of state law. Because the federal court can go directly to the federal issues, *Pennhurst II* presents no bar to exercising federal court jurisdiction. Noninstitutional cases, by contrast, have at least some state issues "in series" with federal issues. Because the federal court must interpret state law before it can reach the federal questions, pendent jurisdiction is necessary to ensure that the federal court always can exercise its jurisdiction over federal claims.

B. The Impact of Institutional and Noninstitutional Relief on State Sovereignty

In shaping eleventh amendment doctrine, in short in deciding whether a certain type of suit is "against the state," the Court gauges both the need for federal jurisdiction and the extent to which it will compromise state sovereiguty. For example, the Court has held the eleventh amendment bars suits naming the state or a state agency as a defendant,[180] but makes an exception for certain suits naming state officials.[181] The point is not that such suits are not really suits "against the state," but rather that the exception is necessary to promote the policy of making a federal forum available to vindicate federal rights.[182] Another example is the distinction the Court has drawn between suits involving retroactive relief and those involving prospective relief. In *Edelman v.*

179. In some cases, the Court has structured federal decrees based on state law to permit the parties to reopen the federal case if the state courts later interpret the state law differently. *See* Lee v. Bickell, 292 U.S. 415, 426 (1934); Wald Transfer & Storage Co. v. Smith, 290 U.S. 602 (1933); Glenn v. Field Packing Co., 290 U.S. 177, 178-79 (1933); *see also* Field, *supra* note 23, at 1094 n.90 (arguing that even if the decree omits such a provision, the federal court may modify the decree when the state court "has authoritatively spoken").

180. *See, e.g.*, Alabama v. Pugh, 438 U.S. 781 (1978) (federal suit barred absent state consent).

181. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908).

182. *See Pennhurst II*, 465 U.S. at 105; *see also supra* text accompanying note 15.

Jordan,[183] the Court held that the eleventh amendment bars suits naming state officials when the relief is a monetary award from the state treasury.[184] Had the Court not drawn such a distinction, either the eleventh amendment or *Ex parte Young* would be a dead letter.[185]

Institutional reform suits have an especially great impact on state sovereignty, and thus raise eleventh amendment concerns. These cases have become an important vehicle by which public interest organizations press for far-reaching structural changes in governmental institutions.[186] Born out of the desegregation litigation in the 1950's and 1960's,[187] suits for affirmative injunctions were virtually unknown when the Court decided *Ex parte Young.*[188]

Typically, such suits charge that state custodial institutions, such as prisons and mental institutions, do not comply with affirmative statutory or constitutional obligations. The plaintiffs' lawyers seek to reform these institutions through detailed injunctions specifying the type, quantity, and quality of services the institution must provide.[189] Upon finding that institutional conditions violate statutory and constitutional provisions, the district court frequently creates a small bureaucracy consisting of special masters and a professional staff to manage the institution and make the day-to-day decisions necessary for interpreting and implementing the decree.[190]

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183. 415 U.S. 651 (1974).

184. *Id.* at 677. In some cases, prospective relief requires the expenditure of substantial amounts of state funds. The Court has upheld the relief in such cases even though it is intended to have a remedial effect. *See id.* at 668 (calling this "ancillary effect . . . a permissible and often inevitable consequence" of *Ex parte* Young); Milliken v. Bradley, 433 U.S. 267, 288-90 (1977) (upholding district court order for state to pay costs of a remedial educational program).

185. The *Pennhurst II* Court also recognized this tension. *See* 465 U.S. at 106 (*"Edelman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte* Young while at the same time preserving to an important degree the constitutional immunity of the States."). The Court has favored prospective relief because retroactive relief would have a greater disruptive impact on state programs, *Edelman,* 415 U.S. at 666 n.11, and because prospective relief is more critical than compensation in vindicating the federal rights derived from the fourteenth amendment. *See* Green v. Mansour, 106 S. Ct. 423, 426 (1985).

186. *See* Diver, *supra* note 26, at 45 ("Parties have used litigation less as a method for authoritative resolution of conflict than as a means for reallocating power."); Ferleger & Boyd, *Anti-Institutionalization: The Promise of the* Pennhurst *Case,* 31 STAN. L. REV. 717 (1979) (describing the authors' use of litigation to achieve their goal of deinstitutionalizing Pennhurst).

187. *See* Fiss, *supra* note 26, at 2-4. The first Supreme Court decision approving structural relief in a desegregation case did not come until 1971 in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

188. *See Ex parte* Young, 209 U.S. 123, 158 (1908) ("There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action.").

189. *See* Chayes, *supra* note 26, at 1298-302; Diver, *supra* note 26, at 49-64; Fiss, *supra* note 26, at 27-28; Fletcher, *supra* note 26, at 637-41.

190. For a brief description of the special master's responsibilities in the *Pennhurst* case, *see*

The structural reform decree eviscerates state discretionary authority because the remedy is disconnected from the right;[191] there is no "unique remedial regime that follows ineluctably from and is measured by the determination of substantive liability."[192] Consequently, the judge's discretion in fashioning relief is "dramatically enhanced,"[193] invariably with a loss of state autonomy in managing the state institution.[194]

Institutional reform suits also threaten state sovereignty by putting state monies at the disposal of federal judges.[195] Through its decree, the court requires the state to pay for new programs, as well as for the federal officials who design and implement these programs. One important consequence is that the state must reallocate state funds, generally at the expense of other individuals, social welfare programs, and institutions not represented in court.[196]

The federal court's interference with state autonomy is heightened when the institutional reform decree is based on a pendent state claim. Often, a federal judge will be less sensitive than a state judge to the nuances of state legislative policy. In devising an injunctive decree, the federal judge will look only to the statutory provisions and will overlook the cold legislative judgment that gives operative meaning to the statute—the actual appropriation of funds to operate the institution. In reality, the substantive rights conferred by state law are a combination of statutory provisions and appropriations to implement those provisions.[197] Whereas the federal judge has limited incentive and ability to weigh competing state concerns carefully,[198] a state judge is more likely

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supra note 39; *see also* Note, *supra* note 2 (describing the implementation of a detailed injunctive decree reforming Alabama's mental health facilities).

191. *See* Chayes, *supra* note 26, at 1293.

192. Chayes, *supra* note 114, at 46.

193. *Id.*

194. For this reason, the *Pennhurst II* Court wrote that even relief based on federal law, which normally would be permitted under *Ex parte* Young, "would be constrained by principles of comity and federalism." 465 U.S. at 104 n.13.

195. *See* Frug, *supra* note 132, at 716 n.5, 743-57; *see also* Harriman & Straussman, *Do Judges Determine Budget Decisions: Federal Court Decisions in Prisons Reform and State Spending for Corrections?*, 43 PUB. ADMIN. REV. 343, 348 (1983) (federal suits challenging overcrowded prison conditions have caused state legislatures to increase prison budgets).

196. *See Nightline: Wrongfully Institutionalized—and Forgotten* at 4-5 (ABC television broadcast, Sept. 5, 1985) (transcript on file with author) (Pennsylvania Secretary of Public Welfare, Walter Cohen, commenting that in responding to the court order in *Pennhurst* the state had to ignore other institutionalized persons in other state institutions); Weinstein, *The Effect of Austerity on Institutional Litigation*, 6 LAW & HUMAN BEHAV. 145, 146 (1982) (because resources are scarce, institutional reform remedies "require the redistribution of present services and resources, generally from one poor group to another").

197. As the *Pennhurst II* Court observed, to "the extent there was a violation of state law in this case, it is a case of the State itself not fulfilling its legislative promises." 465 U.S. at 108-09.

198. *See* McRedmond v. Wilson, 533 F.2d 757, 766 (2d Cir. 1976) (Van Graafeiland, J.,

to be sensitive to the full meaning of state law.

In principle, state sovereignty means the state is the final arbiter of state laws,[199] but in practice the federal judge may irrevocably displace state officials in interpreting and implementing state law. If the federal court imposes an interpretation of state law different from that which the legislature originally intended, there may be insufficient legislative or agency will to change it back. In many institutional reform suits, agency and legislative officials side with the plaintiffs in order to advance substantive reform goals or to enhance the institution's budget,[200] or even to avoid responsibility for difficult political issues.[201] The federal court decision may shift the balance of power, requiring advocates of the old order to take the initiative. Because it often is easier to block legislation than to enact it, the federal court decision makes it difficult to reassert the earlier prevailing view of state law.

Even if they had sufficient political power to do so, state legislators may be unwilling to "reverse" a partially implemented decree. Some legislators will want to avoid the additional delay or disruption entailed by removing the federal court's reforms; others will want to avoid a confrontation with the federal court.[202]

Perhaps most importantly, neither state court decisions reinterpreting state law nor new legislation would allow state officials to reassert

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dissenting) ("A Federal judge rearranging a State's penal or educational system is like a man feeding candy to his grandchild. He derives a great deal of personal satisfaction from it and has no responsibility for the results."); Chayes, *supra* note 26, at 1309 (if "the decree calls for a substantial commitment of resources, the court has little basis for evaluating competing claims on the public purse").

199. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (federal court supervision over state law "is an invasion of the authority of the State and, to that extent, a denial of its independence") (quoting Field, J., dissenting in Baltimore & O.R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893)).

200. *See, e.g.*, Ferleger & Boyd, *supra* note 186, at 720-21 (reporting that a Pennhurst administrator actively sought a structural reform suit); Harriman & Straussman, *supra* note 195, at 349 (suggesting that prison administrators, who normally have little political power in the legislature or in the executive branch, use litigation as a means to increase their budgets).

201. *See* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 562.

202. The *Pennhurst* litigation provides an example of a state legislature opposing the district court, but in the end bowing to its will. When it created the special master's office, the district court ordered the state's Department of Public Welfare to fund the special master's operations. Following the Supreme Court's 1981 decision in *Pennhurst I* reversing the Third Circuit, the state legislature, at the behest of the Secretary of the Department of Public Welfare, refused to appropriate the necessary money. When the Department in turn refused to pay any money to the special master, the district court held the Secretary and Department in contempt, fining them $10,000 for each day of noncompliance. Halderman v. Pennhurst State School & Hosp., 533 F. Supp. 631, 640 (E.D. Pa. 1981), *aff'd*, 673 F.2d 628 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984). Although the legislature continued to refuse to appropriate money for the special master's expenses, it did permit payment of $1.2 million in fines, knowing that the district court was directing those payments to the special master's account. Halderman v. Pennhurst State School & Hosp., 526 F. Supp. 423 (E.D. Pa. 1981).

their authority over state policy. The basic disagreement between state officials and the federal judge generally is not over the proper interpretation of state law, but over both the degree to which and the means by which the federal judge implements state law. Reinterpreting or amending the statute will not shift discretionary authority back to state authorities.

By contrast, noninstitutional relief based on a pendent state claim does not displace state discretionary authority or reallocate state spending priorities. For example, a suit to enjoin enforcement of a state environmental regulation, or the litigation in *Siler* itself to enjoin state officials from enforcing state regulations setting railroad rates, does not require state officials to *do* something, but rather to *stop* doing something. Of course, every affirmative obligation can be formulated as a negative duty. A court order to provide shower water in a prison at a certain temperature could be characterized as an order prohibiting shower water at any other temperature. Nevertheless, there is an important functional distinction between "affirmative" and "negative" injunctions that also marks important differences in the impact that the relief has on state sovereignty.[203]

Siler and *Pennhurst* illustrate this distinction. In *Siler* the injunction prevented state officials from enforcing the state railroad rate regulations, but it did not compel them to create new regulatory programs, spend state resources, or exercise their discretion in any particular fashion. Nor did the decree permit federal officials either to assume responsibility for managing a state program or institution, or to relegate state officials to subordinate positions in the federal bureaucracy. Unlike the district court decree in *Pennhurst, Siler* did not shift discretionary authority—in short, political power—from state to federal authorities.[204]

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203. The one exception to the distinction between affirmative and negative injunctions that comes to mind is a suit challenging the constitutionality of a state tax system. Both Congress and the Court have made clear that the negative injunctions sought in these suits pose such large threats to state autonomy that they must be heard in state court unless the state court remedy is inadequate. *See* Tax Injunction Act, 28 U.S.C. § 1341 (1982 & Supp. III 1985) (prohibiting federal district courts from interfering with assessment, levy, or collection of state taxes); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (discussing scope and purposes of the Tax Injunction Act); *see also* Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 102-03 (1981) ("Congress also recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts. . . . This legislation, and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation.").

204. *See also Ex parte* Young, 209 U.S. 123, 159 (1908) (making the point that negative injunctions, as compared with affirmative decrees, do not interfere with the discretion of state officers).

The distinction between affirmative and negative decrees also may demarcate those issues a federal court is most capable of addressing. *See* D. HOROWITZ, THE COURTS AND SOCIAL POLICY 19 (1977) ("[T]here is a difference between foreclosing an alternative and choosing one, between constraining and commanding. Among other things, it is this difference, and the problematic

It goes too far to say that noninstitutional relief based on state law does not interfere at all with state sovereignty; it does, but only to a limited extent. First, it blocks enforcement of a state law. Although this effect can be significant, it is much less significant than the impact of an affirmative decree reallocating state resources and blocking state officials from exercising their discretionary authority in managing state institutions.

Second, a negative decree requires the federal court to interpret—and thus to some extent to displace state officials from interpreting—state law. Interpreting state law, without more, normally poses only relatively modest federalism problems. In diversity and pendent jurisdiction cases between private parties, federal courts routinely interpret state law without any suggestion that the state's autonomy is at risk.[205] When the Court has required abstention, its aim usually has been to avoid premature decision of constitutional questions rather than to protect state autonomy.[206]

Even when the defendant is a state official, the threat to state sovereignty posed by negative decrees is modest. If state law is unclear, the court may abstain to permit a state court to provide an authoritative interpretation. If the court does not abstain, its interpretation of state law is not binding on state courts. After the plaintiff obtains a federal court order enjoining enforcement of the regulation, the state should be able to seek a state court interpretation that will be both definitive and binding on the federal court. Indeed, to preserve this opportunity, the Court has required federal decrees based on state law to provide explicitly that the parties may move to reopen the case if a state court later interprets state law differently than did the federal court.[207] Thus, federal judicial power to decide pendent state claims may displace state authority to interpret state laws, but only temporarily.

Finally, the intrusion on state sovereignty that occurs when a federal

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character of judicial resources to manage the task of commanding, that make the question of capacity so important.").

205. Professor Field correctly points out, however, that some types of decisions in suits between private parties may bear heavily on important state interests. *See* Field, *supra* note 23, at 1142.

206. *See* Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970) (per curiam); United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135-36 (1962); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960). *But see* Lehman Bros. v. Schein, 416 U.S. 386 (1974) (in a diversity case raising no constitutional questions, the Court remanded to the court of appeals to consider whether certification of state issue to state court is appropriate).

207. *See supra* note 179. Justice Stevens cited these cases in his dissent in *Pennhurst II*. *See* 465 U.S. at 163 n.46. His argument, implicitly, is that relief based on pendent state claims intrudes only modestly on state sovereignty because the state is free to impose its interpretation of state law. Although this argument is correct when applied to noninstitutional cases, it cannot be extended to institutional reform cases. The principal problem is that once a federal court finds the state liable and orders immediate implementation of detailed affirmative relief, the state is unlikely to undo the new program. Such practical barriers do not exist in noninstitutional cases.

court interprets state law frequently is unavoidable. If the state and federal issues are "in series," as they often are in noninstitutional cases, the federal court must interpret state law in order to reach the federal question. Barring relief based on pendent claims in noninstitutional cases will not skirt the need to interpret state law.

CONCLUSION

A broad reading of *Pennhurst II* would provide an easily administered rule: the eleventh amendment bars relief based on state law. This holding would avoid the ambiguity inherent in cases, such as *Lyons*,[208] instructing lower courts to consider the impact of relief on state autonomy in deciding whether to grant equitable relief.

A broad reading of *Pennhurst II*, however, disregards the importance of pendent jurisdiction and fails to acknowledge that different kinds of relief have different impact on state sovereignty. Moreover, it would be inconsistent with earlier developments in eleventh amendment doctrine, such as *Ex parte Young*, in which the Court weighed the intrusion on state sovereignty against the importance of exercising federal jurisdiction.

If the Court's principal concern is, as I have suggested, institutional reform litigation, *Pennhurst II* falls far short of providing a complete doctrinal solution. For example, under long established eleventh amendment doctrine, *Pennhurst II* does not apply to pendent state relief against local officials.[209] Nor does it bar relief based on federal law. It is unlikely that the Court would seek to limit federal remedial power over federal claims by extending *Pennhurst II*; *Ex parte Young* is too well entrenched.

It is possible to sketch out a different approach, focusing more directly on the source of the problem—the power of the federal courts to formulate and implement institutional reform decrees—while giving some weight to the plaintiff's choice of a federal forum. Rather than use the eleventh amendment to bar consideration of pendent claims, the Court could require federal courts to abstain from granting relief, relying by analogy on the equitable restraint doctrines in *Rizzo* and *Lyons*. In other words, the federal court would consider claims for declaratory relief on institutional liability (on both federal and state grounds),[210] but it would abstain to permit the state courts (or even the state legislature) to formulate and implement appropriate relief. The plaintiff would have unrestricted access to federal court on the issue of liability, and the fed-

208. 461 U.S. 95 (1983).

209. *See, e.g.*, Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (eleventh amendment not applicable to suits against a county).

210. *See supra* note 27 (describing declaratory relief satisfying the eleventh amendment).

eral court would not displace state discretionary authority in formulating relief and setting spending priorities. In order to ensure that state officials do not abuse their obligation to exercise their discretionary authority responsibly, the plaintiff should be able to return to federal court for "further necessary and proper relief"[211] if state officials failed to act with "due diligence," or perhaps if they acted in "bad faith."

These ideas are only preliminary. It is enough for now to recognize both that *Pennhurst II* should be read narrowly to achieve its intended purpose, and that there remains ample room for further doctrinal developments.

211. Declaratory Judgment Act, 28 U.S.C. § 2202 (1982).