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“What Me Up, There’s No Intelligent Life Here”: A Dialogue on the Eleventh Amendment with Lawyers from Mars

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"Beam Me Up, There's No Intelligent Life Here": A Dialogue on the Eleventh Amendment with Lawyers from Mars

Discussing our law and legal system with lawyers from a different legal culture can be a rewarding experience. The process of explaining and having to respond to questions about our legal system can be thought-provoking. The sharpness of the criticisms sometimes adds a dimension of difficulty. For example, while teaching in the Netherlands last year, I lectured and answered questions on our system of adversarial criminal jury trials. What made it particularly difficult was that the Dutch are implacably opposed to juries and my lecture took place the day after the O.J. Simpson verdict came down.

That discussion was easy, however, compared to another, more recent, experience. The venue was the annual convention of the Bar Association of the Planet Mars, which was being held in the United States. The topic was the 11th Amendment.

I never figured out why Martian lawyers wanted to know about the 11th Amendment. I did have a pretty good idea why the Bar Association of Mars would have its annual convention on Earth and in the United States. For some reason, the Martians have an affinity for Earthlings in general and a great fondness for the United States in particular. They speak English well. Indeed, they are proud of their knowledge of American idioms and culture. They are also quite informal and have a good sense of humor, although it sometimes borders on the juvenile. An interesting characteristic of Martians is their almost child-like openness and guilelessness. This can be refreshing.

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* Professor of Law, Wayne State University Law School. Apologies to the late Irving Younger for the Martian lawyer device and to the late Henry Hart for the dialogue device.

However, it has a downside as well. Martians are incapable of comprehending irony. This can be unsettling when they take an ironic comment you make seriously and give you puzzled looks.

Martian lawyers are interesting. They have all the delightful traits of Martians in general, plus they are bright and have an insatiable intellectual curiosity. I had no doubt they would be able to understand the complicated law of the 11th Amendment.

I was nonetheless rather nervous about my talk. My nervousness arose out of an experience I recently had while on a panel on Intergalactic Comparative Law at a convention on the Planet of Vulcan. In response to a question from the floor, I had to touch briefly on an 11th Amendment issue. While I was talking, I noticed that the Vulcans in attendance started leaving, many of them holding their heads in visible pain. I found out later that Vulcans are so logical that even this brief exposure to 11th Amendment doctrine had made them ill. All of them had terrible headaches. Some of the more logical ones even had to be hospitalized.

Since Martians are more flexible than Vulcans, I agreed to speak at their conference. The Martians recorded our discussion which enables me to share the transcript with you.2

1. Martian: You'll probably get to this in your talk, but there is a fundamental issue about the 11th Amendment I don't understand. The first thing I don't understand is why it is such a problem. The language of the amendment is clear that it only prohibits suits against a state by citizens of another state. Now, that may happen occasionally when someone goes from one of your states to another and the second state violates the person's constitutional rights, but most people who want to sue a state government are from that very state.

Me: Well, you are correct about the language but it's not that simple. The Supreme Court held in an 1890 case, *Hans v. Louisiana,*3 that despite the explicit wording of the 11th Amendment, it applies to bar suits against states by citizens of the same state. Now, that may happen occasionally when someone goes from one of your states to another and the second state violates the person's constitutional rights, but most people who want to sue a state government are from that very state.

Martian: How could they do that? How much clearer can a constitutional provision get?

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2. The transcript has been altered by the addition of footnotes with citations and explanatory cases or commentary where I thought they would be useful to the reader. For clarity, I have inserted numbers into the transcript to signal the introduction of a new topic. Several different Martian lawyers asked questions and made comments, but their names were not indicated on the transcript I received. Instead, whenever a Martian lawyer is speaking, "Martian" appears.

3. 134 U.S. 1 (1890).
Me: One might think so, but only 5 years ago the Supreme Court again rejected a literal reading and declined to overrule Hans. This was in Pennsylvania v. Union Gas Co.4

Martian: How can that be?

Me: Well, they relied heavily on stare decisis;5 the notion that courts should not be too anxious to overrule even incorrect precedents because . . .

Martian (interrupting): We know all about stare decisis. I know that it is an important part of the conservative judicial philosophy of the current members of your Supreme Court.

Me: Yes, Justice Scalia’s opinion referred to the fact that “Hans has had a pervasive effect upon statutory law, automatically assuring that private damages actions created by federal law do not extend [to suits] against the States.”6 But another reason for refusing to overrule Hans, I believe, was that the Court thought that Hans was correctly decided.

Martian: But I thought another part of the new justices’ conservative judicial philosophy was that they were—how do you say, “interpretivists”—you know, the ones who believe that the Constitution should not be expanded beyond its literal meaning? This sounds pretty “non-interpretivist” to me.

Me: But most interpretivists apply that approach only when it limits constitutional rights or remedies, not when it expands them.

Martian: Why? One would think the policy underlying your constitution—and the 14th Amendment in particular—would be just the opposite.

Me: I suppose you could criticize them for that. But another conservative justification for Hans is that it was a real “original intent” case. The Supreme Court was adhering to the original intent of the framers of the 11th Amendment. The reasoning of Hans was that the 11th Amendment was meant to abolish all forms of federal jurisdiction over claims against states.

Martian(breaking in): But how can you follow “original intent” when it is completely contradicted by what the framers wrote and what the states ratified? And, as I recall, it was Justice Scalia who warned that it is “dangerous to assume” the framers of laws are acting upon “unexpressed assumptions” because judges will read “policies they favor” into those unexpressed intentions.7

5. Id. at 34-35 (Scalia, J., concurring and dissenting).
6. Id. at 35.
Besides, it would have been very easy to express "intent" to abolish all federal court jurisdiction over suits against states if, in fact, that was their intent. The 11th Amendment is hardly a long and confusing statute. We can assume that the authors of such a short text chose their words carefully.8

Me (trying not to sound ironic because Martians don't understand irony): I guess the current conservative Supreme Court believes in "original intent" so deeply that it will ignore "original wording" to give effect to it!9

2. Martian: So, you can't sue in federal court for state violations of federal rights at all. The Chisholm case10 held that Article III provided for subject-matter jurisdiction over diversity suits against states and the 11th Amendment, which was clearly phrased as an amendment of Article III, abolished that jurisdiction. Hans interprets the 11th Amendment as abolishing every form of federal court subject-matter jurisdiction over any kind of claim against a state by anyone. This is going to be a very short discussion, I guess.

Me: No, when it comes to the 11th Amendment, there is "more than meets the eye," as we say. First, it is clear that the United States can sue a state in federal court.11 Also, states can sue each other.12 These exceptions are based on notions that the supremacy of federal power must allow the United States to sue and there must be a neutral forum for disputes between states to be resolved. In the words of Alexander Hamilton, the states surrendered this aspect of their immunity "in the plan of the Convention," that is, the 1787 Constitutional Convention.13

Martian: It would seem to me that the states surrendered more than this at the Convention. The states also surrendered their power to pass laws abridging the obligation of contracts or to pass ex post facto

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8. See 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, 1058-62 (1983)(discussing unsuccessful drafts of the 11th Amendment that would have clearly abolished all forms of federal jurisdiction).

9. Conventional wisdom has it that Hans involved a federal constitutional claim based on the contracts clause that was held barred by a constitutionally-based sovereign immunity of states. In fact, close examination of Hans and the law of "arising under" jurisdiction at the time shows that Hans applied common-law sovereign immunity to a common-law contract claim. See William Burnham, Taming the Eleventh Amendment Without Overruling Hans v. Louisiana, 40 CASE W. RES. L. REV. 931 (1990); Seminole Tribe of Fla. v. Florida, 116 S.Ct. 1114, 1140-41 (1996)(Stevens, J., dissenting).


laws. And later, when the 14th Amendment was ratified, they surrendered even more.

Me: You make a good point. There is considerable debate about precisely what was surrendered at the Convention. Some justices and scholars agree with you, but a majority of the Court has not gone along with that view.

Martian: It's just like what happens at our conventions. Everybody gets drunk, and afterwards nobody can remember what they "surrendered" at the convention! [General laughter in the audience. Recall that I said the Martian sense of humor sometimes borders on the juvenile.]

3. Me: In addition, you should remember that, at the very least, the Supreme Court has always maintained that a state could consent to suit in federal court.

Martian: Maybe I'm mistaken, but I thought I remembered reading somewhere that parties can never agree to federal court subject matter jurisdiction.

Me: Well, the Supreme Court has said the 11th Amendment is not really a jurisdictional bar; it's an immunity. Sovereign immunity was always understood as meaning that a state could not be sued without its consent.

Martian: If this is so, then that's at least one small advantage: since it's not really a subject-matter jurisdiction limit, then if the state slips up and doesn't raise the 11th Amendment as a defense, then it has waived the defense.

Me: Not quite. In one of the major 11th Amendment cases—Edelman v. Jordan14—the Court said the 11th Amendment "sufficiently partakes of the nature of a jurisdictional bar"—that the state can raise it on appeal even if it never raised the issue in the trial court.15 In Edelman, the state didn't wake up to the 11th Amendment issue until it was in the Court of Appeals but the Supreme Court nonetheless considered the issue and ruled against the plaintiffs. The plaintiffs in that case also made arguments that the state had affirmatively waived its 11th Amendment defense by agreeing to abide by federal law when running federally-funded welfare programs, but the Court said 11th Amendment immunity was a constitutional right of states and that any waiver had to be clear, knowing, and voluntary.

Martian: One minute it's an immunity defense; another minute it's a jurisdictional bar. This 11th Amendment is quite amazing! But

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15. Id. at 678.
whatever it is, if I understand what you are saying correctly, the 11th Amendment does have constitutional status.

Me: That's right.

Martian: So if you are ever going to enforce federal law against the states in federal court, you're going to have to get another amendment adopted. I've looked at the procedures in Article V of your Constitution for amending it and I know it has been amended only a few times in the last 200 years. Getting a new amendment ratified would seem to be very difficult, unless, of course, it deals with something really important like flag-burning or school prayer.

Me (beginning to think Martians do understand irony): You're right about the amendment process being difficult. But actually, Congress has the power to abrogate the 11th Amendment by statute.

Martian: How can that be? The hierarchy of your law is that the Constitution is the highest law and the statutes are below it. You just said the 11th Amendment is a constitutional bar to suit. How can a statute overrule a constitutional provision?

Me: Well, according to the Court, it can. The first case that held this was *Fitzpatrick v. Bitzer* in 1976.16 In that case, Congress had passed a law making states liable for damages for employment discrimination. The statute furthered "equal protection of the laws" by the 14th Amendment pursuant to section 5 of that Amendment. The Court explained that when Congress passes a statute pursuant to an explicit power granted to it in the 14th Amendment—a later amendment which by its terms limits state action—it can by statute set aside immunity granted by the earlier-ratified 11th Amendment.

Martian: Okay, I guess I can see that. After all, 14 comes after 11. But if there is this clear conflict between the 14th Amendment and the 11th, why doesn't the 14th Amendment by its own force just automatically overrule the 11th to the extent that a state violates the due process or equal protection clauses?

Me: Well, that is a good question. At least to my mind, the Court has never satisfactorily explained why it doesn't. They have left it open for possible future decision at least twice.17

Martian: That is not very responsible of your Supreme Court. The 14th Amendment was ratified in 1868—almost 130 years ago. Just when does your Supreme Court think it will get around to deciding this fundamental and important question?

Me: I wouldn't hold my breath.

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Martian: How much is the salary of a Supreme Court justice?
Me: (at this point definitely rethinking whether Martians understand irony): About $165,000 a year.

4. Martian: Getting back to this special kind of “super-statute” that can smash through constitutional provisions—it can only be a statute that is passed pursuant to power contained in the 14th Amendment or some other amendment that came after the 11th Amendment. If I recall correctly, most federal legislation has been passed pursuant to your Constitution’s Commerce Clause that is found in Article I. Article I was ratified before the 11th Amendment and is, I would suppose, fully subject to 11th Amendment limits.

Me: Well, there have been some interesting recent developments on that question. Five years ago, in Pennsylvania v. Union Gas Co., a majority of the Court approved abrogation by way of a statute passed pursuant to the Commerce Clause.

Martian: How can that be?

Me: Justice Brennan’s opinion put forth an interesting theory of how that could be, but Union Gas doesn’t matter now. The Court just recently overruled it in the case of Seminole Tribe of Florida v. Florida.

Martian: And what about stare decisis?

Me: The Court said that it felt less bound by it than usual because although there was a majority vote for Article I abrogation power, Justice Brennan’s opinion in support of it was only agreed to by a plurality of the Court. The Justice that provided the crucial fifth vote stated that he agreed with Justice Brennan’s conclusion but disagreed with his reasoning. However, he wouldn’t say how he disagreed with that reasoning.

Martian: Was that the one who played football?

Me: Yes, that was Justice White.

5. Martian: Well, Congress has passed many statutes authorizing claims against states pursuant to § 5 of the 14th Amendment. For example, that statute that you call § 1983, makes “[e]very person” act-

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20. The complete text of Justice White’s opinion on the question was: “This brings me to the question whether Congress has the constitutional power to abrogate the States’ immunity [pursuant to an Article I power]. In that respect, I agree with the conclusion reached by Justice Brennan . . . , although I do not agree with much of his reasoning.” Pennsylvania v. Union Gas Co., 491 U.S. 1, 57 (1989)(White, J., concurring in judgement in part and dissenting in part)(citation omitted).
ing under color of state law liable for any violation of federal rights and subjects them to liability in federal court for damages and equitable relief. If a statute is all that is necessary, the problem doesn’t sound that serious, at least for civil rights cases.

Me: Not so fast. There’s a difference between authorizing a claim against a state and abrogating its 11th Amendment immunity. Just any statute that authorizes a claim against a state isn’t sufficient. It has to be a statute in which Congress makes unmistakably clear in the text of the statute that it means to abrogate state immunity. For example, in one statute Congress provided for claims against “any recipient of Federal assistance” under a funding program. States were clearly recipients, but the Court said that wasn’t enough. In another case, Congress provided in the Bankruptcy Code that all “governmental units” were creditors subject to the act and such would be the case “notwithstanding any assertion of sovereign immunity.” The Court said that wasn’t enough. And, in Quern v. Jordan, it held that while § 1983 might authorize a claim against a state, it did not abrogate 11th Amendment immunity.

Martian: You certainly make fine distinctions in your laws. Is this special requirement related to the well-known doctrine of “read my lips”?

Me: Well, that “doctrine” is usually associated with the executive branch of government, but you could say that. Congress must state its intent to abrogate with “read my lips” clarity.

6. Martian: Well, I assume Congress hasn’t passed too many of these special statutes—especially since the Court only thought up the “read my lips” doctrine in the last few years. So, putting that together with the text of the 11th Amendment that prohibits “any suit in law or equity” against a state, you must be out of luck in getting any redress for state violations of federal rights.

Me: Well, that’s not quite the case. You see, our Supreme Court, in 1908, after it had decided Hans, apparently found it a little peculiar that Hans, read broadly, would mean we had a system in which federal law was supposed to be supreme and yet there was no effective way of enforcing that federal law in the federal courts.

Martian: They should have thought of that when they decided Hans v. Louisiana!

Me: In any event, in a very important case, called *Ex parte Young*, the Court held that, although the 11th Amendment barred a suit against a *state*, it did not bar a suit against the *state officer* in charge of whatever state action was alleged to be unconstitutional. Here's the theory behind that: states are powerless to authorize their officials to violate federal law, so state officers who violate federal law no longer represent the state. If the state officer is violating federal law, then he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."25

Martian: But that creates another problem. You can't have a 14th Amendment violation without *state action*.

Me: That's true, but the Court has held that the state officer's "individual" conduct is still the action of the state.26

Martian: Wow! That's quite a trick. But there is another, even easier way out for the state. After the plaintiff gets relief, the state can defeat the judgment by just having the officer resign. The officer then no longer has any power to do anything for the plaintiffs. So, the plaintiffs can't get any relief.

Me: No. If the officer resigns, the officer's successor is automatically substituted as a defendant and the relief runs against the successor.27

Martian: Even if the successor officer has done nothing wrong?

Me: Yes.

Martian: Even if the official doesn't resign, you said the liability was "individual," so the court can't make the official do anything for the plaintiff in his *official capacity*, such as give the plaintiff his state job back or reinstate his welfare benefits.

Me: Yes, the court can require the state officer to take any of those official actions. You see, it is really a suit against the *office*, not the officer personally. It's an *official capacity* suit.

Martian: I thought you said that the 11th Amendment problem was avoided solely because this officer was "stripped of his official or representative capacity" and was subject "in his person to the consequences of his individual conduct." Now I'm completely confused.

Different Martian (from audience): Good thing there are no Vulcans here! [General laughter in the audience.]

Me: The best way to understand the *Young* case is that it only created a *fiction* that you are suing the officer individually.

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25. Id. at 159-60.
26. Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278 (1913).
Martian: Oh, is John Grisham on your Supreme Court?

Me: No, but maybe he should be. Actually, by the time this discussion is over, you'll think Kurt Vonnegut is on the Supreme Court. [Puzzled looks and confused murmuring from the audience. Sorry, I forgot about the irony thing.]

7. Martian: I assume the state has to pay for the relief that the federal court is requiring this "individual" state official defendant to give the plaintiffs.

Me: Absolutely. Sometimes it can run into the millions of dollars. For example, in the Detroit desegregation case, *Milliken v. Bradley*, the federal court ordered the State of Michigan to pay $5.8 million toward compensatory educational programs for children who had been forced to go to inferior segregated schools. In other cases, states have been required to pay millions of dollars in prospective welfare benefits to plaintiff class members when the federal court found that state welfare regulations violated federal law.

Martian: And all this money came from the state treasury—not from the state official personally?

Me: Yes.

Martian: So, if I am a state employee who was unconstitutionally fired from my job, I assume that one of the "individual" official actions a state officer can be required to take is to pay me my back pay from state funds. Or, if I am a welfare recipient, then the federal court can force the state to pay me retroactive welfare benefits I lost as a result of improper calculations or other negative action.

Me: Well, no. With the *Young* doctrine, you can only get *prospective* relief, at least if that relief has financial impact on the state treasury. In the important case of *Edelman v. Jordan*, the lower court had ruled in a *Young*-type suit that the defendant official had to repay, from state funds, retroactive welfare benefits that were withheld in violation of federal law. The Supreme Court reversed that portion of the District Court order. It held that while a federal court could order payment of future benefits from the state treasury, the retroactive portion of the court's order was barred by the 11th Amendment.

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31. Retrospective relief that does not have any financial impact on the state treasury is not barred. Thus, *habeas corpus* relief against the warden of the state prison is not barred; although such relief is retroactive, it has no (negative) impact on the state treasury. See *Ex parte Young*, 209 U.S. 123, 167-68 (1908)(pointing out that *habeas corpus* relief is not barred by the 11th Amendment). For similar reasons, an order requiring that a public school or employment record of unconstitution-
Martian: Wait a minute. Let's say I have a client who is on welfare. She is shorted $11 a month for a year for a total of $132. A federal court is powerless to order state officials to pay her. Yet, the federal court can order state officials to pay millions of dollars from the state treasury for prospective relief?

Me: I think you're getting the hang of it. So, I think you are ready for the reasoning the Supreme Court gave for making the prospective-retroactive distinction in *Edelman v. Jordan*. Justice Rehnquist essentially said that retroactive benefits of $132 would be much more disruptive of the state's budgetary process than prospective costs of $5.8 million.

Martian: Is your comment some of that irony that you Earthlings are so fond of?

Me: No, that's the explanation Justice Rehnquist gave in *Edelman*.33

Martian: Speaking of this *Milliken v. Bradley* case you mentioned where the state had to pay money to implement "compensatory" education programs, I read the opinion in that case. There was no dissent on the 11th Amendment issue, so I assume it is a pretty reliable case.

Me: Not necessarily, but go ahead.

Martian: My question is this. The federal court order in *Milliken* required the state to pay money for these educational programs that were supposed to remedy the effects of past discrimination in the school system. This sounds like the state had a very good argument that its payment of money was to remedy a past breach of a legal duty. This is like *Edelman* where the court said payment of money to make reparations for the past was improper. The Court distinguished *Edelman*, but I don't quite understand the distinctions they drew.

Me: The main reason the Court gave was that the relief in *Milliken* was not barred because it was ordered into effect prospectively.34

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34. 433 U.S. 267, 290 (1977) ("The educational components . . . [were] ordered into effect prospectively . . . . That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary [integrated] school system.")
is, one supposes, in contrast to relief that is ordered into effect retroactively. They called it the "prospective-compliance exception" of Edelman. Of course, . . .

Martian (interrupting): Your judges must be much smarter than ours. Our judges have never been able to figure out how to order relief into effect retroactively. All of our court orders are ordered into effect and compliance with them is always prospective. Even orders to pay retroactive benefits are ordered into effect and complied with prospectively.

Me: Well, federal judges are kind of an elite among our judges. But they have not figured out how to make parties comply with orders retroactively either. In my opinion, what the Court said on that point didn't make much sense. If Edelman established an exception for any order that is complied with prospectively, then the very order to pay retroactive benefits at issue in Edelman would not have violated the 11th Amendment.

The Court in Milliken did hint at another distinction: the fact that the compensatory education programs would take a long time to carry out, as opposed to the retroactive benefit award in Edelman, which would be instantaneous.

Martian: What difference does that make? The only relief in question was the relief ordered against the state defendants. The state was not implementing the compensatory education programs, the local school board defendants were doing that. All the state was ordered to do was to pay money, just like the state in Edelman.

Me: That's a good point. Yet another reason the Court mentioned was that the plaintiff class members were not being paid money directly. Instead, the order funded a mechanism that would provide the plaintiff class with some kind of in-kind services.

Martian: You have welfare programs in your country that provide in-kind services rather than cash benefits, such as your Medicaid program in which your government pays for medical services needed by people rather than giving them money. I take it then that awards of retroactive benefits in all Medicaid cases are okay, based on Milliken.

Me: Well, no. If the Court was serious about the in-kind services distinction in Milliken, it has not applied it in any other situations.

35. Id. at 289.
36. Id. at 290 n.21 ("Unlike the award in Edelman, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful condition.")
37. Id. at 290 n.22 ("In contrast to Edelman, there was no money award here in favor of respondent Bradley or any members of his class. This case simply does not involve individual citizens' (sic) conducting a raid on the state treasury for an accrued monetary liability.")
Martian: So, how can you explain this Milliken case? It was a unanimous opinion, so it is not like you can just, as you say, "brush it off." Was the entire Supreme Court "asleep at the wheel"?

Me: Do you want my honest opinion?

Martian: Is there any other kind of opinion?

Me: Right. I think Milliken can largely be explained by the fact that it was a school desegregation case in the 1970s, in which effective relief would have been impossible if only the financial resources of the defendant City of Detroit were relied upon. So the pressure was on to get the necessary money from the state.

Martian: Your judges are very smart, but it seems that they are also arrogant if they can just ignore the law when it gets in their way, and then just write nonsense reasons for their decision.

9. Martian: Speaking of nonsense, I'd like to get back to this Ex parte Young doctrine. It seems to me that a state official who acts contrary to state law must be considered the same way as a state official who violated federal law. After all, state officials are no more authorized to act in violation of state law than federal law. So, I would assume that any claims of violations of state law filed in federal court would also not be considered to be a suit against the state, but one against the official.

Me: Well, no. The Supreme Court held in the Pennhurst case that the Young fiction does not work for state-law claims.38

Martian: But surely even fiction has to be consistent to be good fiction.

Me: Your instincts are right. There was a long line of cases going back many years in which the Supreme Court accepted that the Young fiction would allow suit against state officials for state law violations. By one count, Pennhurst overruled some 28 cases.39

Martian: Overruled?! But I thought stare decisis was very important in 11th Amendment law? The Court relied heavily on stare decisis in deciding not to overrule Hans v. Louisiana.

Me: It does seem a little inconsistent.40

39. Id., at 126-39 (Stevens, J., dissenting).
40. Justice Stevens's dissent in Pennhurst is a bitter indictment of the Court on this point. Justice Stevens was apparently angry because, in a case just three years before Pennhurst, he had been persuaded—on stare decisis grounds—to vote against overruling Hans v. Louisiana despite his belief that Hans was incorrectly decided. See Florida Dep't of Health & Rehabilitation Serv. v. Florida Nursing Home Ass'n., 450 U.S. 147, 151-55 (1981)(Stevens, J., concurring). Then, in Pennhurst, many of the same justices, with whom he went along in Florida Nursing Home totally ignored stare decisis. Justice Stevens noted that the Pennhurst ma-
Martian: It also doesn't make much sense as a matter of judicial administration. When you have both state and federal claims arising out of the same facts and the federal claim is in federal court, the plaintiff will have to file the state claim in state court. I thought that there were serious enough problems with heavy docket loads in your courts that you would not want to encourage people to file two lawsuits when one would do.

Me: The Court acknowledged that that was an unfortunate result of the decision, but that constitutional considerations overrode concerns for judicial economy.

Martian: But the "constitutional considerations" involved would seem no greater than the "constitutional considerations" involved when your federal courts take other non-diverse state law claims as part of their pendent jurisdiction. In those situations, the federal courts are no less limited by constitutional subject-matter jurisdictional limitations. The only difference is that the diversity limit is in Article III, rather than the 11th Amendment—which was, after all, an amendment of Article III.41

Me: Yes, but the Court emphasized that there are additional concerns about federalism when state officials are the defendants in the suit. As Justice Powell observed in Pennhurst, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."42

Martian: I'm just a country lawyer from Mars, but I have no trouble thinking of a "greater intrusion on state sovereignty" than a federal court enforcing state law. It would be a federal court instructing state officials on how to comply with federal law! And that is permitted by Ex parte Young. When the claim is based on state law, state sovereignty is fully protected. All the state needs to do is to amend its law and it avoids the federal court judgment altogether. A state that does this completely escapes the effect of the federal judgment, since that judgment under Young can only be prospective.

Me: Perhaps Justice Powell had in mind that federal courts might misconstrue unclear state law to their liking.

Martian: If so, he is forgetting about Pullman abstention and is "double-counting" federalism. The long-established Pullman abstention doctrine, whereby federal courts are supposed to abstain from de-

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41. See 28 U.S.C. § 1367 (1994) and Gibbs v. United Mine Workers, 383 U.S. 715 (1966)(Art. III is not violated when federal courts handle non-diverse state-law claims; they are all part of the same constitutional "case").

ciding unclear issues of state law, is explicitly designed to take care of that federalism concern. 43

By the way, wasn't Justice Powell the one who was quite strongly in favor of judicial restraint for federal courts? 44

Me: Well, yes.

Martian: Then his decision in Pennhurst is even more strange: it actually increases the number of occasions for federal court "intrusions on state sovereignty" on federal grounds and it violates the most basic principle of judicial restraint—the doctrine of avoidance of unnecessary decision of federal constitutional claims. 45 Pennhurst forces federal courts to ignore state-law claims that could easily resolve the case (no matter how clear they might be) and to reach out to decide the case on perhaps difficult federal constitutional grounds instead.

10. Me: Well, there are a number of difficulties with the Pennhurst case, 46 but one possible positive contribution of Justice Powell's opinion in Pennhurst is that it sought to place Ex parte Young on a less "fictionalized" basis. Pennhurst posited that Young was really a case about balancing the need to assure the supremacy of federal law against the need to protect state sovereignty. You must agree with Justice Powell that the policy of assuring the supremacy of federal law is served when the federal court enters prospective injunctive relief enforcing federal law—something that is absent when only state law is enforced.

Martian: I agree with that. What I don't understand is how the supremacy of federal law is not equally served when the federal court enters retroactive or damages relief requiring the state to redress its past violations of federal law. How can federal law be "half-supreme"? It's like you say here, being "half-pregnant."

Me: Well, the Court in a later case explained how: while prospective relief "gives life to the Supremacy Clause, . . . compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." 47

Martian: What "dictates"? Both the 11th Amendment and § 1983 explicitly refer to injunctions and damages relief. The 11th Amendment prohibits "any suit in law or equity," while § 1983 authorizes both "an

44. See, e.g., Cannon v. Univ. of Chicago, 441 U.S. 677, 730-49 (1979)(Powell, J., dissenting)(dissenting on judicial restraint grounds from the majority's approval of an implied right of action for damages in federal court to enforce federal law prohibiting sex discrimination in federally-funded programs).
action at law” and a “suit in equity.” Either both are barred or both are permitted.

I guess the essence of my problem is I don’t see where the Supreme Court gets any basis for distinguishing between prospective and retroactive relief. Even as an abstract matter, it is difficult to separate compliance and deterrence interests. On Mars, our entire tort, contract, and criminal law systems are based on the assumption that redressing past misconduct has a beneficial effect on future compliance with the law. Imagine what would happen if we abolished any kind of “retroactive” relief for torts or contract breaches? Who would have any incentive to comply with the law?

It is nice that your Supreme Court, after 80 years of Ex parte Young, wants to get out of the business of writing fiction when dealing with the 11th Amendment, but its solution seems to be just to write different fiction. And what gets me more is that the judges writing these 11th Amendment opinions are supposed to be strict constructionists or interpretivists! The same judges who have no trouble discovering all kinds of things in the “dictates of the Eleventh Amendment” are the same ones who go crazy when anyone else suggests that the Due Process clause “dictates” anything beyond fair procedures.

Me: Hey, don’t get excited. I don’t write this stuff. I just explain it.

11. Martian: Let’s get away from theory for a minute. I think I have an idea. The 11th Amendment applies only to federal courts, right? That part of the wording hasn’t been ignored, has it?

Me: Not yet, but you should know that . . .

Martian (interrupting): Wait a minute and hear my idea. Why not go to federal court and get prospective relief, and then sue for retroactive benefits in state court. You have this doctrine of collateral estoppel—IL think the real cool people call it “issue preclusion.” Anyway, collateral estoppel would establish liability based on the federal court judgment and the 11th Amendment wouldn’t be a problem in state court.

Me: Well, some clever lawyers in Chicago thought of that one in the Jordan litigation I mentioned before. After being refused retroactive benefits in Edelman v. Jordan, they sought an order providing “notice relief” to the class of welfare applicants who lost back benefits. The notice would advise them that they could seek relief in Illinois state administrative and judicial forums. And in Quern v. Jordan,48 the Court accepted the argument you are suggesting—that when class members respond to that notice and pursue their remedies in state court, there are several “missing links in the chain of causation” be-

tween the federal court judgment and any financial impact on the state treasury. Any state payment of money would be the result, not of the action of the federal court, but of the individual welfare recipient, state law, the state administrative agency, and the state courts.49

Martian: Well, I guess that makes some sense. Or at least as much sense as anything else I've heard today.

Me: But you have to be careful with notice relief. To get it, you must also have a claim for prospective injunctive relief. This is because notice relief is proper only if it is "ancillary" to a prospective injunction. So if the state stops its illegal activity, you no longer have a "live" prospective injunction claim and the federal court must dismiss the entire case. This was the holding in Green v. Mansour.50

Martian: But in Quern, there was no "live" prospective injunction either. That part of the district court's judgment had been moot for years before notice relief was approved. In fact, Congress had completely abolished the program to which it related. Yet, Quern allowed notice relief for class members who were denied benefits before the program was abolished.51 How "live" was that claim for a prospective injunction?

Me: Well, obviously not very "live" by the time notice was ordered. But it had been "live" at one point.

Martian: So notice relief can be ordered ancillary to a live prospective injunction, or ancillary to a "dead but once live" prospective injunction, but it has to be ancillary to something prospective?

Me: Correct.

Martian: Correct me if I am wrong, but "ancillary" is used to describe something a federal court has no power to do independently, but may do if it is logically connected to something that the court does have the power to do. Like your ancillary jurisdiction.52 The Court in this Quern v. Jordan case held that notice relief does not violate the 11th Amendment because the federal court does not directly compel the state to pay money. If so, then it is permissible without any need to make it "ancillary" to anything else.53

49. Id. at 347.
51. See id. at 76 n.2 (Brennan, J., dissenting).
52. See Hutto v. Finney, 437 U.S. 678 (1978)(ancillary order for attorney fees to be paid by the state). Cf. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 19 (1983)(under ancillary jurisdiction, a district court "may as an incident to disposition of matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented.")
53. See supra note 48 and accompanying text.
Me: Well, the court in *Green* held that notice relief would constitute an "end run around" the 11th Amendment unless it was ordered along with a prospective injunction.

Martian: But if notice relief is ordinarily barred by the 11th Amendment, but may be ordered if it is "ancillary" to a prospective injunction, then an order for *retroactive benefits* must be okay when it is "ancillary" to a prospective injunction. Yet, the Court said that was barred in *Edelman*.

Me: I think perhaps you are being a little too logical about this.54

Martian in audience (mockingly): Tsheerk is part Vulcan! Tsheerk is part Vulcan! [General laughter from the audience which, by this time, is getting a little punchy.]

12. Martian: I'd like to follow up on this state court suit idea. As I understand your federal system, a federal law claim in state court cannot be defeated by any state-law governmental or sovereign immunity.

Me: That's correct. Simple concepts of the supremacy of federal law would mean that any federal law claim would override that immunity, whether it is based on state common law, state statute, or even the state constitution.55

Martian: So, if I just filed my § 1983 claim originally in state court, I could get all the relief I needed without worrying about the 11th Amendment. Section 1983 may not be one of those "read my lips" special intent statutes, but you don't need that kind of abrogating statute because there is no 11th Amendment immunity to abrogate in state court.

Me: Not so fast. You are technically correct that the 11th Amendment does not apply in state court. However, if it is a § 1983 claim you are thinking of filing, you won't get far. In *Will v. Michigan Dep't. of State Police*,56 the Court held that a state was not a "person acting under color of state law" within the meaning of § 1983.

Martian: But how could that be? I've looked through your U.S. code. There are many statutes using such words as "person,"57 "person en-

54. I should disclose that I argued the *Green* case for the plaintiffs in the Supreme Court.
57. *See Case v. Bowles*, 327 U.S. 92, 100 (1946)(state is a "person" subject to Federal Emergency Price Control Act); *California v. United States*, 320 U.S. 577, 585-86 (1944)(state among the "persons" bound by the Natural Gas Act of 1938); *Ohio v. Helvering*, 292 U.S. 360 (1934)(state is among the "persons" liable under federal liquor tax); *South Carolina v. United States*, 199 U.S. 437 (1905). As Justice Frankfurter stated the rule regarding inclusion of states as of 1944, states are
gaged in commerce,"58 "employer,"59 or "common carrier by railroad,"60 and in virtually every case the Supreme Court has held that these general terms included states. Not only that, the Court held that a city was a "person acting under color of state law" in that Monell case, and that was based on the Dictionary Act, which defined "person" as presumptively including all "bodies politic and corporate."61

Me: I know. All those cases were pointed out to the Court in Will, but the Court ignored them. Instead, it relied on one case that held a state was not a "white person."62

Martian: You've got to be kidding. My knowledge of the English language is limited, but I think that even I can understand that "white person"—which is hard to apply to any non-natural-person entity—is completely unlike all those other cases.

Martian: What about state officials sued in their official capacity under Ex parte Young? They have to be considered "persons."

Me: Well, according to Will, a state officer sued in his official capacity is not a "person acting under color of state law" either, at least not when the officer is sued for money damages or other retroactive monetary relief.

Martian (incredulously): You say that a state official carrying out a state law is not a "person acting under color of state law"? I'm going to have to have a talk with my English teacher when I get back to Mars!

Me: Well, if it makes you feel any better, state officials are "persons" if they are sued in their official capacities for prospective injunctive relief under Ex parte Young.63

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58. Jefferson County Pharmaceutical Ass'n v. Abbott Lab., 460 U.S. 150 (1983) (a state is a proper defendant as a "person engaged in commerce" in suits under the Clayton and Sherman Acts). See also Georgia v. Evans, 316 U.S. 159, 162 (1942) ("Nothing in the [Sherman] Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7 as to exclude a State.")


63. See Will v. Dep't of State Police, 491 U.S. 58, 71 fn.10 (1989).
Martian: So, if you file a claim seeking both prospective and retroactive monetary relief, the very same official is both a "person" and a "non-person" in the same suit! How do you remember all these illogical distinctions? Does it help to spend some time each day memorizing nonsense syllables or random number sets?

Me: That does help, and I suggest that to my Federal Courts students. But, Will is relatively easy to remember if you keep the basic idea in mind. The Will Court held that Congress intended that "person" would reflect 11th Amendment law. So, when a § 1983 suit is filed in state court, then the state court must apply the same limitations on the suit, as a matter of statutory interpretation of the term "person," as apply as a constitutional matter in federal court.

Martian: Congress intended that? Why does your Supreme Court assume that Congress would be so stupid as to think that the 11th Amendment applies to state courts? I hate to get literal again, but the 11th Amendment clearly refers only to the "judicial power of the United States." Only if Congress somehow intended or thought that § 1983 actions would be brought solely in federal court would this make any sense. Was that the case?

Me: No, the debates on § 1983 and later cases make it absolutely clear that the 1871 Congress that passed § 1983 knew and intended that § 1983 actions would be brought in state court.64

Martian: Besides, it is impossible for Congress to have intended that "person" follow the contours of Young or the prospective-retroactive test. Section 1983 was passed by Congress in 1871. Yet, Hans v. Louisiana, extending the 11th Amendment to federal claims, was not decided until 1890 and Ex parte Young was not decided until 1908. And the whole retroactive-prospective doctrine was not even—how do you say—a "gleam in the eye" of the Supreme Court until the Edelman case in 1974. As of 1871, the most authoritative pronouncement on the 11th Amendment was Chief Justice Marshall’s statement in Cohens v. Virginia, where he said that the 11th Amendment did not apply to federal question cases at all.65 The Court did not depart from the Cohens statement until Hans. This state of 11th Amendment law would have been immediately apparent to any member of Congress who picked up a treatise on constitutional law in 1871.66 How could

64. See Felder v. Casey, 487 U.S. 131, 139 (1988); Patsy v. Bd. of Regents, 457 U.S. 496, 506 (1982). See also Cong. Globe, 42d Cong., 1st Sess., 216 app. (1871) ("I do not say that this section [§ 1983] gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understood. It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court . . . ." (Remarks of Senator Thurman)).

65. 19 U.S. (6 Wheat.) 264 (1821).

66. See, e.g., 2 James Story, Constitution of the United States (2d ed. 1851) ("The [11th] amendment has its full effect, if the constitution be construed as it would
the 1871 Congress have possibly intended to adopt doctrines that didn’t even exist until many years after it passed the statute?

Me (trying not to sound ironic): You underestimate the powers of our Congress!

Martian: And even if it were possible for Congress to intend—by use of the term “person”—to limit § 1983 to prospective injunctive relief, it would be very strange for them to state, just a few words later in the same statute, that the “person” defendants “shall be liable . . . in an action at law, suit in equity, or other proper proceeding for redress.”

Me: If your point is that the Court did not make a serious attempt in Will to look at the evidence for and against Congress having the intent the Court ascribed to it, you are correct.

Martian: I think your Supreme Court is writing some more fiction, but let me see if I understand their latest “novel.” Does Will’s adoption of 11th Amendment law include the “read my lips” doctrine? If Congress wants to change its “intent” not to include states as “persons,” must it do so with “read my lips” clarity?

Me: Yes. That was the only semi-logical basis for the Supreme Court to avoid the effect of all those cases that said states were usually “persons” according to normal rules of statutory interpretation.

Martian: So, if I understand you correctly, the Court admits the 11th Amendment does not apply to bar suit in state court. But the result of this Will case is that Congress must pass a statute subjecting states to suit in state court with the same “read my lips” clarity that it uses to subject them to suit in federal court. In other words, Congress must abrogate a constitutional immunity that the Court admits does not even apply.

Me: I think he’s got it!67

13. Martian: There is another aspect of this whole “read my lips” clarity thing that puzzles me, whether applied to the real 11th Amendment, or the “shadow” 11th Amendment that Will invented. As I understand it, the Supreme Court did not fully develop this require-

have been construed, had the jurisdiction of the Court never been extended to suits brought against a State by the citizens of another State, or by aliens.”)(quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 857-58 (1824); ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 4 (4th ed. 1864)(the 11th Amendment only applies to diversity cases and “if the case arises under the constitution, [etc.], or if it is of admiralty or maritime jurisdiction, it matters not who may be the parties.”)

ment of special textual clarity for the 11th Amendment until the 1985 case of Atascadero State Hosp. v. Scanlon. And the "shadow" 11th Amendment did not appear until 1989 in the Will case.

Me: That's right.

Martian: Well, I heard that your new conservative Supreme Court believes the federal courts must be more respectful of the democratic-majoritarian institutions of government—that they believe in limiting federal court interference with legislative judgments. How does hobbling the Congress retroactively with this special clarity standard support majoritarian democratic institutions and judicial restraint?

Me: Well, I don't know that I . . .

Martian (interrupting): Let me finish. Congress has passed many statutes before 1985 subjecting states to suit—statutes that are clear that Congress is subjecting states to liability, but which do not meet the new "lip-reading" clarity standard for abrogation. Are those statutes no longer sufficient to impose liability in either federal or state court? Does this mean that Congress has to go back and reword and repass all those statutes? I don't think that even your wild Warren Court, for all the legislative judgments it may have questioned, made such a "slap in the face" at a legislature.

Me: It's not quite as bad as that. The Court has given Congress a break in a recent case, Hilton v. South Carolina Pub. Ry. Comm'n. In Hilton, the Court held a federal statute that subjected states to suit in their own courts that was passed before the Will case—the Federal Employer's Liability Act—would not be subject to the new 1989 Will rule at least if the suit is brought in state court.

Martian (getting excited): So, § 1983 is safe, at least in state court. Section 1983 was passed over 100 years before the Will case.

Me: No, they didn't say anything about § 1983 in Hilton and I doubt that the Court would overrule Will and apply the Hilton exception to § 1983.

Martian: So, § 1983 is the only pre-1985 statute that is subject retroactively to the Court's clear statement rule.

Me: There may be others. We don't know yet.

Martian: Why would § 1983 be any different than the federal statute in Hilton?

Me: The Court in Hilton relied heavily on stare decisis policies. [Groans, then snickers from the audience.] In particular, the Court focused on "settled rights and expectations," particularly the reliance

interests of the states with respect to their liability under the Jones Act and the Federal Employers Liability Act. State liability in private damages actions under these federal statutes was so well-established that they had even exempted state railroad workers from state workers compensation coverage.\(^\text{70}\)

Martian: But Justice Scalia stated in *Union Gas* that the states had relied on *Hans*'s “automatically assuring that private damages actions created by federal law do not extend against the states”\(^\text{71}\) That was the reason he gave in *Union Gas* for not overruling *Hans*. Are we talking about the same states?

Me: Those are the only states we have.

Martian: But what kind of court and what kind of law is this where they base decisions on two totally opposite characterizations without even . . . .—oh, never mind!

Me: Perhaps the Court is hinting at a fundamental difference between the *Hilton* and *Will* situations. Injuries from railroad accidents are one thing, but when it comes to constitutional rights, states have always relied on being able to violate people's constitutional rights whenever they wanted without any fear of being called to account.

Martian: Oh. I think we understand completely now. Thank you for an interesting and informative talk. [Polite applause.]

*[END OF TRANSCRIPT]*

\(^{70}\) *Id.* at 200-03.

\(^{71}\) *See supra* note 4 and accompanying text (emphasis added).