

HOW TO BUILD A SEPARATE SPHERE: FEDERAL COURTS AND STATE POWER

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I. INTRODUCTION

States are not inviolable spheres of sovereignty. In our federal system, state courts can and must interpret federal law and are consequently subject to Supreme Court review,¹ state legislatures enact laws that may find their way into lawsuits brought in federal court,² and state-run institutions are bound by requirements of federal statutory and constitutional law.³ Interaction between the federal and state systems is thus inherent in the constitutional structure.⁴ Yet the federal courts base numerous doctrines of federal jurisdiction on a supposed need to respect the separateness of the states. What is the place for “separate spheres” in the analysis of jurisdictional doctrine? If the states cannot claim an entitlement to separateness, what determines when federal courts will respect their separateness nonetheless? *1486

Recently, in *Garcia v. San Antonio Metropolitan Transit Authority*,⁵ five members of the Supreme Court rejected the idea that state sovereignty limits Congress’ power under the commerce clause.⁶ In the view of the *Garcia* majority, the “sovereign state” is whatever remains after Congress has finished exercising its Article I powers.⁷ That is, the state is whatever lies inside of a boundary mutable at congressional will.⁸ Within that

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¹ See *infra* p. 1490.

² See *infra* pp. 1517-19.

³ See *infra* pp. 1511-12.

⁴ The two most common characterizations of the constitutional structure are “dual federalism,” in which the states are “integral units, equal with and antagonistic to the federal government while retaining their own impregnable spheres of authority,” and “cooperative federalism,” a “euphemis[m]” for the “substantial expansion of federal power at the expense of state authority.” Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 874 (1985). Professor Redish rejects both these characterizations and argues that the structure is instead one of “interactive federalism,” in which the two systems inevitably interact, at times in a cooperative or complementary way, and at times combatively. See *id.* at 880-81. For an historical account of the rise of the concept of “dual federalism” and the subsequent rise of “cooperative federalism,” see Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1068-69 (1984).

⁵ 469 U.S. 528 (1985).

⁶ See *id.* at 547-55 (opinion of Blackmun, J., joined by Brennan, White, Marshall, & Stevens, JJ.).

⁷ See *id.* at 547-50.

⁸ The *Garcia* Court attempted to assuage the states’ fears of extinction with the assurance that because they are represented in the federal government, they can trust Congress to look after their interests. The majority cited several examples of federal programs that benefit the states, and the aspects of the federal government (such as the electoral college and the membership of the Senate) that reflect the existence of states. See *id.* at 550-54. *Garcia* leaves open the possibility that the Court would intervene if the states somehow lacked this influence. Compare *id.* at 554 (“[a]ny substantive restraint on the exercise of Commerce Clause powers” must be justified as compensation for “possible failings in the national political process”) with *id.* at 565 & n.9 (Powell, J., dissenting) (arguing that Congress is influenced by special interest groups and is not responsive to the states).

boundary, the state enjoys its sovereignty, guaranteed – although not against further moving of the boundary – by the tenth amendment.⁹

Judicial doctrines of federal jurisdiction operate similarly to adjust – to redraw – the boundary that circumscribes the states’ independent functioning. The courts’ interpretive role regarding jurisdictional grants is well established. Although Congress initially prescribes the jurisdiction of the federal courts,¹⁰ the courts themselves and extensive room for interpretation of these grants of jurisdiction.¹¹ Courts may *1487 interpret their jurisdiction expansively,¹² or they may create “prudential” jurisdictional doctrines that embody principles of restraint.¹³ Unlike Congress, the courts do not initiate legislative schemes that redefine the states.¹⁴ They simply respond to cases brought their way by litigants. But when those cases present jurisdictional issues involving the states, the courts face the task of making the kind of jurisdictional doctrine that is capable of moving the boundary that defines the states’ separate spheres. The spheres in which the states enjoy independence from federal court jurisdiction are thus analogs of the spheres left untouched by legislative impositions under the tenth amendment: they are whatever remains inside boundaries drawn by the courts.

What determines when federal courts will shift the boundaries that define state autonomy? It is the thesis of this Article that the division of judicial opinion about federal jurisdictional doctrines is traceable to the differing interests that motivate judges to redraw the boundary around states’ separate spheres. In identifying these federal interests, judges express their fundamental beliefs about the role of the federal courts in relation to the states. To explore this theory, the Article focuses on two Supreme Court

⁹ The tenth amendment to the Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

¹⁰ Article III provides for the possible establishment of lower federal courts and sets the outside boundaries of jurisdiction that may be granted to them. See U.S. CONST. art. III, § 1. Congress has never granted the full extent of possible article III jurisdiction, and there are important, pragmatic reasons why it should not do so. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 511-15 (1928). Article III also establishes the Supreme Court and goes on to assign its original and appellate jurisdiction, but gives Congress the power to make “Exceptions, and ... Regulations” to the Court’s appellate jurisdiction. U.S. CONST. art. III, § 2, cl. 2. Scholars have debated the extent of Congress’ power over federal court jurisdiction. Compare Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (arguing that Congress has virtually unlimited power to regulate the jurisdiction of the lower federal courts) with Sager, *The Supreme Court, 1980 Term-Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 26 (1981) (arguing that the ‘structural embarrassment’ of the lack of a constitutional grant of jurisdiction ‘does not render lower courts as vulnerable to congressional bullying as one might suppose’).

¹¹ See Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1985) (demonstrating the pervasiveness of discretion in jurisdictional doctrine and defending that discretion on the ground that “courts are functionally better adapted to engage in the necessary fine tuning [of jurisdiction] than is the legislature”). Professors Redish and Wells have offered different views of the role of federal courts in defining jurisdiction by use of abstention. Compare Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74-75, 110-14 (1984) (arguing that principles of separation of powers should preclude the courts from applying doctrines of restraint to limit the jurisdiction given them) with Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1122 (1985) (arguing that judges appropriately make federal common law with abstention doctrines that limit jurisdictional grants).

¹² See, e.g., *Mitchum v. Foster*, 407 U.S. 225 (1972) (discussed infra at note 14).

¹³ See infra pp. 1531-34 (discussing the doctrine of equitable restraint).

¹⁴ Congress obviously has a substantial role in laying out (and changing) state boundaries when it makes jurisdictional grants. But the courts’ interpretive role should not be underestimated. For example, the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), bars injunctions against the state unless the injunction is “expressly authorized” or “in aid of [the federal court’s] jurisdiction.” The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), provides a cause of action against the state and authorizes injunctions against the state. It was the Supreme Court, not Congress, which was responsible for determining that the latter statute fell within the “expressly authorized” exception and for constructing a backup doctrine of equitable restraint lest that authorized intrusion be overused. See *Mitchum*, 407 U.S. 225; *Younger v. Harris*, 401 U.S. 37 (1971).

cases: *Michigan v. Long*¹⁵ and *Pennhurst State School & Hospital v. Halderman*.¹⁶ *Long* involves the issue of the independent and adequate state ground bar to Supreme Court review, and *Pennhurst* deals with the states' sovereign immunity to suit in federal court. In these contexts, the Article considers what federal interests have motivated jurisdictional line-drawing. *1488

The role of the federal courts in expounding federal law appears to be the motivating interest that has had the greatest appeal, at least to a majority of the current Supreme Court.¹⁷ This formalistic interest in delineating the correct rules of federal law, which has guided many jurisdictional decisions, reflects concern for the uniformity and supremacy of federal law. Other interests, however, have motivated other judges and have commanded a majority of the Supreme Court in other eras. The most notable of these is the desire to vindicate federal rights, an interest which characterized the Warren Court¹⁸ and continues to influence a minority of the current Court.¹⁹

This Article finds both of these formulations of the federal interest deficient and focuses on a third one, suggested by Justice Black in *Younger v. Harris*²⁰ the federal interest in effectively functioning states. In *Younger*, Justice Black attributed the federal courts' avoidance of interference with state courts to "proper respect for state functions" and to an awareness "that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the State and their institutions are left free to perform their separate functions in their separate ways."²¹ He immediately disclaimed any belief in "blind deference to 'states' Rights,'" instead grounding this "proper respect" or "comity" in "a sensitivity to the legitimate interests of both State and National Governments."²² It is not that the states deserve autonomy simply because they are states, but rather that it is appropriate to leave the states alone, to accord them a "separate sphere," because the "*National Government* will fare best"²³ that way.²⁴ The state cannot enforce any entitlement to independence, but neither will the federal courts exercise their power without taking into account the federal interest in preserving the states' independent function.²⁵ *1489

¹⁵ 463 U.S. 1032 (1983).

¹⁶ 465 U.S. 89 (1984).

¹⁷ See *infra* pp. 1504-07.

¹⁸ See Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1103 (1977) (observing that the Warren Court, motivated by the desire to protect the civil rights movement, based its theory of federalism on the premise that the federal courts are "the primary guardian[s] of constitutional rights").

¹⁹ See, e.g., *Murray v. Carrier*, 106 S. Ct. 2678, 2679-80 (1986) (Brennan, J., dissenting).

²⁰ 401 U.S. 37 (1971).

²¹ *Id.* at 44. Justice Black cited as support for this often quoted formulation the "ideals and dreams" found in "the profound debates that ushered our Federal Constitution into existence." *Id.*

²² *Id.*

²³ *Id.* (emphasis added).

²⁴ See Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 408 ("The meaning of some activity's being 'local' does not lie in its being 'reserved for the states' or apt to be more efficiently handled by a local authority but in the fact that, unlike most national issues, it is being handled by a participatory institution."); cf. Redish, *supra* note 4, at 864 (arguing that there are no "strict lines of demarcation in function between independent and antagonistic sovereigns," as the theory of "dual federalism" would suggest, but rather there is "a largely 'interactive' blend of state and federal authority").

²⁵ A similar view of state sovereignty seems evident in the dissenting opinions in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which do not characterize the states as immutable separate spheres. See *id.* at 562-63 & n.5, 578

This Article argues that the federal interest in the states as effectively functioning entities includes both having states follow and apply federal law in their courts and encouraging states to develop their own law governing their own institutions. This interest in effectively functioning states suggests expansion of federal jurisdiction when the states either are failing to follow or are misapplying federal law, and restriction of federal jurisdiction when states are engaged in a procedure that is adequate to enforce a federal right or are attempting to find in their own law alternative solutions to the problems addressed by federal law. Federal jurisdiction is needed to correct stagnant situations in which the states are not providing a forum or remedy for would-be federal plaintiffs. In contrast, federal jurisdiction may be counterproductive when states are actively and constructively engaged in dealing with those problems.²⁶ If jurisdictional doctrines are structured optimally, the state that fails to function effectively should suffer federal interference, while the properly functioning state should enjoy a “reward” of separateness. Jurisdictional doctrine may then serve to instruct the states on how to build for themselves the kind of separate sphere that federal courts will respect. *1490

II. ENSURING SUPREME COURT JURISDICTION OVER STATE COURT DECISIONS OF FEDERAL LAW

A. State Courts and the Application of Federal Law

Incorporation of the Bill of Rights into the fourteenth amendment has layered federal constitutional law onto state criminal law, opening up a vast body of state cases to the possibility of Supreme Court review.²⁷ The breach of states’ “separate spheres” effected by the imposition of federal law through incorporation results in a continual loss of federal control over federal law – a corresponding breach of the federal “sphere” – as the

(Powell, J., dissenting) (arguing that the Constitution mandates a balance of power between state and federal governments for the purpose of protecting fundamental liberties); *id.* at 588 (O’Connor, J., dissenting) (arguing that state autonomy is a value to be weighed in determining the extent of Congress’ commerce clause power). The Garcia dissenters did not assert the belief in “states’ rights” that Justice Black was so quick to disavow in *Younger*, rather, they seemed to share his belief that states perform their role in the federal system best when they are left to carry out their essential functions unregulated. See *id.* at 547-77 (Powell, J., dissenting); *id.* at 582 (O’Connor, J., dissenting).

The Garcia majority apparently recognized the importance of the states’ separate functioning, but it denied any role to the judiciary in defining the scope of that functioning. See 469 U.S. at 547-52 (noting the “elusiveness of objective criteria”). The dissenters, however, balked at placing the federalism limitations on Congress outside the scope of judicial review. The Justices basically differed, then, not over whether the states enjoy any area of autonomy, but rather over which institutions may redraw the boundaries around the states’ separate spheres. Their difference was acute in *Garcia* because the courts have traditionally viewed the commerce clause as granting broad power to Congress and authorizing minimal judicial intervention. As noted above, however, the court has also traditionally played a role in creating jurisdictional doctrine. See *supra* pp. 1486-87. Thus, the thesis presented in this Article does not appear to be inconsistent with any of the opinions in *Garcia*. Indeed, at least one commentator has suggested that the Garcia majority itself perceived a minor role for the judiciary in defining state autonomy, even under the commerce clause. See Rapaczynski, *supra* note 24, at 364-65 (arguing that Garcia does not completely render federalism limitations on national power “nonjusticiable” because it holds open the door for judicial review in the event of a congressional failure to perform its role of protecting the interests of the states).

²⁶ Cf. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624-26 (1981) (suggesting that jurisdictional rules can provide incentives to the state courts to treat federal law issues hospitably, and criticizing rules that reflect mistrust of state courts or foster disrespect for federal law).

²⁷ See *Michigan v. Long*, 463 U.S. at 1043 n.8 (noting that state courts handle far more criminal cases (over 12 million in 1982) than do federal courts (32,700 in 1982) and “necessarily create a considerable body of ‘federal law’ in the process”).

states must interpret and apply federal law in their day-to-day processing of criminal cases.²⁸

The Warren Court accompanied its development of the incorporation doctrine with parallel developments in the rights accorded criminal defendants.²⁹ As long as state courts were engaged in absorbing these new standards, they left analogous provisions in state constitutions unexplored.³⁰ Criminal appeals then tended to present only unmixed questions of federal law, and the Supreme Court readily recognized its jurisdiction to resolve these cases. In recent years, however, federal boundary-pushing has subsided,³¹ and some state courts have begun to tap their own constitutions.³² *1491

The supremacy clause of the federal Constitution prevents a state from reducing criminal defendants' protections below the "floor" established by federal law.³³ A more generous interpretation of the state right, however, has the "counter-supremacy" effect of divesting the Supreme Court of jurisdiction. Because the Supreme Court, when reviewing cases arising from the state system, can review only questions of federal law, it may correct a decision that erroneously affords the defendant more protection than the federal Constitution gives only if that decision is premised on the federal Constitution.³⁴ The same protection, when premised on the state constitution, identically worded though the state provision may be, escapes review.³⁵ Thus, the source a state court cites for a right it

²⁸ For an enunciation of a jurisdictional doctrine designed to prevent one sovereign from interpreting the other's law, see *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). For an argument in favor of one sovereign applying the other's law, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). Professors Cover and Aleinikoff find value in the layers of relitigation involved in federal habeas review of state court criminal decisions because of the beneficial dialectical effect of combining two distinct views of federal rights: the "utopian" federal view and the "pragmatic" state view. See *id.* at 1050. For an argument that too much interaction may debilitate the states, see O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

²⁹ See Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

³⁰ See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

³¹ See Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 153-55 (1980).

³² For a sampling of the commentary suggesting that state courts should take this route, see Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982); Bator, *supra* note 26; Brennan, *supra* note 30; Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); and Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985). For a contrary analysis, see Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

³³ This rule was not always so clear. Justice Harlan, supportive of federalism principles, thought that the states should have some latitude in determining such matters, because the resultant diversity and experimentation outweighed the harm that might be caused by individual states falling below the federal standard. See Wilkinson, *supra* note 29, at 1192-94, 1214-19.

³⁴ Prior to 1914, the Court lacked the power to review a state decision of federal law that upheld the assertion of a federal right. Compare Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 and Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-87 with Judiciary Act of 1914, ch. 2, 38 Stat. 790; compare Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 911 (1984) ("Although the uniformity-assuring function of the Court does not strike me as a constitutionally mandated one, as a matter of policy, our system – any system – would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.") with Bator, *supra* note 10, at 1040-41 (rejecting the idea that the need for uniformity among federal decisions limits congressional power over Supreme Court jurisdiction and noting that for years federal criminal cases were not reviewable in the Supreme Court). This historical evidence provides some support for Justice Stevens' assertion in *Michigan v. Long*, 463 U.S. 1032 (1983), that there is no federal interest in reviewing overgenerous state decisions. See *infra* p. 1506. But it is questionable whether the lack of legislative interest in providing a jurisdictional grant in previous years should be the yardstick by which we measure the federal interest today, particularly because that lack of jurisdiction existed before the Bill of Rights was incorporated into the fourteenth amendment.

³⁵ State courts possess final authority when they interpret their own constitutions differently from the federal Constitution, even when the words track those of the latter. See Brennan, *supra* note 30, at 498-504; cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (opinion of Rehnquist, J.) (discussing the state's right to provide broader rights in its own constitution than those guaranteed by the federal Constitution). Professor Powell has discussed PruneYard as a test of Justice Rehnquist's philosophy of federalism. See Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1333-35 (1982) (arguing that Justice Rehnquist's views on federalism, as evidenced in PruneYard, are not "merely a surrogate or disguise for a simple

enforces determines whether or not the Supreme Court has the power to hear the appeal. The state court's effective power over Supreme Court jurisdiction in these instances is intriguing: it can "overprotect" a defendant, and by simply citing the words as they appear in the state constitution instead of citing the same words in the federal Constitution, disempower the *1492 Supreme Court.³⁶ It can create a separate sphere for itself by saying so. Its word makes its word the last word.

This stunning reversal of the usual order of power, which bears the drab appellation "the independent and adequate state ground doctrine," occurs because the Supreme Court, which is in the business of deciding cases and emphatically not in the business of emitting free-floating legal advice,³⁷ cannot decide a federal question in a case that already contains the basis for upholding the same outcome on remand should the federal basis for the state court's decision be reversed.³⁸ That decision of federal law would not resolve any controversy; it would be an advisory opinion, anathema to article III.

But when does the state ground stand independent of the federal ground, so that a reversal of the federal ground does not necessarily undermine the state basis?³⁹ In *Michigan v. Long*,⁴⁰ the development *1493 of state constitutional law described above confronted the Supreme Court with the question of how to decide whether a state court had relied on its own Bill of Rights analog in a sufficiently independent way.⁴¹ Quite naturally, a state court discussing, for example, a search and seizure problem, will string cite the state constitutional provision alongside the fourth amendment. In discussing precedent, the same court is likely to emphasize the well-developed, well-articulated

conservative politics"). Professor Powell goes on to discredit Justice Rehnquist's federalism as unsupported by the history upon which his interpretivist theory relies. See *id.* at 1359-70.

³⁶ In Justice O'Connor's words, the states have the "power to grant or withhold jurisdiction to the Supreme Court by the choice and articulation of the grounds for the state court decisions." O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5 (1984-85).

³⁷ See Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

³⁸ See *Long*, 463 U.S. at 1038 n.4 (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). The classic statement of this policy appears in *Herb v. Pitcairn*, 324 U.S. 113, 125-26 (1945):

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-26.

The word "would" here indicates that doubt about what the state court would do avoids advisoriness. We should not see the state court's subsequent decision to adhere to its original result on a state law basis as retroactively making the earlier Supreme Court decision merely advisory, unless we could predict with certainty that adherence based on the first opinion. If the state court takes a new look at state law on remand and decides at that point that the state right was violated, the Supreme Court's opinion is no more advisory than any decision in a chain of appeals and remands before the result becomes fixed.

³⁹ This is the "independent" component of the "independent and adequate" requirement. Adequacy of the state ground should never be a problem when a state constitution is construed in a way that can only be more protective of individual rights than the federal Constitution. In contexts in which the state court skimps on its protection to the criminal defendant and seeks to use a procedural ground – such as the requirement that a federal constitutional objection be made contemporaneously at trial – to bar review of a federal ground, the relative importance of the federal and state interests at stake may lead the Court to find that the state ground is not adequate. See *Henry v. Mississippi*, 379 U.S. 443 (1965) (finding inadequate a procedural default ground barring consideration of a federal constitutional claim); see also Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130, 1137-45, 1159-64 (1986) (suggesting several sources for the federal authority to find a state procedural ground inadequate); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

⁴⁰ 463 U.S. 1032 (1983).

⁴¹ See *Long*, 463 U.S. at 1037-40.

federal case law.⁴² Of course, references to federal law, no matter how numerous and lengthy, will not bar a state from successfully claiming to rely independently on state law. The mere fact that the court could have relied on the state provision, however, is not enough, because one cannot know whether it would have chosen to expand state law beyond what it believed to be the federal standard.⁴³ If the court misinterpreted federal law and happened to expound state law while operating under this misconception, the state ground may lack the necessary independence from the federal ground.⁴⁴

In *Long*, the Supreme Court instituted a solution to the problem of appeals from state court decisions that rely on an ambiguous mixture of state and federal constitutional rights: a presumption in favor of Supreme Court jurisdiction.⁴⁵ The responses of the various justices to this problem shed light on the kind of federal interest that for them justifies alteration of the state's separate sphere. Justice Stevens, in dissent, professed to find no federal interest in the standards that state courts impose on themselves in the name of federal law, as long as *1494 those standards do not fall below the minimum guarantees of the federal Constitution.⁴⁶ Justice O'Connor, on the other hand, writing for the majority, viewed muddled federal/state opinions as creating a union-threatening deluge of unauthoritative federal law elaboration.⁴⁷ It is interesting to see the conservative members of the Court spring into action on behalf of national unity and against state-generated diversity, and a more liberal justice insist on the separate, independent functioning of the states, precisely when state courts begin overestimating the generosity of federal rights.⁴⁸ *Michigan v. Long* understandably tends to stir up the common suspicion that procedural doctrine masks substantive goals.⁴⁹ Yet *Long* holds itself out as a pragmatic, thoughtful attempt to forge a permanent solution to the problem

⁴² Alternatively, but creating equal confusion, the state court may cite earlier state cases that may themselves rely on federal law. In fact, the Supreme Court seemed most concerned in *Long* with the problem of having to go back and read state cases other than the one currently under review in order to ascertain whether it had jurisdiction. See *id.* at 1039. In that circumstance, the Court might have to go back through several layers of state precedent to determine whether the earlier state cases originated in federal law, and likely would view the contention that the state court intentionally rested its decision on independent state grounds with increased dubiousness. See *infra* p. 1499.

⁴³ See 463 U.S. at 1038 n.4 (citing *Beecher v. Alabama*, 389 U.S. 35, 37 (1967)).

⁴⁴ See *id.* at 1042-43 n.8 (citing *Delaware v. Prouse*, 440 U.S. 648 (1979)).

⁴⁵ Commentary on *Long* is extensive. See, e.g., Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip*, 19 GA. L. REV. 799 (1985); Elison & NettikSimmons, *Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV. 177 (1984); Redish, *supra* note 4; Schleuter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079 (1984); Seid, *Schizoid Federalism, Supreme Court Power and Inadequate State Ground Theory: Michigan v. Long*, 18 CREIGHTON L. REV. 1 (1984); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984); Comment, *Michigan v. Long: Presumptive Federal Appellate Jurisdiction Over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081 (1984); Comment, *Michigan v. Long: The Supreme Court Establishes Presumptive Jurisdiction Over State Court Cases*, 20 NEW ENG. L. REV. 123 (1984- 85).

⁴⁶ See 463 U.S. at 1068 (Stevens, J., dissenting).

⁴⁷ See 463 U.S. at 1040-41.

⁴⁸ Justice Stevens, however, was the sole dissenter who argued that the Court lacked jurisdiction over the case. Justice Brennan, joined by Justice Marshall (who dissented on the fourth amendment ground), addressed the issue in a single sentence, citing a footnote in the majority opinion that states that "[t]here is nothing unfair about requiring a plain statement in this case." See *id.* at 1054, n.1 (Brennan, J., dissenting) (citing 463 U.S. at 1044 n.10). In the footnote cited by Justice Brennan, the majority explained that even under the traditional method of analyzing state precedent to determine whether the state has interpreted its constitution to offer greater protection than the federal Constitution, the Court would have had jurisdiction over *Long*. Justice Blackmun, concurring, found jurisdiction in the instant case, but criticized the majority for establishing a new presumption in favor of jurisdiction, perceiving "little efficiency and an increased danger of advisory opinions in the Court's new approach." 463 U.S. at 1054 (Blackmun, J., concurring).

⁴⁹ See, e.g., Nichol, *Book Review, An Activism of Ambivalence*, 98 HARV. L. REV. 315, 321 n.39 (1984) ("Long apparently indicates that federalism is not a value to be pursued when state courts have afforded their citizens too much constitutional protection.").

of how to know whether there is jurisdiction to review a state court decision that mixes federal and state constitutional law.⁵⁰ Let us then examine the *Long* decision in some detail and consider the motivations behind the making of jurisdictional doctrine that are reflected in the majority and dissenting opinions.

B. *Michigan v. Long*

1. Background

Beneath the jurisdictional issue in *Michigan v. Long* lay the question whether police may for their own protection search the inside of a car in connection with the detention of a criminal suspect. Prior federal case law had established only that the detainee himself could be searched for weapons.⁵¹ *1495

David Long had attracted the attention of two Michigan police officers by driving erratically and swerving off the road into a ditch. Stopping to investigate, the police found that Long had gotten out of the car and had left the door open, that he “appeared to be under the influence of something,” and that he had difficulty responding to a request for his license and registration.⁵² When Long began to walk toward the open car door, the police officers noticed a “large hunting knife” on the floor of the car, whereupon they stopped him and subjected him to a protective search.⁵³ Finding no weapons on Long’s person, one of the officers proceeded to look into the car, purportedly for other weapons, and saw an open bag of marijuana on the front seat.⁵⁴ The police arrested Long, searched the rest of the interior but found nothing, impounded the car, and opened the lockless trunk to find “approximately 75 pounds of marijuana.”⁵⁵ Unsuccessful in his attempt to suppress the marijuana, Long was convicted of possession of illicit drugs.⁵⁶

The Michigan Court of Appeals found the search of the car’s interior a valid “protective search” and the search of the trunk a valid “inventory search,”⁵⁷ but the Michigan Supreme Court reversed. Citing both the federal Constitution and the state constitution, the court dismissed self-protection as a justification for searching the interior, and consequently deemed the marijuana found in the trunk to be the fruit of an

⁵⁰ See 463 U.S. at 1039-41.

⁵¹ See *id.* at 1045-48. The leading case is *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* permits the police to detain a person upon reasonable suspicion that he has committed a crime. Pursuant to such a stop, the officers may also, without a warrant, search the suspect for weapons and “neutralize the threat of physical harm” when they reasonably believe the suspect is “armed and presently dangerous.” *Id.* at 24. The “*Terry* stop,” allowed in the absence of probable cause for arrest, thus supports only a danger-neutralizing warrantless search, in contrast to the broader search incident to arrest, which may extend to the purpose of preserving evidence of the crime. See *Chimel v. California*, 395 U.S. 752, 763 (1969). In all likelihood, the Michigan police had probable cause to arrest Long for driving while intoxicated, although they had not yet arrested him at the time of the search of the automobile’s interior. The state failed to assert that this probable cause to arrest supported more than a protective search, and the Supreme Court deliberately left this issue open. See 463 U.S. at 1035 n.1. On remand, the Michigan Supreme Court found this argument waived. See *People v. Long*, 419 Mich. 636, 649 n.6, 359 N.W.2d 194, 200 n.6 (1984).

⁵² See 463 U.S. at 1035-36 (quoting the Michigan Supreme Court’s characterization of Long’s consciousness in *People v. Long*, 413 Mich. at 469, 320 N.W.2d at 868).

⁵³ See *id.* at 1036.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ See *People v. Long*, 94 Mich. App. 338, 344, 347, 288 N.W.2d 629, 631, 633 (1979).

unlawful search.⁵⁸ According to the state supreme court, then, the trial court should have suppressed all of the marijuana found.

The United States Supreme Court held that the fourth amendment permitted a protective search of the automobile interior, “limited to those areas in which a weapon may be placed or hidden.”⁵⁹ Under *1496 this test, the presence of the knife, Long’s initial behavior, and his subsequent ability to “break away from police control and retrieve a weapon from his automobile” justified the search that uncovered the bag of marijuana.⁶⁰ The Court did not address the validity of the trunk search because the opinion under review had not reached this question.⁶¹ It remanded the case to determine whether the trunk search was valid under either federal or state constitutional law.⁶²

In order to reach the fourth amendment issue, however, the Court needed to determine whether it had jurisdiction over the case. Supreme Court jurisdiction was questionable because the court below had made two brief citations to the Michigan state constitution in an opinion that “otherwise relied exclusively on federal law.”⁶³ Bemoaning the lack of a “satisfying and consistent approach”⁶⁴ that ought to characterize “sensitive issues of federal-state relations,”⁶⁵ Justice O’Connor sought to resolve permanently the problem of applying the independent and adequate state ground doctrine to ambiguous mixtures of state and federal constitutional law.

2. Long’s Survey of Past Solutions.

Although Justice O’Connor found the problem a “vexing issue”⁶⁶ that the Court over the years had treated with troubling inconsistency, she identified only three basic judicial approaches. All three reflect a fairly consistent policy of avoiding jurisdiction based on speculation. *1497

The first approach is simply to dismiss the case whenever the ground for decision is unclear.⁶⁷ This method shows deference to the states and is certainly clear and capable of

⁵⁸ See *id.* at 472-73, 320 N.W.2d at 869-70.

⁵⁹ Long, 463 U.S. at 1049. The Court stated that such a search must be motivated by an effort of self-protection. Although its scope depends on the suspect’s ability to gain access to possible weapons, as well as on the locations of such weapons, contraband discovered in this self-protective process escapes application of the exclusionary rule. See *id.* at 1050.

⁶⁰ See *id.* at 1051-52.

⁶¹ See *id.* at 1053. Once the Michigan Supreme Court had declared the interior search invalid, the appropriateness of the trunk search as an “inventory” search dropped out of the case and was not presented to the United States Supreme Court. When the latter Court upheld the first search, that issue reemerged. See *id.* at 1053. In accord with *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), which held that the United States Supreme Court will not “decide federal constitutional issues raised [in the Supreme Court] for the first time on review of state court decisions,” however, the Court refused to address this question, even though the first state appeal had upheld the inventory search. See Long, 463 U.S. at 1053.

⁶² See *id.* at 1053 & n.17. Interestingly, the majority took the trouble to suggest that the state court was “free” to decide the trunk search question under review-shielding state law, but failed to point out the possibility of recasting the interior search question as one of state law. See *id.* at n.17.

⁶³ *Id.* at 1037. The state court had cited the state constitution along with the federal Constitution in a footnote, concluding: “We hold, therefore, that the deputies’ search of the vehicle was proscribed by the fourth Amendment to the United States Constitution and art. I, § 11 of the Michigan Constitution.” *Id.* at 1073 n.3 (citing *People v. Long*, 413 Mich. 461, 472-73, 320 N.W.2d 866, 870).

⁶⁴ *Id.* at 1038.

⁶⁵ *Id.* at 1039.

⁶⁶ *Id.* at 1038.

⁶⁷ See *id.* (citing *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934)). The Court cited *Lynch* for the proposition that “[i]n some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case.” *Id.* In *Herb*

consistent application. But it creates a presumption that may not always be appropriate; in some cases, there are strong indications that the state court felt compelled by its interpretation of federal law to interpret the state constitution as it did.⁶⁸ Moreover, the method leaves unsatisfied the important need for uniformity in federal law. To always dismiss the case would enshrine the states as “final arbiters”⁶⁹ of a vast body of federal law simply because these unauthoritative, would-be arbiters had mixed up the law. This is too flimsy a basis for wresting the central role of expounding federal law away from the Supreme Court, the ultimate interpretive authority and insurer of uniformity.⁷⁰

The second approach is to send the case back to state court and make the state court untangle the confusion it created.⁷¹ For example, in *Minnesota v. National Tea Co.*,⁷² the United States Supreme Court vacated the judgment of the Minnesota Supreme Court and remanded the case for clarification because the state court had relied on both the federal and state constitutions but had failed to take an “unequivocal position” and “declare its independence” from the federal decisions it discussed.⁷³ This approach mediates between what the Court recognized as a strong federal interest in preventing states from becoming “the final arbiters of important issues under the federal constitution” and the state interest in avoiding federal encroachments.⁷⁴ The Court *1498 sought a rule that would keep both it and the state supreme court “within the bounds of their respective jurisdictions.”⁷⁵ This method obviously is inefficient,⁷⁶ and may not even work.⁷⁷ But what the majority in *Long* found most undesirable about this method was that it put a “significant burden[] on state courts to demonstrate the presence or absence of Supreme Court jurisdiction.”⁷⁸

v. Pitcairn, 324 U.S. 117 (1945), however, the Court stated that the Lynch Court had “strongly intimated that had petitioners requested a continuance in this Court to permit an application to the state court for amendment or clarification ... there would be power and willingness to grant it.” *Id.* at 127. Perhaps the Long Court wanted to use Lynch as evidence that the Court employs a hodgepodge of methods to deal with the speculative grounds problem, rather than as portraying a consistent Court practice of refusing to “proceed with a review while ... jurisdiction is conjectural.” *Id.* at 128.

⁶⁸ See 463 U.S. at 1040 (citing *Minnesota v. National Tea Co.*, 309 U.S. 551, 556 (1940)).

⁶⁹ *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

⁷⁰ See 463 U.S. at 1041; *National Tea Co.*, 309 U.S. at 557.

⁷¹ See 463 U.S. at 1038-39 (citing *National Tea Co.*, 309 U.S. at 556-57; *Pitcairn*, 324 U.S. at 128; and *California v. Krivda*, 409 U.S. 33, 34-35 (1972)).

⁷² 309 U.S. 551 (1940).

⁷³ See *id.* at 556.

⁷⁴ *Id.* at 556-57; accord *Krivda*, 409 U.S. at 35 (vacating judgment due to ambiguity regarding the presence of an adequate and independent nonfederal ground and remanding the case “for such further proceedings as may be appropriate”); *Pitcairn*, 324 U.S. at 128 (holding that continuing a case for clarification is the “simplest procedure” when it is unclear whether a federal question has been decided, and expressing the need to “take steps to protect our jurisdiction when we are given reasonable grounds to believe it exists”).

⁷⁵ *National Tea Co.*, 309 U.S. at 557.

⁷⁶ In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), discussed below at pages 1519-20, the Court rejected inefficiency as a consideration for determining whether pendent jurisdiction could carry state law claims against state officials into federal court despite eleventh amendment immunity. But the eleventh amendment carries the force of a right, against which claims of inefficiency should carry little weight. The independent and adequate state ground doctrine arises not from “rights” of the state, but from the case or controversy limitations of article III; as long as article III is satisfied, considerations of administrative efficiency may properly be taken into account.

⁷⁷ In *Dixon v. Duffy*, 344 U.S. 143, 144-45 (1952), cited by the Court in *Michigan v. Long*, 463 U.S. 1032, 1040 & n.5. (1983), the Supreme Court had continued the case twice in unsuccessful attempts to give the California Supreme Court the opportunity to clarify the basis of its decision.

⁷⁸ 463 U.S. at 1040 (citing *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241, 244 (1978) (Rehnquist, J., dissenting); *Department of Motor Vehicles v. Rios*, 410 U.S. 425, 427 (1973) (Douglas, J., dissenting)). Justice Douglas, dissenting in *Rios*, argued that jurisdiction should be avoided unless the federal ground stood alone or the state ground was too intertwined with the federal ground to be independent. His argument, however, was motivated by the practical policies against intruding on the states and against expanding the Supreme Court docket. See 410 U.S. at 429-30. In *Long*, Justice O’Connor cited Justice Douglas’ opinion not for invoking the policy against intruding on the states by taking review, which of course cuts against the presumption she ultimately fashioned, but for characterizing vacating and remanding for clarification as an “unhappy” practice. As evidence for this

Indeed, Justice Rehnquist once characterized the vacating of a state supreme court's judgment as a "penalty" imposed upon the state courts for failing to establish Supreme Court jurisdiction.⁷⁹ This method, according to Justice Rehnquist, illegitimately shifts the burden of establishing jurisdiction away from the party asserting it, where it traditionally belongs, and intrusively places it on the state court. He suggested the "less intrusive alternative" of deferring consideration of certiorari, without vacating the judgment, to give the petitioner an opportunity to seek clarification from the state court.⁸⁰ *1499

Under the third approach reviewed by Justice O'Connor, the Supreme Court tries to ascertain for itself the basis of the state court's decision.⁸¹ Did the state court view the state constitution as operating independently of the federal Constitution, responsive to persuasive Supreme Court precedent but not compelled by it? Or did the court interpret the state constitution as bound to mean whatever like provisions in the federal Constitution mean? This approach forces the Supreme Court to read state cases cited in the state's opinion in order to answer a fairly subtle question about how the state comprehends its own law.⁸² Although the *Long* Court portrayed this task as arduous, it failed to cite any case where this method caused serious difficulty.⁸³ The root of the Court's objection to the third method may simply be a theoretical opposition to the judiciary of one system interpreting the other system's law.⁸⁴ *1500

How inconsistent and unsatisfying was it for the Court to use these three different methods? Arguably, the *Long* Court made too much of the problematic nature of its "ad hoc method of dealing with cases."⁸⁵ It may have been quite proper for the Court to

characterization, Justice Douglas cited the thinly veiled sarcasm of the Minnesota Supreme Court, on remand in *Minnesota v. National Tea Co.*: "If we were in error, then assuredly the opportunity to be set aright should be cheerfully and thankfully accepted." *Rios*, 410 U.S. at 427 n.1 (Douglas, J., dissenting) (quoting *National Tea Co. v. State*, 208 Minn. 607, 608, 294 N.W. 230, 231 (1940)).

⁷⁹ See *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241, 244 (1978) (Rehnquist, J., dissenting).

⁸⁰ See *id.* Under Justice Rehnquist's approach, the state court does become involved in the decision as to whether the Supreme Court has jurisdiction. By leaving the burden of proving jurisdiction on the party asserting it, however, his approach avoids directly undermining the state court's independence. Unlike a demand for state court clarification, this approach is a more subtle enlistment of help, similar to that used in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), which held that federal courts should abstain, to permit state courts to interpret ambiguous state law, in order to avoid unnecessary interpretations of constitutional law.

Interestingly, Justice Stevens, who dissented in *Long*, agreed with Justice Rehnquist in *Jerome*. See 434 U.S. at 242. One can see why: Justice Rehnquist's recommended method establishes the equivalent of a presumption that the decision in the case did rest on an independent state ground, the opposite of the presumption established in *Long*.

⁸¹ See *Michigan v. Long*, 463 U.S. at 1039.

⁸² See *id.* The *Long* Court criticized this approach on the ground that the parties are unlikely to have adequately briefed and argued the question of the basis of the state court's decision. See *id.*

⁸³ The Court relied on three cases to indicate the difficulty posed by this method. See *Long*, 463 U.S. at 1039. *Texas v. Brown*, 460 U.S. 730 (1983), scarcely demonstrates the difficulty of examining state law. The state court opinion in *Brown* relied on the fourth amendment and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The fact that it also cited numerous Texas cases stirred up a bit of confusion, which the Supreme Court easily dispelled by reading the state cases and finding that they relied on *Coolidge*. See *supra* note 82. Similarly, in *South Dakota v. Neville*, 459 U.S. 553, 556 n.5 (1983), even Justice O'Connor, who wrote for the majority, had no trouble analyzing state law. She found that the state ground was not independent because the state court had only analyzed the fifth amendment to the federal Constitution and had "concluded without further analysis that the state privilege was violated as well." *Id.* According to Justice O'Connor, the Texas state court "could not have stated more clearly that it simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege." *Id.* at 557 n.5. (Justice Stevens, who dissented in *Neville*, may take some comfort in a post-*Long* world in knowing how easily Justice O'Connor perceives clarity in state court opinions.) In *Oregon v. Kennedy*, 456 U.S. 667 (1982), the third case cited in *Long*, Justice Rehnquist had no trouble concluding that a citation by the Oregon Court of Appeals was to its own earlier opinion, *State v. Rathbun*, 37 Or. App. 259, 586 P.2d 1136 (1978), which relied wholly on federal grounds, and not to the Oregon Supreme Court decision reversing that opinion on state grounds, *State v. Rathbun*, 287 Or. 421, 600 P.2d 392 (1979). See 456 U.S. at 671. In dictum that the *Long* Court quoted, Justice Rehnquist added that even if there were some intermixture of state law, the dominance of the federal ground would warrant review (that is, the state ground was not independent). See 456 U.S. at 671.

⁸⁴ See *supra* note 42 (discussing the Court's reluctance to read state cases cited in a decision which it has been asked to review).

⁸⁵ 463 U.S. at 1039.

respond differently to the myriad of cases of the 1930s and 1940s than to the recent confusion of state and federal constitutional analogs.⁸⁶ The Court dealt with the earlier cases by using dismissal, vacation, and continuance – methods that reflected a fairly consistent policy against reaching the merits of a case when jurisdiction was speculative. The Court employed those devices to gain the proof needed to establish jurisdiction, using varying degrees of coercion to enlist the help of the state court.⁸⁷ There was perhaps nothing inherently wrong with having a selection of several “tools” with which to handle a problem that intermittently arose in various contexts.

Later, faced with the recurring problem of cases mixing state and federal constitutional law caused by incorporation of the Bill of Rights into the fourteenth amendment and the development of state constitutional law,⁸⁸ the Court switched to examining the state decision and the cases it cited to ascertain for itself whether the state ground existed and was independent. This method permitted the Supreme Court to be the judge of its own jurisdiction and avoided making the state judges play the roles of its law clerks. Of course, this method rendered the outcome of the Court’s analysis uncertain and subject to dispute among the justices. Even if the Court had used this method consistently, the state would not have been able to foresee the outcome. Nevertheless, it was always in the state court’s power to generate predictability by making the kind of clear statement that would render the Supreme Court’s analysis straightforward, much as the *Long* presumption requires. If unpredictability was the federalism problem, the state always has had the power to resolve it, as it does after *Long*, by showing a deliberate intention to rely on state law. Seeing the purportedly “vexing issue”⁸⁹ in this light makes the step taken in *Long* look something short of revolutionary.

3. Presuming in Favor of Federal Power.

In *South Dakota v. Neville*,⁹⁰ a case decided several months before *Long*, it was, interestingly enough, Justice Stevens, the dissenter in *Long*, who directed *1501 the Court’s attention to presumptions involving the independent and adequate state ground doctrine. Dissenting from a decision that used the third method of analysis described above, Justice Stevens wrote that it is “presumptuous – if not paternalistic” for the Court to “assume” that the state sees its own constitution as “a mere shadow” of the federal Constitution.⁹¹ He wrote:

No matter how eloquent and persuasive our analysis of the Federal Constitution may be, we cannot simply *presume* that the highest court of a sovereign State will modify its interpretation of its own law whenever we interpret comparable federal law differently. Even when a state tribunal misconceives federal law, this Court cannot vacate its judgment merely to give it an unsolicited opportunity to

⁸⁶ See Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1150 (1985) (suggesting greater importance of state independence with respect to criminal procedural law than with respect to other areas of constitutional law).

⁸⁷ See supra pp. 1497-99.

⁸⁸ See supra p. 1490.

⁸⁹ *Long*, 463 U.S. at 1038.

⁹⁰ 459 U.S. 553 (1983); see supra note 83 (discussing Justice O’Connor’s analysis of Texas law).

⁹¹ See id. at 568 (Stevens, J., dissenting).

reanalyze its own law. If a state-court judgment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise.⁹²

Perhaps this observation prompted the Court to seek to establish a presumption that would enable it to avoid case-by-case analysis of state law. In *Long*, a majority of the Court accepted the use of a presumption, albeit, of course, the opposite one.⁹³

The presumption established in *Long* allows the Supreme Court to review a state court decision whenever two conditions exist: first, the decision must “fairly appear[] to rest primarily on federal law, or to be interwoven with the federal law,” and second, “the adequacy and independence of any possible state law ground [must] not [be] clear from the face of the opinion.”⁹⁴ The *Long* Court purported to decide once and for all that whenever these preconditions exist, “the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law required it to do so.”⁹⁵ The Court argued that its newly fashioned presumption would allow it to avoid engaging in detailed analyses of how states understand their own constitutional law – a method that results in decisions of “state law that go beyond the opinion [under] review.”⁹⁶ The Court saw the act of presuming jurisdiction in order to decide questions of federal law as more “respectful” of the state court than the act of **1502* scrutinizing the state’s law. Thus, the state gains autonomous control over an interpretation of state law even as it suffers the loss of autonomy that comes with Supreme Court review.

This “presumption in favor of federal jurisdiction” is, in reality, not much of a departure from prior law. It may sound drastic to “presume” jurisdiction,⁹⁷ but presumptions, including this one, only arise when certain basic facts are shown.⁹⁸ Moreover, *Long*’s presumption, like others, is rebuttable. The state court may “make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court

⁹² Id. at 568-69 (emphasis in original) (citations omitted).

⁹³ See supra pp. 1493-94 and accompanying notes. Significantly, even Justice Stevens’ statement here from *Neville* contains the basis for perceiving that the Court’s review of decisions mixing federal and state law does not produce advisory opinions: he admits that we do not know what the state court will do on remand. The Supreme Court’s opinion in such cases will thus be a link in a continuing chain of decisionmaking and not a superfluous statement made after the result is fixed.

⁹⁴ 463 U.S. at 1040-41.

⁹⁵ Id. at 1041.

⁹⁶ Id. at 1040.

⁹⁷ Indeed, the Court avoided using the word “presume” in the text in which it established the rule. See *Baker*, supra note 45, at 819. The *Long* Court instead wrote: “we will accept as the most reasonable explanation” and “we merely assume.” As if in answer to those rash enough to perceive in these amiable words a formal presumption, the Court in a footnote discussed generally the permissibility of using presumptions to decide jurisdictional issues. See 463 U.S. at 1042 n.8 (citing *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), a case which merely imposes a burden of proof – albeit a “heavy” one – for establishing lack of jurisdiction because of mootness and notes an implicit presumption of jurisdiction until a jurisdiction-destroying factor is proven). The *Long* Court also suggested possible limits to its holding by noting that “[t]here is nothing unfair about requiring a plain statement of an independent state ground in this case,” 463 U.S. at 1044 n.10 (emphasis added), because the state court opinion revealed only a “mere possibility” of reliance on an adequate and independent state ground. See 463 U.S. at 1044.

⁹⁸ Presumptions, although used in order to avoid impasses in proof, “have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.” E. Cleary, *McCORMICK ON EVIDENCE* 969 (3d ed. 1984). Faced with a recurring problem of proof, the *Long* Court used the ordinary solution of fashioning a presumption that accorded with its assessment of the probabilities. See supra p. 1501. That the Court in *Long* was also influenced by a policy consideration (this time the federal interest in uniformity of federal law) does not distinguish it from other courts and legislatures that have resorted to presumptions. See *McCormick*, supra, at 968-73.

has reached,” or “indicate clearly and expressly that [its decision] is alternatively based on bona fide separate, adequate, and independent grounds.”⁹⁹ This is, even if the state court engages in the kind of interweaving that would give rise to the presumption, it can still shield its opinion from review by clearly declaring the state ground adequate and independent.¹⁰⁰ Finally, the Court expressly reserved the option of seeking clarification from the state court; an indication that the Court does not intend to apply its presumption with absolute inflexibility.¹⁰¹

The moderateness of the Court’s approach is apparent in its treatment of the *Long* case itself. Despite the lack of a clear statement by the state court, the Supreme Court did not automatically presume *1503 jurisdiction. Rather, it analyzed the Michigan court’s decision to determine whether the state court had “relied *exclusively* on its understanding of *Terry* and other federal cases.”¹⁰² Only after finding that the bare references to the state constitution “in no way indicate that the decision below rested on grounds in any way *independent* from the state court’s interpretation of federal law” did the Court conclude that, even if Michigan did interpret its constitution as independent from the federal Constitution, the state court relied “primarily” on federal law.¹⁰³

Perhaps the only change wrought by the new presumption, then, is to make the Supreme Court’s analysis more finite and conclusive. A “mere possibility” of an independent state ground will no longer stymie the Court.¹⁰⁴ And the justices can avoid the need to consult the regional reporters, which they so decorously hesitate to read.¹⁰⁵ The Court will still take care to consider whether it has jurisdiction before forging ahead. The primary effect of *Long* is its instruction to the states on how they may entirely avoid review: the states are encouraged and empowered to use state law to construct their own inviolable spheres.

4. Attempting to Speak Clearly.

The subsequent history of the *Long* case supports the presumption fashioned by the Court. Having received a pointed lecture from the Supreme Court, the Michigan Supreme Court on remand nevertheless failed to ground its decision in state law.¹⁰⁶ Rather, it found the trunk search invalid under the federal Constitution, reasoning that because the police followed to established procedure, the search was not a valid “inventory search.”¹⁰⁷ Because the court found the search invalid under the federal Constitution, it saw no need to address the state constitutional issue.¹⁰⁸ Thus, the Michigan Supreme Court laid itself

⁹⁹ 463 U.S. at 1041.

¹⁰⁰ This technique, of course, would have succeeded even prior to *Long*. See *supra* p. 1500.

¹⁰¹ See *id.* at 1041 n.6 (“There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action.”).

¹⁰² *Id.* at 1043 (emphasis in original).

¹⁰³ *Id.* at 1044 (emphasis in original).

¹⁰⁴ See *id.* at 1044.

¹⁰⁵ See *supra* note 42.

¹⁰⁶ See *People v. Long*, 419 Mich. 636, 359 N.W.2d 194 (1984).

¹⁰⁷ See *id.* at 645-49, 359 N.W.2d at 198-200 (citing and comparing the case to *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

¹⁰⁸ See *id.* at 646 n.5, 359 N.W.2d at 198 n.5. The Michigan Supreme Court easily followed the lesson of *Long* elsewhere. See *Charter Township v. Dinolfo*, 419 Mich. 253, 276 n.7, 351 N.W.2d 831, 843 n.7 (1984).

open to a second Supreme Court reversal when it could have shielded itself from review simply by stating that it had relied on the state constitution.¹⁰⁹ Moreover, the Michigan Court, eager though it appeared to grant a new trial,¹¹⁰ failed to restyle as a state law decision its original determination *1504 with respect to the interior search. It sent Long to a new trial for possession of marijuana without suppressing the evidence from the interior search, despite the possibility – the original ambiguity that drew the Supreme Court’s jurisdiction into question – that that search had violated the Michigan constitution. A concurring opinion asserting that the original decision had established that violation and thus required suppression did not persuade the court to rely on state constitutional law.¹¹¹

Although the disarray exhibited by the state court’s opinion on remand may undermine Justice O’Connor’s belief that it will be easy for the state courts to comply with the prerequisite for overcoming the new presumption,¹¹² it supports her general suspicion that the state courts are not consciously resting their decisions on independent state grounds, and that the mixed decisions in question should not be construed to deny the Supreme Court jurisdiction.¹¹³

C. The Integrity of State and Federal Lawmaking

The Court intended its solution in *Long* to protect the “integrity” of both state and federal lawmaking.¹¹⁴ This interest in mutual “integrity” – that federal courts should not expound state law and state courts should not expound federal law – requires both that a state be able to create a separate, unreviewable sphere for itself when it intends to say what state law is, and that the state be unable to create such a sphere when it attempts to declare what federal law is. *1505

Deference to the states, then, is overcome by the interest in the integrity of federal law, a longstanding justification for intrusion on the states. In 1816, Justice Story found Supreme Court appellate review of state court decisions “perfectly compatible with the most sincere respect,” when it was motivated by the need for uniformity in the interpretation of federal law:

¹⁰⁹ There have, however, been no further appeals in the Long case.

¹¹⁰ The court stretched its reasoning to find waiver of two plausible alternate grounds for upholding the search. See Long, 419 Mich. at 649 n.6, 359 N.W.2d at 200 n.6.

¹¹¹ Justice Kavanagh stated that the state court’s original decision “should have made it clearer” that the Michigan constitution forbade the search independently of the federal Constitution. 419 Mich. at 650, 359 N.W.2d at 201 (Kavanagh, J., concurring in reversal). Two justices, concurring in the judgment, stated opaquely that the marijuana was inadmissible “because it was obtained as a result of a warrantless search not permitted under U.S. Const. Am. IV.” 419 Mich. at 650 (omitting text of opinion), 359 N.W.2d at 201 (Ryan and Boyle, JJ., concurring).

¹¹² See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). For a collection of state court decisions and an observation that many state courts remain unaffected by Long, while some “have shown beginning efforts of separating the state and federal grounds of decision,” see Baker, note 45, at 836-838, 847-848 and accompanying notes below.

¹¹³ Other state courts have handled the lesson of Long better. For example, in a very thorough, clear statement, the Texas Court of Appeals wrote: “Our holding ... is based on Texas constitutional law, Texas statutory law, and Texas common law, not on federal constitutional law. These authorities limit warrantless arrests more strictly than does the United States Constitution. This is a ‘plain statement’ within the meaning of *Michigan v. Long*.” *Love v. State*, 687 S.W.2d 469, 478 (Tex. Civ. App. 1985) (citations omitted). In a less heavy-handed but fully adequate clear statement, the Supreme Court of Connecticut wrote: “Although our decision relies in part on rights guaranteed under the fourth and fourteenth amendments, it has an independent basis in article first, § 7 of the Connecticut constitution.” *State v. Scully*, 195 Conn. 668, 674 n.11, 490 A.2d 984, 987 n.11 (1985) (citations omitted).

¹¹⁴ See 463 U.S. at 1041-42, 1042 n.7.

Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only a prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.¹¹⁵

For the majority in *Long*, this overwhelming concern for final, authoritative, uniform decisions of federal law stands apart from any federal interest in the outcome of the case.¹¹⁶ *1506

For Justice Stevens, however, the principle of uniformity alone does not support any intrusion on the states.¹¹⁷ Throughout his dissent, Justice Stevens asserted that the Court should have “no interest” in what the state has done, even if the state has done it with federal law, unless it has deprived an individual of a federal right.¹¹⁸ Overriding concern

¹¹⁵ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816). Justice Story’s other ground for finding a grant of appellate jurisdiction over the states has not survived. See Bator, *supra* note 10, at 1032.

Note that *Martin* contained the possibility of an independent and adequate state ground, that Justice Story rejected an interpretation that would permit appellate review to “be evaded at pleasure,” 14 U.S. (1 Wheat.) at 357, and that the Court exercised jurisdiction even though there was some doubt about whether the state court’s judgment rested on an adequate and independent state ground. Thus, Justice Story’s ideal of uniformity extended much further than that of the current Supreme Court. For a recent article in accord with Justice Story’s view, see Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1297-301 (1986).

¹¹⁶ Justice O’Connor has written elsewhere that the principle of equal treatment of all citizens, regardless of which court hears their claims, underlies the federal interest in uniformity: “a single sovereign’s laws should be applied equally to all.” O’Connor, *supra* note 36, at 4. See generally Note, *Justice Sandra Day O’Connor: Trends Toward Judicial Restraint*, 42 WASH. & LEE L. REV. 1185 (1985). This intrusion of Supreme Court review to impose uniformity is, to Justice O’Connor, the basic connection between the federal and state systems. She asserts that “the marriage between our state and federal courts, like any other marriage, requires each partner to respect the other, to make a special effort to get along together, and to recognize the proper sphere of the other partner.” O’Connor, *supra* note 36, at 12.

In expressing its overwhelming concern for uniformity, the *Long* majority failed to take into account that periods of disuniformity created by various judges applying federal law under the supremacy clause may inform and enrich the uniform interpretation ultimately supplied by the Supreme Court. Undue concern for uniformity dampens creativity, and diverse “unauthoritative” decisions can be invigorating. Just as the states in interpreting their own constitutions can use federal interpretations of the federal Constitution to the extent that they find those decisions persuasive, state decisions of federal law operate as suggestions to be adopted outside the state if they are worthy, not because they are mandatory. Cf. Cover & Aleinikoff, *supra* note 28, at 1052-54, 1064-66 (arguing that the value of habeas corpus review of state court decisions is that both state and federal courts conduct an ongoing dialogue on federal constitutional issues, in which the state court remains unbound by the lower federal court’s precedents, and that this “textured experience” will enrich the final, binding pronouncement of the Supreme Court).

¹¹⁷ See 463 U.S. at 1070-71 (Stevens, J., dissenting).

¹¹⁸ See *id.* at 1068. At one point Justice Stevens’ opinion states that the federal interest in preventing Michigan from protecting a criminal defendant more than the federal Constitution would require is no greater than its interest in preventing Finland from similarly overprotecting an American citizen pursuant to a misinterpretation of federal law. See *id.* at 1068. The analogy of states to foreign countries, however, has failed before. See, e.g., *Testa v. Katt*, 330 U.S. 386, 389 (1947) (citing the supremacy clause of the Constitution for the proposition that Rhode Island may not refuse to enforce federal law even though it may refuse to enforce the law of a foreign nation); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 351, 362 (1816) (reversing the judgment of the Virginia Court of Appeals, in which Judge Cabell had written that if the Constitution gave the Supreme Court power to review criminal cases arising in the state system, “[i]t would give jurisdiction, as well over the courts of England or France, as over the State courts; for, although ... the State Courts are *foreign* Courts in relation to the Federal Courts, yet [they are] not less *independent* than foreign Courts.” *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 14, (1815) (emphasis in original)).

for uniformity in federal law, he wrote, “is truly an ungovernable engine,” because it would justify review merely to “revise opinions,” rather than to deal with wrong judgments and to affect outcomes.¹¹⁹ Untempered, the uniformity interest would lead the Court to expound federal law in the abstract, to render the unconstitutional advisory opinion.

Absolute insistence on uniformity would be problematic, for example, in a state case with two alternate, separate holdings, one based purely on state law and the other based purely on federal law, in which the interpretation of federal law is obviously erroneous. Although the interest in uniformity strongly urges review, to review such a case would be to write an opinion that clearly would have no effect on any real controversy. A good advisory-opinion-fearing Supreme Court justice should recoil from reviewing this case much more than from reviewing a case in which it is uncertain whether the state court will uphold its result on remand. In the latter situation, although the state court has the power on remand to take an action that retroactively operates to make the opinion advisory,¹²⁰ the Court cannot *1507 know that the state will use this power. Thus, when the Court reviews such a case, it takes a risk that perhaps is not very different from the risk it assumes in deciding a case that might become moot, or even a case that might currently be moot, when that mootness remains unproven.¹²¹ Because uniformity is a stronger justification for review in the case involving an erroneous – although clearly alternate – federal holding than it is in that of a classic, ambiguous state opinion, and because review of that alternate holding clearly is impermissible, some principle must limit the uniformity interest.

Justice Stevens suggests that this limiting principle should be a federal interest in the outcome of the case. He would leave the state decision alone unless there were a federal reason for concern about the predicament of the petitioner – and not merely the concern about the “deplorable mischief” of disuniformity which troubled Justice Story.¹²² To Justice Stevens, the primary interest is not in getting it right, but in rights.¹²³ But Justice Stevens’ view,¹²⁴ taken to its extreme, would distort Supreme Court jurisdiction. As the majority pointed out, if the only federal interest warranting review is in undoing the

¹¹⁹ 463 U.S. at 1070 (Stevens, J., dissenting) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)).

¹²⁰ See *Baker*, supra note 45, at 821 (“The Supreme Court’s holding would retrospectively become akin to an advisory opinion on the federal question.”). For a collection of post-*Long* cases creating this retroactive effect, see *id.* at 837 n.181.

The *Long* Court obviously hoped to encourage states to make their reliance on state law clear. As Professor Baker has observed, however, if state courts remain uninfluenced by the likelihood of Supreme Court review and care only about the ultimate outcome of the case, the knowledge that they can assert the state law basis on remand may deter them from clarifying their decisions. See *id.* at 836-38. If a state court so fails to oblige the Supreme Court by supplying it with clear decisions, it does not earn autonomy. When the state court clouds decisions of state law with federal law not subject to change by the state political branches, the state cannot complain about federal intrusion, because it is failing – through its courts – to function effectively. See *infra* pp. 1508-11. If the states keep their decisions ambiguous because they do not care whether the Supreme Court intrudes on them, that is their prerogative: they are not trying to “build a separate sphere” and, under *Long*, they will not succeed.

¹²¹ See 463 U.S. at 1042 n.8 (defending presumptions in jurisdiction by observing that, in cases in which a party alleges mootness, the Court presumes jurisdiction until the allegation has been proven).

¹²² See p. 1505.

¹²³ See 436 U.S. at 1068 (Stevens, J., dissenting) (“[I]n reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard.” (emphasis in original)).

¹²⁴ No other justice shared this view. See *supra* note 48.

deprivation of a federal right, the Court should not review any appeals brought by the state rather than the defendant, even when the federal ground stands alone.¹²⁵

Thus, although both the majority and Justice Stevens have attempted to formulate the federal interest that ought to control the *1508 drawing and redrawing of jurisdictional boundaries, both of those formulations present problems. This then takes us back to our original question: when there is a question of jurisdiction in which federalism is a factor, what, if any, federal interest runs counter to state autonomy? The following Section suggests an answer to that question.

D. Considering Effective Functioning as the Jurisdiction-Determining Interest

As Justice Black recognized in *Younger*, federalism should be understood not in terms of states' rights, but rather in terms of the national interest in the independent functioning of the states. This national interest may frequently – although not, as we shall see, invariably – weigh in favor of respecting a state's autonomy by declining to exercise jurisdiction. The national interest in according states independence so that they may carry out their functions as components of the nation is particularly acute with respect to the day-to-day processing of criminal cases. It is impossible, given incorporation, to avoid large-scale state adjudication of issues of federal constitutional law. Federal interests would be disserved by shuttling back and forth between state and federal court depending on whether state or federal law were at issue.¹²⁶ So we accept state court handling of federal law in the first instance.

But is independence from Supreme Court review similarly functional? There is a strong national interest – the same national interest that locates criminal proceedings in the state courts in the first place – in enabling the states to carry out their separate functions effectively. If state courts were the final authority when they interpret federal law, as they are when they interpret state law, then insulating their decisions from Supreme Court review would make sense. But state courts are compelled to apply federal law and what they ascertain to be the Supreme Court's view of that law, with which they may disagree. Thus, when state courts opine on federal law, they are inevitably dependent on the Supreme Court, and Supreme Court review is needed to enable them to apply both federal and state law properly. If the state court is not conscious of its ability to use state law to accord higher protections to criminal defendants than federal law provides (or not conscious of its freedom to limit the protections given to the federal "floor"), but acts from perceived compulsion, it is not in fact functioning separately. It is in the national interest to *1509 correct such a mistaken perception in order to promote the state's separate functioning. When *Long* instructs state courts on how to "declare independence"

¹²⁵ 463 U.S. at 1042 n.8. Justice Stevens' proposition, in contrast, can reasonably be limited to mean that where there is a gray area of jurisdiction, restraint should prevail; the presumption should be against jurisdiction unless there is a need to vindicate a federal right. See supra pp. 1486-88.

¹²⁶ In any event, the Constitution prohibits federal courts from deciding individual questions isolated from cases. A state court cannot, therefore, send an isolated question to a federal court, whereas a federal court may, under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), refer such a question to a state court. See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

by saying that they are using state law, it is attempting to restore and to encourage separateness. That it uses a somewhat intrusive technique should not disturb us once we perceive the national interest underlying separateness. More important than the need for uniform interpretations of federal law, then, is the need to clarify the distinction between the state and federal “spheres” in the interest of federalism. Looking to the ultimate effect of enabling the states “to develop state jurisprudence unimpeded by federal interference,”¹²⁷ *Long* may promote diversity among the states as well as uniformity in the interpretation of federal law.

Justice Stevens was “thoroughly baffled by the Court’s suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show ‘[r]espect for the independence of state courts.’”¹²⁸ This paradox disappears upon recognizing that federalism is not, fundamentally, about displays of respect. An unbroken flow of politesse would reflect the states’ rights belief disavowed in *Younger*. The need to promote the kind of independent functioning that warrants deference to the states is preferable to absolute deference to whatever a state does.

Of course, Justice Stevens himself does not advocate absolute deference. He realizes that at some point there is a federal interest that justifies interference with the state. He simply refuses to recognize the particular federal interest chosen by the majority. While Justice Stevens would make the sphere-altering interest the vindication of federal rights, the majority has chosen the uniformity of federal law.¹²⁹ Although this Article criticizes both choices, the doctrine dictated by the majority’s choice would serve the federal interest in the effective functioning of the states.

If, as this Article argues, the appropriate interest *is* the effective functioning of the states, the federal courts should design jurisdiction not in order to avoid offense to state judges, but rather with an eye toward the state as a whole. The state courts do not function in isolation: they are subject to various political checks, and the state constitution, although subject to final interpretation by the state supreme court, is open to amendment through state political processes. Once we see this, it becomes apparent that the state court’s use of federal law seriously constrains the state as an entity and thwarts its independence. The state courts need review and the state itself benefits thereby: without review, the state remains ignorant of its power **1510* to change the law, both because the courts may not recognize that they could interpret state law differently – unbound by federal law – and because the political branches of state government, if they believe a particular decision was dictated by federal law, will not recognize that they can change the result by amending the state constitution or by affecting the composition of the state courts.¹³⁰ Once respect for the state is understood as respect for the state as a whole, an absolute policy of nonintrusion appears counterproductive.

¹²⁷ 463 U.S. at 1041.

¹²⁸ *Id.* at 1072 (Stevens, J., dissenting) (quoting *id.* at 1040).

¹²⁹ See *supra* pp. 1504-05.

¹³⁰ See Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 989-91 (1985) (“[W]hen state courts interpret state law to require more than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to insure rational law enforcement.” (quoting *Florida v. Casal*, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring) (emphasis in original))).

It should be kept in mind that in a case like *Long*, the state itself – far from asserting an entitlement to deference – seeks Supreme Court review.¹³¹ Given this active request, it is inaccurate to ascribe to the state an insistence on independence solely on the assumption that state judges rankle at Supreme Court review. Indeed, state courts, like the state itself, may benefit from review: review is a minor intrusion,¹³² and reversal, though superficially “insulting,” reinstates a court in the system of law over which it has final power. Thus, paradoxically, reversal invigorates the court.

Given the requirement that states apply federal law, absolute, immutable spheres would be dysfunctional. Left unreviewed, state courts become bound by false limitations. Moreover, if a state court fails to make clear its insistence on separateness, particularly after *Long*, it is probable that it has not acted independently. One might argue in response that state courts, unlike their federal counterparts, fear political retaliation and thus may rationally choose to avoid flaunting their reliance on state law, preferring to create the appearance that they act as unwilling puppets of the Supreme Court. But that is to say that the state court may have intentionally muddled the state and federal questions in order to prevent their state’s democratic branches from recognizing their power to alter the result. Deference to the state court on that basis parodies true deference to the state.

Interestingly, if the state courts can intentionally separate themselves from politics and majoritarianism, they can effectively restyle themselves in the manner of the federal courts.¹³³ The federal courts *1511 maintain their independence, however, not by covert self-appointment, but because the constitutional convention chose the tenure and salary protections of article III to achieve the benefits of the separation of powers. States have the power to model their courts similarly, and some have done so.¹³⁴ But when they have not done so, it is not the place of the state judiciary to simulate the independent characteristics of the federal model on its own. And, perhaps more importantly, in the federal government, the balancing political branches can alter the law interpreted by the federal courts either through statutes or by initiating the process of amending the Constitution. But state political branches will perceive themselves as incapable of altering a state court’s decision that is apparently based on federal law.¹³⁵ Thus, the federal court analog into which the state court would transform itself by mixing federal and state law creates a distortion not present in the federal model: it thwarts the checking and balancing role of the political branches. The *Long* presumption, by promoting federal intervention when this dysfunction occurs, therefore serves the federal interest in the effective functioning of the states.

¹³¹ In a criminal case, only the state will appeal a decision based on an independent and adequate state ground, because a state constitutional provision can grant more generous rights than does the federal Constitution, but it cannot accord lesser rights. See supra p. 1491.

¹³² See Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1056 (1977) (arguing that federal review to impose uniformity in the interpretation of federal law is a “marginal intrusion” on the states).

¹³³ Cf. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 n.45 (1977) (noting that state appellate courts that enjoy a measure of political independence approaching that enjoyed by federal courts are “most vigorous in protecting individual rights” (specifying the courts of New Jersey, Massachusetts, and California)).

¹³⁴ See O’Connor, supra note 28, at 812-13. For a critical evaluation of the granting of tenure and salary protection to state judges, see R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 173 (1985).

¹³⁵ See Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 757 (1972).

III. THE IMMUNIZING EFFECT OF EXTENDING THE PROTECTIONS OF STATE LAW

A. Federal Courts And the Application of State Law

The desire to preserve federal control over federal law affected the scope of Supreme Court review of state court decisions in *Michigan v. Long*. But will a state's interest in controlling its law similarly shape federal jurisdiction?

State-created rights may naturally find their place alongside federal constitutional and statutory rights and thus fall within the federal courts' pendent jurisdiction.¹³⁶ Plaintiffs will choose to litigate their state law rights in a federal forum if they believe – as many do – that a federal judge will be more sympathetic to their claims and *1512 more likely to translate favorable findings into generous remedies.¹³⁷ Federal court adjudication of state law rights suffers, however, from the same lack of authoritativeness that marked the state court decisions of federal law in *Long*.¹³⁸

For several reasons, unauthoritative federal court decisions of state law may be even more problematic than state court opinions of federal law. First, principles of restraint dictate that a federal court prefer a state statutory basis for decision to a federal constitutional one,¹³⁹ so the federal courts avoid using their “own” law whenever possible. Second, although the independent and adequate state ground doctrine may prevent Supreme Court review of some state court decisions of federal law, state courts never review any federal court decisions of state law to correct erroneous interpretations.¹⁴⁰ And third, the effect of an unreviewed erroneous interpretation of federal constitutional law – to constrain a state's courts and police and grant an extra measure of protection to its criminal defendants¹⁴¹ – seems less objectionable than the

¹³⁶ Subject matter jurisdiction over federal claims falls within the federal question statute. See 28 U.S.C. § 1331 (1982). Under the doctrine of pendent jurisdiction, a federal judge has discretion to hear state claims based on the same “nucleus of operative fact” as the federal claims, without a separate jurisdictional basis. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

¹³⁷ Professor Neuborne, for example, as a civil liberties lawyer, planned a litigation strategy on the assumption that federal constitutional claims would fare better in federal court and that federal courts are “institutionally preferable.” See Neuborne, *supra* note 133, at 1115-16. But see Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 252 (1983) (concluding that ‘there is simply no widespread disregard for the vindication of federal rights in state appellate courts’).

¹³⁸ See *infra* pp. 1522-24.

¹³⁹ See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

¹⁴⁰ A state can, however, in a case arising in state court that is similar to one decided in federal court arising in state court, declare that the federal interpretation is wrong. Federal opinions of state law carry persuasive, but not precedential weight. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959). This doctrine, however, provides little solace to a state that must comply with a burdensome injunction ordered by a federal court adjudicating a case that involves state law. In general, the problem of unauthoritative federal court decisions remains because state law is more than its broad recurring propositions; the nuances of application of law to facts can be corrected and controlled only through review of individual cases. The opportunity for such review will never arise in cases involving claims against states if such cases are taken to federal court in the first instance. This has often occurred, because plaintiffs' attorneys have generally preferred a federal forum with the availability of pendent jurisdiction. See *supra* note 137. There is, however, the potential for state legislative correction of federal misinterpretation of state law. The adequacy of this substitute for state judicial interpretation is discussed at page 1524 below.

¹⁴¹ See *supra* pp. 1508-09.

tremendous expenses and ongoing federal court supervision that a case erroneously enforcing a state-created right is likely to impose on a state.¹⁴²

The Supreme Court has recently curtailed the use of pendent jurisdiction through an interpretation of the law of sovereign immunity. *1513 In *Pennhurst State School & Hospital v. Halderman*,¹⁴³ the Court determined that state officials enjoy immunity from suit on the basis of state law claims in federal court. Plaintiffs seeking to enforce state-created rights against these officials may now bring their suits only in state court. This doctrine serves to return control over state law to the states.¹⁴⁴ A state may choose not only whether to create a new statutory right, but also where that right may be enforced.¹⁴⁵

Part III of this Article examines the functional value of the control that *Pennhurst* secures for states. Viewing the application of law to fact and the fashioning of remedies as an essential element of lawmaking, Part III rejects Justice Stevens' dissenting argument in *Pennhurst* that the federal courts do nothing more than carry out state commands when they hear state law claims.¹⁴⁶ This Part finds that a state's loss of control over its statutory creations inhibits a state's functioning. Federal court involvement in this situation, unlike in *Long*, would do nothing to improve any state or federal lawmaking process. Rather, it would constrain the state in the most inappropriate instance: when the state has created a new right. The risk of finding themselves bound to expensive and burdensome federal injunctions would provide states with a major disincentive to reform their own institutions. By respecting state sovereignty here, federal courts can remove this disincentive and encourage states to perform the kind of role in the federal system that will reduce the need for federal law remedies. Under *Pennhurst*, plaintiffs who choose to rely on their state law claims instead of federal law claims will be forced to bring them in state court. By providing rights in its own law that are superior to the rights offered by federal law, a state may construct for itself a separate sphere. Like *Long*, then, *Pennhurst* can be read as an instruction to the states on how to achieve separateness and to avoid federal court intrusion. *1514

B. *Pennhurst State School & Hospital v. Halderman*

1. Background.

In *Pennhurst*, a class of mentally retarded residents of a state institution sued the institution's officials for gross violations of their civil rights. Trial in federal district court

¹⁴² See Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 959, 969-70 (1978).

¹⁴³ 465 U.S. 89 (1984).

¹⁴⁴ A state has the power to waive sovereign immunity and thus to relinquish to the federal courts its control over state law. *Pennhurst* ensures that if a state creates a right against itself, it can choose to control the application of that right. This result creates a kind of federal-state equity: Congress has the power to make federal jurisdiction over a statutory right exclusive, while the state has no equivalent power. See *Chicago & N.W. R.R. v. Administrator of the Estate of Whitton*, 80 U.S. (13 Wall.) 270 (1871). But the *Pennhurst* doctrine empowers the state to make jurisdiction exclusive in its own courts by withholding consent to suit in federal court. It should be noted that this power extends only to suits against the state: although the eleventh amendment prevents suits in federal court on federal law claims to which the state is the defendant, see *Smith v. Reeves*, 178 U.S. 436, 445 (1900), it is inapplicable to private litigation over a state-created right.

¹⁴⁵ It is well-recognized that the procedures for applying law to fact in individual cases play as great a part in defining rights as the mere statement of a rule of law. See *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958); see also, *Neuborne*, supra note 133, at 1115-16 (1977).

¹⁴⁶ See 465 U.S. at 150-52, 158-59 (Stevens, J., dissenting).

established that the conditions at Pennhurst were very poor: residents received little or no appropriate “habilitation” in the form of education and training and were subjected to physical assaults by the staff members and to indiscriminate drug treatment.¹⁴⁷ The trial judge compiled an impressive list of violations of law, including violations of the federal Constitution,¹⁴⁸ the federal Rehabilitation Act of 1973,¹⁴⁹ and the Pennsylvania Mental Health and Mental Retardation Act of 1966.¹⁵⁰ He tied his chosen remedy of moving the residents into community living arrangements to the right of the institutionalized persons to habilitation in “the *least restrictive setting* consistent with [each] individual’s habilitative needs,”¹⁵¹ and traced that right to federal constitutional due process.¹⁵² On the theory that Pennhurst was too big to habilitate anyone in the requisite least restrictive setting, the district judge ordered the defendants, under the supervision of a court-appointed special master, immediately to begin moving all of the residents into “suitable community living arrangements.”¹⁵³

Although the Court of Appeals for the Third Circuit found that some residents still needed the large institution (which for them was the “least restrictive” setting) and restructured the injunction to include procedures for distinguishing those residents from the ones to be moved to community living arrangements,¹⁵⁴ it affirmed “most of the *1515 District Court’s judgment.”¹⁵⁵ Significantly, however, the Court of Appeals tied the right to habilitation in the least restrictive setting exclusively to the “bill of rights” portion of the federal Developmentally Disabled Assistance and Bill of Rights Act.¹⁵⁶ The Third Circuit failed to uphold any other U.S. federal basis for a right to habilitation in the least restrictive setting.¹⁵⁷ In addition, as the Supreme Court observed, in affirming the district court’s finding that the state statute entitled the residents to “minimally adequate habilitation,” the Third Circuit failed to take the step of saying that minimally adequate habilitation meant habilitation in the least restrictive setting.¹⁵⁸

¹⁴⁷ See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1304-09 (E.D. Pa. 1977).

¹⁴⁸ The Court found violations of the residents’ rights to “minimally adequate habilitation” under the due process clause of the fourteenth amendment, to “freedom from harm” under the eighth and fourteenth amendments, and to “nondiscriminatory habilitation” under the fourteenth amendment. See 446 F. Supp. at 1314-18, 1320-24.

¹⁴⁹ 29 U.S.C. § 794 (1982); see 446 F. Supp. 1295, 1321-24 (right to ‘nondiscriminatory habilitation’).

¹⁵⁰ PA. STAT. ANN. tit. 50, §§ 4101- 4704 (Purdon 1969 & Supp. 1982) [hereinafter “the Pennsylvania statute” or “the state statute”] (right to “minimally adequate habilitation”); see 446 F. Supp. at 1322-23.

¹⁵¹ 446 F. Supp. at 1319 (emphasis added).

¹⁵² See *id.* In discussing the Pennsylvania statute, the district judge found the defendants obligated to provide “minimally adequate habilitation,” without specifying the right to the least restrictive setting. See *id.* at 1323. Likewise, in finding that the defendants had violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), by providing “unnecessarily separate and minimally inadequate services,” the court failed to specify the right to the least restrictive setting. See *id.* at 1323-24.

¹⁵³ 446 F. Supp. at 1326.

¹⁵⁴ See *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 107 (3d Cir. 1979) (en banc).

¹⁵⁵ *Id.* at 95-100, 104-07.

¹⁵⁶ See *id.* at 95-100, 104-07 (relying on 42 U.S.C. § 6010 (1976)).

¹⁵⁷ Although the district judge had relied on § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), the court of appeals, finding the language of the act “somewhat opaque” and declaring that “[o]ne federal statute announces the governing rule, and one is enough,” refused to consider § 504 issues on appeal. 612 F.2d at 108. Following the general principle of restraint, the appellate court also avoided the federal constitutional issues. See *id.* at 104.

¹⁵⁸ See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 94 (1984) (citing 612 F.2d at 100-03). The Third Circuit did not completely agree with the district judge’s interpretation of what constituted the least restrictive setting. It found that a larger institution was appropriate for some aged, severely retarded, and other residents with special needs who “will not be able to adjust to life outside of an institution,” and that the plaintiffs had not established a general right to be deinstitutionalized. The circuit court did, however, determine that there should be a presumption in favor of community placement. See 612 F.2d at 114-15. It therefore remanded the case for elaboration of the procedures for “assessment of each class member’s needs.” *Id.* at 115-16.

To undo the remedy, then, the Supreme Court needed only to cut off the statutory “bill of rights” provision as a source for the right to habilitation in the least restrictive setting. Ironically, the Court did so by holding that the “bill of rights” provision was not intended as a source of any rights.¹⁵⁹ It remanded the case to the Court of Appeals for consideration of other possible sources for the right upon which the remedy depended, specifically suggesting the possibility of reliance on the state statute as well as federal constitutional or statutory law.¹⁶⁰

In the interim between the initial Third Circuit decision and this remand from the Supreme Court, the Supreme Court of Pennsylvania had had the occasion to interpret the very state statute available to uphold the *Pennhurst* injunction.¹⁶¹ Fortuitously, it had held that the statute required habilitation in the least restrictive setting.¹⁶² On remand, the Third Circuit relied exclusively on the state statute in retaining its original result.¹⁶³ *1516

At this point the defendants, perhaps moved by the imminence of defeat on the state law claim that had been hidden beneath the federal claims, came forward with a new jurisdictional attack based on the eleventh amendment. They argued that the provision for state sovereign immunity under the amendment, although unavailable to shield them as individuals from suits in federal court premised on federal law, operated differently when the issue was one of state law.¹⁶⁴ The *1517 correctness of what the Third Circuit

¹⁵⁹ See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 18- 19 (1981).

¹⁶⁰ See *id.* at 31.

¹⁶¹ *In re Schmidt*, 494 Pa. 86, 429 A.2d 631 (1981). The remanding Supreme Court opinion had specifically called attention to this case. See 451 U.S. at 31 n.24.

¹⁶² See 494 Pa. at 98, 429 A.2d at 637.

¹⁶³ See *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647, 650-56 (3d Cir. 1982). Indeed, the Third Circuit went out of its way to discuss whether the remanding opinion required it to consider the other grounds suggested therein. See *id.* Reliance on state law alone was thus a knowing choice. Advocates of judicial restraint should admire the circuit court’s avoidance of the federal constitutional issue when there was a statutory basis for the decision. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Proponents of an interactive, as opposed to a “separate spheres”-oriented federalism might also commend the Third Circuit for avoiding construction of the federal *statute*: they might support a doctrine of restraint favoring state law grounds for decision over *any* federal ground. This form of restraint, however, would lead to more unauthoritative opinions of state law and accord less respect to the states’ separate lawmaking function. The *Pennhurst* doctrine, of course, produces the opposite result: it encourages federal courts to rely on federal law, in the interest of empowering states to create a kind of exclusive state court jurisdiction over suits in which they are defendants and which are based on state law. See *supra* note 144. The states can always counter *Pennhurst*’s rule by consenting to suit in federal court: then, by relinquishing control of their own law, they may choose for themselves the more interactive form of federalism in which the federal courts can avoid the use of federal law by relying on state law.

¹⁶⁴ See 673 F.2d at 656-57. The eleventh amendment provides that “[t]he 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. This overcomes the impression given by article III, which extends the judicial power of the United States to controversies “between a State and Citizens of another State.” U.S. CONST. art. III, § 2. The eleventh amendment was adopted close on the heels of the Supreme Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that the states were not immune to suit in federal court. Although the amendment applies only to suits by noncitizens against a state, the Court determined in *Hans v. Louisiana*, 134 U.S. 1 (1890), that the states also were immune to suits by their own citizens. The immunity to suit fashioned by the *Hans* Court was a broad concept originating in the common law and implicit in article III, and the eleventh amendment was merely a correction of the misapprehension made in *Chisholm* that article III carved out an exception to the general rule of sovereign immunity for suits brought by noncitizens. See *id.* at 11-18. There is considerable debate about whether sovereign immunity is embodied in the Constitution or rather is simply a common law doctrine that the Constitution left untouched. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 125-26 (1984) (Brennan, J., dissenting) (citing Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 538-40 & n.88 (1978); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893-94 (1983)). A majority of the Court is committed to the idea that the doctrine is constitutional. See *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142, 3145-46 (1985). A minority of four, however, seeks reconsideration. See *Green v. Mansour*, 106 S. Ct. 423, 429-31 (1985) (Brennan, J., dissenting) (joined by Marshall, Blackmun, and Stevens, JJ.); *Atascadero State Hosp.*, 105 S. Ct. at 3155 (Brennan, J., dissenting) (joined by Marshall, Blackmun, and Stevens, JJ.).

perceived as a “unique contention”¹⁶⁵ depended upon how the court conceptualized the landmark case *Ex Parte Young*.¹⁶⁶

2. Perspectives on the Rule of *Ex Parte Young*.

Ex Parte Young, vastly important in enabling federal courts to hear civil rights cases,¹⁶⁷ dates back to the judicial activism of the substantive due process era.¹⁶⁸ In 1906, the state of Minnesota undertook to regulate railroads within its borders, providing criminal penalties for violations of the rate schedules set by its railroad commission.¹⁶⁹ Shareholders of one of the railroads claimed that the decrease in passenger fares imposed by the commission violated their federal due process rights, and sought a federal court injunction to prevent the railroad from adopting, and the state from enforcing, the new rate schedules.¹⁷⁰ The federal court, persuaded by the shareholders’ arguments, enjoined the state attorney general from enforcing the state law.¹⁷¹ When the attorney general attacked the injunction in state court, the federal court found him in contempt¹⁷² and ordered him imprisoned.¹⁷³

In *Young*, the United States Supreme Court faced the question whether the eleventh amendment, which had been interpreted to exclude from federal court suits by citizens against unconsenting states, undermined the jurisdictional basis for the federal injunction against the attorney general. The Court theorized that a state official’s enforcement of an unconstitutional statute, though undertaken in the state’s name, is an act “without the authority of and one which does not affect the State in its sovereign or governmental capacity.”¹⁷⁴ According to the Court, the superior federal authority capable of voiding the statute also stripped the attorney general of his status as a representative of the state, so that to sue him was not to sue the state.¹⁷⁵ The official’s answerability to the “supreme authority of the *1518 United States” supervened any immunity that the state might otherwise “impart to him.”¹⁷⁶ Whatever the depth of reality or fiction implicit in these words, it is at least clear that the Court based its escape from the eleventh amendment on

A different eleventh amendment objection, based on *Edelman v. Jordan*, 415 U.S. 651 (1974), arose at the outset of the *Pennhurst* case. See *Haldeman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 109 (3d Cir. 1979). The Third Circuit rejected the defendants’ argument that the amendment barred financially burdensome relief even when the relief operated prospectively. This argument, if successful, would have barred relief regardless of whether it was grounded in federal or state law.

¹⁶⁵ 673 F.2d at 656.

¹⁶⁶ 209 U.S. 123 (1908).

¹⁶⁷ See, e.g., *Griffin v. County School Bd.*, 377 U.S. 218, 228 (1964).

¹⁶⁸ See *Edelman*, 415 U.S. at 664.

¹⁶⁹ See *Young*, 209 U.S. at 127. The railroad rates were “materially reduced.” *Id.* Penalties for overcharging included harsh fines and a ninety-day term of imprisonment for each violation. See *id.* at 145.

¹⁷⁰ See *id.* at 130. The shareholders also sought an injunction against the railroad, which had declined to disobey the law, given the “severity of the penalties.” See *id.* The fact that no one would volunteer to violate the law in order to challenge it provided the irreparable injury needed for the injunction. See *id.* at 163-65.

¹⁷¹ See *id.* at 132.

¹⁷² See *id.* at 133-34.

¹⁷³ See *id.* at 126.

¹⁷⁴ *Id.* at 159.

¹⁷⁵ See *id.* at 159-60. This stripping doctrine creates a well-recognized paradox: if the state official is not the state, how can his action constitute state action for purposes of alleging a fourteenth amendment violation? See, e.g., M. Redish, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 155 (1980).

¹⁷⁶ *Young*, 209 U.S. at 160.

the importance of the supremacy of federal law.¹⁷⁷

The *Pennhurst* plaintiffs, unlike the plaintiffs in *Young*, did not ask the federal court to enjoin the enforcement of a state statute on federal constitutional grounds,¹⁷⁸ but rather to enforce a state statute that did not implicate any federal legal issue. The question of enforcing the state statute arose as part of a case that included several substantial federal claims, including federal constitutional claims that, under *Young*, could strip the defendant officials of their state immunity. But could the *Young* doctrine apply to the state claims as well and deprive the state officials of immunity from suit for violation of the state statute? Was it enough that the state claim was pendent to the federal claim? The Third Circuit found that the primary jurisdictional task in this case was to hale the state officials into federal court and that, once the officials were there for the federal claim, it was a constitutionally unobtrusive act to hear the state law claim as well.¹⁷⁹ After *1519 all, if this were not permissible, a federal court would have to forgo opportunities to base its decisions on nonconstitutional grounds, in contravention of a basic principle of judicial restraint.¹⁸⁰ Although a majority of the Supreme Court rejected the Third Circuit's view, Justice Stevens, writing for a minority of four, expounded on the issue of *Young*'s applicability at greater length, arguing that any violation of law by the individual defendant rendered his action ultra vires and thus incapable of taking on the immunity of the state.¹⁸¹

The *Pennhurst* majority, in an opinion by Justice Powell, grounded its decision in principles of federalism, eschewing the agency concepts that underlay Justice Stevens' ultra vires theory.¹⁸² Justice Powell noted that the narrow interpretation that has marked the history of the *Young* rule demonstrates the Court's persistent sensitivity to the interests of the state.¹⁸³ Most notably, the Court's refusal to construe a state's consent to

¹⁷⁷ See id. at 160. Justice Harlan argued in dissent that the state should be permitted to test its own statute in its own courts. See id. at 176 (Harlan, J., dissenting). Justice Harlan asserted that the majority's holding in *Young* "subordinated" the sovereign states, making them mere "dependencies" or "provinces" of the federal government, and placing them in a "condition of inferiority" they had supposedly "never dreamed of," either when they ratified the Constitution or when they subsequently adopted the eleventh amendment. See id. at 175. Justice Harlan found the interest in enforcing federal law satisfied by the fact that, under the supremacy clause, the state must apply federal constitutional law. In holding this belief, Justice Harlan differed fundamentally from those members of today's Court who tie the importance of a sovereign's law to the need to have that sovereign's courts decide cases under that law. For Justice Harlan, the interest in the independent functioning of the states took precedence over any interest that might be served by permitting a federal court to intervene at the outset of a case to decide the federal issue involved. Balancing the federal and state interests, he would have been content to let the federal issue work its way through the state system and ultimately receive appellate review from the Supreme Court. See id. at 176.

¹⁷⁸ Note that in *Young* the federal interest shaping jurisdiction was the need to vindicate a federal right, a motivation that accords with the view expressed by Justice Stevens in *Long*. See supra p. 1507.

¹⁷⁹ See *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647, 657-58 (3d Cir. 1982) (citing *Siler v. Louisville & N. R.R.*, 213 U.S. 175 (1909) (unanimous opinion written by Justice Peckham, the author of the majority opinion in *Young*)). Rather than asking whether pendent jurisdiction could provide an exception to the eleventh amendment, the Third Circuit asked whether the eleventh amendment could provide an exception to pendent jurisdiction, reversing what the Supreme Court saw as the correct order of authority. See infra p. 1520. The circuit court, perhaps implicitly daring the Supreme Court to reverse it, professed to believe that the Supreme Court's remand with the direction for consideration of the state statutory claim "preclude[d]" it from acting independently to reject *Siler*. See 673 F.2d at 658-59.

¹⁸⁰ See id. at 658 (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

¹⁸¹ See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 130-59 (1984) (Stevens, J., dissenting). Justice Stevens found the ultra vires theory in the same opaque and confused body of caselaw that the majority interpreted to the opposite effect.

¹⁸² See *Pennhurst*, 465 U.S. at 100 (citing *Hutto v. Finney*, 437 U.S. 678, 691 (1978)).

¹⁸³ See id. at 99-103. The rule of *Young* has been applied only where plaintiffs seek to enjoin a state official. The "fiction" of *Young* is pierced if damages are sought: the Court does not then blind itself to the reality that damages will come from the state. See id. at 101 & n.11. Forms of injunctive relief that operate upon the state coffers in a way similar to damages also pierce the *Young*

suit as consent to suit in federal court reflects its conclusion that a state has a “constitutional interest” in where it is sued, as well as whether it may be sued at all.¹⁸⁴ In accord with this narrow interpretation, Justice Powell characterized *Young* as a compromise needed to “harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.”¹⁸⁵ The *Young* Court, argued Justice Powell, deliberately stretched doctrine in order to “promote the vindication of federal rights”¹⁸⁶ and “the supremacy of federal law,”¹⁸⁷ creating a doctrinal fiction that is believable only as long as it is backed by the motivation of enforcing federal law.¹⁸⁸ When the rights *1520 sued upon arise in state law, that motivation is gone and the state’s constitutional interest in immunity – always uncomfortably suppressed under the interest in the supremacy of federal law – springs back. And it springs back with full constitutional power, undaunted by considerations of efficiency and practicality that justify pendent jurisdiction.¹⁸⁹ Thus, for a majority of the Supreme Court, the doctrine of pendent jurisdiction fails to support an extension of *Young*’s fiction into the context of a case like *Pennhurst*.¹⁹⁰ For this majority, the effect of forcing plaintiffs either to bifurcate their litigation or take their federal claims to state court along with their state claims is just another hardship endured in abiding by the Constitution.¹⁹¹ *1521

fiction. See *id.* at 102-03 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974) (refusing to apply the *Young* doctrine in a case that would require a state to provide retroactive payment of benefits under a federal aid program)).

¹⁸⁴ See *id.* at 99 & n.9.

¹⁸⁵ 465 U.S. at 105 (quoting *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Justice Brennan, concurring in part and dissenting in part)).

¹⁸⁶ *Id.* (citing *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974); *Georgia R.R. & Banking v. Redwine*, 342 U.S. 299, 304 (1952)).

¹⁸⁷ *Id.*

¹⁸⁸ Justice Powell explicitly rejected Justice Stevens’ broader view of the *Young* fiction as “out of touch with reality.” *Id.* at 107. Justice Powell emphasized that the relief ordered by the district court in *Pennhurst* “plainly ran against the State.” *Id.* at 109 n.17. Of course, had the relief been ordered pursuant to federal law, it also would have “[run] against the State.” But, according to Justice Powell, under *Young*, “an injunction based on federal law stands on very different footing, particularly in light of the Civil War Amendments,” and “in such cases this Court is vested with the constitutional duty to vindicate ‘the supreme authority of the United States.’” *Id.* (citing *Ex parte Young*, 209 U.S. 123, 160 (1908)). Presumably, this means: we know *Young* created a fiction, and an unbelievable one at that, but we will indulge in it as long as the basis for relief is federal law.

¹⁸⁹ See *id.* at 120 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). It should be noted that even the *Gibbs* Court showed concern for the state’s interest in retaining control over its own laws. According to the Court in *Gibbs*, when practical considerations do not weigh in favor of consolidations, federal courts should “hesitate to exercise jurisdiction” and avoid “[n]eedless decisions of state law ... both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *Gibbs*, 383 U.S. at 726. For discussions of the use of pendent jurisdiction after *Pennhurst*, 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 (1985); Rudenstine, *Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71 (1984).

¹⁹⁰ The majority considered the same *Ashwander* principle of deciding cases on nonconstitutional grounds as a policy behind pendent jurisdiction, but saw pendent jurisdiction as “a judge-made doctrine inferred from the general language of Art. III” and thus subordinate to the “explicit limitation on federal jurisdiction contained in the Eleventh Amendment.” 465 U.S. at 117-18. The Court discounted the precedential value of *Siler v. Louisville & N. R.R.*, 213 U.S. 175 (1909), which the Third Circuit had found controlling, on the ground that although the *Siler* Court did grant relief against state officials on the basis of pendent state law claims, it never explicitly addressed the application of the eleventh amendment to such claims. See 465 U.S. at 118. Thus, the *Pennhurst* majority viewed the issue as “an open one.” See 465 U.S. at 119 (citing *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)).

¹⁹¹ See 465 U.S. at 122-23. Sending the *Pennhurst* plaintiffs to state court with their state claims seems harsh in large part because the jurisdictional problem did not surface until after the plaintiffs had won a long trial. The lateness of the jurisdictional attack did not invalidate it because an unconsented-to suit against a state lies outside a federal court’s subject matter jurisdiction. Unlike objections to personal jurisdiction, which are waived if not asserted at the outset, objections under the eleventh amendment attack the court’s subject matter jurisdiction and thus may be raised at any time. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945).

C. Structuring Jurisdictional Doctrine to Keep State Law in State Courts

The majority found no federal interest that might justify the use of the *Young* fiction. The Court might have regarded the plaintiffs' cost of continuing with their federal claims in federal court – either abandoning their state claims or starting a second lawsuit in state court – as an unacceptable burden on the federal claims that raises a sufficient federal interest.¹⁹² But Justice Powell maintained that all federal interests “disappear[]” when the basis for suit becomes state law.¹⁹³ Considering alternately the state's interest in immunity from suit in federal court, he found that it increased when the suit is based in state law. According to Justice Powell, “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.”¹⁹⁴

Justice Stevens, in dissent, looked at the question of sovereign immunity only from the point of view of the state, because, under his ultra vires theory, he did not need to find a federal interest to justify using *Young*. He found that it was less of an intrusion to help the state to enforce its own law than to force it to follow federal law.¹⁹⁵ To him, if the state has said it does not want its officials to behave in a certain way, then it has no interest in preventing a federal court from telling them the same thing.

Justice Stevens' characterization of the state's interest in the *Pennhurst* litigation is flawed. In adjudicating the case, the federal court would do more than merely repeat the proscriptions of the state statute. It would determine exactly what behavior violates the statute and instruct the officials in detail on how to accomplish ends that the ***1522** statute only suggests.¹⁹⁶ Determining when an official is ultra vires is a more complex task than Justice Stevens admits. The complexity of the task becomes particularly apparent when one considers that to the extent that the officials in *Pennhurst* were failing to meet state standards, they were forced into that position by the state's own lack of support.¹⁹⁷

A state can act only through its agents.¹⁹⁸ In *Pennhurst*, the state acted through the officials who endeavored in good faith to run the institution despite inadequate

¹⁹² If the plaintiff chooses bifurcation under *Pennhurst*, there remains a strong federal interest in maintaining jurisdiction over the federal claim. See *infra* pp. 1535-37.

¹⁹³ 465 U.S. at 106.

¹⁹⁴ *Id.*

¹⁹⁵ See *id.* at 150-51 (Stevens, J., dissenting). This view is strikingly similar to the view of the dissenting justices in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). In *Thibodaux*, Justice Brennan, writing for the dissenters, rejected the majority's view that the need to avoid unnecessary friction with the states dictated that the federal court should abstain from exercising diversity jurisdiction in a case that would have required interpretation of the state's eminent domain statute. Justice Brennan asserted that “[f]ar from disrupting state policy, the District Court would be applying state policy, as embodied in the state statute, to the facts of this case.” 360 U.S. at 35 (Brennan, J., dissenting). Justice Frankfurter, writing for the majority, found that the state court should be given an opportunity to interpret the state's statute, because eminent domain statutes contain “much local variation interpreted in local settings,” about which a federal court could make only a “dubious and tentative forecast.” 360 U.S. at 28-29.

¹⁹⁶ See *supra* note 145.

¹⁹⁷ See 465 U.S. at 107-09.

¹⁹⁸ See *id.* at 114 n.25.

resources.¹⁹⁹ The state also acted through its legislature, which enacted a law that offered habilitation to the mentally retarded, but then failed to allocate sufficient funds to carry out that offer, or at least the most expansive version of that offer.²⁰⁰ Through its courts, the state interpreted the statute to mean that the mentally retarded must be cared for in the least restrictive environment.²⁰¹ Given the necessary interdependence of these components of the state, it is artificial – fictional – to isolate the officials running Pennhurst as “the state.” But for a federal court to consider a claim against a state, it must treat the components of the state separately, ignoring their dependency. The fiction of *Young* requires the federal court to look at the state officials as if they were acting against the wishes of the state, although the state, in the abstract, can wish nothing. This fiction is embraced when the basis for suit is federal law, because of the strength of the federal interest in enforcing that law.²⁰²

When the basis for suit is state law, however, there is not only an absence of that federal interest,²⁰³ but also a risk of misinterpretation of state law. If *Young* applied in these cases, the state’s statute would be isolated from the state courts, its interpretation and application *1523 severed from the gravitational pull of political accountability and transferred to federal court, a forum known and probably chosen for its political independence. The statute may be translated into remedies that the legislature did not contemplate, and, in a case like *Pennhurst*, remedies that the legislature – given its failure to fund the institution adequately – probably would have rejected.²⁰⁴ Of course, federal courts often apply state law and we tolerate differences in result that ensue.²⁰⁵ But the eleventh amendment counsels hesitation. When the state has created a right running against itself, but has failed to take the additional step of consenting to suit in federal court, the federal court should find that jurisdiction properly belongs to the state courts.

A state has an ongoing interest in how the law it creates is applied, which is an aspect of its power to legislate. It oversimplifies and distorts to contend that the state in

¹⁹⁹ See *id.* at 107-08 (noting that the trial court found that the individual defendants “acted in the utmost good faith ... within the sphere of their official responsibilities” and therefore were not personally liable for damages, and that they in fact struggled to improve conditions but were unable to do so because of staff shortages (emphasis added)) (quoting 446 F. Supp. at 1324).

²⁰⁰ See *id.* at 108-09.

²⁰¹ See *In re Schmidt*, 494 Pa. 86, 96-97, 429 A.2d 631, 636 (1981). Although Schmidt provides some guidance for interpreting the Pennsylvania statute, the need for a specific interpretation remains: when is a given institution the least restrictive environment? The Third Circuit and the federal district court in Pennhurst did not agree on this point. Moreover, it will not always be the case that the state supreme court will have passed upon the very point in issue, particularly if federal courts tend to attract this particular type of litigation. Indeed, the Schmidt opinion did not become available until after the Pennhurst case reached the United States Supreme Court.

²⁰² See 465 U.S. at 109 n.17.

²⁰³ But see discussion at *infra* p. 1535.

²⁰⁴ See 465 U.S. at 108-09 (“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.”).

²⁰⁵ Federal courts necessarily apply state law in diversity cases. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). They also hear state claims that are pendent to federal questions. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). And they hear federal law challenges to state statutes. See, e.g., *Ex parte Young*, 209 U.S. 123, 160 (1908). However, when strong state interests are present, federal courts have found ways to enable state courts to determine the meaning of their own law. For example, under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the federal court allows the state court to interpret an ambiguous state statute when the state may be able to make a limiting construction that will permit avoidance of a federal constitutional question. But a strong federal interest overshadows the state’s interest in its own law. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (implicitly rejecting, in a case challenging a state obscenity statute as overbroad under the first amendment, the suggestion of a concurring justice that Pullman abstention was appropriate).

Pennhurst, by enacting the statute at issue, made a promise that it failed to keep.²⁰⁶ One cannot know the contours of any supposed statutory “promise” until a court construes the statute, gives it detail, and applies it in a factual context. The key question is not whether a state may shield its “broken promises” from review, but rather whether a state legislature has the power to control the process of interpreting the statutes it creates by withholding consent to suit in federal court. To respect the state’s limitation of suit to its own courts is to empower the state to control all applications of the law that it has created, and thus to encourage state legislation. If a federal court can assume jurisdiction despite the state’s lack of consent, it may interpret the state law more broadly than the state court would, depriving the state of control over its own law. To attach such a penalty to state lawmaking might well discourage legislation like the Pennsylvania Mental Health and Mental Rehabilitation Act at issue in *Pennhurst*.

Justice Stevens, perhaps recognizing this criticism, suggested that if the state disagreed with the federal court’s interpretation or application *1524 of a state law, the state could change that law.²⁰⁷ This solution to some extent deals with the state’s inability to review federal court decisions judicially. The state is not left powerless to correct its law, because its legislature may amend the statute and make clear that the federal court’s interpretation was incorrect. For example, if the *Pennhurst* injunction had gone into effect and the Pennsylvania legislature had disagreed that its statute guaranteed habilitation in the least restrictive setting, the legislature could have amended the statute to provide that habilitation need not take place in the least restrictive setting.

Justice Stevens’ solution to the *Pennhurst* problem bears an interesting similarity to the clear statement rule of *Michigan v. Long*. *Long* empowers state courts to “declare independence”: to avoid the intrusion of Supreme Court review by clearly stating that their decisions rely independently on state law. Justice Stevens’ solution in *Pennhurst* recognizes the state legislature’s power to use a clear statement to extricate the state from an intrusive injunction that has already gone into effect, and to thus regain state independence, albeit somewhat belatedly. This form of legislative correction, however, is much less efficient than judicial review and it necessarily entails a period of time during which the injunction will have effect. The availability of this solution, then, does not eradicate the disincentive to expand citizen protections that federal jurisdiction over state law claims would create for state legislatures. In contrast, the *Pennhurst* bar to federal court jurisdiction, by allowing the “effectively functioning” state to choose which forum or fora will be permitted to construe its laws, serves the federal interest in encouraging expansive state legislation: it accords the state that attempts to address the problems of its institutions through legislation no less separateness than the state that makes no such effort at all.

D. Has the State Earned Respect for Its Separateness?

²⁰⁶ See supra note 204.

²⁰⁷ See 465 U.S. at 151-52 (Stevens, J., dissenting).

In *Long*, Justice Stevens protested strongly against intruding on the state in the absence of a need to vindicate a federal right.²⁰⁸ In *Pennhurst*, he favored federal intrusion to vindicate not federal but state rights. Can we reconcile his dissents in these two cases? We could say that in both *Long* and *Pennhurst*, Justice Stevens advocated restraint: he argued that federal courts should, whenever possible, rest their decisions on state law grounds. Just as he recognized that the *Long* presumption would result in decisions of federal constitutional law that could have rested – and perhaps already did rest – on *1525 state law grounds,²⁰⁹ he saw the majority’s decision in *Pennhurst* as depriving federal courts of the opportunity to rely on state law.²¹⁰

Justice Powell and the rest of the *Pennhurst* majority, however, could lay claim to a different kind of restraint. After *Pennhurst*, those plaintiffs who wish to sue state officials on both state and federal grounds and not to bifurcate their claims may take all of their claims to state court. If plaintiffs choose this option, there is no federal interference with the state at all.²¹¹ Might not this kind of restraint be preferable to that advocated by Justice Stevens?

States would naturally seem to be in the best position to deal with deficiencies in their own institutions.²¹² Because states often fail to attend to such deficiencies,²¹³ however, federal law remedies for plaintiffs seeking improvements are important. But the dominant federal interest is in encouraging the states to make remedial efforts independently, as, for example, had Pennsylvania by enacting the statute in *Pennhurst*. If the question is whether Justice Powell’s or Justice Stevens’ jurisdictional doctrine provides more incentive for states to supervene federal remedies with state law, the answer is probably that Justice Powell’s doctrinal choice works better.²¹⁴

Under Justice Powell’s doctrine, a state wins independence by offering its citizens generous state law rights and remedies.²¹⁵ The *1526 state makes a “separate sphere” for itself by inducing plaintiff who generally would prefer a federal forum to choose state court instead in order to claim state-created rights. Hence, the state law that wins the state independence must be more generous than federal law, just as the state constitutional law

²⁰⁸ See supra pp. 1506-07.

²⁰⁹ See *Long*, 463 U.S. 1032, 1067 (1983) (Stevens, J., dissenting) (arguing that “a policy of judicial restraint – one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene – enables this Court to make its most effective contribution to our federal system of government”).

²¹⁰ See 465 U.S. at 127 (Stevens, J., dissenting) (calling the majority’s result “inimical to sound principles of judicial restraint”).

²¹¹ An even greater level of restraint is exercised when plaintiffs who choose to bifurcate are also denied the federal forum through the device of abstention, discussed and criticized below at pages 1527-37.

²¹² States are able to fashion remedies tailored to local conditions and thus are more likely to be accepted by the citizenry. See Sheran, *State Courts and Federalism in the 1980’s: Comment*, 22 WM. & MARY L. REV. 789 (1981).

²¹³ Although Justice Brandeis rightly praised the states’ potential to act as innovative laboratories of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), the states do not necessarily live up to that potential. See Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 616 (1980). Because the states often fail to live up to their potential, theories of federalism that emphasize sovereignty (i.e., that guarantee the states an area of control untouchable by federal power) are unsound. Cf. Rapaczynski, supra note 24, at 408.

²¹⁴ Note that Justice Stevens also advocates his form of restraint on the basis of its functional value. See supra note 209.

²¹⁵ Nevertheless, some commentators decry the dilemma presented to a plaintiff who wants to be in federal court and wants to assert state law claims. See, e.g., Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075, 1083-84 (1985); see also Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 731-32 (1981) (noting that plaintiffs would choose state court if they perceived their chances of prevailing there to be as great as in federal court in order to avoid the cost of litigating difficult jurisdictional questions).

that shields a state court opinion from Supreme Court review under the independent and adequate state law ground doctrine must surpass the protection offered by the analogous federal statutory or constitutional law. Justice Powell's doctrine, then, awards separateness only to the state that earns it.

I want to emphasize, in approving of the rule announced in *Pennhurst*, that it does not completely deny access to a federal forum to plaintiffs who bring suits against state officials. If such plaintiffs doubt that they can obtain relief in state court, they can still sue the officials in federal court on federal grounds. In this event, the plaintiffs must either bring a second suit in state court to assert their state claims or else forgo those claims entirely. Presumably, they will avoid state court if the state has failed to offer them attractive rights or if the state's courts tend not to enforce state-created rights generously. By preserving a federal forum for these plaintiffs, *Pennhurst* effectively restricts the reward of autonomy to states that offer genuine alternatives to the enforcement of federal law; that is, to states that function effectively in the federal interest.

Viewing the *Pennhurst* problem from this functional perspective emphasizes the importance of federal jurisdiction to enforce federal law when states have failed to provide adequate alternatives to suit on federal grounds.²¹⁶ Federal courts presented with suits by plaintiffs who have exercised the option to proceed in federal court on their federal claims should not be moved by "states' rights" formulations of federalism designed to avoid federal jurisdiction. They should not defer to state institutions solely because those institutions are operated by the state, without some showing that the institutions themselves serve the federal interest in the supremacy of federal law and the vindication of federal rights.

We need not see sovereign immunity as a clumsy, outmoded obstruction to the enforcement of rights.²¹⁷ Interpreted functionally, the doctrine can serve to free states from the risk of unintended and burdensome applications of their law in individual cases. This freedom may encourage states to develop and experiment with new protections and entitlements for their citizens that extend beyond the federal minimums and to tailor solutions in accordance with their knowledge of local conditions and preferences, within the bounds of *1527 their fiscal limitations. In this way, sovereign immunity can serve the interests of federalism as articulated by Justice Black in *Younger*.

E. A *Pennhurst* Epilogue: Pursuing the Federal Claim

As we have seen, federal jurisdiction over federal claims is a necessary accompaniment to the separateness *Pennhurst* grants the states. But in some instances federal courts will abstain from exercising their jurisdiction. Indeed, the *Pennhurst* Court itself intimated that abstention may lie ahead if plaintiffs attempt to remain in federal court. Let us then examine the impact of this potential on the thesis of this Article.

1. The *Pennhurst* Footnote.

²¹⁶ Cf. *infra* pp. 1527-35 (discussing whether equitable restraint should prevent enforcement of federal law).

²¹⁷ See, e.g., Shapiro, *Comment, Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 84-85 (1984).

After finding that sovereign immunity barred their state law claims, the Supreme Court sent the *Pennhurst* plaintiffs back to federal court to litigate their federal claims.²¹⁸ With federal law as the basis for relief, the *Pennhurst* rationale would not prevent the *Young* fiction from coming into play. But the Supreme Court, at the very outset of its opinion, had sounded a note of caution about the potential for relief. Noting that the court of appeals had held that relief on the federal claims could be granted despite “the prospective financial burden [which] was substantial and ongoing,”²¹⁹ the Supreme Court stated in a footnote:

We do not decide whether the District Court would have jurisdiction under this reasoning 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.’”²²⁰ *1528

The Court seems not to have been suggesting in this statement that it intends to make further changes in eleventh amendment doctrine and the operation of *Young*, which, under present case law, avoids the bar of immunity to suit when federal law is the basis for a request for prospective relief against state officials.²²¹ The Court quoted from *Rizzo v. Goode*,²²² a case that did not involve sovereign immunity at all,²²³ but rather equitable restraint.²²⁴ We may thus anticipate that in this context, the Court will express its federalism in terms of the latter doctrine.

Clearly, the *Pennhurst* Court was concerned about the burdens imposed on state officials by federal court injunctions.²²⁵ Nevertheless, to the extent that it sought to limit

²¹⁸ See 465 U.S. at 124-25 (referring to claims resting on the eighth and fourteenth amendments to the Constitution, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), and The Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6011, 6063 (1976)).

²¹⁹ *Id.* at 104 (citing 673 F.2d at 656). For a discussion of the operation of Ex parte *Young* with respect to past and future relief, see note 183 above.

²²⁰ *Id.* at 104 n.13 (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951))). The intimations in this statement will be played out in future cases: *Pennhurst* itself has been settled. See *Halderman v. Pennhurst State School & Hosp.*, 610 F. Supp. 1221 (E.D. Pa. 1985) (approving a settlement of class action after a hearing). The settlement provided for “community living arrangements to those members of the plaintiff class for whom such placement is deemed appropriate by the individual planning process.” *Id.* at 1227. The district judge noted that transfers from *Pennhurst* to community living arrangements had been taking place throughout the litigation and that the “now-available empirical evidence has vindicated the opinions of the mental retardation experts that institutionalization cannot provide minimally adequate habilitation.” *Id.* at 1232. The judge also noted that continued litigation would be unduly time-consuming and expensive. See *id.*

²²¹ See *Edelman v. Jordan*, 415 U.S. 651, 664 (1974); *supra* note 183.

²²² 423 U.S. 362 (1976).

²²³ *Rizzo* was a suit against supervisors of a city police department; because cities are not considered arms of the state, they are not within the scope of the eleventh amendment. See *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977). The fact that federalism-based equitable restraint is nevertheless applied to cities confirms the thesis of this Article. Under a sovereignty-based theory of federalism, equitable restraint applied to a city seems logically defective. But if one sees jurisdictional federalism doctrines as based on a concept not of impermeable separate spheres – “sovereignty” – but rather of entities with useful purposes, which a city, like a state, may be capable of carrying out, that logical defect dissolves.

²²⁴ For a discussion of *Rizzo* and the doctrine of equitable restraint, see pages 1529-31 below.

²²⁵ See 465 U.S. at 109 n.17; see also Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1225-26 (1977) (noting that there is a national interest in promoting dual federalism, opposing the national interest in federal enforcement that would permit states to provide vital services without undue expense or restriction, in order to avoid usurping democracy and to preserve state autonomy).

federal court power to issue burdensome injunctions enforcing federal law, the Court apparently preferred not to overrule *Young* and thus reinstate absolute state sovereign immunity, but rather to encourage federal courts to apply the less rigid doctrine of equitable restraint.²²⁶ Preference for a flexible doctrine directed at the appropriateness of the remedy seems more closely aligned with a functional analysis. There is a strong federal interest in the enforcement of federal law, and a doctrine less drastic than sovereign immunity may adequately serve both this interest and the contrary state interests in financial viability and autonomy. But let us examine more closely whether federal courts should indeed apply equitable restraint in cases like *Pennhurst*.

2. Equitable Restraint and *Rizzo v. Goode*.

In *Rizzo*, the Supreme Court fashioned a limit on injunctive enforcement of federal law when that enforcement interferes with the internal affairs of a *1529 state agency. The *Rizzo* plaintiffs, a class consisting of the citizens of Philadelphia, had charged the supervisors of the Philadelphia police department with violations of federal law for “discourag[ing] the filing of civilian complaints and ... minimiz[ing] the consequences” of pervasive police brutality.²²⁷ The district court decree would have imposed on the Philadelphia police department “a comprehensive program for dealing adequately with civilian complaints” alleging police misconduct.²²⁸ The district judge issued an injunction against the defendants, the supervisors of the department, on the theory that improved procedures would deter the true culprits, the unnamed defendants.²²⁹ The judge’s vision of the case as an effort to secure the rights of the entire citizenry of Philadelphia from the threat of future police misconduct damages led him to fashion a remedy to achieve institutional reform rather than to compensate for past injuries.²³⁰ *1530

²²⁶ Professor Weinberg has suggested that in fact the Court could have dealt not only with the federal law issue, but also the state law issue in *Pennhurst*, by invoking the doctrine of equitable restraint. See Weinberg, *supra* note 215, at 1080. Weinberg argues that the Court chose sovereign immunity as the means to dispose of the state law issue in order to establish a future bar to all suits against federal officials on state law grounds, including those in which equitable restraint would not be appropriate. See *id.* at 1080-82.

²²⁷ *Rizzo v. Goode*, 423 U.S. 362, 368-69 (1976).

²²⁸ *Id.* at 369 (quoting *COPPAR v. Rizzo*, 357 F. Supp. 1289, 1321 (E.D. Pa. 1973)). From the trial judge’s perspective, the relief granted seemed like the ‘least drastic’ alternative; he rejected the intrusive civilian review proposed by plaintiffs. See 357 F. Supp. at 1320.

²²⁹ See 357 F. Supp. at 1320. To justify injunctive relief creating new intradepartmental procedures, the district judge opined that existing procedures were “inadequate to protect the public interest involved” in anything but “cases of severe injuries.” *Id.* at 1319. An interesting treatment of the “no adequate remedy at law” prerequisite to equitable relief can be seen in the judge’s conclusion that “[p]rivate suits for damages are expensive, time-consuming, not readily available, and not notably successful; moreover, they have no preventive effect.” *Id.* at 1319-20 (also noting the unlikelihood of criminal prosecution). Some commentators have questioned whether the traditional preference for damages is still valid in at least some types of litigation, such as that concerning institutional reform. See, e.g., O. FISS, *THE CIVIL RIGHTS INJUNCTION* 38-85 (1978); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292-96 (1976).

²³⁰ Like those who would enhance the ability of federal judges to respond to the abuses of state institutions, the trial judge apparently embraced the idea of public law litigation. Professor Abram Chayes coined the term “public law litigation” in an article published in the year the Court decided *Rizzo*. See Chayes, *supra* note 229. It is Chayes’ thesis that the Supreme Court should mold procedural doctrine to facilitate suits of the sort brought in *Rizzo* and to clear a path for broad remedies restructuring state institutions. A vast literature exists debating the advisability of such expansion of the federal judicial role. See Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) (discussing the fate of public law litigation in the Burger Court); see also *id.*, at 2 n.1 (citing articles). For Professor Chayes’ own, more recent view of the fate of public law litigation, see Chayes, *The Supreme Court, 1981 Term – Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

In a sense, the federal judge in *Rizzo* was not simply telling defendants how to run the police department. The defendants themselves played a part in developing the terms of the decree. See 423 U.S. at 381 (Blackmun, J., dissenting). For opinions regarding litigant involvement in fashioning injunctive relief, compare Fiss, note 18 above, at 1155, which takes a positive view of such involvement on the part of defendants, with Mishkin, note 142 above, at 957-58, which argues that defendants’ participation in

The Supreme Court, in an opinion written by Justice Rehnquist, expressed grave doubts about the justiciability of *Rizzo*, which it characterized as “a heated dispute between individual citizens and certain policemen” that had somehow “evolved into an attempt by the federal judiciary to resolve a ‘controversy’ between the entire citizenry of Philadelphia” and the officials supervising the police department.²³¹ The Court found that the plaintiffs had failed to establish a violation of federal law by the named defendants, who therefore could not be made to provide the remedy for the violations of individual police officers.²³² Despite these two more-than-adequate bases for its decision, the Court went on to conclude, in the portion of its opinion cited in the *Pennhurst* footnote, that the injunction was inconsistent with the doctrine of equitable restraint.²³³ In response to the plaintiffs’ ***1531** insistence that the breadth of federal remedial power permitted the court to force supervisors to take steps to control the constitutional violations of their employees, the Court not only cited the traditional rule that the scope of the violation determines the extent of the court’s remedial power,²³⁴ but also stated that “important considerations of federalism are additional factors weighing against it.”²³⁵ The same equitable restraint that deters the federal courts from interfering with state court criminal

drafting decrees may improperly insulate politically accountable officials from voter disapproval. Note that in *Rizzo* the Commonwealth of Pennsylvania appeared as amicus curiae on behalf of the plaintiffs, seeking to uphold the decree. See 423 U.S. at 384 (Blackmun, J., dissenting).

²³¹ 423 U.S. at 371-73. That the named plaintiffs had suffered in the past from incidents of brutality raised only an attenuated speculation that they might in the future face similar treatment. According to the Court, that possibility was insufficient to satisfy the requirement of a “real and immediate threat of repeated injury” necessary for awarding injunctive relief. See id. at 372 (quoting *O’Shea v. Littleton*, 414 U.S. 488 (1974)). The Court noted that worse still, the federal district judge, constitutionally capable of reasoning only in a concrete setting, was forced to speculate even further to link the threat of future abuse by unnamed policemen to the indirect deterrent value of improved disciplinary procedures. See id. at 372-73. Although the Court failed to refer explicitly to standing when it spoke of the justiciability problem, the defects it found align closely with the injury-in-fact standing test, which requires, first, an actual or threatened injury to the plaintiffs that is, second, “fairly traceable” to the defendants and third, likely to be redressed by the requested relief. The injury-in-fact test is clearly stated in later cases. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

²³² See 423 U.S. at 376-77. The Court suggested that liability under 42 U.S.C. § 1983 (1982), the statutory basis for the suit, would require proof of a “deliberate plan” on the part of the officials. See id. at 375. The Court rejected the theory that the failure to provide adequate procedures violated a “duty” to prevent future misconduct, asserting that the concept of such a duty is too “amorphous” to comport with the language of § 1983. See id. at 376. The dissent, however, found this duty firmly grounded in case law. See id. at 385 n.2 (Blackmun, J., dissenting). Here, the Justices’ differences may lie chiefly in the factual issue of causation: while the dissent posited that liability for a § 1983 claim falls upon any official whose conduct could have prevented a constitutional violation, the majority refused to locate such liability in officials whose conduct did not itself cause such a violation. Considerations of causation and remedy are also the focus of the standing inquiry. See Note, *Rizzo v. Goode: Federal Remedies for Police Misconduct*, 62 VA. L. REV. 1259, 1265 (1976) (“The [Rizzo] Court’s conclusion that the plaintiffs had no case or controversy with Philadelphia police officials reflected the Court’s view of the merits: high police officials do not ‘cause’ citizens ‘to be subjected’ to patterns of misconduct merely by acquiescing in them.” (footnote omitted)). A judge who would find a failure to act a violation of law probably would also find the plaintiffs’ injury “fairly traceable” to that failure and the improved procedures “likely to redress” the injury. These findings would satisfy the second and third prongs of the injury-in-fact standing test described in note 231 above. Conversely, the *Rizzo* court, if it had dealt more explicitly with standing, would probably have found the lack of procedures only “tenuously” connected to the injuries and a change in those procedures a “speculative” source of redress. Such an approach would have been analytically preferable to discussing the merits (liability) when the case was, or may have been, nonjusticiable.

²³³ See 423 U.S. at 378-80. One might very well wonder why the Court considered any other issue if there were doubts about whether the case was justiciable and thus within federal court jurisdiction. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it cases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”). The answer may be that the Court saw the question of the scope of the federal judge’s equitable power as a continuation of the justiciability problem, as it has previously pointed out. See *O’Shea v. Littleton*, 414 U.S. 488, 499 (1974) (stating that case or controversy considerations “obviously shade into those determining whether the complaint states a sound basis for equitable relief”). Because one of the elements of standing analysis is whether the requested remedy is likely to cure the alleged injury, see *supra* note 231, it is plausible to assert that the relationship between the plaintiff and the requested remedy is a component of the standing analysis.

²³⁴ See 423 U.S. at 378.

²³⁵ *Id.*

proceedings²³⁶ applies – though “perhaps” to a lesser extent²³⁷ – to the internal affairs of a state or city governmental agency, like a police department.²³⁸

Apparently, the *Pennhurst* Court, in citing *Rizzo*, intended to imply that an injunctive suit against a state hospital presents another instance in which equitable restraint may apply.²³⁹ To judge whether this proposed application is justified, we must first ask what justifies deference to state courts. What interest does such deference serve, and what does its adoption encourage state courts to do? Then, we must consider whether the extension of that doctrine of restraint to nonjudicial institutions is justified and what this form of restraint encourages these institutions to do.

3. A Functional Analysis of Equitable Restraint in Its Classic Form.

Younger v. Harris,²⁴⁰ the case from which this Article derives its functional vision of federalism, exemplifies the classic judicial application of equitable restraint.²⁴¹ Harris, the state court *1532 defendant turned federal court plaintiff, argued that California’s Criminal Syndicalism Act²⁴² violated the first amendment and asked a federal court to enjoin the county district attorney from prosecuting him in state court.²⁴³ Unlike the shareholders of the railroads who sought to enjoin the attorney general in *Ex Parte Young*,²⁴⁴ Harris did not face merely the possibility of criminal prosecution should he engage in an activity proscribed by the statute; rather, he had already acted and faced a pending prosecution.²⁴⁵ The Supreme Court, citing *Young*, acknowledged that federal courts have the power to enjoin prosecutions in state court in order to prevent irreparable damage,²⁴⁶ but emphasized that considerations of equity and federalism give rise to “a longstanding public policy against federal court interference with state court proceedings.”²⁴⁷ Because the Court did not view the “cost, anxiety, and inconvenience of having to defend against a single criminal prosecution ... [as] ‘irreparable’ in the special legal sense of that term,”²⁴⁸ the injunction could not issue.²⁴⁹ The Court intertwined this

²³⁶ See infra pp. 1531-34 (discussing *Younger*).

²³⁷ See 423 U.S. at 380.

²³⁸ See id. at 378-80.

²³⁹ See Brown, supra note 189, at 366 (speculating that the Supreme Court is prepared to extend the *Rizzo* principles of comity and federalism “to all suits involving the activities of state and local governments”).

²⁴⁰ 401 U.S. 37 (1971).

²⁴¹ State criminal proceedings present the most compelling situation for federal court deference to state courts, but equitable restraint also may be appropriate in other state enforcement proceedings when important state interests are involved. See, e.g., *Moore v. Sims*, 442 U.S. 415 (1979) (child custody proceeding); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (state attachment proceeding).

²⁴² CAL. PENAL CODE §§ 11400- 11402 (West 1982).

²⁴³ See 401 U.S. at 38-40.

²⁴⁴ See supra pp. 1517-18.

²⁴⁵ See 401 U.S. at 38.

²⁴⁶ See id. at 43. For a discussion of how the plaintiffs in *Young* demonstrated a threat of irreparable damage, see note 170 above.

²⁴⁷ 401 U.S. at 43.

²⁴⁸ Id. at 46. The traditional language of equity does not translate easily into the federalism context. See Fiss, supra note 18, at 1106-07 (“A verbal formula, such as the irreparable injury requirement, suggests that a point is being made about remedies, when in truth a point is being made about the structure of the federal system, one that stands independent of remedy.”). An alternative way of expressing the reason for declining to grant equitable relief is to say there is an “adequate remedy at law.” This locution, like “irreparable injury,” stems from traditional equity practices within one sovereign’s court system and similarly translates somewhat awkwardly to the context of federal/state relations. A criminal defendant’s successful motion to dismiss here would not technically be a “remedy at law.”

²⁴⁹ See 401 U.S. at 54.

discussion of equitable principles with a discussion of federalism. The Court saw the equitable bar to relief as “reinforced by an even more vital consideration, the notion of ‘comity,’ that is, a proper respect for state functions” – the idea “that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”²⁵⁰

In practice, this deference means that the defendant must transform his federal claim for injunctive relief into a defense in the criminal case. If the state court, by upholding this defense, can forestall any damages that are legally cognizable, there are no irreparable damages that would have warranted a federal injunction.²⁵¹ The plaintiff loses his power to choose the forum because the state has ***1533** won its autonomy by offering an institution capable of vindicating federal law. The autonomous operation of state court criminal and other enforcement proceedings at the trial level is functionally superior (unless it is for some reason defective, as discussed below) to the commencement of a secondary litigation in federal court. Routine secondary litigation would both overburden federal courts and delay state proceedings. Moreover, it would express distrust of the willingness of state courts to adequately enforce federal law, and deny them the opportunity to develop expertise and sensitivity in applying that law.²⁵² Resort to federal courts, then, in the absence of some showing of the inadequacy of the state courts, impairs the effective, separate functioning of the state courts.²⁵³

The Supreme Court has tailored the *Younger* doctrine to preserve the ability of federal courts to enjoin state court proceedings when the state courts for one reason or another do not deserve autonomy. If the state does not provide a forum for adequate adjudication of the federal right, the federal court that maintains jurisdiction should not exercise restraint.²⁵⁴ For example, if the federal plaintiffs are indicted solely for harassment purposes without an intention to secure a conviction, so that the state court never has the opportunity to pass on the federal defenses, federal courts will enjoin the prosecution.²⁵⁵ Likewise, if the state court proceeding in question is a summary one that excludes the federal defense, restraint is inappropriate.²⁵⁶ Thus, federal courts do not defer to state courts without considering their adequacy to serve the federal interest in the enforcement of federal law.²⁵⁷ State courts do not receive deference simply because they are ***1534**

²⁵⁰ Id. at 44.

²⁵¹ See id. at 46.

²⁵² See Bator, *supra* note 26, at 624-25.

²⁵³ Note that although federalism considerations in cases like *Pennhurst* justify bifurcating proceedings, in the *Younger* context these considerations counsel in favor of consolidation in a single forum. Identifying the federal interest as the effective functioning of state entities explains this seeming inconsistency. In cases like *Pennhurst*, bifurcation seems tolerable in the hope of encouraging the state to adopt its own remedial legislation. In *Younger*, it was intolerable for a federal court to usurp, in a secondary proceeding, adjudication of rights that might otherwise be vindicated in state court. The results in both cases restrict federal court jurisdiction in the face of a functioning state institution.

²⁵⁴ See 401 U.S. at 48 (discussing the “kind of irreparable injury” inflicted by a state prosecutor that “ha[s] always been considered sufficient to justify federal intervention”).

²⁵⁵ See id. at 48-49 (discussing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

²⁵⁶ In addition, if a state statute patently and thoroughly violates the federal Constitution, the federal court may simply declare that. See id. at 53-54 (citing *Watson v. Buck*, 313 U.S. 387, 402 (1941)). This exception is rarely, if ever, used. Indeed, it is difficult to justify. If the statute is so obviously unconstitutional, it should present the easiest case for the state court to handle. There seems no reason to distrust the state court to invalidate such a statute, for which the state legislature alone is responsible.

²⁵⁷ See *Trainor v. Hernandez*, 431 U.S. 434, 441, 447-48 (1977) (remanding a case to determine whether the state procedure adequately protected federal rights). Justice Stevens, dissenting, asserted that the procedure obviously was inadequate, see id. at 466-70 (Stevens, J., dissenting), and indeed, the lower court on remand agreed, see *Hernandez v. Finley*, 471 F. Supp. 516, 520 (N.D. Ill.

state institutions, but rather because their ability to function effectively in the federal interest has earned them autonomy.

In the words of Justice O'Connor, "state court respect for federal law is inextricably linked to federal court respect for state court proceedings."²⁵⁸ When state procedure prevents a defendant from raising his federal defense, the state proceeding loses the respect that otherwise would insulate it from federal intervention.²⁵⁹ In the terminology of this Article, the state has failed to follow the federal design for building a separate sphere. Thus, the doctrine of equitable restraint encourages states to provide adequate routes for the vindication of federal law within their own processes and "rewards" them with separateness when they succeed.

4. The Appropriateness of Equitable Restraint in *Pennhurst*.

Given these justifications for respecting state court independence, one may well wonder why equitable restraint should extend to accord parallel independence to other state institutions such as police departments and hospitals. In a case like *Pennhurst* or *Rizzo*, it is the hospital or police department that is charged with violating federal law; such an institution, unlike a state court, cannot provide a valid, functional alternative to federal court.²⁶⁰ If no state procedure exists to adequately enforce the federal right at stake, according the state autonomy would serve no federal interest.²⁶¹ If anything, federal court restraint in this context would encourage the violation of federal law. To defer to an institution such as the Philadelphia police department or the Pennhurst State School and Hospital solely because it is a state institution is to adopt the essentially unprincipled theory of "states' rights" that Justice Black disavowed in *Younger*.²⁶² From *1535 a functionalist perspective, separateness simply is not warranted, and equitable restraint should not apply.²⁶³

5. The Perils of Bifurcation.

A more difficult jurisdictional problem is presented in a case like *Pennhurst* if the plaintiffs choose to bifurcate their litigation and proceed in both federal and state courts. Should the federal court exercise restraint when a state adjudicatory body is in the

1978). Justice Stevens would bar abstention "in cases in which the federal challenge is to the constitutionality of the state procedure itself." 431 U.S. at 469 (Stevens, J., dissenting).

²⁵⁸ O'Connor, *supra* note 36, at 9.

²⁵⁹ For an example of a federal court refusal to intervene when state procedures are deemed adequate, see *Stone v. Powell*, 428 U.S. 465, 494 (1976), which held that a full and fair opportunity to litigate whether the fourth amendment bars the introduction of evidence at trial precludes review of that issue in a federal habeas proceeding.

²⁶⁰ At least with respect to criminal cases, because they commence in state court, state court adjudication of an entire case achieves optimal efficiency by avoiding the initiation of a secondary suit in federal court.

²⁶¹ A state institution has some potential to engage in self-correction. For example, when *City of Los Angeles v. Lyons*, 461 U.S. at 95 (1983), was pending in federal court, the Los Angeles Board of Police Commissioners declared a moratorium on the use of the chokeholds challenged in the case. See *id.* at 100. But if such a remedial effort by the state institution takes place, as it did in *Lyons*, only under the influence of a lawsuit and strong public pressure (in *Lyons*, after fifteen people had died from the chokehold, see *id.*), it is an inadequate substitute for federal court action.

²⁶² See *supra* p. 1488.

²⁶³ One commentator has suggested that the Court appears to recognize the lack of functional justification for federal court restraint in at least some cases involving state social institutions. See Rudenstine, *supra* note 189, at 109 (speculating that in future cases involving state institutions the *Pennhurst* majority will "employ comity, if at all, only to check federal judicial power on a case-by-case basis").

picture? Under *Colorado River River Conservation District v. United States*,²⁶⁴ a federal court may stay its own proceeding in deference to parallel state proceedings only when “exceptional circumstances”²⁶⁵ overcome the federal court’s “virtually unflagging obligation ... to exercise the jurisdiction given [it].”²⁶⁶ There is a great deal of play in the assessment of the factors that might combine to constitute the needed “exceptional circumstances.”²⁶⁷ The relevant factors include whether federal or state law is the basis for relief (especially when the federal case presents claims that are within the exclusive jurisdiction of the federal courts),²⁶⁸ the inconvenience *1536 of the federal forum, the order of filing and the relative progress of the lawsuits in the two forums, and the need to avoid piecemeal litigation.²⁶⁹ Yet federal policies for and against piecemeal litigation have had a determinative effect in Supreme Court cases describing this form of abstention. In *Colorado River*, a federal statute favoring consolidated litigation in cases involving water rights dictated abstention.²⁷⁰ In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,²⁷¹ the Arbitration Act, which “requires piecemeal litigation,” produced the opposite result.²⁷²

If plaintiffs attempt to bifurcate their litigation because of the *Pennhurst* rule, will “exceptional circumstances” motivate the federal court to stay its hand with respect to federal claims such as those asserted in *Pennhurst*?²⁷³ Abstention in such cases would permit state court usurpation of decisions regarding very important federal rights.²⁷⁴

²⁶⁴ 424 U.S. 800 (1976).

²⁶⁵ Id. at 813 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)).

²⁶⁶ Id. at 817. The boundaries of the so-called “exceptional circumstances” test are notably ill-formed. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (rejecting the claim that the test was undermined by *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978)); see also Weinberg, *supra* note 215, at 1082 n.33 (expressing the opinion that *Colorado River* abstention would apply to the federal claims that remained in *Pennhurst*); Note, *The Eleventh Amendment's Lengthening Shadow Over Federal Subject Matter Jurisdiction: Pennhurst State School & Hospital v. Halderman*, 34 DEPAUL L. REV. 515, 549-50 (1985) (same).

Note that this situation differs from that in *Younger*, a case in which federal court abstention prevented the state court defendant from interrupting the enforcement of state law in state court. In a bifurcated case, the state defendant himself seeks federal court abstention so that the state proceeding will go forward without a conflicting parallel case. The only “interference” with the state court in a bifurcated case is the existence of a duplicative procedure. Some judges, however, have opined that *Younger* abstention extends to the bifurcation situation. See *Pernsley v. Harris*, 106 S. Ct. 331, 331-32 (1985) (Burger, C.J., dissenting from denial of certiorari). In *Pernsley*, a bifurcated case brought against state prison officials, Chief Justice Burger argued that *Younger* justified federal court abstention because the state was a party, important state policies were implicated, and the federal claims could be raised in state court. See 106 S. Ct. at 331-32. This appears to be the wrong doctrinal choice. The Chief Justice’s concern in *Pernsley* with injunctions running against the state applied only to state prison officials, not the state court. Such an extension of *Younger* was applied in cases like *Rizzo v. Goode*, and is criticized *supra* pp. 1527-35.

²⁶⁷ See *Moses H. Cone*, 460 U.S. at 15-16 (quoting *Colorado River*, 424 U.S. at 818-19).

²⁶⁸ See id. at 23. For a consideration of the state’s effectively exclusive jurisdiction over the state law claim in a bifurcated *Pennhurst* case, see page 1537 below.

²⁶⁹ See *Moses H. Cone*, 460 U.S. at 15-16 (quoting *Colorado River*, 424 U.S. at 818-19).

²⁷⁰ See *Colorado River*, 424 U.S. 800 (interpreting the McCarran Amendment, 43 U.S.C. § 666 (1980), as consenting to state court jurisdiction over federal water rights).

²⁷¹ 460 U.S. 1 (1983).

²⁷² See id. at 20 (interpreting the United States Arbitration Act of 1925, 9 U.S.C. § 4 (1925)). The *Colorado River* abstention has been used more freely in lower courts than the language of *Moses H. Cone* would permit. See Smith, *Pennhurst v. Halderman: The Eleventh Amendment, Erie and Pendent State Law Claims*, 34 BUFFALO L. REV. 227, 274 (1985); Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TULANE L. REV. 651, 664-97 (1985). *Moses H. Cone* makes it explicit that the party asserting jurisdiction need not justify parallel proceedings, but that “the task is to ascertain whether there exist ‘exceptional’ circumstances ... to justify the surrender of that jurisdiction.” 460 U.S. at 25-26 (emphasis in original).

²⁷³ Note that the *Colorado River* factors would more likely have counseled against abstention in the *Pennhurst* case itself than in newly begun litigation. The federal lawsuit in *Pennhurst* had already progressed through trial and it would have been highly inefficient to defer to a state court proceeding.

²⁷⁴ The Supreme Court has more than once asserted that federal courts serve as the guardians of federal rights against infringement by the states. See, e.g., *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Ex parte Virginia*, 100 U.S. 339, 346 (1879).

Abstention would effectively instruct the states: if you provide state law remedies against your own institutions and those remedies appeal to plaintiffs who would otherwise sue on federal grounds, you will achieve exclusive jurisdiction over cases challenging the conditions in your institutions because federal courts will then abstain from hearing the federal claims. In effect, such abstention augments the “reward” that the rule of *Pennhurst* attaches to state legislation, and does so by sacrificing federal control over federal law. Is a reward greater than the one already offered by *Pennhurst* needed to encourage such legislation? And, more importantly, is it worth it to increase that reward when to do so would detract from the federal interest in federal law?

One might assert that sufficient exceptional circumstances justify abstention in cases like *Pennhurst* that have been bifurcated, simply *1537 because maintaining proceedings in two courts is less efficient than consolidating all claims in a single forum.²⁷⁵ This efficiency justification should not suffice. The *Pennhurst* Court characterized *Young* as a fiction needed to preserve federal rights and the vindication of federal law.²⁷⁶ It declined to extend that fiction to state law claims because of the absence of those federal interests. But when federal courts abstain in bifurcated cases, it becomes apparent that the federal interest in federal law *did* attach to the state claims, because the state claims have effectively precluded federal court adjudication of the federal claims. Granting the state law claims this power to induce federal court abstention infuses them with a federal interest that should justify indulgence in the *Young* fiction. *Pennhurst*, by precluding this indulgence, itself declares a federal policy requiring bifurcation that makes the *Colorado River* abstention inappropriate.²⁷⁷

IV. CONCLUSION

It is unavoidable that states will apply federal law and federal courts will apply state law. A federal system is not one in which each “sovereign” interprets only its own law.²⁷⁸ Nor can the states hope to run their institutions wholly free from federal intervention, bound as they are to federal constitutional norms. There are no “mutually impermeable spheres of sovereignty.”²⁷⁹ Nevertheless, “our federal system requires something more than a unitary, centralized government.”²⁸⁰

What is the place for state autonomy? It is not to shield misinterpretations or violations of federal law. But when a state procedure offers genuine potential for enforcing federal law, it is appropriate to allow that procedure to play its course before federal intervention takes place. When states use their own law to satisfy – or exceed – the goals established in federal law, the federal courts should respect state autonomy.

²⁷⁵ See supra p. 1521.

²⁷⁶ See supra pp. 1519-20.

²⁷⁷ This pro-bifurcation policy, based as it is on the importance of vindicating federal rights in federal court, would appear even stronger than the statutory policy that barred abstention in *Moses H. Cone*. For a discussion of the additional problem of claim and issue preclusion in a bifurcated *Pennhurst* case, see Smith, note 272 above, at 275-88.

²⁷⁸ See Redish, supra note 4, at 864.

²⁷⁹ Fiss, supra note 18, at 1107 (characterizing Justice Brennan’s vision of federalism).

²⁸⁰ *Garcia v. Metropolitan Transit Authority*, 469 U.S. 528, 589 (1985) (O’Connor, J., dissenting).

This functional vision – rather than a fear of offending sovereigns or a mistrust of the states’ ability to apply federal law or to offer an adequate alternative to federal law – should guide the delineation of jurisdictional doctrine. Accordingly, federal courts should expand the mutable boundaries of the states’ separate *1538 spheres to encourage state procedures and state lawmaking that fulfill the ends that federal law would otherwise serve, and constrict those spheres when state law and procedure lack this potential. Jurisdictional doctrine should not translate into an empty display of respect or carefulness to avoid wounding the egos of state judges; rather, it should encourage the states to offer alternatives that go beyond and are thus capable of displacing federal law. In this way, doctrines of jurisdiction can serve as blueprints for states that desire to build separate spheres for themselves and can produce a state autonomy that serves, rather than detracts from, federal goals.