

# The *Pennhurst* Doctrines and the Lost Disability History of the “New Federalism”

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*This Article reconstructs the litigation over an infamous institution for people with disabilities—Pennhurst State School & Hospital—and demonstrates that litigation’s powerful and underappreciated significance for American life and law. It is a tale of two legacies. In U.S. disability history, Halderman v. Pennhurst State School & Hospital is a celebrated case. The 1977 trial court decision recognized a constitutional “right to habilitation” and ordered the complete closure of an overcrowded, dehumanizing facility. For people concerned with present-day mass incarceration, the case retains relevance as an example of court-ordered abolition.*

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*For those outside the world of deinstitutionalization and disability rights, however, the Pennhurst case carries different associations, drawn from the two Supreme Court decisions (in 1981 and 1984) that the litigation produced. Although rarely analyzed in tandem, both decisions were about the scope of federal power vis-à-vis the states: the first about how to interpret the terms of federal-state grants-in-aid, a ubiquitous policy device by the second half of the twentieth century; the second about state sovereign immunity.*

*Bringing these multiple legacies together for the first time—with the benefit of interviews and archival research—this Article shows how an unprecedented victory for disabled and institutionalized Americans limited the role of the federal government in the lives of all Americans. The litigation did so by (1) restricting Congress’s ability to incentivize fair and adequate treatment and (2) constraining individuals’ use of federal courts to hold accountable the level of government with the most meaningful ability to harm or help them. This Article concludes by suggesting what we gain from restoring historical context to these doctrinal innovations. Future research should explore how ideas about intellectual and developmental disability in the late twentieth century informed equality doctrines and the judicial enforcement of positive rights.*

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## INTRODUCTION

Thirty miles outside of Philadelphia sit the ruins of the Pennhurst State School and Hospital. From its founding in 1908 until its closing in 1987, the institution housed more than ten thousand people whom the state considered unsuited to life in the community, often because of intellectual or developmental impairment.<sup>1</sup> Today, part of the 110-acre property functions as a “haunted asylum,” capitalizing in complex ways on the real horror that some residents experienced there.<sup>2</sup> Another part of the property hosts a food waste disposal operation. Plans are in the works for a business park.<sup>3</sup>

As Pennhurst’s physical imprint on the land fades, its legal legacy endures and grows. By 1974, the neglect and brutality that residents experienced in this large, state-run facility had become the basis for one of the most important uses of affirmative litigation in the nation’s history: *Halderman v. Pennhurst State School and Hospital*. Through what law professor Owen Fiss famously dubbed a “structural injunction” (i.e., one that “alter[s] or reorganiz[es] some institutional arrangement”),<sup>4</sup> the lawsuit led eventually to Pennhurst’s closure. In doing so, it also produced important pronouncements about the status of people whose bodies and minds functioned differently from the norm.<sup>5</sup> Along

1. Dennis B. Downey, *The Idea of Pennhurst: Eugenics and the Abandonment of Hope*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS 17, 30 (Dennis B. Downey & James W. Conroy eds., 2020). The institution’s original name was the Eastern Pennsylvania State Institution for the Feeble-minded and Epileptic. Dennis B. Downey & James W. Conroy, *Introduction* to PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra*, at 1.

2. Jamie Tarabay, *Haunted House Has Painful Past as Asylum*, NPR (Oct. 29, 2010), <https://www.npr.org/templates/story/story.php?storyId=130840594> [<https://perma.cc/N88J-SH3L>]; see *Pennhurst Haunted Asylum*, PENNHURST ASYLUM, <https://pennhurstasylum.com/> [<https://perma.cc/4B3E-3B9Y>]. On the complexity of the haunted asylum attraction, including managers’ and employees’ personal connections to disability, see Nathan R. Stenberg, *Honoring a House of Horrors: Community, Commemoration, and the Specter of Institutionalization at the Pennhurst Asylum* (forthcoming) (on file with author).

3. See Jacob Adelman, *Notorious Pennhurst Hospital Campus Gets Pa. Grant Toward Rebirth as Business Park*, PHILA. INQUIRER (Nov. 21, 2017), [https://www.inquirer.com/philly/business/real\\_estate/commercial/notorious-pennhurst-hospital-campus-gets-pa-grant-toward-rebirth-as-business-park-20171121.html](https://www.inquirer.com/philly/business/real_estate/commercial/notorious-pennhurst-hospital-campus-gets-pa-grant-toward-rebirth-as-business-park-20171121.html) [<https://perma.cc/V22V-WKNC>]. There is also a dedicated campaign to preserve Pennhurst and the stories of those who resided there. See Nathaniel Guest, *Preservation: A Case Study of Collective Conscience*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1, at 195, 198.

4. OWEN M. FISS, INJUNCTIONS 1 (1972).

5. Drawing on insights from Critical Disability Studies, I try to use terms that the individuals I write about would claim for themselves. When I do not know an individual’s preference but I think disability is relevant, I try to convey that person’s disability/disabilities with specificity and to base my description on reliable sources. When referring to the broad category of people who live(d) with some kind of physical or mental impairment, I tend to use the identity-first term “disabled people,” as is currently common among scholars, writers, and advocates who identify as disabled. When referring to a sub-category of that group, however, such as people with intellectual disabilities, I tend to use the people-first framing, because I think the norm is less clear. See generally *Disability Language Style Guide*, NAT’L CTR. ON DISABILITY & JOURNALISM (Aug. 2021), <https://ncdj.org/wp-content/uploads/2021/08/NCDJ-STYLE-GUIDE-EDIT-2021-SILVERMAN.pdf> [<https://perma.cc/PVH8-HGCR>] (declining to recommend “person-first” language as a universal default

with similar lawsuits in other jurisdictions, the *Pennhurst* case helped make institutionalization seem legally and morally suspect.<sup>6</sup> The 1977 trial court decision retains a vital place in U.S. disability history<sup>7</sup> and has become an important precedent in the growing movement for decarceration.<sup>8</sup>

On appeal, the *Halderman v. Pennhurst* case also produced two far-reaching pronouncements from the U.S. Supreme Court. Both were about the relationship between the states and the federal government, although the two opinions are rarely analyzed in tandem. The first of these Supreme Court decisions, in 1981, birthed an important new rule for interpreting federal-state grants-in-aid: the “clear-statement rule.”<sup>9</sup> In practice, that rule curbs the federal government’s ability to influence the states via its superior financial resources—which by the late twentieth century had become an entrenched mode of exerting national authority and vindicating civil rights.<sup>10</sup> A second Supreme Court decision in 1984 significantly reinterpreted the Eleventh Amendment and thereafter prevented state law claims against state officials from proceeding in federal court.<sup>11</sup> Subsequent decisions built on this foundation, giving more and

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but encouraging writers to consider such language when referring to someone with an intellectual disability).

6. For a succinct overview of this 1960s–1970s wave of deinstitutionalization litigation, see Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012); see also Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgetting History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 454–58 (2018) (discussing efforts by the mental health bar to make visible the “involuntary incarceration” of people with disabilities and to frame their experiences in terms of civil rights).

7. See, e.g., PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1.

8. See LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 236, 238 (2020) (describing *Pennhurst* as “[t]he most remarkable case in the history of decarceration litigation” and noting its unique focus on abolition as opposed to reform).

9. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1 (1981); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619 (1992) (seeing in *Pennhurst I* the beginning of “the Court’s New Super-Strong Clear Statement Rules”); Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1069 (2010) (seeing the same in *Pennhurst I*). For an elaboration on the larger universe of clear statement rules that the Court has articulated, see John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

10. See MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* (1970) (demonstrating the importance of federal-state grants-in-aid to social welfare policy); KIMBERLEY S. JOHNSON, *GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877-1929* (2007) (documenting the expansion of national authority that occurred via grants-in-aid); Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 73 (2022) (describing the suite of “Spending Clause civil rights statutes” that was in place by the late twentieth century).

11. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984). Previous decisions expressed no concern with this practice, so long as there was a valid federal law claim arising from the same underlying facts.

Practically speaking, this doctrinal change affected not only state claims but also federal claims because of the strategic value in pursuing federal and state claims in the same action. After this decision, plaintiffs with both types of claims had an incentive to pursue federal claims in state court and

more heft to the state sovereign immunity principle that the *Pennhurst* decision emphasized.<sup>12</sup>

Taken together, these two Supreme Court decisions helped cabin some of the expansive possibilities that the post-Civil War Constitution made available and that the “Second Reconstruction” enlivened (with help from what political scientist Sean Farhang calls the “litigation state”).<sup>13</sup> Other decisions during this period famously moderated Black Americans’ claims for equality,<sup>14</sup> but the Court’s decisions in *Halderman v. Pennhurst* had a more sweeping, trans-substantive effect, by forcing federal courts into a role that was at once more assertive and more modest. The decisions impelled courts to become more assertive in their oversight of Congress, which critics perceived as making extravagant equality guarantees without pausing to count the costs.<sup>15</sup> The *Pennhurst* decisions impelled modesty in the courts’ dealings with state governments, particularly when it came to enforcing rights in ways that spent and allocated state resources. Cases that built on the *Pennhurst* decisions would further constrain Congress—most recently and significantly in its ability to make government-funded healthcare broadly available to low-income Americans.<sup>16</sup>

In short, the *Pennhurst* decisions heralded the arrival of a “new federalism”: a sea change in how a majority of the Justices on the Supreme Court, led by President Nixon’s appointees, envisioned the proper relationship between the federal government and the states. That vision was in tension with a technique of governance—federal grants-in-aid—that began as an alternative to more robust uses of federal power but that could seem overly intrusive, especially once it became bound up with civil rights enforcement. The Supreme Court’s “new

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to give up the federal forum. See Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 658–59 (1985).

12. See *infra* Part III.B, Insulating the States from Accountability.

13. The “Second Reconstruction” refers to historic mid-twentieth century efforts by all three branches of the federal government to end the racialized caste system that the First Reconstruction targeted. See MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945-2006* (3d ed. 2007). For further discussion on the “litigation state,” see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

14. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). In other cases from this era, the Court did not accept invitations to narrow Black Americans’ equality claims. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1982).

15. Judith Resnik’s work on the Rehnquist Court has captured the assertiveness I am trying to convey. She described how pronouncements about the federal courts’ need for restraint vis-à-vis states coincided with the Supreme Court’s own lack of restraint vis-à-vis Congress’s efforts to create and protect rights. See, e.g., Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003).

16. I refer here to the Patient Protection and Affordable Care Act and the Supreme Court’s treatment of the Act’s Medicaid expansion provision. See Pub. L. No. 111-148, 124 Stat. 119 (2010); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

federalism” placed greater restrictions on the federal government and left it with a smaller toolkit for shaping the content of social and economic citizenship.<sup>17</sup>

To be clear, *Pennhurst* was not a “but for” cause of these broad doctrinal shifts. It did, however, seem to be a convenient vehicle. The kind of people who benefited from the *Pennhurst* litigation—people with often severe intellectual and developmental disabilities—sparked pity in the broader public, but they were not the promise-filled schoolchildren of *Brown v. Board of Education*.<sup>18</sup> The state and local defendants in *Pennhurst* were clearly implicated in an unjust, dysfunctional system, but no one cast them as bigoted obstructionists. And the issue at the heart of *Pennhurst* went well beyond segregation and exclusion. It was about the nature of the government’s obligation to people who were traditionally understood as, at best, objects of charity, and, at worst, dangers to society.<sup>19</sup> Amid narratives of overburdened states and scarce resources, the climate was ripe for limiting the equality rights of certain categories of disabled citizens, and through them, the broader American public.

The *Pennhurst* plaintiffs and their lawyers did not forecast this development and could not have been expected to. For years, reformers had tried to remediate the inhumane conditions at Pennhurst. Federal court litigation seemed like the only avenue left. In this, they were similar to formerly enslaved persons and their descendants, who recognized their vulnerability in state and local fora and turned to federal courts to vindicate their rights.<sup>20</sup> This was one of the central promises of Reconstruction, and in 1974, it still seemed viable. In

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17. When legal scholars think about this “new federalism,” they often invoke landmark decisions interpreting the Tenth Amendment (e.g., *New York v. United States*, 505 U.S. 144, (1992); *Printz v. United States*, 521 U.S. 898 (1997)), the Commerce Clause (e.g., *United States v. Lopez*, 514 U.S. 549 (1995)), and the Fourteenth Amendment (e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997)). See, e.g., Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1 (2004). I am making the case for giving the *Pennhurst* litigation a more prominent place in this story. Joining scholars such as Louise Weinberg and Logan Sawyer III, I am also inviting scholars to see the “new federalism” earlier, well before the 1990s. Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1195–96 (1977); Logan Everett Sawyer III, *The Return of Constitutional Federalism*, 91 DENV. U.L. REV. 221, 221 (2014).

18. This is a statement about how the public tended to perceive the *Pennhurst* plaintiffs, not about their actual promise or potential. In recent decades, with the rise of the self-advocacy movement, former residents have made clear how stifled their growth was at Pennhurst and how much they had to contribute to the wider community. See, e.g., Glenn Rifkin, *Overlooked No More: Roland Johnson, Who Fought to Shut Down Institutions for the Disabled*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/obituaries/roland-johnson-overlooked.html> [https://perma.cc/GHL3-FTLT]; Interview by Lisa Sonneborn with Tom Delmastro, *Visionary Voices: Tom Delmastro Ch 7*, TEMP. UNIV. INST. ON DISABILITIES (Nov. 12, 2013), <https://disabilities.temple.edu/voices/interviews/delmastro-chapter-7> [https://perma.cc/8ZR8-8MJ9]; Mark Friedman & Nancy K. Nowell, *The Rise of Self-Advocacy: A Personal Remembrance*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1, at 124.

19. See Appleman, *supra* note 6.

20. Some members of the *Pennhurst* class were Black, and I want to be careful not to implicitly code all disabled people as White or non-raced (or to code Black people as non-disabled). In litigation, however, the plaintiffs’ lawyers did not emphasize their clients’ races. To the extent race came up, it was as an analogy to disability.

availing themselves of this option, however, the *Pennhurst* plaintiffs inadvertently occasioned its diminishment.

This Article proceeds as follows. Part I reconstructs the circumstances that prompted the *Pennhurst* litigation, emphasizing years of failed efforts to achieve an adequate state response. This context helps explain why the *Pennhurst* plaintiffs ended up in federal court and underscores why federal government authority mattered to disabled and institutionalized Americans. This Section also describes the trial court decision, which the disability rights movement and its allies greeted with excitement but which generated concern among some state officials. Part II summarizes the important turns that the case took on appeal, as it stood in for larger concerns about burdened states, unrealistic federal congressional mandates, and activist federal judges. Part III analyzes the doctrinal legacies of the *Pennhurst* litigation, with an emphasis on what we gain by viewing the two Supreme Court decisions as a pair rather than in isolation. This Section shows how principles that the Supreme Court articulated in *Pennhurst* limited what Americans are now entitled to expect from government and the remedies they may seek.

Part IV is a provocation, inspired by the burgeoning field of disability legal studies<sup>21</sup> and by legal scholars who have shown the value of restoring historical context to legal principles we often take for granted.<sup>22</sup> Instead of de-coupling doctrine from its original context, as lawyers so often do, what if we re-coupled it, and underscored disability? This Section emphasizes tropes that are familiar to the disability community and that appear in the Supreme Court's engagement with *Pennhurst*, such as the notions that inclusion of people with disabilities is too costly, in light of their supposedly limited value to society. This Section also takes note of other Supreme Court cases from the same era involving intellectually or developmentally disabled litigants—*e.g.*, *Cleburne v. Cleburne Living Center*—and in which the result was a retreat from expansive, federally backed guarantees of protection and inclusion.

## I.

### THE ROAD TO *HALDERMAN V. PENNHURST STATE SCHOOL & HOSPITAL*

In 1974, a young lawyer named David Ferleger filed a federal lawsuit in the Eastern District of Pennsylvania on behalf of *Pennhurst* resident Terri Lee

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21. On disability legal studies, see the excellent overview in Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in *THE OXFORD HANDBOOK OF LAW & THE HUMANITIES* 145, 152 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020) (“Looking at the legal system through a disability studies lens exposes biases and stereotypes that are deeply embedded into the law.”). See also Arlene S. Kanter, *The Law: What’s Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 *COLUM. HUM. RTS. L. REV.* 403, 403–04 (2011) (“[T]here is a ‘disability angle’ to every aspect of the law”).

22. See, *e.g.*, Justin Simard, *Citing Slavery*, 72 *STAN. L. REV.* 79 (2020); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 *HARV. L. REV.* 1787 (2019); Shirin Sinnar, *The Lost Story of Iqbal*, 105 *GEO. L.J.* 379 (2017).

Halderman, individually and on behalf of similarly situated residents.<sup>23</sup> The complaint charged Pennhurst, the State Department of Public Welfare, and various state employees with neglectful and abusive conduct, ranging from the overuse of restraints and sedatives, to intentional acts of violence, to the use of dehumanizing practices for meeting residents' toileting and feeding needs. Halderman's records alone suggested over forty injury-causing incidents between March 1966 and November 1973. On one occasion, when Halderman fractured her jaw, Pennhurst employees were so inattentive that, after finally noticing something amiss, they mistook a dangling piece of jaw for a loose tooth and pulled it out.<sup>24</sup> Other alleged injuries were less violent but no less tragic, including Halderman's loss of the handful of words she brought with her into Pennhurst. Upon admission, she only regressed. The complaint charged the defendants with numerous federal and state law violations, including of the plaintiffs' constitutional rights to adequate treatment.<sup>25</sup>

Ferleger was one of a crop of recent law school graduates (he received his JD in 1972) who were concerned about the treatment of people whom society labeled "insane" and "mentally ill."<sup>26</sup> This was the era when psychiatrist Thomas Szasz famously questioned diagnoses of mental illness, casting them as disguised efforts to maintain social order.<sup>27</sup> Around the same time, physician-lawyer Morton Birnbaum advocated for a "right to treatment" in institutional

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23. First Amended Complaint, *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977) (No. 74-1345).

24. *Id.* at 14. Pulling out teeth, without administering pain relief, was reportedly routine at Pennhurst; it was an easy way to stop children from biting. James W. Conroy & Dennis B. Downey, *The Veil of Secrecy: A Legacy of Exploitation and Abuse*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1, at 58, 70.

25. First Amended Complaint, *supra* note 23, at 25–28. An excellent secondary source on the litigation written with access to key actors is Robert H. Mnookin's *In the Interest of Children* (1985). Robert "Bo" Burt, the author of the three chapters on Pennhurst, graduated from Yale alongside Tom Gilhool, one of the main lawyers in the Pennhurst litigation. ROBERT H. MNOOKIN, *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 292 (1985). Burt was also Gilhool's classmate in a transformational seminar on law, psychiatry, and psychoanalysis. Interviews by Fred Pelka with Thomas K. Gilhool, *Legal Advocate for Deinstitutionalization and the Right to Education for People with Developmental Disabilities*, REG'L ORAL HIST. OFF., BANCROFT LIBR., UNIV. OF CAL., BERKELEY 51–52 (2010) [hereinafter Gilhool, UC BERKELEY], [https://digitalassets.lib.berkeley.edu/roho/ucb/text/gilhool\\_thomas.pdf](https://digitalassets.lib.berkeley.edu/roho/ucb/text/gilhool_thomas.pdf) [https://perma.cc/K5YV-NRUS].

26. I acknowledge how derogatory and insensitive some of these terms now sound. Neither I nor the *California Law Review* wish to perpetuate them. My intention in using them is to show, with specificity, what David Ferleger and other lawyers in his cohort were concerned about. In their own time, these lawyers recognized such labels as harmful and unfairly stigmatizing.

27. See THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (1961); Thomas S. Szasz, *The Myth of Mental Illness: 50 Years Later*, 35 *PSYCHIATRIST* 179, 179 (2011) ("I proposed that we view the phenomena formerly called 'psychoses' and 'neuroses', now simply called 'mental illnesses', as behaviours that disturb or disorient others or the self; reject the image of the patients as the helpless victims of pathobiological events outside their control; and withdraw from participating in coercive psychiatric practices as incompatible with the foundational moral ideals of free societies.").

settings.<sup>28</sup> Inspired, Ferleger and his cohort brought a wave of cases to the federal courts on behalf of people who had ended up in institutions solely because of their apparently non-normative mental functioning.<sup>29</sup> These lawyers also offered bold ideas about judicial remedies, borrowing from the desegregation cases that figured so prominently in their young lives and building on the Warren Court's more activist approach toward protecting rights.<sup>30</sup> *Halderman v. Pennhurst* was part of this first wave of litigation.

But to understand why the conditions at Pennhurst, a state institution, became the subject of federal court litigation, we must begin much earlier, in the 1950s.<sup>31</sup> Building on local newspaper accounts, interviews, original archival research, and other first-person accounts of life in and around Pennhurst, this Section traces decades of efforts to improve the institution and explains why these efforts culminated in a landmark trial and injunction. The point here is not to blame any particular set of actors for Pennhurst's failings, but to restore lost context to a remedial decree that conservative members of the Supreme Court would later characterize as extreme—so extreme as to occasion a new rule of statutory interpretation and a new interpretation of the Eleventh Amendment.

#### A. “Hell” Behind a “Boarding School Look”: Pennhurst’s Steady Decline

The decade after World War Two was in many ways a golden age for institutions like Pennhurst. Earlier in the twentieth century, institutions for people with disabilities manifested eugenic thinking: they kept “defective” people away from the general population and thereby helped keep the White race strong and pure.<sup>32</sup> By the mid-twentieth century, these same institutions had a different cast. The eugenic logic, though still an animating force, became less

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28. Morton Birnbaum, *The Right to Treatment*, 46 AM. BAR ASS'N J. 499, 499 (1960).

29. Others in this cohort included Bruce Ennis, Paul Friedman, Thomas Gilhool (discussed *supra* note 25), Steve Gold, Charles Halpern, and Gabe Kaimowitz. Halpern captured the general milieu in his book *MAKING WAVES AND RIDING THE CURRENTS: ACTIVISM AND THE PRACTICE OF WISDOM* (2008).

30. Early landmark cases include *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1955); and *Cooper v. Aaron*, 358 U.S. 1 (1958). Later desegregation cases showcased more aggressive uses of federal judicial power, as federal judges rejected inadequate schemes for implementing *Brown* and instead ordered busing and other forms of equitable relief. *See, e.g., Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

31. This choice of starting point is not meant to suggest a lack of earlier abuses, only that developments in the post-World War Two period exposed Pennhurst to a new degree of scrutiny.

32. There is an extensive literature on eugenic thinking and the institutionalization of people who appeared (or could be cast as) non-normative in their functioning or appearance. For a useful overview, see Michael Rembis, *Disability and the History of Eugenics*, in *THE OXFORD HANDBOOK OF DISABILITY HISTORY* 85 (Michael Rembis, Catherine Kudlick & Kim E. Nielsen eds., 2018); *see also* Appleman, *supra* note 6, at 436–61 (recounting the longstanding role of eugenic thinking in the treatment of disabled people in the United States and the direct connection to mass incarceration). On Pennhurst's connection to eugenics, see Downey, *supra* note 1, at 30–33.

blatant. Proponents of institutionalization instead tended to emphasize families: by providing humane and professional care, the argument went, institutions allowed families to focus on maintaining the healthy and productive households that were the cornerstone of post-World War Two society. Celebrities such as author Pearl S. Buck wrote openly, in sympathetic “confessional” style, about institutionalizing beloved children.<sup>33</sup> Waiting lists for institutions were long, and construction of new facilities tracked demand.<sup>34</sup> Between 1946 and 1967, the number of people with intellectual disabilities living in institutions increased by 65 percent (twice the growth rate of the general population).<sup>35</sup>

There were nonetheless signs that all was not right at Pennhurst. In 1952, twenty-nine-year-old Pennhurst resident Robert Beyers reportedly died of a heart attack, but his family found cuts and bruises all over his body.<sup>36</sup> Combined with Beyers’s race (he was African American) and his parents’ outrage, the injuries triggered an FBI investigation.<sup>37</sup> The next year brought a months-long, school-wide quarantine at Pennhurst in response to the rampant spread of hepatitis. The virus infected 425 people before the institution contained it.<sup>38</sup> In 1957, after Pennhurst failed to inoculate patients against the flu, an epidemic killed twenty and infected hundreds more.<sup>39</sup> Scholars would later connect these outbreaks to Pennhurst’s history as an experimental research site for vaccine development and infectious epidemiology: with the support of federal and corporate grants, researchers injected hundreds of Pennhurst residents with live viruses during and after World War Two.<sup>40</sup> Even before this came to light, however, journalists were alert to other indications of residents’ devaluation, including overcrowding, insufficient staffing, decaying facilities, and lack of resources for basic operating

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33. Michael Grossberg, *From Feeble-Minded to Mentally Retarded: Child Protection and the Changing Place of Disabled Children in the Mid-Twentieth Century United States*, 47 PAEDOGOGICA HISTORICA 729, 729–30, 739 (2011).

34. JAMES W. TRENT, JR., *INVENTING THE FEEBLE MIND: A HISTORY OF INTELLECTUAL DISABILITY IN THE UNITED STATES* 240–41 (2017). This is not to say that there was no skepticism about institutional living. According to Trent, “[e]xposés of public facilities for mentally ill and mentally deficient people appeared often after World War II,” driven in part by conscientious objectors who labored in these facilities during the war and were disturbed by what they saw there. *Id.* at 220. But in the public’s mind, these competed with narratives that framed institutionalization as doctor recommended and essential for the health and well-being of the disabled person’s family. *Id.* at 222–28.

35. *Id.* at 241.

36. *State Orders Probe into Death of Patient at Pennhurst School*, MERCURY (Pottstown), Nov. 19, 1952, at 9.

37. *Fine Raises State Rights Issue over Probe of Dead Boy*, PHILA. TRIB., Aug. 8, 1953. The investigation, which reportedly focused on whether Beyers’s civil rights had been violated, prompted a sharp rebuke from Pennsylvania Governor John Fine. Fine warned that such investigations would invite thousands more, hampering the state’s ability to run its prisons and other institutions of confinement. *Id.*

38. See *Quarantine to End at Pennhurst School*, MERCURY (Pottstown), July 22, 1953, at 11.

39. Steve McNey, *Flu Kills Five at Pennhurst*, MERCURY (Pottstown), Oct. 16, 1957, at 1; *Flu at Pennhurst Takes 20th Life*, MERCURY (Pottstown), Oct. 29, 1957, at 1.

40. Conroy & Downey, *supra* note 24, at 64–68. Pennhurst was not the only such site. See Walter M. Robinson & Brandon T. Unruh, *The Hepatitis Experiments at Willowbrook State School*, in THE OXFORD HANDBOOK OF CLINICAL RESEARCH ETHICS 80, 80 (Ezekiel J. Emanuel et al. eds., 2008) (describing infectious disease studies conducted at Willowbrook State School).

needs.<sup>41</sup> The campus itself remained “picturesque”—“one of wide green lawn expanses” and “curling lanes and driveways,” according to the local newspaper, the Pottstown *Mercury*.<sup>42</sup> But insiders hinted of “disgraceful and disgusting conditions” within.<sup>43</sup>

National trends suggest that Pennhurst was likely getting worse, in ways that could not long be hidden away. Institutionalized populations had increased—Pennhurst’s on-site residential population reached a high of nearly 3,500 in 1955<sup>44</sup>—but states were not necessarily prepared to maintain them.<sup>45</sup> Simultaneously, institutions had become more expensive to operate, an unintended consequence of the nation’s obsession with “juvenile delinquency.” In previous decades, state and local governments had funneled “delinquent” adolescents into institutions, alongside other supposedly “defective” individuals; there, the nondisabled “delinquents” provided unpaid labor.<sup>46</sup> In the late 1950s and early 1960s, as policymakers developed specialized facilities for “juvenile delinquents,” institutions like Pennhurst lost a significant segment of their workforce. Simultaneously, they absorbed new residents, most of whom had greater needs and less capacity to work than the people they replaced.<sup>47</sup>

As conditions at Pennhurst and similar institutions declined, some members of the public grew more vigilant. This had something to do with the shifting class composition of institutions: by the early 1960s, wealthier and more-resourced families had relatives there.<sup>48</sup> Relatedly, parents of children with developmental and intellectual disabilities had formed networks for support and advocacy. One

41. See Steve McNey, *Pennhurst Board Sends List of Needs to State*, MERCURY (Pottstown), July 25, 1957, at 1, 11; *Transfer of Pennhurst “Crib Cases” Cut by Appropriations*, MERCURY (Pottstown), Aug. 2, 1957, at 1; *Pennhurst Forced to Cut Staff*, MERCURY (Pottstown), Jan. 16, 1958, at 1.

42. Gordon P. Griffiths, *Pennhurst Opens Doors for Complete Check*, MERCURY (Pottstown), Sept. 22, 1962, at 8; see also Interviews by Fred Pelka with Thomas K. Gilhool, *supra* note 25, at 19 (describing Pennhurst in the 1960s as resembling a “college campus”).

43. *Favoritism Charged in Pennhurst Hassle*, MERCURY (Pottstown), Apr. 7, 1962, at 1; see also Gordon B. Griffiths, *Pennhurst Professional Employees [sic] Charge Lack of Health Protection*, MERCURY (Pottstown), Sept. 19, 1962, at 1 (detailing unsanitary conditions at Pennhurst).

44. J. Gregory Pirmann, *Living in a World Apart*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1, at 39, 50. The “on-book census” recorded even higher numbers because it included the residents of two affiliated facilities elsewhere in the state (the “Pennhurst Annexes”). *Id.*

45. See TRENT, *supra* note 34, at 241 (describing state legislators’ dawning recognition of the “drain on state budgets”).

46. *Id.*

47. *Id.*; ANNE E. PARSONS, FROM ASYLUM TO PRISON: DEINSTITUTIONALIZATION AND THE RISE OF MASS INCARCERATION AFTER 1945, at 62–65 (2018). On Pennhurst’s use of unpaid resident labor, see Pirmann, *supra* note 44, at 46–48; see also Interview by Lisa Sonneborn with Tom Delmastro, *Visionary Voices: Tom Delmastro Ch 4*, TEMP. UNIV. INST. ON DISABILITIES (Nov. 12, 2013), <https://disabilities.temple.edu/voices/interviews/delmastro-chapter-4> [<https://perma.cc/R5PB-JKTE>] (recalling that he was not paid for the labor he did at Pennhurst, except for when he was working in the “workshop”).

48. See Grossberg, *supra* note 33, at 742 (attributing the rise of parent organizing to the fact that institutions were “suddenly being filled with the sons and daughters of the more prosperous classes”).

influential parents' group—the National Association for Retarded Children (NARC)<sup>49</sup>—had 550 chapters by 1958. Among the group's concerns was the quality of residential institutions.<sup>50</sup> And behind all of these efforts was the glamorous glow of the Kennedys, America's first family. In 1962, the Kennedys disclosed a family secret: that President John F. Kennedy's oldest sister, Rose Marie ("Rosemary") Kennedy, had been born with an intellectual disability; eventually, the family placed her in a private institution.<sup>51</sup> Through federal policy and their family foundation, the Kennedys encouraged Americans to acknowledge the existence of disability and to want more for their disabled children.<sup>52</sup>

By 1965, Pennhurst was regularly making the headlines of the local newspaper, often not in a good way. In January of that year, the *Mercury* noted a plea from Pennhurst's superintendent for more state resources, to respond to severe overcrowding and understaffing.<sup>53</sup> On at least three separate occasions between January and July, the *Mercury* highlighted unusual patient deaths (one in a snow-plowing accident, a second by strangulation, and a third by drowning).<sup>54</sup> And in the fall of 1965, shortly after Senator Robert Kennedy drew national attention for his exposure of horrific institutional conditions in New York State,<sup>55</sup> the *Mercury* launched a broader investigation into Pennhurst. The resulting series proclaimed Pennhurst "a living nightmare," an "overcrowded dumping ground," "hell" behind a "boarding school look," and a place of "desolation" and "despair." "Empty lives just exist day to day" here, reported the paper, some "little elevated from the vegetable state of existence."<sup>56</sup>

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49. At the time of the organization's founding, medical professionals, government officials, and the general public routinely used the term "retarded" to describe people with intellectual and developmental disabilities. This term is now considered derogatory and offensive. NARC eventually renamed itself the Arc in recognition of the term's pejorative connotations.

50. See TRENT, *supra* note 34, at 231; Alison C. Carey & Lucy Gu, *Walking the Line Between the Past and the Future: Parents' Resistance and Commitment to Institutionalization*, in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* 101, 105 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014).

51. Eunice Kennedy Shriver, *Hope for Retarded Children*, *SATURDAY EVENING POST*, Sept. 22, 1962, at 71–72. Left out of this initial disclosure was the family patriarch's role in worsening Rosemary's condition by having her undergo a prefrontal lobotomy. TRENT, *supra* note 34, at 238.

52. See generally EDWARD SHORTER, *THE KENNEDY FAMILY AND THE STORY OF MENTAL RETARDATION* (2000) (describing the Kennedy family's interest in disability and the way this interest affected family members' charitable and political work).

53. *Pennhurst Shows Need for Aid Plea*, *MERCURY* (Pottstown), Jan. 30, 1965, at 1.

54. *Truck Kills Patient at Pennhurst*, *MERCURY* (Pottstown), Jan. 12, 1965, at 16; *Police Checking Death of Patient at Pennhurst*, *MERCURY* (Pottstown), May 17, 1965, at 27; *Pennhurst Patient Is Found Dead*, *MERCURY* (Pottstown), July 1, 1965, at 1.

55. In his testimony before the Joint Legislative Committee on Mental Retardation and Physical Handicap, Kennedy famously characterized New York's Willowbrook State School and Rome State School as "snake pits." *Robert Kennedy Visiting Institutions in NY*, MINN. DEP'T OF ADMIN.: PARALLELS IN TIME, <https://mn.gov/mnddc/parallels/five/5b/bobby-kennedy-snakepits.html> [https://perma.cc/3ZG8-HHVF].

56. Andrew D. Cook, *Dirty, Naked Men and Women Seethe in Turmoil of Clouded Minds*, *MERCURY* (Pottstown), Oct. 21, 1965, at 7; Andrew D. Cook, *An Overcrowded Dumping Ground for*

The *Mercury* relied on grotesque descriptions of physical difference to draw readers into this “nightmare,” raising questions about journalists’ ability to empathize with residents, but the paper did shine a spotlight on Pennhurst’s dehumanizing, warehouse-like conditions.<sup>57</sup> A photo showed a group of White, male residents, all with the same close-cropped haircut, packed together on benches in an otherwise barren room; they were naked, according to the caption (the backs of the benches obscured most of their bodies from view), and doing nothing other than “waiting to return to bed.”<sup>58</sup> Another photo depicted a few of the many “grown men” at Pennhurst who “spen[t] [their] [l]ives in [c]ribs.”<sup>59</sup> The photo caption described that particular ward as “[f]illed with the putrid odor of human waste and the screams and moans of senseless men.”<sup>60</sup>

The *Mercury* aimed its fire at the public, for its irrational fear of people with developmental and intellectual disabilities, and at elected representatives, for failing to allocate adequate resources to Pennhurst.<sup>61</sup> “It is almost purely a financial problem,” the *Mercury* editorialized.<sup>62</sup> The facility needed more and better-qualified workers, and the state had not supplied the funds.<sup>63</sup> Perhaps this was why, in the crib photo cited above, the *Mercury* photographer made sure to include state legislator Edwin Holl looking on, alongside superintendent Dr. Leopold Potkonski.<sup>64</sup> The *Mercury* also took the unusual step of reprinting “special brochure editions” of its Pennhurst exposés and distributing them to state lawmakers.<sup>65</sup>

Initially, the *Mercury* series did provoke a response. Mere weeks after the stories broke, the *Mercury* reported a bipartisan effort to secure institutional improvements and better employee pay.<sup>66</sup> By January 1966, State Secretary of Welfare Arlin M. Adams had named a “blue ribbon panel” to investigate and the

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3182 Retarded; Pennhurst ‘Hell’ Is Hidden by Boarding School Look, *MERCURY* (Pottstown), Oct. 22, 1965, at 1; Andrew D. Cook, *Public’s ‘Don’t Care’ Attitude Mirrored by Desolation, Despair of Retarded*, *MERCURY* (Pottstown), Oct. 23, 1965, at 1; Andrew D. Cook, *Retarded Can Be Helped by State Doctor’s Plan*, *MERCURY* (Pottstown), Oct. 25, 1965.

57. See Cook, *Dirty, Naked Men*, *supra* note 56.

58. Cook, *An Overcrowded Dumping Ground*, *supra* note 56.

59. Cook, *Public’s ‘Don’t Care’ Attitude*, *supra* note 56.

60. *Id.* The men depicted in this photo also appear to be White. This bears noting because a substantial percentage of Pennhurst’s residents at that time were non-White. In 1968, the *Philadelphia Tribune* described the “patient population” as 25 percent Black. *Arlene Urges More Pay for Pennhurst Workers*, *PHILA. TRIB.*, July 27, 1968, at 3. Perhaps *Mercury* editors hoped White residents would be more sympathetic and more likely to spark legislative interest.

61. See Cook, *Public’s ‘Don’t Care’ Attitude*, *supra* note 56.

62. Cook, *An Overcrowded Dumping Ground*, *supra* note 56.

63. *Id.*

64. See Cook, *Public’s ‘Don’t Care’ Attitude*, *supra* note 56.

65. *\$5 Million Total May Be Spent at State School*, *MERCURY* (Pottstown), Jan. 4, 1966, at 9.

66. *State Considers New Hospital for Retarded*, *MERCURY* (Pottstown), Nov. 18, 1965, at 1; *Bipartisan Effort Gains in State for Pennhurst*, *MERCURY* (Pottstown), Nov. 29, 1965, at 1.

legislature had authorized an emergency appropriation of \$1 million (\$8.68 million in 2022 dollars) to address deficiencies at the facility.<sup>67</sup>

The hopeful news continued over the following months. In February 1966, Pennhurst received a modest increase in its annual appropriation, as well as a commitment from the state to shift one hundred of its most “serious cases” into “private nursing homes.”<sup>68</sup> And that fall, the state legislature enacted the Mental Health Mental Retardation Act, which articulated the State’s duty to make available “adequate . . . services” to people whose mental health, intellectual disability, or developmental disability created service needs.<sup>69</sup> The *Mercury* celebrated. A “crusade” that “had been going on around here for years” finally seemed to be achieving results.<sup>70</sup>

### B. *The Inadequacy of State and Local Advocacy*

If state officials were sincere in their desire to improve Pennhurst, their efforts were also tragically inadequate. Some evidence of this emerged in the summer of 1968 as disgruntled employees, themselves stressed by Pennhurst’s inadequacies, rebutted the notion that residents were content. “Mice and cockroaches crawl over the patients,” reported a group of employees seeking to unionize.<sup>71</sup>

The organization that did the most to show this inadequacy, however, was the Pennsylvania Association for Retarded Children (PARC),<sup>72</sup> a well-connected and resourceful state-level chapter of NARC. One PARC member, in particular, was a great energizing force: lawyer Dennis Haggerty, chairperson of PARC’s Residential Care Committee. Having seen how poorly a state-run institution treated his own son, Haggerty threw himself into investigating and exposing Pennhurst and its ilk.<sup>73</sup>

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67. See *State Pushes \$1 Million for Pennhurst*, MERCURY (Pottstown), Jan. 4, 1966, at 1; *Blue Ribbon Panel Named to Investigate Pennhurst*, MERCURY (Pottstown), Jan. 5, 1966, at 1. Adams would go on to become a judge on the Third Circuit, where he would continue to encounter Pennhurst’s failings. See *Pa. Ass’n for Retarded Child. v. Pennsylvania*, 343 F. Supp. 279, 281 (E.D. Pa. 1972); *Romeo v. Youngberg*, 644 F.2d 147, 154 (3d Cir. 1980), *vacated*, 457 U.S. 307 (1982).

68. See *Pennhurst Gets Increase for ‘66-‘67 Budget*, MERCURY (Pottstown), Feb. 8, 1966, at 6; *Pennhurst to Transfer 100 Patients to Nursing Homes*, MERCURY (Pottstown), Feb. 10, 1966, at 1. By the fall, state authorities had promised to transfer 600 to 700 Pennhurst residents to less-crowded facilities in the area. *Pennhurst to Transfer Patients*, MERCURY (Pottstown), Sept. 15, 1966, at 1.

69. *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 100 (3d Cir. 1979).

70. See *Step Closer to Reform*, MERCURY (Pottstown), Aug. 17, 1966, at 4.

71. *Pennhurst Employes [sic] to Form Union*, MERCURY (Pottstown), Aug. 12, 1968, at 7.

72. In recognition of the offensiveness of the term “retarded,” PARC later renamed itself the Arc of Pennsylvania. At this historical moment, however, the term was in widespread use, including in clinical practice.

73. See FRED PELKA, *WHAT WE HAVE DONE: AN ORAL HISTORY OF THE DISABILITY RIGHTS MOVEMENT* 133–34 (2012). Haggerty moved his son to a private residential facility in Delaware. Robert A. Burt, *Plaintiffs and Defendants*, in *IN THE INTEREST OF CHILDREN*, *supra* note 25, at 291. On PARC’s activities and positions before 1968, see Carey & Gu, *supra* note 50, at 102–05. Although Haggerty’s efforts were noteworthy, they were not unique. During the same time period, Robert Nelkin, Ginny

PARC began with a “Public Awareness Campaign”: for five nights at the beginning of July 1968, one of the main television news channels in the Philadelphia area aired disturbing footage from inside Pennhurst.<sup>74</sup> Captured by reporter Bill Baldini and a camera crew (with the consent of Pennhurst superintendent Leopold Potkonski),<sup>75</sup> the footage showed shocking images of daily life, including, most memorably, nearly naked adolescents confined to cribs with leather straps.<sup>76</sup> “Suffer the Little Children,” the news channel branded the series.<sup>77</sup>

A different and equally troubling facet of the institution came into focus that fall, as PARC learned of a pattern of sexual abuse and assault.<sup>78</sup> Male residents were most commonly the abusers and the victims, employee informants reported, but there were also anecdotes involving staff members and on-site construction workers.<sup>79</sup> The underground tunnels connecting the campus were particularly dangerous: aggressors would “drag” victims there or lay in wait for them.<sup>80</sup> Incidents reportedly happened on a “nightly” basis.<sup>81</sup> And although attendants took note, higher-ups declined to investigate further.<sup>82</sup> (Residents

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Thornburgh, and others were on a similar crusade in the western part of the state. Interview with Robert Nelkin (June 9, 2021).

74. *Public Awareness and Uproar*, 11 THE RECORD (Residential Care Comm., Nat’l Ass’n for Retarded Child., New York, N.Y.), Summer 1968, at 2, Box 11, Folder 27, DENNIS E. HAGGERTY PAPERS, Special Collections Research Center, Temple University Libraries (Philadelphia, Pa.) [hereinafter HAGGERTY PAPERS].

75. Bill Baldini, *Suffer the Little Children: An Oral Remembrance*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1, at 79, 80–81.

76. See *Suffer the Little Children* (NBC10 Philadelphia 1968), PENNHURST PRES. & MEM’L ALL., <http://www.preservepennhurst.org/default.aspx?pg=26> [https://perma.cc/PC75-6UYH].

77. Baldini connected the title to the Gospel of Mark (Mark 10:14–16). Baldini, *supra* note 75, at 82. But the title also echoed a chapter title from an important photographic essay on conditions inside institutions like Pennhurst: Burton Blatt and Fred Kaplan’s *Christmas in Purgatory*. That essay, along with a companion piece in *Look Magazine* in 1967, attracted widespread attention. See BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY (1966); Steven J. Taylor, *Christmas in Purgatory: A Retrospective Look*, 44 PERSPECTIVES 145, 145 (2006).

78. This initially came to light via an attendant at Pennhurst, who was also the head of the union at Pennhurst and the husband of another Pennhurst employee. He detailed the situation in a letter to Vice President of the United States Hubert Humphrey; Humphrey contacted the President’s Committee on Mental Retardation, which then asked PARC to investigate. *Report to Counsel Concerning Possible Legal Action Against the Department of Welfare and Pennhurst State School and Hospital*, n.d., Box 12, Folder 14, HAGGERTY PAPERS, *supra* note 74. Around the same time, PARC received a \$25,000 grant from the Kennedy Foundation in support of its investigations of Pennsylvania institutions. Janet Albert-Herman & Elizabeth Coppola, *The Rise of Family and Organizational Advocacy*, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS, *supra* note 1, at 85, 96.

79. See Notes from Meeting, Oct. 1, 1968, Box 11, Folder 59, HAGGERTY PAPERS, *supra* note 74; see also Dennis E. Haggerty, *Sexual Abuse at Pennhurst*, Sept. 26, 1968, Box 12, Folder 14, HAGGERTY PAPERS, *supra* note 74.

80. Notes from Meeting, Oct. 1, 1968, at 3, Box 11, Folder 59, HAGGERTY PAPERS, *supra* note 74.

81. *Id.*

82. In one reported instance, a doctor refused to examine a resident who had run “bloody [*sic*] and screaming to an attendant,” stating, “clean him up and put him to bed.” *Id.*; see also Dennis E. Haggerty, *Sexual Abuse at Pennhurst*, Sept. 26, 1968, Box 12, Folder 14, HAGGERTY PAPERS, *supra*

themselves were not in communication with PARC, but their own accounts confirm the pattern.)<sup>83</sup> PARC leaders were circumspect in what they told the public, fearing danger to informants and victims,<sup>84</sup> but they conveyed the general pattern in a press release, hoping to gain the attention of state and local politicians.<sup>85</sup>

Additional reports of violence and negligence amassed in PARC's hands as 1968 drew to a close. Twenty-two-year-old Pennhurst resident Joseph Crispo suffered serious injuries in what Pennhurst officials reported as a bad fall, but informants described as a severe beating.<sup>86</sup> A similar fate befell thirty-eight-year-old Joseph Jagers.<sup>87</sup>

Perhaps the greatest parental nightmare, however, was that of Inez Williams Gantt. On November 24, 1968, Gantt went to visit her teenage son, John Stark Williams. Records suggest that it was hard for her to do so: she traveled to Pennhurst from North Philadelphia, where she lived, via a special bus that PARC arranged for people in her circumstances ("people in the ghetto area," as Haggerty remembered it).<sup>88</sup> After a three-hour wait at Pennhurst, she learned that her son had died—a full ten months earlier.<sup>89</sup> Gantt never received notice

note 74 (detailing other acts of resident abuse). Around this time, evidence also came to light of heterosexual activity and abuse, including an unexplained reference to "human fetus" found in locations where abusers were known to frequent. *Report to Counsel Concerning Possible Legal Action Against the Department of Welfare and Pennhurst State School and Hospital*, n.d., Box 12, Folder 14, HAGGERTY PAPERS, *supra* note 74.

83. Roland Johnson, a Pennhurst resident from 1958 to 1971, detailed his experiences of sexual abuse and that of other residents in his autobiography. ROLAND JOHNSON, *LOST IN A DESERT WORLD* (1994), <https://www.disabilitymuseum.org/dhm/lib/detail.html?id=1681&&page=all> [<https://perma.cc/7327-B824>]; *see also* Friedman & Nowell, *supra* note 18, at 135–36 (discussing a retreat in which fifty residents disclosed that each had been harmed physically or sexually by a staff member); Jerry Wheaton, *THE PENNHURST PROJECT* (2010), <http://pennhurstproject.com/Videos.html> [<https://perma.cc/WKJ8-BFVY>] (describing the brutal attacks he endured as a Pennhurst resident and implying that he was raped).

84. *See* Notes from Meeting, Oct. 1, 1968, Box 11, Folder 59, HAGGERTY PAPERS, *supra* note 74.

85. Statement by Harold Nathan, President, P.A.R.C., Nov. 13, 1968, Box 9, Folder 22, HAGGERTY PAPERS, *supra* note 74 (noting that "many" "attacks in the mens' [*sic*] wards . . . involve[d] sodomy and certainly assault and battery in the case of the unwilling victim"; describing "the tunnels" as "frequent[]" sites of attack, where "aggressors lay in wait" for victims; observing Pennhurst's disinterest in investigating reported sexual assaults).

86. *See* Memorandum from Dennis E. Haggerty to Harold Nathan, Jan. 27, 1969, Box 12, Folder 20, HAGGERTY PAPERS, *supra* note 74.

87. *See* Edith Taylor, Memorandum, Dec. 2, 1968, Box 12, Folder 17, HAGGERTY PAPERS, *supra* note 74.

88. Dennis E. Haggerty, "*The Winds of Change*" – *A Short Story about Penn's Worst – Pennhurst*, Box 13, Folder 8, HAGGERTY PAPERS, *supra* note 74. I acknowledge that the word "ghetto" is now an offensive term. I include it here because I lack demographic data about Gantt and the word "ghetto," when placed in historical context, strongly suggests that Gantt and her family were non-White. A postmortem report categorized John Stark Williams as Black. Postmortem Report, Box 12, Folder 15, HAGGERTY PAPERS, *supra* note 74.

89. Haggerty, *supra* note 88.

that her son had fallen ill or that he had subsequently died.<sup>90</sup> Meanwhile, Pennhurst had given the body to a local medical school for research.<sup>91</sup> For a fee, a friend of the family was able to reclaim the body, but it was not in a condition to be viewed.<sup>92</sup> Pennhurst disposed of him “like he was an animal,” Williams’s stepfather angrily told a local newspaper.<sup>93</sup>

At this point, some PARC leaders began talking quietly of federal intervention. If Pennsylvania would not meaningfully address Pennhurst’s failings, might the federal government lean on the state to do so, leveraging the federal funds that Pennsylvania used to care for its citizens? The abundance of federal-to-state funding streams made this a plausible approach, used in previous years by both the Black freedom movement<sup>94</sup> and advocates for welfare rights.<sup>95</sup> And if federal officials were to intervene, parents’ groups would not have to spend their own resources or further strain their relationship with state officials. Not all federal administrators in this era had an appetite for these confrontations, however.<sup>96</sup> The federal public health official that PARC approached in 1968 was of little help.<sup>97</sup>

Meanwhile, the situation at Pennhurst only seemed to worsen. Early January brought death-via-skull-fracture to Joseph Crispo, the patient whose

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90. Letter from Dennis E. Haggerty to Thomas W. Georges, Jr., Dec. 11, 1968, Box 12, Folder 15, HAGGERTY PAPERS, *supra* note 74.

91. PELKA, *supra* note 73, at 134–35. PARC officials later characterized Williams’s death as suspicious. Pennhurst authorities had attributed the death to complications from bronchial pneumonia. But another resident stated that Williams died in a fire, and existing medical records provided some corroboration of that theory. *Id.*

92. Pamela Haynes, *Dead Boy, 13, Center of Bizarre Mystery at Troubled Pennhurst Retarded School*, PHILA. TRIB., Nov. 30, 1968, at 1.

93. *Id.*

94. See Jill Quadagno, *Promoting Civil Rights Through the Welfare State: How Medicare Integrated Southern Hospitals*, 47 SOC. PROBS. 68, 69 (2000).

95. See generally KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972 (2016) (documenting advocates’ awareness of the terms states agreed to when they accepted federal aid for their public welfare programs and how advocates used that knowledge to press for fairer and more generous state treatment of welfare applicants and recipients).

96. The legal literature on administrative constitutionalism suggests administrators’ divergent attitudes around this time towards helping individuals vindicate their rights vis-à-vis state and local officials. See, e.g., Karen M. Tani, *Administrative Equal Protection: Federalism, The Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015); Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020).

97. In December of 1968, PARC leaders traveled to Arlington, Virginia to meet with Robert Jaslow, a Pennsylvania native who was then Chief of the Mental Retardation Branch of the U.S. Public Health Service. Jaslow could help, PARC leaders believed, because Pennhurst had received at least two federal grants and was out of compliance with the federal requirements attached to those funds. Jaslow declined to help “directly” or “openly” but offered “suggestions” as to how PARC might “provide him opportunities” to intervene. Notes describing Dec. 27, 1968, meeting, Jan. 3, 1969, Box 12, Folder 22, HAGGERTY PAPERS, *supra* note 74. PARC followed up on all of these leads but made no apparent headway. See Letter from Harold Nathan to John Conte, Jan. 3, 1969, Box 12, Folder 22, HAGGERTY PAPERS, *supra* note 74; Letter from Harold Nathan to Art Mazer, Jan. 3, 1969, Box 12, Folder 22, HAGGERTY PAPERS, *supra* note 74.

suspicious injuries had come to PARC's attention the previous November.<sup>98</sup> April brought two separate scalding incidents, one resulting in death and the other in serious burns; both could have been avoided had Pennhurst installed anti-scald valves on the plumbing.<sup>99</sup> PARC representatives pleaded with authorities for investigations at either the county level or the state level.<sup>100</sup> "[T]here are just simply too many curious deaths at this one particular facility," echoed a letter to the governor from PARC's Philadelphia branch.<sup>101</sup>

This was the backdrop for the *Halderman* litigation, a lawsuit that tried to use both the aspirations of the Fourteenth Amendment and the strings attached to federal money to force a state and local response. But first, the story of *PARC v. Pennsylvania*. This first federal court lawsuit attempted to rescue the children of Pennhurst—and in doing so, began to educate state officials about the intergovernmental consequences of disability rights.

### C. Making a Federal Case Out of It<sup>102</sup>

On May 9, 1969, attendees of PARC's annual convening took what leaders considered a "drastic" step: by resolution, the attendees voted to explore some kind of lawsuit to address the conditions at Pennhurst.<sup>103</sup> The word "drastic" might sound hyperbolic, given how often other reformers at this time used the courts, but for PARC, the word is apt. Although many PARC parents were

98. Letter from Dennis E. Haggerty to Norman Pine, Jan. 7, 1969, Box 12, Folder 20, HAGGERTY PAPERS, *supra* note 74. Around the same time, PARC received a letter from the mother of Pennhurst resident Joseph Manchor, Jr., detailing his long history of mistreatment. "They are Killing my son," she alleged. Letter from Angeline Manchor to Whom It May Concern, Jan. 25, 1969, Box 12, Folder 18, HAGGERTY PAPERS, *supra* note 74.

99. According to an inside source, the death occurred after a "working resident" (a resident whom the institution tasked with a job) used dangerously hot water to bathe another resident, Anna Owen; five staff members who might have been supervising were drinking coffee in another room. Owen Case, Apr. 15, 1969, Box 12, Folder 24, HAGGERTY PAPERS, *supra* note 74. The other scalding incident occurred similarly and, according to the resident's mother, resulted in a four-week hospital stay. Letter from Gerald Jay Haas to Dennis Haggerty, Mar. 6, 1969, Box 12, Folder 6, HAGGERTY PAPERS, *supra* note 74; Letter from Isabel Sheppard to Whom It May Concern, [n.d. but likely March 1969], Box 12, Folder 16, HAGGERTY PAPERS, *supra* note 74; Box 11, Folder 59, HAGGERTY PAPERS, *supra* note 74.

100. See Letter from Dennis E. Haggerty to Norman Pine, Apr. 21, 1969, Box 12, Folder 16, HAGGERTY PAPERS, *supra* note 74; Harold Nathan to Raymond P. Shafer, Apr. 17, 1969, Box 12, Folder 24, HAGGERTY PAPERS, *supra* note 74; Harold Nathan to William C. Sennett, Apr. 17, 1969, Box 12, Folder 24, HAGGERTY PAPERS, *supra* note 74.

101. Telegram from Gerald Jay Haas to Raymond P. Shafer, Apr. 18, 1969, Box 12, Folder 24, HAGGERTY PAPERS, *supra* note 74.

102. On how and when this phrase entered the popular lexicon, see Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 981 & n.223 (2000).

103. *Report to Counsel Concerning Possible Legal Action Against the Department of Welfare and Pennhurst State School and Hospital*, n.d., Box 12, Folder 14, HAGGERTY PAPERS, *supra* note 74. This is not to say that PARC had given up on state-level reforms. Around the same time PARC developed a "blueprint" for a state legislative program that would accelerate the creation of community-based alternatives to Pennhurst-type facilities. Minutes of the Residential Care Committee Meeting, Mar. 1, 1979, Box 11, Folder 22, HAGGERTY PAPERS, *supra* note 74.

financially secure, the group still relied heavily on the educational and social services that state and local government offered; the parents had labored for decades to cultivate good relationships with public authorities.<sup>104</sup> Over strong dissents (one prominent member even resigned), the PARC leadership compiled all the abuses and failings they knew about and handed the record to a lawyer for advice.<sup>105</sup>

PARC's choice of counsel—Thomas Gilhool—suggested a willingness to think big. Gilhool was a well-connected Philadelphia lawyer who had trained at Yale Law School at perhaps the height of legal liberalism (he graduated in 1964); he believed deeply in the power of federal courts to effect progressive social change.<sup>106</sup> By the time PARC reached out, Gilhool had already participated in a major welfare rights case,<sup>107</sup> a longstanding local desegregation battle, and a legal challenge to an “urban-renewal project.”<sup>108</sup> In short, Gilhool was both part of the establishment and entirely comfortable challenging it. Gilhool also, it turned out, had a personal investment in the issue: his younger brother was born with a cognitive disability and had briefly spent time in Pennhurst.<sup>109</sup>

As Pennhurst's failings persisted,<sup>110</sup> Gilhool outlined various options for PARC. One was a “right to treatment” lawsuit under the Fourteenth

104. Interview by Lisa Sonneborn with Thomas K. Gilhool, *Visionary Voices: Thomas K. Gilhool*, TEMP. UNIV. INST. ON DISABILITIES (Sept. 28, 2011), <https://disabilities.temple.edu/voices/interviews/gilhool> [<https://perma.cc/8JKE-P4RK>]; Gilhool, UC BERKELEY, *supra* note 42.

105. The report recounted the incidents described above and others: a twenty-year-old “boy” named Sofi who had his eyes gouged out by another resident and died five days later; a female resident stripped and placed in seclusion in a room with heated pipes, and then found dead the next morning “with burns and blistering on the entire side of the body”; multiple and varied reports of negligent medical treatment. REPORT TO COUNSEL CONCERNING POSSIBLE LEGAL ACTION AGAINST THE DEPARTMENT OF WELFARE AND PENNHURST STATE SCHOOL AND HOSPITAL, n.d., Box 12, Folder 14, HAGGERTY PAPERS, *supra* note 74.

106. On Yale Law School and legal liberalism, see generally LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* (2005).

107. He was counsel on one of the challenges to residence restrictions that, in consolidated form, became *Shapiro v. Thompson*, 394 U.S. 618, 620 (1969).

108. 1 EARL JUSTICE, JR., *TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* 157 (2014); Gilhool, UC BERKELEY, *supra* note 42. The desegregation battle was over Girard College, a Philadelphia-area institution that resisted integration well after *Brown v. Board of Education* and that became a focus of a hard-fought NAACP campaign.

109. PELKA, *supra* note 73, at 136–37. As Lennard Davis underscored in his account of the Americans with Disabilities Act, personal connections to disability were crucial to the development of disability civil rights law. See LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* 3–6 (2015) (noting that many of the key players who shepherded the ADA into law had experience with disability, either themselves or via a close family member).

110. In 1969, the institution was clearly still failing. After spending time inside Pennhurst that fall, one reporter (writing under a pseudonym) confessed that she would kill her own child before “condemn[ing] him to years of living death at Pennhurst.” Severine Bunuel, *Pennhurst*, DISTANT DRUMMER (Phila.), Aug. 29, 1969, Box 11, Folder 26, HAGGERTY PAPERS, *supra* note 74. Meanwhile, actual deaths at Pennhurst continued, such as that of Maria Bondi, age fourteen, who died after drinking

Amendment's Due Process Clause<sup>111</sup> (not unlike how David Ferleger would eventually frame the 1974 complaint in the *Halderman* case). Just as institutionalized people with mental illness had a right to treatment, the argument went, Pennhurst's disabled residents had a constitutional right to a minimum level of habilitation, and many were not receiving their due.<sup>112</sup> But ultimately Gilhool and PARC settled on a different tactic. Their carefully crafted class action lawsuit against the State said nothing about conditions at Pennhurst; rather, the suit alleged that the State's public education system had denied children with intellectual and developmental disabilities the equal protection of the law.<sup>113</sup> Should the lawsuit succeed, Gilhool and his clients believed, it would benefit all children with intellectual and developmental disabilities in the state. It would also have the happy consequence of getting some children out of places like Pennhurst, because it would be clear that institutionalized children were not receiving the educational opportunities guaranteed by law. Banging on the front doors of the state's public schools, PARC hoped to throw open the back doors at Pennhurst.<sup>114</sup>

PARC's education lawsuit, with its many resonances with *Brown v. Board of Education* (1954) and its sympathetic school-age plaintiffs, landed well.<sup>115</sup> After a single day of testimony at a preliminary hearing in August 1971, the parties came together to craft a consent agreement. Indeed, state officials seemed to welcome being under court order.<sup>116</sup> The agreement, which the court approved

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detergent. Gene Harris & John Clancy, *State Panel Studies 'Detergent' Death of Girl, 14, at Pennhurst*, PHILA. INQUIRER, Oct. 1, 1969, at 41, Box 11, Folder 26, HAGGERTY PAPERS, *supra* note 74.

111. This was still early days in the development of the right to treatment. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451, 452 (D.C. Cir. 1966); O'Connor v. Donaldson, 422 U.S. 563, 567 (1975) (originally filed in 1971 as a right to treatment case). For a useful reconstruction of the legal landscape at this juncture and after, see Judith A. Gran, *From PARC to Pennhurst: The Legal Argument for Equality, in PENNHURST AND THE STRUGGLE FOR DISABILITY RIGHTS*, *supra* note 1, at 104.

112. Letter from L. Steuart Brown to PARC Board of Directors et al., Feb. 6, 1970, Box 10, Folder 35, HAGGERTY PAPERS, *supra* note 74. Gilhool also raised the idea of a Thirteenth Amendment claim on the basis of the unpaid labor that Pennhurst required of some residents. If successful, his thinking went, such a suit would make Pennhurst too costly for the state to operate and force development of non-institutional alternatives. *Id.* David Ferleger would later pursue just this theory in *Downs v. Dep't of Pub. Welfare*, 368 F. Supp. 454 (E.D. Pa. 1973). The resulting settlement significantly curtailed the use of resident labor. On this line of case law, see RUTHIE-MARIE BECKWITH, *DISABILITY SERVITUDE: FROM PEONAGE TO POVERTY* (2016).

113. Pa. Ass'n for Retarded Child. v. Pennsylvania, 343 F. Supp. 279, 283 (E.D. Pa. 1972). The lawsuit targeted a state law that allowed schools to exclude children who had not reached a "mental age of five years" by the time they should be enrolling in first grade. *Id.* at 282.

114. On this strategy, see Gilhool, UC BERKELEY, *supra* note 42; Gran, *supra* note 111. A complementary explanation is that for Gilhool and his clients, *Brown v. Board of Education* represented legal heroism; a *Brown*-like case had obvious appeal. *See* PELKA, *supra* note 73, at 138 (quoting Gilhool as saying that "all of us at law school, and then after law school, in anything we were doing, were constantly tuned into" the school desegregation lawsuits unfolding around the country).

115. *See* e-mail from Robert Nelkin to Karen Tani, June 10, 2021 (on file with author) (suggesting that top decisionmakers in the State's Department of Education greeted the lawsuit warmly and welcomed the opportunity to collaborate).

116. *See* DONALD N. JENSEN, PURSE, SWORD, AND JUDGMENT: THE IMPACT OF COURT INTERVENTION ON SOCIAL POLICY 29 (1984).

the following spring, had far-reaching effects. Most notably, the agreement required the State to search out children with intellectual and developmental disabilities, whether currently in school or not, and to provide them with a free program of education appropriate to their learning capacities.<sup>117</sup> Along with a similar case in the District of Columbia,<sup>118</sup> the PARC litigation helped spark a sea change in public education in the United States.<sup>119</sup> The Education of Handicapped Children Act of 1975<sup>120</sup> took the basic guarantees from the PARC case and extended them nationwide, dramatically improving the prospects of an entire class of children. At the same time, this law and others like it imposed vast new costs on the states (the federal government has always provided some funds to states to help meet this obligation, but never enough).

Although PARC saw the education lawsuit as an unqualified victory, the suit's resolution did not directly address the conditions at Pennhurst, nor did it say anything about the rights of residents older than age twenty-one. That lawsuit would not come until lawyer David Ferleger learned about Terri Lee Halderman. By then, the State was no longer in a settling mood. The year before the PARC education case, Pennsylvania had spent \$64 million on special education in public and state-supported private schools. That number multiplied rapidly after 1972 (nearly quadrupling by 1979-80).<sup>121</sup> The education case had also spawned a new special education bureaucracy and produced a seemingly endless stream of follow-on litigation in federal court as parents advocated for the rights of their children.<sup>122</sup> The message was clear: disability rights could be very costly and policymaking-via-litigation carried significant risks for state actors.

#### D. Pennhurst on Trial

Terri Lee Halderman was in some ways a typical Pennhurst resident. She had experienced brain damage shortly after birth, leaving her with serious intellectual and developmental impairments. As she grew, she gained physical strength and mobility, but only a very limited ability to care for herself. She entered Pennhurst in 1966, at the age of eleven, when the Halderman family was unable to meet her needs at home and after her size and energy outpaced the capacities of the smaller, private facility that had accepted her at age nine.<sup>123</sup>

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117. See 343 F. Supp. at 306, 315 (E.D. Pa. 1972).

118. *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972). Congress codified the guarantees articulated in the *PARC* and *Mills* decisions in 1975 when it enacted the Individuals with Disabilities Education Act (IDEA).

119. On the history and impact of this case, see generally LEOPOLD LIPPMAN & I. IGNACY GOLDBERG, *RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN* (1973).

120. At the time of this law's enactment, "handicapped" was a commonly used term for people with disabilities; lawmakers were not alert to the term's derogatory connotations. When reauthorizing this statute in 1990, Congress changed its name to the Individuals with Disabilities Education Act.

121. JENSEN, *supra* note 116, at 56.

122. *Id.* at 30-62.

123. Burt, *supra* note 73, at 281-83.

What was not typical about Terri Lee Halderman was the consistent post-admission attention that she received from her mother (attention that Pennhurst surprisingly allowed). Winifred Halderman visited almost every week and watched, distressed, as her daughter's condition deteriorated. Terri Lee Halderman had tended to bang her head on hard surfaces, and this tendency increased.<sup>124</sup> She lost her ability to communicate verbally.<sup>125</sup> Winifred Halderman was also alarmed by the conditions she observed—so neglectful that she once found another resident lying unattended, “face down in a pool of urine and later eating feces from a toilet.”<sup>126</sup> She complained repeatedly to Pennhurst employees and received sympathetic but ineffectual responses. In 1973, one administrator finally suggested that she file a lawsuit. “Call David Ferleger and sue me,” the administrator allegedly said.<sup>127</sup>

That an employee would do such a thing is entirely believable. Those who worked at Pennhurst saw the same problems that Winifred Halderman did, and the ones who had been around long enough knew how hard it was to wheedle adequate resources out of even a scandalized state legislature.<sup>128</sup> A lawsuit had the potential to compel the flow of funds.<sup>129</sup>

That this employee thought of David Ferleger also makes sense, even though Ferleger had only received his JD the year before. The son of two Holocaust survivors<sup>130</sup> and an acolyte of “welfare law guru” Edward Sparer at the University of Pennsylvania, Ferleger had gone straight from law school to a pioneering legal advocacy project he had developed at a nearby state-run mental hospital.<sup>131</sup> Just as Sparer had taken up the cause of welfare recipients, with little concern for the ire of state and local officials, Ferleger fearlessly pursued the rights of people in mental hospitals—including by suing the very hospital superintendent who gave him space for his project.<sup>132</sup> Such actions made

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124. *Id.*

125. *Id.* at 283.

126. *Id.*

127. *Id.*; Interview with David Ferleger (July 31, 2019). The staff member was George A. Kopchik, later Pennhurst's superintendent. *Id.*

128. Bill Baldini recalls that when he filmed “Suffer the Little Children” at Pennhurst in 1968, “at least half the staff was ecstatic. Because they knew it was wrong. They just couldn't change the system.” Baldini, *supra* note 75, at 81.

129. See Bagenstos, *The Past and Future*, *supra* note 6, at 17 (“[W]orkers in institutions were among the drivers of some of the early deinstitutionalization litigation.”). Cf. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 562 (2006) (noting that “[p]rison and jail officials were frequently collaborators” in prison reform litigation in the 1970s).

130. Gran, *supra* note 111, at 117.

131. See Interview with David Ferleger, *supra* note 127. On Edward Sparer as “welfare law guru,” see MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 22 (1993); see also Edward V. Sparer, *Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361 (1965) (explaining the role lawyers could and should play in helping poor people navigate the public welfare system).

132. See Interview with David Ferleger, *supra* note 127. The case against that superintendent—*Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1977)—led to important

Ferleger a known quantity among Philadelphia-area institutions. Ferleger took the Halderman case and on May 30, 1974, filed a complaint in the Eastern District of Pennsylvania.

Over the next two years, the case expanded and changed in several important ways. Additional Pennhurst residents joined Terri Lee Halderman as named plaintiffs. PARC successfully moved to intervene as a party plaintiff, picking up where the group's education case had left off and bringing Gilhool's considerable legal acumen to the case.<sup>133</sup> The U.S. Department of Justice (DOJ) also intervened on the plaintiffs' side, which injected enormous resources into the litigation.<sup>134</sup> Last, and of great significance, in early 1976, Gilhool and then Ferleger filed Amended Complaints asking the court to order Pennhurst's closure (merely reforming the institution, in other words, would not do).<sup>135</sup>

The 1977 trial at last laid the full horrors of Pennhurst before a federal court. The trial judge, as it turned out, was already acquainted with the situation. Judge Raymond Broderick had been part of the three-judge panel that heard the PARC education case. Moreover, when he served as Lieutenant Governor (1967-1971), he had seen Pennhurst with his own eyes.<sup>136</sup> Still, the information that emerged at trial put Pennhurst in a new light. More than eighty witnesses testified, including three former residents and thirty-nine employees.<sup>137</sup> Every morning for

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pronouncements about the due process rights of juveniles facing civil commitment in a psychiatric facility. In terms of law school influences, Ferleger also recalls taking a class called "asylums and jails" with psychiatrist Richard Lonsdorf and law professor James O. Freedman. Interview with David Ferleger, *supra* note 127; Richard G. Lonsdorf, *Adventures with Jim—An Appreciation*, 130 U. PA. L. REV. 265, 266 (1981) (describing the content of that course).

133. According to PARC lawyer Judith Gran, PARC always intended to follow up on its victory in the education case with a lawsuit aimed at "creat[ing] opportunities for community living for institutional residents." But the group was waiting to file that suit until a state court had an opportunity to construe the Pennsylvania Mental Health and Mental Retardation Act of 1966. After Ferleger filed the *Halderman* case, PARC naturally sought to join forces. Gran, *supra* note 111, at 117; *see also* Letter from C. A. Peters to Executive Committee, Allegheny County Chapter of the Pennsylvania Association for Retarded Children, Dec. 7, 1972, personal papers of Robert Nelkin (on file with author) (describing a PARC "Right to Treatment" suit as "in the making").

134. Interview with Arthur Peabody (Jan. 19, 2021). In an ironic twist, the person who was perhaps most instrumental in securing the DOJ's participation—Dick Thornburgh—would as governor oversee two appeals to the Supreme Court. *See* L. Steuart Brown to Richard Thornburgh, May 15, 1979, Box 2, Folder 13, Bob Nelkin Collection of ACC-PARC Records, Heinz History Center (Pittsburgh, Pa.), [https://historicpittsburgh.org/islandora/object/pitt%3AMSS\\_1002\\_B002\\_F13\\_I02](https://historicpittsburgh.org/islandora/object/pitt%3AMSS_1002_B002_F13_I02) [<https://perma.cc/Z4F8-FR62>].

135. Burt, *supra* note 73, at 285, 310.

136. In that role, Judge Broderick later told David Ferleger, he had also helped constituents get their relatives into Pennhurst. Interview with David Ferleger, *supra* note 127. That there was always a waiting list for Pennhurst, despite documented problems, reflects the pressures that families experienced in this era. Without adequate resources for home-based care for relatives with developmental and intellectual disabilities, and often advised by doctors to pursue institutionalization, some families perceived places like Pennhurst as their best option. *See* Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAMILY L.Q. 153, 191–97 (1978).

137. David Ferleger & Patrice Maguire Scott, *Rights and Dignity: Congress, the Supreme Court, and People with Disabilities After Pennhurst*, 5 W. NEW ENG. L. REV. 327, 346 (1983).

thirty-two days, Ferleger stacked piles of boxes labeled “restraints” in front of his table—a reminder of the hours on end that Pennhurst residents spent in the most restrictive conditions, all meticulously documented by Pennhurst’s own staff.<sup>138</sup> Even the defendants’ experts had little good to say, concluding in one report that for “literally hundreds of reasons,” Pennhurst was “simply too far beyond repair” to “be made into an adequate facility.”<sup>139</sup>

The trial court’s decision in the *Halderman v. Pennhurst* case is legendary among advocates for deinstitutionalization and disability rights. On December 23, 1977, Judge Broderick delivered an opinion that chronicled Pennhurst’s problems in bracing detail: gross understaffing, resulting in minimal efforts to educate, train, and habilitate residents; overuse of physical restraints, psychotropic drugs, and seclusion rooms; conditions that produced and enabled serious harms, ranging from pinworm infections, to bitten-off earlobes, to rape; and a physical environment that was unsanitary (“[t]here is often excrement and urine on ward floors”), excessively noisy, and more likely to cause residents to lose the skills they had than to help them acquire new ones.<sup>140</sup>

Judge Broderick went on to conclude that “when a state involuntarily commits” people with intellectual and developmental disabilities, the Due Process Clause of the U.S. Constitution requires that the state “provide them with such habilitation as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit.”<sup>141</sup> This right extended to residents who were not court committed, Judge Broderick added, because when it came to both admission and release, “voluntariness . . . is an illusory concept”; “Pennhurst residents had no practical alternative at the time of their admission and at the present time, they have no place else to go.”<sup>142</sup> Having established the existence of a constitutional right to habilitation, Judge Broderick went on to find that the defendants in this case had violated it: Pennhurst residents “have not received, and are not receiving, minimally adequate habilitation.”<sup>143</sup> What is more, Judge Broderick found, in what at the time was a striking and novel conclusion, “minimally adequate habilitation *cannot be provided in an institution such as Pennhurst.*”<sup>144</sup>

Judge Broderick shored up this novel constitutional finding with a bevy of additional legal findings. He held that Pennhurst residents had a right to be free from harm, protected under the Eighth and Fourteenth Amendments; that they had a constitutional right to non-discriminatory habilitation (that is, to “at least as much education and training” as the state afforded to others), protected under

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138. Interview with David Ferleger, *supra* note 127.

139. Ferleger & Scott, *supra* note 137, at 346 (citing the 1977 Trial Transcript).

140. *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306–08 (E.D. Pa. 1977), *aff’d in part*, 612 F.2d 84 (3d Cir. 1979), *rev’d*, 451 U.S. 1 (1981).

141. *Id.* at 1317–18.

142. *Id.* at 1311, 1318.

143. *Id.* at 1318.

144. *Id.* (emphasis added).

the Equal Protection Clause of the Fourteenth Amendment; that they had a state statutory right to minimally adequate habilitation (under the Mental Health and Mental Retardation Act of 1966); and that they had a federal statutory right to non-discriminatory habilitation, under Section 504 of the 1973 Rehabilitation Act. The defendants had violated all of these rights.<sup>145</sup>

An order for injunctive relief followed three months later. Taking inspiration, perhaps, from the structural injunctions that famously desegregated public schools in the American South and, more directly, from a historic district court decision in the Alabama patients' rights case *Wyatt v. Stickney*,<sup>146</sup> Judge Broderick required the defendants to "provide suitable community living arrangements" for everyone currently residing at Pennhurst (approximately 1,200 persons), as well as all those on the waiting list.<sup>147</sup> He further required the defendants to provide whatever services were necessary to support "minimally adequate habilitation" in these community placements.<sup>148</sup> And as the defendants made those arrangements, under the guidance of a court-appointed special master, Judge Broderick prohibited them from admitting new residents to Pennhurst.<sup>149</sup> In this regard, Judge Broderick went significantly beyond *Wyatt* or any other "right to treatment" case.<sup>150</sup> His opinion and order signaled that Pennhurst would not be salvaged; its population would be gradually integrated into the community until the institution itself ceased to exist.<sup>151</sup>

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145. *Id.* at 1314, 1320–21. When the Pennsylvania state legislature enacted the Mental Health and Mental Retardation Act of 1966, medical professionals, government officials, and the general public routinely used the term "retardation" to describe the condition of having an intellectual or developmental disability. This term is now disfavored, owing to its derogatory connotations.

146. *See* 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1305 (5th Cir. 1974); *see also* *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) (finding that the entire Arkansas prison system violated the Constitution), *aff'd*, 442 F.2d 304 (8th Cir. 1971). There is an ample contemporaneous literature on how federal court judges at this time were approaching their role and deploying their equitable powers. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Paul S. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

147. 446 F. Supp. at 1326.

148. *Id.*

149. *Id.* at 1326–27.

150. *See* Gran, *supra* note 111, at 115 (explaining that whereas other "right to treatment" cases "fail[ed] to challenge the institutional model," the district court decision in *Pennhurst* cast that model as incompatible with habilitation).

151. 446 F. Supp. at 1326–29.

## II.

“THE CHARACTER OF AN INSTITUTION”: *PENNHURST* MEETS THE “NEW FEDERALISM”

Had the case ended after the trial, the *Pennhurst* litigation would still have a prominent place in U.S. history—as an example of one force, among several, that tipped the scales away from the mass institutionalization of people with disabilities in state-run facilities<sup>152</sup> toward other forms of care (and, in some cases, other institutional confinements).<sup>153</sup> But the case did not end there. As the State Attorney General’s office put it in a memo to the State Department of Public Welfare, the district court’s rulings were “both unprecedented and unpalatable.”<sup>154</sup> They would not go uncontested.

On appeal, the *Pennhurst* case took several unanticipated turns, resulting in Supreme Court decisions that said very little about the status of people like Terri Lee Halderman, but a lot about federal-state relationships. More specifically, these decisions addressed the role of federal power in incentivizing, regulating, and disciplining state-level actors. Since Reconstruction, at least, the power of federal courts over state actors had been one of *the* great questions hovering over American politics and policy. Progressive and New Deal reforms presented a second great question: to what extent could Congress use its spending power to create the kind of social and economic citizenship that federal policymakers desired to see out in the states? The Civil Rights Act and other federal statutes from subsequent decades added a third question: were private lawsuits against state and local officials a fair and appropriate vehicle for enforcing Congress’s will? The *Pennhurst* litigation would provide new answers, with consequences extending well beyond the plaintiff class.

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152. On the factors that contributed to deinstitutionalization, see PARSONS, *supra* note 47; BEN-MOSHE, *supra* note 8, at 37–68. On *Pennhurst*’s significance to deinstitutionalization, see BEN-MOSHE, *supra* note 8, at 236, 238; Gran, *supra* note 111, at 119.

153. By “other forms of institutionalization,” I refer to nursing homes, smaller congregate care facilities, jails, and prisons. See PARSONS, *supra* note 47; DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014). Scholars of deinstitutionalization resist the notion that deinstitutionalization led directly to mass incarceration, but also note the overrepresentation of disability in incarcerated populations today.

154. Memorandum from Norman J. Watkins to Aldo Colautti, Dec. 4, 1978, personal papers of Robert Nelkin (on file with author); see also Aldo Colautti to Milton J. Shapp, Mar. 29, 1978, personal papers of Robert Nelkin (on file with author) (estimating that complying with the district court’s order would cost the state \$25 million, over and above the \$35 million already committed to *Pennhurst*); *Reasons for Appeal*, personal papers of Robert Nelkin (on file with author) (recounting the reasons that various high-level state officials offered in early 1978 for appealing the *Pennhurst* case).

A. Pennhurst I and the Clear Statement Rule

The first appeal was to the Third Circuit, which heard the case *en banc* in 1979 after a three-judge panel was unable to produce a majority opinion.<sup>155</sup> The *en banc* decision, issued almost exactly two years after the remarkable district court decision on the merits, reversed a few aspects of Judge Broderick's remedial decree, but otherwise affirmed his judgment.<sup>156</sup> Like Judge Broderick, the Third Circuit found that Pennhurst's residents had a legal right to treatment and to habilitation and that the defendants had violated these rights.<sup>157</sup>

The circuit court did not reach this conclusion via the same path as the district court, however, and its alternative route became the basis for the Supreme Court's first *Pennhurst* decision (*Pennhurst I*).<sup>158</sup> Following the canon of constitutional avoidance, the circuit court looked first to the potential statutory bases for the plaintiffs' cause of action<sup>159</sup> and, specifically, to possible *federal* statutory bases.<sup>160</sup> The circuit court also chose to rely on a federal statute different from the district court. Rather than basing its decision on Section 504 of the 1973 Rehabilitation Act, a relatively untested anti-discrimination provision,<sup>161</sup> the circuit court found a valid claim under the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the DD Act), which Congress had enacted after the initiation of the *Halderman* lawsuit and which the plaintiffs had asserted as a source of relief in their second amended complaint.<sup>162</sup>

The horror stories coming out of Pennhurst (and elsewhere) were in fact part of the motivation for the DD Act, which used the lure of federal funds to encourage states to do more for people with developmental disabilities. Previous laws, such as the Mental Health Centers Construction Act of 1963 and the Developmental Disabilities Services and Facilities Construction Act of 1970, evinced concern for this population, but the DD Act more explicitly favored community-based programs and services.<sup>163</sup> It offered states even more financial incentives to deinstitutionalize and it included a "bill of rights" setting forth the

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155. *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 100, 116 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981).

156. *Id.*

157. *Id.*

158. *See id.*; *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 5–32 (1981).

159. *Halderman*, 612 F.2d at 104, 116.

160. Relying primarily on a state statute was not preferable, the court explained, because a state court might reject the federal court's interpretation of the applicable state statute. *Id.* at 94.

161. Owing to administrative foot-dragging, there were no implementing regulations for Section 504 until 1977. *See* RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 128 (1984). The Supreme Court did not take up a Section 504 case until *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

162. 612 F.2d at 95.

163. *See* Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282; Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486.

treatment, services, and habilitation that people with developmental disabilities were entitled to receive.<sup>164</sup>

In interpreting the DD Act in the *Pennhurst* case, the circuit court made three important legal findings. First, by its plain language, the Act conferred upon developmentally disabled individuals “a right to treatment and habilitation,” as well as a right to “the least restrictive environment” (which for some individuals might be an institutional setting but in many other cases would not be).<sup>165</sup> Second, states that accepted funding under the Act were required to comply with the Act’s rights-affirming language.<sup>166</sup> Third, the Act conferred upon individual beneficiaries—here, people with developmental disabilities—a private right of action.<sup>167</sup> Such a right of action could arguably “infringe basic state prerogatives, and transgress the bounds of federal law making competence,” the circuit court recognized. But that concern was misplaced in this case, where (in the court’s view) Congress had legislated pursuant to its authority to enforce the Fourteenth Amendment rather than solely its authority under the Spending Clause.<sup>168</sup>

Having secured this alternative federal statutory basis for affirming the district court’s decision, the circuit court moved on to the attached, or “pendent,” state law claim.<sup>169</sup> This claim provided an alternative, independent ground for a right to treatment and habilitation.<sup>170</sup> Pennsylvania’s Mental Health and Mental Retardation Act of 1966 set forth a state duty “[t]o assure . . . the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them.”<sup>171</sup> In the circuit court’s reading, this language created an affirmative right, enforceable by private litigants against both state and county defendants.<sup>172</sup> Combined with the factual findings in the case, these legal interpretations meant that the core of Judge Broderick’s 1977 order would remain in place.<sup>173</sup>

Unless, of course, the defendants chose to appeal the case to the Supreme Court and secured a reversal. This choice is worth underscoring. Litigating at the Supreme Court level is expensive. Teams of lawyers spend hours preparing, and litigants often retain experienced (i.e., expensive) advocates to argue before the Court. In this instance, an appeal also seemed out of step with the direction that some states were voluntarily headed: around the country, states were downsizing

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164. 89 Stat. 486. On Willowbrook in the years leading up to the DD Act, see generally DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS: BRINGING THE MENTALLY DISABLED INTO THE COMMUNITY* (1984).

165. 612 F.2d at 97, 107.

166. *Id.* at 99.

167. *Id.* at 97–98.

168. *Id.* at 95–100, 104–07.

169. *Id.* at 103.

170. *Id.* at 95–107.

171. *Id.* at 100.

172. *Id.* at 100–03.

173. *See id.* at 95–116.

institutions, recognizing that they were a drag on state finances and that federal funds were available for community living.<sup>174</sup> The plaintiffs' lawyers begged the state attorney general not to appeal further;<sup>175</sup> similar efforts were underway in the governor's office, where PARC had allies.<sup>176</sup>

But the state officials calling the shots for the defendants<sup>177</sup> appeared to be taking an even longer view, seeing in this appeal the chance to make a broader argument about federal courts and state power.<sup>178</sup> In the words of one of the defendants' briefs to the Supreme Court, the lower court decision "would open [the federal] courts to innumerable lawsuits by developmentally disabled persons seeking to dispute the nature or setting of their treatment."<sup>179</sup> This, in turn, would lead to federal courts "displac[ing] state and local governments as the decisionmakers empowered to determine the proper allocation of resources and the appropriate treatment for each developmentally disabled person."<sup>180</sup> The remaining role for the states was pathetic: they would merely "fund and implement the treatment prescribed by the federal court."<sup>181</sup>

The defendants' appeal reached the Supreme Court at an auspicious time for state governments. During the Warren Court years, the Court's approach to civil rights and civil liberties had often seemed to come at the expense of the states. Chief Justice Warren's departure in 1969 gave President Nixon a chance to reorient the Court, via the appointment of Warren Burger. Two additional appointment opportunities arose for President Nixon in 1971 with the retirement of Justice John Marshall Harlan II and Justice Hugo Black. Harlan, though sometimes on the dissenting side of Warren Court decisions,<sup>182</sup> voted in favor of civil rights in key cases<sup>183</sup> and was known for advancing a broad interpretation of the Fourteenth Amendment's Due Process Clause.<sup>184</sup> Black had been a reliable defender of the New Deal<sup>185</sup> and a famous proponent of applying all the guarantees in the Bill of Rights against the states ("total incorporation").<sup>186</sup>

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174. BEN-MOSHE, *supra* note 8, at 254–55; VALERIE J. BRADLEY, DEINSTITUTIONALIZATION OF DEVELOPMENTALLY DISABLED PERSONS: A CONCEPTUAL ANALYSIS AND GUIDE 34–36 (1978).

175. Letter from Thomas K. Gilhool to Edward G. Beister (May 4, 1979) (on file with author).

176. Interview with Robert Nelkin (June 9, 2021); Letter from Robert Nelkin to Richard Thornburgh (July 27, 1979) (on file with author).

177. Letter from Richard Thornburgh to Richard A. McClatchy, Jr. (Feb. 5, 1980) (on file with author) (explaining that the county defendants appeared inclined to follow the state's lead).

178. Speaker of the State House of Representatives H. Jack Seltzer urged Governor Thornburgh to "uphold the rights of our Commonwealth." Letter from H. Jack Seltzer to Richard Thornburgh (Jan. 23, 1980) (on file with author).

179. Brief for Petitioners at 10, *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst I*), 451 U.S. 1 (1981) (Nos. 79-1404, 79-1408, 79-1415 & 79-1489).

180. *Id.*

181. *Id.*

182. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 589–632 (1964) (Harlan, J., dissenting).

183. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1 (1958); *Loving v. Virginia*, 388 U.S. 1 (1967).

184. *See* *Poe v. Ullman*, 367 U.S. 497, 509–55 (1961) (Harlan, J., dissenting).

185. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 5 (1998).

186. *See* *Adamson v. California*, 332 U.S. 46, 70–72 (1947) (Black, J., dissenting).

Black's fellow Roosevelt appointee Justice William O. Douglas left the Court four years later, in 1975. His replacement, Justice John Paul Stevens, was only a modest counterweight to the other three Justices whom Nixon appointed: Harry Blackmun, Lewis F. Powell, and William Rehnquist. Justice Rehnquist would write the Court's decision in *Pennhurst I*.<sup>187</sup>

Rehnquist's special concern for states was well established by that point. His decision in the 1976 case *National League of Cities v. Usery*, holding that state employees could not be subjected to a federal minimum wage law, is perhaps the most famous example.<sup>188</sup> Though formally overruled less than a decade later, it "plainly invigorated the Tenth Amendment" and signaled to lower courts and court watchers a shift in the winds.<sup>189</sup>

But even more salient to this Article is Justice Rehnquist's 1976 opinion in *Rizzo v. Goode*.<sup>190</sup> Multiple groups of Philadelphia residents, including the local chapter of the Black Panther Party, had sued the mayor, the police commissioner, and other local officials over the police department's allegedly persistent mistreatment of Black citizens, in violation of the U.S. Constitution.<sup>191</sup> After two long trials, the district court judge (from the same district as Judge Broderick) ordered the defendants to formulate "a comprehensive program for dealing adequately with civilian complaints," subject to the court's guidelines.<sup>192</sup> On appeal, the Third Circuit affirmed. Notably, the district court's order of equitable relief was weaker than what the plaintiffs wanted and was modest compared to what federal courts were doing in school desegregation cases.<sup>193</sup> This relative modesty helps explain why amici ranging from the Commonwealth of Pennsylvania to the Philadelphia Bar Association urged the Supreme Court to affirm.<sup>194</sup>

Writing for the majority in *Rizzo*, Justice Rehnquist nonetheless held that the disputed court order swept far too broadly, in ways that offended bedrock

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187. See *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 5 (1981) (Rehnquist, J., writing for the Court).

188. See 426 U.S. 833, 835–56 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

189. Richard J. Lazarus, *Rehnquist's Court*, 47 ST. LOUIS U. L.J. 861, 864 (2003).

190. 423 U.S. 362 (1976).

191. For a rich excavation of this case's backstory, see Vivek Kembaiyan, *The Philadelphia Black Panther Party's Attempt to Assert Community Control Over Police Through Litigation* (May 14, 2020) (unpublished manuscript) (on file with author). Kembaiyan explains that the district court eventually dropped the Black Panthers from the suit "because of their refusal to submit to discovery." *Id.* at 20. On law-and-order politics in Philadelphia during Frank Rizzo's ascendance and leadership, see TIMOTHY J. LOMBARDO, *BLUE-COLLAR CONSERVATISM: FRANK RIZZO'S PHILADELPHIA AND POPULIST POLITICS* (2018); Eric C. Schneider, Christopher Agee & Themis Chronopoulos, *Dirty Work: Police and Community Relations and the Limits of Liberalism in Postwar Philadelphia*, 2 J. URB. HIST. 1 (2017).

192. 423 U.S. at 369.

193. Weinberg, *supra* note 17, at 1261; see also Kembaiyan, *supra* note 191, at 19 (noting that the district court order "deeply disappointed" the plaintiffs).

194. Weinberg, *supra* note 17, at 1261.

federalism principles.<sup>195</sup> Federal courts had to be “constantly mindful” of how federal equitable power might impinge on a state’s prerogatives, he wrote; injunctions of state officials were an “extraordinary” remedy, to be viewed in the same skeptical light as interference with state judicial proceedings.<sup>196</sup>

The *Rizzo* precedent would seem to bode ill for the *Pennhurst* plaintiffs and the much more sweeping remedial decree they sought to preserve. As legal scholar Louise Weinberg observed, *Rizzo* suggested that, notwithstanding “*Ex parte Young*, section 1983 and *Brown II*,” a federal trial court could not “fashion a prospective remedy to discourage deprivations of constitutional rights.”<sup>197</sup> It was almost as if federalism *prohibited* interference with state officials who failed to protect against such deprivations.<sup>198</sup>

As it turned out, Justice Rehnquist stopped shy of striking down the remedial order in *Pennhurst*.<sup>199</sup> Instead, he held that the Third Circuit had misapplied federal law when it upheld Judge Broderick’s decision.<sup>200</sup> This alternative holding would turn out to have momentous federalism implications of its own, but Justice Rehnquist obscured them in the measured language of statutory construction.<sup>201</sup>

The statutory interpretation exercise unfolded in several steps. First, Justice Rehnquist emphasized the need for clarity from Congress about the source of its power when imposing “*affirmative* obligations on the States to fund certain services.”<sup>202</sup> The Third Circuit had named the Fourteenth Amendment as the source, thereby linking the DD Act to the project of Reconstruction and the value of equality.<sup>203</sup> Not so fast, said Justice Rehnquist.<sup>204</sup> Unless Congress expressly invoked its power to enforce the Fourteenth Amendment—not the case here—the Court would not infer that they intended to do so.<sup>205</sup> The Court proceeded, then, as if Congress enacted the DD Act pursuant to its Spending Power (i.e., as if it were nothing more than a “typical funding statute”).<sup>206</sup>

This first step enabled a crucial second step, now so woven into the fabric of our law that it is difficult to appreciate. According to Justice Rehnquist, “legislation enacted pursuant to the spending power is much in the nature of a

195. 423 U.S. at 378–81.

196. *Id.* at 378–79; *see also* *Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (criticizing federal district court judges for becoming too “enmeshed in the minutiae of prison operations,” under cover of enforcing the U.S. Constitution).

197. Weinberg, *supra* note 17, at 1218.

198. *Id.*

199. *See Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 31–32 (1981).

200. *Id.*

201. *See id.* at 16–31 (grounding the analysis in statutory interpretation principles).

202. *Id.* at 16–17.

203. *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647, 649–61 (3d Cir. 1982) (en banc), *rev’d*, 465 U.S. 89 (1984).

204. *See Pennhurst I*, 451 U.S. at 5–3.

205. *Id.* at 15–18, 22.

206. *Id.*

contract: in return for federal funds, the States agree to comply with federally imposed conditions.”<sup>207</sup> Continuing with this contract analogy, Justice Rehnquist emphasized the importance of a state “voluntarily and knowingly accept[ing] the terms” and the presumed invalidity of a term which a state was “unaware” or “unable to ascertain” the meaning of.<sup>208</sup> “[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously,” Justice Rehnquist insisted.<sup>209</sup>

In the case of the DD Act, Justice Rehnquist continued, “Congress fell well short of providing clear notice to the States” that the sweeping language in the “bill of rights” section functioned as a “condition” for receipt of federal funds.<sup>210</sup> This was not a matter of sloppy drafting, in his view, but a sign that Congress never intended to bind the states in this way.<sup>211</sup> Congress “plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it.”<sup>212</sup> To find such a mandate now, he implied, would be akin to ripping open a clear contract and adding a contradictory term.<sup>213</sup> The Court would not hold states to such a bargain.<sup>214</sup>

The majority opinion concluded by giving the plaintiffs a faint glimmer of hope. It remanded the case to the Third Circuit to consider several issues, including whether some other provision of the DD Act might support the district court’s decision (although Justice Rehnquist sounded several notes of skepticism here) and whether some other source of federal law might provide a basis for relief.<sup>215</sup> The Court also ordered the Third Circuit to reconsider its interpretation of the state Mental Health and Mental Retardation Act, suggesting (without elaboration) that the circuit court’s construction of this state law “may well have been colored” by an erroneous interpretation of the federal DD Act.<sup>216</sup>

It was a clever decision, noted Michael McConnell, a conservative lawyer who at the time of *Pennhurst I* was serving as assistant general counsel to the Reagan Administration’s Office of Management and Budget and would go on to a notable career as a judge and law professor.<sup>217</sup> Indeed, it was so clever that McConnell made it the centerpiece of his remarks at the first-ever conference of

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207. *Id.* at 17.

208. *Id.*

209. *Id.*

210. *Id.* at 20, 25–26.

211. *See id.* at 27.

212. *Id.*

213. *See id.* at 17 (“The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”).

214. *See id.* at 15–32.

215. *Id.* at 30–31.

216. *Id.*

217. *See* Michael W. McConnell, *The Politics of Returning Power to the States*, 6 HARV. J.L. & PUB. POL’Y 103–08 (1982). On the import of this convening and the Federalist Society more broadly, see generally AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2019).

the Federalist Society, held in 1982 at Yale Law School.<sup>218</sup> In McConnell's words, Justice Rehnquist "skillfully" "put to conservative use" what McConnell recognized as "a famous, well-trying, and well-beloved liberal device": "deciding that [a] statute means something other than what it otherwise appears to say" out of a purported desire to avoid potential "constitutional problems."<sup>219</sup> Here, the potential constitutional problem came via the Tenth Amendment. Citing his own recent opinion in *National League of Cities v. Usery*, Justice Rehnquist implied that surely this amendment must impose some limit on the Spending Power.<sup>220</sup> To avoid this looming Tenth Amendment problem, McConnell noted with admiration, Justice Rehnquist advanced "a narrow reading of the statute," different from "what it apparently meant on its face."<sup>221</sup> In doing so, he "create[d] a new mode of interpreting *all* grant statutes."<sup>222</sup>

As McConnell explained it, the "new principle of statutory construction" was this: "any limitations or conditions on State activity imposed as an exercise of Spending Power authority must be precisely stated or the States (and the courts) will be free to ignore them."<sup>223</sup> The implications of this principle, now known as the "clear statement rule," were profound. "This could be an extremely useful doctrine for recovering for the States some measure of the power that has been seduced away from them by the proffer of grants," McConnell predicted (echoing critiques voiced in conservative circles since at least the New Deal), "because very few [federal] statutes . . . phrase their conditions in anything close to precise language."<sup>224</sup> "Congressional activists" might continue to try to fulfill their "do good"-er impulse by creating ever-more expansive rights and responsibilities, but when they did so through federal-state grants-in-aid, federal courts now had "a solid doctrinal basis" for protecting the states from the costs of Congress's hubris.<sup>225</sup>

Not everyone, of course, was so appreciative of Justice Rehnquist's handiwork. Tom Gilhool, one of the lawyers on the plaintiffs' side, would later concede the weakness of the DD Act argument,<sup>226</sup> but other commentators at the

218. McConnell, *supra* note 217, at 103–08.

219. *Id.* at 106–07. McConnell, a former law clerk to Justice William Brennan, was well-positioned to know of such devices.

220. See *Pennhurst I*, 451 U.S. at 17 n.13 (citing *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842–43 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

221. McConnell, *supra* note 217, at 107, 109.

222. *Id.* (emphasis added).

223. *Id.* at 109.

224. *Id.*; see also Stewart A. Baker, *Making the Most of Pennhurst's "Clear Statement" Rule*, 31 CATH. U. L. REV. 439, 441 (1982) ("State and local governments concerned about litigation over the 'strings' attached to federal aid will find, in *Pennhurst*, a broad new basis for resisting excessive federal mandates."). On conservative critiques of federal-state grants-in-aid and the way they seduced power away from the states, see generally TANI, *supra* note 95.

225. McConnell, *supra* note 217, at 109–10; see also Baker, *supra* note 224, at 439 (recognizing *Pennhurst I* as holding great potential value to lawyers representing state and local governments).

226. In the world of disability activism, Gilhool later recalled, "nobody thought" that the states should have to carry out all the "lovely language" in the DD Act's "[b]ill of [r]ights"; he and the other

time believed it was a good one,<sup>227</sup> as did representatives from the U.S. Department of Justice and three of Justice Rehnquist's fellow Justices.<sup>228</sup> As Justice Marshall put it in a pre-decision memo to his colleagues, no one actually disputed "that Congress had in mind Pennhurst and other institutions like it" when it added the "bill of rights" language to the DD Act.<sup>229</sup> The real issue in the case seemed to be Judge Broderick's remedial decree, which arguably swept too broadly and gave Pennsylvania an insufficient opportunity to comply with the law. Why not, then, simply remand the case and order that "the remedy track the statute," as the Court had done in the 1970 grant-in-aid case *Rosado v. Wyman*?<sup>230</sup> Justice White picked up on this idea in dissent, noting that this approach would meet the Court's main concerns without "mak[ing] nugatory" actions that Congress had "carefully undertaken."<sup>231</sup>

That the Court did not follow this established route raised concerns about what this case portended. In Professor Judith Baer's words, the majority "implicitly conceded that both the Spending Power and the Fourteenth Amendment give Congress the power to do what the plaintiffs argue the Act has done" only to then "balk at concluding that Congress really intended" to do what it said.<sup>232</sup> It was a decision that entertained "[e]very possible presumption . . . in favor of congressional circumspection and state autonomy."<sup>233</sup>

#### B. Pennhurst II and the New Sovereign Immunity

"Did you ever see a kid scared of himself?" former Pennhurst resident Alfred Pitts asked David Ferleger in 1981.<sup>234</sup> "That's how it was," Pitts recalled.<sup>235</sup> "Forcing people to do things outside their own will. It looked bloody. It looked terrible. The way the patients looked, the way the patients sat on the ground. It looked like a dead home."<sup>236</sup>

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lawyers argued this only because the Third Circuit asked them to. Gilhool, UC BERKELEY, *supra* note 42, at 163.

227. See, e.g., Jane S. Randall, *Pennhurst v. Halderman: A Bill of Rights in Name Only*, 13 U. TOL. L. REV. 214, 220 (1981); Ferleger & Maguire, *supra* note 139, at 331, 338-45.

228. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 33-55 (1981) (White, J., dissenting in part); Brief for the United States in Opposition, *Pennhurst*, 451 U.S. 1 (No. 81-2101).

229. Justice Thurgood Marshall, Memorandum to the Conference Re: Nos. 79-1404, 1408, 1414, 1415 & 1489 - *Pennhurst v. Halderman*, Mar. 11, 1981, Box 272, Folder 6, THURGOOD MARSHALL PAPERS (Library of Congress).

230. *Id.*; see *Rosado v. Wyman*, 397 U.S. 397, 421-23 (1970).

231. *Pennhurst I*, 451 U.S. at 35 (White, J., dissenting in part).

232. Judith A. Baer, *The Burger Court and the Rights of the Handicapped: The Case for Starting All Over Again*, 35 W. POL. Q. 339, 350 (1983).

233. *Id.* Baer described similarly the Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), in which the Court considered Section 504 of the Rehabilitation Act of 1973 for the first time and adopted an inappropriately narrow view of the statute. *Id.* at 344-46.

234. David Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 595 (1983).

235. *Id.*

236. *Id.* Pitts resided in Pennhurst in the mid-1970s. John Woestendiek, *Living the Life of Pitts— at Last*, PHILA. INQUIRER, Jan. 17, 1983, at B01.

Like Pitts, most of the judges on the Third Circuit seemed to have no interest in giving Pennhurst a second chance at life. Pursuant to the Court's remand order, the Third Circuit reconsidered the case and issued a second *en banc* decision, reaching the same ultimate conclusion but basing its decision solely on state law grounds.<sup>237</sup> Conveniently, the Pennsylvania Supreme Court had recently interpreted the state's Mental Health and Mental Retardation Act, and its reading of that statute supported the District Court's 1977 decision.<sup>238</sup> Perhaps this long-running litigation would finally expire.

Instead, the defendants once again filed an appeal to the Supreme Court.<sup>239</sup> Pennsylvania officials, at least, seem to have done so because they saw an opportunity to gain further ground in a perceived battle between beleaguered state officials and an activist federal judiciary. By 1983, this was a battle that went well beyond institutions like Pennhurst and implicated important aspects of state governance. In the words of Pennsylvania Secretary of Welfare Walter W. Cohen, the State aimed to establish whether it was up to federal judges to "decide what state prisons or mental hospitals . . . or highways should be closed."<sup>240</sup> This time, the State claimed that the Eleventh Amendment meant the federal courts should never have even entertained a state law claim against the state.<sup>241</sup>

In 1983, this argument was dubious. Compared to other provisions of the Constitution, the Eleventh Amendment looks narrow and technical—not naturally amenable to novel re-readings.<sup>242</sup> In an important case in 1890, the Supreme Court had given the amendment a more expansive interpretation, suggesting that it encapsulated the principle of state sovereign immunity.<sup>243</sup> But a host of cases since then had treated that principle as subordinate to other considerations.<sup>244</sup> At the time of the *Pennhurst* appeal, suits against state officers were commonplace in federal court, including suits involving state law claims.<sup>245</sup>

237. *Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 647, 656–61 (3d Cir. 1982) (en banc), *rev'd*, 465 U.S. 89 (1984).

238. *Id.* at 651–53 (citing *In re Schmidt*, 429 A.2d 631 (Pa. 1981)).

239. *Petition for Writ of Certiorari, Pennhurst State Sch. & Hosp v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984) (No. 81-2101).

240. John Woestendiek, *Pa. Files Plan to Shut Pennhurst, but Will Pursue Appeal*, PHILA. INQUIRER, Nov. 30, 1983, at B06. "By 1984," according to Margo Schlanger, "24% of the nation's 903 state prisons (including at least one in each of forty-three states and the District of Columbia) reported to the federal Bureau of Justice Statistics that they were operating under a court order." Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2004 (1999). On prison reform litigation in this period, see generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); Schlanger, *supra* note 129.

241. *Petition for Writ of Certiorari* at 10, *Pennhurst II*, 465 U.S. 89 (No. 81-2101).

242. The amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

243. *Hans v. Louisiana*, 134 U.S. 1, 13–21 (1890).

244. *See, e.g., Ex Parte Young*, 209 U.S. 123, 142–68 (1908).

245. On the history of the Eleventh Amendment and the Court's interpretation of it over time, see Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State and Tribal: The Story of Seminole*

Indeed, the legal authority appeared so one-sided as to make the defendants' Eleventh Amendment argument "unique," in the words of the court of appeals—an argument "not previously advanced anywhere," as far as that court could tell.<sup>246</sup>

That the Supreme Court would choose to entertain such a claim was, in fact, no surprise to astute observers of the institution.<sup>247</sup> As Professor William Fletcher noted in 1983, some of the Justices seemed to see in the Eleventh Amendment a potentially sweeping "jurisdictional bar" against types of suits that they no longer wanted to see in federal court (namely, private suits against state governments).<sup>248</sup> For these Justices, the *Pennhurst* litigation was a tempting vehicle for "litigating abstract federalism and comity issues," as one of Justice Blackmun's law clerks noted.<sup>249</sup>

Urging on the Court in this case were attorneys general (AGs) from twenty-two states, plus Puerto Rico and American Samoa.<sup>250</sup> This was significant in that state AGs had not previously been particularly coordinated, nor were they known for strong performances before the Supreme Court (much to the chagrin of some of the Court's more conservative Justices).<sup>251</sup> By 1982, they had turned things around.<sup>252</sup> They had created within their existing organization (the National Association of Attorneys General) a dedicated Supreme Court Project. And via a friendly assist from the Reagan Administration's Department of Justice, they enjoyed energetic leadership from attorney-advisor Douglas Ross.<sup>253</sup> The *Pennhurst* amicus brief reflected these efforts.

Tribe of Florida v. Florida, in *FEDERAL COURT STORIES* 329, 329–37 (Vicki C. Jackson & Judith Resnik eds., 2010).

246. Halderman v. Pennhurst State Sch. & Hosp., 673 F.2d 647, 656 (3d Cir. 1982) (en banc), *rev'd*, 465 U.S. 89 (1984).

247. See *Pennhurst State Sch. & Hosp. v. Halderman*, 457 U.S. 1, 1 (1982) ("Petition for writ of certiorari . . . granted.").

248. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *STAN. L. REV.* 1033, 1033–34, 1033 n.2 (1983); see also Weinberg, *supra* note 17, at 1193 n.10 (noting the Court's reinvigoration of the Eleventh Amendment in civil rights cases).

249. Letter from HKK to Justice Blackmun, June 15, 1982, Box 391, Folder 1, HARRY A. BLACKMUN PAPERS (Library of Congress) [hereinafter BLACKMUN PAPERS].

250. Brief of Alabama et al. as Amici Curiae Supporting Petitioner, *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984) (No. 81-2101).

251. Douglas Ross & Michael W. Catalano, *How State and Local Governments Fared in the United States Supreme Court for the Past Five Terms*, 20 *URB. L.J.* 341, 341 (1988); John P. MacKenzie, Editorial, *Even Up the Odds at the Court*, *N.Y. TIMES*, Oct. 3, 1983, at A22.

252. Douglas Ross, *Safeguarding Our Federalism: Lessons for the States from the Supreme Court*, 45 *PUB. ADMIN. REV.* 723, 727 (1985).

253. *Id.* On the activity of state attorneys general from the late 1970s forward, see generally Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amici Curiae*, 70 *JUDICATURE* 298 (1987); Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 *MICH. L. REV.* 1463, 1475–79 (2003); Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 *N.Y.U. L. REV.* 1229 (2015).

Writing for the majority in *Pennhurst II*, Justice Powell gave the state AGs everything they could have hoped for. His opinion characterized the Eleventh Amendment as representing more than its text: it affirmed “the fundamental principle of sovereign immunity” and recognized that principle’s firm constraints on the federal courts’ jurisdictional authority.<sup>254</sup> Seen in this light, the Eleventh Amendment barred the Third Circuit’s most recent actions in the *Pennhurst* case (in which they affirmed the District Court’s decision on state law grounds) and placed the plaintiffs’ case on precarious footing.<sup>255</sup>

Justice Powell might seem an odd figure to deliver this message, given how tightly his legacy is now linked to affirmative approaches to addressing inequality.<sup>256</sup> But one of the great themes of Justice Powell’s career was skepticism of federal court efforts to remedy state and local discrimination. As a member of the Richmond, Virginia, school board in the era of *Brown* (he served from 1952 to 1961) and, subsequently, the state board of education (on which he sat from 1961 to 1969), Powell believed that federal courts should intrude minimally into local desegregation efforts.<sup>257</sup> After joining the Court, Powell tried to guide his fellow Justices in this direction, both in cases involving court-ordered busing and in ones involving the preclearance requirement of the Voting Rights Act, which he saw as similarly intrusive.<sup>258</sup> Along similar lines, Powell dissented vigorously in *Maine v. Thiboutot*, in which the Court expanded its

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254. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 98 (1984).

255. *Id.* at 103–06.

256. Powell famously authored the majority opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

257. See Earl M. Maltz, *The Triumph of the Southern Man: Dowell, Shelby County, and the Jurisprudence of Justice Lewis F. Powell, Jr.*, 14 DUKE J. CONST. L. & PUB. POL’Y 169, 173–208 (2019).

258. For Powell’s views on busing, see his opinion in *Keyes v. School District No. 1*, 413 U.S. 189, 217–53 (1973) (Powell, J., concurring in part and dissenting in part). See also *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 991 (1976) (Powell, J., concurring). For Powell’s views on the Voting Rights Act, see, for example, *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting), and *City of Rome v. United States*, 446 U.S. 156, 193–206 (1980). These examples come from Maltz, *supra* note 257, at 218–25. For other thoughtful discussions of Justice Powell’s views on racial discrimination and its remediation, see, for example, Anders Walker, *A Lawyer Looks at Civil Disobedience: How Lewis F. Powell, Jr. Reframed the Civil Rights Revolution*, 86 U. COLO. L. REV. 1229 *passim* (2015); Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1435–57 (2020). For more on desegregation battles in Richmond, see MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2007).

interpretation of Section 1983<sup>259</sup> to allow many more claims against state and local officials into federal court.<sup>260</sup>

To Justice Powell, the district court's actions in *Pennhurst* offered another example of federal judicial overreach. "Off the wall!" read one of Powell's annotations, on a portion of a bench memo describing Judge Broderick's order to close the institution.<sup>261</sup> He scrawled a similar notation next to a mention of the daily fines Broderick imposed on noncompliant state administrators.<sup>262</sup>

Justice Powell's formal opinion in *Pennhurst II* was more restrained. It calmly walked the reader through a doctrinal thicket, rereading landmark opinions along the way.<sup>263</sup> The most significant was a line of Eleventh Amendment cases that distinguished a plaintiff's request for retroactive monetary relief from the kind of prospective relief at issue in *Pennhurst*.<sup>264</sup> The Eleventh Amendment barred federal courts from ordering the former, the Court had held, but not the latter—even when prospective relief would have a significant impact on a state treasury.<sup>265</sup> Powell circumnavigated those cases by emphasizing the federal nature of the claims at issue there: federal judicial relief was necessary to vindicate the principle of *federal* supremacy.<sup>266</sup> When the relief being ordered stemmed from a violation of *state* law, rather than federal law, that vital first principle was no longer at issue.<sup>267</sup> But what remained in play was the principle of state sovereignty. "[I]t is difficult to think of a greater intrusion on

259. Section 1983 is part of the Civil Rights Act of 1871. In pertinent part, it reads:

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

42 U.S.C. § 1983.

260. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980) (Powell, J., dissenting). Powell's strong views on *Thiboutot* reappear in his notes on *Pennhurst I*. He acknowledged the case's precedential authority but repeatedly referred to it as "erroneous." 19-1414 *Pennhurst* Pre-Conference Notes, Box 76, LEWIS F. POWELL JR. ARCHIVES, Wash. & Lee Univ. Sch. of L., Va. (available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1577&context=casefiles> [<https://perma.cc/NNV7-SDZX>] [hereinafter POWELL PAPERS]). "Miserable case!" he scribbled on one draft opinion that cited it. *Pennhurst State Sch. & Hosp. v. Halderman*, Sup. Ct. Case Files Collection, Box 76, POWELL PAPERS, *supra*.

261. Memo, Box 141, POWELL PAPERS, *supra* note 260.

262. Bench Memo at 2–3, *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89 (1984) (No. 81-2010); Box 141, POWELL PAPERS, *supra* note 260. Justice Powell was not unsympathetic to the plaintiffs, as evidenced by his majority opinion in *Youngberg v. Romeo*, 457 U.S. 307, 309–25 (1982) (recognizing, in a case involving a *Pennhurst* resident, that an individual involuntarily committed in a non-penal institution had a constitutionally protected liberty interest in reasonable conditions of safety and freedom from unreasonable restraints). What he was apparently averse to was sweeping judicial mandates that required structural change.

263. *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89, 102–03 (1984). (citing *Edelman v. Jordan*, 415 U.S. 651 (1974)).

264. *Id.*

265. *Id.*

266. *Id.* at 105–06.

267. *Id.*

state sovereignty,” Powell wrote, “than when a federal court instructs state officials on how to conform their conduct to state law.”<sup>268</sup> The other major precedential obstacle was a long line of cases in which federal courts, exercising “pendent jurisdiction,” had adjudicated state-law claims against state officials and ordered relief, without anyone apparently perceiving an Eleventh Amendment problem.<sup>269</sup> Powell treated those cases as irrelevant because there was no Supreme Court precedent that expressly approved this practice.<sup>270</sup>

Toward the end of his decision, Justice Powell implicitly recognized what a significant change he had wrought, noting a potential “disruptive effect” on litigation against state officials.<sup>271</sup> But having found a constitutional defect with the federal courts’ jurisdiction, the Court need not—indeed, must not—entertain such “policy” considerations.<sup>272</sup> The Court reversed and remanded the case once more, this time for the Third Circuit to consider whether the district court’s decision might be sustained on the basis of an alternative, federal law ground.<sup>273</sup>

This resolution was not as obviously correct as Justice Powell made it out to be. The U.S. Department of Justice, whose Reagan-appointed leadership had adopted a relatively conciliatory stance toward state governments, actually argued in an amicus filing that the Eleventh Amendment was *not* an obstacle in this case (even as it withdrew its support for the district court’s remedy).<sup>274</sup> Indeed, in his own pre-argument notes, Powell seemed to agree. The district court’s decision to consider the state law claim squared with his own previously expressed views on federal court jurisdiction. And although the Eleventh Amendment was never far from Powell’s mind, he saw a way to avoid it through the Court’s previously drawn distinction between retroactive and prospective relief. Powell also seemed to agree with a law clerk about an acute prudential concern: resolving a case on state law grounds was clearly preferable to federal judges tackling novel and tricky federal constitutional claims. (“Amen!” Powell wrote next to his clerk’s observation.)<sup>275</sup> That escape route would vanish if the Court interpreted the Eleventh Amendment to bar consideration of state law claims.<sup>276</sup>

These privately expressed doubts—about precedents and prudence—shed light on why Justice Powell’s confident opinion provoked such a sharp dissent from Justice Stevens (joined by Justices Brennan, Marshall, and Blackmun).

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268. *Id.* at 106.

269. *Id.* at 117–21.

270. *See id.* at 120–23.

271. *Id.* at 121.

272. *Id.* at 122–23.

273. *Id.* at 125.

274. Brief for the United States in Opposition at 11, *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984) (No. 81-2101).

275. Bench Memo at 6, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (No. 81-2010), Box 141, POWELL PAPERS, *supra* note 260.

276. *Id.*

Stevens charged the majority with “repudiat[ing] at least 28 cases, spanning well over a century of this Court’s jurisprudence,” to find a constitutional violation where the Court had never spotted one before.<sup>277</sup>

Justice Stevens also pointed out a great irony: when the Third Circuit upheld the District Court’s decision on state law grounds, it had “conformed precisely” to the Supreme Court’s directive in *Pennhurst I.*<sup>278</sup> Now, in an “unprecedented about-face,” the majority held “that the Eleventh Amendment prohibited the Court of Appeals from doing what this Court ordered it to do when we instructed it to decide whether respondents were entitled to relief under state law.”<sup>279</sup> “This case has illuminated the character of an institution,” Stevens famously wrote in the opening lines of his dissent, referring there to *Pennhurst*.<sup>280</sup> He closed his dissent in the same way—with a reference to institutional “character.”<sup>281</sup> This time the referent was an “undisciplined” Supreme Court.<sup>282</sup>

The majority opinion also drew fierce critiques from academics—“almost universally hostile,” as one commentator put it.<sup>283</sup> Harvard Law Professor David Shapiro devoted an entire article to the “wrong turns” the Court took in its interpretation of the Eleventh Amendment.<sup>284</sup> Professor Erwin Chemerinsky noted worrisome doctrinal and practical consequences, including the implication that litigants with federal and state law claims should simply give up the federal forum.<sup>285</sup> Professor David Rudenstine observed how easily the Court could have vacated the injunction on non-constitutional grounds.<sup>286</sup> Instead, the Court

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277. *Pennhurst II*, 465 U.S. at 126–27 (1984) (Stevens, J., dissenting).

278. *Id.* at 130.

279. *Id.*

280. *Id.* at 126.

281. *Id.*

282. *Id.* at 166–67.

283. George D. Brown, *Beyond Pennhurst: Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 351 (1985).

284. David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). These navigational errors included the Court’s “extension of the eleventh amendment beyond its terms and its bonding to the doctrine of sovereign immunity” (augmenting an error in the Court’s much-criticized late-nineteenth-century decision *Hans v. Louisiana*, 134 U.S. 1 (1890)); “the expansive operational definition” that the Court “accorded the sovereign immunity defense” (ignoring limitations implied by precedents); and the Court’s “failure to give adequate attention to state law in determining the availability of that defense” (for instance, to consider whether Pennsylvania had, in fact, waived its sovereign immunity in the type of case at hand). *Id.* at 67, 70, 78.

285. The incentives would arguably run that way because for a litigant to bifurcate their claims—the state claim(s) to state court, the federal claim(s) to federal court—would be costly and could result in a finding of res judicata as to the federal claim. Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 658–59 (1985); see also Robert H. Smith, *Pennhurst v. Halderman: The Eleventh Amendment, Erie and Pendent State Law Claims*, 34 BUFF. L. REV. 227, 271–94 (1985) (playing out different post-*Pennhurst II* claim and issue preclusion scenarios and explaining why litigants would feel pressured to bring both state and federal claims in a state court proceeding).

286. David Rudenstine, *Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71, 89 (1984).

“impose[d] a constitutional restriction on the federal courts’ jurisdiction” and called into question federal courts’ long-established use of their equitable powers to enjoin unconstitutional actions by state officers.<sup>287</sup> After dutifully summarizing the case, the leading casebook on Federal Courts asked simply: “What accounts for the majority’s strained reading and repudiation of so many precedents?”<sup>288</sup> Such responses are a reminder that, at the time, *Pennhurst II* represented a major step forward in the Court’s “new federalism” jurisprudence.

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On the ground in Pennsylvania, ironically, the Supreme Court’s decision did not change much. Pennsylvania officials seemed to understand that *Pennhurst* was irredeemable and announced their intention to close it.<sup>289</sup> In the months after *Pennhurst II*, as the Third Circuit prepared to consider the case for a third time, the parties entered settlement negotiations.<sup>290</sup> In July 1984, when the parties reached an agreement, only 460 residents remained at *Pennhurst*.<sup>291</sup>

The terms of the resulting agreement, which Judge Broderick formally approved on April 5, 1985, did not differ dramatically from the terms of his original 1977 order.<sup>292</sup> The primary difference was the exclusion from the plaintiff class of persons who had never actually resided at *Pennhurst* (the original class had included people who were on the waiting list and those who faced the possibility of placement there).<sup>293</sup> As to current and former residents, however, the state made a significant commitment: it promised to continue providing community services for those individuals who had already transitioned out of the institution, to provide community placements and services for those who remained, and to make available sufficient funds to honor these commitments.<sup>294</sup> The proposed rate of community placements would allow for the closing of *Pennhurst* by July 1, 1986.<sup>295</sup> In short, the settlement agreement gave the plaintiffs virtually everything they had wanted, albeit over a decade after they had asked for it.<sup>296</sup>

Judge Broderick also appeared to view the final settlement agreement as a victory, despite two Supreme Court reversals that questioned his expansive use

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287. *Id.* He referred specifically to the way the majority treated *Ex parte Young*, 209 U.S. 123, 152 (1908).

288. PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1201 (Found. Press, 3d. ed. 1988).

289. John Woestendiek, *State Plans to Close Pennhurst*, PHILA. INQUIRER, Nov. 26, 1983, at A01.

290. Amy Linn, *Order to Close Pennhurst Ends Landmark Case*, PHILA. INQUIRER, Apr. 6, 1985, at A01.

291. Robert A. Burt, *The Judge*, in IN THE INTEREST OF CHILDREN, *supra* note 25, at 362.

292. *Halderman v. Pennhurst State Sch. & Hosp.*, 610 F. Supp. 1221, 1226–34 (E.D. Pa. 1985).

293. *Id.*

294. *Id.* at 1227–29.

295. *Id.* at 1227.

296. *See id.* at 1226–29.

of judicial power.<sup>297</sup> “This settlement is more than just a termination of litigation,” Judge Broderick wrote in the concluding paragraph of his 1985 approval order, “it is the beginning of a new era.”<sup>298</sup> It was an era in which people on various sides of the issue could agree that people with intellectual or developmental disabilities “have a right to care, education and training in the community”; that such citizens “are not subjects to be warehoused in institutions”; and that “they are individuals, the great majority of whom have a potential to become productive members of society.”<sup>299</sup>

This is a vital legacy. But there were other legacies, too.

### III.

#### LEGACIES

In the decades after Pennhurst’s closure, as former residents dispersed into the community, the Supreme Court cases that bore their names lessened the appeal of federal litigation based on the “right to habilitation” and “right to treatment.” Advocates of deinstitutionalization perceived the closing of a door, the end of an era.<sup>300</sup> Some followed the arrows to state court, pursuing claims under “patients’ bill of rights” laws, state constitutional provisions, and other state law guarantees.<sup>301</sup> Some continued to summon federal government power—just in different ways. They filed individual suits and hoped that these would spark broader change;<sup>302</sup> they encouraged the U.S. Department of Justice to investigate and prosecute state institutions, using its authority under the Civil Rights of Institutionalized Persons Act (CRIPA) (1980);<sup>303</sup> they lobbied for

297. *See id.* at 1233–34.

298. *Id.*

299. *Id.*

300. *See* Barbara R. Grumet, *The Changing Role of the Federal and State Courts in Safeguarding the Rights of the Mentally Disabled*, 15 PUBLIUS: J. FEDERALISM 67, 72–73 (1985).

301. *See* Katie Eyer, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness*, 28 N.Y.U. REV. L. & SOC. CHANGE 1, 12–13 (2003) (documenting the different legal bases on which state law right-to-treatment claims have been predicated). As far as I can tell, existing research has not resolved whether there is “parity” between state and federal courts when it comes to enforcing the federal rights of disabled plaintiffs. It is also unclear whether state law, as interpreted by state courts, is a better or worse protector of disabled plaintiffs than federal law. On state law as a resource, *see generally* Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier*, 20 LOY. L.A. L. REV. 1249 (1987); Eyer, *Litigating for Treatment, supra*. *But see* Am. Bar Ass’n, *State Courts Slow Deinstitutionalization*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 98, 98–100 (1987) (documenting decisions from two state courts limiting their state’s obligations to institutionalized individuals). My own research on post-*Pennhurst II* right-to-treatment-type cases in state courts showed neither sweeping success nor sweeping failure. This research also suggests that any state court findings regarding legal rights will exist alongside recognition of limited resources.

302. *See, e.g.,* *Clark v. Cohen*, 613 F. Supp. 684, 706 (E.D. Pa. 1985) (finding that state officials had denied to the institutionalized plaintiff her “fundamental right to liberty . . . without due process” and finding the plaintiff entitled to injunctive relief).

303. Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349. On the history of CRIPA and its enforcement, *see generally* KAREN E. HOLT, *WHEN OFFICIALS CLASH: IMPLEMENTATION OF THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT* (1998). A striking

statutory and administrative changes that could encourage states to invest in less restrictive forms of care; and, after 1990, they attempted to leverage the anti-discrimination protections in the Americans with Disabilities Act (ADA).<sup>304</sup> To the extent that these efforts harnessed federal power against the states, however, they did so less directly and arguably less forcefully than the litigants did in *Pennhurst*.<sup>305</sup>

Meanwhile, the Supreme Court's two *Pennhurst* decisions developed lives of their own, separate from the deinstitutionalization context. These judicial legacies helped entrench a changed understanding of the federal government's role in articulating and vindicating basic entitlements—not only for Americans with developmental and intellectual disabilities, but for the much wider set of Americans that have relied on federal power to secure material and dignitary support.

#### A. Constraining the Rights-Giving Congress

Consider first the clear statement rule articulated in *Pennhurst I*. This canon of statutory interpretation intervened in a long-running debate over the use of federal resources (i.e., the exercise of the Spending Power) to secure cooperation from state governments. The stakes of this debate seemed to grow higher every year, as the number of federal-state grant-in-aid programs multiplied and public expectations of government grew. In the words of one concerned commentator, there was a veritable “explosion” of such grants in the 1960s and 1970s; their share of the Gross National Product went from 0.1 percent in 1929, to 1.1 percent in 1939 (as the New Deal expanded their use), to 3.6 percent in 1978.<sup>306</sup> These grants brought with them power—including the power to impact citizens' lives in meaningful ways—but also costs, burdens, and uncertainties.<sup>307</sup> They also sometimes created hopes or demands that states and localities were not able or willing to fulfill, thereby sparking sharp conflicts.

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finding throughout the book is how much CRIPA enforcement has depended on the preferences of whoever controls the executive branch. *See id.*; *see also* Robert D. Dinerstein, *The Absence of Justice*, 63 NEB. L. REV. 680, 681–82, 692–707 (1984) (demonstrating that the Reagan Administration significantly cut back on CRIPA enforcement, bringing virtually no new cases under CRIPA); Interview with Arthur Peabody (Jan. 19, 2021).

304. *See, e.g.*, *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 593–94 (1999). For an excellent overview of this “second . . . wave of deinstitutionalization litigation,” as well as an analysis of the political forces that are likely to shape its trajectory, *see* Bagenstos, *supra* note 6, at 1, 31–51.

305. A notable example is the Supreme Court's decision in *Olmstead*, 527 U.S. Although the case was an important victory for disability rights and is rightly celebrated for the more inclusive future it might yet help produce, the decision also tethers disability rights to a number of external factors, including state resources. 527 U.S. at 607; Interview with Steve Gold (Jul. 30, 2019).

306. Bruce J. Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, 20 URB. L. 25, 32 (1988).

307. *See* John E. Chubb, *Federalism and the Bias for Centralization*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 273 (John E. Chubb & Paul E. Peterson eds., 1985) (documenting these concerns).

Over time, the *Pennhurst I* clear statement rule had the effect that conservative lawyer Michael McConnell predicted, albeit not in every instance that defendants raised it. The myth remained “that Congress could ‘do anything’ under its power to tax and appropriate,” to borrow legal historian Michele Landis Dauber’s words.<sup>308</sup> But in practice, the clear statement rule limited the scope and effectiveness of some Spending Clause statutes.<sup>309</sup> This Section begins with two examples from the 1980s to make the point that lower federal courts did take note of *Pennhurst I* and that the clear statement rule had real consequences for some of the populations Congress intended to benefit. I then review the rule’s implications for federally guaranteed civil rights and government-funded health insurance.

*Pennhurst I*’s clear statement rule is what Professor Stephen Ross has called a “normative canon”: it expresses a “principle[] . . . that do[es] not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct[s] courts to construe any ambiguity in a particular way in order to further some policy objective.”<sup>310</sup> The principle at the heart of *Pennhurst I*’s clear statement rule is solicitude for the states—a principle that the Court cast as so deeply rooted that there would be no unfairness, going forward, for the new clear statement rule to apply to any number of other statutes that were drafted before Congress had formally heard of the rule.

Consider, for example, the narrowing of the Adoptive Assistance and Child Welfare Act of 1980 in the 1989 case *Aristotle v. Johnson* out of the Northern District of Illinois.<sup>311</sup> The statute made available payments to states with an approved foster care and adoption assistance plan.<sup>312</sup> One “requisite feature” of a state plan was that it provide for “reasonable efforts to reunify families.”<sup>313</sup> Another was that it “provide for a case review system” designed around the goal

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308. Michele Landis Dauber, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 390 (2005) (quoting Justice Harlan F. Stone).

309. Terry Jean Seligmann has illustrated this trend well, with an article that sweeps broadly but also delves deeply into the Supreme Court’s interpretation of the Individuals with Disabilities Education Act. See generally Seligmann, *supra* note 9. For a brisk discussion of the development of the clear statement rule and a thorough review and evaluation of the various rationales that have been offered for it, see generally Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking about Conditional Grants on Federal Funds*, 37 CONN. L. REV. 155 (2004). For a particular focus on the clear statement rule in the Roberts Court era (albeit one written pre-*NFIB v. Sebelius*), see Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 394–95 (2008).

310. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992).

311. 721 F. Supp. 1002, 1011–12 (N.D. Ill. 1989). Judge Williams did not treat the plaintiffs in this case as entirely without remedy. In denying, in part, the defendant State’s motion to dismiss, Judge Williams noted “the plaintiffs’ constitutionally protected right to associate with their siblings” and made clear that infringements of this right should be “evaluated under a heightened level of scrutiny.” *Id.* at 1006.

312. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

313. *Id.*

of placement “in the least restrictive, most family like setting.”<sup>314</sup> The plaintiff children alleged that the Illinois Department of Children and Family Services accepted federal funds but disregarded plan requirements—for example, by separating them from their siblings and refusing to arrange sibling visits.<sup>315</sup> The court, citing *Pennhurst I*, deemed these plan requirements unenforceable.<sup>316</sup> In Judge Ann Williams’s view, the statutory language was “amorphous and not subject to precise definition”; “Congress did not ‘unambiguously’ express its intent to condition the grant of federal funds on the state’s compliance” with those particular terms.<sup>317</sup>

The D.C. Circuit reached a similar decision in the 1987 case *Edwards v. District of Columbia*, involving the United States Housing Act of 1937 (as amended in 1983).<sup>318</sup> The case began when a group of current and former residents of a federally funded housing project, Fort Dupont, alleged “constructive demolition” of that complex, via a pattern of neglect and abandonment by the local housing authority.<sup>319</sup> The plaintiffs characterized these actions as inconsistent with the United States Housing Act, which set forth specific conditions upon which the Secretary of the Department of Housing and Urban Development (HUD) could approve demolition.<sup>320</sup> The plaintiffs emphasized that the local housing authority had yet to receive HUD approval at the time it abandoned their home.<sup>321</sup> The circuit court affirmed the dismissal of the complaint, relying heavily on *Pennhurst I*.<sup>322</sup> Chief Judge Patricia Wald’s majority opinion characterized the housing authority’s alleged circumvention of the prescribed process as perhaps “insensitive,” but not so clearly prohibited by the statute as to give the housing authority fair notice that acceptance of federal funds might carry with it a duty not to do what it did.<sup>323</sup>

The dissent from Senior District Court Judge Hubert Louis Will, sitting by designation, illuminates the stakes of this interpretive canon. Having entered the legal profession as a “New Deal lawyer” and joined the judiciary under President Kennedy, Judge Will was likely accustomed to a more generous approach to Congress’s handiwork and struggled with *Pennhurst I* (or at least Judge Wald’s

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314. *Id.*

315. *Aristotle*, 721 F. Supp. at 1004.

316. *Id.* at 1003–12.

317. *Id.* at 1012 (quoting *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 17, 24–25 (1981)).

318. 821 F.2d 651, 662–63 (D.C. Cir. 1987).

319. *Id.* at 654.

320. *Id.* at 652–54.

321. *Id.*

322. *Id.* at 652–63.

323. *Id.* at 660. As Chief Judge Wald had recognized several years earlier in a law review article about the Supreme Court’s approach to statutory interpretation, a “popular presumption” on the Court was that “Congress did not intend to interfere with the traditional power and authority of the states unless it signaled its intention in neon lights.” Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 208 (1983). Although the *Edwards* case involved a local government, not a state government, she apparently applied this same presumption.

reading of it).<sup>324</sup> Looking at the statute in question, its legislative history, and HUD's implementing regulations, he found a clear intention not to allow "destruction of a housing project without prior approval."<sup>325</sup> The court now invited local housing authorities to do just that, he alleged, with potentially tragic implications for "the available supply of low-income housing" and "the plight of our nation's homeless and impoverished citizens."<sup>326</sup>

*Edwards v. District of Columbia* led promptly to a congressional override,<sup>327</sup> but in other instances, Congress could not or would not pay the "clarity tax"<sup>328</sup> that the clear statement rule imposed (or perhaps simply did not object to courts' clear statement holdings). One notable example is *Arlington Central School District Board of Education v. Murphy*, in which the Supreme Court applied *Pennhurst I*'s clear statement rule in a way that narrowed the potential damages available under the Individuals with Disabilities Education Act.<sup>329</sup> Another is *Gregory v. Ashcroft*, which limited the reach of the Age Discrimination in Employment Act (and is noteworthy for extending *Pennhurst I* outside the grant-in-aid context).<sup>330</sup>

To be sure, these examples represent only a small fraction of the statutes governing American life at the end of the twentieth century. That some of their terms became less enforceable or unenforceable in private lawsuits mattered greatly to those statutes' beneficiaries, but what about the broader legal landscape?

Most consequentially, *Pennhurst I*'s clear statement rule has affected the reach of what Professor Joy Milligan has called "Spending Clause civil rights" guarantees: anti-discrimination laws that use as their "hook" a potential discriminator's reliance on federal funds.<sup>331</sup> Title VI of the Civil Rights Act of 1964 is a prominent example. Two others are Title IX of the Education Amendments of 1972 (dealing with sex-based discrimination) and Section 504

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324. See Hubert Louis Will Profile, FED. JUD. CTR., <https://www.fjc.gov/node/1389801> [<https://perma.cc/M5QR-NYJL>].

325. *Edwards*, 821 F.2d at 670.

326. *Id.*

327. See Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (clarifying local housing authorities' duties not to constructively demolish public housing). For another example of this pattern, see *Virginia Department of Education v. Riley*, 106 F.3d 559, 560-61 (4th Cir. 1997).

328. Manning, *supra* note 9, at 399; see also Eskridge & Frickey, *supra* note 9, at 639 (explaining how difficult it can be to override a Supreme Court statutory decision).

329. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-304 (2006) (applying the rule developed in *Pennhurst I* to find that the IDEA did not put states on notice of their potential liability for expert-services fees in private enforcement actions).

330. See *Gregory v. Ashcroft*, 501 U.S. 452, 455-73 (1991). These citations should not be read to suggest that "clear statement" arguments have always worked for the litigants who raised them. For counterexamples, see *Forest Grove School District v. T.A.*, 557 U.S. 230, 246-48 (2009); *Madison v. Virginia*, 474 F.3d 118, 124-26 (4th Cir. 2006); *Lampkin v. District of Columbia*, 27 F.3d 605, 611 (D.C. Cir. 1994).

331. Milligan, *supra* note 10, at 6.

of the Rehabilitation Act of 1973 (regarding disability). Importantly, these anti-discrimination mandates go well beyond specific programs. In the case of Title VI and Section 504, they reach all recipients of federal funds. In the case of Title IX, they reach all educational activities or programs that receive federal funds.<sup>332</sup>

Immediately after the Supreme Court decided *Pennhurst I*, there were ripple effects in the realm of Spending Clause civil rights. Consider, for example, the Seventh Circuit's decision in *Lieberman v. University of Chicago* (1981). Plaintiff Judy Lieberman claimed that, because of her sex, she was not awarded a place at the University of Chicago's Pritzker School of Medicine, which was near where she and her husband lived.<sup>333</sup> Ultimately, she accepted a spot at Harvard Medical School.<sup>334</sup> Lieberman alleged violation of Title IX and sought compensatory damages, including for moving expenses and loss of consortium.<sup>335</sup> Citing *Pennhurst I*, the court concluded that Title IX did not explicitly create a damages remedy and therefore institutions like the defendant were not on notice of how their acceptance of federal funds might trigger this potential liability.<sup>336</sup> Lieberman remained free to seek injunctive or declaratory relief under the statute, but the institution that allegedly wronged her could not be held responsible for the material consequences of its actions.<sup>337</sup> Dissenting Judge Luther Meritt Swygert labeled the decision "an evisceration" of Title IX's ban against sex discrimination.<sup>338</sup>

Just over a decade later, in *Franklin v. Gwinnett County Public Schools*, the Supreme Court clarified that in *some* Title IX cases—those involving allegations of intentional discrimination—monetary damages were available.<sup>339</sup> But, building on its fractured opinion in the Title VI case *Guardians v. Civil Service Commission*,<sup>340</sup> the Court strongly suggested that the clear statement rule from *Pennhurst I* would pose a problem if the alleged conduct was not intentionally discriminatory.<sup>341</sup> In such situations, the defendant funding recipient may not have contemplated liability for monetary damages.<sup>342</sup>

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332. 660 F.2d 1185, 1186–89 (7th Cir. 1981).

333. *Id.* at 1186.

334. *Id.*

335. *Id.*

336. *Id.* at 1186–89.

337. *Id.*

338. *Id.* at 1189 (Swygert, J., dissenting).

339. 503 U.S. 60, 62 (1991).

340. The Court drew here on its fractured 1983 decision *Guardians v. Civil Service Commission*, which involved a claim under Title VI of the 1964 Civil Rights Act and a factual situation that sounded in disparate impact rather than intentional discrimination. *See* *Guardians v. Civ. Serv. Comm'n*, 463 U.S. 582, 584–89 (1983). Justice White's controlling opinion cited *Pennhurst I* for the proposition that "'make whole' remedies" (such as money damages) "are not ordinarily appropriate in private actions seeking relief for violations of" Spending Clause statutes because such remedies might represent "unanticipated burdens" not obvious to a state at the time they accepted federal funds. *Id.* at 596.

341. *See* *Gwinnett*, 503 U.S. at 73–74.

342. *Id.*

The Supreme Court addressed Title VI more squarely in 2002, in the police misconduct case *Barnes v. Gorman*, and again used the logic of *Pennhurst I* to impose limits.<sup>343</sup> The case involved serious injuries to a paraplegic man in police custody and claims under Section 202 of the ADA and Section 504 of the Rehabilitation Act.<sup>344</sup> The legal question was whether punitive damages—here, a \$1.2 million jury award—were available in suits brought under Title VI (which would, in turn, decide the question for the ADA and Section 504).<sup>345</sup> Writing for the Court, Justice Scalia answered “no.”<sup>346</sup> *Pennhurst I* said that federal-state grants-in-aid were akin to a contract, Scalia explained, and liability for punitive damages for Title VI violations was simply not part of the bargain that federal funding recipients agreed to when they accepted federal money.<sup>347</sup> Concurring only in the judgment, Justice Stevens (joined by Justices Ginsburg and Breyer) wrote separately to warn of the Court’s “particularly inappropriate” “reliance on, and extension of *Pennhurst*,” and also to dispute whether “the rules of contract law” were “necessarily relevant to the tortious conduct” at issue.<sup>348</sup> “The Court’s novel reliance on what has been, at most, a useful analogy to contract law has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case,” Justice Stevens warned.<sup>349</sup>

The Court’s approach to the Spending Clause civil rights case *Cummings v. Premier Rehab Keller, P.L.L.C.*,<sup>350</sup> from the 2021-22 Term, bears out Justice Stevens’s warnings. Described by her lawyers as “deaf since birth” and “legally blind,” Cummings alleged that a Texas-based physical therapy provider violated her rights under Section 504, as well as the Patient Protection and Affordable Care Act of 2010 (ACA), when it refused to provide her with an American Sign Language interpreter at her sessions.<sup>351</sup> She sought compensation for

343. 536 U.S. 181, 185–90 (2002). Scholars have recognized this line of reasoning as a significant elaboration of *Pennhurst I*, turning what had been an analogy to contract into an implied assumption that grants-in-aid were, in fact, contracts, to be governed by contract law principles of interpretation. *See id.* (reasoning that “punitive damages . . . are generally not available for breach of contract”). For an elaboration of the “contract thesis” of the spending power, see David Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496 (2007).

344. *Barnes*, 536 U.S. at 183–90.

345. *Id.*

346. *Id.*

347. *Id.* at 188. Lower courts continue to struggle with what exactly this line of cases means for Section 504, posing problems for all of the parties that this law affects. The most recent American Law Reports commentary on the availability of damages under Section 504 describes the issue as “an extremely contentious one, with many disagreements between the circuits” and with six of the circuits reporting intra-circuit disagreement on the issue. John A. Bourdeau, Annotation, *Availability of Damages Under § 504 of Rehabilitation Act (29 U.S.C.A. § 794) in Actions Against Persons or Entities Other than Federal Government or Agencies Thereof*, 145 Am. L. Reps. Fed. 353 (1998).

348. 536 U.S. at 192 (Stevens, J., concurring).

349. *Id.* at 192–93.

350. *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, 596 U.S. \_\_ (2022) (available at [https://www.supremecourt.gov/opinions/21pdf/20-219\\_1b82.pdf](https://www.supremecourt.gov/opinions/21pdf/20-219_1b82.pdf) [<https://perma.cc/4MRK-XEPY>]).

351. Brief for Petitioner at 10, *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219 (U.S. Aug. 23, 2021) (available at <https://www.supremecourt.gov/DocketPDF/20/20->

“humiliation, frustration, and emotional distress.”<sup>352</sup> Tellingly, the oral argument revolved around the notion of a “contract” between the federal government and its grantee—an idea borrowed directly from *Pennhurst I.*<sup>353</sup> Indeed, the contract analogy has now become so firmly embedded in the Court’s Spending Clause jurisprudence that contract law, rather than Congress’s equality mandates, dominated the discussion.<sup>354</sup>

Chief Justice John Roberts, who clerked for Justice Rehnquist at the time of *Pennhurst I.*, wrote the Court’s opinion in favor of the physical therapy provider—and devoted the opinion’s first citation to *Pennhurst I.*<sup>355</sup> The opinion went on to find that compensatory damages for emotional distress were not available under existing Spending Clause civil rights statutes because, following the logic of *Barnes*, there was “no basis in contract law to maintain that emotional distress damages are ‘traditionally available in suits for breach of contract’” and therefore “no ground” to conclude that recipients of federal funds had “clear notice” that they might be on the hook for such damages.<sup>356</sup>

It was an odd opinion in that the majority insisted that contract was just an analogy—a position reminiscent of Justice Stevens’s warning in *Barnes*—while simultaneously relying heavily on contract law treatises, contract law Restatement provisions, and contract law scholarship. Here, the just-an-analogy position served to make available “general” or “normal” contract law principles while removing from consideration finer-grained readings of contract law that supported the availability of emotional distress damages in certain contexts. As Chief Justice Roberts explained elsewhere in the opinion, the Court was only really interested in contract law principles that might limit the liability of federal funding recipients.<sup>357</sup>

Cases like *Barnes* and *Cummings* may seem relatively insignificant, especially to people who are inclined to see the disabled plaintiffs’ experiences

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219/188259/20210823125207944\_20-219ts-1.pdf [https://perma.cc/UZB5-MTCN]). She also sought injunctive relief. *Id.* at 11.

352. *Id.*

353. Transcript of Oral Argument at 3–4, *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219, 596 U.S. \_\_\_ (2022) (available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/20-219\\_h3dj.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-219_h3dj.pdf) [https://perma.cc/4UPQ-QV43]).

354. The word “contract” (or a variation thereof) appears ninety-seven times in the eighty-nine-page transcript of the oral argument. *See id.*

355. *Cummings*, 596 U.S., slip op. at 1.

356. *Id.* at 2 (quoting *Barnes v. Gorman*, 536 U.S. 181, 187 (2002)).

357. *Id.* at 10 (“[O]ur cases do not treat suits under Spending Clause legislation as literal ‘suits in contract’ . . . . Rather . . . we employ the contract analogy ‘only as a potential *limitation* on liability’ compared to that which ‘would exist under nonspending statutes.’”) (quoting *Sossamon v. Texas*, 563 U.S. 277, 290 (2011)). This awkward parsing of contract law appears to have motivated Justice Kavanaugh’s concurrence, joined by Justice Gorsuch. Recognizing that the majority opinion and the dissent were both able to draw persuasively on contract law, Justice Kavanaugh urged the Court to instead return to first principles (chiefly separation of powers) and treat emotional distress damages as a matter for Congress to speak upon directly, if it so chose. He suggested that the Court had gone far enough with “implied causes of action” and should insist on getting additional guidance before venturing further. *Id.* at 1 (Kavanaugh, J., concurring).

in these cases as marginal or exceptional, but together they reveal an important pattern. Spending Clause civil rights statutes have historically been a crucial tool to combat discrimination; the clear statement rule and the contract analogy used to explain that rule have allowed accused discriminators to elude responsibility, or at least to significantly lower the cost of discriminating. As Justice Breyer noted in his dissent in *Cummings*, such a result is “difficult to square . . . with the basic purposes that antidiscrimination laws seek to serve.”<sup>358</sup>

*Pennhurst I*'s most famous (and yet still underappreciated) legacy, however, is surely the Spending Power limitation that Chief Justice Roberts articulated in *National Federation of Independent Business (NFIB) v. Sebelius* (2012), a landmark case involving the constitutionality of the Affordable Care Act.<sup>359</sup>

*NFIB v. Sebelius* upheld key provisions of the ACA but struck down the “Medicaid expansion,” the provision requiring the states to expand their Medicaid programs by 2014 to cover all low-income Americans under the age of sixty-five or risk losing all of their existing Medicaid funding.<sup>360</sup> “As we have explained,” Chief Justice Roberts wrote, quoting *Pennhurst I*, “though Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.”<sup>361</sup>

Chief Justice Roberts also cited *Pennhurst I* and its progeny for observations about the system of dual sovereignty that the Framers established and the potential of Spending Clause legislation to “undermine the status of the States” in that system.<sup>362</sup> From this vantage point, the ACA’s Medicaid expansion looked alarming—fatally so.<sup>363</sup> Chief Justice Roberts likened it to one sovereign (the federal government) holding “a gun to the head” of the other (the states).<sup>364</sup> And thus for the first time in Spending Clause history, noted Professor Lynn Baker, the Court invalidated an “offer of federal funds to the States on the ground that it was unconstitutionally coercive.”<sup>365</sup>

Concurring in the judgment in part and dissenting in part, Justice Ginsburg took special note of Chief Justice Roberts’s use of *Pennhurst I*.<sup>366</sup> Crucial to the majority’s holding regarding the Medicaid expansion was “the notion that States must be able to foresee, when they sign up, alterations Congress might make

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358. *Id.* at 10 (Breyer, J., dissenting).

359. *See* 567 U.S. 519 (2012); Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

360. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 584.

361. *Id.*

362. *Id.* at 577.

363. *Id.* at 577–81.

364. *Id.* at 581.

365. Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 71, 73 (2014).

366. *See Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 637 (Ginsburg, J., dissenting).

later on”]; *Pennhurst I* was the “only” case the Chief Justice cited for that proposition, Ginsburg observed.<sup>367</sup>

The stakes of *NFIB v. Sebelius* were high. As of the time of this writing, in the midst of a public health crisis, twelve states have declined to expand their Medicaid programs, stranding more than two million people in a healthcare “coverage gap.”<sup>368</sup> The decision has also disadvantaged an additional 1.8 million uninsured, low-income adults who are currently eligible for marketplace coverage but who, under the expansion, would be eligible for the more comprehensive and less costly benefits that Medicaid offers.<sup>369</sup> Outside the healthcare context, meanwhile, *NFIB v. Sebelius* has emboldened critics of government regulations, such as states and industry groups that feel unfairly burdened by the Clean Air Act<sup>370</sup> and federal education funding conditions.<sup>371</sup> They have not yet succeeded in their legal challenges, but, if history is any guide, they are not wrong to discern seeds of possibility in this landmark decision.<sup>372</sup>

These developments reinforce one of this Article’s core claims: that from *Pennhurst I*’s seemingly limited principle of statutory interpretation, there emerged a powerful justification for a more general cabining of the Spending Power. This is no small development: historically, distributions of federal funds have been a crucial vehicle for protecting civil rights and advancing the general welfare.<sup>373</sup> This vehicle became even more important as the Supreme Court placed greater limits on Congress’s power under two other major grants of

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367. *Id.* Ginsburg conceded that *Pennhurst I* was a relevant precedent, but she interpreted it differently. In her view, there was no “clear statement” problem because the disputed provision was not set to go into effect until several years after the ACA’s enactment, giving states ample time to consider their choices and withdraw from the Medicaid program if they were no longer amenable to federal conditions. *Id.* at 637–38.

368. Rachel Garfield, Kendal Orgera & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND. (Jan. 21, 2021), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/> [https://perma.cc/DJ5H-ZWW4].

369. *Id.* Congress could, of course, devise a different scheme for meeting the population’s healthcare needs. But given congressional gridlock and the forces arrayed against universal, nationally administered healthcare, the framework of the ACA appears likely to govern this field for the foreseeable future.

370. *See, e.g.*, *Texas v. EPA*, 726 F.3d 180, 182–83 (2013); Miss. Comm’n on Env’t Quality v. EPA, 790 F.3d 138, 144–86 (2015).

371. *See, e.g.*, *Jindal v. U.S. Dep’t of Educ.*, 2015 U.S. Dist. LEXIS 123257, at \*2–5 (M.D. La. 2015).

372. *See* Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577 (2013); Sarah Buckley, Note, *Clean Air Post-Healthcare: The Federalism Limits of the Spending Power and the Future of Environmental Regulation*, 101 VA. L. REV. 807 (2015).

373. On the importance of federal-state grants-in-aid as a national policymaking device, historically and in the twenty-first century, see DERTHICK, *supra* note 10; JOHNSON, *supra* note 10; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920 (2015); TANI, *supra* note 95.

authority, the Fourteenth Amendment<sup>374</sup> and the Commerce Clause.<sup>375</sup> It is a weaker vehicle now.

*B. Insulating the States from Accountability*

*Pennhurst II* (1984) also turned out to be a crucial step in the court-led realignment of federal and state power. Directly in its wake came *Atascadero State Hospital v. Scanlon* (1985), in which the Court held that the Rehabilitation Act did not abrogate states' Eleventh Amendment immunity from suit.<sup>376</sup> In the face of less-than-clear congressional language, the Court protected "the fundamental principle of sovereign immunity" that *Pennhurst II* had articulated.<sup>377</sup> The 1989 case *Dellmuth v. Muth* produced a similar conclusion regarding the 1975 Education of the Handicapped Act<sup>378</sup>—despite a 1986 statute indicating that Congress had overruled *Atascadero* and, further, that it intended to abrogate state immunity for suits brought under this statute.<sup>379</sup>

In giving such strong constitutional grounding to the principle of state sovereign immunity, *Pennhurst II* also paved the way for the better-known state sovereignty cases of the 1990s. A key example is *Seminole Tribe of Florida v. Florida*, in which the Supreme Court sharply circumscribed Congress's ability to create a private federal cause of action against a state for the violation of a federal right.<sup>380</sup> Previous cases had suggested that Congress could do so whenever it was legislating for a constitutionally authorized purpose, so long as it clearly stated its intention to abrogate state sovereign immunity.<sup>381</sup> Writing for the majority in *Seminole Tribe*, Chief Justice Rehnquist changed course, characterizing as valid only those private federal causes of action that could be linked to Congress's enforcement power under the Fourteenth Amendment.<sup>382</sup> As with *Pennhurst II*, the dissents were sharp and vigorous. But the conservative majority's interpretation of state sovereign immunity was becoming ever more entrenched.

*Alden v. Maine* (1999), involving an allegation that Maine violated the Fair Labor Standards Act in its treatment of state probation officers, continued that

374. See Galle, *supra* note 309, at 158 ("[R]ecent cut-backs in Congress's ability to use its power under Section Five of the Fourteenth Amendment to enact constitutionally-inspired legislation broader than what the Supreme Court has been willing to recognize place increasing weight on the Spending Clause—the best available avenue for reinvigorating the Constitution in the states.").

375. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551–68 (1995); *United States v. Morrison*, 529 U.S. 598, 601–27 (2000).

376. 473 U.S. 234, 247 (1985).

377. *Id.* at 238 (quoting *Pennhurst II*).

378. On the terminology used in this statute, see *supra* text accompanying note 119.

379. 491 U.S. 223, 228–29 (1989). Congress subsequently overrode *Dellmuth*, but the fact that it had to do so demonstrates the power of the *Pennhurst II* clear statement rule. Eskridge & Frickey, *supra* note 9, at 639.

380. 517 U.S. 44, 74 (1996).

381. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5–14 (1989).

382. *Seminole Tribe*, 517 U.S. at 59.

trend: the Court's conservative majority extended the holding in *Seminole Tribe* to actions against states in state court.<sup>383</sup> Along with other cases that term, *Alden* famously prompted Justice Stevens to compare the Court's emergent sovereign immunity jurisprudence to "a mindless dragon that indiscriminately chews gaping holes in Federal statutes."<sup>384</sup>

*Pennhurst II* was crucial to the dragon's growth. As Professor William Baude has explained, *Alden v. Maine* can only be justified if the principle of sovereign immunity enjoys some kind of constitutional protection (i.e., it is more than just common law) but receives that protection somewhere other than the Eleventh Amendment (which would have no bearing on a suit in state court).<sup>385</sup> *Pennhurst II*, though an Eleventh Amendment case, invited this interpretation by characterizing sovereign immunity as bigger than any single constitutional provision.<sup>386</sup> It was a "fundamental principle," the Court explained in *Pennhurst II*, with a "vital role . . . in our federal system."<sup>387</sup>

By the early 2000s,<sup>388</sup> the Court recognized only one circumstance in which Congress could hale a non-consenting state into federal court: where Congress was exercising its power under Section Five of the Fourteenth Amendment.<sup>389</sup> Other Rehnquist Court decisions, meanwhile, made clear that Congress's Section Five power had limits.<sup>390</sup> Indeed, in the wake of these decisions, the Court rejected two major congressional attempts to abrogate state sovereign

383. 527 U.S. 706, 759–60 (1999).

384. Linda Greenhouse, *The Supreme Court; Federalism; States Are Given New Legal Shield by the Supreme Court*, N.Y. TIMES (June 24, 1999), <https://www.nytimes.com/1999/06/24/us/the-supreme-court-federalism-states-are-given-new-legal-shield-by-supreme-court.html> [<https://perma.cc/63VC-WJVA>].

385. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 15–17 (2017). Baude described sovereign immunity as a "constitutional 'backdrop,'" *id.* at 3, invoking the work of Steven Sachs. *See id.* at 3; Steven E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) (identifying as "constitutional 'backdrops'" those "rules of law that aren't derivable from the Constitution's text, but . . . are left unaltered by the text, and in fact are protected by the text from various kinds of legal change").

386. *See Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 98–99 (1984).

387. *Id.*; *see also Alden*, 527 U.S. at 728, 757 (citing *Pennhurst II* for the proposition that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself" and for the idea that "the principle of sovereign immunity . . . strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States"); *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (citing *Pennhurst II* for the proposition that "[s]overeign immunity principles enforce an important constitutional limitation on the power of the federal courts").

388. *Fed. Mar. Comm'n (FMC) v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002).

389. Stephen I. Vladeck, *State Sovereign Immunity and the Roberts Court*, 5 CHARLESTON L. REV. 99, 102 (2010).

390. *City of Boerne v. Flores*, 521 U.S. 507, 516–36 (1997) (holding that the Religious Freedom Restoration Act of 1993 was unconstitutional as applied to state and local governments because it exceeded Congress's power under Section Five).

immunity, for purposes of combating age discrimination and disability discrimination.<sup>391</sup>

In short, by the turn of the twenty-first century, the Court's sovereign immunity jurisprudence had combined with its Section Five jurisprudence to give states a thick layer of insulation from accountability in federal court.<sup>392</sup> Other doctrinal trends, in areas such as standing and pleading, added to the effect.<sup>393</sup> Americans who believed that states were violating their federally guaranteed rights could still sue state *officials* (under what remained of the doctrine of *Ex parte Young*).<sup>394</sup> But the state itself—and importantly, its treasury—was increasingly difficult to reach.<sup>395</sup>

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Taken each on their own terms, the legacies of *Pennhurst I* and *Pennhurst II* are noteworthy; taken together, they are striking. They remind us that only fifty years ago, the federal government had a relatively robust set of tools for elaborating the promise of the Reconstruction Amendments—the promise of a more inclusive society, a more egalitarian democracy, a less exploitative economy. As the 1960s drew to a close, Congress had an important tool in its ability to spend federal money, and to place conditions on the money it gave out. The federal judiciary, for its part, appeared more available than ever before to aggrieved individuals, especially those seeking to hold state and local officials to account. The *Pennhurst* cases show us how, in a piecemeal fashion, powerful legal and political actors succeeded in narrowing the federal government's scope of action.

#### IV.

##### RESTORING DISABILITY CONTEXT

This Article does not advance a “but for” argument—that without the *Pennhurst* litigation, the Court never would have articulated these doctrines. Given the composition of the Court in the 1980s, the popular perceptions of

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391. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (the Age Discrimination in Employment Act); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (the Americans with Disabilities Act).

392. Under the Court's current sovereign immunity jurisprudence, Congress retains the power to abrogate States' sovereign immunity and also to incentivize states to waive sovereign immunity (such as through Spending Clause statutes). See *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726–30 (2003). But, building on the same principles that undergird the clear statement rule, such interferences are valid only where Congress's intent to abrogate a State's sovereign immunity is “unequivocally expressed.” *Sossamon v. Texas*, 563 U.S. 277, 284 (2010). Moreover, even where a State has waived its immunity, the Court will not allow a plaintiff to recover money damages unless a State has expressly consented to this form of relief, a phenomenon that Professor Aaron Tang has labeled “double immunity.” Aaron Tang, *Double Immunity*, 65 STAN. L. REV. 279 *passim* (2013).

393. See generally STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

394. See *Ex parte Young*, 209 U.S. 123, 152 (1908).

395. Litigants may sue state officials in their *personal* capacity for damages, under 42 U.S.C. § 1983, but in doing so face other hurdles, including qualified immunity.

resource scarcity, and the powerful forces pushing for a more conservative approach to federal judicial enforcement of civil rights, it is entirely possible—even likely—that absent the *Pennhurst* case, the Burger or Rehnquist Court still would have articulated something like the clear statement rule in the cooperative federalism context. It still would have advanced a more expansive interpretation of the Eleventh Amendment and state sovereign immunity. Some other legal controversy would have been the vehicle.

But to acknowledge this likelihood does not change historical facts: *Pennhurst* was the vehicle. Can we extract any additional meaning from this—from recoupling the *Pennhurst* doctrines with the case’s original context? Reflecting on why the Supreme Court first agreed to hear *Pennhurst*, and canvassing Supreme Court case law more generally, I think we might.<sup>396</sup>

#### A. “Extreme” and “Expensive” Equality

Crucial to the Justices’ interest in the *Pennhurst* case, in my reading, was that it was both the same as and different from legal controversies they had seen before. It was the same in that the lower court judge had responded to a demand for equality and inclusion with a broad remedial decree. That decree required a major restructuring of the status quo at the local level and had significant implications for state finances. It therefore raised at least some Justices’ hackles. *Pennhurst* was different in that the rights at issue seemed more tenuous or more costly (or perhaps more tenuous because they seemed so costly) than the rights at issue in other cases implicating equality and inclusion. This made the district court’s order seem like even more of an imposition than similar orders from other contexts (e.g., busing).

This cost or burden narrative is one that runs across disability law cases and that disabled Americans have routinely encountered in their efforts to secure equal opportunity.<sup>397</sup> And that narrative clearly mattered in this case, despite mounting evidence that deinstitutionalization was more economical than institutionalization and was, indeed, the policy preference of a growing number of states.<sup>398</sup> Explaining to Justice Stevens why the first *Pennhurst* appeal might warrant a grant of certiorari, one of Stevens’s law clerks underscored cost.<sup>399</sup> The relief that the district court ordered was “very expensive,” and the clerk seemed

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396. My point here is not that the Supreme Court treated disabled litigants differently from other similarly situated litigants—although other scholars have persuasively made that argument. *See, e.g.,* Anita Silvers, Michael E. Waterstone & Michael Ashley Stein, *Disability and Employment Discrimination at the Rehnquist Court*, 75 *MISS. L.J.* 945 (2006). It is that cases involving disabled litigants enabled or invited statements about the law that perhaps would not have been so easily made in cases involving non-disabled litigants.

397. *See* Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act*, 60 *AM. J. COMP. L.* 205, 207 (2012).

398. Bagenstos, *The Past & Future*, *supra* note 6, at 20–21.

399. Box 178, JOHN PAUL STEVENS PAPERS (Library of Congress) [hereinafter STEVENS PAPERS].

incredulous that the rights of the Pennhurst plaintiffs required it.<sup>400</sup> Appropriations under the DD Act were \$75 million in 1981 (\$214.7 million in 2020 dollars), which the clerk translated into “minimal funds” from the states’ perspective.<sup>401</sup> The clerk doubted that a state would actually take those funds if it understood that Congress intended to require deinstitutionalization as a condition of receipt; this, in turn, made it doubtful that Congress intended to impose such a requirement.<sup>402</sup> A law clerk to Justice Powell raised the same concerns. Analyzing whether Congress could have intended to require habilitation in the “least restrictive” setting and, if so, whether that intention would support the district court’s order, the clerk characterized the remedy as “extreme.”<sup>403</sup>

Justice White’s memo to the Court, suggesting the questions on which cert should be granted, framed the appeal similarly. “[A]t the core of the dispute” was whether the DD Act required a state “to create and fund” community-based treatment facilities for the statute’s intended beneficiaries “irrespective of cost, available resources, or state policy” and whether affected individuals were allowed to enforce such a requirement via private litigation.<sup>404</sup> The lower courts’ answers to these questions had “far-reaching policy implications for States,” White concluded, making them worthy of the Court’s time.<sup>405</sup>

The eleven states that filed an amicus brief in support of the defendants stressed this point and suggested cost implications extending well beyond their disabled citizens. Quoting the Court’s recent abortion-funding decision, *Harris v. McRae*,<sup>406</sup> and shifting the focus of *Pennhurst* subtly from government-enforced segregation and maltreatment to government-funded liberty, the states asked what would happen “if the developmentally disabled may be ‘confer(red) an entitlement to such funds as may be necessary to realize the advantages of . . . freedom’?”<sup>407</sup> Their answer: “all other disadvantaged citizens should have such an entitlement as well.”<sup>408</sup> Besides causing “chao[s]” on the ground, this would be a deep affront to the states.<sup>409</sup>

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400. *Id.*

401. *Id.*

402. *Id.* The clerk did not note how the Reagan Administration’s budget-cutting efforts might have affected appropriations.

403. Paul Shechtman, Supp. Memorandum, Box 76, POWELL PAPERS, *supra* note 260 (quoting marginalia by Mary Ellen Richey).

404. Justice Byron R. White to the Conference, Re: Nos. 79-1404, 79-1408, 79-1414, 79-1415 & 79-1489 – Pennhurst State School & Hospital, etc., June 4, 1980, in Folder 327, BLACKMUN PAPERS, *supra* note 248. The vote to grant cert was 8 to 1, with only Justice Stewart voting against. Box 178, STEVENS PAPERS, *supra* note 399.

405. *Id.*

406. 448 U.S. 297 (1980).

407. Brief of Illinois, et al. as Amici Curiae Supporting Petitioner, Pennhurst State Sch. & Hosp. v. Halderman (*Pennhurst I*), 451 U.S. 1 (1981) (No. 79-1404).

408. *Id.*

409. *Id.* at 37.

The idea of expenses as affronts illuminates another facet of the cost narrative. Conversations about cost are also often conversations about *value*—about whether the thing associated with the cost is “worth it.” Where the answer is yes, cost narratives have less purchase. Consider, for example, the equal protection case *Plyler v. Doe* (1982), involving the exclusion from a Texas school district of children who could not prove their legal entitlement to live in the United States.<sup>410</sup> The Court dismissed out of hand Texas’s arguments about fiscal burden, characterizing the alleged costs as unsubstantiated and, in any event, “insubstantial” when compared to the interests at stake.<sup>411</sup> The plaintiff children were “innocent” and fully educable, capable of becoming productive members of society.<sup>412</sup> Denied their rights, they would experience the “enduring disability” of illiteracy, followed by “lifetime hardship” and “stigma.”<sup>413</sup> The Court went on to strike down the Texas statute at issue.<sup>414</sup>

Different judgments about value flow beneath the surface of *Pennhurst*, making available different legal arguments. As the Court noted in the opening of its opinion in *Pennhurst I*, 75 percent of Pennhurst residents were “either ‘severely’ or ‘profoundly’ retarded—that is, with an IQ of less than 35”—and some also had physical impairments.<sup>415</sup> There was no mention of their innocence or promise. In *Pennhurst II*, the Pennhurst residents were almost completely absent from the Court’s opinion, although there was discussion of the “plight of . . . the mental institutions,” which had long been “underfunded and understaffed.”<sup>416</sup>

My point is not that the Court should have denied cert in *Pennhurst* or that it was illegitimate for the defendants and their amici to raise concerns about cost and value. It is to note how readily the Justices seemed to accept this narrative of too-expensive rights—a narrative that might have felt unseemly or inappropriate in a different (non-disability) equality context. And once the Court had accepted the case, it was free to make major, trans-substantive pronouncements about the states’ sovereignty and dignity.

### B. *Judicial Restraint in the Face of Discrimination*

Broadening out from *Pennhurst*, we see that ideas about intellectual and developmental disability appear elsewhere in Supreme Court case law, often in

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410. 457 U.S. 202, 205 (1982).

411. *Id.* at 227–30.

412. *Id.* at 223–24.

413. *Id.* at 222–24.

414. *Id.* at 230.

415. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst I)*, 451 U.S. 1, 5–6 (1981). As readers at the time would likely have recognized, an IQ score of thirty-five is significantly below the “average” score of one hundred. I include the word “retarded” here because the Court clearly found meaning in it. At the time of the litigation, this word functioned as a clinical judgment about the nature and degree of an individual’s intellectual or developmental impairment. I acknowledge the term’s current offensiveness and do not wish to perpetuate its use.

416. *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 108 n.16 (1984).

ways that suggest the need to place boundaries and limits on equality principles. Consider the opening lines of former Solicitor General John W. Davis's argument before the Supreme Court in *Brown v. Board of Education*, as he pleaded the case of the Clarendon County, South Carolina school board:

I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity.<sup>417</sup>

These non-racial segregations—of different sexes, ages, and mental capacities—were obviously valid, Davis implied, and thus signaled states' right to segregate on the basis of race, too.<sup>418</sup> “If [a state] may classify . . . for one purpose . . . , it may, according to my contention, classify . . . for other.”<sup>419</sup> Davis trusted his audience to extrapolate: if a state may *not* classify on the basis of these traits, classrooms would become sites of unregulated mixing, including among “normal” children and those children that states had identified as subnormal or lesser in their mental functioning. Davis's argument did not prevail in *Brown*, but he was a famously savvy legal advocate; the rhetoric itself is telling.<sup>420</sup>

Or consider the Supreme Court's decision in *Cleburne v. Cleburne Living Center* (1985), involving a plan to build a group home for people with intellectual disabilities and a municipal zoning ordinance that required a special use permit for such a project.<sup>421</sup> Applying that ordinance, the City Council of Cleburne, Texas, had voted to deny the permit in this case.<sup>422</sup> The Supreme Court struck down this application of the ordinance as a violation of the Equal Protection Clause.<sup>423</sup> The decision was in some sense a victory for people with

417. Transcript of Oral Argument, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (available at <https://www.lib.umich.edu/brown-versus-board-education/oral/Marshall&Davis.pdf> [<https://perma.cc/82U8-QKEF>]). This example comes from Tom Gilhool, who mentioned it in interviews. I acknowledge that the Davis quote contains terms that today might be considered offensive, depending on the audience and the context. I include them here because to paraphrase would sanitize the quote and thereby prevent readers from seeing the racial calamity that Davis was attempting to invoke.

418. *See id.*

419. *Id.*

420. As Davis surely knew, his argument about “mental capacity” found support in the Supreme Court decision *Buck v. Bell*, 274 U.S. 200 (1927) (suggesting the constitutional validity of separating out and sterilizing individuals with intellectual disabilities); *cf.* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”). On Davis's career, influence, and reputation, see *Sydnor Thompson, John W. Davis and His Role in the Public School Segregation Cases—A Memoir*, 52 WASH. & LEE L. REV. 1679 (1996); WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973).

421. 473 U.S. 432, 435–36 (1985).

422. *Id.* at 437.

423. *Id.* at 450.

disabilities, especially people seeking noninstitutional placements in the community.<sup>424</sup> But the Court also explicitly rejected the notion that state or local laws singling out people with intellectual or developmental disabilities merited a higher-than-ordinary level of scrutiny, and in doing so, made sweeping statements about the Court's equal protection jurisprudence.<sup>425</sup>

The gist of these statements—packaged within an ostensible victory for *Cleburne*'s intellectually disabled residents—was that if the Court were to liberalize its equal protection jurisprudence in this case, everything would become unsettled.<sup>426</sup> The Court instead chose to characterize the existing tiers of scrutiny as firmly fixed; to make clear that a group's political marginalization was not, in and of itself, a sound reason for requesting a harder look from the courts; and to urge that both federalism and separation of powers counseled judicial restraint in this area.<sup>427</sup>

The implications of these jurisprudential choices extended well beyond the *Cleburne* litigants. Indeed, as Professor William Araiza has shown, it was certain Justices' desire to make these more general pronouncements that really drove the opinion.<sup>428</sup> Most obviously, *Cleburne*'s approach to the Equal Protection Clause affected whether other groups could claim a more exacting level of scrutiny from the courts in future cases. When combined with the Court's restrictive Section Five jurisprudence, the Court's statements in *Cleburne* also limited what Congress could do to remedy perceived discrimination. After all, if there were no constitutional violations to remedy, the Fourteenth Amendment gave Congress no authority to act.<sup>429</sup>

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424. *Id.*

425. *Id.* at 442. For useful summaries and critiques of the Court's equal protection holding, see Anita Silvers & Michael Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 84 (2001) (describing how the Supreme Court's "retrogressive" approach to disability in *Cleburne* imposed "a disability classification that presupposes incompetence"); Michael Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 541 (2014) (arguing that the *Cleburne* Court's analysis "created and perpetuated a harmful constitutional 'otherness' to the disability classification"). In *University of Alabama v. Garrett*, the Court would transform *Cleburne*'s holding as to individuals with intellectual or developmental disabilities into a more general holding as to "the disabled." 531 U.S. 356, 360–74 (2001); Waterstone, *supra*, at 543.

426. On the openness of the Court's equal protection jurisprudence in the years leading up to *Cleburne*, see Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014).

427. *Cleburne*, 473 U.S. at 441. As it turned out, *Cleburne*'s stringent application of rational basis review would undermine the majority's efforts to halt the liberalization of the Court's equal protection jurisprudence. With the distance of time, it is clear that it built support for "what scholars now call the 'animus' doctrine." William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 627 (2017). This result appears to have been purely "accident[al]." *Id.*

428. Araiza, *supra* note 427, at 623–26.

429. Waterstone, *supra* note 425, at 543–46; see also Pamela Brandwein, *Constitutional Doctrine as Paring Tool: The Struggle for "Relevant" Evidence in University of Alabama v. Garrett*, 35 U. MICH. J.L. REFORM 37 (2001) (explaining how this dynamic played out in *University of Alabama v. Garrett*).

Intellectual and developmental disability has also figured in underappreciated ways in cases involving affirmative rights to state or local government action. Consider the child at the heart of *DeShaney v. Winnebago County* (1989). Owing to a series of traumatic injuries inflicted by his father while four-year-old Joshua was formally under the protection of the county Department of Social Services, Joshua “suffered permanent brain damage and was rendered profoundly retarded.”<sup>430</sup> According to the Supreme Court’s recounting of the facts, Joshua was “expected to spend the rest of his life confined to an institution.”<sup>431</sup> The Court went on, famously, to articulate the limits of the government’s affirmative obligation under the Constitution’s Due Process Clauses: these Clauses “generally confer no affirmative right to governmental aid,” according to Chief Justice Rehnquist, “even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”<sup>432</sup> Were it otherwise, Rehnquist continued, every case like this, that inspired “natural sympathy” in lawyers and judges, might become the foundation for constitutional litigation.<sup>433</sup> This severely disabled child—“Poor Joshua,” as Justice Blackman memorialized him in dissent<sup>434</sup>—represented the slippery slope beneath the Justices’ feet.

From *DeShaney*, commentators have extracted a much broader idea: that the Constitution, as a whole, is a “charter of negative liberties”; it tells states only what they may *not* do, not what they must or should do, to ensure citizens’ well-being.<sup>435</sup> Even when a state statute guarantees a citizen a certain minimal level of state protection, and state officers tragically fail in their duties, the U.S. Constitution may well have nothing to offer the aggrieved citizen.

Indeed, citing *DeShaney*, the Court held as much in the domestic abuse case *Town of Castle Rock v. Gonzales*.<sup>436</sup> Jessica Gonzales had sued the Town of Castle Rock after the police department failed to enforce a domestic abuse restraining order against her estranged husband, leading ultimately to the death of her three children.<sup>437</sup> Gonzales characterized the lack of enforcement as a deprivation of a property interest, one that was recognized by state statute and

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430. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 189 (1989). I include the word “retarded” because I think it mattered to the Court and because I think that a less offensive phrase may not capture the clinical judgment underlying the term (as used here). At the time of the litigation, experts still used the word “retarded” and its modifiers to describe the nature and degree of an individual’s intellectual or developmental impairment. I acknowledge the current offensiveness of the term and do not wish to perpetuate its use. Likewise, I include the ableist trope of “suffering” because I think this wording illuminates how some Justices understood the experience of disability.

431. *Id.* at 193.

432. *Id.* at 196.

433. *Id.* at 202–03.

434. *Id.* at 213 (Blackmun, J., dissenting).

435. See generally Lynda G. Dodd, *DeShaney v. Winnebago County: Governmental Neglect and the “Blessings of Liberty,”* in *CIVIL RIGHTS STORIES* 185–210 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

436. 545 U.S. 748 (2005).

437. *Id.* at 751–54.

therefore protected by the Fourteenth Amendment's Due Process Clause.<sup>438</sup> The Supreme Court disagreed, overruling a Tenth Circuit decision in Gonzales's favor.<sup>439</sup> It was a striking abandonment of vulnerable citizens to the whims (good or bad) of state and local officials.<sup>440</sup> The concededly "horrible facts" of the case—as "undeniably tragic" as those in *DeShaney*<sup>441</sup>—only made the principle seem more secure against future challenge. If "Poor Joshua" and poor Jessica had no affirmative rights under the Constitution, no one did.

Again, it would be possible for courts to reach these legal conclusions in a different context, completely unrelated to intellectual or developmental disability. What these examples suggest, however, is that ideas about certain disabilities and the difficulty of preventing or accommodating them may have eased the path—the path toward a vision of government that accepts powerful central-state intervention in some arenas but circumscribes the federal government's ability to assure inclusion and protection in others.<sup>442</sup> Neatly reversing the presumptions of the Reconstruction Amendments, those promises now often depend on states and their subsidiaries, for better or for worse.

#### CONCLUSION

One of Pennhurst's most prominent survivors is Roland Johnson. Before his death in 1994, Johnson became a well-known voice in the self-advocacy movement and also published a short memoir. A theme of that memoir is his repeated efforts to understand his time at Pennhurst—how he ended up there,

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438. *Id.* at 754–55.

439. *Id.* at 768–69.

440. *Id.* at 768 (rejecting the plaintiff's constitutional due process claim but noting that the people of her state were free to create an appropriate state law remedy for the rights violation she alleged).

441. *Id.* at 751, 755.

442. Another example, of less relevance to the Article's federalism theme and involving a different type of disability, is *Mathews v. Eldridge*, 424 U.S. 319 (1976), which stemmed from the termination of George Eldridge's disability benefits. The decision famously reined in the Supreme Court's due process jurisprudence, narrowing the possibilities that *Goldberg v. Kelly*, 397 U.S. 254 (1970) had opened up. *See Mathews*, 424 U.S. at 349. In articulating and justifying the balancing approach that it would apply going forward, the *Eldridge* Court repeatedly emphasized how the disability benefits that Eldridge received were different from the need-based income support benefits at issue in *Goldberg v. Kelly*, and in doing so drew on tropes about disabled people. *Id.* at 333–49. Writing for the majority, Justice Powell noted the "significant" "hardship" that loss of benefits might cause to someone in Eldridge's position, who was physically unable to accrue income through work, but then simply assumed that such a person was unlikely to experience dire need. *Id.* Other social safety net programs would pick up the slack, Justice Powell suggested (with apparently no understanding of how difficult it is to enroll in public benefits programs). *Id.* at 342. Similarly, in assessing the public interest in the level of process accorded to claimants like Eldridge, Powell seemed to assume a vast number of ineligible recipients on the disability rolls, each of whom would exploit any pre-termination procedures accorded to them. *Id.* at 347. The specter of disability fraud thus helped justify a due process jurisprudence that applied well beyond disability benefits. On the idea of disability fraud or fakery and its cultural and legal significance, see SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 108–37 (2009); ELLEN SAMUELS, *FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE* (2014); Doron Dorfman, *The Fear of Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 *LAW & SOC'Y REV.* 1051 (2019).

what it all meant. “It took me a long while to think why I was sent there, why I was put there at Pennhurst.”<sup>443</sup> “I wonder why I went to Pennhurst, but things came to me while I went to Pennhurst.”<sup>444</sup> “Pennhurst didn’t meant nothing to me. Pennhurst was me with sorrows and grief.”<sup>445</sup> “I went back and talked to people when the closing of the Pennhurst. But I didn’t go back there to talk when people was still there. . . .”<sup>446</sup> At one point Johnson simply concluded that “they”—whoever the deciders were—“had nowhere else to put me, so I had to go there.”<sup>447</sup>

Just as Johnson’s memories of Pennhurst evade easy analysis, so does the Pennhurst litigation. From the years I have spent researching and discussing this Article, however, one comment stands out: in an offhand way, a fellow law professor remarked that they just didn’t see *Pennhurst* as “a disability case.” One reason this comment was striking is that it fundamentally contradicts how people outside of legal academia think about the *Pennhurst* litigation. To those who have a scholarly or personal interest in disability history, or a personal connection to an institution like Pennhurst, disability is central to the *Pennhurst* litigation (and, surprisingly, the Supreme Court is not).<sup>448</sup> But another reason this comment stuck with me is that it raises fundamental questions about this project and my own aspirations: What does it mean to be “a disability case”? Do I want *Pennhurst* to be understood as such? Is that all?

To recategorize or relabel can be a powerful move, but my aspirations for *Pennhurst* are bolder. As scholars continue to think through the relationship between federalism, inter-branch dynamics, and the elusive promise of equality, I hope that the concepts of ability and disability infuse that work—alongside such better-recognized concepts as race, gender, sexuality, national origin, and economic status. Scholars are relatively adept at noticing how these markers and experiences of difference matter to law’s subjects—how people draw on them to make sense of their own lives and the people around them. And we are getting better at recognizing how these axes of difference matter to law, including to areas of law that do not explicitly concern them. But too often, disability still remains outside the frame. It is a problem for specific bodies of law to “deal with,” rather than a concept, like gender or race, that can itself do important legal work.<sup>449</sup>

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443. Johnson, *supra* note 83, at 9.

444. *Id.* at 11.

445. *Id.*

446. *Id.* at 15.

447. *Id.* at 9.

448. See, e.g., 3 *Pennsylvania Court Cases That Changed the World*, PENNHURST MEM’L & PRES. ALL., <http://www.preservepennhurst.org/default.aspx?pg=1649> [<https://perma.cc/GV3Z-EXQX>] (describing the Pennhurst case as world changing but mentioning only the 1977 district court opinion).

449. Scholars cited throughout this piece are working to change this. My concluding thoughts build on their important work.

Ultimately, *Pennhurst* is a “disability case,” and it is also a testimony to the power of ideas about disability to shape our legal world.