Bound By Oath Episode 402 | Needless Friction. And treason.

John: In 1821, in the case of *Cohens versus Virginia*, Chief Justice John Marshall wrote some immortal words that are foundational to our law today. The Supreme Court, he said, must decide the cases that are properly before it. Quote: "With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution." Hello and welcome to Episode 2 of Season 4 of Bound By Oath, a podcast on legal and constitutional history brought to you by the Institute for Justice's Center for Judicial Engagement. On this episode, we are going to explore another slightly treasonous doctrine that allows federal courts to decline to decide cases they have jurisdiction to hear: the doctrine of *Pullman* abstention. *Pullman* abstention is the first of five or so so-called abstention doctrines created by the Supreme Court, all of which instruct federal judges to abstain from rendering judgment in a variety of different scenarios.

Lauren Robel: All abstention doctrines are balanced against that deep duty of the federal courts to hear cases that are within their jurisdiction.

John: We'll start this episode with a look at the *Pullman* case itself, which was both a challenge to Jim Crow and a classic case of economic protectionism. Then we'll dig into the doctrine that the case produced.

Lauren Robel: It was such an elegant solution when Justice Frankfurter wrote about it. It seemed so sensible. It has never worked like that.

John: And we'll talk a whole bunch about Justice Felix Frankfurter, who wrote the opinion for the Court in *Pullman* and who was the justice most responsible for bringing abstention to fed courts.

Lael Weinberger: We have two court systems. We have federal courts, we have state courts. And having two court systems in the same location at the same time overlapping is inherently a bit messy and a bit complicated. And this is where Frankfurter's abstention vision comes in, and it's informed both by those practicalities as well as by the larger political concerns that he has about federal courts being too aggressive in deciding issues that are coming before them.

John: And we'll talk about how the case impacts civil rights suits today.

Lauren Robel: For federal litigants, it's often being sent out to wander the desert for the next 40 years, with perhaps the possibility of ultimately finding an oasis, but perhaps not.

John: And finally, we conclude this episode with an update to a case that longtime listeners will remember from Season 1 – a case where our clients were sent out to wander the constitutional wilderness in search of a lost clause in the Fourteenth Amendment. I'm John Ross. Thanks for listening to Bound By Oath.

BBO Montage

John: *Pullman* abstention comes from a railroad case – the case of *Texas Railroad Commission v. Pullman Company* decided by the Supreme Court in 1941. After the Civil War and through the

Great Depression, if you wanted to travel the country in style and comfort, you would do it in a Pullman sleeper car.

Lauren Robel: Pullman sleeping cars were the first-class travel of their time. They were known for being extraordinarily comfortable. They were in some ways opulent.

John: That is Lauren Robel, professor emeritus and the former dean at the Indiana University Maurer School of Law.

Lauren Robel: Most sleeping car porters were, in the beginning, people who had been enslaved. They handed those jobs down through their families because they were great employment for the time.

John: Pullman sleeper cars featured two kinds of employees: conductors, all of whom were white, and porters, all of whom were black.

Lauren Robel: What the Pullman porters did was they essentially functioned as servants for people who were traveling in the Pullman sleeping cars. They were responsible for carrying people's baggage, for making sure that the cars were clean and comfortable, for watching out for the safety of passengers.

John: The job was not an easy one. Porters worked approximately 100 hours a week, and they were not permitted to sleep while on duty. There was no possibility of promotion. But the wages were good relative to other options, and by the early 1900s, the Pullman Company had become the largest employer of African-Americans in the country.

Lauren Robel: Pullman porters were a backbone of the development of the black middle class. They were people who were able to amass enough wealth to buy homes, support their families and even move their children into higher education. So they were quite a force in the 1920s in the 1930s. You can lay a lot of the responsibility for the Great Migration of black people from the South to the North at the doorstep of the sleeping car porters.

John: By the 1930s, however the company had fallen on hard times.

Lauren Robel: At the point this case was brought, the Pullman Company, which had been magnificently profitable in earlier years, had, during the Depression, lost half of its ridership. And so the jobs with Pullman were were valuable, and they were scarce. In fact, in Texas in the 10 years-plus before this case was actually brought, Pullman had hired neither conductors nor porters.

John: To save money, Pullman began to run sleeper cars without a conductor on some less-traveled, shorter routes, leaving a porter in charge.

Lauren Robel: The Pullman Company decided that on some less heavily traveled routes where they only had one sleeping car, they could do without the conductors. And so they had the porters – they were called porters in charge – without the conductors essentially doing everything that the conductors would otherwise do.

John: Porters in charge got a nice little bump in pay over their regular wages, though not on par with what conductors were paid.

Lauren Robel: Conductors obviously didn't like this. So the conductors launched a campaign to ensure that the Pullman Company would be forbidden to use porters in charge. They started in the southern states. And they were pretty successful in this campaign. They'd already succeeded in three states before they went to Texas.

John: The union for the conductors went around to state railroad regulators and lobbied them to ban porters in charge.

Lauren Robel: The idea was if you're going to have to choose between a conductor and a porter, choose the conductor. So that's the case they made to the Texas Railroad Commission.

John: The railroad commission, obviously, was responsible for regulating the railroads, and the legislature had given it the authority to penalize quote "unjust discrimination" in prices and quote "all other abuses" in the industry.

Lauren Robel: The railroad commission was responsible for the railroads. But that was not its main claim to fame. Its main claim to fame was that it was responsible for all regulation of Texas oil. So it was probably, at the time, the most powerful state agency in the country. Railroads were a kind of side gig for the for the railroad commission, despite its name. So the the commission sided with the conductors and did so in an order that was, by today's standards, racist through and through.

John: The Railroad Commission held some hearings, it made some findings, and it adopted the conductors' proposed rule. It didn't find that there was any evidence of any actual problems on porter-in-charge routes. The commission instead relied on Jim Crow.

Lauren Robel: It relied on two stereotypes and no testimony. The first stereotype was these black porters were lazy. They'd get drunk and wouldn't be able to do their jobs. And the second stereotype was that the people of Texas would not take orders from a porter, so they wouldn't be able to maintain discipline. And that the white womanhood of Texas would be afraid to travel in these overnight cars if there was just a black man there to protect them.

John: On the basis of that, the railroad commission said the Pullman Company was engaging in unjust pricing practices. Charging passengers the same rates for routes with both a conductor and a porter as for routes with only a porter was illegal, the commission said, because the service was inferior. So the Pullman Company sued the railroad commission in federal court.

Lauren Robel: The Pullman Company argued that the Texas Railroad Commission's order violated both its authority under state law, but more importantly, for our purposes, it violated the federal Constitution and particularly due process and equal protection. And on equal protection, the Pullman Company made the argument that the Texas Commission's order discriminated on race, among its employees.

John: When the case arrived in federal district court, a three-judge panel was convened, which under the rules at the time happened in constitutional cases. And that panel relied on more than stereotypes.

Lauren Robel: At the district court, a number of porters intervened, and they also testified. They had all been employed for upwards of 25 years by the Pullman Company. They were people of substance. They were educated. They were homeowners. They were family men.

John: The porters testified that they were absolutely capable of dealing with difficult or drunken passengers. It was a routine part of the job, and in fact they were more effective than conductors in dealing with difficult passengers because, owing to the racial dynamics of the time, they were viewed as less threatening.

Lauren Robel: The porters testified about the kid gloves with which they handled customers, how effective they were at their jobs because they never argued with them.

John: Moreover, there was other evidence presented that Pullman had received no complaints and there were no reports of crimes on porter-in-charge routes. A parade of Pullman customers testified that they felt perfectly safe and that they entrusted their loved ones to the care of porters in charge. To counter all of that, the Railroad Commission brought in a bunch of college kids.

Lauren Robel: The sleeping car conductors brought in just a long line of University of Texas students – how they had convinced them to testify about this, I have always wondered – but they brought them in to bolster the commission's claim that white people would not answer to black porters. But the testimony for the Pullman Company, those porters just belied it in every possible way. And my guess is resonated with the judges who had watched them in action.

John: Indeed, the judges were plenty familiar with riding on Pullman sleeper cars themselves. And so the three-judge panel ruled in favor of Pullman and the porters.

Lauren Robel: They rejected the conductors' case completely. They found that the Texas Commission had had overstepped its authority, and that it was incorrect in its factual findings. And they permanently enjoined the Commission's ruling on the basis of state law, which nowadays, that is not an injunction that a federal court would issue, but at the time, seemed a way to seemed the right thing to do as a matter of constitutional avoidance.

John: At the time of course, the Equal Protection Clause was a mere figment of a shadow of a wisp of what it is today. *Plessy v. Ferguson* was still good law, and the decision that overruled it, *Brown v. Board of Education*, was over a decade in the future.

Lauren Robel: The constitutional questions were obviously very thorny and complicated, or at least they were undecided at the time.

John: The district court based its ruling on Texas state law, holding that there was nothing abusive about the fares Pullman was charging on porter-in-charge routes. Adapting a service to meet changing conditions, the court said, was not unjust. Moreover, the panel accepted Pullman's argument that even though the Railroad Commission had what looked like pretty broad authority, it wasn't as all-encompassing as it would seem. Indeed, the Texas Supreme Court had previously ruled that the Commission could not itself define what constituted an abusive practice – that had to be done by the legislature. That opinion was authored by a justice who had previously, as a legislator, written and been the chief sponsor of the Texas Railroad Commission Act.

Lauren Robel: When the case was appealed, at that point directly to the Supreme Court, the Pullman Company was in great shape. It had a full-throated ruling on behalf of the district court that supported their case in whole.

John: The Railroad Commission appealed to the Supreme Court, and the Commission's opening brief focused on the state-law issue rather than the constitutional ones. But the brief is more notable for what it did not say.

Lauren Robel: They wrote a brief in which there was absolutely no mention of race whatsoever. They quoted the Commission's order, but they left out every single thing that had to do with race.

John: Pullman, on the other hand, made clear that the whole case was about race. The basis of the Commission's order was that the porters' race necessarily meant they were too unreliable and incompetent to be in charge, and everything else flowed from that. What neither side argued, however, is that the Supreme Court should decline to decide the case.

Lauren Robel: Neither party asked for abstention – not in their briefs. We don't know what happened at the argument. It's just not available. But I don't think either party was expecting that. Nor do I think either party was expecting what what happened at the Supreme Court, which you can kind of piece together afterwards.

John: There's no record of what happened at oral argument, but one thing we do know is that supplemental briefs were filed afterwards. And we can guess why.

Lauren Robel: It seemed clear in supplemental briefings that what had happened at the Supreme Court is someone had asked, Well, if the issue is you have to have conductors, why not make all your black porters into conductors? And the Pullman Company was taken aback by this. They had no interest in desegregating the ranks of their porters and conductors.

John: It bears mentioning that while Pullman was bringing virtuous claims, its own practice of maintaining a segregated workforce was not above reproach. Nevertheless, if Pullman had desegregated in 1941 that would have been a disaster for the porters.

Lauren Robel: They'd all be at the bottom of the list, the seniority list for the conductors.

John: Per the collective bargaining agreement, any new conductor would be at the bottom of the seniority list and, in the midst of a downturn, would get virtually no work. That possibility perhaps explains, according Prof. Robel, why the porters' union, which was influential and effective and was certainly equipped to bring a groundbreaking equal protection challenge, was not involved in the case. But be that as it may, when the Supreme Court announced its ruling, the justices – by a vote of 8 to zero – had decided not to decide.

Lauren Robel: So the Supreme Court famously created a doctrine in the *Pullman* case that has carried its name ever since, that essentially says: if there is a question of state law, an unresolved question of state law, and a difficult question of constitutional law on the other side, one mechanism for constitutional avoidance would be to for the federal court to retain the federal case on its docket, but send the litigants to state court to get a definitive ruling on the state law claim with the hope that if the state law claim is resolved in favor of the petitioners,

then the case will never go back to federal court. The whole case will become moot. And that that's what the Court did in this case.

John: And before we get into the doctrine, we should note that that is the end of the story for the case.

Lauren Robel: All we know about what happened once the case went back to Texas is that it was filed. And all we know about that is that no resolution ever came to the case.] Maybe they reached some kind of settlement. But that one is lost to the shrouds of history. And this is true even though I went to the Pullman Company's archives in Chicago and opened boxes I don't think anybody had open since this case was decided.

John: Which is not to say that there was nothing interesting in the archives.

Lauren Robel: For instance, one of the lawyers for the Pullman Company, had been general counsel for Pullman for years and years and years. And what came out of the archives was how much he loved Chicago and the Pullman Company and his wife, Georgia Faye, about whom he wrote a 600-page book that was reviewed in the ABA Journal.

John: Kind of raising the bar for us husbands, that guy. Anyway, with the *Pullman* case, the Supreme Court announced what would become the first of five or so abstention doctrines that let federal courts abstain from deciding cases that Congress has told them to hear. If the Railroad Commission lacked authority under Texas state law to ban porters-in-charge, then there was no need for federal courts to confront the big constitutional questions.

Lauren Robel: What got me interested in this case was how cryptic the Supreme Court decision was – very short decision and just alludes briefly to the underlying facts.

John: The decision is a breezy seven pages, and there is just one sentence alluding to race. It was written by Justice Felix Frankfurter, who said that there was no question that the case raised substantial constitutional questions. Moreover, there was no doubt that the district court's opinion on the state-law issue was well-considered and well-reasoned and well-taken. But federal judges, he wrote, really shouldn't be guessing how Texas judges would decide a question of Texas law. Quote: "The last word on the meaning of Article 6445 of the Texas Civil Statutes … belongs neither to us nor to the district court but to the supreme court of Texas."

Lauren Robel: He justifies it on principles of federalism, and he just justifies it on the inherent power of an equity chancellor to shape requests for equitable relief.

John: We'll come back to this idea that state judges are the stewards of state law, on the one hand, and federal judges are the stewards of federal law, on the other, as the natural order of things. Spoiler alert: It's not. In any case, Justice Frankfurter said abstention in this case was justified because of federalism, the idea that in a system which has overlapping federal and state systems there needs to be a thoughtful way to address overlaps and avoid stepping on toes. Quote: "Few public interests have a higher claim upon the discretion of the federal chancellor than the avoidance of needless friction with state policies." As we'll talk about more in a few minutes, Justice Frankfurter virtually invented judicial federalism as it is now understood. But then there's the other rationale for abstention: the history of courts of equity dating back to England exercising discretion.

Lauren Robel: The idea of the power of the equity chancellor to use discretion in cases involving a request for equitable relief is quite palpable in Justice Frankfurter's opinion.

John: Dating back to the English legal system, judges who sat in courts of equity – often called chancellors – had an enormous amount of discretion to dole out relief. But they were expected to use that discretion wisely – you couldn't just order relief that was infeasible or would hamstring a party in some way that wasn't intended. And sometimes, if a chancellor knew on the front end before they even heard a case that they wouldn't be able to offer a remedy, they wouldn't hear the case at all.

Lauren Robel: The idea behind equity is that you're asking for something extraordinary. You're asking for a court to intervene on an ongoing basis in the activities of another human or in the activities of a state. And so the idea is that the court needs to be sensitive to the implications of that kind of ongoing intervention and ensure that if it's given, it's given with lots of of underlying considerations accounted for. And that's exactly how you see Justice Frankfurter talking about it in this case. The idea of equity being awash in discretion for the court is sitting in back of this decision in a fairly heavy way.

John: In that way, Justice Frankfurter said, abstention is grounded in legal history and tradition. Which is very much up for debate, and indeed there is a long-running scholarly debate on whether that tradition of discretion trumps a congressional grant of jurisdiction. For now, we'll just say that abstention obviously stands in stark contrast to Chief Justice Marshall's admonition that judges commit treason when they decline to decide cases that are properly before them. And it obviously stands in stark contrast with the Fourteenth Amendment, the very purpose of which was to rein in state laws and regulations that violate the federal Constitution.

In any case, the practical effect of *Pullman* abstention is that a lot of cases are sent off into the wilderness.

Lauren Robel: It was such an elegant solution when Justice Frankfurter wrote about it. It seemed so sensible. You send the litigants to state court, they get a ruling on their state case, and then they go back to the federal court. And everything's nice and clean. The interests of the state are respected, and the interests of the federal Constitution are respected. It has never worked like that. It has never worked that cleanly at all.

John: For one thing, federal courts are only meant to abstain when the issue of state law is exceptionally tricky or unsettled. But it's never been all that clear just how tricky the state law question has to be. It leaves a lot in the eye of the beholder, and federal judges can often squint at even the most carefully crafted case and say, well, there's an unresolved issue of state law in play. Moreover, *Pullman* abstention is really tough on litigants. It is expensive to pursue what is essentially a second lawsuit in a different court that – probably for strategic reasons – you chose not to file suit in in the first place. And going to state court introduces a variety of procedural and practical difficulties.

Lauren Robel: Think what a federal court is asking a litigant to do. In order to get a real definitive ruling from a state court you have to litigate this question all the way through the state courts, all the way to the court that can give you the definitive ruling, which is their state supreme court. But you have to do it in a way that both lets the state courts know what the stakes are that there's this federal question hanging over the case and still sitting over in the federal court and avoid having the state court rule on your federal question. Why? Because ordinarily, if the state court ruled on the federal question, that ruling would have preclusive effect. And so you you're

really threading a very, very, very difficult needle. And after *Pullman*, the federal courts had to come up with all sorts of ways to help litigants thread that needle, not all of which the state courts much appreciated.

John: For example:

Lauren Robel: If you're in a state, for instance, that that thinks about the possibility of advisory opinions and doesn't permit its state courts to issue them, then the idea that you might be providing a legal answer that becomes irrelevant in the case when it goes back to federal court is not a particularly appetizing one. So for federal litigants, it's often being sent out to wander the desert for the next 40 years, with perhaps the possibility of ultimately finding an oasis, but perhaps not. For the federal courts, there are all kinds of things that can get in the way of them actually hearing the case again, so it sits on their dockets.

John: Perhaps the most notorious example of the sort of delay that *Pullman* abstention can cause comes from school desegregation cases in the years after *Brown v. Board of Education*. In 1954, of course, the Supreme Court finally revived the equal protection clause. But when plaintiffs tried to give effect to that ruling, their lawsuits ran smack into *Pullman* abstention – with federal courts sending cases to state court for a first crack at interpreting state statutes that had been enacted to resist desegregation, causing years and years of delay.

Lauren Robel: *Pullman* abstention becomes one of those famous ways of the federal courts avoiding constitutional questions to give them time to manage when they show up and and to gain an ability to have some consensus on a court before they do show up for decision. But

there are serious costs to *Pullman*, and to the extent that federal courts can avoid it, they ought to be avoiding it.

John: Hear, hear. In a few minutes, we'll talk about some of the costs of *Pullman* in a more recent civil rights case that longtime listeners will remember. But before that, we're going to examine why Justice Frankfurter was so keen on abstention.

Lael Weinberger: We have two court systems. We have federal courts, we have state courts. And having two court systems in the same location at the same time overlapping is inherently a bit messy and a bit complicated.

John: That is Prof. Lael Weinberger of the Scalia Law School at George Mason University.

Lael Weinberger: And this is where Frankfurter's abstention vision comes in, and it's informed both by those practicalities of managing state and federal as well as by the larger political concerns that he has about federal courts being too aggressive in deciding issues that are coming before them.

John: Prior to becoming a Supreme Court Justice, Frankfurter had a distinguished career as an advocate arguing for progressive causes, as a law professor, and as an advisor to FDR.

Lael Weinberger: Felix Frankfurter, before he became a Supreme Court justice, spent most of his career as an academic. He was influential both in scholarly discussions about the federal courts as well as influential in behind the scenes conversations about what a progressive legal approach should look like in practice and in the courts.

John: As we have talked about previously, the Supreme Court in the era before Justice Frankfurter joined it was generally upholding progressive regulation, like zoning, like occupational licensing, even minimum-hour regulation. But it did strike down economic regulation on constitutional grounds a lot more often than it does today – and sometimes in the very cases where Frankfurter himself was the attorney defending those regulations.

Lael Weinberger: Frankfurter finds all of this troubling, like many progressives and so then he's wondering, how do we rein in what he sees as a federal judiciary that is increasingly out of control.

John: One of the key issues that Frankfurter found particularly troubling was labor injunctions. As we talked about last episode, that was one of the hot-ticket political issues of the day, with employers going to court and seeking injunctions ordering union members to stop interfering with their businesses. Usually once an injunction was issued, a strike would fizzle out. Even if there was an appeal, it would take time; the momentum was lost. And eventually Frankfurter had a hand in legislation that limited those injunctions.

Lael Weinberger: Frankfurter is closely involved in drafting the Norris-LaGuardia Act, which limits injunctions against labor. So Frankfurter is no disinterested observer.

John: While much of Professor Frankfurter's life was geared toward progressive politics, his research program on the other hand took on a more nonpartisan and technocratic gloss, proposing solutions to problems faced by the courts.

Lael Weinberger: What's happening in the federal courts from the late 19th century into the 20th century is the federal courts have a massive expansion in their case load. This is both from expansions of federal jurisdictional coverage, growth of federal law under the 14th Amendment in particular. And so the courts are are swamped. The Supreme Court at one point was backlogged three years. This is not the Supreme Court's greatest moment. There are lots of opinions that come out of the Court around this time that show the negative effects of hurry and overwork. So Frankfurter is watching all of this, and he writes an influential book on the federal court docket and the business of the Supreme Court.

John: In a series of articles, Frankfurter documented problems like docket congestion and proposed solutions that had appeal to progressives and non-progressives alike.

Lael Weinberger: Clearly, there are great synergies here between what he's doing as a technocratic academic: Let's do these tweaks to reduce the caseload of the federal courts. That coincides really nicely with some of his normative, political and jurisprudential beliefs about where things are going wrong in the American legal system. So, great, if you can reduce the caseload of the federal courts, let's just have fewer cases there, and that might, at least on the margin, provide some relief in the areas that Frankfurter is concerned about.

John: Federal judges will have fewer opportunities to strike down state laws or issue labor injunctions. And, at least on the margin, state courts – where judges don't have life tenure - might prove more amenable to progressive ideals. And so ultimately when Frankfurter is appointed to the Supreme Court, he brings with him his deep knowledge of labor history, including the seed of the idea for what became *Pullman* abstention.

Lael Weinberger: With Frankfurter's interest in how to trim back the overwork of the federal courts, one place that that he looks is a 1910 piece of failed legislation in the House of Representatives. And this particular proposed amendment to a statute would have prohibited district courts from taking jurisdiction of suits to suspend, enjoin or restrain the action of any officer of a state in the enforcement of a statute upon the ground of the unconstitutionality of such statute. What does that mean? Well, basically, it's saying that the courts are not supposed to get involved with issuing direct injunctions to a state officer when that officer is trying to enforce a state statute when that statute is viewed by the federal courts as unconstitutional.

John: That sounds awfully broad, but what the legislation was intended to do was to limit courts' ability to issue labor injunctions and hamstring striking workers.

Lael Weinberger: The purpose of the amendment – it's explained by a Democratic Representative, William Cullop from Indiana, and what he says in trying to explain this statute, which is not the most clearly worded, is that he believed it would give the state courts the right to construe their own statutes first before federal courts construe the statute. This legislation doesn't go anywhere in 1910, but Frankfurter picks up on this some years later. In 1928, he's working on a series of articles that will eventually go into his book on the business of the Supreme Court.

John: And when the *Pullman* case reached the Supreme Court in 1941, Frankfurter turned that failed legislation from 1910 into the law.

Lael Weinberger: This theory of abstention strikingly parallels some of the ideas that were present in that 1910 congressional debate that Frankfurter had been writing about back in the

1920s. And now here we are, the start of the 1940s and Frankfurter pulls some of the ideas back out and says that, yeah, all right, here's an unsettled issue of state law. We don't know how much authority the Texas Railroad Commission has here. And if it turns out they didn't have the authority to write this particular regulation, to issue this particular order, well then we have no reason to have to decide the issue of the equal protection clause.

John: Of course, Frankfurter was just one justice, and abstention obviously appealed to other justices as well, including justices who did not share Frankfurter's vision of the courts. But abstention, unlike some of his other ideas, caught on – in part because he grounded it in judicial federalism, which was a concept that he himself virtually invented.

Lael Weinberger: It is a wild fact that the Supreme Court did not use the term federalism in any of its opinions in its first 150 years. Now, of course, they're still trying to do things with the state-federal relationship, but they didn't have the terminology that we use now. And that changes very suddenly when Frankfurter joins the Supreme Court in 1939, and he starts talking about federalism right away.

John: Prior to Justice Frankfurter, with only a few spare and unrelated exceptions, the term federalism did not appear in judicial opinions. And outside of court, if you heard the term, it meant something else.

Lael Weinberger: Prior to Frankfurter, the term federalism was not in wide use. And when you did come across it, it often sounded a little bit different than how we're used to hearing it today. People would use the term federalism like they use the term federalist in the debates about the

Constitution's ratification. They're talking about a need for a strong national government. Federalism, federalist, federal were used to talk about the national government.

John: Today, federalism, at least as expressed in legal opinions, means nearly the opposite.

Lael Weinberger: Often when people are talking about federalism today, they mean the federal-state relationship. And people who are described, in the legal field especially, as believers in federalism, are often those who have been seen as wanting smaller national government, a larger role for the states.

John: And certainly a larger role for state court systems.

Lael Weinberger: Felix Frankfurter is an innovator in legal usage, because he brings to the Supreme Court a usage that is much more like what we're used to today. He is, in that sense, the inventor of federalism at the Supreme Court.

John: Of course, prior to Frankfurter, the courts had words for the idea of the proper roles of state and federal governments. The federal government had enumerated powers. Police powers were reserved for the states. The Constitution has the Supremacy Clause, which means federal law trumps state law when there is a conflict. Frankfurter's innovation was to make a concern for whether a case with a federal question should instead be heard in state court a central consideration.

Lael Weinberger: This is a novel move. Even if one has the view that federal courts have some zone for exercising abstention. Maybe it's grounded in equity. That's probably the best historical

view. Federalism, that's not a normal equitable consideration. That's a Frankfurter original to bring that into the conversation and say, Hey, as you look at whether you want to hear this case, let's just bring federalism in as this kind of free-floating value that can then tell us that maybe we should be more deferential, more respectful to the state courts. So that's a novel move, because federalism is not itself an equitable doctrine. There's a whole body of doctrines that arise from the old law of equity. Federalism isn't one of them.

John: And when Professor Weinberger uses the term free-floating, what he means is that Frankfurter's understanding of federalism is not in the Constitution or the law. It's not a background principle from legal tradition and history.

Lael Weinberger: We have a national government. We have state governments. They're both important and valuable, and that's all inarguably true from the structure of the Constitution. But we don't have any guidance in the Constitution of exactly how we allocate the authority that that Frankfurter is trying to do at this granular level. We don't have something that says, Oh yes, here's the federalism clause that tells you that when there's a state issue coupled with a federal-law issue, you send that to state court. So it's free floating in the sense that it's a broad value that can be purposed and repurposed in a variety of ways, at variety of levels of generality, provides lots of material for argument.

John: And while Frankfurter used federalism to serve his ideals, other justices of course use it for theirs.

Lael Weinberger: Think about what happened to the Supreme Court in the 1990s. Under the leadership of Chief Justice Rehnquist, we had several important decisions that announced

limits on what the national government could do, and were then seen as important for enhancing the role of the states. The legal commentariat tended to call that a federalism innovation. People called it the federalism revolution.

John: What does that mean for abstention doctrines like *Pullman*? Well, it's harder to say that they are deeply rooted in tradition.

Lael Weinberger: Especially now for judges who are more attuned to the concerns of textualism and some forms of originalism, it's harder to say that yes, here is an originalist or a textualist case for something that looks like Frankfurter's abstention doctrines.

John: Although it does vary depending on which doctrine we're talking about. Later this season, we'll cover a different abstention doctrine that does hew pretty closely to tradition. *Pullman* though, and giving state courts a first crack, we're not so sure. And neither are many scholars, including Prof. Martin Redish, who wrote a seminal paper criticizing abstention in the 1980s.

Lael Weinberger: Professor Redish argues that judge-made abstention is really a form of judicial power grab. Now it looks weird, because when judges invoke abstention, they're saying, Oh, we're not exercising power here. We're declining to do so. But Professor Redish points out that that is nonetheless a very significant decision. And it's a power grab in the sense that it is taking for the court a decision that was actually made by the legislature. That is actually a really significant abdication of authority.

John: We'll provide links to Professor Redish's article in the show notes as well as scholarly counterarguments. And before we close this episode, we'll finish with a few words on a

particular mechanism for getting a ruling on state law that has eclipsed *Pullman* abstention. And we'll provide an update about an IJ case we talked about way back on Season 1.

Michael Bindas: At the Founding, nearly all lawsuits heard in federal court were about questions of state law.

John: That is my colleague, Michael Bindas, who is a senior attorney at IJ.

Michael Bindas: And that's because most federal lawsuits involved diversity jurisdiction.

John: Citizens of different states bringing their disputes to federal court instead of having them heard in state court where in theory one of the parties would have home court advantage.

Michael Bindas: So, perhaps counterintuitively, the law that federal judges at the Founding were interpreting was almost exclusively state law. By contrast, most federal law was being interpreted by state judges.

John: At its very first session, Congress allowed for federal questions to be heard in state courts. In 1789.

Michael Bindas: That is nearly the opposite of what we have today with Congress giving federal question jurisdiction to the federal courts after the Civil War, and the Supreme Court in 1938 in the famous case of *Erie v. Tompkins* saying that state courts are the ultimate authority on state law. So this notion reflected in the *Pullman* case and elsewhere that there's something unnatural

or improper about federal judges interpreting state law or state judges interpreting federal law was relatively new at that time and not reflective of historical practice.

John: We bring this up because while it might make some intuitive sense that federal judges would get first crack at federal questions and state judges at state questions, it's not some ironclad law of the universe, and indeed there is still plenty of good caselaw saying that federal judges can be presumed to interpret state law competently and fairly.[1] Anyway, you can't talk about *Pullman* without a few brief words about a mechanism developed by the states that has mostly – but as we'll see, not entirely – replaced *Pullman* abstention.[2]

Michael Bindas: Starting in the 1960s – actually a little bit earlier, but really beginning in the 1960s after the Supreme Court endorsed it – state legislatures adopted a practice called certification where federal courts can certify a question of state law directly to the highest court in a state.

John: Which seems like a significant improvement on *Pullman* abstention, where litigants have to start their quest in a state trial court or a state administrative agency and do a few rounds of appeals before they reach a state supreme court. Today, every state except for North Carolina has adopted certification. Even so, not everyone loves certification.

Michael Bindas: Back in the 1990s, the late Judge Selya from the U.S. Court of Appeals for the First Circuit documented and tried to explain instances of state courts refusing to answer

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[1] *Salve Regina College v. Russell* 499 U.S. 225 (1991); *Meredith v. Winter Haven*, 320 U.S. 228 (1943)
[2] "Certification today covers territory once dominated by a deferral device called '*Pullman* abstention,' after the generative case, *Railroad Comm'n of Tex.* v. *Pullman Co., 312* U. S. 496 (1941). Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 75 (1997).

certified questions, or answering them without much reasoning, and taking an inordinate amount of time to answer them.

John: And he questioned whether certification is in actual practice all that respectful of state courts.

Michael Bindas: Judge Selya argued that certification doesn't really advance federalism in part because it's optional – federal judges don't have to abstain and they can and do keep state law questions for themselves. It's not as if state supreme courts can claw away cases from federal courts if there's some big issue they want to address and prefer federal courts not address. So it doesn't really put states in the driver's seat.

John: More recently, Judge Oldham in the Fifth Circuit has argued that certification is really not particularly efficient, and among a whole host of other criticisms, he says that that the standard that his circuit at least uses to decide which cases to certify is a quote "standardless" standard, and one the court applies even when litigants don't want them to. Quote: "Our job is not to pawn questions off to state courts when we would rather not expend the energy answering them."

Michael Bindas: Judge Oldham argues that answering hard questions is a judge's job, and abstention is often a convenient excuse not to do it. He points to cases from the Fifth Circuit where certifying a question delayed cases, and then ultimately the answers state courts gave didn't really help anyone – either the litigants or the courts. Separately, he argues that even though state courts many times do take up certified questions in good faith and put in significant work, their answers are not a judicial act as understood by Article III of the Constitution – it's just advice.

John: In any case, certification is a regular part of federal court practice that today is more or less taken for granted by many litigators. It's just a thing that's out there. And although it arguably wastes a lot of time it doesn't waste as much as *Pullman*. But the good news about *Pullman* is it gives us a chance to update you on an IJ case we talked about way back on Season 1.

Cliff Courtney: Thanks to a law passed by the legislature, we really have a monopoly on the lake where only one company can run a passenger boat and that's Lake Chelan Boat Company.

John: That is IJ client Cliff Courtney, whose family runs resort and outfitting businesses in Stehekin, Washington, a remote town nestled in a national recreation area that is not accessible by car. The only way to get there is by boat, a 55-mile journey up Lake Chelan. But for nearly 100 years, the State of Washington has imposed a monopoly on ferry boat service. And the monopoly boat company was providing crummy service.

Cliff Courtney: It's time to change and the refining fires of competition would do that automatically. You can try to regulate quality, but really it's competition that that that creates quality when you come right down to it. If you don't have any reason to improve your service or to be nice to people or to keep things clean or what have you don't tend to do it.

Michael Bindas: Cliff and his brother Jim asked for permission to start a competing ferry service, but in the alternative they also asked the state Utilities and Transportation Commission if they could operate a smaller service akin to a hotel shuttle just to get their own guests up the lake.

John: But the commission said no. Even the smaller hotel shuttle idea would be too much competition.

Michael Bindas: That is what the UTC's executive director said. The commission's staff sent several letters to that effect, and the commission even produced a report specifically saying that that was not allowed.

John: Which sounded to us quite a bit like a state law abridging the privileges or immunities of citizens of the United States.

Michael Bindas: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

John: That is the text of the Privileges or Immunities Clause of the Fourteenth Amendment.

Michael Bindas: And way back in 1873 the Supreme Court ruled that one of the privileges or immunities that the clause unquestionably protects is the right to use the navigable waters of the United States.

John: No state shall make or enforce any law – it is hard to get more emphatic than that. Nevertheless, in the over 150 years since the Fourteenth Amendment was ratified, the clause has virtually never been used to strike down any state law, including state laws that violate the right use the navigable waters.

Michael Bindas: So Cliff and Jim filed this lawsuit in 2011 to breathe some life back into the clause, and we marshaled a lot of evidence that the Framers of the Fourteenth Amendment intended for the right to use the navigable waters to include a right to use the navigable waters for commerce.

John: But when the case got into federal court, the state argued that the judges shouldn't reach that constitutional question because actually the state law was unclear. In spite of what the commission had repeatedly told Cliff and Jim up to that point, maybe they could have operated a new service. And the district court, and then later the U.S. Court of Appeals for the Ninth Circuit, grabbed onto that and ruled that Washington state courts should have a first crack at interpreting Washington law. If it didn't prevent Cliff and Jim from start a new service after all, there was no need to reach the privileges or immunities clause.

Michael Bindas: So the federal district and then appeals court both abstained under *Pullman*. And we did what you have to do under *Pullman*, which was to go to state court and litigate a full second lawsuit. We started in the UTC administrative process where the commissioners said what the commission had said all along – that the Courtneys could not open a competing business. And then we appealed that to a state trial court, a state appeals court, and then finally the Washington Supreme Court.

John: That process took five years.

Michael Bindas: It was just a monumental amount of work and waste of time for something we knew at the beginning of the case. I'm not sure why the courts chose to use *Pullman* abstention instead of, say, certifying the question directly to the Washington Supreme Court, but that's what

they did. And I think it's an example or a cautionary tale of how these abstention doctrines are used in practice to delay litigation to no good end.

John: With the state-law issue clear beyond reason or doubt, Cliff and Jim were finally allowed back to federal court, which I am sorry to say, ruled that the right to use the navigable waters does not include the right to use the waters for commerce.

Michael Bindas: Maybe you can use the navigable waters for canoeing or swimming, but not for business. At least not in the Ninth Circuit.

John: Sadly, after the episode came out, we learned that the Supreme Court would not take up the case. The privileges or immunities clause remains in the constitutional wilderness. But there is some good news.

Michael Bindas: A few years after the case ended, the owner of the monopoly boat company put the business up for sale. Cliff's nephew bought the business and is operating it today how Cliff and Jim had hoped it would be operated. The schedule is fixed. There are more boats, and different kinds of boats, nicer boats. And it's really much, much easier and more pleasant for the public and for local residents to get to Stehekin.

John: Obviously, it would be preferable if the state would stop insisting that competition on the lake is a bad thing. And we would have preferred if it if the courts had said privileges or immunities clause actually does a little work. But even so today, today the traveling public can get to Stehekin and have a much better time doing it. Which is where we'll conclude this episode. On the next episode, we'll take a quick break from jurisdiction and abstention and dive

back into the meaning of the Constitution. Specifically, the meaning of a different clause that – like the privileges or immunities clause – has been virtually erased from the Constitution. It's been right there in the Fourth Amendment since the very beginning. And for nearly 200 years, it protected Americans' liberty and security, but today it restrains the government not hardly one bit at all. On the next episode, the Oath or Affirmation requirement of the Fourth Amendment.

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