PULLMAN ABSTENTION IN PREEMPTION CASES

Abstract: The abstention doctrine articulated by the Supreme Court in 1941 in Railroad Commission of Texas v. Pullman Co. calls for federal courts to postpone asserting jurisdiction over federal constitutional challenges to state laws to permit state courts to resolve potentially dispositive ambiguities in those laws. In preemption cases, however, many courts have declined to abstain under Pullman, despite the fact that preemption challenges to state laws raise the very federalism-based concerns that the Pullman doctrine was designed to address. When a state law is challenged on grounds that it is preempted by a federal law, ambiguous and potentially dispositive matters of state law often remain undecided. A federal court’s refusal to abstain in such cases risks the possibility of needless interference with state programs, unseemly conflict with state courts, or superfluous or premature adjudication of federal issues. This Note argues that federal courts should invoke Pullman abstention in preemption cases using a flexible, case-by-case analysis that preserves the ability of federal courts to vindicate federal rights without jeopardizing core principles of judicial federalism or wasting scarce resources.

INTRODUCTION

Notwithstanding the U.S. Supreme Court’s recent “New Federalism” jurisprudence, which has threatened to curtail the unlimited legislative power enjoyed by Congress in the post–New Deal era, concurrent regulation of broad swaths of the economy by both federal and state governments is certain to remain a permanent feature of our political order. ¹ Heightened regulatory activity at both levels of government in

¹ See, e.g., United States v. Morrison, 529 U.S. 598, 617 (2000); United States v. Lopez, 514 U.S. 549, 560 (1995); Allison H. Eid, Preemption and the Federalism Five, 37 Rut. L.J. 1, 1 (2005) (“As part of this ‘New Federalism,’ the [Supreme] Court . . . has placed limits on Congress’s authority to regulate commerce, abrogate states’ sovereign immunity, craft remedies for constitutional violations, and ‘commandeer’ state officials.”). The Court’s New Federalism revival establishes an “outer limit” to Congress’s power, rather than sharply restricting or repealing any powers Congress enjoyed in the post–New Deal era. See Allison H. Eid, Teaching New Federalism, St. Louis U. L.J. 875, 877–78 (“Clearly, the Lopez majority was searching for a way to put some teeth back into the Commerce Clause. . . . But it seemed far more reluctant to cast doubt on [post-New Deal] precedent.”); see also Comstock v. United States, 130 S. Ct. 1949, 1956 (2010) (upholding a federal statute requiring civil detention for sexually dangerous federal prisoners as a legitimate exercise of Congress’s far-reaching power under the Constitution’s Necessary and Proper Clause); Gonza-
turn makes it increasingly likely that federal and state laws will conflict. As a general matter, when there is a conflict between a state law and a federal law, the federal law “preempts” the state law pursuant to the U.S. Constitution’s Supremacy Clause.

Litigants seeking to reduce their regulatory burdens frequently try to use federal preemption of state law to their advantage. Regulated parties often file suit in federal court seeking declaratory or injunctive relief against a state statute, regulation, or other action on grounds that it is preempted by a federal law. Although the basis for federal jurisdiction over such matters has been contested, federal courts have long been willing to entertain these actions.

Federal courts’ exercise of original jurisdiction over preemption challenges to state laws, however, may pose a subtle threat to important principles of judicial federalism. When federal courts are called upon to review a recently enacted state measure to determine if it is preempted by a federal law, potentially dispositive matters of state law may remain unclear. A state court may never have interpreted the chal-

\[\text{les v. Raich, 545 U.S. 1, 25–26 (2005) (upholding Congress's power under the Commerce Clause to prohibit personal use of medical marijuana).}\]

[2] See Ronald J. Mann, Note, Federal Jurisdiction over Preemption Claims: A Post-Franchise Tax Board Analysis, 62 Tex. L. Rev. 895, 893 (1984) (“As Congress uses the commerce power to regulate areas of the economy previously controlled by the states, federal statutes conflict with state law with increasing frequency.”); Ernest Young, The Rehnquist Court’s Two Federalisms, 83 Tex. L. Rev. 1, 131 (2004) (“To the extent all regulatory authority is concurrent now—Lopez and Morrison notwithstanding—then preemption ought to emerge as the central preoccupation of constitutional federalism.”).


[5] See Fallon et al., supra note 4, at 806; Mann, supra note 2, at 894.


[7] See Fleet Bank, Nat’l Ass’n v. Burke, 160 F.3d 883, 892 (2d Cir. 1998) (warning that “opening the federal courts” to certain preemption claims “risks a major and unwarranted incursion on the authority of state courts to construe state statutes”); see also infra notes 212–239 and accompanying text.

[8] See Fleet Bank, 160 F.3d at 889 n.5 (“In some cases properly invoking federal jurisdiction to consider preemption claims, state law must be examined by the federal court . . . to determine whether the nature of the interest regulated by state law is preempted by federal law.”).
challenged law, and its precise meaning and scope might be ambiguous. In addition, doubts may remain as to whether the state law authorized the law.

Federal court resolution of such difficult matters of state law risks disturbing the delicate relationship between state and federal courts and perhaps even undermines the "reign" of law. Under our constitutional scheme of federalism and dual sovereignty, it is state, not federal, courts that serve as the "final expositors of state law." For this reason, federal courts must decide questions of state law only as they believe a state’s highest court would decide them. Although federal judges are highly competent and usually able to accurately apply state law, in cases in which a question of state law is genuinely unclear, a federal judge can only speculate as to how a state judge would resolve the unclear state law issue.

The potential hazards of such a guessing game are significant. If a federal court strikes down a state measure on the basis of an erroneous interpretation of state law, it risks invalidating a policy that the state

---

9 See id.
10 See Martha A. Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1101 (1974) ("There are differences . . . between cases in which the state issue is whether state law authorizes the challenged state enactment and those in which the state issue is, instead, the meaning of the challenged state enactment."). In 1984, in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106 (1984), the U.S. Supreme Court established that the U.S. Constitution’s Eleventh Amendment prohibits federal courts from awarding injunctive or declaratory relief against state officials on the basis of state law. For this reason, federal courts are typically not permitted to consider state law-based claims, including state constitutional claims, as alternative grounds for relief in challenges to recently-enacted state measures. See id. There remain numerous scenarios, however, where state-law based claims continue to be relevant. See infra notes 268–274 and accompanying text.
12 See England v. La. State Bd. of Med. Exam’rs, 375 U.S. 411, 415 (1964); see also Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (holding that states “utter the last word” with respect to state law); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1875) (“The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise.”).
13 See Erie, 304 U.S. at 79.
14 See Pullman, 312 U.S. at 499–500.

But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of . . . the Texas Civil Statutes . . . belongs neither to [the U.S. Supreme Court] nor to the district court but to the supreme court of Texas.

Id.
15 See infra notes 16–20 and accompanying text.
believes is legitimate. On the other hand, if the court upholds the state measure on the basis of a mistaken interpretation of state law, it must go on to decide the preemption claim, resulting in premature, and perhaps unnecessary, adjudication.

The abstention doctrine of Railroad Commission of Texas v. Pullman Co., first articulated by the Supreme Court in 1941, would seem to provide a federal judge with an alternative to this precarious method. Under the Pullman doctrine, a federal court may stay proceedings to permit a plaintiff to seek definitive resolution of unclear and potentially dispositive issues of state law in the state judiciary. If the state court’s resolution is not favorable, a plaintiff may afterwards return to federal court and litigate remaining federal issues.

Judicial and academic authority, however, establishes that Pullman abstention is inappropriate in preemption cases. This Note takes issue with that now-dominant approach: it contends that “harmonious rela-

---

16 See Field, supra note 10, at 1093–95.
17 See id. at 1096–97. Superfluous adjudication is a problem because Article III’s “case or controversy” requirement limits federal courts to resolution of disputes on the narrowest available ground. See U.S. Const. art. III, § 2; N.J. Payphone Ass’n v. Town of W. N.Y., 290 F.3d 235, 249 (3d Cir. 2002) (Alito, J., concurring) (“[T]he limitation on Article III courts to adjudication of actual cases or controversies counsels us to dispose of cases on the narrowest possible ground . . . .”).
18 Pullman, 312 U.S. at 499; see Erwin Chemerinsky, Federal Jurisdiction 783–97 (5th ed. 2007) (discussing Pullman abstention); Fallon et al., supra note 4, at 1057–75 (same). There are several doctrines of federal court abstention besides the Pullman doctrine. See Chemerinsky, supra, at 797–807, 819–88 (discussing Thibodeaux, Burford, Younger, and Colorado River abstentions); Fallon et al., supra note 4, at 1075–1140 (same). Although this Note is limited to a discussion of Pullman abstention, the abstention doctrine that was first articulated by the Supreme Court in 1971, in Younger v. Harris, 401 U.S. 37, 41 (1971), which bars federal courts from interfering with ongoing proceedings in a state court or administrative agency, is also difficult to apply in preemption cases. See generally Daniel Jordan Simon, Note, Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of “Our Federalism,” 99 Nw. U. L. Rev. 1355 (2005); Patrick J. Smith, Note, The Preemption Dimension of Abstention, 89 Colum. L. Rev. 310 (1989).
19 Pullman, 312 U.S. at 499.
20 See England, 375 U.S. at 421. In 1964, in England, the Supreme Court made clear that litigants who, pursuant to Pullman, must obtain an authoritative resolution of a question of state law from the state judiciary may not be denied their right to return to federal court for a hearing on their federal claims. See id. The plaintiff must “inform the state courts that . . . he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.” Id. Because the England procedure preserves a plaintiff’s right to return to a federal tribunal, if necessary, Pullman abstention “does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise.” Id. at 416 (internal quotations omitted).
tion[s] between state and federal authority” are preserved when the state judiciary resolves potentially dispositive ambiguities in state law before a federal court determines if a state measure is preempted by a federal law. Though the *Pullman* doctrine creates significant costs for litigants, who must “shuttle . . . cases back and forth from state to federal court,” it permits federal courts to review state laws without jeopardizing core principles of judicial federalism or wasting scarce judicial resources.

Part I of this Note provides an overview of the *Pullman* abstention doctrine and situates it within a broader historical debate regarding judicial federalism and the propriety of federal courts reviewing state laws for compliance with the federal Constitution. Part II discusses the development of original federal jurisdiction over preemption claims and illustrates how such suits can create difficulties for judicial federalism similar to those addressed by the *Pullman* doctrine. Part III then examines the competing policy justifications for *Pullman* abstention and discusses how each account supports, or fails to support, the view that *Pullman* should be invoked in preemption cases. Part IV surveys federal courts’ conflicting views regarding the propriety of *Pullman* abstention in preemption cases. Finally, Part V argues that *Pullman* abstention is an important mechanism for delaying review of preemption claims until such time as a federal court can vindicate federal rights without disturbing the crucial relationship between federal and state courts or risking wrongful interference with state policies and programs. This Note concludes by offering a series of hypothetical scenarios illustrating how and why *Pullman* abstention is valuable in pre-

---

22 See *Pullman*, 312 U.S. at 501.
23 AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 285 (1967). *Pullman* abstention, combined with the *England* procedure, often leads to enormous delays and entails significant costs for litigants. See id. For this reason, the American Law Institute (“ALI”) recommended the elimination of the *England* procedure, proposing instead that plaintiffs in *Pullman* abstention cases litigate all issues, both state and federal, in a state court, with no opportunity to return to federal court. See id. Under the ALI’s proposal, discretionary Supreme Court review would provide the only potential federal forum for the plaintiff’s federal claims. See id.
24 See infra notes 30–79 and accompanying text.
25 See infra notes 80–110 and accompanying text.
26 See infra notes 111–152 and accompanying text.
27 See infra notes 153–206 and accompanying text.
28 See infra notes 207–274 and accompanying text.
emption cases, given the “configuration of parties and claims” that federal courts are most likely to confront. 29

I. THE ORIGINS OF THE PULLMAN ABSTENTION DOCTRINE

The U.S. Supreme Court’s 1941 decision in Railroad Commission of Texas v. Pullman Co. must be understood in light of the broader historical debate over the appropriate role of the federal courts in reviewing state laws. 30 The Pullman doctrine is best characterized as a restoration of principles of judicial federalism that were temporarily displaced by the Supreme Court’s 1908 decision in Ex parte Young, which empowered lower federal courts to enjoin state officers from enforcing state laws that violate the federal Constitution. 31 This Part illustrates how the Pullman doctrine, as articulated in Justice Frankfurter’s landmark opinion, was designed to allow federal courts to exercise this important new power to vindicate federal constitutional rights while remaining sensitive to the role of state courts as the “final expositors of state law.” 32

Section A discusses the Court’s establishment of original federal jurisdiction over federal constitutional challenges to state laws in Ex parte Young. 33 Section B discusses the Court’s development of pendent jurisdiction over state law claims in 1909 in Siler v. Louisville and Nashville Railroad, which further empowered federal courts to opine on matters of state law. 34 Finally, Section C illustrates how the Court in Pullman responded to these earlier innovations by articulating a new doctrine of abstention designed to “allocate[] issues between state and federal courts in a way that optimizes each forum’s expertise.” 35

29 See Keith Werhan, Pullman Abstention After Pennhurst: A Comment on Judicial Federalism, 27 Wm. & Mary L. Rev. 449, 454 (1986); infra notes 240–274 and accompanying text.
30 See 312 U.S. 496, 501 (1941); Field, supra note 10, at 1074–76; Werhan, supra note 29, at 468.
31 See Ex parte Young, 209 U.S. 123, 155–56 (1908); Field, supra note 10, at 1074–76; Werhan, supra note 29, at 468 (noting that “[t]he Court’s principal moderating response to the Young-Siler jurisdictional model came several decades later” in Pullman).
32 See England v. La. State Bd. of Med. Examiners, 375 U.S. 411, 415 (1964); Werhan, supra note 29, at 473 (“The Pullman doctrine avoids the polar extremes of the judicial federalism spectrum. Instead, it allows the Court to move flexibly and moderately to assess judicial federalism implications on a case-by-case basis.”).
33 See infra notes 36–49 and accompanying text.
34 213 U.S. 175, 191 (1909); see infra notes 50–58 and accompanying text.
35 Werhan, supra note 29, at 471; see infra notes 59–79 and accompanying text.
A. Original Federal Jurisdiction over Suits to Compel State Officers to Comply with the Federal Constitution

In 1908, in *Ex parte Young*, the Supreme Court authorized federal courts to exercise original jurisdiction over suits challenging the validity of state laws under the federal Constitution. The Court’s decision to permit federal district courts to review state measures permanently altered the relationship between the federal judiciary and the state governments.

First, *Ex parte Young* changed the timing of federal review of state legislation. Previously, challenges to state policies were initially adjudicated in enforcement proceedings in state courts, with federal involvement limited to discretionary Supreme Court review of specific federal defenses. Moreover, when enforcement of a state measure was merely threatened but not acted upon, judicial review in any forum was postponed indefinitely. *Ex parte Young*, however, invited persons aggrieved by any state policy or program, regardless of “whether it was longstanding or newly enacted and not yet launched,” to seek an immediate federal remedy in federal district court. It allowed for the use of the federal Constitution as a sword by empowering litigants to chal-

---

36 See [*Ex parte Young*], 209 U.S. at 155–56.
37 See Chemerinsky, supra note 18, at 434 (noting that “[t]he decision in *Ex parte Young* long has been recognized as a primary method of . . . ensuring state compliance with federal law”); Werhan, supra note 29, at 465 (noting that *Ex parte Young* “open[ed] the courthouse door to active federal control over state economic policy”).
38 See Field, supra note 10, at 1074–76 (noting that *Ex parte Young* permits federal court interference even with state programs that are “newly enacted and not yet launched”).
39 See id. *Ex parte Young* bypassed two major hurdles to federal court review of state laws. See 209 U.S. at 155–56. First, the Court avoided the constraints of the Eleventh Amendment by establishing the fiction that state officers do not act “on behalf of” the state when they violate the federal Constitution. See id.; see also U.S. Const. amend. XI (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”). Thus, state officers are deemed state actors, subject to the Fourteenth Amendment, but they are not protected by the Eleventh Amendment’s bar on suits against sovereign states. See Chemerinsky, supra note 18, at 434.
40 Second, *Ex parte Young* evaded the “well-pleaded complaint” rule, later articulated by the Court in 1908, in *Louisville & Nashville Railroad Co. v. Mottley*, which bars federal question jurisdiction based solely on an anticipated federal defense. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). The claim that a state law violates a provision of the federal Constitution is typically a defense to enforcement of the state law and does not appear on the face of the plaintiff’s complaint.
41 See Field, supra note 10, at 1075 n.6.
lenge state measures even before such measures had been fully implemented or enforced.\(^{42}\)

Consequently, *Ex parte Young* altered the factual and legal setting in which federal courts reviewed state measures.\(^{43}\) When federal review of such measures was confined to the appellate level, the Supreme Court took hold of the case only after the factual record had been extensively developed and the federal questions had been isolated and defined.\(^{44}\) After *Ex parte Young*, federal district courts were called upon to exercise original jurisdiction, which is “unavoidably jurisdiction to decide whole cases and not merely questions in cases.”\(^{45}\) For this reason, review of state policies raised complex questions regarding the interpretation of state law by federal judges.\(^{46}\)

Finally, *Ex parte Young* created the possibility of sharp conflict between federal courts and state governments.\(^{47}\) Federal district courts, in effect, were charged with supervising the implementation of state policies.\(^{48}\) A state program could be halted completely by a single federal judge.\(^{49}\)

\(^{42}\) See id.

\(^{43}\) See id.

\(^{44}\) See *Ex parte Young*, 209 U.S. at 155–56.


\(^{46}\) See id.; Werhan, supra note 29, at 471 (“Especially in the context of modern public law litigation, the interpretation of state governing statutes poses subtle problems for a court. The task of intuiting how the highest state court would approach these issues is not always easy for federal judges.”).

\(^{47}\) See *Ex parte Young*, 209 U.S. at 175 (Harlan, J., dissenting). Writing in dissent, Justice John Marshall Harlan argued that *Ex parte Young* would work a radical change in our governmental system. . . . It would enable the subordinate Federal courts to supervise and control the official actions of the States as if they were “dependencies” or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted . . . .

\(^{48}\) See id.

B. Pendent Jurisdiction over State Law Claims

The Supreme Court further complicated the relationship between federal and state courts when, in *Siler*, it concluded that a federal court, after obtaining jurisdiction over a lawsuit, may resolve all questions of law in the case.\(^{50}\) Until *Siler*, it was unclear whether plaintiffs challenging a state measure on grounds of both federal and state law would have to file their state law claims in state court.\(^{51}\) Such a requirement would have detracted from the power of *Ex parte Young* by requiring plaintiffs with related federal and state claims to pursue litigation in two different forums or relinquish their right to a federal forum altogether.\(^{52}\) *Siler* ensured that litigants would have all of their claims, federal and state, resolved in a single action in federal court.\(^{53}\)

At the time of its decision, *Siler* was also understood as an effort to moderate the potential conflict resulting from federal court review of state laws.\(^{54}\) The *Siler* Court counseled federal judges to resolve challenges to state laws on state law grounds whenever possible, rather than appeal directly to the force of the federal Constitution.\(^{55}\) This practice was thought to ameliorate conflict between the federal government and the states and to permit a continued dialogue with state legislatures regarding the reform of state programs and policies.\(^{56}\)

*Siler*’s long-term consequence, however, was to draw federal judges even further into the resolution of complicated and ambiguous questions of state law.\(^{57}\) Although federal courts were designed as forums for vindicating federal rights, challenges to state measures routinely required federal judges to interpret and apply state law, often without adequate guidance from state courts.\(^{58}\)

\(^{50}\) See 213 U.S. at 191.

\(^{51}\) See Werhan, supra note 29, at 465–66.

\(^{52}\) See id.

\(^{53}\) See Siler, 213 U.S. at 191; Werhan, supra note 29, at 455–66.

\(^{54}\) See Siler, 213 U.S. at 191; Chemerinsky, supra note 18, at 789.

\(^{55}\) See Siler, 213 U.S. at 191; Chemerinsky, supra note 18, at 789.

\(^{56}\) See Siler, 213 U.S. at 191; Chemerinsky, supra note 18, at 789.

\(^{57}\) See Werhan, supra note 29, at 467. It is important to note that *Siler* was decided before *Erie* and the Court clearly did not view state law claims as posing any particular interpretive challenges for federal courts. See id. In *Siler*, the Court was not concerned with the autonomy of state courts when it struck down a state statute based on a broad, independent interpretation of state law. See id. at 468 (arguing that *Siler* “offered nothing more than the free-wheeling judicial approach of *Lochner* in state law clothing”).

\(^{58}\) See id.
C. Justice Frankfurter’s Response: Pullman and the Establishment of the Abstention Doctrine

The Supreme Court’s decisions expanding the role of the lower federal courts in reviewing state measures were seen by many as privileging access to federal justice over adherence to long-standing constitutional principles of federalism and dual sovereignty.\(^{59}\) \textit{Ex parte Young} and \textit{Siler} were strongly criticized for diminishing the power of states and municipalities to organize their affairs free from intrusive oversight by the federal judiciary.\(^{60}\)

In 1941, in \textit{Pullman}, the Supreme Court—the members of which were now more sympathetic to such criticisms—articulated an abstention doctrine, which addressed the unique problems of judicial federalism arising from the exercise of original federal jurisdiction over challenges to state measures.\(^{61}\) The \textit{Pullman} doctrine calls on federal courts to abstain from ruling on federal constitutional challenges to state measures when a state court’s resolution of an unclear question of state law might avoid, or substantially change the consideration of, the federal question.\(^{62}\)

The \textit{Pullman} case originated with a controversial order of the Railroad Commission of Texas mandating that sleeper cars operated on Texas railroads be staffed at all times by an individual with the rank of Pullman conductor.\(^{63}\) At the time the order was promulgated, it was “well known” that all Pullman conductors were white and all Pullman porters were black.\(^{64}\) The Commission’s policy, although expressed in neutral terms, had very strong overtones of racial discrimination.\(^{65}\)

The Pullman Company and the railroads sought an injunction against the Commission in the U.S. District Court for the Western District of Texas on grounds that the order violated the federal Constitution and Texas law.\(^{66}\) The three-judge panel sought to avoid the federal constitutional claim by grounding its decision exclusively on Texas law.\(^{67}\) Following a line of Texas Supreme Court decisions, the panel de-
terminated that the Commission exceeded its mandate under Texas statutes to correct abuses in the railroad industry. 68

In reversing the lower court, the Supreme Court, in an opinion by Justice Felix Frankfurter, held that the Commission’s authority under Texas law was “far from clear” and could not be accurately determined by a federal court. 69 Because federal courts may not reach authoritative interpretations of state law, “the judgment of . . . [a] district court [with respect to the Texas law] . . . [could not] escape being a forecast rather than a determination.” 70 The Court remanded, ordering the lower court to stay the proceedings to allow for the plaintiff to seek a declaration from the Texas courts as to extent of the Commission’s authority under state law. 71

Pullman did not overrule Ex parte Young or Siler, nor did it require federal courts to abandon their crucial role in reviewing the legality of state actions. 72 Rather, the Court instructed federal courts to postpone review to provide the state judiciary with the opportunity to resolve the potentially dispositive ambiguities in state law. 73 Because original jurisdiction remains “jurisdiction to decide whole cases, and not merely questions in cases,” a challenge to a recently enacted state measure—such as the controversial order of the Texas Railroad Commission in Pullman—typically features novel or unclear matters of state law intermingled with the plaintiff’s allegation that the measure violates the federal Constitution. 74 Justice Frankfurter’s reasoning in Pullman recognizes that federal review under such circumstances is premature and may pose a unique risk of wrongful interference with state programs and policies. 75 Pullman abstention thus permits federal courts to avoid “needless friction with state policies” that might result from the invalidation of a state law based on an erroneous interpretation. 76

Moreover, abstention in Pullman also prevented the “waste of a tentative decision,” which could easily be displaced by a state court. 77 It also

---

68 See id.
69 Pullman, 312 U.S. at 499.
70 Id.
71 See id. at 501–02.
72 See Chemerinsky, supra note 18, at 808 (noting that “in Pullman abstention situations . . . the federal court retains jurisdiction over the case”).
73 Id.
74 Pullman, 312 U.S. at 498; Hart, supra note 45, at 504.
75 See Pullman, 312 U.S. at 499–501; Field, supra note 10, at 1095; Werhan, supra note 29, at 473–74.
76 See Pullman, 312 U.S. at 500; Field, supra note 10, at 1095.
77 See Pullman, 312 U.S. at 500; Field, supra note 10, at 1094.
avoided the need for unnecessary or “premature” adjudication of the federal question.\textsuperscript{78} Pullman thus remained faithful to the influence of Article III, which limits federal courts to resolution of actual “cases or controversies” and requires resolution of disputes on the “narrowest possible ground.”\textsuperscript{79}

II. ORIGINAL FEDERAL JURISDICTION IN PREEMPTION CASES

The U.S. Supreme Court’s development of the abstention doctrine in \textit{Railroad Commission of Texas v. Pullman Co.}, was no doubt a prudent and “moderating” response to the expansion of federal jurisdiction in \textit{Ex parte Young} and \textit{Siler v. Louisville and Nashville Railroad}.\textsuperscript{80} Pullman embraced a larger role for federal courts, while simultaneously reinforcing core principles of judicial federalism, including respect for the predominant role of the state judiciary in deciding matters of state law.\textsuperscript{81}

The role of federal courts has expanded even further in recent years, however, as the courts now consider federal preemption challenges to state laws.\textsuperscript{82} Persons subject to regulation under a federal law may seek a declaration or injunction from a federal court to prohibit the enforcement of an allegedly conflicting state law.\textsuperscript{83} Although these actions often present difficult questions of federal and state law in the same suit, and thus pose significant challenges for judicial federalism, \textit{Pullman} abstention is typically deemed inappropriate.\textsuperscript{84}

This Part begins in Section A with a brief discussion of federal preemption law.\textsuperscript{85} Section B then discusses the establishment of federal

\textsuperscript{78} See \textit{Pullman}, 312 U.S. at 500.

\textsuperscript{79} See \textit{id}. at 498; N.J. Payphone Ass’n v. Town of W. N.Y., 299 F.3d 235, 249 (3d Cir. 2002) (Alito, J., concurring) (“[T]he limitation on Article III courts to adjudication of actual cases or controversies counsels us to dispose of cases on the narrowest possible ground . . . .”).


\textsuperscript{81} See Bezanson, \textit{supra} note 80, at 1115; Werhan, \textit{supra} note 29, at 468.

\textsuperscript{82} See \textit{Shaw v. Delta Air Lines}, Inc. 463 U.S. 85, 96 n.14 (1983); \textit{Fallon et al.}, \textit{supra} note 4, at 806. Presumably, federal courts may always consider preemption claims in federal constitutional cases. \textit{Siler}, 213 U.S. at 191; \textit{Ex parte Young}, 209 U.S. at 155–56. \textit{Shaw} made clear that federal courts also have jurisdiction in cases where federal preemption is the sole ground on which a state law is challenged. See 463 U.S. at 96 n.14.

\textsuperscript{83} See \textit{infra} notes 89–93 and accompanying text.
jurisdiction over preemption claims.\textsuperscript{86} It illustrates how the timing and scope of review in such actions often requires federal courts to interpret state law without adequate guidance from the state judiciary.\textsuperscript{87} This development suggests that original federal jurisdiction over preemption claims may disturb the relationship between federal and state courts unless abstention is applied in appropriate cases.\textsuperscript{88}

\textbf{A. A Brief Primer on Federal Preemption of State Law}

The Constitution’s Supremacy Clause states: “[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.”\textsuperscript{89} For this reason, when a state law conflicts with a federal law, the federal law “preempts” the state law.\textsuperscript{90} The Supreme Court has summarized its preemption jurisprudence:

Pre-emption may be either express or implied, and “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.\textsuperscript{91}

In short, the Supremacy Clause “requires courts to ignore state law . . . if state law contradicts a valid rule established by federal law . . . .”\textsuperscript{92}

\textsuperscript{86} See infra notes 94–110 and accompanying text.
\textsuperscript{87} See infra notes 94–110 and accompanying text.
\textsuperscript{88} See infra notes 94–110 and accompanying text.
\textsuperscript{89} U.S. Const. art. VI, cl. 2.
\textsuperscript{90} See id.
\textsuperscript{91} Gade v. Nat’l Solid Wastes Mgmt Ass’n, 505 U.S. 88, 98 (1992) (internal quotations and citations omitted).
any, are available to persons subjected to regulation under state law despite being governed by a conflicting federal rule.93

B. Original Federal Jurisdiction in Suits for Declaratory or Injunctive Relief in Which State Law Is Allegedly Preempted by Federal Law

Federal courts have jurisdiction to hear federal preemption challenges to state laws, although the source of that jurisdiction is somewhat difficult to identify.94 In 1983, in *Shaw v. Delta Air Lines, Inc.*, the Supreme Court made clear that federal courts may entertain suits seeking declaratory or injunctive relief against the enforcement of a state law that is allegedly preempted by a federal law.95 The *Shaw* Court drew on the reasoning of *Ex parte Young* and suggested that the power to enjoin state laws that violate federal constitutional rights also includes the power to enjoin state laws that violate federal statutory rights.96

*Shaw* involved a federal preemption challenge to two New York statutes requiring in-state employers to provide certain benefits to pregnant employees.97 The plaintiffs, a coalition of airlines, claimed that the state laws were preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) that, at the time, did not prohibit discrimination with respect to pregnancy or require employers to provide benefits for pregnant employees.98 The *Shaw* Court chose not to rely on ERISA’s explicit language, even though the statute explicitly preempted state laws relating to employee benefit plans and authorized

---

93 See U.S. Const. art. VI, cl. 2.
94 See Fallon et al., supra note 4, at 806–07.
95 463 U.S. at 96 n.14. *Shaw* indicated that federal injunctive relief is presumptively available to litigants seeking to prevent the enforcement of a state law preempted by a federal law, even if the allegedly controlling federal law does not expressly provide a cause of action. See id.; Fallon et al., supra note 4, at 806. For this reason, *Shaw* is difficult to reconcile with the modern Supreme Court’s reluctance to create implied causes of action under federal statutes. See Shaw, 463 U.S. at 96 n.14; Fallon et al., supra note 4, at 712, 806–07; David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 358 (2004) (“[T]he Supreme Court applies two very different private right of action doctrines in cases where plaintiffs sue to enjoin state action that allegedly conflicts with a federal statute.”). *Shaw* is also difficult to characterize as a logical extension of *Ex parte Young* because preemption only has an indirect basis in the federal Constitution. See Fallon et al., supra note 4, at 712. Although the Supremacy Clause requires that a federal law preempt a state law in the case of a conflict, the Supremacy Clause does not create “rights.” See id.
96 See Shaw, 463 U.S. at 96 n.14; *Ex parte Young*, 299 U.S. at 155–56; Fallon et al., supra note 4, at 807.
97 See Shaw, 463 U.S. at 88.
employers to sue in federal court to seek relief from such laws. Rather, the Court cited Ex parte Young for the broad proposition that “[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.” Accordingly, federal courts can always consider preemption challenges to state laws because a plaintiff “who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail . . . presents a federal question which the federal courts have jurisdiction . . . to resolve.”

Federal preemption challenges to state measures frequently require federal courts to address ambiguous and potentially dispositive questions of state law. For example, to determine whether a state law is preempted by a federal law, a federal court must first determine the nature and scope of the “interest regulated” by the state law. Moreover, a court may first need to determine if the state law in question was within the state government’s authority under state law.

Federal preemption claims thus present challenges for judicial federalism similar to those posed by federal constitutional claims. An erroneous interpretation of state law might needlessly impact a state policy or program and create friction between federal and state courts. Alternatively, mistakes in the interpretation of state law might lead to an unnecessary determination of the federal preemption claim, which likewise ought to be avoided.

---

99 See 88 Stat. at 129; Shaw, 463 U.S. at 96 n.14.
100 See Shaw, 463 U.S. at 96 n.14.
101 See id. The Court affirmed this proposition in 2002, in Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (2002). In Verizon, the Court upheld the right of a plaintiff to file suit in federal court challenging an order of a state utility commission on grounds that the federal Telecommunications Act of 1996 preempted the order. See id. The Court’s decision indicated that jurisdiction to consider preemption claims is a natural extension of Ex parte Young. See id; see also Sloss, supra note 95, at 357 (noting that the Court’s decision in Verizon “affirmed the continued vitality of Ex parte Young”).
102 See Fleet Bank, Nat’l Ass’n v. Burke, 160 F.3d 883, 889 n.5 (2d Cir. 1998) (“In some cases properly invoking federal jurisdiction to consider preemption claims, state law must be examined by the federal court . . . to determine whether the nature of the interest regulated by state law is preempted by federal law.”).
103 See id.
104 See Field, supra note 10, at 1101.
105 See Fleet Bank, 160 F.3d at 892.
106 See id.
Pullman abstention, however, has typically not been invoked to postpone decision of preemption claims.\textsuperscript{108} Indeed, federal courts have at times insisted on deciding federal preemption claims in order to avoid a constitutional issue or an unfamiliar question of state law.\textsuperscript{109} Whether Pullman may be invoked to postpone jurisdiction in preemption cases requires an analysis of the underlying justification for the doctrine.\textsuperscript{110}

III. THE AIMS OF THE PULLMAN ABSTENTION DOCTRINE: SHOULD FEDERAL COURTS ABSTAIN TO POSTPONE DECISION OF NON-CONSTITUTIONAL FEDERAL QUESTIONS?

If Railroad Commission of Texas v. Pullman Co. is merely a corollary to the well established doctrine of constitutional avoidance, then courts have no good reason to abstain to avoid deciding non-constitutional federal claims.\textsuperscript{111} Consequently, abstention may not be warranted for preemption claims, which are often viewed as statutory, rather than constitutional, in nature.\textsuperscript{112} On the other hand, Pullman can also be understood as a more nuanced and flexible doctrine that promotes the interests of judicial federalism on a case-by-case basis.\textsuperscript{113} If Pullman is intended to permit federal courts to postpone jurisdiction when the risk of wrongful interference with state programs and policies is signifi-

\textsuperscript{108} See, e.g., Muir, 792 F.2d at 364; 17A Wright et al., supra note 21, at 325–27.

\textsuperscript{109} See Muir, 792 F.2d at 364.

\textsuperscript{110} See supra notes 111–152 and accompanying text.

\textsuperscript{111} See, e.g., Propper v. Clark, 337 U.S. 472, 490 (1949); United Servs. Auto. Ass’n v. Muir, 792 F.2d 356, 363 (3d Cir. 1986); 17A Wright et al., supra note 21, at 325–27.

\textsuperscript{112} See, e.g., Muir, 792 F.2d at 363; Garrick B. Pursley, The Structure of Preemption Decisions, 85 Neb. L. Rev. 912, 914 (2007) (noting that preemption claims are often accorded “subconstitutional status”). Preemption’s constitutional status is a point of significant disagreement among judges and scholars, however, with many authorities suggesting that preemption claims are indeed a form of constitutional adjudication. See N.J. Payphone v. Town of W. N.Y., 299 F.3d 235, 249 (3d Cir. 2002) (Alito, J., concurring) (“It is clear, however, that preemption is a constitutional issue.”); Pursley, supra, at 918 (“My thesis is that the adjudication of preemption issues is constitutional adjudication full stop.”). This Note assumes, without accepting, the apparent majority view that preemption is a purely statutory matter. See Muir, 792 F.2d at 363. But cf. Druker v. Sullivan, 458 F.2d 1272, 1274 (1st Cir. 1972) (noting that preemption is mainly a statutory issue but still abstaining under Pullman). Unlike the U.S. Court of Appeals for the First Circuit, the U.S. District Court for the District of Massachusetts in Druker v. Sullivan assumed that preemption claims were simply constitutional claims and thus warranted abstention based on principles of constitutional avoidance. See 334 F. Supp. 861, 865 (D. Mass. 1971), aff’d, 458 F.2d 1272 (1st Cir. 1972).

\textsuperscript{113} See Werhan, supra note 29, at 473 (“[Pullman] allows the Court to move flexibly and moderately to assess judicial federalism implications on a case-by-case basis.”).
cant, or the possibility of superfluous adjudication is considerable, abstention may be justified in the preemption context.\textsuperscript{114}

This Part analyzes the competing explanations for the \textit{Pullman} doctrine.\textsuperscript{115} Section A discusses the argument that \textit{Pullman} abstention is designed solely to avoid federal constitutional questions.\textsuperscript{116} Section B considers the argument that the \textit{Pullman} doctrine provides a multi-factored inquiry meant to harmonize federal court review of state laws with principles of judicial federalism and thus may apply even in the absence of a federal constitutional issue.\textsuperscript{117}

\textbf{A. The Invocation of \textit{Pullman} Abstention to Avoid Federal Constitutional Questions}

\textit{Pullman} is often viewed as “... illustrative of ... the basic constitutional doctrine that substantial constitutional issues should be adjudicated only when no alternatives are open.”\textsuperscript{118} In other words, \textit{Pullman} abstention can be understood as a corollary to the well-established doctrine of “constitutional avoidance,” which instructs courts to interpret statutes and other enactments to avoid constitutional problems.\textsuperscript{119} The avoidance principle is typically grounded in the insight that a constitutional ruling halts the democratic process and terminates any ongoing or potential dialogue with other governmental actors.\textsuperscript{120} The judiciary’s power to interpret the Constitution may permanently limit the latitude of the political branches, including state governments, and thus must be wielded only when absolutely necessary.\textsuperscript{121}

According to this interpretation, the Supreme Court abstained in \textit{Pullman} because a decision regarding the Railroad Commission’s authority under Texas law would end the suit and avoid the need to decide whether the Commission’s order violated the federal Constitu-
If that interpretation is correct, then the Court’s opinion in *Pullman* stands for the narrow proposition that federal courts should abstain to permit plaintiffs to seek a definitive opinion from a state court on an unclear question of state law only when doing so would allow the federal court to avoid decision of a federal constitutional issue.\(^\text{123}\)

In 1949, in *Propper v. Clark*, the Supreme Court indicated that *Pullman* may not be invoked to avoid the decision of federal non-constitutional issues, seemingly confirming a narrow view of the *Pullman* doctrine.\(^\text{124}\) The Court opined that “[w]here a case involves a non-constitutional federal issue . . . the necessity for deciding which depends upon the decision on an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues.”\(^\text{125}\)

*Propper* involved a federal statute, the applicability of which turned on the interpretation of state law.\(^\text{126}\) New York state appointed a receiver to liquidate and distribute the assets of an Austrian firm.\(^\text{127}\) After the receiver’s appointment, the President of the United States issued an Executive order, applying the federal Trading with the Enemy Act to Austria.\(^\text{128}\) The Alien Property Custodian (the “Custodian”), the federal officer responsible for enforcing the federal statute, brought suit in federal court to obtain the Austrian firm’s assets.\(^\text{129}\)

Ultimately, the federal Custodian’s ability to seize the assets pursuant to the federal statute turned on the extent of the receiver’s authority under New York law.\(^\text{130}\) Yet, because the federal issue was a purely statutory matter, the Court concluded that abstention under *Pullman* was inappropriate notwithstanding the ambiguous and potentially dispositive questions of New York law.\(^\text{131}\) The Court added that, although the issue of New York law was subject to varying interpretations, abstention would be an improper application of the *Pullman* doctrine because federal courts may depart from the “normal procedure” of deciding


\(^{123}\) See Chemerinsky, *supra* note 18, at 788.

\(^{124}\) See 337 U.S. at 490.

\(^{125}\) Id.

\(^{126}\) Id.

\(^{127}\) Id. at 475.

\(^{128}\) See id.

\(^{129}\) Id. at 474.

\(^{130}\) Propper, 337 U.S. at 493 (Frankfurter, J., dissenting).

\(^{131}\) See id. at 490.
matters of state law only when necessary to avoid an interpretation of the federal Constitution.132

The narrow understanding of the Pullman abstention doctrine advanced by the Propper Court has been criticized because it does not explain the outcome in Pullman.133 The district court in Pullman struck down the Railroad Commission’s controversial order on Texas law grounds and, in so doing, deftly avoided the federal constitutional question.134 Yet the Supreme Court still reversed, suggesting that constitutional avoidance does not account for the Pullman Court’s decision to abstain rather than resolve the state law question.135

B. Pullman Abstention as a Flexible, Case-by-Case Standard Used to Reconcile Federal Review of State Laws with Principles of Judicial Federalism

Justice Frankfurter adhered to a broad understanding of Pullman abstention and did not view the Court’s holding in that case as motivated solely, or even primarily, by a narrow principle of constitutional avoidance.136 In his dissenting opinion in Propper, he argued that the “fundamental” purpose of the Pullman doctrine is to “[maintain] harmonious relations between parallel systems of State and federal courts.”137 Justice Frankfurter’s description suggests that the Pullman doctrine is not a rule of constitutional avoidance, but a more flexible standard designed to promote essential principles of judicial federalism.138 On this view, Pullman is designed to delay federal court review of state laws when necessary to avoid needless interference with state programs, destabilizing conflict between state and federal courts, or superfluous adjudication.139

According to Justice Frankfurter, Pullman is relevant in any challenge to a state measure “where, because State law control[s], the State courts [have] the last word and so a federal court at best [can] make only an informed guess.”140 After all, federal judges tasked with inter-

132 Id. at 487, 491.
133 See Field, supra note 10, at 1136–37; see also Chemerinsky, supra note 18, at 788–89 (noting that constitutional rulings can be avoided simply by having the federal court decide the state law issue first).
135 See Chemerinsky, supra note 18, at 788–89; Field, supra note 10, at 1136–37.
136 See Propper, 337 U.S. at 494–95 (Frankfurter, J., dissenting).
137 Id.
138 Id.
139 See id.; Werhan, supra note 29, at 473.
140 See Field, supra note 10, at 1093–1101.
interpreting state law must decide the matter as would the state’s highest court.\textsuperscript{141} If adequate guidance from the state judiciary is lacking, the federal court may err.\textsuperscript{142}

If the federal court strikes down a state program or policy based on an erroneous interpretation of state law, it will have needlessly struck down a measure that the state itself believed to be legitimate.\textsuperscript{143} Such unnecessary interference with the implementation of a state program significantly disrupts the federal system.\textsuperscript{144}

Moreover, an error of this kind gives rise to the possibility of an unseemly struggle between state and federal courts.\textsuperscript{145} A subsequent state court determination will likely supplant the federal decision, and efforts to implement the state measure will begin once again (assuming the unnecessary delay has not permanently damaged the state’s program).\textsuperscript{146} The litigation will then return to federal court for a ruling on the federal constitutionality of the program.\textsuperscript{147} According to Justice Frankfurter’s opinion in \textit{Pullman}, such conflict and instability is inconsistent with the “reign of law” and tentative decisions of this kind should be avoided whenever possible.\textsuperscript{148}

If the federal court upholds the state measure based on an erroneous interpretation of state law, it will have superfluously ruled on the federal issue.\textsuperscript{149} An unnecessary decision may be inconsistent with the obligation of Article III courts to adjudicate only “actual cases or controversies” and, in any case, should be avoided on prudential grounds.\textsuperscript{150}

Thus, it seems that \textit{Pullman’s} judicial federalism-based policies against “wrongful interference” with state laws and “friction” between federal and state courts can be served equally regardless of whether there is any federal constitutional issue in the case.\textsuperscript{151} For this reason, commentators have proposed eliminating the presence of a federal constitutional issue as a prerequisite for \textit{Pullman} abstention.\textsuperscript{152}

\begin{footnotesize}
\begin{itemize}
\item[$141$] See \textit{Pullman}, 312 U.S. at 500.
\item[$142$] See \textit{id}.
\item[$143$] See Field, \textit{supra} note 10, at 1095.
\item[$144$] See \textit{id}.
\item[$145$] See \textit{Pullman}, 312 U.S. at 501; Field, \textit{supra} note 10, at 1094.
\item[$146$] See Field, \textit{supra} note 10, at 1094.
\item[$147$] See \textit{id}.
\item[$148$] See \textit{Pullman}, 312 U.S. at 500.
\item[$149$] See Field, \textit{supra} note 10, at 1096–97.
\item[$150$] See \textit{N.J. Payphone}, 299 F.3d at 249 (Alito, J., concurring).
\item[$151$] See Field, \textit{supra} note 10, at 1138.
\item[$152$] See \textit{id}.
\end{itemize}
\end{footnotesize}
IV. THE FEDERAL COURT RECORD: CONFLICTING APPROACHES TO PULLMAN ABSTENTION IN PREEMPTION CASES

Federal courts have disagreed on whether the Pullman doctrine may be invoked to postpone decision of federal preemption challenges to state laws. Though some federal appellate courts have yet to grapple with the applicability of Pullman in preemption cases, existing case law reveals three distinct perspectives. The U.S. Court of Appeals for the Third Circuit, along with a majority of federal courts, has refused to abstain to avoid deciding federal preemption claims on the grounds that preemption is not a substantial constitutional issue. The U.S. Court of Appeals for the First Circuit has abstained in such cases on the grounds that federal preemption challenges to state laws raise the very judicial federalism concerns that the Pullman doctrine was designed to address. Finally, the U.S. Court of Appeals for the Second Circuit has denied federal jurisdiction altogether over federal preemption challenges to state laws when the plaintiff disputes the meaning of the challenged state measure.


The U.S Court of Appeals for the Third Circuit has adopted a bright-line rule that Pullman abstention is never warranted to postpone the decision of a federal preemption claim. This view rests on the premise that federal preemption claims are not the sort of sensitive constitutional questions that the Pullman doctrine was purportedly designed to avoid. On this reading, preemption claims call for merely

---

153 See infra notes 158–206 and accompanying text.
154 See infra notes 158–206 and accompanying text.
155 See infra notes 158–206 and accompanying text.
156 See infra notes 172–188 and accompanying text.
157 See infra notes 189–206 and accompanying text.
158 See, e.g., United Servs. Auto. Ass’n v. Muir, 792 F.2d 356, 363 (3d Cir. 1986); Coal. of N.J. Sportsmen v. Florio, 744 F. Supp. 602, 605 (D.N.J. 1990). This view is shared by a majority of federal courts that have considered the question. See, e.g., United States v. Morros, 268 F.3d 695, 704 (9th Cir. 2001); Fed. Home Loan Bank Bd. v. Empie, 778 F.2d 1447, 1451 & n.4 (10th Cir. 1985); see also Fallon et al., supra note 4, at 1063 n.5 (“Most lower courts have resisted efforts to circumvent Propper by characterizing federal statutory challenges to state action as constitutional challenges under the Supremacy Clause.”); 17A Wright et al., supra note 21, § 4242 (collecting cases regarding the applicability of Pullman abstention to preemption cases).
159 See Muir, 792 F.2d at 363.
statutory, not constitutional, interpretation, and thus fall outside of Pullman’s constitutional avoidance rationale: the basic task in a preemption claim is to lay the federal statute and the state statute side by side and to decide whether the latter conflicts with the former.\textsuperscript{160}

The Third Circuit articulated this narrow understanding of Pullman in the preemption context most prominently in 1986 in United Services Automobile Association v. Muir.\textsuperscript{161} In Muir, the plaintiff, a national insurance company, filed suit in federal district court seeking to enjoin Pennsylvania’s insurance regulation department from revoking the company’s license to insure persons in the state.\textsuperscript{162} The state insurance regulators had threatened to revoke the license on grounds that the company was in violation of the Pennsylvania Insurance Act of 1921, a state statute prohibiting mergers between financial institutions and insurers.\textsuperscript{163} The company argued that the threatened license revocation was a violation of the Equal Protection and Due Process Clauses of the 14th Amendment and was also preempted by federal banking statutes.\textsuperscript{164}

The state insurance department called on the federal court to abstain under Pullman.\textsuperscript{165} According to the state insurance regulators, the state statute at issue had never been authoritatively construed by the state courts, and thus consideration of the legality of the license revocation under the federal Constitution or federal statutes was premature.\textsuperscript{166} The district court agreed and dismissed the case.\textsuperscript{167} The Third Circuit, in an opinion authored by Judge Max Rosenn, reversed the decision to abstain.\textsuperscript{168}

The Third Circuit held that a claim that a state statute is preempted by a federal statute, although it may be partially grounded in the Constitution’s Supremacy Clause, is not a substantial federal consti-

\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} Id. at 359.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} See Muir, 792 F.2d at 360.
\textsuperscript{166} See id. at 361.
\textsuperscript{167} See id. The district court found abstention was warranted under the doctrines established in Younger v. Harris and Burford v. Sun Oil Co., as well as under Pullman. See Younger v. Harris, 401 U.S. 37, 41 (1971); Burford v. Sun Oil Co., 319 U.S. 315, 320 (1943); Muir, 792 F.2d at 360. For this reason, the district court dismissed the case outright, rather than staying the proceedings pending a state court resolution of the state issue, as required by Pullman. See Muir, 792 F.2d at 363. There is nothing to suggest that the district court’s disposition of the case explained the panel’s view of Pullman on appeal. See id.
\textsuperscript{168} See Muir, 792 F.2d at 363.
tutional issue; therefore, Pullman abstention is inappropriate. The court determined that preemption questions are resolved through a non-constitutional process of statutory construction and thus abstention in preemption cases does not promote the goal of constitutional avoidance. The court’s implicit view was that constitutional avoidance is the principal justification for the Pullman doctrine.

B. The First Circuit: Pullman Abstention Is Appropriate in Preemption Cases

Because Preemption Claims Raise the Same Judicial Federalism Concerns as Federal Constitutional Claims

Only the U.S. Court of Appeals for the First Circuit has expressed the view that Pullman abstention may be invoked to postpone decision of federal preemption challenges to state measures. In 1972, in Druker v. Sullivan, the First Circuit held that the Pullman doctrine is still “applicable where . . . the federal claim is in part statutory.” Druker remains a significant case because of its conclusion that Pullman abstention applies to at least some non-constitutional federal questions, including preemption claims.

Druker involved a decision by the Boston Rent Board to invalidate a rent increase sought by the proprietors of Castle Square, a federally subsidized housing project. The owners of the property filed suit against the Rent Board in federal district court alleging, among other claims, that the Rent Board’s authority to regulate federally subsidized buildings was preempted by the National Housing Act. The district court abstained from ruling to permit a state court to decide whether the Rent Board had authority under state law to deny the rent increase.

The First Circuit, in an opinion by Judge Frank Coffin, affirmed the abstention order. After a prolonged analysis of the possible interpretations of state law, the court concluded that the “discussion casts more than contrived doubt on Boston’s authority [under state law] to

---

169 See id.
170 See id.
171 See id.
173 Id.
174 See id.
175 Id. at 1273.
177 See id. at 865.
178 Druker, 458 F.2d at 1274.
impose rent control on Castle Square.” Accordingly, this unclear and potentially dispositive question of state law justified the district court’s decision to abstain.180

Drucker’s broad understanding of the Pullman doctrine’s scope was followed by the U.S. District Court for the District of Massachusetts in 1996 in Phillip Morris v. Harshbarger.181 In Phillip Morris, a group of cigarette manufacturers sought to enjoin the Massachusetts Attorney General from filing a lawsuit to recover expenses paid by the state’s Medicaid program for patients who had illnesses caused by smoking.182 A recently-enacted state law explicitly authorized the suit.183 The plaintiffs alleged that both the state law and the threatened lawsuit violated the federal Constitution’s dormant Commerce Clause and were also preempted by federal statutes, including the Medicaid Act and the Public Health Cigarette Smoking Act of 1969.184 Although the court had jurisdiction to hear the federal claims, it abstained.185

The court determined that, under the Pullman doctrine, “a federal court may abstain from hearing federal statutory and constitutional issues until uncertain underlying issues of state law have first been resolved by the state courts.”186 The court observed that the Attorney General’s lawsuit was based on a novel theory of liability, the precise contours of which had not yet been determined and which needed to be first “construed as a matter of state law.”187 The court therefore decided to stay the proceedings, including both the federal preemption claim and the federal constitutional claim, pending determination by the state judiciary of the uncertain state law questions.188

C. The Second Circuit: Federal Courts Lack Subject Matter Jurisdiction over Preemption Claims When the Plaintiffs Dispute the Meaning of the Challenged State Measure

The view of the U.S. Court of Appeals for the Second Circuit is that federal courts do not have subject matter jurisdiction to consider

---

179 See id. at 1275–76.
180 See id. at 1276.
182 Id. at 1069.
183 Id. at 1069 n.1.
184 Id. at 1070.
185 See id. at 1078.
186 Id. at 1078–79.
188 See id.
federal preemption challenges to state laws when the plaintiffs dispute the meaning of the state measure. The Second Circuit established this rule in 1998, in *Fleet Bank, National Ass’n v. Burke*, which involved a suit by a national bank seeking declaratory and injunctive relief to prevent Connecticut’s Commissioner of Banking from interfering with the bank’s imposition of surcharges on automated teller (ATM) transactions. The plaintiff alleged that Connecticut’s banking laws—properly construed—did not prohibit the bank from imposing the ATM fees. If the statutes were interpreted to prohibit the fees, however, the plaintiff alleged that the laws would then be preempted by federal banking statutes.

The Commissioner sought a stay of the proceedings pursuant to the *Pullman* doctrine. He argued that the state statutes in question “never been construed by any court . . . and urged that the initial construction should be made by a state court.” The district court refused to abstain, however, on grounds that *Pullman* abstention is “not appropriately invoked in a preemption case.” Instead, the court resolved the matter entirely on the basis of state law, ruling that Connecticut’s banking laws did not prohibit the bank from imposing the ATM fees.

On appeal, the Second Circuit held that the lower court lacked subject matter jurisdiction. Although the court recognized that the Supreme Court’s decision in *Shaw v. Delta Air Lines, Inc.* authorized federal courts to hear challenges to state laws based exclusively on federal preemption, the court distinguished *Shaw* by noting that the bank was actually seeking a favorable interpretation of state law, rather than a direct ruling on a preemption claim.

The court expressed serious concern that accepting jurisdiction over preemption claims when the challenged state law is ambiguous

---

189 See *Fleet Bank, Nat’l Ass’n v. Burke*, 160 F.3d 883, 893 (2d Cir. 1998). The Second Circuit’s rule is narrow and does not apply when there is a federal constitutional issue in the case or, in preemption cases, when the court, on its own motion, detects ambiguity in the meaning or application of state law. See id.
190 See id. at 884–85.
191 Id. at 885.
192 Id.
193 Id. at 885.
194 Id.
195 Fleet Bank, 160 F.3d at 885.
197 Fleet Bank, 160 F.3d at 893.
would create major challenges for judicial federalism and potentially strain the relations between federal and state courts.\textsuperscript{199} Consideration of such suits by federal courts, the court reasoned, constitutes a “major and unwarranted incursion on the authority of state courts to construe state statutes.”\textsuperscript{200} The court concluded that allowing a federal court to “determine . . . as a matter of state law . . . the authority of state officials to act,” without any guidance from the state judiciary, is an “ill-advised use of federal question jurisdiction.”\textsuperscript{201}

The court conceded that one solution to judicial federalism concerns would be for federal courts to accept jurisdiction over preemption claims and then abstain under \textit{Pullman} to allow a state court to resolve unclear and potentially dispositive issues of state law.\textsuperscript{202} The court determined, however, that the “subtle issue of \textit{Pullman} abstention” should be avoided.\textsuperscript{203} Moreover, the court recognized that the consensus among federal courts is that “preemption claims . . . do not present ‘substantial’ constitutional issues” and thus \textit{Pullman} abstention is inappropriate in preemption cases.\textsuperscript{204}

Nonetheless, the court’s disposition of the suit closely mirrored the procedure that courts follow in \textit{Pullman} abstention cases.\textsuperscript{205} The court dismissed the case and directed the plaintiff to obtain a declaration from a state court regarding the unclear question of Connecticut law, but also instructed the plaintiff to reserve its federal preemption claims so that it might return to federal court if the state court’s ruling was not favorable.\textsuperscript{206}

V. A Flexible, Case-by-Case Approach to Promoting Judicial Federalism in Preemption Cases: A Limited yet Important Role for \textit{Pullman} Abstention

As the previous Part illustrates, federal courts continue to disagree as to the propriety of invoking \textit{Pullman} abstention to postpone ruling on federal preemption challenges to state laws.\textsuperscript{207} Section A of this Part argues that \textit{Pullman} abstention remains highly valuable as a mechanism

\textsuperscript{199} \textit{Fleet Bank}, 160 F.3d at 892.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} See id. at 891, 892.
\textsuperscript{203} Id. at 892.
\textsuperscript{204} See id. at 890.
\textsuperscript{205} See \textit{Fleet Bank}, 160 F.3d at 893.
\textsuperscript{206} Id.
\textsuperscript{207} See supra notes 153–206 and accompanying text.
for delaying jurisdiction over preemption claims until federal courts can review state laws without violating core principles of judicial federalism or damaging the critical relationship between federal and state courts.²⁰⁸ Although Pullman can be an unwieldy doctrine for courts to apply, and its use should certainly be limited to those cases where state law is genuinely unclear, it remains an important tool for federal courts to ensure that review of state laws does not needlessly interfere with the “harmonious functioning” of the federal system.²⁰⁹

Section B of this Part illustrates how the Pullman abstention doctrine should be applied to the kinds of preemption claims that federal courts are most likely to confront.²¹⁰ By proposing and analyzing hypothetical scenarios based on the fact patterns of actual cases, this Note illustrates how a federal judge can recognize the instances in which the Pullman doctrine is applicable and clarifies the concrete interests that abstention can promote.²¹¹

A. The Invocation of Pullman in Preemption Cases with Unclear and Potentially Dispositive Issues of State Law

Some think that federal courts should be reluctant to apply Pullman abstention because it is awkward, outdated, and unmanageable.²¹² The Pullman doctrine has been criticized for requiring unnecessarily complex procedures, which impose enormous costs and delays on litigants.²¹³ It has also been heavily criticized for vesting extraordinary discretion in federal courts to ignore affirmative congressional grants of jurisdiction, purportedly violating separation of powers principles.²¹⁴

²⁰⁸ See infra notes 212–239 and accompanying text.
²⁰⁹ See infra notes 212–239 and accompanying text.
²¹⁰ See infra notes 240–274 and accompanying text.
²¹¹ See infra notes 240–274 and accompanying text.
²¹³ See Chemerinsky, supra note 18, at 789.

Questions of jurisdiction are of special concern to the courts because they intimately affect the courts’ relations with each other as well as with the other branches of government. Therefore, the continued existence of measured au-
Nonetheless, the *Pullman* doctrine remains an indispensable solution to the unavoidable dilemmas that arise when the laws of two sovereign legal systems are implicated in a single case.\footnote{See Field, supra note 10, at 1084–85.} Specifically, *Pullman* solves a significant problem of judicial federalism that stems from the competing obligations of Article III federal courts to both protect federal rights from encroachment by state authorities as well as to decide matters of state law only as would a state’s highest court.\footnote{See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983); Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938); Field, supra note 10, at 1085.} Because state measures often threaten to trample on federal rights, federal courts must be able to entertain preemptive challenges to state action.\footnote{See Field, supra note 10, at 1085.} At the same time, such cases will often require decision of difficult or ambiguous questions of state law, which can only be authoritatively decided by the state judiciary.\footnote{See Shaw, 463 U.S. at 96 n.14; Ex parte Young, 209 U.S. 123, 155–56 (1908).}

This dilemma persists in preemption cases, despite the unwillingness of many federal courts to acknowledge it.\footnote{See, e.g., United Servs. Auto. Ass’n v. Muir, 792 F.2d 356, 363 (3d Cir. 1986).} Preemption claims require a federal court to handle difficult or unclear matters of state law, including the important question of whether the “interest regulated” by the state law falls within the scope of the allegedly controlling federal statute.\footnote{See Field, supra note 10, at 1085.} The federal court’s determination of the state law question often is, or should be, the most controversial matter in the case.\footnote{See Field, supra note 10, at 1085.} Thus, litigants in preemption cases, especially those charged with representing state authorities, often wonder why a federal court is involved in what appears to be purely a matter of state law.\footnote{See Field, supra note 10, at 1085.}

The obvious response is that preemption claims implicate federal rights and that protecting federal rights is a federal court’s highest priority.\footnote{See Shaw, 463 U.S. at 96 n.14; Ex parte Young, 209 U.S. at 123, 155–56 (1908).} Yet, regardless of the nature of the rights at stake, it seems un-

---

Shapiro, supra, at 574.
\footnote{See Field, supra note 10, at 1084–85.}
\footnote{See Shaw, 463 U.S. at 96 n.14; Ex parte Young, 209 U.S. 123, 155–56 (1908).}
\footnote{See Field, supra note 10, at 1085.}
deniable that some, perhaps many, preemption cases are dominated by matters of state law.\textsuperscript{224} Litigants are thus justified in doubting that any interest is served by requiring a federal court to “[shoot] in the dark on the state law issue” in a suit between citizens of the same state.\textsuperscript{225} Such a requirement intrudes into a realm usually reserved to the state judiciary.\textsuperscript{226}

*Pullman* abstention provides a partial solution to this problem: when a litigant seeks a federal forum to enforce his federal rights, but the outcome of the suit turns on ambiguous matters of state law, *Pullman* allows the federal court to retain control of the proceedings even as the the state judiciary resolves unclear questions of state law.\textsuperscript{227} It therefore allows for state court involvement in federal question litigation when matters of state law dominate the case.\textsuperscript{228}

Thus, the *Pullman* doctrine promotes much needed comity between federal and state courts by considering the crucial role of state courts as the “final expositors of state law.”\textsuperscript{229} Complimentarily, the doctrine confines the federal courts to their appropriately limited role as interpreters of federal law, insofar as that role is consistent with congressional grants of jurisdiction and with the “just, speedy, and inexpensive” resolution of disputes between litigants.\textsuperscript{230} The doctrine can, and should, be used to avoid or postpone federal jurisdiction over preemption claims until review of state laws can take place without disrupting the relationship between federal and state courts, unnecessarily

\begin{itemize}
\item \textsuperscript{224} See, e.g., *Fleet Bank*, 160 F.3d at 889.
\item \textsuperscript{225} See *Werhan*, supra note 29, at 473.
\item \textsuperscript{226} See *Fleet Bank*, 160 F.3d at 892.
\item \textsuperscript{227} See *Chemerinsky*, supra note 18, at 787.
\item \textsuperscript{228} See *Bezanson*, supra note 80, at 1107; *Field*, supra note 10, at 1085.
\item \textsuperscript{229} See *England*, 375 U.S. at 415.
\item \textsuperscript{230} See Fed. R. Civ. P. 1; *Field*, supra note 10, at 1085. Although other doctrines of abstention ostensibly apply in diversity cases, it is clear that postponement or denial of jurisdiction in suits between citizens of different states violates Congress’s intent in a way that *Pullman* abstention—which can apply only when federal jurisdiction is based on a federal question—does not. See *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *Chemerinsky*, supra note 18, at 801. Nonetheless, the fact that the Supreme Court has approved of abstention in diversity cases when state law is unclear offers further support for the thesis that abstention is appropriate even in the absence of a federal constitutional issue. See *Thibodaux*, 360 U.S. at 28; *Field*, supra note 10, at 1137–38. *Thibodaux* abstention reinforces the principle that federal courts may abstain from ruling when decision of an unclear question of state law risks only unwarranted interference with a state measure and does not help to avoid a federal constitutional question. See *Thibodaux*, 360 U.S. at 28; *Field*, supra note 10, at 1137–38.
\end{itemize}
meddling in state programs and policies, or creating a risk of superfluous or wasteful adjudication.231

Of course, Pullman abstention is not any easier to apply in preemption cases than in other contexts.232 Federal courts will still need to confront the same difficult set of questions that the Pullman doctrine always provokes: How unclear must the state law be to warrant abstention?233 How likely must it be that an alternative, and dispositive, interpretation will be supplied by the state judiciary?234 When do the costs to the litigants outweigh the potential benefits of abstention?235 All of these questions remain in preemption cases and require application of a supple, even-handed inquiry that is capable of accurately weighing costs and benefits in particular instances.236

Even if the doctrine continues to be difficult for courts to understand and apply, its utility in promoting principles of judicial federalism, in the preemption context and elsewhere, cannot be denied.237 Pullman abstention allows federal courts to vindicate federal rights, as Congress and the public expect, without infringing on the “rightful independence of the state governments.”238 The doctrine may not deserve routine application, but it does deserve serious consideration by federal courts interested in “retain[ing] . . . a manageable federalized judicial structure.”239

B. A Guide to the Application of the Pullman Abstention Doctrine in Preemption Cases

Because the amorphous standards of the Pullman abstention doctrine are difficult to apply, the following hypothetical scenarios help to illustrate how and why abstention can be valuable in preemption cases.240 Each hypothetical presents a different “configuration of parties

---

231 See Field, infra note 10, at 1093–1101.
232 See Chemerinsky, supra note 18, at 790–97.
233 See id. at 791.
234 See id.
235 See id. at 794.
236 See id. at 790–97; Werhan, supra note 29, at 473 (“[Pullman abstention] allows the Court to move flexibly and moderately to assess judicial federalism implications on a case-by-case basis.”).
237 See Werhan, supra note 29, at 474 (“Used properly, Pullman abstention operates as an essential ultimate regulator of the judicial federalism system.”).
239 See Beazanson, supra note 80, at 1107.
240 See infra notes 242–274 and accompanying text.
and claims” to illustrate the varying circumstances in which Pullman abstention is relevant.\(^{241}\)

1. Suits Alleging That Federal Law Preempts an Ambiguous State Statute or Regulation: “Construction Cases”\(^{242}\)

The plaintiff, a manufacturer of industrial cleaning supplies, files suit in federal district court seeking declaratory and injunctive relief to prevent the State Attorney General from enforcing a recently-enacted state law regulating exposure to hazardous chemicals.\(^{243}\) The state statute sets costly new standards requiring employers to limit workers’ exposure to certain toxins and authorizes civil and criminal penalties for employers who fail to comply with the law’s provisions.\(^{244}\) The plaintiff alleges that the state law is preempted by a federal statute that regulates the same toxins but permits higher levels of exposure.\(^{245}\) The plaintiff also seeks a declaration that the state statute, properly construed, does not apply to the chemicals used at its facilities, which the company has long believed is safe.\(^{246}\)

If the federal court cannot, with reasonable certainty, predict how the state statute would be construed by the state’s highest court, and the interpretation suggested by the plaintiff is possible, the federal court should abstain under Pullman pending a definitive ruling by the state judiciary regarding the statute’s precise scope.\(^{247}\) Unlike the Second Circuit in Fleet Bank, National Ass’n v. Burke, which denied federal subject matter jurisdiction over a similar preemption challenge because the plaintiff disputed the meaning of the challenged state law, the court in the hypothetical scenario should instead accept jurisdiction and abstain under Pullman if the dispositive question of state law is ambiguous.\(^{248}\) Pullman abstention seems like the appropriate mechanism for involving

\(^{241}\) See Werhan, supra note 29, at 454; infra notes 242–274 and accompanying text.

\(^{242}\) See Field, supra note 10, at 1111.

\(^{243}\) See Fleet Bank, 160 F.3d at 886. This hypothetical mimics the fact pattern in the Second Circuit’s Fleet Bank, N.A. v. Burke. See id. The plaintiff challenged a state law solely on federal preemption grounds, but also alleged that the state law, properly construed, should not apply. See id.

\(^{244}\) See id. The state measure challenged in Fleet Bank was a state banking statute that the state banking commissioner interpreted as prohibiting the imposition of ATM fees. See id.

\(^{245}\) See id. The allegedly controlling federal law in Fleet Bank was a federal banking statute. See id.

\(^{246}\) See id.

\(^{247}\) See Druker v. Sullivan, 458 F.2d 1272, 1274 (1st Cir. 1972) (calling for abstention in preemption cases).

\(^{248}\) See Fleet Bank, 160 F.3d at 892.
the state courts in this case; denying jurisdiction entirely, as did the Second Circuit in *Fleet Bank*, probably does not give sufficient weight to the federal court’s interest in protecting the litigant’s federal rights.\(^{249}\)

2. Suits Alleging That Federal Law Preempts a State Statute or Regulation: “Construction Cases” in Which “Conduct Under Authority of the Ambiguous Provision Is Also at Issue”\(^{250}\)

The plaintiff, a large, publicly-traded corporation, files suit in federal district court seeking declaratory and injunctive relief to prevent the State Securities Commissioner (“the Commissioner”) from proceeding with a threatened lawsuit based on a novel theory of liability under the state’s “Blue Sky” laws.\(^{251}\) The plaintiff alleges that the Commissioner’s threatened lawsuit, first mentioned after a recent nonpublic offering of securities within the state, is preempted by provisions of the federal securities laws.\(^{252}\) There also remain numerous ambiguities concerning the precise nature and reach of the new cause of action as a matter of state law.\(^{253}\)

Because the scope of liability under the threatened action, as well as the reasonableness of the Commissioner’s reading of the statute remain open to question, abstention under *Pullman* is appropriate.\(^{254}\) This result accords with the approach of the federal district court in *Phillip Morris v. Harshbarger*, which abstained to permit the state courts to decide the extent of cigarette manufacturers’ liability for health care costs under state law before weighing in on the plaintiff’s federal constitutional and preemption claims.\(^{255}\) Although the state court’s ruling on the meaning of the novel cause of action may not dispose of such a case entirely, the state court will no doubt have a better understanding of the

\(^{249}\) See id. at 892, 893.

\(^{250}\) See Field, supra note 10, at 1121.

\(^{251}\) See *Phillip Morris v. Harshbarger*, 946 F. Supp. 1067, 1069 (D. Mass. 1996). This hypothetical is based on the fact pattern in *Phillip Morris*. See id. Unlike the previous hypothetical, the plaintiff in this case makes federal claims against both the state law and official action threatened under authority of the law. See id. The U.S. Supreme Court’s decision in *Pennhurst* would bar the court from entertaining any state law-based claims against the threatened enforcement action. See 465 U.S. 89, 106 (1984). Nonetheless, the court may rightfully consider the possibility that state law-based claims may be available to the plaintiff and that a state court would be the appropriate forum for adjudicating such claims. See *Phillip Morris*, 946 F. Supp. at 1079. Such considerations may constitute an additional reason for abstention in this matter. See id.

\(^{252}\) See id.

\(^{253}\) See id.

\(^{254}\) See id.

\(^{255}\) See *Phillip Morris*, 946 F. Supp. at 1078.
state’s interest in the matter and will be able to “educate” the federal court as to the interests regulated by the state law, rendering the preemption ruling more accurate and sensitive to the state’s concerns.\textsuperscript{256}

3. Suits Alleging That a State Statute or Regulation Is Unconstitutional and Preempted by a Federal Law: “Construction Cases” Involving both Constitutional and Preemption Claims\textsuperscript{257}

The plaintiff, a large office supply retailer, files suit in federal district court seeking injunctive and declaratory relief to prevent the State Board of Employment Discrimination from revoking its license to operate in the state.\textsuperscript{258} The Board has notified the company of its intent to strip the company of the license via administrative proceeding.\textsuperscript{259} The Board is ostensibly enforcing a state statute that prohibits employers from discriminating with respect to overtime pay.\textsuperscript{260} The plaintiff alleges that its employees do not receive overtime pay within the meaning of the state statute, properly construed.\textsuperscript{261} The plaintiff also alleges that the threatened administrative proceeding violates federal constitutional rights under the Due Process Clause and is preempted by federal labor regulations, which do not prohibit the plaintiff’s labor practices.\textsuperscript{262}

Unlike the Third Circuit’s approach in \textit{Muir}, resolution of the preemption claim is not a proper method of avoiding the federal constitutional claim or of bypassing difficult matters of state law.\textsuperscript{263} Rather, if the court determines that it is indeed “far from clear” whether the Board’s application of the statute to the plaintiff is correct, abstention under \textit{Pullman} is warranted to permit the state courts to resolve those

\textsuperscript{256} See Bezanson, supra note 80, at 1116–17, 1134–35.

Since abstention in general is basically an allocative device designed to promote the sharing of responsibility in federal litigation with state courts, it takes advantage of the expertise of state courts on state law issues. State courts may be more capable of articulating and understanding the purposes underlying a state statute or regulatory order, and they may be better able to identify and narrow the relevant issues . . . .

\textit{Id.}

\textsuperscript{257} See Field, supra note 10, at 1111.

\textsuperscript{258} See \textit{Muir}, 792 F.2d at 359. This hypothetical is based on the facts of the Third Circuit’s decision in \textit{Muir}. See \textit{id.}

\textsuperscript{259} See \textit{id.}

\textsuperscript{260} See \textit{id.}

\textsuperscript{261} See \textit{id.}

\textsuperscript{262} See \textit{id.}

\textsuperscript{263} See \textit{id. at} 363.
questions. The Third Circuit viewed preemption as a preferential ground of decision, despite the fact that a narrowing interpretation of the state law would have resolved the dispute without reaching the federal constitutional or preemption claims. Reaching the preemption claim was likely inappropriate because the court had an obligation to explore available state law grounds of decision before going on to consider the federal issues. Also, a state court would have been better positioned to articulate the nature of the state statutory scheme, leading to a more accurate decision on the preemption and constitutional claims, even if the state ruling was not dispositive.

4. Suits Alleging That Federal Law Preempts a Local, as Opposed to a State, Ordinance or Regulation: “Authorization Cases” Involving Local, as Distinguished from State, Officials

The plaintiff, an operator of a chain of grocery stores, files suit in federal district court seeking declaratory and injunctive relief to prevent the Municipal Economic Redevelopment Commission (“the Commission”) from enforcing a new rule prohibiting the display of alcohol-related advertisements in designated areas. The Commission issued the rule pursuant to its organic statute, which gives it the authority to take any reasonable measures to promote economic growth and development in low-income urban areas. The plaintiff alleges that the Commission’s rule is unauthorized by state law and is preempted by new federal regulations governing the sale and distribution of alcoholic beverages.

The federal court should abstain to permit a state court to define the scope of the challenged ordinance as well as to pass on the authority of the Commission under state law, if those questions have never be-

---

264 See Pullman, 312 U.S. at 499.
265 See Muir, 792 F.2d at 363.
267 See Bezanson, supra note 80, at 1116.
268 See Field, supra note 10, at 1101.
269 See Druker, 458 F.2d at 1272. This hypothetical is based on the facts of the First Circuit’s decision in Druker. See id.
270 See id.
271 See id. Although the U.S. Supreme Court’s decision in Pennhurst established that the Eleventh Amendment prohibits federal courts from ordering injunctive or declaratory relief against state officials on the basis of state law, the protections of the Eleventh Amendment do not apply to municipal officials. See 465 U.S. at 106; Monell v. Dep’t of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978).
fore been handled by the state judiciary and are so unclear that a federal court cannot predict how they should be decided. This method would accord with the First Circuit’s approach in *Druker v. Sullivan*, in which the federal court first explored the available state law grounds of decision, including separate and independent claims regarding the Commission’s authority to act under state law, and then abstained to permit a state court to rule on those claims. It would also mimic the approach of the Supreme Court in *Pullman*; there, the court abstained to permit the state court to weigh in on a pendent claim regarding the state official’s authority under state law.

**Conclusion**

*Pullman* abstention is an important tool that promotes core principles of judicial federalism without compromising the ability of the federal courts to vindicate federal constitutional and statutory rights. When a federal court’s necessarily tentative resolution of unclear matters of state law constitutes needless interference with state programs and policies or creates the potential for unnecessary adjudication of a plaintiff’s federal claims, *Pullman* allows the federal court to stay the proceedings so that such issues can be definitively resolved by a state court. If the state court’s resolution is not favorable, a plaintiff may return to federal court to litigate any remaining federal claims.

For this reason, federal courts should abstain under *Pullman* to permit the state judiciary to resolve potentially dispositive and unclear matters of state law before considering a preemption challenge to a state measure. Preemption claims often turn on novel and difficult questions of state law that federal courts should allow state courts to decide.

The courts that have refused to invoke *Pullman* in preemption cases have taken too narrow a view of the doctrine as exclusively concerning constitutional avoidance. In fact, *Pullman* can, and should, be invoked even in the absence of a constitutional issue, so long as doing so furthers the judicial federalism-based policies of avoiding unnecessary interference with state measures, minimizing conflict between federal and state courts, and preventing unnecessary adjudication.

Thus, *Pullman* should be invoked in preemption cases when doing so is consistent with the judicial federalism-based policies that alone justify application of the doctrine. The doctrine should not be arbitrari-

---

272 See id. at 1274.
273 See id.
274 See *Pullman*, 312 U.S. at 499.
ily limited to constitutional cases: preemption cases, regardless of their constitutional status, clearly raise the kinds of problems that *Pullman* abstention was designed to address. Therefore, courts should apply the doctrine accordingly.

Sebastian Waisman