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Night and Day: *Coeur d'Alene*, *Breard*, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine

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ARTICLES

Night and Day: *Coeur d'Alene*, *Breard*, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine

CARLOS MANUEL VÁZQUEZ*

TABLE OF CONTENTS

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INTRODUCTION

The Supreme Court has long interpreted the Eleventh Amendment to protect the states from private lawsuits based on federal law.[1] At the same time, it has alleviated the rule-of-law problems with this immunity by holding that, at least in certain circumstances, a suit against a state official challenging the official's violation of federal law is not a suit against the state and thus is not barred. This principle, which the Supreme Court has said "gives life to the Supremacy Clause,"[2] has become known as the *Ex parte Young*[3] "exception" to the Eleventh Amendment,[4] even though it did not originate with that case.[5] The limits of this exception were elaborated in *Edelman v. Jordan*,[6] in which the Court held that the exception does not extend to suits seeking "retroactive" relief "which requires the payment of funds from the state treasury."[7] Later cases have read *Edelman* as establishing that suits seeking "prospective" relief from a state official's violation of federal law are not barred by the Eleventh Amendment, while suits seeking "retrospective" or "retroactive" relief are barred.[8]

In perhaps the most often quoted passage from *Edelman*, the Court admitted that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that

1. *See* Hans v. Louisiana, 134 U.S. 1, 14 (1890).
2. Green v. Mansour, 474 U.S. 64, 68 (1985).
3. 209 U.S. 123 (1908).
4. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984).
5. *See generally* Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).
6. 415 U.S. 651 (1974).
7. *Id.* at 677.
8. *See generally* Part II, *infra*. I use the terms "retrospective and "retroactive" interchangeably, as the Supreme Court appears to do in this context.

between day and night."[9] The Court of Appeals for the Second Circuit was closer to the mark when it wrote that drawing the distinction that has evolved from *Edelman* "is more like examining a subject in that half-light called the gloaming, where to identify it accurately one needs to have the instincts of Argos, Odysseus' dog, who recognized his master dressed as a beggar upon his return home after twenty years' absence."[10] The truth is that even Argos would have difficulty navigating the Supreme Court's doctrine in this area.

The inadequacies of the prospective-retrospective distinction have long been noted by scholars[11] and lower courts,[12] but until now the courts have muddled through and scholars have focused their attention on the many other problematic aspects of Eleventh Amendment doctrine.[13] The difficulty of explaining the Court's results as applications of a rule turning on prospectivity has led the lower courts to assimilate the prospective-retrospective terminology as shorthand for a rule barring suits seeking damages and damage-like monetary remedies from the state treasury.[14] Commentators, too, have understood the test this way.[15] Insofar as the distinction operates merely to bar suits for damages

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9. *Edelman*, 415 U.S. at 667. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2040 (1997); Papasan v. Allain, 478 U.S. 265, 278 (1986); *Pennhurst*, 465 U.S. at 105; Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 604 (1983); Hutto v. Finney, 437 U.S. 678, 690 (1978).

10. New York City Health & Hosps. Corp. v. Perales, 50 F.3d 129, 130 (2d Cir. 1995).

11. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987) (referring to the "*ad hoc* mishmash of *Young* and *Edelman*" and the Court's "incoherent" case law in this area); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 88 & n.353 (1988) (referring to "the much criticized distinction drawn in *Edelman v. Jordan*" and citing articles attacking it).

12. *See, e.g.*, *Perales*, 50 F.3d at 130.

13. Scholars giving more-than-passing attention to the prospective-retrospective distinction include Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1140-52 (1989); William Burnham, *Federal Court Remedies for Past Misconduct by State Officials: Notice Relief and the Legacy of* Quern v. Jordan, 34 AM. U. L. REV. 53 (1984); Jackson, *supra* note 11; Norman B. Lichtenstein, *Retroactive Relief in the Federal Courts Since* Edelman v. Jordan*: A Trip Through the Twilight Zone*, 32 CASE W. RES. L. REV. 364 (1982); Eric B. Wolff, Note, Coeur d'Alene *and Existential Categories for Sovereign Immunity Cases*, 86 CAL. L. REV. 879 (1998). Articles giving passing consideration to the issue include Amar, *supra* note 11; William Burnham, *"Beam Me Up, There's No Intelligent Life Here": A Dialogue on the Eleventh Amendment with Lawyers from Mars*, 75 NEB. L. REV. 551, 560-63 (1996) [hereinafter Burham, *"Beam Me Up, There's No Intelligent Life Here"*]; Daniel J. Cloherty, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1297 (1994); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1268-69 (1978); 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, 1119-27 (1983); Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 214-21 (1981).

14. *See, e.g.*, Brennan v. Stewart, 834 F.2d 1248, 1253 (5th Cir. 1988), discussed *infra* text accompanying note 263.

15. *See* Burnham, *"Beam Me Up, There's No Intelligent Life Here"*, *supra* note 13, at 560 n.31; William Burnham & Michael C. Fayz, *The State as a "Non-Person" Under Section 1983: Some Comments on Will and Suggestions for the Future*, 70 OR. L. REV. 1, 22 (1991); Jackson, *supra* note 11,

and similar monetary relief, the rule is relatively straightforward (although even in this limited sphere, the Court's application of the distinction is not without its problems). Some commentators have criticized even this limited version as unprincipled and unjustified,[16] but few have dwelt on its incoherence. The Court's more recent articulations of the test have aggravated the doctrinal problems by seeming to bar all retrospective relief, whether or not monetary, yet there has still been little commentary. This is not surprising. The severest of these problems have been posed by decisions appearing to find seemingly retrospective forms of nonmonetary relief to be prospective. Since most Eleventh Amendment scholars believe that the Court has interpreted the Amendment far too broadly anyway,[17] the scholarly community has not gotten exercised about aberrant decisions that limit the Amendment's reach.

Two recent Supreme Court decisions, however, suggest that the neglect of these doctrinal problems can no longer be regarded as benign. The first case is *Idaho v. Coeur d'Alene Tribe of Idaho*.[18] The plaintiff in *Coeur d'Alene* was an Indian Tribe which claimed that federal law gave it the beneficial ownership of certain submerged lands. The Tribe sought an order prohibiting officials of Idaho from interfering with its rights.[19] A fractured Supreme Court decided that the claim was barred.[20] Justice Souter, writing for four dissenters, agreed that the relief sought was prospective,[21] as apparently did Justice Kennedy and the Chief Justice. The dissenters would have found this a sufficient reason for permitting the suit to go forward,[22] but Justice Kennedy argued that suits seeking prospective relief should be dismissed on Eleventh Amendment grounds if, in the court's view, they unduly infringe upon the values underlying the Amendment.[23] The controlling opinion in the case, however, was Justice O'Connor's concurrence, which Justices Scalia and Thomas joined.[24] Justice O'Connor criticized Justice Kennedy for "unnecessarily question[ing]" the "basic principle of federal law" that the *Ex parte Young* exception applies "where the relief sought is *prospective* rather than *retrospective*,"[25] but agreed

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at 88-93; Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 126-27 & n.168 (1996); Vázquez, *supra* note 5, at 1715.

16. *See, e.g.*, Amar, *supra* note 11, at 1479-80.

17. *See* Vázquez, *supra* note 5, at 1694 n.42 (citing scholars critical of the holding of *Hans v. Louisiana*, 134 U.S. 1 (1890)).

18. 117 S. Ct. 2028 (1997).

19. *See id.* at 2032.

20. *See id.* at 2040.

21. *See id.* at 2040 (Kennedy, J.); *id.* at 2051 (Souter, J., dissenting).

22. *See id.* at 2052 (Souter, J., dissenting).

23. *See id.* at 2038-39.

24. *See id.* at 2048 ("JUSTICE O'CONNOR'S view is the controlling one.").

25. *See id.* at 2028, 2045, 2046. The Court actually said that "a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." *Id.* at 2046. On the relationship between the requirement that the violation of federal law be "ongoing" and the requirement that the relief sought be prospective, *see infra* text accompanying notes 397-99.

nevertheless that the relief sought by the Tribe was barred by the Eleventh Amendment.[26] Courts and commentators disagree about why exactly the concurring Justices found the relief sought by the Tribe to be barred, but some have read the opinion as holding that the relief was barred because it was retrospective.[27] If so, then *Coeur d'Alene* simultaneously reaffirms the prospective-retrospective test as a "basic principle of federal law," but contorts the concept of retrospectivity beyond recognition by finding a seemingly prospective form of relief to be retrospective.

Among the courts to interpret Justice O'Connor's opinion in *Coeur d'Alene* to hold that the relief sought by the Tribe was retrospective was the United States Court of Appeals for the Fourth Circuit, whose decision in *Paraguay v. Allen*[28] led to the second recent Supreme Court decision that necessitates a re-examination of the prospective-retrospective distinction. The Republic of Paraguay sued George Allen, the Governor of Virginia, and asked the court to halt the scheduled execution of its national, Angel Breard.[29] The Vienna Convention on Consular Relations, a treaty to which the United States and Paraguay are parties, provides that nationals of one country, if arrested in another country, have a right to be informed that they may consult with their consul if they wish.[30] Virginia violated its duty to notify Breard of this right,[31] and Paraguay argued that, because this treaty violation materially contributed to the subsequent imposition of Breard's death sentence, the sentence should be vacated.[32] Breard himself sought to raise the treaty-based claim in his federal habeas corpus petition, but the district court held that he had forfeited this basis for relief by failing to raise the issue at trial or on his direct appeals.[33] Paraguay's separate lawsuit was dismissed on Eleventh Amendment grounds.[34] The court came to the startling and counterintuitive conclusion that the Eleventh Amendment bars a suit seeking to halt an execution because such relief is retroactive, not prospective.[35] The Court of Appeals affirmed the dismissal of both Breard's and Paraguay's claims.[36] It concluded that Paraguay was seeking retrospective

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26. *See Coeur d'Alene*, 117 S. Ct. at 2046.

27. *See, e.g.*, Republic of Paraguay v. Allen, 134 F.3d 622, 628-29 (4th Cir.), *cert. denied*, 118 S. Ct. 1352 (1998); Vicki C. Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENTARY 301, 312 (1998). *See also infra* text accompanying note 295-96.

28. 134 F.3d 622, 628-29 (4th Cir.), *cert. denied*, 118 S. Ct. 1352 (1998).

29. *See id.* at 625 n.2.

30. Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261.

31. The federal government conceded this point in its submission to the International Court of Justice. *See infra* note 371.

32. *See Paraguay*, 134 F.3d at 624.

33. *See* Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff'd*, 134 F.3d 615 (4th Cir.), *cert. denied*, 118 S. Ct. 1352 (1998).

34. *See* Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272-73 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir.), *cert. denied sub nom.* Breard v. Greene, 118 S. Ct. 1352 (1998) (per curiam).

35. *See id.* at 1273.

36. *See Breard*, 134 F.3d at 615; *Paraguay*, 134 F.3d at 622.

relief because Virginia's violation of the treaty took place in the past.[37] Since Virginia was no longer hindering Breard's right to consult with his consul, there was no ongoing violation of the treaty; hence, Paraguay was not seeking prospective relief from an ongoing violation of federal law.[38] In a similar case, *United Mexican States v. Woods*,[39] the Ninth Circuit reached the same conclusion.[40]

Paraguay and Breard both sought relief in the United States Supreme Court, as did Mexico. While Paraguay's petition for certiorari was pending, and less than a week before Breard's scheduled execution, the International Court of Justice (ICJ) in The Hague ordered the United States to postpone the execution to give it time to consider Paraguay's claim that the execution violated the United States' treaty obligations.[41] Notwithstanding this order, the Supreme Court denied the relief sought by both Breard and Paraguay. Breard was executed less than two-and-a-half hours later.[42] The *per curiam* opinion in *Breard v. Greene*[43] devotes only five sentences to the Eleventh Amendment issue. In those sentences the Court expressed agreement with the Fourth Circuit's conclusion that Paraguay's suit was barred by the Eleventh Amendment.[44]

When two courts of appeals conclude that a court order halting an execution scheduled to take place in the future is retrospective relief barred by the Eleventh Amendment, and the Supreme Court finds nothing wrong with that conclusion, something is awry. The error becomes evident when one compares the form of relief sought in these cases to the forms of relief sought in a typical habeas corpus petition. Indeed, in both the Fourth Circuit and Ninth Circuit cases, the prisoner himself sought the very same relief in a habeas proceeding, and in neither habeas proceeding was an Eleventh Amendment problem even suggested.[45] As Justice Souter observed in *Seminole Tribe*, the reason federal habeas relief for state prisoners does not raise Eleventh Amendment problems is

37. *See Paraguay*, 134 F.3d at 629.

38. *See id.* The court regarded the "prospectivity" requirement as separate from the requirement that there be an ongoing violation of federal law, but it found both that the violation of federal law was not ongoing and that the relief sought was not prospective.

39. 126 F.3d 1220, 1223 (9th Cir.), *cert. denied*, 118 S. Ct. 1517 (1998).

40. *See id.* at 1223-24.

41. *See* Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.) (Apr. 9, 1998) <www.icj-cij.org/idocket/ipaus/ipausframe.htm>.

42. The Supreme Court announced its decision at 8:22 p.m. on April 14, and Breard was pronounced dead at 10:39p.m. Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas; World Tribunal, State Department Had Urged Delay*, WASH. POST, Apr. 15, 1998, at B1.

43. 118 S. Ct. 1352 (1998) (per curiam). Although the Eleventh Amendment was relevant to Paraguay's petitions to the Supreme Court, not Breard's, the Supreme Court addressed Breard's petitions and Paraguay's in a single opinion. That is why this article's title refers to the "*Breard*" case even though Breard's case, as distinguished from Paraguay's, did not itself raise Eleventh Amendment issues. The lower courts, by contrast, wrote separate opinions.

44. *See id.* at 1356.

45. *See* Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305-06 (9th Cir. 1995), *cert. denied sub nom.* Martinez-Villareal v. Stewart, 117 S. Ct. 588 (1996).

that such petitions fall within the *Ex parte Young* exception.[46] If the applicability of the *Ex parte Young* exception turns on whether the relief sought is prospective or retrospective, and if a habeas petition seeking to halt the execution of a state prisoner because of a violation of federal law falls within that exception, then the lawsuits brought by Paraguay and Mexico seeking the very same relief must fall within it too.

Paraguay v. Allen and *United Mexican States v. Woods* are the *reductio ad absurdum* of the Supreme Court's jurisprudence in this area. Though the decisions almost certainly were wrong, what is remarkable about these cases is the *plausibility* of their startling holdings as applications of the Supreme Court's decisions elaborating the prospective-retrospective distinction. Like the Fourth and Ninth Circuits, the Supreme Court itself has largely ignored the relevance of the habeas cases to the *Ex parte Young* doctrine. When one takes them into account, it becomes clear that the doctrinal problems in this area run very deep.

Justice O'Connor's refusal to go along with Justice Kennedy's radical recasting of *Ex parte Young* doctrine was apparently based in part on her mistaken belief that distinguishing prospective from retrospective relief involved a "straightforward inquiry."[47] If the inquiry were indeed straightforward, the effort of the concurring and dissenting Justices in *Coeur d'Alene* to preserve it as the exclusive—or virtually exclusive[48]—test of the permissibility of suits against state officials would be praiseworthy. Before *Edelman*, the Court used a variety of formulations to describe when a suit against a state official was barred by the Eleventh Amendment. One of the virtues of the *Edelman* line of cases is that it purports to replace these disparate formulations with a single, straightforward rule. If, as I attempt to show in this article, a comprehensive prospective-retrospective test is neither straightforward nor consistent with the decided cases, the challenge is to find a straightforward test that is. I suggest that the results in the Supreme Court's decisions are consistent with a relatively straightforward test in which the concept of "prospectivity" plays only a limited role. The test is essentially the one first articulated in *Edelman*: the Eleventh Amendment bars suits against state officials seeking retroactive *monetary* relief.[49] Suits seeking retroactive nonmonetary relief are not barred.

Part I of this article places the prospective-retrospective distinction in context by explaining how the rule of the *Edelman* case operates to limit the federal courts' ability to enforce the federal obligations of the states. Part II then

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46. *Seminole Tribe*, 517 U.S. at 178 (Souter, J., dissenting). The Justices in the majority did not dispute Justice Souter on this point. *See id.* at 75 n.17 (distinguishing statute involved in *Seminole Tribe* from the "statutes cited by the dissent as examples where lower courts have found that Congress implicitly authorized suit under *Ex parte Young*," among them statute authorizing federal habeas relief for state prisoners).

47. *Coeur d'Alene*, 117 S. Ct. at 2047 (O'Connor, J., concurring).

48. As discussed in Part III, the concurring opinion is best read as recognizing a narrow exception to the general rule that prospective relief against state officials who violate federal law is not barred by the Eleventh Amendment.

49. *Edelman*, 415 U.S. at 665.

explains how the Supreme Court gradually and apparently inadvertently transformed the test adopted in *Edelman* from rule barring only retrospective monetary relief into a rule barring all retrospective relief. Part III discusses the decision in *Coeur d'Alene* and shows that the controlling opinion in that case did not narrow the *Ex parte Young* exception by adopting an expansive definition of "retrospective" relief, but instead recognized a narrow exception to the rule that prospective relief against state officials who violate federal law is not barred by the Eleventh Amendment. Part IV suggests that the analyses of the lower courts in *Breard* and *Woods* were plausible as applications of the Supreme Court's highly indeterminate "prospectivity" test, but must be regarded as erroneous in the light of the long and unchallenged history of affording federal habeas relief to state prisoners. This Part also explains why the Supreme Court's opinion explaining its denial of relief to Paraguay should not be read as an endorsement of those decisions.

Part V examines the concepts of prospectivity and retrospectivity more closely to see whether there is a test turning on those concepts that can explain the Supreme Court's decisions in this area. I conclude that there is a version of a prospective-retrospective test that can explain the benefits cases and the habeas cases, albeit uneasily, but there is none that will also explain the results in the desegregation cases. In Part VI, I consider how best to address this doctrinal problem. I consider four options: jettisoning the current analytical framework in favor of an entirely new approach; adopting an otherwise comprehensive prospective-retrospective test while recognizing an exception for desegregation cases; adopting a comprehensive prospective-retrospective test and overruling the desegregation cases; or reverting to *Edelman*'s original holding, under which only retrospective monetary relief would be barred. Although none is a panacea, I conclude that the fourth option is far superior to the others.

I. THE PLACE OF THE PROSPECTIVE-RETROSPECTIVE DISTINCTION IN ELEVENTH AMENDMENT DOCTRINE

The rule associated with the *Ex parte Young* case is today often described as an "exception" to the states' Eleventh Amendment immunity.[50] That the Eleventh Amendment is itself is an exception to a broader rule is less often noted.[51] The Amendment, of course, confers an immunity, and immunities are by definition exemptions from more-broadly-applicable rules. The Eleventh Amendment is in tension with, and thus might be regarded as an exception to, two fundamental maxims of political science, both closely linked to the ideal of the rule of law.[52] The first was well expressed by Alexander Hamilton in *The Federalist*: "If there are such things as political maxims, the propriety of the

50. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984).

51. *But cf.* Henry P. Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996).

52. *See, e.g.*, Amar, *supra* note 11, at 1466-92; Jackson, *supra* note 11, at 3-13.

judicial power of a government being coextensive with the legislative may be ranked among the number."[53] The second was famously put by Chief Justice Marshall in *Marbury v. Madison*: "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[54] To understand the *Edelman* exception to the *Ex parte Young* exception, it is necessary first to understand the nature of the Eleventh Amendment exception. To understand the Eleventh Amendment, it is necessary to understand the principles of the rule of law to which it is, or may be, an exception.

In a federal system in which the federal government has the power to impose legal obligations directly on individuals, the need in theory for federal judicial tribunals with jurisdiction to enforce those obligations is not difficult to grasp. For structural reasons, the alternative of relying on the courts of the states to enforce these obligations is unsatisfying. Federal laws are needed primarily, if not solely, when the state legislatures have failed to take measures the federal legislature regards as necessary. In such circumstances, it is at least a significant possibility that the relevant measures will not be to the liking of at least some state legislatures. State judges are likely to be ineffective enforcers of these potentially unpopular measures because they are in theory answerable to the state legislatures that, for whatever reason, failed to adopt the measures.

At the time of the Founding, this problem was far from theoretical. Under the Articles of Confederation, the state courts had proved to be ineffective enforcers of federal obligations.[55] It was for this reason that the Founders decided to establish a federal judiciary staffed by judges having life tenure and salary protection,[56] and to give it jurisdiction over cases and controversies "arising under" federal law.[57] The Constitution does not presume conclusively that state courts will be hostile to federal rights. It establishes a Supreme Court and confers on it appellate jurisdiction over cases "arising under" federal law, but it does not establish lower federal courts. Thus, the default mechanism set up by the Constitution for enforcing federal obligations entrusts such enforcement as

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53. THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818-19 (1824) (Marshall, C.J.) ("[T]he legislative, executive, and judicial powers of every well-constructed government [must be] potentially coextensive. . . . All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws.").

54. Marbury v. Madison, 5 U.S. (5 Cranch) 137, 163 (1803).

55. *See generally* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097-1102 (1992).

56. Under the federal Constitution, federal judges are entitled to life tenure and an undiminishable salary. U.S. CONST. art. III, § 1. By contrast, most state judges are elected and must stand for re-election, and are subject to term limits. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-26 (1995); Edward Harnett, *Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 974-75 (1997).

57. *See* Vázquez, *supra* note 55, at 1097-1102.

an initial matter to state judges, who are instructed in the Supremacy Clause to give effect to federal law "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[58] But the Constitution gives the Supreme Court the power to review the state courts' judgments to ensure that they comply with this instruction. Moreover, the Founders recognized the possibility that Supreme Court review of state court decisions might be insufficient to protect the federal interests implicated in suits arising under federal law, and so they gave Congress the power to establish lower federal courts with original jurisdiction over cases "arising under" federal law.[59] These were the provisions of the Constitution the Founders adopted to implement the political axiom to which Hamilton referred.[60]

The mechanism just described was established to give efficacy to federal legal obligations generally, but the *Ex parte Young* doctrine is relevant to one particular subcategory of federal laws: those imposing obligations directly on the states. The Constitution itself, as originally adopted, imposed significant obligations on the states, primarily of a negative character, such as the obligation not to enforce *ex post facto* laws[61] or bills of attainder,[62] and the Civil War Amendments imposed substantial additional obligations.[63] The Constitution also gives Congress the power to impose obligations on the states through legislation. Under the Court's current doctrine, Congress may impose substantive obligations on states as part of a larger class of regulated parties.[64] Thus, Congress can require the state as an employer to pay a minimum wage, and it can prohibit the state from infringing patents and copyrights. Even if the Court were to begin construing Congress's powers in this regard more narrowly, it is unlikely to withdraw the power entirely.[65] Additionally, federal obligations may be imposed on the states by treaty.[66]

For reasons that require little elaboration, the need for a federal forum in which to enforce federal law is at its zenith when the federal law is one that imposes obligations directly on the state.[67] A norm whose "enforcement" is

58. U.S. CONST. art. VI, cl. 2.

59. This has become known as the Madisonian Compromise. *See generally* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7-9 (1996) [hereinafter HART & WECHSLER].

60. *See Osborn*, 22 U.S. (9 Wheat.) at 819.

61. U.S. CONST. art. I, § 10, cl. 1.

62. *Id.*

63. U.S. CONST. amends. XIII, XIV, XV.

64. *See* Printz v. United States, 117 S. Ct. 2365, 2383 (1997).

65. *See* Vázquez, *supra* note 5, at 1750-51.

66. *See, e.g.*, Asakura v. Seattle, 265 U.S. 332 (1924). Whether the limitations elaborated in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997), are applicable in the context of treaties is unclear. If applied fully in this context, the consular notification provision at issue in the *Breard* case may well have been inapplicable to state officials for reasons of domestic constitutional law. If so, then Congress was, and is, required to establish some mechanism to ensure that federal officials provide the necessary notification.

67. *See also* Vázquez, *supra* note 5, at 1701.

controlled by an agent of the supposedly obligated party hardly warrants the appellation "law" at all, let alone "supreme law." Yet it is precisely in this situation that the Eleventh Amendment, as interpreted in *Hans v. Louisiana*, denies the federal courts jurisdiction. This is the reason the *Hans* decision has been so controversial.

The offensiveness of *Hans* to rule-of-law values depends on what exactly the Amendment immunizes the states from, and this is currently a matter of uncertainty.[68] By its terms, the Amendment places certain cases outside the federal judicial power.[69] This seems to mean that no federal court has jurisdiction over the types of cases the Amendment reaches. If so, then, to the extent the Amendment denies the federal courts jurisdiction over remedies for the violation of federal rights, litigants seeking such remedies would be wholly at the mercy of potentially hostile state courts. Under such circumstances, the Amendment effectively immunizes the states from the types of remedies it bars the federal courts from awarding. A number of the Court's decisions support this "immunity-from-remedy"[70] interpretation of the Eleventh Amendment.[71]

Other cases, however, suggest that the Amendment does considerably less than this.[72] Under the "forum-allocation" interpretation, the Amendment does

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68. I examine the competing views the cases reflect concerning the nature of Eleventh Amendment immunity more fully in Vázquez, *supra* note 5.

69. The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend" to certain categories of cases. U.S. CONST. amend. XI.

70. *See generally* Vázquez, *supra* note 5, at 1714-44. In an earlier article, I referred to this interpretation as the "immunity-from-liability" interpretation, *id.* at 1700, but in choosing that term I was assuming that *Edelman* and its progeny barred only monetary relief. Since that is the issue now on the table, I have adopted the less conclusory, though more awkward, term used above.

71. *See generally id.* at 1702. There are in theory two versions of this view. Under the first version, the Amendment protects the state from an appeal to the Supreme Court without its consent. On this view, state courts may be theoretically required to entertain suits against the state itself, but the Supreme Court will be unavailable to reverse their judgments if they violate this duty. Under the second version, the Eleventh Amendment does not shield the states from the appellate jurisdiction of the Supreme Court, but there is nothing in the Constitution that denies the states the privilege of asserting sovereign immunity in their own courts, even from claims based on federal law. (This is not so much an interpretation of the Eleventh Amendment as an interpretation of the Supremacy Clause. It interprets the Supremacy Clause as not imposing an obligation on the states to entertain suits against themselves in their own courts if the Eleventh Amendment would protect the states from such suits in the federal courts.) I regard the two positions as effectively the same, for without Supreme Court review, the states' "duty" to award relief in their own courts can be violated with impunity. *See id.*

There is currently a split among state supreme courts about whether they are required by the Supremacy Clause to entertain suits against states based on federal law that would be barred from the federal courts by the Eleventh Amendment. *Compare* Alden v. Maine, 1998 Me. 200 (sovereign immunity may be invoked to dismiss private suit against state under Fair Labor Standards Act), *with* Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998) (sovereign immunity not a defense in such a lawsuit). Thus, the Supreme Court may soon have occasion to decide (a) whether it has jurisdiction to review a state court decision dismissing on sovereign immunity grounds a federal-law action against a state, and, if so, (b) whether the states are barred by the Supremacy Clause from invoking sovereign immunity as a defense to such an action in circumstances in which the suit would be barred from federal court by the Eleventh Amendment.

72. The cases supporting this narrower interpretation are discussed in Vázquez, *supra* note 5, at 1708-14.

not limit the appellate jurisdiction of the Supreme Court and has no bearing on the obligation of state courts to entertain suits against the states based on federal law. The state courts, on this view, remain obligated by the Supremacy Clause to entertain suits brought against states that would be barred by the Eleventh Amendment if brought in the federal courts, and the Supreme Court retains the power to make sure that they do. If this is the sort of immunity the Amendment confers, then its function is merely to channel certain suits against the states into the state courts as an initial matter, postponing federal court involvement until the appellate stage.

The Amendment is less offensive to rule-of-law values under the forum-allocation view than under the immunity-from-remedy view. Nevertheless, the Founders understood that the vindication of federal rights might in certain circumstances require the creation of lower federal courts with original jurisdiction over suits arising under federal law. Their decision to authorize Congress to give the lower federal courts jurisdiction over cases "arising under" federal law means that they recognized that state court hostility to federal rights, or even the state courts' possible lack of expertise on federal matters, might undermine the interests underlying federal laws in ways that could be difficult for the Supreme Court to correct on appeal.[73] The Eleventh Amendment inhibits the vindication of federal norms to the extent it disables Congress from giving the federal courts original jurisdiction even when federal rights are likely to be undermined in these ways.

Commentators have argued that *Hans* is not only offensive to the rule of law but also rests on shaky constitutional ground. Proponents of the "diversity" theory of the Eleventh Amendment maintain that the Amendment should not have been read to apply to cases "arising under" federal law in the first place.[74] Relying on the Amendment's text, the intent of its Framers, and constitutional structure, they have made a strong case for interpreting the Eleventh Amendment as merely removing a diversity basis of federal jurisdiction over cases against states, leaving intact the "arising under" basis of jurisdiction. This interpretation would, of course, eliminate the rule-of-law problems that make *Hans* so controversial. As the states' immunity would not extend to suits based on federal law, there would no longer be a gap between the legislative and judicial powers of the federal government.

The Court was recently evenly divided on whether to overrule *Hans* and adopt the diversity interpretation. Justice Scalia reserved judgment on the question in *Welch v. Texas Department of Highways and Public Transporta-*

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73. *See* THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1966) (statement of James Madison).

74. The relevant commentators are cited, and their arguments discussed more fully, in Vázquez, *supra* note 5, at 1694-99. For a more recent defense of the diversity theory, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

tion,[75] but in *Pennsylvania v. Union Gas Co.*[76] he came out against doing so. Although Justice Scalia was in dissent in that case, his views later prevailed in *Seminole Tribe of Florida v. Florida*, in which the Court narrowly but emphatically reaffirmed *Hans*.[77] As discussed more fully in Part VI, the Justices who decline to overrule *Hans* granted that the evidence of the decision's consistency with the Framers' intent was ambiguous, but they decided to adhere to it anyway, largely for reasons of stare decisis.[78]

Justice Scalia was in dissent in *Union Gas* because a majority of the Court in that case adopted a somewhat different strategy to alleviate the rule-of-law problems posed by *Hans*. In *Fitzpatrick v. Bitzer*,[79] the Court had held that the immunity conferred by the Eleventh Amendment could be abrogated by Congress under its power to enforce the Civil War Amendments. In *Union Gas*, a majority of the Court held that this immunity could be abrogated as well under the Commerce Clause,[80] and this holding was widely understood as recognizing a plenary congressional power to abrogate Eleventh Amendment immunity.[81] Though this holding did not eliminate the rule-of-law problem, it greatly reduced its significance, at least so far as the statutory obligations of the states were concerned.[82] In *Seminole Tribe*, however, the Court reversed *Union Gas* and held that Congress has no power to abrogate Eleventh Amendment immunity under Article I.[83]

In deciding to uphold *Hans* in the face of the challenge posed by the diversity theory, the Court emphasized that the Amendment was not as pernicious as its detractors made it out to be.[84] A number of features of the increasingly rococo structure of rules and exceptions that make up Eleventh Amendment doctrine do indeed alleviate the rule-of-law problems posed by *Hans*. The *Ex parte Young* exception is perhaps the most important, but there are others.

First, the Court has interpreted the Amendment not to apply to suits brought by the United States[85] or by sister states.[86] This means the Amendment bars only suits brought by private parties, Indian Tribes,[87] and foreign states.[88] The fact that federal laws remain enforceable in federal court at the behest of the federal executive branch alleviates but does not cure the problem posed by the

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75. 483 U.S. 468 (1987).
76. 491 U.S. 1, 35 (1989)
77. 116 S. Ct. 1114 (1996).
78. *See infra* text accompanying notes 485-98.
79. 427 U.S. 445 (1976).
80. 491 U.S. at 15.
81. This is how all of the Justices in *Seminole Tribe* interpreted *Union Gas*. *See* 116 S. Ct. at 1126-27; *id.* at 1133-34 (Stevens, J., dissenting); *id.* at 1184 (Souter, J., dissenting).
82. *See* Vázquez, *supra* note 5, at 1687 & n.20.
83. 517 U.S. at 66. The Court did not disturb *Fitzpatrick*, however. *See id.* at 65-66.
84. *See infra* text accompanying notes 488-489, 494, 498.
85. United States v. Texas, 143 U.S. 621, 643-46 (1892).
86. Kansas v. Colorado, 206 U.S. 46, 83 (1907).
87. Blatchford v. Native Village of Noatack, 501 U.S. 775, 779-82 (1991).
88. Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

Eleventh Amendment. Relying on the executive branch to initiate litigation to enforce the countermajoritarian rights conferred by the Constitution, and other legal rights that might at certain times or in certain contexts be unpopular, is problematic. Additionally, the requirement that the executive branch litigate these obligations raises the cost of enforcing these rights. In a world of limited governmental resources, this means that some significant portion of such violations will go uncorrected. The possibility of enforcement by the executive branch, however, does mean that the Amendment provides, at most, an immunity from certain sorts of remedies, not an immunity from substantive federal regulation. The Amendment limits the enforcement mechanisms Congress can establish to give efficacy to the obligations it imposes on the states, but it does not limit Congress power to impose obligations on the states in the first instance.[89]

Congress's options are limited in this way, moreover, only when it exercises certain of its legislative powers. As already noted, the Court in *Fitzpatrick v. Bitzer* held that Congress may abrogate the states' Eleventh Amendment immunity when it legislates pursuant to its power to enforce the Civil War Amendments,[90] and presumably this power extends to legislation pursuant to later Amendments that include similar "enforcement" clauses.[91] This means that the Amendment inhibits Congress only when it exercises a power to regulate the states having its source in the unamended Constitution. Even in this context, moreover, there is an exception of a sort. Under the Spending Clause, it may condition the states' receipt of federal funds on the states' waiver of its Eleventh Amendment immunity.[92] In this situation, Congress does not, strictly speaking, abrogate the states' immunity; the states voluntarily agree to provide certain remedies and submit to federal jurisdiction. The Amendment limits Congress's enforcement options only when it exercises Article I legislative powers to impose obligations on the states rather than encourage them to assume obligations in exchange for federal funds.[93]

Congress's abrogation power and its ability to secure waivers under the Spending Clause further alleviate the rule-of-law problems, but, again, they do not cure them. Under *Seminole Tribe*, Congress may not abrogate pursuant to its Article I powers, so the Eleventh Amendment continues to be an obstacle to the enforcement in federal court of such state obligations as the obligation not to

89. There are limits on Congress's power to impose obligations on the states, but these limits do not have their source in the Eleventh Amendment.

90. U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

91. U.S. CONST. amend. XIX, § 2; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2. *But cf.* Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n, 141 F.3d 88, 92 (3d Cir. 1998) ("[A]fter Seminole, the only remaining source of congressional power to abrogate states' Eleventh Amendment immunity is the Fourteenth Amendment.").

92. *See* Vázquez, *supra* note 5, at 1707 & n.112.

93. *See generally* Kits Kinsports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793 (1998).

infringe copyrights and patents, or not to engage in unfair competition.[94] To overcome this problem, the option of attempting to secure a waiver in exchange for federal funds is not wholly satisfying as it is costly and in many circumstances may be infeasible or invalid.[95] Finally, even where abrogation is possible, it requires the concurrence of the majoritarian branches of the federal government and so is unlikely to be an effective strategy for enforcing the federal obligations of the states that are countermajoritarian or unpopular.

The *Ex parte Young* exception reduces the severity of the rule-of-law problems that remain. It does this by distinguishing suits against state officials from suits against the states themselves. The plaintiffs in *Ex parte Young* maintained that certain state statutes were unconstitutional and requested a federal district court to enjoin the state's Attorney General from enforcing them.[96] The Court's reasons for rejecting the Attorney General's argument that the suit was one against the state and thus barred by the Eleventh Amendment were already well established at the time,[97] but the Court's articulation of them in *Ex parte Young* has become the best known:

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[98]

The distinction between suits against states and suits against state officials is problematic in some respects.[99] Since states can only act through their officials,

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94. Some courts have upheld Congress's power to abrogate Eleventh Amendment immunity with respect to patent and copyright claims on the theory that these laws create property rights that Congress may properly "enforce" under the Fourteenth Amendment's Due Process Clause by abrogating the states' Eleventh Amendment immunity. *See* College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 47 U.S.P.Q.2d (BNA) 1161 (Fed. Cir. 1998). I call this line of analysis the "abrogation reductio," and I discuss it in Vázquez, *supra* note 5, at 1744-66. *See also* John T. Cross, *Intellectual Property and the Eleventh Amendment after* Seminole Tribe, 47 DEPAUL L. REV. 519 (1998)

95. *See* Lynn A. Baker, *Conditional Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995).

96. 209 U.S. at 129-31.

97. The Court had earlier used the same analysis to reject an Eleventh Amendment challenge in *Poindexter v. Greenhow*, 114 U.S. 270, 285-89 (1885).

98. 209 U.S. at 159-60.

99. One oft-noted problem concerns the apparent conflict between *Ex parte Young* and the principle

a flat rule that suits naming state officials as defendants do not implicate the Eleventh Amendment would effectively read that Amendment out of the Constitution.[100] It was for this reason that the Court in *Edelman* drew the line it drew.[101] As the next Part explains, the Court in *Edelman* held that the *Ex parte Young* exception does not reach suits against state officials seeking retrospective monetary relief from the state treasury, but this holding gradually evolved into a rule barring all retrospective relief.

In the *Pennhurst* case,[102] the Court recognized another exception: *Ex parte Young* does not reach suits seeking prospective relief against state officials on the basis of state law. For our purposes, however, what is most important about the *Pennhurst* decision was the reasoning that led the Court to that conclusion, and the matters it clarified along the way. The authority-stripping rationale embraced by the Court in *Ex parte Young* would appear to have required the conclusion that a state official's conduct that violates state law cannot be attributed to the state for Eleventh Amendment purposes.[103] The Court in *Pennhurst*, however, recognized the obvious: *Ex parte Young* rests on a fiction.[104] Suits against state officials are for all practical purposes suits against the states themselves. When the suit alleges a violation of federal law, the Eleventh Amendment challenge is overcome, not because such suits are unimportant to the states, but because of the overriding interest in the supremacy of federal law.[105] This rationale, the Court held, does not apply to suits challenging state conduct as a violation of state law, and so the Eleventh Amendment barrier remains in place for such suits.[106]

The *Pennhurst* Court's willingness to look through the *Ex parte Young* fiction

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that the substantive provisions of the Constitution apply only to "state action." If the acts of state officials that violate federal law were for that very reason deemed to be the act of a private individual rather than that of the state, then how can such acts constitute "state action" such as to implicate the Constitution in the first place? *See Pennhurst*, 465 U.S. at 89 (calling this a " 'well-recognized irony' " (quoting Florida Dept. of State v. Treasure Salvors, Inc. 458 U.S. 670, 685 (1982)).

100. Chief Justice Marshall appeared to embrace such a rule in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857-58 (1824), but he backed away from it in *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828).

101. 415 U.S. at 665.

102. *Pennhurst State Sch. & Hosp. v. Halderman*, 461 U.S. 89 (1984), was the Supreme Court's second decision in the *Pennhurst* litigation. Since I do not cite the first *Pennhurst* decision, 451 U.S. 1 (1981), elsewhere in this article, I refer to the second *Pennhurst* decision as "*Pennhurst*" rather than as "*Pennhurst II*."

103. This was the view of the dissenters. *See* 465 U.S. at 144-45 (Stevens, J., dissenting).

104. 465 U.S. at 105.

105. *See Pennhurst*, 465 U.S. at 105:

> [T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' As Justice Brennan has observed '*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.' Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.

106. *See id.* at 106.

was an important breakthrough.[107] For one thing, it permitted the Court to clarify some previously confusing aspects of Eleventh Amendment doctrine. Before *Pennhurst*, Supreme Court decisions used a variety of formulations to describe when a suit against state officials is "really" a suit against the state. Many of these formulations were difficult to square with *Ex parte Young*, which was itself a decision that purported to explain when a suit against state officials should be regarded as a suit against the state. The Court in *Ford Motor Co. v. Department of Treasury*, for example, said that a suit is really against the state if "the state is the real, substantial party in interest."[108] In *Hawaii v. Gordon*, it said that a suit is against the state if it would "affect the public administration of government agencies."[109] In *Dugan v. Rank*, it said that a suit is against the state if the effect of the judgment would be "to restrain the government from acting or to compel it to act."[110] Taken literally, these standards would bar the typical *Ex parte Young* suit. By recognizing that *Ex parte Young* rests on a fiction, *Pennhurst* obviated the question of when a suit against a state official is "really" against the state. The Court made it clear that the *Ford*, *Hawaii*, and *Dugan* formulations set forth a general rule[111] to which *Ex parte Young* is an *exception*.[112] Thus, after *Pennhurst*, if the suit challenges action taken by state officials in their official capacities, we may assume that such actions are actions of the state under these other tests, but that conclusion serves merely to raise the question whether the suit falls within the *Ex parte Young* exception.[113] Under

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107. *See* Amar, *supra* note 11, at 1480 n.224; Jackson, *supra* note 11, at 62 (*Pennhurst* "a real advance"). *See also* David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 83 (1984) (praising "the Court's emphasis on the subordination of immunity doctrine to federal interests" and its "frank recognition that state sovereign immunity must consistently yield to the effective enforcement of federal law.").

108. 323 U.S. 459, 464 (1945). The Court in *Edelman* relied on this formulation in deciding that a suit seeking money from the state treasury is a suit against the state. 415 U.S. at 663.

109. 373 U.S. 57, 58 (1963).

110. 372 U.S. 609, 620 (1963). In *Dugan*, the Court recognized that, even if the suit is "against the state" under this test, it is not barred if it challenges a violation of the Constitution. 372 U.S. at 621-22. Other cases, however, set forth this test without mentioning the exception. *See, e.g.*, Brown v. GSA, 425 U.S. 820, 826-27 (1976).

111. *See Pennhurst*, 465 U.S. at 101-02 & n.11 (quoting *Ford Motor*, *Hawaii v. Gordon*, *Dugan v. Rank* and other cases as setting forth the general rule about when a suit against a state official is a suit against the state for Eleventh Amendment purposes).

112. *See id.* at 102 (describing *Ex parte Young* as an "important exception" to the general rule, as set forth in cases such as *Ford Motor*, *Dugan v. Rank*, and *Hawaii v. Gordon*).

113. Accordingly, there should be little need after *Pennhurst* to quote or rely on the standard expressed in *Dugan v. Rank* and similar cases. The court in *Poarch Band of Creek Indians v. Alabama*, 784 F. Supp. 1549, 1552 (S.D. Ala. 1992), thus erred when it held that a suit seeking prospective relief against the Governor of Alabama was barred by the Eleventh Amendment because the court was being asked to " 'restrain the government from acting or to compel it to act.' " *Id.* at 1552 (quoting Dugan v. Rank, 372 U.S. at 101 n.11). Instead of treating *Ex parte Young* as an exception to *Dugan* and like cases, the Court treated *Dugan* as an exception to *Ex parte Young*. After *Pennhurst*, the *Dugan*, *Hawaii*, and *Ford Motor* formulations would appear to have no analytical significance whatsoever, except perhaps insofar as they tell us that suits seeking damages from state officials personally are not suits against the state. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974) (explaining that while "*Ex*

Pennhurst, a suit falls within the *Ex parte Young* exception if it alleges that the official's conduct violates federal law and seeks relief not barred by the *Edelman* decision.[114] *Pennhurst* thus also established the *Edelman* test as the sole determinant of whether suits against state officials alleging a violation of federal law are barred by the Eleventh Amendment. Finally, *Pennhurst* recognized more generally that the *Ex parte Young* exception does not rest on the relative unimportance of certain categories of cases to the states, but on their importance to the federal government. This last lesson appears to have been lost on the Justices in the majority in *Coeur d'Alene*.[115]

The only reason given in either *Edelman* or *Pennhurst* for excluding suits seeking retrospective relief from the *Ex parte Young* exception was that to hold otherwise would "effectively eliminate the Constitutional immunity of the States."[116] If true, this would of course be a reason to exclude some category of cases from the scope of the *Ex parte Young* exception,[117] but it is not a reason for excluding any particular category. It was not until the decision in *Green v. Mansour* that the Court offered a reason for excluding suits for retrospective relief:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.[118]

The Court thus suggested that the line drawn in *Edelman* reflects the idea that stopping here-and-now violations of federal law is more important than redressing past violations or deterring future violations by punishing past violations. The former interest outweighs the "dictates of the Eleventh Amendment," but the latter interests do not. The Court did not identify the interests underlying the

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parte Young is of no aid to a plaintiff seeking damages from the public treasury . . . damages against individual defendants are a permissible remedy in some circumstances").

114. 465 U.S. at 105-06. *See also id.* at 102-03 ("*Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief.").

115. *See infra* text accompanying note 310.

116. *Pennhurst*, 465 U.S. at 105. The Court in both *Edelman* and *Pennhurst* quoted Judge McGowan's statement that monetary relief would have to be prohibited "if [the Eleventh Amendment] is to be conceived of as having any present force." *Pennhurst*, 465 U.S. at 106 (quoting *Edelman*, 415 U.S. at 665, which in turn quoted from *Rothstein v. Wyman*, 467 F.2d 226, 237 (2d Cir. 1972)).

117. If the diversity theory were correct, however, the Amendment, properly read, would not reach suits arising under federal law in the first place. Since *Pennhurst*'s holding that the Amendment bars suits based on state law would thus give the Amendment its full scope, the rule barring retrospective relief from federal-law violations would not be justified by the interest in not "effectively eliminating" the states' immunity.

118. 474 U.S. at 68.

Eleventh Amendment, but other cases do. "[O]ne of the most important goals of [Eleventh Amendment] immunity," the Court has said, is to protect state treasuries.[119] Additionally, the Amendment protects the states' dignity by "avoid-[ing] 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' "[120] It is for the latter reason that the Amendment protects states from being sued *eo nomine* even for only prospective relief.[121]

Identifying the interests underlying the Eleventh Amendment and the *Ex parte Young* exception, however, tells us little about where the line between *Edelman* and *Ex parte Young* should be drawn. The proponents of the diversity theory, for example, recognized that the point of the Eleventh Amendment was to protect state treasuries,[122] but they argued that, for the Amendment's Framers, this interest may well have been outweighed in all cases arising under federal law by the need to ensure the efficacy of the states' federal obligations.[123] The Court in *Seminole Tribe* rejected the diversity interpretation, but it did so principally for reasons of stare decisis. This suggests that doctrinal stability and continuity are the most important interests underlying the retention of the *Hans* interpretation of the Eleventh Amendment. If so, then the important question is how existing doctrine balances the competing interests.

The Court in *Green* suggested that Eleventh Amendment doctrine reflects the subordination of compensatory and deterrence interests to the interests underlying the Eleventh Amendment,[124] but the Court's analysis was flawed in fundamental ways. The Court relied on a false dichotomy between supremacy and deterrence, and it overlooked an important piece of the sovereign immunity

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119. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 49 (1994) (quoting Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 440 (5th Cir. 1985). *See generally* Vázquez, *supra* note 5, at 1722-32. *But cf. infra* text accompanying note 510 (protecting state treasuries is not an interest advanced by the Eleventh Amendment under the forum-allocation view).

120. *Seminole Tribe*, 517 U.S. at 58 (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

121. *Seminole Tribe*, 517 U.S. at 58. Justice Kennedy in *Coeur d'Alene* intimated that the Amendment serves the interests of judicial federalism as well—allowing state courts to get a first crack at adjudicating the liabilities of the states. *See* 117 S. Ct. at 2038. This seems to be just a narrower version of the dignitary interest mentioned in *Seminole Tribe*: giving the states' own courts first crack at lawsuits against them is desirable because subjecting them to suits in a "foreign" forum would antagonize them. *See id.* at 2038 (Kennedy, J.). Kennedy's version is narrower because it is concerned about the indignity of being hauled into federal court, whereas in *Seminole Tribe* the Court was concerned about the indignity of being hauled into *any* court.

122. *See, e.g.*, William A. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 117, 135-36 (1990); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1386 (1989).

123. Fletcher, *supra* note 122, at 135-36.

124. The Court actually said that "compensation and deterrence interests are insufficient to overcome *the dictates of* the Eleventh Amendment." Green v. Mansour, 474 U.S. 64, 68 (1985) (emphasis added). This statement is true in a trivial sense; if they could be overcome, they would not be "dictates." Because the Court suggested that these "dictates" can be overcome by the interests that undergird prospective relief, I understand the Court to have been saying that compensatory and deterrence interests cannot overcome the interests underlying the Eleventh Amendment.

puzzle. If by "supremacy" of federal law we mean its efficacy, then it is clear that this interest cannot be separated from the need to deter violations. The point of law is to guide human conduct.[125] A law can be said to be efficacious to the extent it succeeds in its purpose of guiding conduct, and obviously a law that guides conduct without recourse to judicial proceedings is more efficacious than one that does not. An important way the law induces compliance without recourse to judicial proceedings is by threatening potential violators with a sanction, or, in other words, by deterring violations. As Justice Brennan pointed out in *Green*, if the only remedy available against a state official who has violated federal law were an order requiring the violator to stop, state officials would have no incentive to pay any regard whatsoever to federal statutes or regulations.[126] Until they are told by a court what to do, they can ignore federal law safe in the knowledge that they will suffer no consequences. Far from ensuring the supremacy of federal statutes and regulations, this regime ensures their irrelevance except as the source of the truly binding category of federal law: the court order.[127]

The Court in *Green* was also wrong to suggest that the law does not rely on the deterrence provided by retrospective sanctions to give efficacy to the federal obligations of the states. Most tellingly, the Court accepts the appropriateness of such sanctions to deter violations of *judicial* orders. For example, although *Edelman* held that a court is initially only permitted to order the payment of benefits due in the future, if the defendant violates that order, he is subject to a number of retrospective sanctions, including civil and criminal contempt sanctions, and indeed the court may order the use of state funds to pay the benefits withheld in violation of the court's order, as well as the plaintiff's costs and attorney's fees.[128] More important, even when the litigant complains initially only of a past violation of law, the court's arsenal of remedies includes the quintessentially retrospective remedy of damages. The Court in *Edelman* held that the Eleventh Amendment barred certain suits seeking money *from the state treasury*, but it did not purport to disturb the long line of cases holding that the Amendment does not bar suits seeking damages payable from the state official's personal resources,[129] and the Court has continued to adhere to these cases after *Edelman*.[130] State officials are protected from such suits by a qualified immu-

125. This is, at least, one of its principal purposes. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extra-Judicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375 (1997).

126. *Green*, 474 U.S. at 77-78 (Brennan, J., dissenting).

127. A rule permitting only prospective relief thus has an unexpected connection to the theory of law propounded earlier in this century by John Chipman Gray, who famously defined the law as "[r]ules of conduct laid down and applied by the courts of a country," THE NATURE AND SOURCES OF LAW 102 (1909), and contended that statutes were not really law but only "sources" used by the courts to lay down true legal norms. *Id.* at 152. Whatever the merit of this view, it is surprising, to say the least, to see it endorsed (implicitly) by judges who are typically thought to disdain judicial lawmaking.

128. *See* Hutto v. Finney, 437 U.S. 678, 689-93 (1978).

129. The Court in *Edelman* noted that the plaintiffs did not seek money payable from the defendants' personal resources. 415 U.S. at 664-65.

130. *See, e.g.*, Papasan v. Allain, 478 U.S. 265, 278 n.11 (1986).

nity, and thus plaintiffs can recover damages only for the most egregious violations.[131] But limiting liability in this way does not (or at least is not intended to) compromise the interest in deterring violations of federal law. Underlying the officials' immunity seems to be the fear that, without it, state officers will be *over*deterred.[132]

The Court in *Green* thus got the relationship between *Ex parte Young* and the interest in deterrence all wrong.[133] The case law permitting individual-capacity damage actions against state officials is a key aspect of sovereign immunity doctrine, as Justice Scalia recognized when he cited these cases along with *Ex parte Young* as alleviating the rule-of-law problems posed by *Hans*.[134] Eleventh Amendment doctrine does not suggest that deterring violations of federal law by state officials is unimportant. The doctrine merely seeks to advance the interest in deterrence through the regime of officer liability as opposed to entity liability.[135]

The line of cases affirming the availability of individual-capacity damage actions places the original holding of *Edelman* in an entirely different light. If *Edelman* merely protects states from suits seeking money from the state treasury, then *Ex parte Young* is not a narrow exception to a broad rule of immunity for state actors; rather, it establishes a bright line between federal-law suits against states and federal-law suits against state officials. The former are barred by the Eleventh Amendment regardless of the relief sought, but the latter are permitted by the Eleventh Amendment regardless of the relief sought. On this view, *Edelman* merely establishes that whether the plaintiff is suing the state or the official does not turn entirely on whom the plaintiff has named as the defendant. In a suit for monetary relief, the suit is against the official only if the plaintiff seeks money *from the official*. But if the plaintiff seeks specific relief, the suit is regarded as one against the official as long as the official is the named defendant. If *Edelman* were read merely to bar suits seeking money from the state treasury, the Eleventh Amendment would not categorically bar any type of relief. It would merely specify who is the proper defendant in a suit seeking money damages, and a wholly separate (and subconstitutional) immunity doctrine would bar monetary remedies not deemed necessary to ensure the supremacy of federal law. On the other hand, reading *Edelman* more broadly to bar some forms of nonmonetary relief, as the Supreme Court's recent cases do,

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131. The privilege protects officials from damage liability if the federal law they violated was not "clearly established." Harlow v. Fitzgerald, 457 U.S. 800 (1982).

132. *See id.* at 807; Clinton v. Jones, 117 S. Ct. 1636, 1643-44 (1997).

133. The Court in *Green* was also mistaken about the connection between the Eleventh Amendment and the interest in compensating victims of violations of federal law. *See infra* text accompanying note 124.

134. *Union Gas*, 491 U.S. at 34 (Scalia, J., concurring in part and dissenting in part).

135. Whether it succeeds is a different question. For a discussion of whether an officer liability regime is, or can be made, as effective as an entity liability regime, see generally Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249; Vázquez, *supra* note 5, at 1801-04.

creates a gaping hole in the constitutional regime for enforcing the federal legal obligations of the states.

II. THE INADVERTENT EXPANSION OF THE *EDELMAN* EXCEPTION TO THE *EX PARTE YOUNG* EXCEPTION

Although *Edelman v. Jordan* is widely regarded as the source of the prospective-retrospective distinction, the Court in *Edelman* did not purport to be breaking new ground. The Court appeared to believe that the case before it was governed by the already well-settled rule that "a suit by private parties seeking to impose a liability payable from public funds in the state treasury is foreclosed by the [Eleventh] Amendment."[136] The Court asserted that proposition near the beginning of its analysis, citing three Supreme Court decisions from the 1940s,[137] and then proceeded to apply the rule to the facts before it.[138] The innovation in the Court's analysis in *Edelman* was its use of the terms "prospective" and "retrospective" to describe the limits of *Ex parte Young*. As explained below, however, the Court used these adjectives to distinguish the sort of monetary relief permitted by the Eleventh Amendment from the sort of monetary relief barred by it; the Court did not say that retroactive *non*monetary relief was barred. Retroactivity, in other words, was treated by the Court as necessary but not sufficient to take the suit out of the *Ex parte Young* exception.

This Part describes the gradual transformation of a holding that suits seeking retroactive monetary relief from the state fall outside the *Ex parte Young* exception into a rule that can be read to bar, *inter alia*, suits seeking to halt an unlawful execution. This discussion will show that the test the Court today espouses came about as the result of an apparently inadvertent, and in any event unexamined, overreading of the *Edelman* holding. It also shows that, with one independently vulnerable exception, the decisions adopting this broader test have done so only in dictum.

A. *EDELMAN*

The plaintiffs in *Edelman* were challenging a policy followed by Illinois officials administering a benefits program funded by the federal government pursuant to the Aid to the Aged, Blind and Disabled (AABD) statute.[139] Specifically, the plaintiffs claimed that Illinois officials were violating a federal regulation requiring that eligibility for benefits for the aged and blind be decided within thirty days of the application date,[140] and providing that benefits

136. *Edelman*, 415 U.S. at 651.

137. The Court cited *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946), *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), and *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47 (1944).

138. *See Edelman*, 415 U.S. at 666-67.

139. *Id.* at 653.

140. Federal regulations required that the processing of the applications of the disabled be completed within 60 days. *See id.* at 654.

begin to accrue on the date the application is approved or on the thirtieth day after a successful application was submitted, whichever comes first.[141] The state officials challenged the validity of those regulations, but the district court ordered the officials to adhere to them in processing future applications.[142] In addition, the court ordered the state to "release AABD benefits withheld from those whose applications . . . had not been processed within the federal time limits."[143] In other words, the state officials were ordered to pay successful applicants the benefits they would have received had their applications been processed on time.

The Court of Appeals affirmed,[144] and the Supreme Court affirmed the portion of the order requiring the officials to adhere to the time limit in processing future applications.[145] The Court held, however, that the Eleventh Amendment barred the court from ordering the state officials to use money from the state treasury to pay past-due benefits.[146] The Court relied on the principle that, "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."[147] Throughout the opinion, the Court expressed its holding in such a way as to reach only claims for monetary relief.[148]

The Court introduced the concept of retroactivity only to distinguish permissible from impermissible monetary relief. The Court did not disturb the district court's injunction insofar as it required the state officials to dispense funds to future applicants in accordance with the federal deadlines, concluding that this

141. *See id.* at 654 n.3.

142. *See* Jordan v. Weaver, 472 F.2d 985, 988 (7th Cir. 1973), *rev'd*, 415 U.S. 651 (1974).

143. *Id.* at 988 (quoting the district court).

144. *See id.* at 999.

145. *See Edelman*, 415 U.S. at 664. Justice Kennedy in *Coeur d'Alene*, writing only for himself and the Chief Justice, argued that, because the parties had conceded that the "prospective" portion of the award fell within the *Ex parte Young* exception, the Court in *Edelman* had no occasion to decide whether that was in fact the case. 117 S. Ct. at 2038. However, seven Justices in *Coeur d'Alene* expressly rejected Kennedy's suggestion that *Edelman* left the question open. *Id.* at 2046 (O'Connor, J., concurring); *id.* at 2051 n.6 (Souter, J., dissenting). Moreover, even Kennedy did not dispute that a court orders prospective relief when it orders that payments due in the future comply with federal law. Kennedy instead questioned whether such prospective relief should always be available in federal court. *See id.* at 2034. In this article, I rely on the Court's upholding of the "prospective" portion of the district court's order primarily for what it tells us about how the Court understood the concept of "prospectivity."

146. *See Edelman*, 465 U.S. at 668-70.

147. *Id.* at 663 (quoting *Ford Motor Co.*, 323 U.S. at 464).

148. *See id.* ("liability which must be paid from public funds" barred); *id.* ("retroactive payments of statutory benefits"); *id.* at 664 ("accrued monetary liability"); *id.* at 665 (suits seeking award of "state funds to make reparation for the past" barred (quoting Rothstein v. Wyman, 467 F.2d 226, 236-37 (2d Cir. 1972)); *id.* ("monetary award against the state itself" barred); *id.* at 666 ("monetary judgment payable out of the state treasury" barred); *id.* at 668 (suits requiring "payment of state funds . . . as a form of compensation" barred); *id.* (relief granted by district court impermissible because "it is in practical effect indistinguishable in many aspects from an award of damages against the States" and "is measured in terms of a monetary loss resulting from a past breach of a legal duty"); *id.* at 677 (award "may not include a retroactive award which requires the payment of funds from the state treasury").

portion of the order fell within the *Ex parte Young* exception because it simply required the state to bring its conduct into compliance with federal law. Because the Court thus upheld an award of monetary relief, the proposition that suits seeking money from the state treasury are barred failed to explain the Court's judgment. That is why the Court introduced the distinction between prospective and retrospective relief. The Court's opinion makes it clear, however, that the Eleventh Amendment bars an award of past-due benefits because such relief is *both* retroactive *and* monetary.[149] The Court never said that *all* retroactive relief is barred by the Eleventh Amendment.

Keeping in mind that the *Edelman* Court's distinction applied only to monetary relief, it is useful to consider briefly how the Court understood the concepts of prospectivity and retrospectivity.[150] In other contexts, the distinction between what is prospective and what is retrospective is straightforward. The Oxford English Dictionary defines the term "prospective" as "operative with regard to the future"[151] and "retrospective" as "operative with regard to past time."[152] A statute is said to have prospective effect when it applies only to conduct taking place after the statute's enactment, and it is said to have retrospective or retroactive effect when it addresses the legal status of conduct that took place before its enactment. When used to describe forms of relief, however, the meaning of the terms is necessarily more complex. Consistent with the dictionary definitions, the Court has stated that *Edelman* permits relief "that governs the official's future conduct."[153] But that formulation is unhelpful, as *any* sort of relief necessarily addresses the defendant's future conduct. A court order awarding damages, considered the prototypical form of retrospective relief, requires the defendant to pay the damages in the future.

The Court in *Edelman* tells us that the relief sought in that case was retrospective because "[i]t is measured in terms of a monetary loss resulting from a past breach of a legal duty."[154] The Court thus focuses on the time of the conduct complained of, suggesting that if the plaintiff is complaining about, and seeking relief from, conduct that already took place, she is seeking retrospective relief. On this view, the courts' role in suits against state officials is merely to prevent anticipated violations of federal law, or to stop ongoing violations, but not to redress violations that have already taken place. Past events may be relevant to show that the plaintiff has standing to complain of possible future violations or to show that the plaintiff's fear of future violations is well-founded, but when it comes to awarding relief, the courts must simply disregard them.

This seemingly straightforward formulation of the test, however, elides some

149. *See id.* at 668.
150. For a more extensive discussion, *see infra* Part V.
151. 12 OXFORD ENGLISH DICTIONARY 669 (2d ed. 1989) (definition 4a).
152. 13 *id.* at 801 (definition 2).
153. *Pennhurst*, 465 U.S. at 103.
154. *Edelman*, 415 U.S. at 668.

serious complexities. These difficulties will be examined in Part V. For the moment, it suffices to note that the Court provided no reason for concluding that an obligation to pay money is not a continuing or ongoing obligation as long as the obligation remains unfulfilled. What the Court does tell us is that an award of benefits is "retrospective" insofar as the plaintiff's entitlement to the benefits "accrued" in the past.[155] A suit seeking benefits that accrue after the court's order seeks prospective relief. We shall see that the Court itself has failed consistently to follow even this limited guidance.

B. *MILLIKEN*

The Court's 1977 decision in *Milliken v. Bradley*[156] appeared to confirm that *Edelman* placed only retrospective *monetary* relief outside the safe harbor of *Ex parte Young*. If ever there was a case involving nonmonetary relief susceptible to classification as "retrospective," *Milliken* was it. Yet the Court held the relief to be permissible under *Ex parte Young*.

Milliken v. Bradley came before the Supreme Court twice. The plaintiffs alleged that the defendants, Michigan and Detroit officials, had maintained a system of *de jure* segregation in the Detroit public schools, and the district court agreed.[157] As a remedy, the court ordered, *inter alia*, the busing of children from neighboring school districts into the Detroit school district,[158] concluding that there was no other way to integrate the Detroit schools.[159] The first time the case reached the Supreme Court, the issue was whether the court had acted properly in ordering a multidistrict remedy without first finding that there had been unconstitutional segregation in the other districts, or that officials from other districts were responsible in some way for the unconstitutional segrega-

155. This is suggested by the Court's statement in *Edelman*, repeated in later cases, that the relief sought in the case was retrospective because the plaintiff was seeking an "accrued monetary liability." *Id.* at 664; *see also* Milliken v. Bradley, 433 U.S. 267 (1977), discussed below. The Court did not elaborate on the meaning of "accrued," but lower courts have defined it as the date when the obligation to pay money matures or vests, which may be the same as the date by which payment was required or may be earlier. The Second Circuit, for example, has held that liability for Medicaid benefits accrue when medical services are rendered, even if payment is not due until later. *See Perales*, 50 F.3d at 130. Thus, a court may not order a state to pay for medical services performed before the court's order, even if payment for the services is not due until after the court's order. In *Edelman*, class members whose applications had already been processed were not entitled to any relief, as they were complaining about the failure to pay benefits that had already accrued. Class members whose applications had not yet been processed were entitled to an order requiring that the applications be processed within the relevant time period. If their applications had already been pending longer, they were presumably entitled to an order requiring that, if found eligible, they be paid amounts that accrued between the court's order and the approval of their applications, but not amounts that had accrued before the court's order. *Cf.* Barnes v. Bosley, 828 F.2d 1253, 1257-58 (8th Cir. 1987) (upholding an award of "backpay" for the period between the issuance of the court's order and the time employee reinstated).

156. 433 U.S. 267 (1977).

157. *See* Milliken v. Bradley, 418 U.S. 717, 725 (1974).

158. *See id.* at 754.

159. *See id.*

tion in Detroit.[160] In reversing the multidistrict remedy, the Court relied heavily on its earlier decision in *Swann v. Charlotte-Mecklenburg Board of Education*[161] to the effect that the object of the remedy must be to "correct . . . 'the condition that offends the Constitution.' "[162] The Court stressed that the condition that offended the Constitution in *Milliken* was the past *de jure* segregation in the Detroit public schools, *not* their present racial imbalance. On the latter point, the Court quoted its statement in *Swann* that "as a matter of substantive constitutional right, [no] particular degree of racial balance or mixing" is required.[163] The Court remanded for the imposition of a proper remedy.[164]

On remand, the district court ordered the defendants to put in place, *inter alia*, "13 remedial and compensatory programs,"[165] including a "remedial reading and communications skills program."[166] The district court found that this relief was "needed to remedy effects of past segregation."[167] Because state as well as local officials had been responsible for maintaining the system of *de jure* segregation, the court ordered that the costs of these programs be shared equally by the state and city defendants.

Before the Supreme Court a second time, the defendants challenged the propriety of the district court's remedy, and the state officials argued that the portion of the order requiring them to pay half the cost of the programs violated the Eleventh Amendment under the standard adopted in *Edelman*.[168] This time, the Supreme Court affirmed the district court's order in its entirety. On the question of the appropriate remedy, the Court quoted its earlier decision as setting forth the relevant standard: the remedy "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' "[169] "The ultimate objective," the Court said, "is to make whole the victims of unlawful conduct."[170] The Court said that it was appropriate to establish "a program of compensatory education"[171] for victims to help them "overcome the past inadequacies of their education,"[172] and that the remedy may include "specific educational programs designed to compensate minority group children for

160. *See id.* at 744-45.

161. 402 U.S. 1, 14 (1971).

162. *Milliken*, 418 U.S. at 738 (quoting *Swann*, 402 U.S. at 16). *See also id.* at 744 ("the scope of the remedy is determined by the nature and extent of the constitutional violation").

163. *Id.* at 740.

164. *See id.* at 753.

165. Milliken v. Bradley, 433 U.S. at 272.

166. *Id.* at 272 n.5.

167. *Id.* at 274 (quoting the district court).

168. *See id.* at 288-90.

169. *Id.* at 280 (quoting *Milliken*, 418 U.S. at 746).

170. *Id.* at 280 n.15.

171. *Id.* at 284 (quoting Plaquemines Parish Sch. Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969)).

172. *Id.* at 285 (quoting Smith v. St. Tammany Parish Sch. Bd., 302 F. Supp. 106, 110 (1969), *aff'd*, 448 F.2d 414 (5th Cir. 1971)).

unequal educational opportunities resulting from past or present racial and ethnic isolation."[173]

The Court's reasons for upholding the remedy left the part of the order requiring the state defendants to pay for half of the cost vulnerable to an Eleventh Amendment challenge. The district court had ordered the payment of funds from the state treasury, and the funds were concededly being used to "compensate" and "make whole" the victims of past wrongdoing by state officials. The Court had made it clear that the constitutional violation at issue was the past *de jure* segregation, *not* any present failure to achieve "a particular degree of racial balance" in the schools, and the district court had expressly ordered the state officials to use state funds "to remedy effects of *past* segregation."[174] This, the state defendants argued, was clearly retroactive monetary relief.[175] The Court, however, affirmed the order against the state officials.

Milliken can be read to have found *Edelman* inapplicable because: (a) the relief sought was not monetary; (b) the relief sought was not retrospective; or (c) the relief sought was neither. The most satisfying interpretation construes the decision as holding that the case fell within the *Ex parte Young* exception because the relief sought (and awarded) was not monetary. The Court characterized the *Edelman* case as "a suit for money damages," and described the holding in *Edelman* as barring "the award of an *accrued* monetary liability" representing "retroactive payments."[176] It distinguished *Milliken* from *Edelman* on the ground that, in *Milliken*, "there was no money award . . . in favor of respondent Bradley or any members of his class."[177] "This case," the Court said, "simply does not involve individual citizens conducting a raid on the state treasury for an accrued monetary liability."[178] The Court's language suggests that *Edelman* bars the court from ordering that defendants pay state money *to the plaintiffs* for the purpose of compensating them for past wrongs. On this theory, the *Edelman* rule was inapplicable because the defendants were not ordered to pay money to the plaintiffs, but were instead required to bear the cost of a form of nonmonetary relief.

There is language in *Milliken*, however, suggesting that the Court found the *Edelman* rule inapplicable because it regarded the relief awarded by the district court to be prospective.[179] But the Court's attempt to distinguish *Edelman* on this ground was almost embarrassingly weak. Every reason given by the Court for regarding the relief in *Milliken* as prospective applied equally to the relief found retrospective in *Edelman*. For example, the Court stressed that in *Milliken* the court had ordered that remedial programs be put into effect "*prospectively*,"

173. *Id.* at 285 (quoting United States v. Texas, 447 F.2d 441, 448 (5th Cir. 1971)).
174. *Id.* at 274 (emphasis added).
175. *See id.* at 288-89.
176. *Id.* at 289 (quoting *Edelman*, 415 U.S. at 663-64) (emphasis added in *Milliken*).
177. *Id.* at 290 n.22.
178. *Id.*
179. *See infra* text accompanying notes 180, 182-83.

and that the order thus operated "*prospectively* to bring about the delayed benefits of a unitary school system."[180] The profusion of italics, however, cannot obscure the fact that the "retrospective" portion of the district court's order in *Edelman* operated prospectively in just the same way—to bring about delayed benefits (literally). As David Currie has observed, "no one is ever ordered to have paid yesterday."[181]

The Court also stressed that the order at issue in *Milliken* did "no more than" "enjoin state officials to conform their conduct to the requirements of federal law, notwithstanding a direct and substantial impact on the state treasury,"[182] and that they were merely ordered to "eliminate from the public schools all vestiges of state-imposed segregation."[183] That is true, but we are left to wonder why eliminating "vestiges" of past unconstitutional conduct is not retrospective relief. The plaintiffs in *Edelman* were denied funds that federal law required the state to pay them; the Court might just as plausibly have said that the district court had merely ordered the defendants to eliminate the "vestiges" of that unlawful omission.

In short, the Court's attempt to classify the relief in *Milliken* as prospective completely fails to distinguish it from the relief the Court in *Edelman* found to be retrospective.[184] For this reason, the *Milliken* decision is best understood as reaffirming that *Edelman* bars only retroactive *monetary* relief.[185] So understood, the decision merely clarifies that "monetary relief" means relief requiring the defendant to pay money directly to the plaintiff.

C. FROM *QUERN* TO *PAPASAN*

Although the *Edelman* holding applied only to suits for monetary relief, and *Milliken* is best read to confirm that limitation, the Court in subsequent cases

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180. *Id.* (emphases in original).

181. David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 162.

182. *Milliken*, 433 U.S. at 289.

183. *Id.* at 290 (quoting *Swann*, 402 U.S. at 15).

184. The Court in *Milliken* also distinguished the relief involved in *Edelman* from that upheld in *Milliken* on the ground that, "[u]nlike the award in *Edelman*, the injunction entered here could not instantaneously restore the victims of unlawful conduct to their rightful position." *Milliken*, 433 U.S. at 290 n.21. *See also id.* at 290 ("These programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke, as could a retroactive award of money in *Edelman*."). It is not clear why the comparative ineffectiveness of the remedy at correcting the violation should make it less objectionable under the Eleventh Amendment. At any rate, if the permissibility of a remedy turns on its failure to "wipe the slate clean in one bold stroke," then it would follow that the district court in *Edelman* could have avoided Eleventh Amendment problems by ordering the defendant to pay plaintiff Jordan the past-due amounts in installments, but no one reads either *Edelman* or *Milliken* that way. The Court here seems to be grasping at straws to distinguish the case before it from *Edelman*. This particular straw, however, has nothing to do with "prospectivity" or "retrospectivity." To the extent the lack-of-instantaneity point is relevant, it may provide a further gloss on the type of monetary relief permitted by the Eleventh Amendment and the type it prohibits, but it does not shed any light on the concept of prospectivity.

185. *But cf. Coeur d'Alene*, 117 S. Ct. at 2047 (O'Connor, J., concurring) ("[T]he Court [in *Milliken*] upheld the relief . . . because the remedy was prospective rather than retrospective.").

has taken a number of small, almost imperceptible, steps towards reading *Edelman* to turn on the retroactivity *vel non* of the relief sought.[186] Until *Coeur d'Alene*, the *holdings* of all of these cases, with one shaky exception, were consistent with the view that *Edelman* bars only retroactive monetary relief.[187] Nevertheless, these cases laid the groundwork for the problematic decisions in *Coeur d'Alene* and *Breard.*

1. *Quern*

The first step came in *Quern v. Jordan*,[188] a sequel to *Edelman*. After the remand in *Edelman*, the lower court ordered the defendants to send class members a notice informing them that "a state administrative procedure [was] available" by which they might pursue their claims for past benefits.[189] The Supreme Court held that such relief was permissible as "ancillary" to the prospective relief the Court had upheld in *Edelman*, stressing that the district court did not purport to decide whether the class members were in fact entitled to any relief from the state,[190] and that the state officials had not raised an objection to the expense of preparing or sending the notice.[191] The significance of *Quern* for present purposes lies in the Court's description of what it had decided in *Edelman*. Consistent with the reading of *Edelman* offered above, the Court in *Quern* explained that *Edelman* merely "reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[192]

Two statements in *Quern*, however, read out of context, could be understood to treat "retrospectivity" as a sufficient condition for Eleventh Amendment immunity. One of those statements—a reference to "the distinction set forth in *Edelman* between prospective relief, which is permitted by the Eleventh Amend-

186. Doctrinal evolution by "almost imperceptible steps" is characteristic of the law in this area. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954).

187. With the exception of *Papasan v. Allain*, discussed *infra* text accompanying notes 228-56, all of the cases in which the Eleventh Amendment was found applicable on the ground that the relief sought was retrospective involved solely monetary relief.

188. 440 U.S. 332 (1979).

189. The notice ordered by the district court actually went further; it would have informed the class members that their rights were violated and it would have included a "notice of appeal" for the class members to file with the state administrative agency. The Court of Appeals held that such a notice was barred by the Eleventh Amendment but said that notice relief of the type described in the text was permissible. The Supreme Court was reviewing the latter decision.

190. *See Quern*, 440 U.S. at 348 ("[W]hether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislatures, not with the federal court.").

191. *See id.* at 349. The circumstances in which notice relief is permitted by the Eleventh Amendment were clarified in *Green v. Mansour*, discussed *infra* text accompanying notes 216-27.

192. *Id.* at 337 (citing *Edelman*, 415 U.S. at 663; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944)).

ment, and retrospective relief, which is not"[193]—is merely a description of the Court of Appeals' holding. The other is a statement that "[t]he distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on the one hand and retrospective relief on the other."[194] This statement came at the end of the paragraph that began with the description of *Edelman*'s holding as "reaffirming" the principle quoted above about liabilities that must be paid from public funds, and immediately followed the Court's observation that *Ex parte Young* permits prospective injunctive relief "even though such an injunction may have an ancillary effect on the state treasury."[195] In context, therefore, it seems clear that the Court was merely saying that the distinction between the relief found permissible in *Ex parte Young* and that found impermissible in *Edelman* was that between prospective and retrospective *monetary* relief. Unfortunately, the Court in *Quern* was less careful than in *Edelman* to make it clear that its holding extended only to monetary relief. [196]

2. *Cory v. White*

Cory v. White[197] is easily misread to hold that *Edelman* bars all suits against state officials seeking retrospective relief. Although some lower courts appear to have read the case that way,[198] the case stands for no such thing, and subsequent Supreme Court decisions properly read the case more narrowly.[199]

The plaintiff in *Cory* was the administrator of the estate of Howard Hughes, who complained that officials in both California and Texas were imposing inheritance taxes on the Hughes estate based on the claim that Hughes was domiciled in their state at the time of his death. The administrator brought an interpleader action in federal district court naming as defendants the California and Texas officials and seeking a determination of Hughes' domicile. To prevail, however, the plaintiff had to overcome the Supreme Court's unanimous decision in *Worcester County Trust Co. v. Riley*[200] that the Eleventh Amendment barred such interpleader actions. The administrator relied on *Edelman*, which he interpreted as silently overruling *Worcester County Trust* by holding that the Eleventh Amendment bars only "suits 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury.' "[201] The

193. *Quern*, 440 U.S. at 336.

194. *Id.* at 337.

195. *Id.*

196. The controlling opinion in *Coeur d'Alene* read *Quern* to permit the relief to stand "because it was . . . prospective." *Coeur d'Alene*, 117 S. Ct. at 2046 (O'Connor, J., concurring).

197. 457 U.S. 85 (1982).

198. *See, e.g.*, Doe v. Wigginton, 21 F.3d 733, 737 n.2 (6th Cir. 1994); Ulaleo v. Paty, 902 F.2d 1395, 1399 (9th Cir. 1990); Banas v. Dempsey, 742 F.2d 277, 288 (6th Cir. 1983); Steffens v. Steffens, 955 F. Supp. 101, 105 n.5 (D. Colo. 1997).

199. *See infra* note 206 and accompanying text.

200. 302 U.S. 292 (1937).

201. *Cory*, 457 U.S. at 90 (quoting *Edelman*, 415 U.S. at 663).

majority rejected that reading of *Edelman* and accused the dissent of "mischaracteriz[ing] *Edelman* as asserting that the Eleventh Amendment bars 'only' suits seeking money damages."[202]

The majority's criticism of the dissent was well-founded, but it is a mistake to read *Cory* as holding that all suits seeking retrospective relief fall outside the *Ex parte Young* exception. As the majority noted in *Cory*, *Worcester County Trust* held that the plaintiff's interpleader action fell outside the *Ex parte Young* exception because it did not allege that "the action sought to be restrained [was] without the authority of state law or contravene[d] the statutes or Constitution of the United States."[203] It was for these reasons that the Court in *Worcester County Trust* found the *Ex parte Young* exception to be inapplicable, and the majority in *Cory* was correct to conclude that *Edelman* did not disturb this holding.[204] But neither *Edelman* nor *Cory* stands for the proposition that a suit seeking retroactive nonmonetary relief is barred if the plaintiff *is* alleging a violation of state or federal law. To the contrary, *Cory* supports the reading of *Edelman* offered above. While the *Cory* majority found that suits against state officials seeking retroactive monetary relief are not the only suits barred by the Eleventh Amendment, it recognized that the holding in *Edelman* was limited to such suits.[205] Significantly, *Cory* is usually cited today for the proposition that suits against the state itself, as distinguished from state officials, are barred regardless of the relief sought.[206] The cases that read it for the proposition that suits challenging a state official's violation of federal law are barred even if they seek nonmonetary relief[207] are reading it too broadly.[208]

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202. *Id.* at 90 n.2.

203. *Id.* at 89 (quoting *Worcester County Trust*, 302 U.S. at 297). According to the Court in *Cory* it was "clear . . . that inconsistent determinations by the courts of two States as to the domicile of a taxpayer did not raise a substantial federal constitutional question," and that the state officials were acting within the scope of their authority under state law. *Id.*

204. Today the outcome would be even clearer, as the Court held in *Pennhurst* that a claim that state officials are acting in violation of state law is barred by the Eleventh Amendment, even if the plaintiff seeks prospective relief. 465 U.S. at 100.

205. The *Cory* majority stated:

> The dissent mischaracterizes *Edelman* as asserting that the Eleventh Amendment bars "only" suits seeking money damages. *Edelman* recognized the rule 'that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment' . . . but never asserted that such suits were the only ones so barred.

457 U.S. at 90 n.2.

206. *See, e.g.*, *Seminole Tribe*, 517 U.S. at 58. It is also sometimes cited for the proposition that a suit against a state official does not fall within the *Ex parte Young* exception if the plaintiff does not allege that the official's conduct is illegal. *See, e.g.*, Papasan v. Allain, 478 U.S. 265, 277 (1986).

207. *See supra* note 198.

208. In the light of the *Pennhurst* Court's explanation of *Ex parte Young* as an exception to the principle that the Eleventh Amendment bars suits against state officials that are really suits against the state, it is interesting to note the Court's treatment of *Cory v. White*. The Court in *Pennhurst* reads *Cory* as establishing that "a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 102. In the very next sentence, however, the Court states that *Ex parte Young* "recognized an important exception to this general rule,"

3. *Pennhurst*

As we saw in Part I, *Pennhurst* was a watershed Eleventh Amendment decision because it recognized that *Ex parte Young* rests on a fiction made necessary by the need to ensure the supremacy of federal law rather than a judgment that certain suits are not "really" against the state. *Pennhurst* is also important because it takes another step towards treating retroactivity as a sufficient condition for denying relief on Eleventh Amendment grounds. The Court in *Pennhurst* raised the profile of the *Edelman* test by making it the exclusive determinant of when a suit against state officials alleging a violation of federal law is barred by the Eleventh Amendment.[209] At the same time, dicta in the opinion appeared to narrow the *Ex parte Young* exception by reading *Edelman* to adopt a test turning on the prospectivity *vel non* of the relief sought.

The Court in *Pennhurst* initially described the *Edelman* holding as barring "an injunction . . . that awards retroactive monetary relief."[210] Later in the opinion, however, the Court phrased the holding more broadly. After explaining that the *Ex parte Young* exception rests on the need to ensure the supremacy of federal law, the Court asserted that this need "must be accommodated to the constitutional immunity of the States."[211] Then it stated that "the significance of *Edelman v. Jordan*" was that the decision "declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the immunity of the States."[212] "[A]n award of retroactive relief," the Court said, "necessarily 'fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.' "[213] Given the Court's earlier, narrower description of *Edelman*'s holding, it is likely the Court was using the term "retroactive relief" here to mean "retroactive monetary relief," a construction that is supported by the fact that the language quoted from *Rothstein v. Wyman* was explicitly limited to suits seeking monetary relief.[214] Later cases, however, cite these statements in *Pennhurst* as

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id., and this exception is one that, the Court later explains, extends only to suits against state officials seeking prospective relief. Thus, the rule is that a suit against state officials that is really a suit against the state is barred, whether it seeks prospective relief or damages, except that a suit against state officials is not against the state and thus not barred if it seeks prospective relief from a violation of federal law. The upshot is that a suit against a state official seeking prospective relief is barred by the Eleventh Amendment when the plaintiff does not claim a violation of federal law.

209. *See supra* note 114 and accompanying text.

210. 465 U.S. at 102-03.

211. *Id.* at 105.

212. *Id.*

213. *Id.* at 105-06 (quoting *Edelman*, 415 U.S. at 665, which in turn quoted from *Rothstein v. Wyman*, 467 F.2d 226, 237 (2d Cir. 1972)).

214. *Edelman*, 415 U.S. at 665, quoted the following sentences from *Rothstein*, 467 F.2d at 237, in full:

> It is one thing to tell the Commissioner of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the

support for a rule barring all retroactive relief.[215]

4. *Green v. Mansour*

Green v. Mansour[216] took perhaps the biggest step toward placing all retroactive relief outside the *Ex parte Young* exception. *Green* involved a claim that Michigan officials were violating federal law in dispensing benefits under the Aid to Families with Dependent Children program. While the case was pending in the district court, Congress amended the statute, and the plaintiffs conceded that thereafter the Michigan officials were complying with federal law.[217] The sole remaining dispute concerned whether state officials had violated federal law in disbursing benefits that had accrued in the past. Plaintiffs sought a declaration that the Michigan officials had violated federal law in the past and notice relief similar to what had been upheld in *Quern*.

The district court denied the relief, concluding that "the changes in federal law rendered moot the claims for prospective relief, and that the remaining claims for declaratory and notice relief related solely to past violations of federal law" and thus were barred by the Eleventh Amendment.[218] The Court of Appeals affirmed,[219] as did the Supreme Court. The Court clarified that it had approved the notice relief in *Quern* not because it was prospective, but because it was a "mere case-management device" that was "narrow" and "ancillary to a valid injunction previously granted."[220] Notice relief was impermissible in *Green*, however, because the claim for injunctive relief was moot, as there was no ongoing violation of federal law.[221] Declaratory relief was similarly impermissible because, as there was no continuing violation of federal law, the declaration would be useful to the plaintiffs only if it would have *res judicata* effect in the state courts, and such a "result would be a partial 'end run' around [the] decision in *Edelman v. Jordan*."[222]

To this extent, the *Green* case does not break much new ground. The plaintiffs' ultimate objective was monetary relief of the type found retroactive in

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Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.

The Court in *Pennhurst* substituted "retroactive relief" for "[an order that] the Commissioner . . . use state funds to make reparation for the past," *Pennhurst*, 465 U.S. at 105-06, which suggests that the Court was using the former term as a shorthand for the latter.

215. *See, e.g.*, Green v. Mansour, 474 U.S. 64, 68 (1985).

216. *Id.*

217. *See id.* at 65-66.

218. *Id.* at 64.

219. *See* Banas v. Dempsey, 742 F.2d 277 (6th Cir. 1984), *aff'd sub nom.* Green v. Mansour, 474 U.S. 64 (1985).

220. *Green*, 474 U.S. at 71. *But cf. Coeur d'Alene*, 117 S. Ct. at 2046 (O'Connor, J., concurring) (reading *Quern* as permitting relief "because it was . . . prospective").

221. Again, the Court failed to explain why the failure to pay past-due benefits was not a "continuing" violation; apparently, the Court was applying the "accrual" test applied in *Edelman*. *See supra* note 155 and accompanying text.

222. *Green*, 474 U.S. at 73 & n.2.

Edelman, and the Court merely closed what it saw as a loophole created by *Quern*. The Court need not have said anything about suits seeking nonmonetary relief, but, alas, it did. It repeatedly described the *Edelman* holding as setting forth a distinction between prospective and retrospective relief, and, in what soon became the standard formulation, the Court defined "prospective" relief as relief seeking to stop an "ongoing" or "continuing" violation of federal law.[223] No fewer than ten times, the Court described the type of relief permitted by *Ex parte Young* as relief seeking to halt an "ongoing" or "continuing" or "current" or "present" violation of federal law.[224] Perhaps more important, the Court stated that it had "refused to extend the reasoning of *Young* . . . to claims for retrospective relief."[225] Under this formulation, it is irrelevant that the relief sought is monetary. The applicability of the *Ex parte Young* exception turns entirely on when the violation of federal law is deemed to have occurred.

Additionally, the policy rationale the Court in *Green* provided for the line drawn in *Edelman* confirms that it believed the Eleventh Amendment barred more than just monetary relief. As discussed in Part I, the Court suggested that *Edelman* bars remedies that serve "deterrence or compensatory" interests as distinguished from remedies that ensure "supremacy" of federal law.[226] We have already seen that the Court erred in drawing such a sharp distinction between supremacy and deterrence and in overlooking the fact that the law gives effect to deterrence interests (and, to some extent, compensatory interests as well) by permitting suits seeking damages from state officials personally.[227] Our discussion of *Milliken* exposes another error in the *Green* Court's analysis: even in a suit seeking relief that requires the expenditure of state funds, compensatory interests can, in certain circumstances, overcome the states' Eleventh Amendment interests. Since compensatory interests can clearly be advanced by nonmonetary forms of relief, as *Milliken* shows, the Court's rationale for the *Edelman* distinction indicates that more than just monetary relief is barred. But the fact that the relief in *Milliken* was available, even though its purpose was to compensate victims of past wrongs, also demonstrates that the Court in *Green* was wrong not only about the Eleventh Amendment's

223. *Id.* at 67-68.

224. *Id.* at 67 (describing question presented as "whether federal courts may order the giving of notice of the sort approved in *Quern v. Jordan* or issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law"); *id.* at 68 ("injunctive relief stopping ongoing violations of federal law" permitted); *id.* (describing relief available under *Ex parte Young* as "prospective injunctive relief to prevent a continuing violation of federal law"); *id.* ("[r]emedies designed to end a continuing violation of federal law" permitted); *id.* at 69 ("injunction against [a] current violation of federal law" permitted); *id.* at 71 ("remedy designed to prevent ongoing violations of federal law" permitted); *id.* (relief barred if "there is no continuing violation of federal law"); *id.* at 73 (relief barred if "[t]here is no claimed continuing violation of federal law"); *id.* at 74 ("injunction and declaratory judgment against continuing and future violations of federal law" permitted); *id.* (relief impermissible because "no present violations" of federal law).

225. *Id.* at 68.

226. *See supra* text accompanying note 118.

227. *See supra* text accompanying notes 125-33.

relationship to the deterrence interest, but also about its relationship to the compensation interest.

5. *Papasan*

Papasan v. Allain[228] was the first Supreme Court decision after *Milliken* to give sustained attention to the distinction between prospective and retrospective relief, and it has been the last to do so as well. The Court's analysis in *Papasan* is consistent with the test articulated in *Green*, which asks whether the defendant's violation of federal law is ongoing or not. *Papasan* is also the only one of the Supreme Court's post-*Edelman*, pre-*Coeur d'Alene* decisions in which the Court's embrace of a comprehensive prospective-retrospective test may be said to have been more than dictum. Nevertheless, *Papasan* is not a serious obstacle to a return to *Edelman*'s original holding, for depending on how one interprets it, *Papasan* is in conflict with either *Edelman* or *Milliken* and would have to be reconsidered anyway. In this section, I explain *Papasan*'s conflict with *Edelman*. In Part VI, I suggest an interpretation of *Papasan* that would square it with *Edelman*, but this interpretation places it in conflict with *Milliken*. The conflict with *Milliken* can be overcome only by rejecting the *Papasan* holding insofar as it purports to apply to nonmonetary forms of relief.

The plaintiffs in *Papasan* were public school officials and public school students from the twenty-three northern counties of Mississippi who claimed they were "being unlawfully denied the economic benefits of public school lands granted by the United States to the State of Mississippi well over 100 years ago."[229] The facts underlying their claims are complex: In a series of federal statutes enacted between 1798 and 1817 in connection with its admission to the Union, Mississippi was required to reserve a certain portion of its land for the support of the public schools. These statutes, however, did not apply to lands in northern Mississippi comprising what later became the northern twenty-three counties of the state. The Chickasaw Nation ceded these lands to the United States in 1832, and an 1836 federal statute vested title to a portion of them in the State of Mississippi "for the use of schools within [the Chickasaw Cession] in said State."[230] The purpose of this arrangement was to make the same provision for public education in the northern twenty-three counties that had previously been made for the rest of the state.[231] However, in 1856, the state legislature, with Congress's permission, sold the land and loaned the proceeds to the state's railroads.[232] The railroads were destroyed during the Civil War and the state's investment vanished.[233] The state legislature made alternative provision for public education in the northern twenty-three counties,

228. 478 U.S. 265 (1986).
229. *Id.* at 268.
230. *Id.* at 272 (quoting 5 Stat. 116) (1836).
231. *See id.* at 271.
232. *See id.* at 272.
233. *See id.*

but the upshot was that, at the time of the lawsuit, the average per-pupil amount spent on education in the northern twenty-three counties was $0.63, while in the rest of the state it was $75.34.[234]

The plaintiffs raised two claims. First, they argued that federal law created a "trust obligation" to use the land, or income from the land, "for the benefit of Chickasaw Cession schoolchildren in perpetuity,"[235] and that the defendants were violating that obligation. As relief, the plaintiffs requested, *inter alia*, "the establishment by legislative appropriation or otherwise of a fund in suitable amount to be held in perpetual trust for the benefit of plaintiffs; or in the alternative making available to plaintiffs [lands] of the same value as the original Chickasaw Cession . . . lands."[236] Second, the plaintiffs argued that the disparity between the amount of resources devoted to education in the northern twenty-three counties and that devoted to education elsewhere in the state violated the Equal Protection Clause.[237] The Court found that the first claim was barred by the Eleventh Amendment because it sought retrospective relief, but that the second claim sought prospective relief and thus was not barred.

The Court's discussion of the prospective-retrospective distinction drew heavily from *Green*. The Court quoted the statement in *Green* that remedies designed to end a continuing violation of federal law are necessary to vindicate the supremacy of federal law, whereas the need to compensate for or deter future violations does not outweigh "the dictates of the Eleventh Amendment,"[238] and it added that

> [*Ex parte*] *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation.[239]

In a different formulation, the Court indicated that the time when the injury is

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234. *See id.* at 273.

235. *Id.* at 274. The federal law that was violated was apparently the 1836 federal statute. Since the state officials' actions that resulted in the sale of the land and ultimately the loss of the proceeds were taken with the express authority of a federal statute, it is unclear why the later federal statute was not deemed to repeal the earlier statute. The Supreme Court's opinion indicates that the plaintiffs also pressed a Contract Clause claim that was "in all essential respects the same as" the trust claim. *Id.* at 274 n.8. This suggests that the plaintiffs were arguing that the 1836 law created a vested property right that the state could not constitutionally breach even with federal permission. *But cf.* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 732-33 & n.9 (1984) (holding that limits imposed on states by Contract Clause not applicable to federal government through reverse incorporation).

236. *Papasan*, 478 U.S. at 275.

237. *See id.* at 274.

238. *Id.* at 278 (quoting *Green*, 474 U.S. at 68).

239. *Id.* at 277-78.

suffered determines whether relief is prospective or retrospective.[240] The Court's observation that "the line between permitted and prohibited suits will often be indistinct"[241] was well borne out by its application of the test to the two claims before it.

The Court concluded that the trust claim was retrospective and thus barred. After expressing some skepticism about the merits of the claim, the Court said that it would accept the plaintiffs' characterization of the claim for purposes of analysis.[242] It thus assumed that the federal statute created an obligation to use the land, or income from the land, for the benefit of schoolchildren in the northern twenty-three counties "in perpetuity." But the Court concluded that this claim, which it characterized as "a continuing obligation to comply with trust obligations," was indistinguishable from "an ongoing liability for past breach of trust," which the Court apparently thought was clearly retrospective in nature.[243] "In both cases, the trustee is required, because of the past loss of the corpus, to use its own resources to take the place of the corpus or the lost income from the corpus."[244] The Court concluded that the relief sought would be retrospective even to the extent the petitioners were seeking only the income from the corpus that would have accrued after the court's order had the trust corpus not been lost.[245] "Such payment," the Court held,

> would be merely a substitute for the return of the trust corpus itself. That is, continuing payment of the income from the lost corpus is essentially equivalent in economic terms to a one-time restoration of the lost corpus itself: It is in substance the award, as continuing income rather than as a lump sum, of 'an *accrued* monetary liability.'[246]

On the other hand, the Court found the plaintiffs' equal protection claim to be permissible because it sought prospective relief. The claim was prospective because "the essence of the equal protection allegation" was not "the past actions of the state," but "the present disparity in the distribution of the benefits of state-held assets."[247] This, the Court said, "is precisely the type of continuing violation for which a remedy may permissibly be fashioned under [*Ex parte*] *Young*."[248]

The Court's heavy reliance on, and indeed elaboration of, the analysis it had

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240. *See id.* at 278 ("[r]elief that in essence serves to compensate a party injured in the past" barred).

241. *Id.*

242. *See id.* at 279-80.

243. *Id.* at 280-81.

244. *Id.* at 281.

245. *See id.*

246. *Id.* (quoting *Milliken v. Bradley*, 433 U.S. at 289, which in turn quoted from *Edelman*, 415 U.S. at 664) (emphasis added in *Milliken*).

247. *Id.* at 282.

248. *Id.*

introduced in *Green* indicates that it did not regard *Edelman* to be limited to monetary relief. But, unlike the discussion in *Green*, the Court's apparent embrace of a comprehensive prospective-retrospective distinction in *Papasan* appears to have been part of its holding. It is difficult to characterize the plaintiffs' alternative request for an order requiring the defendants to make state land available to them as a request for monetary relief.[249] The Court's denial of this relief on Eleventh Amendment grounds thus makes it difficult to regard the Court's apparent extension of the prospective-retrospective test to nonmonetary relief as mere dictum.

Nevertheless, the *Papasan* opinion is not a serious obstacle to a return to the original holding of *Edelman* because, to the extent the Court based its decision on the conclusion that the requested relief was retrospective, even the portion of *Papasan* denying monetary relief is in conflict with *Edelman*. The plaintiffs claimed that the federal statute imposed a trust obligation to use the income from the trust corpus for the benefit of the plaintiff schoolchildren in perpetuity, and the Court assumed that this obligation continued even after the loss of the trust corpus. The accrual test adopted in *Edelman* would have barred the Court from awarding the payment of the income that would have accrued from the time the state lost its investment to the date of the district court's order, but not the income that would have accrued after the court's order.

The Court's reasons for concluding otherwise are unpersuasive and seem to have little to do with "retrospectivity." The Court relied heavily on its conviction that the continuing payment of the income "is essentially equivalent in economic terms to a one-time restoration of the corpus itself[.]"[250] While it is true that one way for the state to have fulfilled its obligation would have been to replace the corpus, that would not have been the only way: the state might instead have appropriated an amount equal to the prospective income from the corpus, to be disbursed periodically for the benefit of the plaintiffs. It is not true, moreover, that an award of prospective income would "in substance" have been the same as a "lump sum" award of "an *accrued* monetary liability." The state's accrued monetary liability consisted of the income that accrued from time it lost its investment to the time of the court's order. But the Court dismissed as "retrospective" the plaintiffs' request for income that had not yet accrued at the time of the court's order. The Court was apparently moved by the fact that, because the trust corpus no longer existed, the state would be required "to use its own resources to take the place of . . . the lost income." But, in *Edelman*, the state was similarly required to "use its own resources" to pay

249. *But cf. infra* note 528 (suggesting that a rule barring only monetary relief may in the end have to be expanded to include certain suits seeking land or goods in lieu of money and expressing uncertainty about whether the *Papasan* plaintiffs' request for land would have fallen within the rule as so expanded).

250. *Id.* at 281.

class members future benefits,[251] yet the Court found that portion of the order prospective. The fact that the trust corpus was lost meant that the "lost income" would have to be calculated *as if* the trust corpus had not been lost, but affording the plaintiffs the requested relief would not have required the state actually to replace the trust corpus.

In any event none of this seems relevant to the question of the relief's prospectivity. As discussed more fully in Part VI, these portions of the Court's analysis support a reading of the *Papasan* opinion as resting on the "secondary" nature of the relief sought. In other words, the Court appears to have concluded that the suit was barred because the plaintiffs were seeking an order requiring the defendants to provide a substitute for the primary obligation imposed by federal law, as opposed to ordering the performance of the primary obligation itself.[252] If so, then *Papasan* was not a case about the prospective-retrospective distinction at all; like *Milliken*, it purported to turn on prospectivity, but in fact turned on something else. This reading of *Papasan* squares it with *Edelman* but, as explained in Part VI, places it in conflict with *Milliken*.[253]

To the extent the reasons given by the Court for denying relief do bear on prospectivity, they demonstrate the slipperiness of the relevant concepts and the indeterminateness of the Court's test. The Court emphasized that the distinction between a trustee's "continuing obligation" to pay the plaintiffs the trust income and a trustee's "ongoing liability for past breach of trust" was "essentially a formal distinction of the sort . . . rejected in *Edelman*."[254] The Court's apparent assumption that the latter relief is retrospective suggests that the Court focused on the time of the defendants' acts that gave rise to the plaintiffs' injury—here, the unwise and assertedly illegal investment in railroad bonds. In the Court's view, these actions constituted the "breach of trust" of which plaintiffs were complaining, and the suit was retrospective because they occurred in the past. This analysis, when considered alongside the Court's earlier statement that the *Edelman* test seeks to identify cases in which federal law was violated "at one time or over a period of time in the past," suggests that the Court was equating the time at which the "violation" of federal law occurred with the time at which the acts causing plaintiffs' injury occurred. Federal law was violated when the defendants lost the trust corpus, and the remedy being sought was retrospective because those acts took place in the past.

But that is not the only, or even the most sensible, way to characterize the relevant legal violation. The plaintiffs argued that the defendants violated an obligation to use income of the trust corpus *in perpetuity* for the benefit of

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251. Admittedly, the funds were given to the state by the federal government, but that hardly seems relevant to the question of whether these payments were prospective or retrospective.

252. The distinction between primary and secondary obligations is discussed *infra* text accompanying notes 420-22.

253. *See infra* text accompanying notes 522-27.

254. *Papasan*, 478 U.S. at 280.

public schoolchildren in the twenty-three northern counties of Mississippi. If that is the legal obligation, then it was violated over time and the plaintiffs were entitled to an order "stopping" the violations that had not yet occurred.[255] This conclusion is supported by the portion of the Court's opinion suggesting that whether or not the relief is prospective turns on the time when the injury is suffered, as opposed to the time when the acts causing the injury took place.[256] To the extent the plaintiffs were complaining about the violation of an obligation to devote a certain amount to education in the northern counties in the future, they were complaining about a future injury. The *Papasan* opinion offered no reason for rejecting this characterization of the relevant legal violation in favor of the one it chose.

D. THE PROSPECTIVE-RETROSPECTIVE DISTINCTION ON THE EVE OF *COEUR D'ALENE*

By the end of the Court's 1985 Term, the transformation of retrospectivity from necessary to sufficient reason for finding relief barred by the Eleventh Amendment was essentially complete. The *Green* formulation, under which *Ex parte Young* permits "prospective injunctive relief to prevent a continuing violation of federal law," became the standard one in Supreme Court opinions.[257] By the time *Coeur d'Alene* was decided, the idea that *Ex parte Young* permits only prospective relief had become so ingrained that it was the *dissenters* who stated the requirement most clearly:

> [T]he plaintiff must allege that the officers are acting in violation of federal law [citing *Pennhurst*], and must seek prospective relief to address an ongoing violation, not compensation *or other retrospective relief* for violations past. [citing *Green*, *Quern*, and *Edelman*.][258]

The concurring Justices similarly wrote that "[a] federal court cannot award retrospective relief, designed to remedy past violations of federal law,"[259] and repeatedly referred to the type of relief theretofore permitted by *Ex parte Young* as "prospective relief to end an ongoing violation of federal rights,"[260] or words to that effect.[261] The idea that the Amendment bars only *monetary* relief

255. Since the trust corpus was lost, complying with the obligation required the defendants to use their own money to replace the income the land would have produced, but, as noted above, this has no bearing on the prospectivity of the relief.

256. *See id.* at 281.

257. In *Seminole Tribe,* for example, the Court said that "federal jurisdiction over a suit against a state official" is permissible under *Ex parte Young* "when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.' " 517 U.S. 44, 73 (1996) (quoting *Green*, 474 U.S. at 68).

258. *Coeur d'Alene*, 117 S. Ct. at 2048 (Souter, J., dissenting) (emphasis added).

259. *Id.* at 2043 (O'Connor, J., concurring).

260. *Id.* at 2045.

261. *See id. See also id.* at 2043 ("prospective relief to end a state officer's ongoing violation of federal law"); *id.* at 2046 (the cases establish that "a *Young* suit is available where a plaintiff alleges an

was not expressed. The debate among the Justices concerned the extent to which the prospectivity of the relief sought should *suffice* to avoid the Eleventh Amendment bar. The dissenters maintained that it should always suffice, the "principal" opinion by Justice Kennedy maintained that it should not,[262] and the controlling opinion by Justice O'Connor came out somewhere in the middle. As discussed in the next Part, the precise status of the prospective-retrospective distinction after *Coeur d'Alene* is a matter of some uncertainty. The *Coeur d'Alene* opinions do confirm, however, that all of the Justices believed that the case law as it had developed to that point barred a federal court from awarding retrospective relief in suits against state officials, regardless of whether or not that relief was monetary.

It is nevertheless the case that, until *Coeur d'Alene*, this transformation had taken place almost entirely in dicta. With the independently vulnerable exception of *Papasan*, all of the cases in which the Court found relief to be retrospective involved monetary relief and thus fit squarely within the more limited rule set forth in *Edelman*. None of these cases, therefore, gave the Court any occasion to wrestle with the difficult doctrinal problems raised by a comprehensive prospective-retrospective test.

In the lower courts, too, the cases finding relief to be retrospective and thus barred were virtually all suits seeking monetary relief.[263] Indeed, even after *Green*, the lower courts continued to describe the line between *Ex parte Young* and *Edelman* in language more closely resembling the limited *Edelman* formulation than the broader *Green* formulation. For example, the Fifth Circuit in *Brennan v. Stewart* described the distinction as "a relatively simple rule" that is "usually quite easy to apply." The court explained:

> Basically, prospective injunctive or declaratory relief . . . is permitted—whatever its financial side effects—but retrospective relief in the form of a

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ongoing violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*"); *id.* (describing *Green* as holding that "Eleventh Amendment bars notice relief where plaintiffs alleged no ongoing violation of federal law); *id.* (describing *Edelman* as holding that "Eleventh Amendment bars relief for past violation of federal law"); *id.* ("*Edelman* is consistently cited for the proposition that prospective injunctive relief is available in a *Young* suit."); *id.* ("[T]he question in *Quern* was whether the notice relief was more like the prospective relief allowed in typical *Young* suits, or more like the retrospective relief disallowed in *Edelman* . . . . The *Quern* Court permitted the relief to stand not because it was inconsequential, but because it was adjudged prospective."); *id.* at 2047 ("[T]he Court [in *Milliken*] upheld the relief . . . because the remedy was prospective rather than retrospective.").

262. Justice O'Connor's concurring opinion and Justice Souter's dissenting opinion both refer to Justice Kennedy's opinion as the "principal opinion." *See Coeur d'Alene*, 117 S. Ct. at 2045 (O'Connor, J., concurring); *id.* at 2048 n.2 (Souter, J., dissenting).

263. Decisions finding nonmonetary relief to be barred were few and far between. *See* Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990) (seeking "return of land"); Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549 (S.D. Ala. 1992) (seeking order requiring Governor to negotiate with Tribe). In the latter case, moreover, the relief was found to be barred not because it was retrospective, but on other, clearly erroneous, grounds; *see supra* note 113.

> money judgment in compensation for past wrongs—no matter how small—is barred.[264]

In the light of *Papasan*, the Court's statement that the prospective-retrospective distinction is usually "relatively simple" and "easy to apply" in the context of monetary relief was an exaggeration. But if the test were extended to nonmonetary relief, the adjectives "simple" and "easy" would be the last to come to mind. The lower courts appear to have regarded the prospective-retrospective distinction as relatively straightforward only because they assimilated it as a rule barring damage-like monetary relief. Commentators, too, regarded the *Edelman* line of cases as simply barring suits for money damages and their equivalent.[265] As a description of *Edelman*'s practical impact in the lower courts and in the Supreme Court on the eve of the Court's decision in *Coeur d'Alene*, this understanding of *Edelman* was largely accurate.

By the time *Coeur d'Alene* reached the Court, it had also been established that *Ex parte Young* represented an "exception" to the various previous formulations of when a suit against a state official is "really" a suit against the state. The Court in *Pennhurst* had clarified that *Ex parte Young*, when it applies, trumps those other formulations, and the lower courts had, by and large, correctly assimilated that teaching.[266] *Pennhurst* had also established the *Edelman* test as the sole determinant of whether a suit against a state official alleging a violation of federal law is barred by the Eleventh Amendment. *Coeur d'Alene* clearly changed that.

III. *COEUR D'ALENE* AND THE AVERTED REFORMULATION OF *EX PARTE YOUNG* DOCTRINE

In *Coeur d'Alene*, the Supreme Court came very close to radically revising its *Ex parte Young* doctrine. Exactly what the Court held, and thus how radically it changed the doctrine, is a matter of some dispute. In this Part, I defend an interpretation of the controlling opinion as establishing a narrow exception to the general rule that suits against state officials seeking prospective relief from ongoing violations of federal law are not barred by the Eleventh Amendment.

The Coeur d'Alene Tribe and some of its members maintained that federal law entitled the Tribe to the beneficial ownership, subject to the trusteeship of the United States, of certain submerged lands in and around Lake Coeur d'Alene. They sought an injunction invalidating state laws that interfered with the Tribe's ownership and prohibiting state officials from so interfering.[267] The

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264. 834 F.2d 1248, 1253 (5th Cir. 1988).

265. *See supra* note 15.

266. *See, e.g.*, United Mexican States v. Woods, 126 F.3d 1220, 1222 (9th Cir.), *cert. denied*, 118 S. Ct. 1517 (1998) (describing *Ex parte Young* as "exception" to rule that Eleventh Amendment bars suits against state officials "if the decree would operate against the [state]").

267. *See Coeur d'Alene*, 117 S. Ct. at 2032.

district court found that their claim was not barred by the Eleventh Amendment, but rejected the claim on the merits.[268] The Court of Appeals agreed that the claim fell within the *Ex parte Young* exception, but reversed and remanded on the merits.[269] The dissenting Justices would have affirmed,[270] but a majority of the Supreme Court found that the claim was barred by the Eleventh Amendment.[271]

The structure of Justice Kennedy's "principal" opinion in the case suggests that he was initially writing for a five-Justice majority but ultimately lost the votes of Justices O'Connor, Scalia and Thomas.[272] The portions of Justice Kennedy's opinion that the three Justices ultimately refused to join would have drastically revised *Ex parte Young* doctrine.[273] Strikingly, however, the final section of his opinion, which the concurring Justices did join, advances more limited bases for dismissing the Tribe's suit.[274] In the end, the decision does not revise *Ex parte Young* doctrine quite so thoroughly as Kennedy would have liked,[275] but, beyond that, the courts and commentators do not agree about what exactly the Court held. The answer turns on the concurring Justices' reasons for concluding that the Tribe's claim did not fall within the *Ex parte Young* exception.

As I read it, the concurring opinion reaffirms the prospective-retrospective test articulated in such cases as *Green*, but at the same time carves out a narrow exception to the rule that suits seeking prospective relief are not barred. Before examining Justice O'Connor's views, however, I shall discuss the "minority" views expressed in Justice Kennedy's opinion. After discussing Justice O'Connor's reasons for refusing to concur in these portions of the opinion, I shall turn to the analysis in the parts of Justice Kennedy's opinion that O'Connor, Scalia, and Thomas did join, and the additional reasons given by O'Connor for joining these portions.

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268. *See* Coeur d'Alene Tribe of Idaho v. State of Idaho, 798 F. Supp. 1443, 1449-52 (D. Idaho 1992).

269. *See* Coeur d'Alene Tribe of Idaho v. State of Idaho, 42 F.3d 1244 (9th Cir. 1994).

270. *Coeur d'Alene*, 117 S. Ct. at 2047-59 (Souter, J., dissenting).

271. *See id.* at 2043.

272. Justices O'Connor, Scalia, and Thomas joined in Sections I, II.A, and III; only Chief Justice Rehnquist joined in Sections II.B, II.C, and II.D. *See id.* at 2031.

273. *See id.* at 2035-36.

274. Justice Kennedy obviously borrowed from Justice O'Connor's opinion the statement that "[a]n allegation of an on-going violation of federal law is ordinarily sufficient to invoke the *Young* fiction." *Id.* at 2040. *Cf. id.* at 2043 (O'Connor, J., concurring) ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court."); *id.* at 2045 (O'Connor, J., concurring) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar."). This statement seems inconsistent with his proposed "case-by-case approach," *id.* at 2039, requiring a "careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," *id.* at 2038.

275. Several lower courts, however, have applied Justice Kennedy's *ad hoc* balancing analysis even though a majority of the Court clearly rejected such an approach. *See* Herbst v. Voinovich, Case No. 1:96-CV-1002, 1998 U.S. Dist. LEXIS 9430 (N.D. Ohio June 22, 1998); Hou Hawaiians v. Cayetano, 996 F. Supp. 989, 997 n.9 (D. Haw. 1998). *See also* cases cited *infra* note 293.

Part II.B of Justice Kennedy's opinion, which only the Chief Justice joined, appears to defend a bright-line rule that suits against state officials for prospective relief are barred by the Eleventh Amendment if state courts are open to adjudicate the claim and confer the requested relief.[276] Justice Kennedy argues that the Court applied this rule in *Ex parte Young* and other early cases, but that later cases "somewhat obscured" "this mode of analysis."[277] Since "[t]oday . . . it is acknowledged that States have real and vital interests in preferring their own forum in suits brought against them," and since Idaho's courts were open to the plaintiffs in this case, Kennedy concludes that "there is neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum."[278] He buttresses this conclusion in Part II.C, again writing just for himself and the Chief Justice, by belittling "[what] is described as the interest in having federal rights vindicated in federal courts."[279] He repeatedly expresses confidence in the state courts as forums for enforcing federal rights, denying that "state courts are a less adequate forum for resolving federal questions" than are the federal courts,[280] and stressing the state courts' "right and duty . . . to interpret and follow the Constitution and the laws enacted pursuant to it, subject to a litigant's right of review in [the Supreme] Court in a proper case."[281]

The bright line is blurred in Part II.D, however, in which Kennedy explains that *Ex parte Young* in fact requires a "case-by-case approach"[282] entailing a "careful balancing"[283] of a "broad" "range of concerns."[284] With some justification, Justice Kennedy has difficulty squaring the Court's past results with a comprehensive test turning on prospectivity, and so he proffers alternative

276. *See id.* at 2035.

277. *Id.* at 2036. As Justices Souter and O'Connor pointed out, Justice Kennedy misread *Ex parte Young* and the other early cases. He relied on the portion of the *Young* opinion which concluded that because the state law being challenged imposed large penalties on anyone who violated it, it effectively "preclude[d] a resort to the courts (either state or Federal) for the purpose of testing its validity." *Id.* at 2035 (quoting *Ex parte Young*, 209 U.S. at 146). The Court in *Ex parte Young* relied on these penalties, however, only in concluding that it was unreasonable to require the plaintiffs to test the legality of the law by violating it and then raising the issue of its validity as a defense to prosecution. As Justices Souter and O'Connor correctly observed, the penalties merely established that testing these laws by violating them was not an adequate remedy at law. *See id.* at 2045 (O'Connor, J., concurring); *id.* at 2057 (Souter, J., dissenting). The *Ex parte Young* Court gave no consideration to whether the state courts were available to award an injunction of the sort the plaintiffs were seeking from the federal court. Justice Kennedy's reliance on other early opinions was similarly misplaced. For example, he cited *Poindexter v. Greenhow*, 114 U.S. 270, 299 (1885), as supporting his proposed rule that a federal action against a state official is available only if no state court remedy is available. *Coeur d'Alene*, 117 S. Ct. at 2035. But *Poindexter* was a case from the state courts, and although the state courts denied relief, the Supreme Court reversed on appeal. *See generally* Vázquez , *supra* note 5, at 1735-36.

278. *Coeur d'Alene*, 117 S. Ct. at 2036.

279. *Id.*

280. *Id.* at 2037.

281. *Id.*

282. *Id.* at 2039.

283. *Id.* at 2038.

284. *Id.* at 2039.

explanations. He suggests, for example, that the result in *Milliken* actually rested on the strong federal interest in providing a federal forum for the vindication of Fourteenth Amendment claims.[285] Citing the Court's holding in *Fitzpatrick v. Bitzer*[286] that the Civil War Amendments give Congress the power to abrogate Eleventh Amendment immunity, Kennedy concludes that "it follows that the substantive provisions of the Fourteenth Amendment themselves offer a powerful reason to provide a federal forum."[287] But, again, Kennedy does not advocate a flat rule that the Eleventh Amendment is inapplicable to Fourteenth Amendment claims (a rule that would have opened the door to damage actions against states for violation of antidiscrimination principles, for example). Instead, he treats *Milliken* as an example of how the Court had decided Eleventh Amendment cases in the past based on an *ad hoc* weighing of the federal rights at issue against the state interests involved.[288]

Justice O'Connor's concurring opinion criticizes Justice Kennedy for "replac-[ing] a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a 'broad' range of unspecified factors."[289] Her opinion characterizes the prospective-retrospective test as not just well-established, but a "basic principle of federal law."[290] She also criticizes Justice Kennedy for denigrating the federal interest in having federal issues decided in federal courts.[291] Her opinion has accordingly been praised for averting an evisceration of *Ex parte Young* doctrine that would have been disastrous for the enforcement of federal rights against the states.[292]

Whether the concurring opinion is indeed more protective of federal rights than Justice Kennedy's is not so clear. Justice O'Connor did, after all, agree with Justice Kennedy's conclusion that the Tribe's lawsuit did not fall within the *Ex parte Young* exception. This means either that she interpreted the concept of retroactivity very broadly, thus contracting the reach of *Ex parte Young* in a potentially significant way, or that she agreed with Justice Kennedy's conclusion that prospectivity alone is not sufficient to place a suit within the *Ex parte Young* exception. For the reasons discussed below, I conclude that the concurring Justices found the Tribe's suit to be barred not because the Tribe was seeking retrospective relief, but because the Justices carved out a narrow exception to the general rule that suits seeking prospective relief are permitted. Additionally, I understand Justice Kennedy to have advocated a case-specific balancing approach not for all cases but only for cases seeking prospective

285. *See id.*
286. 427 U.S. 445 (1976).
287. *Coeur d'Alene*, 117 S. Ct. at 2039.
288. *See id.*
289. *Id.* at 2047.
290. *Id.* at 2045.
291. *See id.* at 2046.
292. *See, e.g., id.* at 2048 (Souter, J., dissenting).

relief.[293] Because suits seeking retrospective relief would continue to be categorically barred under his test, Justice Kennedy's balancing approach would have operated only to deny jurisdiction. If so, then *Ex parte Young* does retain a broader scope under Justice O'Connor's approach than under Justice Kennedy's. Nevertheless, Justice O'Connor's approach is still something of a mixed bag from the perspective of protecting federal rights against infringement by the states. As I explain below, although remedies will be more readily available in federal court under Justice O'Connor's approach than under Justice Kennedy's, there will apparently be more cases under Justice O'Connor's approach in which there will be no remedy at all for a state's violation of federal rights.[294] The significance of this problem depends on the breadth of the exception recognized by the concurring Justices.

It is difficult to imagine how anyone could disagree with the conclusion of the lower court judges and the dissenting Justices that the Tribe was seeking prospective relief. The dissenting opinion, however, reads Justice Kennedy's opinion as concluding that the relief the Tribe sought was an "impermissibly retrospective remedy."[295] Although Justice Souter said that he understood this conclusion to be confined to Justice Kennedy's opinion,[296] the language from Justice Kennedy's opinion that he cited in support of this reading appears in a portion of the opinion that Justices O'Connor, Scalia, and Thomas joined. If Justice Souter's reading is correct, then a majority of the Court found the relief sought by the Tribe to be "impermissibly retrospective." Lower courts also appear to have read *Coeur d'Alene* to hold that the relief sought was barred because it was retrospective.[297]

Those readings of the opinion are, in my view, mistaken. Justice Souter relied on Justice Kennedy's statement near the end of his opinion that, "[i]f the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury."[298] But this does not say that the relief sought was

293. This is suggested by the statements in the opinion to the effect that not all suits for prospective relief should automatically be permitted to proceed. *See Coeur d'Alene*, 117 S. Ct. at 2034 ("to permit a federal court action to proceed in every case where prospective and injunctive relief is sought . . . would be to adhere to an empty formalism"); *id.* at 2038 ("where prospective relief is sought . . . the Eleventh Amendment, in *most* cases, is not a bar") (emphasis added). Some lower courts, however, have applied Justice Kennedy's balancing approach to permit suits that in their view otherwise would have been barred. *See* Ashmus v. Calderon, 123 F.3d 1199, 1205-06 (9th Cir. 1997) (permitting action to proceed "despite California's Eleventh Amendment immunity defense" citing efficiency and fairness concerns, and noting that the suit would have little impact on the state's sovereign interests), *rev'd on other grounds*, 118 S. Ct. 1694 (1998); United States W. Communications, Inc. v. Reinbold, No. A1-97-25, 1997 U.S. Dist. LEXIS 22606, at *11-12 (D.N.D. July 28, 1997) (permitting action to proceed based on finding that federal interests at issue outweighed state interests).

294. *See infra* text accompanying notes 317-19.

295. *Coeur d'Alene*, 117 S. Ct. at 2055.

296. *See id.* at 2054 (Souter, J., dissenting).

297. *See, e.g., Paraguay v. Allen*, 134 F.3d at 628.

298. *Coeur d'Alene*, 117 S. Ct. at 2043 (quoted by Justice Souter, *id.* at 2055).

retrospective. Moreover, an earlier part of Justice Kennedy's opinion, also joined by Justices O'Connor, Scalia and Thomas, clearly states that the relief sought by the Tribe was prospective.[299] All five of the Justices in the majority thus hold that at least some lawsuits against state officials alleged to be violating federal law are barred by the Eleventh Amendment even though only prospective relief is being sought. *Coeur d'Alene* does not contract *Ex parte Young* by broadening the concept of retroactivity.

This is scant comfort, however, if the Court held that relief against state officials is barred if it is as "intrusive" as retrospective relief.[300] Already, one federal appellate court has read *Coeur d'Alene* to establish such a test.[301] Although other portions of Justice Kennedy's opinion that Justices O'Connor, Scalia, and Thomas joined include broad language that might be interpreted as vague support for something like an "intrusiveness" test,[302] Justice Souter was right to conclude that this test could not be attributed to the concurring Justices. The concurring Justices criticized Justice Kennedy's balancing test because it was vague and unfaithful to precedent.[303] An "intrusiveness" test would be just as vague and just as unfaithful to precedent. Justice O'Connor repeatedly stated that the cases established that "a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*."[304] But, as she also recognized, prospective relief of the sort allowed by *Ex parte Young* and *Edelman* is very often as intrusive as retrospective relief, if not more so.[305] Justice O'Connor also emphasized that she "would not narrow our *Young* doctrine."[306] An intrusiveness test would clearly represent a substantial narrowing of that doctrine.

Justice O'Connor's opinion is best read as recognizing a narrow exception to the rule that prospective relief against state officials violating federal law is not barred. This reading is supported by her repeated references to the prospective-

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299. *See id.* at 2044 ("The Tribe has alleged an on-going violation of its property rights in contravention of federal law and seeks prospective injunctive relief.").

300. *See* Jackson, *supra* note 27, at 312.

301. *See* ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1190 (10th Cir. 1998).

302. For example, Justice Kennedy wrote that interpreting *Ex parte Young* to permit lawsuits against state officials "in every case where prospective declaratory and injunctive relief is sought" would be "to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a court's federal question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Coeur d'Alene*, 117 S. Ct. at 2034.

303. For example, while Justice Kennedy would have the courts dismiss suits against state officials if they unduly interfere with state interests, Justice O'Connor correctly noted that "we have never doubted the importance of state interests in cases falling squarely within the our part interpretations of the *Young* doctrine." *Id.* at 2047 (O'Connor, J., concurring).

304. *Id.* at 2046 (emphases in original); *see also id.* at 2045 ("Where a plaintiff seeks prospective relief to end a continuing violation of federal rights, ordinarily the Eleventh Amendment poses no bar.").

305. *See id.* at 2055.

306. *Id.* at 2047.

retrospective test as the "ordinary" rule.[307] Additionally, her statement that she "[does] not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry *for all cases* in which a plaintiff invokes the *Young* doctrine,"[308] suggests that she was accepting a reformulation for *some* cases.[309] The breadth of this exception is a matter of some uncertainty. Justice O'Connor's analysis supports the conclusion that the exception is quite narrow.

Justice O'Connor gave two reasons for finding the Tribe's suit to be barred. First, she treated it as settled that "a federal court cannot summon a State before it in a private action seeking to divest the State of a property interest," and she noted that the Tribe conceded that this suit was "the functional equivalent" of such a suit. Her reliance on this principle suggests a broad exception for suits challenging on federal grounds a state's claim to property. In seminal cases such as *United States v. Lee*,[310] a precursor to *Ex parte Young*, the Court had walked a fine and uneasy line: it allowed the plaintiffs to obtain a court order prohibiting state officials from interfering with their property rights, but at the same time it maintained that such an order would not bind the state itself, as only the officials were parties to the lawsuit. Of course, if a state's officials are required by court order to respect the plaintiffs' property rights, then a state's claim to the property is effectively adjudicated. This seemed just another example of the fictitious nature of *Ex parte Young* suits, and one would have thought that the Court's willingness to see through this fiction in *Pennhurst* would have led it in *Coeur d'Alene* to dismiss as quaint the idea that an award of prospective relief against state officials does not bind the state itself. *Pennhurst* seemed to be saying: "Everybody knows that a suit against a state official awarding prospective relief is really a suit against the state. We nevertheless indulge the fiction that it is just a suit against the official because this is necessary to preserve the supremacy of federal laws." Had it taken this approach in *Coeur d'Alene*, the Court would have erased the uneasy line drawn in *Lee* by admitting that suits ordering state officials not to interfere with federal property rights are really suits against the states, but accepting them nevertheless as necessary to ensure the supremacy of federal law. The Court's apparent inclination to resolve the tension by holding instead that such suits are barred because they are really suits against the states represents an analytical retrenchment.

Dicta in a more recent Supreme Court decision suggests that Justice O'Connor may well be ready to adopt an exception to *Ex parte Young* for all property claims,[311] but *Coeur d'Alene* does not adopt such an exception. Her concur-

307. *See supra* notes 274 & 304, and accompanying text.

308. *Id.* at 2047 (emphasis added).

309. Admittedly, this is in tension with her statement that she would not narrow *Ex parte Young* doctrine. Perhaps she did not regard the reformulation as a narrowing because of her reading of such old cases as *Lee*, discussed below. The reformulation was a narrowing, however, if one reads *Pennhurst* as replacing those old formulations with a comprehensive prospective-retrospective distinction. *See supra* text accompanying notes 108-15.

310. 106 U.S. 196 (1882).

311. *See* California v. Deep Sea Research, Inc., 118 S. Ct. 1464, 1471-73 (1998).

rence rested in addition on the fact that the Tribe was asserting a right to *sovereignty* over the lands at issue.[312] Since it is only the latter factor that distinguished this case from *Lee*, and since Justice O'Connor asserted that she was not "narrowing" *Ex parte Young* doctrine, the exception she recognized must include only cases in which the plaintiff raises a claim to exclusive sovereignty over land. The exception recognized in *Coeur d'Alene* would thus appear to embrace only disputes over sovereignty between states and Indian Tribes, and possibly also between states and foreign states. After all, only sovereigns may have disputes over sovereignty, and the Eleventh Amendment does not apply to suits brought by sister states or the United States.[313]

The exception may be narrower still. Justice Kennedy, for five Justices, wrote at length about the special importance to the states of submerged lands, stating that such lands have a "unique status in the law."[314] Justice O'Connor added that the Court has "repeatedly emphasized the importance of submerged lands to state sovereignty" and that "[c]ontrol of such lands is critical to a State's ability to regulate use of its navigable waters."[315] It is not clear why any of this should bear on whether a court may adjudicate a Tribe's claim that federal law denies the state sovereignty over such lands. Justices Kennedy and O'Connor seem to prejudge the merits here, holding in effect that the suit may not be maintained because the state, not the Tribe, has sovereignty over the land. Be that as it may, the Court's disquisition on the special nature of submerged lands suggests that the exception extends only to disputes over sovereignty over such lands, a reading that is confirmed by Justice O'Connor's statement that her holding extends only to suits in which "a plaintiff seeks to divest the State of all regulatory power over submerged lands."[316] The *Coeur d'Alene* exception to the *Ex parte Young* exception is thus narrow indeed.

Recognizing the limited scope of this exception helps alleviate concerns over an aspect of the concurring opinion that might otherwise be troublesome. One of the key disagreements between Justices Kennedy and O'Connor concerned the relevance of the availability of a state forum. In denying relief, Justice Kennedy regarded it as important that the courts of Idaho were open to hear this case. Though he minimized the importance of *federal* courts, he affirmed the need for *some* court to be available to enforce federal law.[317] He appeared to regard *Ex parte Young* as a stop-gap measure, allowing federal courts to fill in when the state courts decline to enforce the federal obligations of state offi-

312. "[T]he Tribe seeks to eliminate all together the State's regulatory power over the submerged lands at issue—to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all." *Coeur d'Alene*, 117 S. Ct. at 2044.

313. *See supra* notes 85-86.

314. *Coeur d'Alene*, 117 S. Ct. at 2041.

315. *Id.* at 2044.

316. *Id.* at 2047.

317. *See id.* at 2305 (noting that "the plan of the convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy").

cials.[318] Although Justice O'Connor criticized Justice Kennedy for understating the importance of the federal courts' role in protecting federal rights, she recognized that certain suits against state officials seeking prospective relief are barred even if they claim a violation of federal law. For the concurring Justices (or some of them), therefore, the unavailability of a federal forum may mean that in these cases there is potentially no forum at all in which to vindicate the federal rights at issue. In this respect, Justice O'Connor's position appears to be less protective of federal rights than Justice Kennedy's.[319]

Limiting the exception to disputes about sovereignty over submerged lands significantly alleviates this concern. Disputes between states and Indian tribes concerning sovereignty over submerged lands can be resolved in the federal courts if the federal government brings suit. The *Coeur d'Alene* dispute is currently being resolved in just this way, albeit with respect to only a portion of the land the Tribe claims.[320] Disputes about sovereignty over submerged lands between a state and a foreign state can be submitted by the federal government to an arbitral forum, with or without the state's consent.[321] That these mechanisms depend on the executive branch's initiative makes them less than completely satisfying to disputants, but the incentive of the executive branch to intervene in these cases is likely to be quite high.

Coeur d'Alene might be a worrisome precedent if it portended a proliferation of "exceptions" to the *Ex parte Young* exception. The case would be cause for considerable concern if the Court were contemplating an exception for every case in which "it simply cannot be said that the suit is not a suit against the State,"[322] for, as the Court recognized in *Pennhurst*, all suits against state officials falling within the *Ex parte Young* exception are for all practical purposes suits against the states. Although the concurring Justices' reaffirmation of the prospective-retrospective test as the "ordinary" rule is preferable to Justice Kennedy's unmoored case-by-case approach, their decision to craft an exception barring a narrow class of suits seeking prospective relief represents a marked retrenchment from the analytical advance made in *Pennhurst*. This retrenchment, and the fact that even the dissenting Justices appear to have

318. "Where there is no available state forum the *Young* rule has special significance. In that instance providing a federal forum for a justiciable controversy is a specific application of the principle that the plan of the convention contemplates a regime in which federal guarantees are enforceable so long as there is a justifiable controversy. THE FEDERALIST No. 80, p. 475 (A. Hamilton) (C. Rossiter ed. 1961) ('[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions.')" *Id.* at 2035.

319. Strictly speaking, O'Connor's position is not inconsistent with the proposition that state courts are required under *General Oil Co. v. Crain*, 209 U.S. 211 (1908), to entertain suits against state officials seeking prospective relief from violations of federal law. It is at least curious, however, that the concurring Justices, unlike the dissenters, do not criticize Kennedy's implicit repudiation of *Crain*. On this repudiation, see *infra* notes 472-79 and accompanying text.

320. *See Coeur d'Alene*, 117 S. Ct. at 2032; United States v. Idaho, No. CV 94-328-N-EJL (D. Idaho July 28, 1998).

321. *See* Lattimer v. Poteet, 39 U.S. (14 Pet.) 4, 13-14 (1840).

322. *Coeur d'Alene*, 117 S. Ct. at 2047 (O'Connor, J., concurring).

embraced a comprehensive prospective-retrospective test, appear to bode ill for a return to *Edelman*'s original holding. On the other hand, the concurring Justices' decision to resolve the case as they did, ironically, may hasten the demise of the test they purported to reaffirm. By deciding the case on the basis of a narrow exception crafted for the occasion, the concurring Justices demonstrated that, if the prospective-retrospective test is the "ordinary" rule, it is a rule that does little work. *Edelman*'s original holding explains the unavailability of damages and damage-like monetary remedies. Seemingly retrospective nonmonetary relief, on the other hand, is permitted (*Milliken*), while seemingly prospective relief is barred if it is secondary rather than primary (*Papasan*) or if the dispute concerns sovereignty over submerged lands (*Coeur d'Alene*). By adopting an exception to govern the case, rather than relying on the "ordinary" rule, the concurring Justices have provided yet another example of the poverty of the rule they say they regard as a "basic principle of federal law."

IV. *BREARD V. GREENE* AND THE OVERLOOKED LINK BETWEEN HABEAS CORPUS AND *EX PARTE YOUNG* DOCTRINE

In *Breard v. Greene*, the Supreme Court said little about the Eleventh Amendment, but what it said—and, more importantly, what it did not say—tells us volumes about the sorry state of *Ex parte Young* doctrine. The lower courts dismissed a lawsuit based on a reading of *Edelman* that would require the dismissal of virtually all petitions for federal habeas relief filed by state prisoners. Instead of reversing this problematic holding, the Court expressed its agreement with the lower courts' reasoning and denied the requested relief.[323]

In Part IVA, I give a brief history of the *Breard* litigation, summarizing the reasons given in that case and in the similar *Woods* case for finding an order halting an allegedly unlawful execution to be retrospective. In Part IVB, I evaluate the lower court decisions in these cases as applications of the prospective-retrospective test, as the Supreme Court has elaborated it so far, and conclude that, judged by that standard, the decisions were plausible, if unsatisfying. In Part IVC, I explain the conflict between these holdings and the long history of granting federal habeas relief to state prisoners. Finally, in Part IVD, I explain why the Supreme Court's decision in *Breard* should not be regarded as an Eleventh Amendment decision at all.

A. THE *BREARD* LITIGATION

Angel Breard was a Paraguayan national who was convicted by a trial court in Virginia of a brutal rape and murder and was sentenced to death.[324] The controversy that concerns us grows out of Virginia's violation of the Vienna Convention on Consular Relations, a multilateral treaty to which the United

323. *See Breard v. Greene*, 118 S. Ct. at 1356.

324. *See* Breard v. Pruett, 134 F.3d 615, 617 (4th Cir.), *cert. denied*, 118 S. Ct. 1352 (1998).

States and Paraguay are parties.[325] The treaty provides that a national of one country "arrested or committed to prison or to custody pending trial or ... detained in any other manner" by the authorities of another country has the right to confer with the consul of his country, if he so requests.[326] It provides further that "said authorities shall inform the person concerned without delay of his rights under this [provision]."[327] No one seriously disputed that Breard had a right under this treaty to be informed that he was entitled to consult with Paraguay's consul to the United States, and that this right was violated by Virginia.[328] According to the courts entertaining his federal habeas petition, though, by the time Breard became aware of this right, it was too late. The district court held that he had forfeited his claim by failing to raise it at his trial or on his direct appeals,[329] and the Fourth Circuit affirmed.[330]

In a parallel case, the Republic of Paraguay and its consul[331] sued the Governor of Virginia, George Allen, raising the treaty violation issue and seeking a *vacatur* of the death sentence.[332] The failure to notify Breard of his rights under the treaty, Paraguay argued, had materially contributed to the ultimate imposition of the death sentence.[333] Because of his lack of familiarity with the American justice system, Breard had turned down a plea bargain that would have averted the death penalty and, instead, after pleading not guilty, he confessed to the crime on the stand, claiming that he had been "under a curse placed upon him by his ex-wife's father."[334] Although his court-appointed counsel advised against this course of action, Paraguay argued that the Paraguayan consul, being familiar with both Paraguayan and American judicial practice and culture, would have been more effective at explaining the risks and persuading Breard to accept a plea bargain.[335]

Governor Allen moved to dismiss Paraguay's action on a number of grounds. In addition to raising the Eleventh Amendment argument, he argued, *inter alia*, that the treaty-based claim was nonjusticiable, that the plaintiffs lacked standing to demand the relief they sought, that the suit violated the Rooker-Feldman

325. *See Paraguay v. Allen*, 134 F.3d at 625.

326. Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 59 U.N.T.S. 261.

327. *Id.*

328. The United States conceded these points in the ICJ proceeding initiated by Paraguay. *See infra* note 371.

329. *See* Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff'd*, 134 F.3d 615 (4th Cir.), *cert. denied*, 118 S. Ct. 1352 (1998). The court also said that "a violation of rights under the Convention is insufficient to permit [habeas] relief," citing the unpublished decision in *Murphy v. Netherland*, No. 3:95cv856, slip op. at 6-8 (E.D. Va. July 26, 1996), *aff'd on other grounds*, 116 F.3d 97 (4th Cir.), *cert. denied*, 118 S. Ct. 26 (1997). The basis of the dismissal in *Breard v. Netherland*, however, was forfeiture.

330. *See Breard v. Pruett*, 134 F.3d at 617.

331. Although the consul was also a plaintiff, I shall hereinafter refer only to Paraguay.

332. *See Paraguay v. Allen*, 949 F. Supp. at 1272.

333. *See* Appellants' Brief at 5-6, Paraguay v. Allen, 134 F.3d 144 (4th Cir. 1998) (No. 96-2770).

334. Breard v. Commonwealth, 248 Va. 68, 73, 445 S.E.2d 670, 674 (1994).

335. *See* Appellant's Brief at 5-6, Paraguay v. Allen, 134 F.3d 144 (4th Cir. 1998) (No. 96-2770).

doctrine,[336] and that the exclusive basis on which to seek to vacate a criminal sentence is habeas corpus.[337] The district court rejected the Governor's justiciability and standing arguments,[338] but dismissed Paraguay's suit on Eleventh Amendment grounds.[339]

The court's analysis was brief. After noting that the Eleventh Amendment bars suits against state officials that are in fact suits against a state, the court correctly noted that the *Ex parte Young* case is an "exception" to this rule.[340] But to fall within the exception, according to the court, "the plaintiffs must satisfy two criteria: (1) they must show that they seek a remedy for a continuing violation of federal law and (2) they must show that the relief is prospective."[341] The court devoted most of its analysis to determining whether there was a "continuing violation of federal law," concluding that there was not.[342] It quoted *Papasan* for the proposition that the question is whether federal law is being violated now as opposed to "at one time or over a period of time in the past,"[343] and it cited *Milliken* as a case in which the state officials were violating federal law "at the precise moment when the case was filed."[344] In this case, the court held, Virginia violated the treaty in the past, and the violation was not "continuing," since Virginia was no longer hindering Breard's efforts to consult with his consul.[345] The court assumed the validity of plaintiff's factual claim that, but for the violation, Breard would not be on death row today.[346] It characterized this result as "a tragic consequence of Virginia's failure to abide by the law," but stressed that "it is still a *consequence* of the violation and not a continuing wrong."[347] The court concluded its analysis by characterizing the relief sought by the plaintiffs as "retroactive" and thus barred by the Eleventh Amendment.[348] It accordingly denied the plaintiffs the opportunity to present evidence that Virginia's violation of the treaty materially contributed to the imposition of Breard's death sentence.

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336. Under this doctrine, which takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), "federal courts do not have jurisdiction pursuant to § 1983 to review the judgments and decisions of state courts." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 423 (2d ed. 1994).

337. *See* Appellee's Brief at 14-26, Paraguay v. Allen, 134 F.3d 144 (4th Cir. 1998) (No. 96-2770).

338. *See Paraguay v. Allen*, 949 F. Supp. at 1274-75.

339. *See id.* at 1273.

340. *Id.* at 1272.

341. *Id.* (citing *Green*, 474 U.S. at 68).

342. *Id.* at 1273.

343. *Id.* (quoting *Papasan*, 478 U.S. at 278).

344. *Id.*

345. *Id.*

346. *See id.*

347. *Id.* (emphasis in original).

348. *Id.* Although the court indicated that there were two requirements—that the relief sought be prospective and that the violation of federal law be ongoing—the fact that the court characterized the relief as retrospective immediately after concluding that the violation of federal law was not ongoing, and without any additional analysis, suggests that the court regarded the two requirements as related. The Courts of Appeals criticized the district court for not treating the requirements as distinct. *See* 134 F.3d at 627 n.5.

While Paraguay's appeal was pending in the Fourth Circuit, the United States submitted a brief as *amicus curiae* volunteering its views. The Justice Department questioned the district court's Eleventh Amendment analysis,[349] but argued that the dismissal of the plaintiffs' claims should be affirmed on other grounds. The Department argued broadly that "treaty disputes between governments are not justiciable in domestic courts,"[350] and, more narrowly, that this particular treaty did not give the plaintiffs a cause of action.[351] The Court of Appeals, however, declined the invitation to affirm on other grounds and instead affirmed on Eleventh Amendment grounds.

Like the district court, the Court of Appeals asserted that suits against state officials must meet two requirements to escape the Eleventh Amendment bar: the violation of federal law must be ongoing, and the relief sought must be prospective.[352] The Court found that neither was satisfied here. The court found it "obvious . . . that the actual violation alleged is a past event that is not itself continuing."[353] It distinguished *Milliken* and *Papasan* on the ground that they "involve[d] classic examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights."[354] That would have seemed an apt description of Paraguay's case, too,[355] but, in a classic *non sequitur*, the court concluded that Paraguay's claim was distinguishable because Virginia officials "were [not] continuing to prevent

349. *See* Brief for *Amicus Curiae* United States at 30-32, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770). The United States suggested that the Eleventh Amendment should not apply when the federal government, "by statute or through a duly ratified treaty adopted under the foreign affairs power, authorize[s] a foreign government to sue a state in order to enforce" its treaty-based rights. *Id.* at 31. In other cases, the Justice Department has advanced the somewhat more limited argument that the Eleventh Amendment does not limit Congress's exercise of the war power. *See* Brief of the United States as Intervenor, at 5-15, Velasquez v. Frapwell, 994 F. Supp. 993 (S.D. Ind. 1998) (No. IP 96-0557-C H/G); Brief of the United States as Intervenor-Appellant at 6-17, Velasquez v. Frapwell, Nos. 98-1547, 98-203N (filed June 5, 1998); Brief of the United States Intervenor at 6-17, Palmatier v. Michigan Dep't of State Police, No. 97-1982 (filed Dec. 15, 1998); Reply Brief for the United States as Intervenor at 2-5, Palmatier v. Michigan Dep't of State Police, No. 97-1982 (filed Feb. 18, 1998). One court adopted that position shortly after the Court decided in *Seminole Tribe* that Congress does not have the authority to abrogate Eleventh Amendment immunity under its Article I powers, *see* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 (1st Cir. 1996), but the district courts in *Velasquez* and *Palmatier* rejected the argument. Velasquez v. Frapwell, 994 F. Supp. 993, 1001-03 (S.D. Ind. 1998); Palmatier v. Michigan Dept. of State Police, 981 F. Supp. 529, 532 (W.D. Mich. 1997). Appeals are pending.

350. Brief for *Amicus Curiae* United States at 11, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770). This argument provoked a reply from a group of law professors. *See* Brief for *Amici Curiae* Group of Law Professors, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

351. *See* Brief for *Amicus Curiae* United States at 23-26, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

352. *See Paraguay v. Allen*, 134 F.3d at 627.

353. *Id.* at 628.

354. *Id.*

355. The district court, after all, had stated that the death sentence was a "*consequence*" of Virginia's violation of the treaty—a "tragic" one, at that. For the district court, however, consequences were not enough. *See Paraguay v. Allen*, 949 F. Supp. at 1273 (emphasis in original).

Paraguay . . . from providing aid and counseling to Breard."[356] The court gave similar reasons for distinguishing Fourth Circuit precedent permitting an employee who had been fired in violation of federal law to obtain an award of reinstatement,[357] as well as a precedent permitting former patients of a mental institution who had been subjected to unconstitutional treatment while at the institution to obtain "a federal injunctive decree for their care."[358] In those cases, too, the court said, "responsible state officials were presently violating the claimants' ongoing rights."[359]

The court also concluded that the relief being sought was not "in any true sense prospective," but rather was "quintessentially retrospective: the voiding of a final state conviction and sentence."[360] "[T]he inescapable fact," the court said, is that the effect of this relief "would be to undo accomplished state action and not to provide prospective relief against the continuation of a past violation."[361] Finally, the court faulted the plaintiffs for arguing, "as if [it] were dispositive of the question," that the suit fell within the *Ex parte Young* exception because they were not seeking money damages.[362] Citing *Coeur d'Alene*, the court wrote that "[m]oney damages are probably the purest and most recognizable form of retrospective relief, but surely not the only form."[363]

In its conclusion, the Fourth Circuit cited the Ninth Circuit's decision in *United Mexican States v. Woods*[364] as being in accord with its holding. *Woods* involved a very similar claim by the Mexican government seeking to vacate the death sentence of Ramon Martínez Villareal on the ground that a violation of the Vienna Convention by Arizona officials had materially contributed to the ultimate imposition of his sentence.[365] The Ninth Circuit dismissed the suit on Eleventh Amendment grounds, providing an even breezier analysis than the Fourth Circuit:

> A criminal proceeding can be roughly analogized to a series of videotaped scenes: the arrest, the interrogation, the trial, the sentencing, and the appeal. Each of these scenes is examined *post hoc* in state postconviction proceedings and federal habeas. In no event, however, can the conviction or sentence be considered as a dynamic event, to be examined in a prospective fashion. The facts relating to the analysis of whether the proceedings met constitutional requirements are fixed and must be viewed through a retrospective lens.[366]

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356. *Paraguay v. Allen*, 134 F.3d at 628.
357. *See* Coakley v. Welch, 877 F.2d 304, 307 (4th Cir. 1989).
358. *Paraguay v. Allen*, 134 F.3d at 628 (discussing Thomas S. by Brooks v. Flaherty, 902 F.2d 250 (4th Cir. 1990)).
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. 126 F.3d 1220, 1223 (9th Cir.), *cert. denied*, 118 S. Ct. 1517 (1998).
365. *Id.* at 1222-23.
366. *Id.* at 1223.

Like the Fourth Circuit, the Ninth Circuit held that there was no continuing violation of the treaty because the prisoner was currently being allowed to consult with his consul.[367]

Both Paraguay and Mexico filed petitions for certiorari, as did Breard. With Breard's execution date set for April 14, 1998, and the Supreme Court yet to rule on its petition, Paraguay on April 3 filed an application with the International Court of Justice (ICJ) in The Hague arguing that the execution of Breard would violate the Vienna Convention and seeking an order prohibiting the execution.[368] Paraguay further asked for provisional measures—the equivalent of a preliminary injunction—for the purpose of maintaining the *status quo pendente lite*.[369] The ICJ heard argument on April 7. The United States admitted the treaty had been violated, but it argued that vacating the death sentence was not the appropriate remedy because (a) it is not a remedy authorized by the treaty, and (b), in any event, the failure to notify Breard of his rights did not have an appreciable effect on the ultimate outcome of the case. In support of the latter point, the United States noted, among other things, that Breard had been in the United States for six years, was familiar with American culture and had a good command of English; that he had been counseled against the strategy he ultimately pursued not just by his court-appointed counsel, but also by his mother, uncle and cousin, each of whom was familiar with Paraguayan culture; and that Virginia officials had not in fact offered Breard a plea agreement, and under the circumstances never would have.[370] The United States also questioned the ICJ's jurisdiction over the case.[371] The United States did not, of course, rely on the Eleventh Amendment, as this provision of domestic law, even if it had been correctly applied by the Fourth Circuit, would not have excused a violation of the treaty as a matter of international law.

On April 9, the ICJ issued an opinion reserving judgment on the arguments

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367. *See id.*

368. *See* Application of the Republic of Paraguay (April 3, 1998) <www.icj-cij.org/idocket/ipaus/ipausframe.htm>.

369. Under appropriate circumstances, the ICJ has "the power to indicate ... any provisional measure which ought to be taken to preserve the respective rights of either party." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 41(1). The ICJ may indicate provisional measures only if the plaintiff's claim *prima facie* falls within the ICJ's jurisdiction and the measures are needed to prevent irreparable prejudice to the moving party. *See* Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99, 103-05 (Interim Protection Order of June 22); Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135, 136-43 (Interim Protection Order of June 22).

370. *See* Verbatim record of oral argument in case concerning the Application of the Vienna Convention on Consular Relations (Para. v. U.S.), CR 98/7, at 35-37 [hereinafter Verbatim Record].

371. An Optional Protocol to which both the United States and Paraguay are parties gives the ICJ "compulsory jurisdiction" over any dispute about the interpretation or application of the treaty. Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, T.I.A.S. 6820, 596 U.N.T.S. 487 (Apr. 24, 1963). The United States argued that there was no "dispute" within the meaning of the Protocol, as the United States agreed that the treaty had been violated. Verbatim Record CR 98/7, at 42-43. Paraguay responded that there was a dispute about whether the treaty required the *vacatur* of Breard's sentence. *See id.* CR 98/8, at 8.

advanced by the United States but finding Paraguay's claims sufficiently meritorious to warrant an order granting the requested provisional measures.[372] The unanimous order provided that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."[373] Upon the issuance of this order, Paraguay supplemented its certiorari petition to the Supreme Court with a motion for permission to file an original action in the Court against the Governor of Virginia (who was now James Gilmore).[374]

In the meantime, on April 8, the Supreme Court had invited the Solicitor General to submit the views of the United States on or before 5:00 p.m. on April 13, the day before the scheduled execution. At around that time, the Solicitor General filed the Brief of the United States as *Amicus Curiae*. Although the federal government urged the Supreme Court to deny the requested relief, it pointedly declined to endorse the Fourth Circuit's Eleventh Amendment analysis.[375] Instead, it argued that the Fourth Circuit had rightly dismissed Paraguay's suit because the Vienna Convention does not authorize the setting aside of a criminal conviction as a remedy for breach of the duty Virginia had violated.[376] It argued further that Breard's petition was correctly dismissed because he had forfeited his claim by failing to raise it earlier.[377] Finally, it argued that the ICJ order did not require, or even justify, a grant of certiorari. It took the position that, under our constitutional system, the only mechanism "at [the federal government's] disposal" for securing compliance with the ICJ order was to request the Governor of Virginia to postpone the execution.[378] Accordingly, Secretary of State Madeleine Albright sent Governor Gilmore a letter pointing out the importance to the United States of complying with the ICJ order and requesting that he postpone the execution.[379]

The Supreme Court issued its decision the following day, less than an hour before the scheduled execution,[380] denying the petitions of both Breard and Paraguay.[381] Governor Gilmore then took the United States' foreign policy

372. *See* Order of April 9, 1998, in case concerning the Vienna Convention on Consular Relations (Para. v. U.S.), at 7.

373. *Id.*

374. *See* Motion for Leave to File Bill of Complaint, Complaint and Memorandum in Support, No. 125 Orig. (filed April 13, 1998).

375. *See* Brief for *Amicus Curiae* United States at 15, Breard v. Greene, 118 S. Ct. 1352 (1998) (Nos. 97-1390 (A-738), 97-8214 (A-732)) ("[W]e do not necessarily endorse the court of appeals' distinction between "past" and "ongoing" violations of the Convention for Eleventh Amendment purposes.").

376. *See id.* at 25-26.

377. *See id.* at 18-19.

378. For a critique of this position, see Carlos Manuel Vázquez, Breard *and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998).

379. *See* Letter from Madeleine K. Albright, Secretary of State, to James S. Gilmore III, Governor of Virginia, 1-2 (Apr. 13, 1998).

380. *See* Brooke A. Masters & Joan Biskupic, *Killer Executed Despite Pleas: World Tribunal, State Had Urged Delay*, WASH. POST, Apr. 15, 1998, at B1.

381. *See Breard v. Greene*, 118 S. Ct. at 1356.

interests into account and, finding them wanting, denied Albright's request for a postponement.[382] Breard was executed that evening. The Supreme Court's decision received a great deal of press coverage in the succeeding days, as the Court had permitted an execution to go forward in defiance of an order of the International Court of Justice.[383] For present purposes, however, the importance of the decision lies in its apparent endorsement of the lower courts' conclusion that Paraguay's lawsuit was barred by the Eleventh Amendment because the relief Paraguay sought was retrospective.

The Court wrote only five sentences on the Eleventh Amendment:

> The Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed. That Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State" was enunciated in *Principality of Monaco v. Mississippi* . . . . Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights, see *Milliken v. Bradley* . . . we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case.[384]

In the alternative, the Court denied Paraguay's petitions because "neither the text nor the history of the Vienna Convention clearly provides a foreign nation with a private right of action in United States court to set aside a criminal conviction and sentence for violation of consular notification provisions."[385] Justice Souter wrote separately to explain that he was concurring in the denial of Paraguay's petitions only on the ground that the treaty did not authorize the remedy being sought.[386] Justices Stevens, Ginsburg and Breyer dissented and would have set the case for briefing and argument.[387]

I explain below why the lower courts' Eleventh Amendment holdings in *Allen* and *Woods* cannot be right, and why the Supreme Court's rushed judgment in *Breard* should not be treated as a binding endorsement of these holdings. The Court's opinion in *Breard* is nevertheless troubling, primarily for what it did *not*

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382. *See* Commonwealth of Virginia, Office of the Governor Press Office, Statement of Governor James S. Gilmore III, Concerning the Execution of Angel Breard (April 14, 1998). After the Supreme Court issued its decision, Paraguay filed an original action in the U.S. District Court for the Eastern District of Virginia, seeking relief based on the ICJ order. The district court denied relief, and the Fourth Circuit affirmed. Republic of Paraguay v. Gilmore, CA-98-227-3 (E.D. Va. Apr. 14, 1998), *aff'd*, No. 98-1547 (4th Cir. Apr. 14, 1998).

383. *See e.g.*, Masters & Biskupic, *supra* note 380; Frank J. Murray, *U.S. Law Outweighs Older Pact: Foreign Countries Can't Sue States*, WASH. TIMES, Apr. 16, 1998, at A1; Peter J. Spiro, *States that Flout World Opinion May Incur Loss*, NAT'L L.J., May 4, 1998, at A23.

384. *Breard v. Greene*, 118 S. Ct. at 1356 (citations omitted).

385. *Id.*

386. *See id.* (Souter, J., concurring).

387. *See id.* (Ginsburg, J., dissenting). It is not clear from Justice Ginsburg's opinion whether she was dissenting from the denial of Paraguay's petitions as well as Breard's. *See id.* at 1357 (referring only to Breard's petitions).

say. One might have expected the Court quickly to disavow the lower court's problematic Eleventh Amendment analysis, particularly since the majority apparently agreed with the Solicitor General that there were independent grounds for affirming the judgment. Yet the Court declined the opportunity to disavow, or even reserve judgment on, the lower court's analysis, and instead expressed the view that the suit was correctly dismissed because it sought retrospective relief.[388] This suggests that the Supreme Court is as confused by its doctrine in this area as are the lower courts.

B. THE *ALLEN* AND *WOODS* OPINIONS AS APPLICATIONS OF THE COURT'S ELEVENTH AMENDMENT DOCTRINE

The reasoning that led the Fourth and Ninth Circuits to conclude that the suits by Paraguay and Mexico were barred by the Eleventh Amendment was unsatisfying, but then, as we have seen, so is the reasoning of many of the Supreme Court's decisions in this area. What is more remarkable about these cases is the *plausibility* of their holdings as applications of the Supreme Court's test for determining whether a suit falls within the *Ex parte Young* exception. One begins to suspect that something is wrong with the Supreme Court's test when it supports the conclusion that as intuitively prospective a remedy as the halting of a future execution is in fact "retrospective" relief. The suspicion is confirmed when one considers that this analysis would require the rejection of over a century of cases recognizing the constitutionality of federal habeas relief for state prisoners.

1. Distinguishing "Ongoing" from "Past" Violations

The test the Supreme Court articulated in *Green* for distinguishing prospective from retrospective relief turns on whether the relevant violation of federal law occurred in the past or is instead occurring in the present (or is expected to occur in the future). This analysis focuses the court's attention on the legal violation that is the basis of the plaintiff's complaint, and in the *Allen* and *Woods* cases, the relevant violation seemed to be the failure to provide the notification required by the Vienna Convention. This was certainly the most prominent legal violation in these cases, and, as the court said in *Allen*, it is "obvious" that it occurred in the past. By focusing the court's attention on the complained-of legal violation, the Court's test deflects the intuition in these sorts of cases that the plaintiffs are seeking prospective relief.

Even the *Green* test, however, permits relief from a continuing violation. The plaintiffs in *Allen* had relied on cases that they construed to allow relief from continuing consequences of past violations of the law.[389] This argument was supported by *Milliken*, in which the district court had awarded relief because it

388. The Court did not use the term "retrospective," but it said that the relief was barred because it related to a violation of law that happened "long ago" and had no "continuing effect." *Id.* at 1356.

389. *See* Appellants' Brief at 10-16, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

was "needed to remedy effects of past segregation."[390] The Fourth Circuit in *Allen* apparently accepted this argument,[391] as did the Supreme Court, whose opinion in *Breard* described *Milliken* as establishing "an exemption dealing with continuing consequences of past violations of federal rights."[392] But this test fails to explain why the plaintiffs in *Edelman* were unable to recover their past-due benefits.[393] It was perhaps the difficulty of squaring *Edelman* with a "continuing effects" test that led the district court to conclude that a showing of continuing consequences of past violations was not enough to place a suit within the *Ex parte Young* exception.[394] It may also have been this difficulty that led the Fourth Circuit, even while interpreting *Milliken* to permit relief from continuing *consequences* of past violations, ultimately to deny relief because the *violation* was not ongoing.[395] A "continuing consequences" or "continuing effects" test should have produced the opposite result on the Eleventh Amendment issue in *Allen*,[396] but such a test is untenable in light of *Edelman*.

The district court was thus justified in rejecting the "continuing effects" test and insisting instead that the violation of law itself be "ongoing" rather than "in the past." Under this test, the outcome depends on the specification of the relevant legal violation. The district court and the Court of Appeals regarded the relevant legal violation as either the violation of the duty to notify Breard of his right to consult with his consul or the violation of his right to consult with his consul. Either way, the violation itself was not continuing. The time for notification had passed, and Breard and his consul were now being allowed to consult. As discussed below, the habeas cases require the conclusion that these were not the relevant legal violations. The Supreme Court's decisions on the scope of the *Ex parte Young* exception, however, overlook the relevance of the habeas cases to the prospective-retrospective test, and the district court offered little basis for resisting the intuition that these were the relevant legal violations.

2. Distinguishing Prospective from Retrospective Relief

If defining prospective relief by reference to the complained-of legal violation of law risks deflecting the intuition in certain cases that the relief being sought is prospective, the Fourth Circuit should not have fallen into that trap, as it understood the requirement of prospectivity to be separate from the require-

390. 418 U.S. at 274.

391. 134 F.3d at 628.

392. 118 S. Ct. at 1356.

393. *See supra* text accompanying notes 183-84 (asking why plaintiffs in *Edelman* were not permitted to obtain a remedy eliminating the vestiges of the defendant's unlawful failure to pay them past-due benefits). *See also* HART & WECHSLER, *supra* note 59, at 1074 ("Might not indigent beneficiaries in *Edelman* have been suffering continuing effects of previous denials of benefits?").

394. *See supra* text accompanying note 347.

395. *See supra* notes 354-56 and accompanying text.

396. As distinguished from the merits. *See infra* text accompanying notes 416-17 (explaining why Supreme Court decision should be understood as a merits decision).

ment that the violation of law be ongoing. Even without this deflection, however, the court concluded that the relief sought by Paraguay was retrospective. This section considers whether the Fourth Circuit correctly concluded that these two requirements are separate and whether, ultimately, it matters whether they are separate or not. I also examine the reasoning that led the Fourth and Ninth Circuits to conclude that the relief sought by Paraguay and Mexico was retrospective.

The Supreme Court originally introduced the idea of an "ongoing" violation as a way to define prospective relief. *Green v. Mansour*, which the Fourth Circuit regarded as the relevant authority, defined "prospective relief" as "remedies designed to end a continuing violation of federal law,"[397] and "retroactive" relief as remedies that relate to "past violations of federal law."[398] The Court thus envisioned a single requirement, not two separate ones. Later cases, however, such as *Seminole Tribe* and *Coeur d'Alene*, phrase the test in language amenable to the Fourth Circuit's construction.[399] If the Court in these cases established the requirement of an "ongoing" violation of federal law as separate and distinct from the prospectivity requirement, it has done so, once again, inadvertently and without analysis.

Does it matter whether the requirements are treated as separate and independent? Under the test as the Fourth Circuit understood it, a suit falls within the *Ex parte Young* exception only if both requirements are met. I suggested above that defining prospectivity by reference to the underlying violation of law risks deflecting the intuition that certain forms of relief are prospective. If so, then delinking the requirements may help produce correct decisions on the prospectivity issue. But this is of little relevance if the plaintiff must additionally, and independently, show that the violation of law is ongoing. On the other hand, if the requirements are indeed just two sides of the same coin, then delinking them poses a danger that, in determining whether the violation of law is ongoing, the court will be uninfluenced by whatever insight it would otherwise have gotten from the intuition that the relief sought was prospective.

In any event, no such insights would have illuminated the Fourth and Ninth Circuits' analyses of whether there was an "ongoing" violation, for neither court regarded the relief sought by the plaintiffs to be prospective. Rather than view the case as an attempt to stop a future execution, the Fourth Circuit

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397. *See Green*, 474 U.S. at 68:

> Both prospective relief and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

Id.

398. *See id.* at 69. The Court explained that: "[*Edelman* held that] the Eleventh Amendment barred the injunction ordering retroactive benefits because it was effectively an award of money damages for past violations of federal law." *Id.*

399. *Seminole Tribe*, 517 U.S. at 73; *Coeur d'Alene*, 117 S. Ct. at 2040.

described it as an attempt to "void[] a final state conviction and sentence."[400] "That this could be effectuated in an injunctive or declaratory decree directed at state officials," the court wrote, "does not alter the inescapable fact that its effect would be to undo accomplished state action."[401] The conviction and the judge's imposition of the sentence had, of course, been "accomplished" by the time the court wrote, but Paraguay was seeking to stop the *carrying out* of the sentence. Had *that* been "accomplished," Breard would have been dead and Paraguay's lawsuit moot. Of course, the lawsuit was *both* an attempt to "undo" a conviction and sentence imposed in the past *and* an attempt to stop an execution scheduled to take place in the future. The Court's Eleventh Amendment cases do not offer a basis for choosing between these two possible characterizations.[402]

The Ninth Circuit's judgment in *Woods* that the plaintiff sought retrospective relief was similarly driven by its focus on the events the plaintiff was seeking to undo. For the court, it was significant that "[t]he facts relating to the analysis of whether proceedings met constitutional requirements are fixed and must be viewed through a retrospective lens."[403] The Supreme Court's Eleventh Amendment cases offer little basis for rejecting that characterization in favor of the one Mexico advocated. But the Ninth Circuit unwittingly brushed up against a line of cases that does provide very relevant guidance. The court recognized that these events may be "examined *post hoc* in state postconviction proceedings and federal habeas."[404] Its characterization of state habeas proceedings as "*post hoc*" no doubt contributed to its conclusion that the relief sought by Mexico was retrospective. As the next section shows, however, the many cases affording federal habeas relief to state prisoners establish beyond cavil that the suits brought by Paraguay and Mexico fell within the *Ex parte Young* exception.

C. HABEAS CORPUS AND THE ELEVENTH AMENDMENT

The relationship between habeas corpus jurisprudence and Eleventh Amendment doctrine has been largely overlooked by the courts and commentators. It is difficult to think of cases better situated to correct this oversight than *Allen* and *Woods*. In both cases, the prisoner himself pursued the same forms of relief as the plaintiffs, yet in neither case did the court notice that, if it were right in its conclusion that the governments' suits were barred by the Eleventh Amendment because the relief sought was retrospective, the same conclusion would follow

400. *Paraguay v. Allen*, 134 F.3d at 628.

401. *Id.*

402. Compare the Ninth Circuit's decision in *Bennett v. Yoshino*, 140 F.3d 1218 (9th Cir. 1998), involving a challenge to an election that had already taken place. The court rejected the defendants' characterization of the requested relief as retrospective, emphasizing that "[w]hat [plaintiff] objects to is not the mere occurrence of the vote, but the state's decision *to give effect to* that vote." *Id.* at 1224 (emphasis in original).

403. *Woods*, 126 F.3d at 1223.

404. *Id.*

for the prisoners, and indeed for virtually every state prisoner seeking federal habeas relief.

It is especially surprising that the Fourth Circuit failed to see this connection, as its opinion recognized that Breard's federal habeas petition was "itself an action against a state official, the prison warden, that itself is maintainable in federal court only by virtue of the *Ex parte Young* exception, as specifically implemented by 28 U.S.C. § 2254."[405] The court cited for this proposition Justice Souter's dissent in *Seminole Tribe*, which states that "[i]t is well established that when a habeas corpus petitioner sues a state official alleging detention in violation of federal law and seeking the prospective remedy of release from custody, it is the doctrine identified in *Ex parte Young* that allows the petitioner to evade the jurisdictional bar of the Eleventh Amendment."[406] It is a bit of an anachronism to describe the habeas cases as an application of the *Ex parte Young* exception, as these cases predated and indeed were relied upon in *Ex parte Young* itself.[407] But it is true that the habeas cases do not violate the Eleventh Amendment because of the principle, later identified with *Ex parte Young*, that a suit against a state official alleging a violation of federal law is not a suit against the state because "[t]he state cannot . . . impart to the official immunity from responsibility to the supreme authority of the United States."[408] As the Court went on to say in *Ex parte Young*:

> This supreme authority . . . is nowhere more fully illustrated than in the series of decisions under the Federal *habeas corpus* statute . . . in some of which cases persons in custody of state officers for alleged crimes against the state

405. *Paraguay v. Allen*, 134 F.3d at 627 n.6. The Fourth Circuit's opinion alludes to Virginia's argument that, while Breard was concededly complaining of an ongoing violation of his rights, Paraguay was not. *See id.* at 627. If the court meant to endorse this argument, it failed to explain how the identity of the plaintiff bears on the "ongoing" nature of Virginia's violation of the treaty or the "retrospective" nature of the relief being sought. If the violation led to the imposition of a death sentence on its national, then it would seem that the violation of Paraguay's rights under the treaty were just as ongoing as the violation of Breard's rights. (This, of course, assumes that Paraguay had the right under the treaty that its nationals not be executed if his conviction or sentence was materially influenced by a violation of the consular notification provision, but one must make this assumption in engaging in the Eleventh Amendment analysis. A dismissal that depended on the conclusion that Paraguay did not have such a right would have been a dismissal on the merits.) There certainly were defensible grounds in *Allen* for concluding that Breard's petition was proper but Paraguay's lawsuit was not. The United States made some of these arguments to the Fourth Circuit and the Supreme Court, and Virginia made others. *See supra* notes 336-37 & 350-51 and accompanying text. For example, drawing on such cases as *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994), the court might defensibly have held that habeas corpus is the exclusive avenue for obtaining relief from a death sentence. A dismissal on such grounds, however, would not have been an Eleventh Amendment dismissal.

406. *Seminole Tribe*, 517 U.S. at 178. (Souter, J., dissenting). The Justices in the majority did not dispute Souter on this point. *See supra* note 46. *See also* Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689-90 (1949); Booth v. Maryland, 112 F.3d 139, 144 (4th Cir. 1997); Brennan v. Stewart, 834 F.2d 1248, 1252 n.6 (5th Cir. 1988); United States *ex rel.* Elliott v. Hendricks, 213 F.2d 922, 926-28 (3d Cir. 1954).

407. *Ex parte Young*, 209 U.S. at 167-68.

408. *Id.*

> have been taken from that custody and discharged by a Federal court or judge, because the imprisonment was adjudged to be in violation of the Federal Constitution. The right to so discharge has not been doubted by this court, and it has never been supposed there was any suit against the state by reason of serving the writ upon one of the officers of the state in whose custody the person was found.[409]

The Court cited ten Supreme Court cases dating back to 1886 as "fully recognizing" the power of federal courts to grant such relief notwithstanding the Eleventh Amendment.[410]

All of these decisions, and many, many others rendered after 1908, would be called into question by a rule barring as retrospective the sort of relief Paraguay and Mexico were seeking. Since the Fourth and Ninth Circuits obviously did not mean to question these decisions, and in any event an Eleventh Amendment challenge to the federal power to grant habeas relief to state prisoners is inconceivable, we can conclude with confidence that these courts erred when they held that the relief sought by Paraguay and Mexico was barred by the Eleventh Amendment. If the *Ex parte Young* exception is subject to an exception for suits seeking retrospective relief, then "retrospective" must be defined so as to accommodate the well-established principle that federal courts are not constitutionally barred from granting habeas relief to state prisoners who challenge the legality of their convictions or sentences.

The reasons given by the Fourth and Ninth Circuits for regarding the relief sought by Paraguay and Mexico as retrospective would require the same characterization of the relief sought in virtually every habeas case. The Ninth Circuit said that the relief was prospective because "the facts relating to the analysis of whether the proceedings met constitutional requirements are fixed." But the facts are fixed in the same way whenever a state prisoner seeks release based on an allegation that, say, constitutional errors in his trial materially contributed to his conviction. The Fourth Circuit said that the relief was retrospective because the plaintiff was seeking to "void[] a final state conviction" and thus to "undo accomplished state action." But every habeas petitioner is similarly seeking to "void" an otherwise final state conviction or sentence.

Nor can *Allen* and *Woods* be distinguished from a typical habeas action on the ground that the violation of federal law was in the past. In virtually every habeas action, the petitioner is seeking relief because of some past act that violated federal law, whether the basis of the claim is the unconstitutionality of the statute under which he was convicted, or the failure of the police to give him *Miranda* warnings, or some procedural violation in his trial, or some error in the

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409. *Id.*

410. *Id.* (citing *Ex parte* Royall, 117 U.S. 241 (1886); Thomas v. Loney, 134 U.S. 372 (1890); Cunningham v. Neagle, 135 U.S. 1 (1890); Baker v. Grice, 169 U.S. 284 (1898); Ohio v. Thomas, 173 U.S. 276 (1899); Minnesota v. Brundage, 180 U.S. 499 (1901); Reid v. Jones, 187 U.S. 153 (1902); United States v. Lewis, 200 U.S. 1 (1906); *In re* Lincoln, 202 U.S. 178 (1906)).

imposition of his sentence.[411] If the petitioner claims that the state law under which he was convicted was unconstitutional, he may be said to be complaining that the legislature acted unconstitutionally in enacting the statute, that the prosecutor acted unconstitutionally in bringing the prosecution, that the state trial court acted unconstitutionally in failing to dismiss the indictment, and that various appellate courts acted unconstitutionally in failing to reverse the trial court. By the time the habeas petition reaches federal court, there have been numerous past "unconstitutional" acts, and the petitioner is asking the court to focus on one or more of them.

If the applicability of the *Ex parte Young* exception turns on whether the plaintiff or petitioner is seeking to remedy a continuing violation of federal law—either because this is what it means to be seeking prospective relief or because this is an additional, separate requirement—then the analysis must be such as to permit the sort of relief sought in the typical habeas petition. This means that, in the case of a state prisoner claiming her conviction was invalid, the relevant legal violation must be regarded as the *present incarceration*, not the past unlawful conviction. In the case of a state prisoner seeking the *vacatur* of her death sentence, the relevant legal violation must be regarded as the *carrying out* of the sentence, not the judge's imposition of the sentence, or the prior violations of law that rendered invalid the imposition of the sentence. Unlike the Supreme Court's Eleventh Amendment cases, the habeas cases give us strong ground for concluding that the Fourth Circuit erred when it characterized the suit for Eleventh Amendment purposes as a suit to "undo" accomplished state action or to "void" a conviction and sentence. In short, if the Fourth and Ninth Circuits were right, then over a century of habeas corpus jurisprudence is wrong.[412]

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411. Among the few situations in which the relief sought does not relate to a past violation is the case where the petitioner argues that the imposition of a death sentence is unconstitutional because he is presently insane. *See, e.g.*, Stewart v. Martinez-Villareal, 118 S. Ct. 1618, 1619 (1998). Ironically, Justices Scalia and Thomas have expressed the view that habeas relief is unavailable in this context. *See id.* at 1625 n.3 (Thomas, J., dissenting).

412. It might be argued that § 2254, the statute authorizing federal habeas relief for state prisoners, raises no Eleventh Amendment problems because Congress, in enacting it, validly abrogated Eleventh Amendment immunity pursuant to § 5 of the Fourteenth Amendment. There are several problems with such an argument. First, § 2254 was enacted in 1867, one year before the Fourteenth Amendment was ratified. There is no evidence that the framers of the Fourteenth Amendment intended to ratify an otherwise unconstitutional abrogation of Eleventh Amendment immunity, or indeed that the framers of § 2254 intended to abrogate any such immunity. Moreover, § 2254 authorizes federal habeas relief for state prisoners in custody in violation not just of the Fourteenth Amendment, but of other types of federal law, including constitutional provisions found in the unamended Constitution, as well as federal statutes and treaties. The Court has found no Eleventh Amendment problem with habeas petitions by state prisoners claiming they are in custody in violation of such constitutional provisions as the Ex Post Facto Clause, *see* Lynce v. Mathis, 519 U.S. 433 (1997); Weaver v. Graham, 450 U.S. 24 (1981), or the Bill of Attainder Clause, *see* Gusman v. Marrero, 180 U.S. 81 (1901); McMullen v. United States, 989 F.2d 603 (2d Cir. 1993), or federal statutes enacted pursuant to Article I, *see* Reed v. Farley, 512 U.S. 1277 (1994), or treaties, *see* United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13 (1925); Wildenhus' Case, 120 U.S. 1 (1886). In these contexts, § 2254 can only with difficulty be said to be enforcing the

D. THE BASIS OF THE SUPREME COURT'S DECISION IN *BREARD*

The Supreme Court in *Breard* appeared to agree with the Fourth Circuit that Paraguay's lawsuit was barred by the Eleventh Amendment because it sought retrospective relief. The elliptical opinion does not use the term "retrospective," but it does say that the failure to notify "occurred long ago" and that the claim does not fall within the *Milliken* exception to the Eleventh Amendment for "continuing consequences of past violations of federal rights."[413] The Court thus seems to be endorsing the Fourth Circuit's conclusion that the claim was retrospective because Paraguay was complaining about the failure to notify Breard of his rights under the treaty, which occurred in the past.

But *Breard* should not be treated as a binding Eleventh Amendment holding for two reasons. First, the opinion itself indicates that the Court did not reach firm conclusions on the Eleventh Amendment's applicability. The Court stated that "[t]he Eleventh Amendment provides a separate reason why Paraguay's suit *might* not succeed."[414] The Court was less tentative when it indicated that

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Fourteenth Amendment. Furthermore, even before § 2254 was enacted, federal law authorized federal habeas relief in specific circumstances for persons in the custody of state officials in violation of federal law. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 187-89 (1980); Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 358 (1930). Although these laws were controversial in some respects, no one appears to have questioned their constitutionality on Eleventh Amendment grounds. *See Ex parte* Sifford, 22 F. Cas. 105 (S.D. Ohio 1857) (No. 12,848); *Ex parte* Robinson, 20 F. Cas. 965 (C.C.S.D. Ohio 1856) (No. 11,934); *Ex parte* Jenkins, 13 F. Cas. 445 (C.C.E.D. Pa. 1853) (No. 7,259). Finally, the Court in *Ex parte Young* purported to be giving the state official the full scope of the protection afforded by the Eleventh Amendment on the assumption that it had not been cut back in any way by the Fourteenth Amendment, 209 U.S. at 150, yet the Court relied on the habeas cases as support for the holding that the suit was not one against the State. Thus, the Court itself does not appear to have regarded § 2254 as a statute enforcing the Fourteenth Amendment. Its analysis was based on the idea that these cases did not raise Eleventh Amendment problems because they were not covered by that Amendment, not because Congress had abrogated an otherwise-inapplicable immunity.

It has been argued that the habeas cases do not raise Eleventh Amendment problems because federal habeas review of state criminal convictions is appellate review. James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisiommaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 882-84 & n.894 (1998). This argument assumes that the Eleventh Amendment does not apply to federal appellate review of state courts decisions. The claim that the Eleventh Amendment does not apply to the Supreme Court's review of state court decisions in suits against the states finds support in the cases, *see* McKesson Corp. v. Department of Alcoholic Beverages and Tobacco, 496 U.S. 18, 26-31 (1990), although there are cases that suggest that it does. *See generally* Vázquez, *supra* note 5, at 1714-44. The claim that the Eleventh Amendment does not bar appellate review of state court decisions by the lower federal courts, however, is highly speculative at this point. *See id.* at 1689 n.33. In any event, the appellate review theory would only explain the cases granting federal habeas relief to persons who had been convicted by state courts. The habeas statute, however, authorizes habeas relief for persons illegally in the custody of state officials without a trial. Indeed, that the federal courts have the power to grant habeas relief to persons in state custody without a trial is probably the *least* controversial proposition of habeas jurisprudence. *See* Schlup v. Delo, 513 U.S. 298, 317 (1995); McCleskey v. Zant, 499 U.S. 467, 478 (1991).

413. *Breard v. Greene*, 118 S. Ct. at 1356.

414. *Id.* at 1356 (emphasis added). The reason is "separate" from the other reason given for denying Paraguay's petitions—*i.e.*, that the treaty did not authorize the remedy being sought. Here, too, the Court appears to be giving only a tentative judgment. If the Eleventh Amendment is "another reason

Paraguay's suit failed the test of *Milliken v. Bradley*, but this should be read in the light of the Court's earlier indication of tentativeness. It is unclear why the Court allowed an execution to go forward, and the order of an international court to be flouted, on the ground that there was a mere possibility that Paraguay's claim would fail, but that is what the Court said. The Court did not purport to be rendering a considered or firm Eleventh Amendment decision.[415]

Indeed, the Court appears not to have expressed even tentative views on the scope of the Eleventh Amendment. The Court concluded that Virginia's failure to notify Breard of his rights under the treaty had "no continuing effect" because "the causal link present in *Milliken* is absent in this case."[416] The causal link was lacking, apparently, for the reasons the Court gave earlier in its opinion for denying relief to Breard:

> Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial. In this case, no such showing could even arguably be made. Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been. Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases where an inmate alleges that his plea of guilty was infected by attorney error.[417]

The Court appears to be saying that Paraguay's claim was correctly dismissed on threshold grounds without a hearing because Paraguay failed to prove what it wanted to prove at the hearing. More generously, the Court might be understood to be establishing a requirement that claimants in Paraguay's position must proffer evidence that meets a higher threshold of persuasiveness than is usually required to defeat a motion to dismiss. To be sure, these reasons for denying relief are highly problematic, but the problems they raise have nothing to do with the Eleventh Amendment. In deciding whether a defendant enjoys an immunity of any sort, a court must *assume* that the plaintiffs' claim is otherwise meritorious, both on the facts and on the law. Quite apart from the Eleventh Amendment, Paraguay would not have been entitled to the relief it sought if it could not show some causal connection between the claimed violation of the

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Paraguay's suit might not succeed," then the no-remedy point is the first reason Paraguay's suit "might not succeed."

415. *See id.* Moreover, "opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits." Teague v. Lane, 489 U.S. 288, 296 (1989).

416. *Id.* at 1356.

417. *Id.* at 1355.

treaty and the sentence that was ultimately imposed. The Supreme Court in *Breard* concluded that "no showing could even arguably be made" that the treaty violation "had an effect on the trial." That is an opinion about the merits. It tells us nothing about the Eleventh Amendment.

V. EXPLAINING THE CASES AS APPLICATIONS OF A COMPREHENSIVE RULE TURNING ON "PROSPECTIVITY"

The Court's recent cases purport to adopt a comprehensive test turning on the concept of prospectivity.[418] In this Part, I consider whether there is a coherent understanding of that concept that can explain the principal lines of Supreme Court cases (including the habeas cases). I make no attempt to defend, or even to provide a rationale for, a rule permitting certain forms of relief but not others. My effort here is solely to determine whether the Supreme Court's holdings can be reconciled along the dimension of prospectivity.

I conclude that there may be a test turning on the concept of prospectivity that can reconcile all of the Supreme Court's holdings except *Papasan* and the desegregation cases. The rule that emerges takes the following form: the Eleventh Amendment does not bar a court from ordering a state official to comply in the future with a primary obligation imposed by federal law (as distinguished from a secondary or remedial obligation), or from awarding compensation for anticipated future violations of such an obligation, but it does prohibit courts from awarding redress for past violations of such an obligation. This rule reconciles the habeas cases with the benefits cases, but it rests on a distinction between primary obligations and secondary or remedial obligations that is unfamiliar to courts, counterintuitive in certain respects, and difficult to apply. For this reason, and because no conceivable rule turning on prospectivity can also explain the results in the desegregation cases, I conclude that a comprehensive rule turning on prospectivity is untenable. In Part VI, I consider possible substitutes.

A. RECONCILING THE BENEFITS CASES AND THE HABEAS CASES

In *Allen* and *Woods*, the Courts of Appeals attempted to apply the test the Supreme Court had articulated in such recent cases as *Green* and *Papasan*, under which a court is permitted to order a halt to a continuing or ongoing violation of federal law, but not to redress a past violation. Under this test, the permissibility of the relief turns on when the relevant violation of federal law is deemed to have occurred. The trick, as we have seen, is identifying the relevant violation of law. The courts in *Allen* and *Woods* concluded that dismissal was required because the plaintiffs were complaining about Virginia's past failure to provide notice under the Vienna Convention. This analysis, however, would require the dismissal of most federal habeas petitions filed by state prisoners, as

418. Comprehensive, that is, except for the narrow exception recognized in *Coeur d'Alene*.

such petitioners are typically complaining in the same way about past violations of federal law.

The past failure to provide notice was not the only violation of federal law about which the plaintiffs in *Allen* and *Woods* were complaining. They also argued that the Vienna Convention prohibited states from carrying out a sentence materially caused by a violation of the obligation to provide notice.[419] The habeas cases suggest that, when a person argues that a past violation of law renders his sentence invalid and seeks to prevent the sentence from being carried out, the court should focus on the future violation that would occur if the sentence were carried out, not the past violation that occurred when the judge imposed the sentence, or the earlier violations of law that made the imposition of the sentence invalid.

But, if the relevant legal violation in habeas cases is the violation that would occur if the remedy the petitioner seeks (for example, release or *vacatur* of sentence) were not granted, then why wasn't the remedy sought by John Jordan deemed prospective? The district court in *Edelman* ordered the state official to pay John Jordan his past-due benefits *in the future*. Indeed, all plaintiffs whose complaints are not vulnerable to dismissal under Rule 12(b)(6) are necessarily maintaining that the law entitles them to an order requiring the defendant to do (or refrain from doing) something in the future, either to avert or to redress a violation of law.

A moment's reflection reveals that a court's power to award a remedy under a rule turning on prospectivity cannot turn on whether, absent the claimed immunity, the defendant would be under a continuing obligation to afford the remedy. Secondary or remedial obligations are by their nature continuing ones, and all plaintiffs whose claims are not defective are necessarily claiming that the defendant is presently under such a duty. (There are, of course, defenses such as prescription and statutes of limitations, but we do not need the Eleventh Amendment to protect states from stale claims.) If the Eleventh Amendment draws a line between suits seeking to halt a continuing violation (or avert a future one) and suits seeking to redress a past violation, then it is clear that the violation of law to which this test refers cannot be the secondary or remedial obligation the plaintiff seeks to enforce. This insight suggests that, in asking whether the plaintiff seeks to halt a continuing violation or redress a past violation, we must focus instead on the primary legal obligation, the obligation for which the plaintiff seeks the remedy. If so, then the court may award a remedy only if it serves to halt an ongoing violation of a *primary* obligation, or to avert an anticipated future violation of such an obligation, but not if it serves to redress the past violation of a primary obligation.

The crux of this test, then, is the distinction between primary and secondary obligations. But drawing this distinction is not always straightforward. Although I conclude that a version of this test can reconcile the habeas cases with

419. *See* Appellants' Brief at 20, Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770).

the benefits cases, this reconciliation requires plausible but counterintuitive and difficult-to-apply glosses on the concept of a primary obligation.

In the habeas context, two subtly different problems arise, one more serious than the other. First, confusion may arise from the fact that the term "remedy," and thus "remedial obligation," may be understood in two different senses. The relief requested by Paraguay and Breard was clearly a "remedy," if that term is used, as it often is, to encompass any sort of relief requested of a court. Under the rule as stated above, the permissibility of the relief cannot turn on whether the remedial or secondary obligation is continuing; we must focus exclusively on the primary obligation. But the relief sought by the plaintiff will *always* be remedial in this sense, and the defendants' claimed obligation to act as the plaintiff wants the court to order it to act will typically be the only future obligation of the defendant at issue. If the fact that the obligation the plaintiff seeks to enforce is remedial in this sense were enough to prevent the court from ordering it, then all suits would be barred. Clearly, the obligation the plaintiff seeks to enforce is sometimes the relevant legal obligation for purposes of this test even though it is "remedial" in the sense that the plaintiff is asking the court to order its performance.

To clarify this aspect of the rule, it is useful to consider the "remedy" of specific performance. As Professor Corbin notes, sometimes the breach of a primary duty results in the substitution of a secondary duty, but sometimes the primary duty continues to exist and a secondary or remedial obligation is added to it, so that the plaintiff may obtain court enforcement of the primary duty (that is, specific performance) plus enforcement of a secondary duty (such as a duty to pay damages) to compensate for the failure to perform earlier.[420] Both are remedies in the sense that the court has awarded them, but one remedy orders compliance with a primary duty, while the other orders compliance with a secondary duty. Hart and Sacks would apparently regard a court order of specific performance as requiring compliance with a secondary duty, albeit a secondary duty that is "a simple duplicate of the primary duty."[421] Putting aside their apparent semantic disagreement with Corbin, we may restate the rule as follows: a court may order compliance in the future with the primary duty or with a secondary duty that duplicates the primary duty, but it may not otherwise redress past violations of a primary duty. In other words, the court may order the plaintiff to perform now a primary obligation that was due earlier, but it may not award a remedy for the defendant's failure to perform the primary obligation earlier.

This formulation still leaves us with the task of distinguishing primary from secondary duties. The habeas cases are consistent with the posited rule only to the extent a court ordering habeas relief can be said to be ordering future

420. *See* Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 516 (1924).

421. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

compliance with a primary obligation, as opposed to a secondary obligation. This means that the prisoner seeking habeas relief must be said to have a primary right not to be incarcerated (or executed) except in certain circumstances, and hence that the state has a primary obligation not to incarcerate him or execute him except in those circumstances. But is it the case that successful habeas petitioners possessed a primary right not to be incarcerated all along? In certain circumstances at least, the habeas cases resist being characterized as cases seeking to require future compliance with a primary obligation.

Professor Corbin defines a primary right as "a right resulting from some operative fact that was not itself a violation of some precedent right," and a secondary or remedial right as "a right resulting from some operative fact that was a violation of some precedent right."[422] (The corollary primary and secondary obligations may be defined by substituting the word "obligation" for "right.") Did Breard have a "primary right" not to be executed, or did his right "result from" the state's prior violation of the Vienna Convention? Does someone whose conviction was based in part on evidence admitted in violation of the rule of the *Miranda v. Arizona* decision[423] have a primary right not to be incarcerated, or did his right to be released "result from" the violation of *Miranda*? Obviously, there is a sense in which the obligation to release the prisoner "results from" the prior violation, yet this cannot render it a secondary obligation under the posited Eleventh Amendment rule without disturbing a great deal of settled habeas jurisprudence.[424] Professor Corbin's definition of secondary obligation must be understood to include only obligations *whose existence does not depend on* the prior violation of a legal duty.[425] Nor can the obligation be regarded as secondary for purposes of this rule because the lawmaker imposed it primarily, or even exclusively, to deter police misconduct rather than to protect the guilty defendant, for the Court permits habeas relief on the basis of *Miranda* claims even while acknowledging its predominantly prophylactic purpose.[426] To explain the habeas cases, the posited rule must count a prisoner's right not to be incarcerated as "primary" even if the right appears in some respects to be a remedy for a prior violation of law.

If relief for the violation of a federal law is available on habeas, then the posited rule must regard the federal law as placing conditions on the state's power to deprive people of life or liberty, while regarding the right to life or

422. Corbin, *supra* note 420, at 515.

423. Miranda v. Arizona, 384 U.S. 436 (1966).

424. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 686-95 (1993) (violation of *Miranda* a ground for habeas corpus relief).

425. The existence of the hypothetical prisoner's right not to be incarcerated does not depend on the state's violation of *Miranda*. It is rather the state's power to incarcerate him that depends on its getting a valid conviction, which in turn may depend on its satisfaction of the *Miranda* rule. (Of course, the state has the power to detain people before conviction under the rules that specify the conditions of pre-trial detention. These rules further qualify the prisoner's primary right not to be detained.)

426. *See Withrow*, 507 U.S. at 693.

liberty as the relevant primary right (albeit a defeasible one).[427] This is not to say that all federal laws addressing state law enforcement activities impose conditions on the state's power to incarcerate people (or execute them). A given federal law may not make compliance a condition of incarceration, and if it does not, then *vacatur* of the conviction is not an available remedy. Such a law is either precatory or backed by other sanctions. What the legal consequences of a violation are is a matter of interpreting the law at issue. What is important for present purposes is that a law whose violation requires release is, for that reason, a condition of the state's deprivation of the prisoner's primary right to life and liberty for purposes of the posited rule.

The posited rule thus explains the habeas cases, but only if we conceive these cases in a particular way, transforming what the *Breard* Court took to be the relevant legal violation into the failure to meet a condition for denying the prisoner his primary right. Though this analytical move is defensible, and in some respects attractive, characterizing habeas claims in this way is in tension with some of the Court's recent decisions in the habeas area. In the *Teague* line of cases, for example, the Court has appeared to view habeas corpus as a remedy for state courts' violation of established federal law, rather than as the enforcement of any right of a prisoner to be free unless convicted in accordance with the law.[428] Thus, the court has ruled that a conviction that should be reversed on direct appeal because of a violation of federal law generally may not be vacated on habeas if the federal right that was violated was not clearly established at the time of the conviction. The Court appears to have reasoned that the purpose of habeas is to deter state courts from violating federal law, but state courts cannot be deterred from violating rights that were not clearly established.[429] This objection is not fatal to the posited rule; as we have seen, a right may be primary for purposes of our rule even if it is conferred for instrumental reasons and seems in some respects remedial. But the fact that the modes of analysis used in closely related areas discourage courts from viewing the case as the posited rule requires increases the likelihood of error and thus reduces the rule's appeal.

Recharacterizing what may appear to be a secondary or remedial right as a defeasible primary right helps illuminate another line of cases that has been destabilized by the Court's recent decisions, but here, too, other factors discourage the courts from conceiving these cases as the rule requires. When *Edelman* was thought merely to bar damage-like monetary relief, the courts had little

427. Put another way, Breard did not have an absolute right not to be executed; he had a right not to be executed unless and until convicted and sentenced to death in accordance with certain rules. His claim was that the state had not yet convicted him and sentenced him to death in accordance with those rules, and thus he had a right not to be executed yet. No one claimed that the state was without power to attempt anew to satisfy the conditions federal law imposed for executing Breard.

428. Teague v. Lane, 489 U.S. 288 (1989). *See generally* HART & WECHSLER, *supra* note 59, at 1392-1413.

429. *See generally* Richard Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1773, 1793 (1991).

trouble concluding that the relief of reinstatement in employment cases was permitted under the *Ex parte Young* exception.[430] More recently, the courts have begun to find the issue difficult because of the new requirement that there be an "ongoing" violation of federal law. In *Doe v. Lawrence Livermore National Laboratory*,[431] for example, the district court found this remedy to be barred because what it regarded as the relevant violation of federal law—the firing—occurred in the past, and no additional violations of federal law were currently occurring.[432] The Ninth Circuit reversed, but it had considerable difficulty with the Court's new standard. The defendant had argued that reinstatement was not available because there was "no ongoing policy and hence no threat of future enforcement . . . against [plaintiff]" of the unlawful policy that had led to his discharge.[433] The Ninth Circuit responded not by denying the relevance of this contention, but by denying the factual claim. Pointing to evidence that the defendant continued to apply the same policy, the court concluded that the plaintiff "had alleged an ongoing policy (relating to employment suitability) and the likelihood of future enforcement" of that policy against him if he reapplied.[434] To the extent the court relied on this point, however, it did not really decide that reinstatement was an available remedy. If a plaintiff is only permitted to complain about the fact that the employer currently has in force an unlawful policy, and if the only remedy the court may award is an order assuring the plaintiff that, if he applies for the job again, he will not be subjected to that policy, then the court does not have the power to award reinstatement. A reinstated employee gets his job back until he is fired for a valid reason; he does not merely get a chance to compete for the job with other applicants.[435]

The court in *Doe* might have said instead that the defendant had misconceived the nature of the claimed duty: the plaintiff in such cases seeks to enforce the defendant's primary obligation to employ him until he is fired for valid

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430. *See* Thomson v. Harmony, 65 F.3d 1314, 1317 n.1, 1320-21 (6th Cir. 1995) (reinstatement and expungement); Cross v. State Dep't of Mental Health, 49 F.3d 1490, 1503 (11th Cir. 1995) (reinstatement); Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 589 (10th Cir. 1994) (reinstatement); Williams v. Kentucky., 24 F.3d 1526, 1543 (6th Cir. 1994) (reinstatement and expungement); Nix v. Norman, 879 F.2d 429, 433 (8th Cir. 1989) (expungement); Coakley v. Welch, 877 F.2d 304, 306-07 (4th Cir. 1989) (reinstatement); Barnes v. Bosley, 828 F.2d 1253, 1257 (8th Cir. 1987) (reinstatement); Kashani v. Purdue Univ., 813 F.2d 843, 848 (7th Cir. 1987) (reinstatement); Elliott v. Hinds, 786 F.2d 298, 301-02 (7th Cir. 1986) (reinstatement and expungement); Dwyer v. Regan, 777 F.2d 825, 836 (2d Cir. 1985) (reinstatement); *Cf.* Russell v. Dunston, 896 F.2d 664, 667-68 (2d Cir. 1990) (reinstatement to medical leave status prospective); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 307 (6th Cir. 1984) (reinstatement of student prospective).

431. 817 F. Supp. 77 (N.D. Cal. 1993), *rev'd*, 131 F.3d 836, 839 (1997).

432. *See id.* at 79.

433. *Doe*, 131 F.3d at 841.

434. *Id.* at 841 & n.3.

435. *See* NLRB v. Textile Mach. Workers, 214 F.2d 929, 932 (3d Cir. 1964) (discussing differences between reapplying for previously-held job and reinstatement); Greenspan v. Automobile Club of Mich., 495 F. Supp. 1021, 1051-52 (E.D. Mich. 1980) (distinguishing reapplication from reinstatement).

reasons, and a court that orders reinstatement merely requires prospective compliance with that primary duty. The few courts that have delved into the issue have reasoned along these lines.[436] But, as in the habeas context, other factors discourage the courts from viewing employment discrimination cases this way. For example, federal law sometimes entitles even employees-at-will to reinstatement if they were unlawfully fired. One can perhaps say that even at-will employees have a right to continue to be employed until fired for valid reasons, but that characterization seems forced. Since such employees could be fired for any reason not excluded by federal law, or even for no reason at all, one is at least tempted to say that their right to get their job back exists solely by virtue of the employer's prior violation of federal law and is thus a secondary right. Characterizing these claims as attempts to enforce a primary right to continued employment is additionally in tension with established principles of federal jurisdiction. An employee's right to his job is usually a creature of state law; in such cases, federal law operates merely to make some reasons for termination unlawful. If we regarded the employee's complaint as an attempt to enforce the employer's duty to employ him until fired for valid reasons, the federal issue would appear to arise in replication to the defendant's answer to a well-pleaded complaint raising a state-law claim, thus presenting the same jurisdictional problem that arose in the *Mottley* case.[437] The well-pleaded complaint rule nudges the court to view the case as one to enforce a federal right to be free of discrimination in employment, and thus to view reinstatement as a remedy for a past breach of that obligation. There is of course no reason why the case cannot be viewed one way for purposes of the well-pleaded complaint rule and another way for Eleventh Amendment purposes, just as there is no reason release from incarceration cannot be viewed at the same time as both a remedy for the state's violation of federal law and as the enforcement of the state's primary obligation not to incarcerate persons except in certain circumstances. But, as in the habeas context, the fact that the posited test requires the courts to resist ingrained ways of viewing a lawsuit increases the risk of erroneous decisions and thus reduces the rule's appeal.

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436. *See, e.g.*, Elliott v. Hinds, 786 F.2d 298, 302 (7th Cir. 1986) ("The goal of reinstatement . . . is to compel the state official to cease her actions in violation of federal law and to comply with constitutional requirements. As long as the state official keeps him out of his allegedly tenured position the official acts in what is claimed to be in derogation of [the plaintiff's] constitutional rights."). Even the appeals court in *Doe*, before it strayed, seemed to look in this direction. 131 F.3d at 841 ("[R]einstatement would simply prevent the prospective violation of [plaintiff's] rights which would result from denying him employment in the future.").

437. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908). A special federal question statute confers jurisdiction over employment claims based on Title VII. *See* 42 U.S.C. § 2000e-5(f)(3). But other federal claims must rely on the general federal question statute. For example, an employee who claims that he was fired in violation of the First Amendment would not be able to rely on Title VII. The well-pleaded complaint rule may well be inapplicable to all cases in which state employees claim they were fired in violation of federal law, since all such cases may well fall within the scope of § 1983. But my point is more general: the well-pleaded complaint rule (as applied to private employees claiming they were fired in violation of federal law) predisposes federal courts against viewing such cases as suits to enforce a primary right to be employed until validly fired.

The posited rule must undergo even further tinkering to explain the benefits cases. Recall that John Jordan in *Edelman* argued that the state had invalidly failed to pay him past-due benefits. Under the posited rule, a court may order the defendant to comply in the future with his primary obligation, but it may not redress a past violation of the primary obligation. Thus, the court may order future compliance with the obligation not to incarcerate the petitioner, or with the obligation to employ the plaintiff, but it may not award a remedy for the past violations of those obligations. The question is whether a court order requiring the defendant to pay Jordan his past-due benefits was simply an order requiring specific performance of the primary obligation, or was an improper attempt to redress a past violation of the primary obligation.

The Court in *Edelman* regarded the order as retrospective because the obligation to pay had accrued in the past, but this does not explain why the obligation was not deemed a continuing one. The obligation to pay money by a certain date does not typically end when the due date has passed; indeed, it usually grows the longer it remains unfulfilled. An accrual test, moreover, does not help explain why habeas and reinstatement relief are prospective. Although the meaning of the term "accrual" can vary with the context, as the term is typically understood it would be difficult to deny that a prisoner's right to be free of incarceration "accrued" before the court's order requiring his release, or that the employee's right to his job accrued before the court ordered his reinstatement.[438]

The Court's adoption of an accrual test suggests that it viewed the relevant primary obligation as the obligation to pay money by a certain date, an obligation that becomes impossible to perform after the date's passage. The obligation to pay the money after the date, on this view, would be a secondary obligation replacing the primary obligation to pay on time. But even if considered a remedial obligation, it is one that duplicates the primary obligation in every respect except the date. Clearly, the fact that the ordered conduct is taking place later than it should have cannot be enough to render the obligation a secondary one under the posited rule. Assume that X is under an obligation to build Y a house by date Z. If Z passes and X has not built the house, a court order requiring X to pay Y damages for the period before the court's order in which Y was without a house would clearly be retrospective relief, but I doubt that anyone would regard an order requiring X to build the house to be

438. An obligation is usually said to have accrued when it "matures" or "vests," *see* Whitney Bros. Plumbing & Heating, Inc. v. United States, 224 F. Supp. 860, 862 (D. Alaska 1963) ("maturing"); Alker v. United States, 38 F.2d 879, 883 (E.D.N.Y. 1930), *aff'd*, 47 F.2d 229 (2d Cir. 1931) ("vesting"), or when every event necessary to entitle the plaintiff to demand from the defendant the conduct he asks the court to order has occurred, *see, e.g.*, Swank v. Mortgage Inv. Co. of El Paso, 83 F.2d 868, 869 (5th Cir. 1936). The term "accrued" might perhaps be understood in such a way as to require the analysis suggested below, but that is only because the term is so versatile. The concept of accrual thus does not help reconcile the cases unless the particular sense of the concept is spelled out, as I do below. Once that is done, the term becomes superfluous. (Its usefulness as shorthand is vitiated by its vagueness.)

retrospective. Yet, if the date of performance were regarded as an unseverable part of the primary obligation, then the court did more than simply order X to perform the primary obligation.[439]

This hypothetical suggests that an order requiring the belated performance of a primary obligation is prospective and that *Edelman* should therefore have come out the other way. But this overlooks a critical analogy between the type of relief found unavailable in *Edelman* and a type of relief that is unavailable to a state prisoner unlawfully in custody. Recall that such a prisoner is entitled to be set free, but not to compensation for the part of his life he spent behind bars. In a crucial way, the benefits denied in the *Edelman* case are analogous to the lost portion of the prisoner's freedom, while the benefits due in the future correspond to the future liberty the prisoner is entitled to recover. That is not because the benefits were payable in the past, but because the obligation to pay the benefits was imposed for the purpose of entitling the beneficiary to the means of subsistence for a given period of his life, and at the time the court issued its order, that period had passed. This insight suggests a technique for squaring the benefits cases with the rule proposed above to explain the habeas cases: when the primary obligation is an obligation to pay money, the obligation must be "pierced" to expose its underlying purpose; this purpose should be treated as the primary obligation, and the obligation to pay money should be treated as secondary. The obligation to pay benefits thus becomes an obligation to provide the means of support for a specific portion of the beneficiary's life, and an order to pay benefits is prospective to the extent the relevant portion of the beneficiary's life has not yet passed. The technique may seem contrived, but there is something to be said in its defense. Money is typically a substitute for something else. Its value is not intrinsic; it has value because of what one can exchange it for.[440] The nature of the obligation to pay money thus invites the sort of piercing the posited rule contemplates.[441]

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439. We might say that the obligation to do something by a certain date is in fact two separate primary obligations: the obligation to do something and the obligation to do it by a given date. Specific performance of the first obligation is still possible, and a court order requiring such performance is prospective. Compliance with the latter obligation is impossible, and so the court can award only compensation.

440. *See* F.A. MANN, THE LEGAL ASPECT OF MONEY 26 (4th ed. 1982) ("[M]oney is 'wealth power', is 'purchasing power in terms of wealth in general.' "); *id.* at 28 ("[A]ccording to its intrinsic nature money represents purchasing power.").

441. A similar but distinct approach would be to conceive the right to money as a right to enjoy money over a given period of time. If the plaintiff claims a right to enjoy the money in the future, then the relief is prospective. The unavailability of past-due benefits in *Edelman* would, under this test, flow from the conclusion that the right to the benefits Jordan was seeking was a right to enjoy money during a limited period—the period during which the money was to provide his subsistence. Under this test, however, monetary relief would ordinarily be fully available, as ordinarily the right to money is the right to enjoy it over one's lifetime and to pass it on to one's heirs. Although it is plausible to infer that, when Congress created the right to benefits, it intended to establish a right to enjoy money during a more limited period, no such inference can be drawn about an ordinary plaintiff's right to damages from a tortfeasor. A test under which the right to damages would emerge as prospective relief cannot be right, as damages are regarded as the prototypical form of retrospective relief. Moreover, this test seems to

In sum, it appears that the Supreme Court's results in the habeas cases and the benefits cases, as well as the uniform results of the lower courts in the reinstatement cases, can be reconciled according to a rule that turns on prospectivity: The Eleventh Amendment does not bar a court from ordering a state official to comply in the future with a primary obligation imposed by federal law (as distinguished from a secondary or remedial obligation), or from awarding compensation for anticipated future violations of such an obligation,[442] but it does prohibit courts from awarding redress for past violations of such an obligation. However, this rule succeeds in reconciling the habeas and benefits cases only if the concept of "primary" obligations is understood in a quite specific sense. The heavy lifting under this rule is done by the distinction between primary and secondary rights and obligations, a distinction that will not be familiar to courts or litigants. Moreover, the rule uses these terms in not-entirely-intuitive senses. In the habeas and reinstatement contexts, the rule requires the courts to conceive of the claims in ways that are in tension with how other doctrines will encourage them to conceive the claims. In the benefits context, the conceptualization of the primary right seems contrived, if not downright fanciful. These drawbacks alone may or may not be fatal to the posited rule, but to the list of drawbacks we must add one that is weighty indeed: the rule fails to explain the results in the desegregation cases.

B. ACCOMMODATING *MILLIKEN* AND THE DESEGREGATION CASES

1. Under the Posited Test

The prospectivity rule posited above reconciles the cases by isolating the defendant's primary obligation and the plaintiff's correlative primary right, and

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collapse the Eleventh Amendment issue into the question whether the remedy is available in the first place. Jordan was seeking retrospective relief under this test because Congress did not intend to give him a right to enjoy the money after the subsistence period elapsed. The latter conclusion seems identical to the conclusion that Congress did not intend to give him a right to damages. If Congress had intended to give him a right to damages, then it by definition intended to give him the right to enjoy the money after the end of the subsistence period. A rule under which the states' obligation to pay damages from the state treasury turned on congressional intent to create a right to damages would be inconsistent with the idea that the Eleventh Amendment limits Congress's power in this regard. *But cf. infra* note 452 (discussing Professor Burnham's argument that this is in fact the test under *Edelman*).

442. This aspect of the rule isn't required by the Supreme Court's decisions. Indeed, as explained in Part VI, leaving this part out may help explain *Papasan*. It may also explain dictum in decisions of the lower courts. For example, in the employment context, if reinstatement becomes impossible or unfeasible for some reason, then awarding money in lieu of reinstatement (a remedy known as "front pay") would be barred. Some courts have apparently concluded, tentatively and without analysis, that front-pay is barred by the Eleventh Amendment. *See* Grantham v. Trickey, 21 F.3d 289, 296 n.5 (8th Cir. 1994) (front pay "probably is barred by the Eleventh Amendment"). *But cf.* Barnes v. Bosley, 828 F.2d 1253, 1257-58 (8th Cir. 1987) ("back pay" awarded prospectively). If front pay is barred, however, it would not be because such a remedy is retrospective but because it is a secondary or remedial right as opposed to the primary right itself. I have included this clause in the posited rule because I am attempting to frame a comprehensive rule that turns on prospectivity. A rule barring prospective secondary remedies such as front pay but permitting prospective primary remedies such as reinstatement would not turn on prospectivity.

asking whether the plaintiff seeks relief for a past or a future violation of that right. An employee's primary right under this test is his job and so he is entitled to have the job restored but not to compensation for the past deprivation of his job. The state prisoner complaining of the deprivation of his primary right to liberty is entitled to have that right restored for the future but not to compensation for the past loss of it. These rights are "primary" in the sense that they exist without regard to any previous violation of the law by the state. A secondary right, by contrast, is a right that exists only by virtue of the fact that the defendant violated a primary obligation and thus infringed a primary right.[443] The right to back pay is a secondary right; the state is obligated to pay it only because the state violated the primary obligation to employ the plaintiff. The secondary right is a substitute for the primary right. It seeks to compensate for the primary right's loss.[444]

The analysis suggested in the last section reconciles the benefits cases with the reinstatement and habeas cases, albeit uneasily, but it cannot accommodate *Milliken*. Recall that in *Milliken* the substantive law violated by the defendants was the law prohibiting the state from maintaining a system of *de jure* segregation.[445] The Court upheld certain remedies, including the institution of remedial reading programs, that were avowedly for the purpose of "compensating" the victims of past legal violations. In doing so, it made clear that the remedies were permissible only because there had been a violation of the law in the past. The Court stressed that, in the abstract, the Constitution does not require any particular level of racial mixing.[446] Without the prior history of *de jure* segregation or another similar constitutional violation, the measures upheld by the Court in *Milliken* would have been impermissible.

Subsequent cases attempt to explain *Milliken* as having merely required the state to bring itself into compliance with its constitutional obligations. In *United States v. Fordice*, the Court expressed the duty of a state that had maintained a system of *de jure* segregation as the duty to take "affirmative steps to dismantle" that system.[447] "If the state does not discharge this duty," the Court wrote, "it remains in violation of the Fourteenth Amendment."[448] It described the constitutional violation as the state's "perpetuation" of the system of *de jure* segregation.[449] Relying on *Fordice*, the Seventh Circuit has explained *Milliken* as simply ordering state officials to bring their future conduct into compliance with their Fourteenth Amendment duty to take "affirmative steps to discharge

443. *See supra* text accompanying notes 422-26 and accompanying text.

444. The right to front pay is also a secondary obligation, as it substitutes for the primary right, but it is nevertheless available under the posited rule because it compensates for the future loss of the primary right. *But cf. Grantham*, 21 F.3d at 296 n.5 (suggesting that front pay is barred by the Eleventh Amendment).

445. 418 U.S. at 745.

446. *See id.* at 740-41.

447. 505 U.S 717, 725 (1992).

448. *Id.* at 727.

449. *Id.* at 728.

their duty to dismantle the dual school system that its laws helped to create and maintain."[450] Even more pointedly, the district court in *Paraguay v. Allen* distinguished *Milliken* on the ground that "the defendants were perpetuating a system of *de jure* segregation. They were in violation of federal law at the precise moment when the case was filed."[451]

It is true that the defendants in *Milliken* and other desegregation cases were in violation of federal law at the moment the suit was filed, but the federal law they were violating was federal *remedial* law. One could equally say that, by failing to pay the plaintiffs past-due welfare benefits, the state defendants in *Edelman* were in violation of federal law when the suit was filed.[452] It is also true that, if the defendants in *Fordice* did not discharge their duty to take affirmative steps to dismantle a system of *de jure* segregation they had erected, they were in violation of the Fourteenth Amendment, but, again, they were in violation of *secondary* or *remedial* obligations imposed by that Amendment. The same can be said about the *Fordice* Court's characterization of the violation in that case as the "perpetuation" of a system of *de jure* segregation. By "perpetuation" the Court could have meant one of two things. If the defendants were perpetuating the system by continuing to enforce laws requiring segregation or otherwise performing acts that would violate the Fourteenth Amendment if performed by state officials who had not previously violated the Fourteenth Amendment, then a court order requiring the ceasing of that conduct would be prospective under our rule, as it would merely require compliance in the future with primary legal obligations. But if the defendants were perpetuating the system of *de jure* segregation by not dismantling it, by not eliminating its

450. Parents for Quality Educ. with Integration, Inc. v. Indiana, 977 F.2d 1207, 1210 (7th Cir. 1992).

451. *Paraguay v. Allen*, 949 F. Supp. at 1273.

452. Professor Burnham once argued that the reason the relief was allowed in *Milliken* but not in *Edelman* was that in the former case federal law (the Fourteenth Amendment) required the states to provide the relief the Court upheld, whereas the relevant federal statutes in *Edelman* did not clearly require the relief the plaintiffs sought. *See* William Burnham, *Federal Court Remedies for Past Misconduct by State Officials: Notice Relief and the Legacy of* Quern v. Jordan, 34 AM. U. L. REV. 53, 98-100 (1984). On this view, neither *Milliken* nor *Edelman* turns on retrospectivity or prospectivity; indeed, on this view, neither was an Eleventh Amendment decision at all. Professor Burnham seems to be saying that the Eleventh Amendment permits a remedy as long as federal law requires the states to provide it. This view, however, was rejected in *Green*, since Congress had by then made it clear that the states were obligated to provide a retrospective remedy (as Burnham himself argued, *id.* at 99), yet the Court found the suit in federal court to be barred. *See also* Jackson, *supra* note 11, at 71-72. (Professor Burnham was counsel to the plaintiffs in *Green*, *see* 474 U.S. at 65.)

As discussed in Part I, on one view of the Eleventh Amendment, saying that there is Eleventh Amendment immunity is the same thing as saying that federal law does not establish the requested remedy against the state. Nevertheless, in a case such as *Milliken*, it still makes sense to separate the question whether the Fourteenth Amendment contemplates a particular type of remedy from the question whether the state is immune from this remedy under the Eleventh Amendment. The remedial principles of the Fourteenth Amendment apply to local officials as well as state officials, and local officials are not entitled to Eleventh Amendment immunity. See Vázquez, *supra* note 5, at 1704 n.100. If the Fourteenth Amendment requires a remedy but the Eleventh shields state officials from the remedy, then, under the "immunity-from-remedy" view, local officials are obligated to provide the remedy but state officials are not.

continuing effects, then a court order requiring them to stop "perpetuating" would be retrospective. It would be affording a remedy for a past violation of primary obligations.[453] The Court in *Fordice* was clearly using the term in the second sense. It specifically "reject[ed] the position" that the defendants were required to eliminate "present discriminatory effects [regardless of] whether such consequences flow from policies rooted in the prior system."[454]

Green and *Papasan* emphasize that the Eleventh Amendment does not bar the courts from ordering a halt to an ongoing violation of federal law. For the reasons explained above, this has to be understood to include only violations of primary legal obligations. Under this rule, the courts would be permitted to order state officials to stop enforcing their laws establishing a system of *de jure* segregation, and to stop any other conduct that would violate the Fourteenth Amendment if performed by a state that had not previously violated the Amendment. But *Milliken* clearly authorizes more than that. In the words of the Court, the state officials were required to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[455] If this form of relief is permitted by the Eleventh Amendment, however, the *Edelman* plaintiffs should have recovered their past-due benefits, the unlawfully fired employee his back-pay, and the unlawfully incarcerated prisoner compensation for the years of earnings he missed, not to mention the years of lost liberty. In short, if the relief upheld in *Milliken* is prospective, then the relief denied in *Edelman* was prospective, and it would be difficult to conceive of any relief—or at least any nonmonetary form of relief—that would be retrospective.

2. A Possible Alternative Test

The test suggested in the last section took as its starting point the *Green* Court's approach to prospectivity, turning on the time of the relevant legal violation. Focusing on the legal violation led us to conclude that secondary or remedial obligations could not count as the relevant violation, and this in turn led to a rule that turned on the distinction between primary and secondary obligations. If this test fails to explain *Milliken*, then perhaps an alternative approach not focusing on the time of the legal violation will. The following hypothetical suggests another problem with the test proposed above: it seems to characterize as retrospective a form of relief most people would, I think, regard as prospective. The hypothetical also suggests that some forms of relief requiring the defendant to "undo" a past violation of a primary obligation should be regarded as prospective. In the end, though, an alternative test building on this insight also fails to explain *Milliken*.

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453. Otherwise, the court in *Edelman* could have circumvented the Eleventh Amendment by ordering the defendants to stop "perpetuating" their violation of their duty to pay the plaintiffs the benefits that they had failed to pay before the court order.

454. *Fordice*, 505 U.S. at 730 n.4.

455. *Milliken*, 418 U.S. at 746.

Assume the law prohibits person B from polluting person A's lake. Assume further that person B violates this obligation by emitting certain effluents into the lake. Would a court order requiring B to clean up the lake be prospective or retrospective relief? I believe most people would regard such an order as prospective. The order, after all, gives A her pristine lake, but only for the future. The unlawful injury she suffered during the period in which the lake was polluted remains unredressed. The relief A would be getting is precisely analogous to the relief Y obtained when the court ordered X to build the house he should have built earlier.[456]

Under the test elaborated in the previous section, however, an order to clean up the lake would apparently be retrospective. Under that test, relief is prospective if it requires compliance in the future with—that is, specific performance of—a primary obligation, or a substitute for the future performance of such an obligation. In this case, however, the primary obligation is the obligation not to pollute. The obligation to clean up the lake appears to be a secondary obligation: it is an obligation that exists only by virtue of the duty-holder's prior violation of her primary obligation. A court order requiring that the lake be cleaned up appears to order specific performance of a secondary obligation. As we saw, however, secondary obligations are by their nature continuing ones; if an order requiring the performance of a secondary obligation were prospective merely because the secondary obligation is a continuing one, then all suits would be suits seeking prospective relief.[457]

It may be possible to characterize the primary obligation in our pollution example in such a way as to satisfy the test for prospective relief described in the previous section. If we regarded the effluents as extensions of B, one might say that B is currently violating his primary obligation not to pollute the lake. Because his stuff (the effluents) is currently polluting the lake, we might say that B himself is currently polluting the lake. A court that orders B to clean up the lake is, on this view, merely requiring B to stop his present "pollution" of the lake by getting his stuff out of it. There is some appeal to this characterization. By analogy, one might say that if I drive my car onto your property and leave it there, a court order requiring me to get my car off your property is merely requiring prospective compliance with my primary obligation not to

456. *See supra* text accompanying note 439.

457. One might attempt to characterize the remedy in our hypothetical as prospective under the test discussed in the last section by characterizing the primary right as a right to a clean lake. But, even though we might say that A has a right to a clean lake, we cannot say that B has an obligation to keep A's lake clean. If the effluents had been emitted by C, B would have had no obligation to clean the lake up. We might attempt to elide this problem by recharacterizing the relevant right as the right to a lake unpolluted by B; the relevant obligation would then become the obligation to give A the benefit of a lake unpolluted by B. But this is the same as the obligation not to pollute A's lake. The attempted recharacterization is not just awkward, it "solves" the problem merely by incorporating the remedy into the definition of the primary right. This tack is of course available in every case, and thus, again, would render every lawsuit a suit for prospective relief.

trespass. This characterization would permit us to retain the "primary obligation" test posited above.

But even if we rejected that test, the pollution example does not yield a test that would explain the result in *Milliken*. A court order requiring the clean-up of the lake "undoes" the violation to the extent of giving the rightholder now what she was entitled to earlier. Thus, A was given her right to a lake unpolluted by B. This test stops short of proving too much only because A still lacks a remedy for the period of time in which she was deprived by B of her right to an unpolluted lake. The hypothetical suggests the following test: Relief is prospective if it restores the rightholder to the position she would have been in at the time of the violation had the violation not occurred, but disregarding differences in the plaintiffs' situation resulting from the lapse of time. Thus, A gets her clean lake, but no compensation for the fact that she is now older and a portion of her life elapsed during which she was unable to enjoy the lake in its unpolluted state. Similarly, a wrongfully incarcerated prisoner gets her freedom, but no compensation for the fact that a portion of her life elapsed in which she was prevented from enjoying such freedom. A wrongfully fired employee gets her job back, but no compensation for the period of her life in which she was denied the job.[458]

This test cannot explain the result in *Milliken*, however. The legal violation in *Milliken* was *de jure* segregation. Under the alternative test just described, persons subjected to unlawful *de jure* segregation would be entitled to be placed in the position they were in before the violation took place, except that they cannot be compensated for the period of time in the past in which they were denied the right to be in such position. With respect to the obligation not to engage in *de jure* segregation, this test yields the same result as the test posited previously: the plaintiffs are entitled not to be subjected to *de jure* segregation.[459] But the Court in *Milliken* approved a court order awarding more than that. It said that the plaintiffs were entitled to be compensated for the unlawful segregation they were subjected to in the past. In the Court's words, they were entitled to be "made whole."[460] A "make whole" remedy by definition compensates for past deprivations. Indeed, a "make whole" remedy is complete relief. If a "make whole" remedy is prospective and thus permissible, then no category of remedy is retrospective and thus barred.

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458. If the prisoner had her leg broken while in prison, an order requiring that the leg be mended would not be retrospective, since it places her in the position she occupied before the violation (i.e., possessing an unbroken leg), while not compensating her for the time in the past during which she lacked an unbroken leg. However, an unlawfully fired employee would apparently not be entitled to lost seniority, since that is something she did not enjoy at the time of the violation.

459. This result suggests that the difference between this alternative test and the one elaborated in Part VA is not that great. Indeed, the close analogy between the polluted lake hypothetical and the belated housebuilding hypothetical suggests that our different conclusions about whether the court was ordering the specific performance of a primary right results only from the absence of apt words in the English language (perhaps any language) to describe B's primary right vis-à-vis A in a way that captures its similarity to Y's primary right vis-à-vis X.

460. *See supra* text accompanying note 170.

VI. RESTORING COHERENCE TO *EX PARTE YOUNG* DOCTRINE

If the Supreme Court's decisions cannot be reconciled using the standard the Court has purported to apply, what should be done? The Court has a duty to guide the conduct of the lower courts, and to do so the Court must articulate the law in a manner that is at least moderately coherent and intelligible. The Supreme Court has emphasized that "doctrinal consistency . . . is required when sensitive issues of federal-state relations are involved."[461] Continuing to adhere to a comprehensive prospective-retrospective test without disavowing holdings that clash with such a test produces only confusion and ultimately leads to arbitrary results.

In this Part, I consider four ways to address the coherence problem posed by the Court's decisions. The first option, which I call the "Kennedy approach," consists of jettisoning the analytical structure the Court has purported to apply and replacing it with something entirely new. The second option, which I call the "O'Connor approach," is to retain a comprehensive prospective-retrospective distinction as the "ordinary" rule, but carve out an exception for desegregation cases such as *Milliken*. The third option is to retain a comprehensive prospective-retrospective distinction but overrule *Milliken*. The final option is to revert to the original holding of *Edelman*, under which only certain forms of monetary relief are barred. I conclude that the last option is superior to the others.

A. THE KENNEDY APPROACH

One way to solve the coherence problem would be to replace the current test with something completely different. I call this the Kennedy approach because it resembles what Justice Kennedy proposed in *Coeur d'Alene*.[462] The new approach need not be a case-by-case approach of the sort Kennedy proposed, but, since a case-by-case approach is what Kennedy proposed, I shall begin by examining the merits of this approach. This examination shows not just that a case-by-case approach is ill-suited to the Eleventh Amendment area, but also that drastic repudiation of existing doctrine—indeed, any narrowing of the *Ex parte Young* exception—would be inconsistent with the Court's reasons for adhering to the *Hans* interpretation of the Eleventh Amendment.

A case-by-case balancing approach would solve the coherence problem in the

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461. Michigan v. Long, 463 U.S 1032, 1039 (1983).

462. There was some ambiguity in his opinion about whether Justice Kennedy proposed his case-by-case balancing approach only for suits seeking prospective relief or for all *Ex parte Young* suits. *See supra* note 293 and accompanying text. If he intended merely to add another hurdle to be overcome by litigants seeking prospective relief, his proposal would not have completely avoided the coherence problems discussed above. It would, however, have reduced the scope of the problem: although courts would still have had to find the relief to be prospective before permitting the suit to go forward, they would not have had to apply the prospective-retrospective test before dismissing on Eleventh Amendment grounds. At any rate, the option I consider in this section would dispense entirely with the prospective-retrospective test and replace it with a case-by-case approach.

sense that the Court's holdings would all be reconcilable with the test the Court purports to apply. But that is because virtually any set of results can be said to be consistent with such an approach, and therein lies one of its flaws.[463] Such an approach offers minimal guidance to the decisionmaker and little, if any, certainty and predictability to those whose rights and obligations the law supposedly regulates. The well-known practical problems with a case-by-case approach,[464] render it particularly unsuitable for jurisdictional issues (which is what Justice Kennedy (at least sometimes) believes the Eleventh Amendment to be). Potential litigants would be able to tell whether a federal court has jurisdiction only by bringing suit in federal court and awaiting the court's decision, wasting significant time and money to find out whether the court regards the case as worthy of federal attention. Nor is the approach particularly attractive to the states supposedly protected by the Amendment, for they too cannot be certain of their immunity without first litigating the issue. A case-by-case approach eliminates clashes between the legal standard and the case results, but only by eliminating the legal standard. The case results will continue to be arbitrary—will indeed become *more* arbitrary—when measured against any given standard. Justice Kennedy himself acknowledged that "clarity and certainty [are] appropriate to the Eleventh Amendment's jurisdictional inquiry,"[465] but unfortunately his approach would dispense with both.

A case-by-case approach begins to differ from totally discretionary, ad hoc decisionmaking only to the extent the Court identifies the general purposes or interests underlying the law, or the factors or considerations to be taken into account and some rough idea about how they are to be weighed. Unfortunately, the Court itself (at least the portion of the Court currently in the majority on Eleventh Amendment questions) is a long way from having a well-developed sense of what its Eleventh Amendment doctrine is supposed to accomplish.

Just how far the Court is from having a firm grasp of the issues in this area is illustrated by the inconsistent positions its opinions espouse on such basic questions as what the Eleventh Amendment immunizes the states from when it applies.[466] Even individual Justices oscillate between the forum-allocation view and the immunity-from-remedy view. Take Justice Kennedy. In the majority opinion he authored in *Hilton v. South Carolina Public Railways Commission*,[467] he clearly embraced the forum-allocation view.[468] On the other hand, he

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463. *Cf.* Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 821 n.1 (1986) (Brennan, J., dissenting) ("[W]e could reconcile many of the inconsistent results that have been reached under § 1331 with [the majority's] test. But this is so only because a test based on an ad hoc evaluation of the importance of the federal interest is infinitely malleable. . . . [I]f one makes the test sufficiently vague and general, virtually any set of results can be 'reconciled.' ").

464. *See generally* Morrison v. Olson, 487 U.S. 654, 733-34 (1988) (Scalia, J., dissenting); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

465. *Coeur d'Alene*, 117 S. Ct. at 2040.

466. *See supra* notes 70-72 and accompanying text.

467. 502 U.S. 197 (1991).

468. The Court had held in *Welch v. Texas Department of Highways and Public Transportation*, 483

concurred in Justice Scalia's dissenting opinion in *Pennsylvania v. Union Gas*, which adopts the immunity-from-remedy view.[469] He also joined the majority opinions in *Hess v. Port Authority Trans-Hudson Corp.*[470] and *Seminole Tribe*, both of which are in conflict with the forum-allocation view.[471]

In *Coeur d'Alene*, Justice Kennedy purported to leave this question open, but his analysis was in fact inconsistent with the forum-allocation view.[472] He argued that the availability of a state court forum should be regarded as a reason favoring the dismissal of suits on Eleventh Amendment grounds.[473] Under the forum-allocation view, however, the states are *always* required to entertain federal claims against themselves in their own courts.[474] If a state court forum will be available in every case, then the availability of a state forum cannot help separate the cases in which federal jurisdiction is appropriate from those in which it is not. Justice Souter's dissent made this point, noting that *General Oil Co. v. Crain*[475] had held that, under the Supremacy Clause, state courts are obligated to entertain suits seeking an injunction requiring a state official to comply with federal law.[476] Instead of maintaining (as he did in *Hilton*) that the state courts are obligated to entertain federal claims against the states and that it is the role of the Supreme Court to ensure they do, Justice Kennedy took the position in *Coeur d'Alene* that the states have the option to entertain such claims or not, and that it is the role of the lower federal courts under *Ex parte Young* to fill the enforcement gap created when the state courts elect not to provide a forum.[477] In fact, there is evidence that Justice Kennedy's opinion at one point included language to the effect that *Crain* had been "overruled" or "abandoned" by later cases.[478] In the end, however, his opinion purports to reserve

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U.S. 468, 471-72 (1987), that the Eleventh Amendment barred from the federal courts suits against the states by private individuals to enforce rights under the Federal Employers' Liability Act, but in *Hilton* the Court said that such suits must be entertained by the state courts under the Supremacy Clause, 502 U.S. at 207 (citing Howlett v. Rose, 496 U.S. 356, 367-68 (1990)).

469. 491 U.S. 1, 33-35 (1989) (Scalia, J., concurring in part and dissenting in part). The opinion states that the Eleventh Amendment "automatically assur[es] that private damages actions created by federal law do not extend against the States," and prevents the federal government from "confer[ring] upon private individuals federal causes of action reaching state treasuries." *Id.* at 35.

470. 513 U.S. 30 (1994).

471. *See* Vázquez, *supra* note 5, at 1731-32, 1738-40 (discussing *Hess*); *id.* at 1717-22 (discussing *Seminole Tribe*).

472. 117 S. Ct. at 2035.

473. *See supra* note 276 and accompanying text.

474. Of course, the state courts are required to award relief only if federal law requires it, but (under the forum-allocation view) this is a question about which the Eleventh Amendment has nothing to say. The state courts may dismiss on the merits but they must entertain the claim—that is, they may not dismiss on sovereign immunity grounds.

475. 209 U.S. 211 (1908).

476. *See Coeur d'Alene*, 117 S. Ct. at 2057.

477. *See supra* note 318.

478. This is suggested by the phrasing of a footnote in Justice Souter's dissent. Justice Souter writes: "Nor was *General Oil* overruled or otherwise 'abandoned' by *Georgia R.R. & Banking Co. v. Musgrove*." *Coeur d'Alene*, 117 S. Ct. at 2057 n.14. Since neither Justice Kennedy nor Justice O'Connor claimed that *Crain* had been overruled or abandoned, it is strange that Justice Souter chose to

this question.[479] Without knowing the answer to such a basic question, however, the lower courts can be expected to have a difficult time applying Justice Kennedy's case-by-case balancing approach in a way that rationally advances the purposes of the law in this area.[480]

The current deficiencies of the Court's Eleventh Amendment jurisprudence counsel against adopting a case-by-case approach now, but these deficiencies can and should be addressed by the Court quite apart from the need to clarify the scope of the *Ex parte Young* doctrine. There is a more fundamental reason for the Court not to throw out the analytical scheme the Court has developed in this area, at least not in a way that threatens to expand the scope of Eleventh Amendment immunity: Jettisoning the established analytical structure for determining the applicability of the *Ex parte Young* exception in favor of an approach that narrows that exception would be inconsistent with the reasons the Court has given for adhering to *Hans*.

As discussed in Part I, Eleventh Amendment scholars have made a strong case that the *Hans* Court erred when it held that the Eleventh Amendment applies in suits "arising under" federal law. Had the Court adopted the diversity interpretation, there would of course be no need for an *Ex parte Young* exception.[481] In *Atascadero State Hospital v. Scanlon*,[482] and later in *Welch*, four Justices adopted the diversity theory and voted to overrule *Hans*.[483] In the latter case, Justice Scalia reserved judgment on the question, noting that "the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it" were "complex . . . questions" that he was unwilling to address unnecessarily.[484] The other Justices were evenly divided on the issue, but it is important to

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deny the point. The fact that he uses quotation marks around "abandoned" suggests that an earlier version of Justice Kennedy's opinion made that claim.

479. *See* 117 S. Ct. at 2035, noting that Justices Kennedy and Rehnquist "express no opinion as to the circumstances in which the unavailability of injunctive relief in state court would raise constitutional concerns under current doctrine."

480. The Court's failure in *Green* and *Papasan* to account for the line of cases permitting personal-capacity damage actions against state officials in describing the purposes served by its *Ex parte Young/Edelman* doctrine, *see supra* text accompanying notes 125-33, is another example of just how far it has to go to meet the essential preconditions for an even arguably acceptable case-by-case balancing approach.

481. Vicki Jackson has argued that, even if the Court were to adopt the diversity interpretation and thus overrule *Hans*, it might properly retain a version of the *Edelman* rule as a matter of federal common law. Jackson, *supra* note 11, at 88-93. To the extent the Court continued to adhere to *Edelman* as a matter of federal common law after overrruling *Hans*, there would admittedly be a need for a federal-common-law version of the *Ex parte Young* exception. It is important to note, however, that the version of *Edelman* Professor Jackson defends (a) is entirely subject to congressional abrogation, and (b) would bar only suits for money damages and similar damage-like remedies. See *id.*

482. 473 U.S. 234 (1985).

483. *Atascadero*, 473 U.S. at 298-302 (Brennan, J., dissenting); *Welch*, 483 U.S. at 519-21 (Brennan, J., dissenting).

484. *Welch*, 483 U.S. at 496 (Scalia, J., concurring). Justice Scalia concurred in the judgment on the ground that the statute did not purport to make states liable in damages. *See id.*

note the nature of their disagreement. Justice Powell, writing for the four Justices voting not to overrule *Hans*, examined the historical material relied on by the dissenters and found that it merely "show[ed] that—to the extent this question was debated—the intentions of the Framers and Ratifiers were ambiguous."[485] He then noted the importance of stare decisis to the rule of law,[486] and concluded that "[t]he arguments made in the dissent [fell] far short of justifying such a drastic repudiation of this Court's prior decisions."[487] In particular, Justice Powell rejected the dissenters' argument that the Eleventh Amendment's effect was "pernicious" because it allowed states to escape the consequences of their illegal actions.[488] In this connection, he noted that "[r]elief may be obtained through suits against state officials rather than the State itself, or through injunctive or other prospective remedies."[489]

In *Union Gas*, Justice Scalia ultimately came out against overruling *Hans*, and his dissenting opinion in that case was subsequently endorsed by a majority in *Seminole Tribe*.[490] The question, as Justice Scalia viewed it, was whether a waiver of state immunity in suits based on federal law was "implicit in the constitutional scheme."[491] He emphasized that "[u]ndoubtedly the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws,"[492] but, he observed, it does not follow that the Constitution authorizes private suits against the states themselves.[493] Instead, in addition to suits by the federal government, it permits suits seeking "a federal injunction against the state officer, which will effectively stop the unlawful action,"[494] and suits seeking "money damages against state officers . . . under 42 U.S. § 1983."[495] Finally, Justice Scalia noted that, even if he was wrong about what the Framers deemed "inherent in the constitutional scheme," "the question is at least close."[496] Hence, the case for overruling *Hans* fails on stare decisis grounds, given that *Hans* had repeatedly been reaffirmed by the Court and relied on by Congress in enacting statutes.[497] Like Justice Powell, Justice Scalia did not defend the correctness of *Hans* so much as conclude that overruling precedent was not justified. Part of the reason it was not justified was that the *Ex parte Young* exception alleviated the rule-of-law problems that would otherwise

485. *Id.* at 484.
486. *See id.* at 494-95.
487. *Id.* at 495.
488. *Id.* at 487.
489. *Id.* at 488.
490. *Seminole Tribe*, 517 U.S. at 62-66.
491. *Union Gas*, 491 U.S. at 33.
492. *Id.*
493. *See id.* at 33-34.
494. *Id.* at 34.
495. *Id.*
496. *Id.*
497. *See id.* at 34-35.

have been posed by the states' immunity.[498]

Like the Court in *Welch* and *Union Gas*, the commentators are divided between those who would overrule *Hans*[499] and those who would tolerate *Hans* because of its age and because, in light of the exceptions, it is not as pernicious as its detractors claim.[500] Few affirmatively defend the *Hans* holding. Justices and commentators defend limits on the federal government's power to impose obligations on the states in the first place, but it is difficult to defend a regime in which federal law validly imposes obligations on the states but federal courts lack the power to entertain suits against the states to enforce those obligations. The most that even *Hans*' defenders have been able to claim for the regime it establishes is that changing it at this late date is unwarranted because its effects are not that bad in light of the exceptions that have been recognized, most importantly the *Ex parte Young* exception.

Stare decisis is, of course, a valid, indeed weighty, reason for adhering to a prior decision.[501] But a doctrine whose reason for being is merely that the matter has already been so decided is clearly not a doctrine that warrants expansion. When the problems created by the doctrine are so readily understood and its benefits so difficult to articulate, the case for keeping the doctrine within its current bounds, or even contracting it, is at its strongest. If the case for adhering to the *Hans* version of the Eleventh Amendment hinges ultimately on the rule of law benefits of respecting precedent, it would be "error coupled with irony"—to paraphrase Justice Kennedy[502]—to throw out wholesale the established analytical scheme for determining the scope of the Amendment's applicability to suits against state officials. It would be doubly ironic to throw it out in favor of an approach as offensive to the rule of law as case-by-case balancing. And, given that the *Ex parte Young* exception was expressly relied on to demonstrate that *Hans*' effects were not all that bad,[503] it would be triply ironic to replace the existing analytical scheme with an approach that narrows the *Ex parte Young* exception.[504]

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498. *See id.* at 34. *See also Seminole Tribe*, 116 S. Ct. at 1131 n.16 (relying on availability of *Ex parte Young* relief in defending *Hans* interpretation of Eleventh Amendment).

499. These include most of the proponents of the diversity interpretation. *See* Vázquez, *supra* note 5, at 1694-99.

500. These include John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 53-54 (1998); William P. Marshall, *The Diversity of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1375 (1989); and Vázquez, *supra* note 5, at 1804-06.

501. *But cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

502. *See Coeur d'Alene*, 117 S. Ct. at 2037.

503. *See supra* notes 489 & 498 and accompanying text.

504. One is reminded here of Justice Powell's suggestion in *Welch* that Chief Justice Marshall had employed a sort of bait-and-switch tactic. *See Welch* 483 U.S. at 482 n.11. Powell was comparing Marshall's narrow interpretation of state sovereign immunity in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382-83, 412 (1821), with the broader interpretation he had championed at the Virginia ratifying convention. *See Welch*, 483 U.S. at 482 n.11. The Justices who rebuffed the proponents of the diversity

B. THE O'CONNOR APPROACH

The fact that the law in this area serves primarily the interests underlying the doctrine of *stare decisis* tends to support the retention of a comprehensive retrospective-prospective distinction, but, as explained above, retaining this test without explaining how the holding in *Milliken* squares with it vitiates these rule-of-law benefits. The O'Connor approach attempts to stipulate away this problem. Under this approach, the Court would continue to adhere to a comprehensive prospective-retrospective distinction as the "ordinary" rule, but it would recognize an exception for *Milliken*-type cases, just as Justice O'Connor in *Coeur d'Alene* recognized an exception for disputes about sovereignty over submerged lands.

If the Court adopted this strategy, the lower courts would continue to have to distinguish prospective from retrospective relief in most cases. This would not be easy even if we stipulated away the problem of accounting for *Milliken*. As already explained, the definition of "prospective" must be broad enough to encompass the form of relief sought in the typical habeas case, yet not so broad as to encompass past-due welfare benefits.[505] The difficulty of articulating and applying such a test counsels against the adoption of the O'Connor approach.

But there is a more fundamental problem. There is something deeply unsatisfying about the O'Connor approach. We expect our courts to provide reasons for treating cases differently. Even Justice O'Connor offered a reason (albeit an unsatisfying one) for the exception she adopted in *Coeur d'Alene*.[506] The impulse to rationalize the law is so strong that the lower courts have already begun to treat the sovereignty-over-submerged-lands exception recognized in *Coeur d'Alene* as merely an instantiation of a more general rule.[507] Over time, then, the O'Connor approach begins to resemble the Kennedy approach and so becomes unacceptable for the same reasons. As exceptions to the "ordinary" rule multiply, professions of continued faith in that rule ring increasingly hollow. Soon it becomes apparent to all that the rule itself does little work, and the question becomes whether there is any pattern or logic to the exceptions. If there is, then that pattern or logic yields the true rule. If there is not, then what we have is ad hoc decisionmaking inconsistent with the premises of the rule of law. I shall accordingly reject the O'Connor approach and proceed to compare the unqualified version of the comprehensive prospective-retrospective distinction[508] with the original *Edelman* holding.

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theory in reliance on the existence of the *Ex parte Young* exception might similarly be accused of baiting and switching if they were now to narrow significantly the *Ex parte Young* exception.

505. *See supra* Part VA.

506. 117 S. Ct. at 2044-45 (O'Connor, J., concurring).

507. In *ANR Pipeline Co. v. Lafaver*, 150 F.3d at 1190 (10th Cir. 1998), for example, the Tenth Circuit read *Coeur d'Alene* to hold that *Ex parte Young* is inapplicable to cases that implicate "special sovereignty interests."

508. Unqualified, that is, except for the exception Justice O'Connor recognized in *Coeur d'Alene*. My criticism of what I have called the O'Connor approach can also be directed to some extent to the actual holding of *Coeur d'Alene*. My conclusion in Part III that Justice O'Connor's approach was

C. OVERRULING *MILLIKEN*

A third way to address the coherence problem would be to bite the bullet and adopt a comprehensive prospective-retrospective distinction even if it means overruling *Milliken*'s Eleventh Amendment holding. A threshold problem with this approach, as with the O'Connor approach, is that we would be left with a test that rests on an unfamiliar, counterintuitive, and difficult-to-apply distinction between primary and secondary obligations. For this reason, adopting this approach would probably not produce much doctrinal coherence. Indeed, even with *Milliken* alive and well and cutting the other way, the courts in the *Allen* and *Woods* cases reached the wrong result, and the Court of Appeals in *Doe* went astray. This suggests, perhaps ironically, that overruling *Milliken* would make doctrinal matters worse. Even if it were possible to resolve this problem by adopting a straightforward version of the prospective-retrospective distinction consistent with the habeas and benefits cases, however, overruling *Milliken* would be a bad way to address the coherence problem. In the end, this approach should be rejected for the reason we rejected the Kennedy approach: it unnecessarily narrows the *Ex parte Young* exception.

What it would mean to overrule *Milliken* depends on which of the two views about the nature of Eleventh Amendment immunity is correct. Under the forum-allocation view, the states would still be obligated to afford the remedies upheld in *Milliken*, and state courts would be required under the Supremacy Clause to entertain suits against state officials (indeed, suits against the states themselves) seeking such relief. If they do not entertain the case or award the remedy, the Supreme Court would retain the power to reverse their judgments. Under the immunity-from-remedy view, on the other hand, overruling *Milliken* would mean that the remedies upheld in that case would not be available against state officials (or the states themselves). Where, as in *Milliken*, local officials were jointly responsible, the remedy would be available against them. But if state officials were solely responsible, the remedy would be entirely unavailable.

The current uncertainty about the nature of Eleventh Amendment immunity complicates any effort to assess whether overruling *Milliken* would advance the interests underlying the Eleventh Amendment more than it would undermine the interests underlying the *Ex parte Young* exception. The Eleventh Amendment contravenes the interests underlying *Ex parte Young* in subtly different ways depending on which view is adopted. Under the immunity-from-remedy view, *Ex parte Young* averts the undermining of federal interests that would occur if no federal court were available to afford certain remedies for the violation by states of their federal obligations. Under the forum-allocation view, *Ex parte Young* guards against the more subtle manifestations of state court hostility to

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preferable to Justice Kennedy's was not intended to suggest that it was also preferable to Justice Souter's, nor is it inconsistent with my point here that, if exceptions proliferate, Justice O'Connor's approach and Justice Kennedy's begin to resemble one another.

federal rights or inexpertise in federal law or policy that could not easily be corrected by the Supreme Court on appeal. The interests protected by the Eleventh Amendment also differ depending on which of the two views is adopted. As I have explained elsewhere, if the Amendment serves merely to channel suits against states into the state courts, which are obligated by the Supremacy Clause to afford whatever remedies substantive federal law requires, subject to Supreme Court review, then, contrary to what the Court frequently says,[509] the Amendment does not in fact protect state treasuries.[510] Under the forum-allocation view, therefore, the Amendment serves merely to protect the states' dignitary interests. If the immunity-from-remedy view is correct, however, the purpose of Eleventh Amendment immunity could in theory be to protect state treasuries as well as their dignity.

Under either theory, it is difficult to say whether overruling *Milliken* would advance the interests underlying the Eleventh Amendment more than it would undermine the interests underlying the *Ex parte Young* exception. If the remedies approved in *Milliken* were in theory required but were enforceable as an original matter only in state courts, there would be reason to fear that the relevant federal interests would be undermined in state courts in a way that could not easily be corrected on appeal by the Supreme Court. The Supreme Court today cannot realistically review cases to correct case-specific mistakes. The likelihood that state courts will make such mistakes would appear to be higher in cases requiring the sort of structural relief upheld in the *Milliken* case than in cases involving more conventional remedies, as the state courts have less experience with these remedies than do the federal courts. The opportunity to manifest hostility to federal rights would also appear to be greater with respect to structural remedies, as fashioning such remedies involves the exercise of a greater measure of discretion. On the other hand, if *Milliken* were overruled, the state courts would inevitably obtain more experience with these sorts of remedies. And structural remedies are more intrusive than ordinary remedies, so the offense to the dignity of the states, and to federalism interests more generally, is arguably greater when federal courts award such remedies.

If overruling *Milliken* means immunizing states and state officials from these sorts of remedies altogether, the interest in protecting state treasuries would be advanced by such a move, since these sorts of remedies cost money. But overruling *Milliken* seems an arbitrary way to advance this interest. Prospective relief of the sort allowed by *Ex parte Young* can be expected to be as expensive as the relief approved in *Milliken* or the relief barred in *Edelman*, if not more so.[511] The fact is that the prospective-retrospective distinction is not tailored to advance the interest in protecting state treasuries. A sort of reverse jurisdictional-

509. *See supra* note 119 and accompanying text.

510. *See* Vázquez, *supra* note 5, at 1725, 1731-32.

511. *See* Jordan v. Weaver, 472 F.2d 985, 991 (7th Cir. 1973), *rev'd on other grounds sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974); Jackson, *supra* note 11, at 90 & n.361.

amount rule would advance that interest more rationally, but no one advocates it. The interest in stopping ongoing violations of federal law is not served by the sort of relief upheld in *Milliken* if this interest extends only to ongoing violations of primary obligations. But, as we have seen, this is not the only "supremacy" interest underlying the law in this area. The official-liability cases show that the law also seeks to protect the supremacy of federal law by deterring violations. But the interest in deterring violations of federal law does not justify the relief awarded in *Milliken*. To the extent the acts found illegal in that case were consistent with the law as interpreted by the Supreme Court at the time the acts were performed, they could not reasonably have been deterred. On the other hand, where deterrence is possible, it should be achievable through a regime holding individual officials personally liable in damages.[512] The *Milliken* opinion confirms that the remedies awarded in that case were not intended to deter. The Court made it clear that the remedies were designed to compensate the victims of past violations.[513] As already noted, the *Milliken* decision itself shows that the Court in *Green* erred when it said that the interest in compensation is always insufficient to overcome the interests underlying the Eleventh Amendment. On the other hand, the qualified immunity cases show that the interest in compensating victims can sometimes be subordinated to sovereignty interests, broadly understood.[514] The Court has not had occasion to explain the relationship between *Milliken*'s Eleventh Amendment holding and the qualified immunity cases.

The frustrating inconclusiveness of the foregoing analysis is attributable in part to the absence thus far of a baseline—that is, the lack of a basis for assigning weight to the competing interests. As noted in Part I, advocates of the diversity theory acknowledge that the Framers of the Eleventh Amendment intended to protect the states' treasuries, but they maintain that, for the Framers, that interest may have been outweighed in all cases arising under federal law by the need to give efficacy to the federal obligations of the states.[515] If the diversity theory is right, then the Eleventh Amendment does not apply to *any* suits challenging state official action as a violation of federal law. The Supreme Court declined the invitation to overrule *Hans*, but it did not conclude that the diversity theorists were wrong about original intent. The Court's conclusion that the evidence on this question was "ambiguous" means that the *Hans* interpretation of the Eleventh Amendment does not rest on original intent either. Since *Ex parte Young* is made necessary by *Hans*, and *Edelman* by *Ex parte Young*, it follows that the line between *Ex parte Young* and *Edelman* cannot rest on original intent. The Court decided to adhere to *Hans*, despite the problems it creates and the ambiguity of its support, for stare decisis reasons and because

512. *See* Vázquez, *supra* note 5, at 1801-04.
513. *See supra* text accompanying notes 165-73.
514. *See supra* text accompanying notes 131-32.
515. *See supra* text accompanying note 122-23.

the *Ex parte Young* exception (among other doctrines) alleviates the problems *Hans* creates. Our baseline, therefore, must be existing doctrine. This does not mean that all the details of existing doctrine are fixed in stone, but it does rule out drastic change, and it all but rules out any change that would narrow the *Ex parte Young* exception.

If this is the right benchmark, then overruling *Milliken* is a bad way to solve the coherence problem not just because such a move is unlikely to achieve much doctrinal coherence, but also because it would narrow the scope of *Ex parte Young*. That *Milliken* has been relied upon in numerous subsequent desegregation cases[516] is just one indication that overruling it would produce a significant narrowing of *Ex parte Young*.[517] Indeed, reconsidering *Milliken* appears to be outside the universe of doctrinal changes the Court seems even remotely willing to contemplate. Seven Justices seem prepared to overlook the obvious difficulties *Milliken* poses to what they regard as a "basic principle of federal law."[518] In *Coeur d'Alene*, only Justice Kennedy and the Chief Justice even came close to acknowledging the conflict between *Milliken* and the established analytical framework,[519] and their response was to abandon the

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516. *See, e.g.*, United States v. Fordice, 505 U.S. 717 (1992); Parents for Quality Educ. with Integration, Inc. v. Indiana, 977 F.2d 1207 (7th Cir. 1992); Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988); Clark v. Cohen, 794 F.2d 79 (3rd Cir. 1986); Liddell v. Missouri, 731 F.2d 1294 (8th Cir. 1984); Kozera v. Spirito, 723 F.2d 1003 (1st Cir. 1983); Evans v. Buchanan, 582 F.2d 750 (3rd Cir. 1978).

517. The number of published decisions citing *Milliken*'s Eleventh Amendment holding is likely to understate the decision's significance, however. Cases involving relief falling squarely within the scope of the ruling are likely to be settled without trial, or decided summarily by the court. Published opinions on the relevant issue are likely to result only in cases that test the limits of the *Milliken* rule.

Articles discussing the importance of the second *Milliken* decision include Patricia A. Brannan, Missouri v. Jenkins*: The Supreme Court Reconsiders School Desegregation in Kansas City, Criteria for Unitary Status, and Remedies Reaching Beyond School District Lines*, 39 HOW. L.J. 781, 785-93 (1996) (describing *Milliken* as a landmark decision which has retained its importance despite skepticism in the Court concerning desegregation decrees); Nathaniel R. Jones, Milliken v. Bradley*:* Brown*'s Troubled Journey North*, 61 FORDHAM L. REV. 49, 53-54 & n.32 (1992) (importance of *Milliken*'s Eleventh Amendment holding in the desegregation of northern schools); *Public School Desegregation - Withdrawal of Judicial Control*, 106 HARV. L. REV. 249, 257-58 (1992) (*Milliken*'s significance in authorizing courts to develop plans to remedy de jure segregation); Gerald W. Heaney, *Busing, Timetable, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN. L. REV. 735, 774-81 (1985) (types of remedies authorized by *Milliken* will help the education of minority students in the North); *see also* Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 863 & n.135 (1983) (citing *Milliken* for the proposition that injuries caused by discrimination can only be cured by addressing the original constitutional violation).

518. The concurring Justices in *Coeur d'Alene* used this term to describe the prospective-retrospective rule, *see* 117 S. Ct. at 2045 (O'Connor, J., concurring). The dissenting Justices would probably not disagree with this characterization, as they objected to the concurring Justices' adoption of an exception to this rule. 117 S. Ct. at 2052-54 (Souter, J., dissenting).

519. They did so by suggesting that *Milliken* actually turned on the importance of the Fourteenth Amendment rights at issue rather than on the prospective nature of the relief sought. As noted, this does not necessarily eliminate the prospective-retrospective distinction; indeed, Kennedy and Rehnquist appear to have proposed superimposing an ad hoc balancing approach over the prospective-retrospective standard as an additional hurdle to be overcome by litigants seeking prospective relief. But, as discussed above, if *Milliken* involved prospective relief, then all cases involve prospective relief. If so, then the prospective-retrospective test excludes no cases, and only the ad hoc balancing analysis does any work.

established analytical framework. If drastic repudiation of precedent were appropriate, however, then overruling the problematic *Hans* decision would be the more justified move. The Court's decision to adhere to *Hans* for stare decisis reasons is defensible, but only if *Ex parte Young* retains its current scope.

At any rate, achieving coherence without narrowing *Ex parte Young* is far preferable to an approach that would narrow that exception. I show in the next section that the alternative of adhering to *Edelman*'s original holding is superior not just because it would preserve *Ex parte Young* in more or less its current state, but also because it promises greater doctrinal coherence than the other options.

D. THE ORIGINAL *EDELMAN* HOLDING

The test originally adopted in *Edelman*, under which only retrospective monetary relief is barred, explains *Milliken* as well as the benefits cases, the habeas cases, and the reinstatement cases, and preserves the *Ex parte Young* exception largely within its current contours.[520] To the extent this interpretation of *Edelman* continued to rely on a vague distinction between prospective and retrospective relief, the coherence problem would not go away completely. Even with these difficulties, however, the original holding of *Edelman* would be preferable from the perspective of doctrinal coherence, as limiting the scope of the rule would limit the scope of the problem. More important, limiting the prospective-retrospective distinction to suits seeking monetary relief makes it possible to define "prospective" in a way that minimizes these difficulties.

Nevertheless, if a key interest in this area is doctrinal stability and continuity, a test that explains *Papasan* as well as the other Supreme Court cases is better than one that does not, other things being equal. As we saw in Part II, under the accrual test adopted in *Edelman* and the other benefits cases, *Papasan* should have come out differently, as the plaintiffs in *Papasan* were seeking (*inter alia*) an order requiring the defendant to disburse in accordance with federal law amounts that had not yet accrued. This section considers whether there is a test that reconciles *Edelman* with *Papasan*. It also considers another possible objection to the prospective-retrospective distinction as applied to monetary relief: its apparent overinclusiveness. Addressing the latter objection suggests a test that would square *Papasan* with *Edelman*. This test, however, places *Papasan* in conflict with *Milliken* to the extent *Papasan* purported to apply to nonmonetary forms of relief. Limiting *Papasan* to suits seeking monetary relief makes possible an understanding of the case that would be consistent with both *Edelman* and *Milliken*. In the end, I conclude that *Edelman*'s accrual test is preferable even though it would require overruling *Papasan*'s holding on the

520. To the extent the Supreme Court's post-*Edelman* dicta narrowed *Ex parte Young* by embracing a rule barring all retrospective relief, reverting to *Edelman*'s original holding would broaden *Ex parte Young*. Change in this direction would, of course, be perfectly consistent with the Court's reasons for adhering to *Hans*.

trust claim. More important, however, I also conclude that limiting *Edelman* to suits seeking monetary relief is preferable to the three options discussed above, whether we adhered to the original accrual test or adopted the version that would square *Edelman* with *Papasan* in part.

We focused in Part V on the underinclusiveness of a blanket prospective-retrospective distinction. But such a rule may also be overinclusive to the extent it permits suits seeking prospective monetary relief, for even the least controversially "retrospective" of remedies—damages—is often prospective in important senses. Consider this hypothetical: A state official violates federal law and in the process injures B, a pianist, to such an extent that her hand has to be amputated. If B sues the state official seeking damages from the state treasury, most courts would not hesitate to dismiss the suit on Eleventh Amendment grounds. Yet, in a similar suit against a private tortfeasor, the remedy for such an injury would consist not only of damages to compensate B for the pain she suffered at the moment she was physically being injured, but also compensation for her loss of earning potential from the time of the injury forward, as well as, more generally, for the loss of her ability to enjoy life during that period. Isn't the damage remedy "prospective" to the extent it compensates her for the decrease in her earning potential and loss of happiness from the time of the court order forward? Doesn't that relief correspond exactly (along the dimension of time) to the state prisoner's freedom from the time of the court's order onward? If a court order restoring that freedom is prospective relief, then why isn't an order awarding B a monetary substitute for lost future earning potential also prospective? Prospectivity fails to explain why the latter order is barred.

There appear to be two ways to reconcile the unavailability "prospective" damages for the pianist with the availability of prospective monetary relief in benefits cases. The first is to replace the rule barring retrospective monetary relief with a rule barring "damage-like" monetary relief—that is, relief in which money functions as a "substitute [] . . . for the original condition or thing to which the plaintiff was entitled."[521] Under this rule, the suit would be barred if the plaintiff's right to money is a secondary or remedial right. If the right to receive money is itself the primary right, however, a court order requiring the defendant to pay it prospectively with state funds would not be barred.[522] Under this test, money as a substitute for a primary right would be barred, even if "prospective" in the sense that our amputee's damages were, but money as the primary right could be awarded prospectively.

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521. DAN B. DOBBS, LAW OF REMEDIES § 3.1, at 209 (2d ed. 1993).

522. This analysis is in tension with our earlier characterization of the primary right in benefits cases as a right to subsistence rather than the right to receive money, but we recognized above that this characterization seemed contrived. Moreover, it was contrived for the purpose of reconciling the benefits cases with the habeas cases along the dimension of prospectivity. If we limited *Edelman* to suits seeking monetary relief, such a reconciliation would be unnecessary. *But cf. infra* note 523 (Congress's purpose would still have to be consulted under this rule to determine whether primary obligation occurred in past).

This test explains not just the benefits cases and the "prospective damages" hypothetical, it may also explain the *Papasan* holding. The Court in *Papasan* appeared to be heavily influenced by the idea that, if the plaintiffs prevailed, the state would have had to use its own resources to replace the trust corpus—that is, land conveyed by the federal government, the proceeds of which were invested and lost during the Civil War. To the extent the Court relied on this factor, it seems to have applied a rule permitting a court to order the specific performance of the defendant's primary obligation, but not a substitute for that obligation. The Court appears to have conceived the primary obligation at issue in *Papasan* as the obligation to use the land (or the proceeds) for the plaintiffs' benefit. Since neither the land nor the proceeds existed any longer, however, the plaintiffs were seeking a substitute, and the Court appears to have concluded that such relief is barred.

This test resembles but modifies in an important way the rule posited in Part V to explain the habeas and benefits cases. That rule permitted the court to order either the specific performance of a primary obligation due in the future or the performance of a substitute for the performance of a primary obligation due in the future.[523] The rule now suggested to explain *Papasan* simply eliminates the option of ordering a substitute for the primary right.[524] But recall that we included this clause because otherwise the test would not turn on prospectivity. Dropping the clause means that we are replacing the prospectivity test with a rule categorically barring orders requiring the performance of secondary obligations. Even if the defendant is violating or threatening to violate a primary obligation due in the future, the court may not award a remedy other than the specific performance of the primary obligation. Thus, if an employee was unlawfully fired, but reinstatement becomes unfeasible, the court may not award the remedy of "front pay" in lieu of reinstatement. In that situation, the court would still be able to award reinstatement, which would strengthen the employee's hand in negotiating a monetary settlement. But where, as in *Papasan*, performance of a primary obligation due in the future has become impossible, the court would not be able to award any remedy. The remedy would be unavailable not because it is retrospective or monetary, but because it is secondary as opposed to primary.

That this test explains *Papasan* is a virtue from the perspective of "fitting" current case law, but this benefit is vitiated by the fact that a flat prohibition of secondary remedies would be inconsistent with *Milliken*, for the Court in

523. Although usually a court order requiring the late performance of a primary obligation would be regarded as prospective, the unavailability of past-due benefits would be explicable as the application of a special rule for primary obligations to pay money. In such cases, the prospectivity of the obligation turns on the purpose of the obligation, and in the case of benefits, prospectivity turns on whether the benefits were to provide subsistence in the past or in the future.

524. A substitute that is nonmonetary would not be barred by the Eleventh Amendment under a rule limiting *Edelman* to suits seeking monetary relief. Since the Court in *Papasan* found nonmonetary relief to be barred by the Eleventh Amendment, however, explaining *Papasan* requires us to drop the option of a nonmonetary substitute for the primary obligation.

Milliken upheld an order requiring the defendants to perform a secondary obligation. This problem can be avoided by rejecting *Papasan* to the extent it bars secondary nonmonetary relief. But even this limited version of the *Papasan* test is difficult to justify. Both *Edelman* and *Papasan* involved a federal obligation to supply a continuing stream of money in the future, but under this test the court would have the power to enforce this obligation in one context but not the other. Doctrinally, the discrepant results are traceable to the fact that in one case the obligation to pay money from the treasury was the primary obligation whereas in the other case the primary obligation was the obligation to use the land, or income from the land, for the plaintiffs' benefit, and the obligation to pay money from the treasury is a substitute. This seems an inadequate justification for treating the two cases differently, given that the need to use money from the state treasury arose only because the state's officials lost the corpus through unwise investments. Additionally, such a test is unappealing because it rests on the unfamiliar and difficult distinction between primary and secondary obligations.[525]

A second way to reconcile the benefits cases with the prospective damages hypothetical would be the test the Court adopted in *Edelman*: retrospective monetary relief is barred, and retrospectivity turns on the time the obligation to pay accrues. We rejected the accrual test above because it failed to explain the habeas and reinstatement cases,[526] but limiting the prospective-retrospective test to suits seeking monetary relief means that these cases need no longer be regarded as suits for prospective relief. We are thus free to adopt a different definition of prospectivity. The accrual test adopted in the benefits cases explains why "prospective" damages are retrospective. Even though the damages are in part for the purpose of compensating for future earning potential and future happiness, the obligation to pay them accrues at the time of the injury.[527]

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525. Such a rule would also appear to be easily manipulable by Congress. The characterization of the relief sought in *Papasan* as secondary turns on a definition of the primary obligation as the obligation to use income from the land itself or its proceeds for the plaintiffs' benefit. On this view, once the land or proceeds are lost, the obligation to use money to replace the lost sums is secondary or remedial. This may or may not have been an accurate characterization of the obligation Congress had created, but, had Congress been aware of the Court's test, it could as easily have defined the primary obligation as the obligation to use for the plaintiffs' benefit an amount of money equal to the estimated income from the relevant tract of land, whether or not the land continued to be owned by the state. If the right had been so defined, the plaintiffs in *Papasan* would have been seeking to enforce a primary obligation. If this were enough to satisfy the posited test barring secondary monetary relief (and it is difficult to understand why it would not be), then the test in this context amounts to little more than a clear statement rule.

526. *See supra* text accompanying note 438.

527. *See* DOBBS, *supra* note 521, § 3.1, at 208 ("[T]he damages award is traditionally made once, in a lump sum to compensate for all the relevant injuries, past and future."). The time the liability accrues should be distinguished from the time the loss accrues. *Cf. id.* ("[T]he damage remedy is not payable periodically as the loss accrues, unless a statute so provides.") The vagueness of the concept of accrual may reduce the appeal of this test, but this problem can easily be addressed by the Supreme Court. The Court might, for example, adopt an interpretation of accrual under which the time of accrual is the time payment is due. Better yet, it could replace the time-of-accrual test with a time-of-payment test.

As explained above, the accrual test requires a different result in the *Papasan* situation, but that is arguably a point in its favor.[528]

There are potential problems with an accrual test, but they seem less severe than the problems with the test barring all monetary relief except the specific performance of a primary obligation to pay money. Assume, for example, that the federal government obligates the states to provide benefits in the form of a one-time lump-sum payment instead of in monthly installments, and the state defaults. Under the accrual test, this obligation is retrospective and thus unenforceable once the time of payment has passed. A test that looks to the purpose of the obligation and regards it as prospective to the extent the money is for the purpose of providing subsistence in the future seems preferable. But this test fails to explain the unavailability of prospective damages. In any event, Congress is unlikely to want to adopt a lump-sum regime, and if it does want to, it remains free to attempt to secure the states' waiver of their Eleventh Amendment immunity in exchange for federal funds.[529]

It may thus be preferable to adhere to the unvarnished *Edelman* test even though it means rejecting *Papasan* insofar as it bars secondary monetary relief. Overruling this aspect of *Papasan* is not as problematic as overruling *Milliken* for several reasons. First, this aspect of *Papasan* has not been the basis of subsequent Supreme Court or lower court holdings; indeed, *Papasan* has not been widely read to adopt such a test. Second, and more importantly, overruling *Papasan* would not narrow the *Ex parte Young* exception, and thus would not be in conflict with the Court's reasons for adhering to *Hans*. Finally, as discussed above, saving *Papasan* would require a rule barring all remedies ordering the performance of secondary obligations, but such a rule would be in conflict with

528. A rule barring only monetary relief seems a bit silly if it prohibits someone from maintaining a suit for monetary damages but allows her to pursue the same suit by substituting a request for, say, land or goods. We may be justified in treating a claim seeking land or goods in this context as requesting monetary relief, as the land or goods would be functioning essentially as money. Doing so, however, blurs the distinction between monetary and nonmonetary relief and thus reduces the appeal of the rule I propose. We might instead say that such a suit is not barred by the Eleventh Amendment, but fails under the law of remedies. Only rarely will that law entitle someone to "compensation" in the form of land or goods, or in any form other than money. *See* DOBBS, *supra* note 521, at 209. But regarding this issue as one of nonconstitutional remedial law would permit Congress to circumvent the Eleventh Amendment limits on its powers by making the states liable for land or goods instead of money. Solving this problem appears to require an extension of the Eleventh Amendment bar to suits seeking land or goods in circumstances where traditional remedial law would have provided only for money damages. It is unclear how *Papasan* would have come out under this test. The plaintiffs' claim for land in that case was less transparently an end run around a rule barring money damages than that of our hypothetical circumventor.

529. I doubt that Congress would have the power to obligate the states to pay benefits of this sort *except* in exchange for federal funds. Another problem with the accrual test is that the obligation to pay money in exchange for goods or services would be unenforceable once the goods are transferred or the services rendered. *See* New York City Health & Hosps. v. Perales, 50 F.3d 129, 130 (2d Cir. 1995) (obligation to reimburse health care providers "accrues" when services rendered). But this is not a significant problem in the scheme of things, as a person dealing with the state in consensual transactions of this sort retains the option of not transferring the goods or rendering the services until after payment has been made.

Milliken, and overruling *Milliken* is certainly less defensible than overruling *Papasan*. *Milliken* would not prevent us from saving *Papasan* insofar as it bars secondary *monetary* relief, but saving half a holding seems like an exceedingly weak basis for adopting a test that is otherwise as unappealing as the one under consideration.

In the end, though, the decision to limit the prospective-retrospective distinction to suits seeking monetary relief is of far greater moment than the choice between the version on the limited test that would reject *Papasan*'s holding on the trust claim in whole and the version that would reject it only in part. Regardless of which of the two versions were adopted, limiting *Edelman* to monetary relief would be far superior to the other possible responses to the coherence problem posed by the prospective-retrospective distinction.

The more difficult question is whether *Edelman*'s limitation of the *Ex Parte Young* exception should be retained even to that extent. The policy justification for this limitation is not self-evident. As noted, *Edelman* doesn't seek to identify the cases involving the greatest incursions on the state treasury,[530] and arguably the states' dignitary interest is adequately protected in all suits against state officials simply because the states themselves are not formal parties.[531] The Court in *Edelman* relied on its own past statements about when a suit against a state official is "really" against the state, but *Pennhurst* appeared to obviate that question, and for good reason. *Pennhurst*'s analysis thus offered an opportunity to reconsider *Edelman*.[532] The Court declined to do so based on its view that such a move would eviscerate the Eleventh Amendment.[533] This would be true, however, only if the Amendment was designed to reach suits under federal law in the first place—in other words, if the diversity theory were rejected. Because overruling *Edelman* would be tantamount to embracing the diversity theory, *Edelman* is part and parcel of the Court's decision not to adopt that interpretation of the Amendment. In the end, therefore, *Edelman* is justified for the same reasons, and to the same extent, the Court was justified in declining to overrule *Hans*.

As discussed above, the Court decided not to adopt the diversity theory largely for stare decisis reasons and in reliance on the existence of the *Ex parte Young* exception *and* the availability of damage actions against state officials personally.[534] The availability of the latter form of relief elucidates the strongest case for retaining *Edelman* insofar as it precludes suits seeking money from the

530. *See supra* text accompanying note 511.

531. Sometimes, protecting someone's dignity is merely a matter of observing formalities. Thus, this may be an area in which "elementary mechanics of captions and pleading" do make a difference. *Cf. Coeur d'Alene*, 117 S. Ct. at 2034 (Kennedy, J.) ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings).

532. *Cf.* Shapiro, *supra* note 107, at 84 (suggesting, hopefully, that *Pennhurst*'s analysis "could lead to the abandonment of the questionable distinction between prospective relief requiring substantial state expenditures and retrospective monetary relief for harm done").

533. *See supra* text accompanying note 116.

534. *See supra* text accompanying notes 30, 495.

state treasury. First, this aspect of *Edelman* is supported by tradition: suits seeking damages for a state official's violation of federal law have traditionally been handled through an officer-liability regime.[535] Second, the availability of damages from the state official alleviates the policy problems with prohibiting suits seeking money from the state treasury. As already noted, *Edelman*, so construed, would not categorically bar any form of relief; it would merely identify the proper defendant in a suit seeking damages and damage-like monetary relief. It should be possible to craft an officer-liability regime that would secure the efficacy of the federal legal obligations of the states.[536] Finally, the officer-liability cases offer a strong coherence-based reason for keeping *Edelman*: together, *Edelman* and the officer-liability cases yield a rule of supreme simplicity—suits seeking money damages from the officer are permitted (subject to a nonconstitutional doctrine of official liability), while suits seeking money damages from the state are not.

CONCLUSION

This article has sought to show that the comprehensive prospective-retrospective test the Court purported to reaffirm in *Coeur d'Alene* as the "ordinary" rule—indeed, as a "basic principle of federal law"—actually came about through inadvertent and unexamined extensions, largely in dicta, of a rule barring only retrospective *monetary* relief. It has also attempted to show that, far from requiring a "straightforward inquiry," a comprehensive rule that truly turned on prospectivity would be analytically complex and difficult to apply. The rule has seemed straightforward only because, until recently, most courts and commentators have understood it as a rule barring only certain forms of monetary relief. The Court's more recent formulations of the test, focusing the courts' attention on whether the violation of law of which the plaintiff complains is ongoing or not, has begun to produce results, such as that in *Breard*, which are not only problematic, but also, once one considers that petitions for habeas corpus fall within the *Ex parte Young* exception, demonstrably wrong.

One of the main problems with the Court's test is that it is highly indeterminate. A single count in a complaint may be said to be complaining of past and future violations of federal law simultaneously, and thus to be seeking relief that may be characterized as *both* retrospective and prospective. So far, the Court has failed to provide a reasoned basis for choosing among the competing characterizations. If it attempts to make its test more determinate, moreover, it will find that there is no version of a test turning on "prospectivity" that can explain the results it has reached in this area. There are a number of ways for the Court to try to restore coherence to the doctrine, but most of the options would narrow the *Ex parte Young* exception and would thus be inconsistent with

535. *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1997).

536. *See* Vázquez, *supra* note 5, at 1801-04.

the Court's stated justification for adhering to the *Hans* interpretation of the Eleventh Amendment in face of the challenge posed by the diversity theorists. The Court's best option is to revert to the original holding of *Edelman*, under which only retroactive *monetary* relief would be barred.

By narrowing *Ex parte Young*, the Court in *Coeur d'Alene* took a (small) step in the wrong direction, but its decision to craft a narrow exception rather than apply the prospective-retrospective distinction was an unwitting recognition of the poverty of the test it purported to reaffirm as the "ordinary" rule. If it reverted to *Edelman*'s original holding, by contrast, it would be embracing a test that, by contrast, actually does some work. Reverting to *Edelman*'s original holding, moreover, would make it possible to replace a rule posing analytical difficulties of Herculean dimensions with a test turning on a distinction that comes close to being as simple as that between night and day.